

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**(ARUSHA DISTRICT REGISTRY)
AT ARUSHA**

CIVIL APPEAL NO. 39 OF 2020

(Originating from the Juvenile Court of Arumeru at Arusha, Civil Application No. 16 of 2020)

EMMANUEL PASCHAL APPELLANT

Versus

CLEMEN TINE MESHACK RESPONDENT

JUDGMENT

1st March & 29th April, 2022

Masara, J.

Parties herein started to live together as husband-and-wife respectively in 2008. They were blessed with three issues: Admas Emmanuel (aged 14 years), Emati Emmanuel (aged 10 years) and Teresia Emmanuel (aged 4 years). During the subsistence of their marriage, they built a three-roomed house. They lived together until 2019, when they got separated due to misunderstandings. The Appellant left the matrimonial house, leaving the Respondent and the three children thereat. As of now, the Appellant is married to another woman. According to the records available, the Appellant was not paying maintenance of his children. The Respondent made a complaint before the Social Welfare offices, where the Appellant was ordered to pay maintenance at the tune of TZS 60,000/=. He paid for a while but later stopped.

When payment stopped, the Respondent made a formal petition for maintenance in the Juvenile Court of Arumeru (the trial court). At the trial court, the Respondent prayed that the Appellant be ordered to pay TZS 150,000/= per month as maintenance, since he was a mason, had gas business and was a porter as well. On his part, the Appellant prayed to be given custody of the two elder children while the last child be under the custody of her mother. The trial court, after hearing the parties, declined to give custody of the two elder children to the Appellant on the ground that the Appellant failed to prove anything wrong befalling the children if they continued to live with their mother in the matrimonial home. The trial court also ordered the Appellant to pay TZS 90,000/= monthly as maintenance of the three children. The Appellant was dissatisfied by that decision, hence this appeal on the following grounds:

- a) That, the honourable resident magistrate having known my (sic) income as per welfare officer report to be Tshs 200,000/= per month erred in law and in fact to make an order for payment of Tshs 90,000/= per month, an amount which is very high while I am required to pay for (sic) school fees, to buy uniforms and to maintain myself including payment of house rent;*
- b) That, the honourable resident magistrate erred in law and in fact by refusing to grant custody of the 1st, and 2nd children who are above 7 years to be under my custody while the law allows; and*

c) That the honourable resident magistrate erred in law and in fact for failure to realize that the petitioner and the Respondent are not employed so each of them has to struggle to maintain the children the whole burden of maintaining the three issues should not be placed on me (sic) as I am (sic) also required to pay house rent and all other necessities of life.

At the hearing of the appeal, the Appellant and the Respondent appeared in person, unrepresented. The appeal was heard orally.

Submitting in support of the grounds of appeal, the Appellant contended that the trial court erred in ordering him to pay TZS 90,000/= for the children who the Respondent claimed that they are not his and that he was not her husband but just a boyfriend. He added that after he had constructed a 4 roomed house, she chased him away, so he was left with nothing. He amplified that he went to the social welfare where the Respondent admitted that the children were his, but she said she would not give them to him. He was further told that the children were younger to be given to him. According to the Appellant, he could not cater for them while they were in the Respondent's custody. He maintained that he wants to have custody of his children because the Respondent said once that they were not his children and since he is a mason, he can cater for them if they are placed under his custody.

On her part, the Respondent submitted that she had never said that the children were not of the Appellant. That she has been living alone with the children for four years now. She also admitted that the Appellant constructed a four-bedroom house but it was involved in fire accident, and she had to reconstruct it afresh. According to the Respondent, the Appellant left the house on his own volition and got married within three months of separation. The Respondent submitted that she declined to hand over the children to the Appellant as they are still young, but also that the Appellant wanted to send them to his parents in Iringa. She further submitted that the Appellant's parents are old, therefore incapable of taking care of the children. She maintained that since she is a petty business woman and has a house of her own, the children will survive. She categorically stated that she was not ready to surrender the children to the Appellant. According to the Respondent, she and the Appellant live nearby, but whenever children go to the Appellant for any issue, he does not support them, instead he directs them to go back to her.

In a short rejoinder, the Appellant asserted that when they got married the Appellant had a child who did not go beyond class seven. That it is that child who caters for the Respondent, since she has no any income. The Appellant fortified that his children are suffering as they are forced to

go to Kiombero market to get something for the family. He insisted that the children do not go to school. That he is capable of taking care of them as he lives in a two-bedroom house and was going to take them to a boarding school.

