IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CIVIL APPEAL NO.27/2021

(C/f civil application no. 23/2019 at the Juvenile Court of Arusha at Arusha Urban Primary Court)

KLAMIAN MENGORU.....APPELLANT

Versus

NAOMI KLAMIAN.....RESPONDENT

JUDGMENT

Date of last order: 1-12-2021

Date of Judgement: 3-2- 2022

B. K. PHILLIP, J

A brief background to this appeal is as follows; The Appellant and respondent are husband and wife, living in the same compound. The appellant herein was the respondent in Civil Application No.23/2019 at juvenile Court of Arusha at Arusha Urban Primary Court in which the respondent herein moved the Court to grant orders for the maintenance of three children, the issues of marriage, namely Ahadi Klamian, born on 25th June 2002, Stephano Klamian, born on 18th May 2006 and Shangwe Klamian born 7th April 2014.

At the trial Court the respondent's case was as follows; That in 1994 the appellant forced the respondent to leave her matrimonial home and had to stay with her parents until 1998, when she came back to her husband. (appellant herein). Her matrimonial house had collapsed, thus she had to built another house with the assistance of her family. The appellant never took any responsibility for providing for the needs and necessities to the above named issues of marriage who are minors. Moreover, the respondent told the Court that her health condition is not good. The appellant used to beat her so much, to the extent that she sustained injuries in her backbone. Thus, she cannot undertake any heavy duties. In addition she told the Court that the appellant owns one acre which he uses to plant maize, one acre of coffee plantation and receives a lot of money for the sales of raw coffee. Also, he owns about 26 sheep. Respondent prayed for payment of Tshs. 100,000/= per month being maintenance for the aforementioned three children.

The appellant's defence was to the effect that he had been paying the school fees for all his children from his earnings from his farms. He has two wives and gave each wife piece of land for farming so that they can manage to get food and other needs for themselves as he is too old. Currently he is not capable of cultivating his farms. He depends on

his elder children and whatever little income he gets, he uses the same to maintain his children who are below 18 years old.

After hearing the evidence from both sides the trial court decided in favour of respondent. The appellant was ordered to pay Tshs. 100,000/= per month for maintenance of the three children who are still minors. Being aggrieved with the decision of the lower Court, the appellant lodging this appeal on three grounds, to wit;

(a) *That the learned trial magistrate erred in law by determining the case which she never ever had a chance to hear and without assigning the reasons for change of hands, from her predecessor Hon. BWIGOGE she thus ended to misconceived and unrealistic findings that occasioned to serious injustice.*

(b) *That the trial court erred in law and fact by ignoring the evidence apparent on record establishing that the respondent and her children resides in one compound with the applicant and comprehensively maintained.*

(c) *That, the trial court erred in law and fact by relying on weak and incredible evidence to condemn the appellant to pay monetary maintenance, the mode which according to the circumstance of the applicant is not only unrealistic but myopic.*

The appellant was represented by Mr. Asubuhi John Yoyo, learned counsel whereas the respondent was represented by the learned

advocate Richard E. Manyota from Legal and Human Rights Centre. I ordered the appeal to be disposed of by way of written submissions.

Submitting for the first ground of appeal, the appellant contended that it is settled law and indeed cardinal principle of practice that once trial of a case begins before one judicial officer it must be brought to a completion by the same judicial officer and whenever necessary to change hands the Court is duty bound to record the reason for the change of hands of the case file . He was of a strong view that it was wrong to change the magistrate without giving the reason for doing so because the rationale behind that settled principle is to enhance substantive justice that may be miscarried due to consequences likely to arrive from change of hands. The appellant further contended that the ruling of the lower Court cannot stand because it offends a settled principle of practice. He added that the change of hands in the case under consideration denied the succeeding magistrate fair chance to make proper evaluation of evidence on key points of contest between the parties because she had no opportunity to observe the demeanour of the parties which , to his view was important as the case had to be decided basing on only two competing averment of the parties without any documentary evidence, henceforth caused serious miscarriage of

justice .To substantiate his argument he cited the case of **National Micro Finance Bank vs Augustino Weseke Gidimara T/A Paint and General Enterprises Civil Appeal No. 74/2016** and **Fahari Bottlers and Another vs Registral of Companies and Another Civil Revision No. 153/2016** (both unreported) .