Having gone through the submissions by the parties, I opt to determine the grounds of appeal as presented. In so doing, I will combine the 1st and the 3rd grounds of appeal since they are interrelated. I also need to point out that I requested the Social Welfare Office to prepare a Report regarding the suitability of the Parties herein for the custody of the three children. The same was prepared and submitted to Court. However, it appears to me to be a copy and paste Report of the one they had prepared and presented to the trial court. The only changes relate to the date and the amount of money to be paid as maintenance. The Report does not state why the Court should not vary the status quo. That said, I now address the grounds of appeal.

In the first and third grounds of appeal, the Appellant faults the decision of the trial court for ordering him to pay TZS 90,000/= monthly while his income per month was found to be TZS 200,000/= in the Social Welfare report. He further faults the trial court for placing maintenance on him alone while the Respondent is left untasked. According to the trial court

record, the Respondent prayed that the Appellant be ordered to pay TZS 150,000/= as maintenance. In making the maintenance order, various factors are to be taken into account as enumerated under section 44 of the Law of the Child Act, Cap. 13 [R.E 2019] and Rule 84 (2) of the Law of the Child (Juvenile Court Procedure) Rules, G.N No. 182 of 2016. Section 44 provides:

"44. A court shall consider the following matters when making a maintenance order-

- (a) the income and wealth of both parents of the child or of the person legally liable to maintain the child;*
- (b) any impairment of the earning capacity of the person with a duty to maintain the child;*
- (c) the financial responsibility of the person with respect to the maintenance of other children;*
- (d) the cost of living in the area where the child is resident; and*
- (e) the rights of the child under this Act."*

Along with the above factors, in making a maintenance order service provided and needs of other dependants are also to be taken into account. According to the Social Welfare Report filed in the trial court, the Appellant's income per month is TZS 200,000/=. However, the report shows also that the Appellant caters for the needs of his parents at the tune of TZS 30,000/= per month. That leaves him with TZS 170,000/=

per month. The reason for challenging the decision, according to the Appellant, is that he is also required to provide other services including payment of school fees, buying uniforms, maintaining himself as well as payment of house rent. The trial magistrate in her decision stated that she considered all these factors in concluding that the Appellant pays TZS 90,000/= monthly.

As earlier stated, when I asked the Social Welfare Office to prepare a report, they proposed that the amount of maintenance to be paid to the Respondent ought to be TZS 70,000/=. This was an increase of TZS 10,000/= from the rate they had proposed earlier. This they did notwithstanding that the income of the Appellant had not increased. This new rate, in my view, considered the ability of the Appellant and the fact that taking care of three children at the moment require a substantial amount of money. As a father, the Appellant cannot abdicate from the responsibility of paying school fees, buying uniforms and other necessities for his own children. I am aware that his income is not substantial, all the same he cannot be exonerated from the responsibility of taking care of his infant children. It is upon him to add efforts to increase his monthly income so that his children are well catered for.

Having gone through the trial record, the Appellant did not offer sufficient reasons while requesting custody of the two elder children. In his submission in respect of this appeal, the Appellant prayed to be granted custody because the two children do not go to school and that they are suffering because they are forced to go to Kilombero market to get something. He also mentioned that the Respondent's other child was not schooling and was forced to work so as to provide for his mother and himself. There was also mention of the Respondent having uttered that her children could ride "mkokoteni" instead of going to school. However, those reasons were not stated during trial. They are without any proof. The reasons I directed that Social Welfare undertakes an assessment regarding custody was to substantiate those serious allegations regarding the suitability of the Respondent to continue with custody of the three children. Unfortunately, the Report submitted added nothing of substance to enable this Court to make an informed decision relating to custody of the children in question. I expected the Report to investigate whether the said children were attending school or otherwise. I therefore have no grounds to disturb the order of custody made by the trial court.

The Appellant further submitted that he intends to take the children to a boarding school. He did not state, however, whether his proposal was

expressed to the Respondent who turned it down. I have no doubts that such proposal would be in the best interest of the children, after all it is his responsibility to take care of their educational needs. How the Respondent would be opposed to such a proposal completely beats my mind. He can take them to a boarding school while they are in the Respondent's custody.

The record shows that the Appellant was given access to the children, so any concern regarding development of the children ought to be communicated to the Respondent. I have also taken into consideration the fact that since they are three children, it is in their best interest that they are raised together. Separating them may not augur well with their best interests.

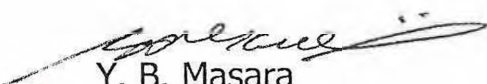
From what I have endeavoured to discuss above, I hereby dismiss this Appeal and order as follows:

- a) Custody of the three children to remain with the Respondent;
- b) The Appellant to pay TZS 70,000/= per month to the Respondent as maintenance of their three children;
- c) Maintenance amount shall persist to the time the last of the children attains the age of majority;
- d) Other orders made by the trial court remain unchanged; and

e) Each party to bear their own costs

Order accordingly.




Y. B. Masara

JUDGE

29th April, 2022

ORIGINAL