Submitting on the second ground of appeal, Mr Yoyo argued that trial court ignored the inconsistencies between what was pleaded by the respondent in her application and what was adduced at the hearing. He submitted further that according to the pleadings filed before the trial court, it is pleaded that the appellant herein stopped from providing for the needs and maintenance of the children since December 1988. That is to say for the last 31 years of marriage there has never been maintenance whatsoever. However, the evidence adduced before the trial court, as reflected at page 4, 5 and 6 of the typed proceedings gives a different picture as the respondent herself told the trial Court that she stays in the same compound with the appellant as husband and wife.

He further submitted that the inconsistency between pleading and evidence was purely a matter of law which ought to have been resolved in favour of the appellant and that trial Magistrate would have made

ruling that to find that the respondent's case was fabricated as it is a settled principle of law that parties are bound by their pleadings. He cited the case of **Pushpa d/o Raojibhai M Patel vs The Fleet Transport Company Limited (1960) E.A at page 1025** to bolster his arguments. Mr Yoyo argued that with the truth revealed at the hearing that the parties were living together as husband and wife in one compound watered down the integrity of the respondent's claim and the same ought to have been given credence in favour of appellant who claimed that he provided for the needs and maintenance his children bellow age of majority.

On the last ground of appeal, Mr Yoyo submitted that respondent failed to discharge her burden of proof to the standard required by the law that the appellant was not providing maintenance the children, Expounding on this point , Mr Yoyo submitted that in his defence the appellant told the trial Court that he provides all the needs for his children and it was confirmed in evidence that both, the appellant and respondent live in one compound, with such clear exposition of the appellant the burden of proving the alleged failure to maintain his children was on respondent's shoulder.

Mr Yoyo faulted the findings of the trial court on the ground that it relied on weak and incredible evidence to condemn the appellant to pay monetary maintenance. He further argued that the appellant could not afford making the maintenance in form of cash money at tune of Tshs. 100,000/=.The trial Court ignore the appellant's argument that he is not able to maintain his children in cash but in kind as he used to do. To cement his argument he sited rule 84 (1) of the rule of child (Juvenile Court Procedure) Rule of 2016, which provides that before making an order for maintenance the court is supposed to asses and consider the condition of parties, the income of each party. Mr Yoyo contended that there was no such assessment as required by the law that was conducted in this case. He insisted that the evidence adduced by the appellant as to his incapacity to raise cash money was well corroborated with report made by the social welfare officer, hence ought to be taken into account.Mr Yoyo prayed for this appeal to be allowed.

Mr Manyota's response to the first ground of appeal was to the effect that Hon. Bwegoge, RM was transferred to another station while the matter between parties was pending for judgement. He contended that the successor Magistrate (R. A. Ngoka , RM) had no option except to

proceed with the case and compose the judgment as he did. He urged this court not to be tied up with technicalities but look at the best interests of the children. To cement his argument he referred this Court to the provisions of section 4 of the Law of the Child Juvenile Court Procedure) Rules, G. N No. 182 of 2016.He insisted that the appellant have not been providing maintenance to the children. There was a time the respondent's house collapsed, but the respondent was not ready to assist her. The respondent has been struggling on her own to provide for the needs of the children.

With regard to the 2nd ground of appeal, Mr Manyota submitted that it is not true that the appellant has been taking care of the children. Had it been so, the respondent would have not lodged in court the application for maintenance of children.

With regard to the third ground of appeal, Mr Manyota argued that it was a appropriate for the trial Magistrate to order the appellant to pay Tshs 100,000/= as maintenance for the children since payment for school fees, buying food , clothes and other necessities for the children needs money.He contented that the appellant owns big farms in which he harvests fruit and food products for sale. Thus , he is capable of raising the sum of Tshs 100,000/=for the maintenance of children.

Lastly, Mr Manyota referred this Court to the case of **Celestine Kilala and Halima Yusufu Vs Restituta Celestine (1980) TLR 76,** and urged that this court to consider the best interests of the children.

I rejoinder, Mr Yoyo reiterated his submission in chief and insisted that , he has demonstrated how the change of hands of the case file from one magistrate to another occasioned failure of justice to the appellant. He maintained that Hon Ngoka who composed the judgment never had audience of the parties in this case. Mr Yoyo questioned if it was the intention of the legislature that matters involving issues pertaining to the rights of the children should be heard without taking into consideration the acceptable legal procedures and the requirement of the law.

Moreover, Mr Yoyo contended that the respondent has failed to demonstrate how the appellant neglected the respondent and her children while they are living in the same compound as members of one household. Citing the provisions of section 110 (1) (2), 111, 112, 113 and 115 of the Law of Evidence Act. He maintained that the respondent had a burden of proving her allegations but failed to do so.

I have given due consideration to the grounds of appeal as well as the submissions filed by the parties. Starting with the 1st ground of appeal,

indeed as correctly submitted by Mr Yoyo, the trial of this matter was conducted by two different magistrates. The trial started on 17/7/2019 before Hon. O.F.J BWEGOGE, DRM. He recorded the evidence of respondent and that of appellant on 24/7/2019. On 25/9/2019 R. A NGOKA, RM took over the hearing of the application and ordered the social welfare officer to conduct inquire and submit report. She also composed the ruling and deliver it on 17/10/2019. The court record reveals that no reason was given as to why Hon Bwegoge was unable to try the case to its conclusion. In the case of **Kinondoni Municipal Council vs Q. Consult Limited Civil Appeal No. 70/2016 (CAT) at Dar es salaam** in which they cite the case of **M/S Georges Centre Limited vs The Honorable Attorney and Another, Civil Appeal No.29 of 2016** (unreported) in interpreting order XV111, rule 10 (1) of Civil Procedure Code, the Court said the following;

> *"The general premise that can be gathered from the above provision is that once the trial of a case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason he/ she is unable to do that. The provision cited above imposes upon a successor judge or magistrate an obligation to put on record he/ she has to take up a case that is partly heard by another"*

The Court went ahead to provide the rationale for that position and stated that;

> " *there are a number of reasons why it is important that a trial started by one judicial officer be completed by the same judicial officer unless it is not practicable to do so for one thing as suggested by Mr. Maro, the one who sees and hears the witness is in the best position to assess the witness's credibility. Credibility of witnesses which has to be assed is very crucial in the determination of any case before a court of law. Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised"*

[Also see the case of **Priscus Kimaro vs The Republic, Criminal Appeal No. 301 of 2013** and **Abdi Masoud @ Iboma and Others vs The Republic** Criminal Appeal No. **116 of 2015** (both unreported)].

In the instant matter I find myself in agreement with Mr Yoyo that the way R. A NGOKA, RM took over the hearing of the case was un-procedural as will elaborate soon. The case file was not re –assigned to R.A. Ngoka. Assuming that the failure to re- assign the case to Hon R.A Ngoka was a humanly oversight, still no ground was put in the record for Hon R.A Ngoka , RM, taking over the hearing of the case. Mr Manyota submitted that Hon. O. F. J BWEGOGE, RM was transferred to another work station,I take it to be his own averment , which cannot be of any assistance in this matter since there is no any court record to

that effect. It is a settled principle of the law that Court's records are presumed to show what transpired in Court. It is also a settled position of the law that whenever, there is a need to transfer partly heard case to another judicial officer, the reasons for doing do has to be recorded. Under the circumstances, it is the finding of this Court that the entire proceedings conducted before R.A.Ngoka after taking over the hearing of the matter irregularly together with the judgment, are null and void.

In addition, I wish to point out that I have considered critically, Mr Yoyo's argument that the change of Magistrate has prejudiced the right of the appellant and Hon R.A Ngoka took over the case when the hearing was already completed. In my view that argument is misconceived. The court's record shows that Hon R. A. Ngoka took over the case and continued with the hearing of the application. He ordered the Social welfare officer to submit her report in Court and that is when hearing was closed.It has to be noted that a partly heard case can be re-assigned to another judicial officer provided that the procedure is adhered to and the reason for re- assignment are put in record. As alluded earlier in this judgment, the problem here is that the Court's records do not show what happened to Hon Bwegoge and how the case file was moved from him to Hon R. A. Ngoka.

I am alive that the law of the child provides that the best interest of the child is of paramount importance, but in the course of considering the best interests of the child, proper legal procedures must be adhered to, or else the administration of justice will be chaotic. A case file should change hands in an acceptable manner.

From the foregoing, I hereby nullify all the proceedings of the lower Court and set aside its judgment. The application has to be tried *de novo* before another Magistrate.

Dated this 3rd day of February 2022

B. K. PHILLIP

JUDGE