

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**CIVIL APPEAL NO. 12 OF 2021**

(Originating from Juvenile Civil Application No. 1/2021 Juvenile Court of  
Kilimanjaro at Mwanga)

**EZEKIEL ANTONI ----- APPELLANT**

**VERSUS**

**ADELINA MWALINO ----- RESPONDENT**

**JUDGMENT**


*24/2/2022 & 6/4/2022*

**SIMFUKWE, J.**

The appellant appeals against the decision of Juvenile Court before Mwanga District Court at Mwanga, in Juvenile Civil Application No. 1 of 2021 which was delivered on 6/4/2021.

Briefly, the facts leading to this appeal are that; the appellant and the respondent are parents of three children namely Veronika Ezekiel who was born on 2008, and the twins Justine and Jafeti who were born in 2011. Before the Juvenile court, the appellant unsuccessfully applied for custody and access of the named children who were residing with the respondent. Dissatisfied, the appellant preferred this appeal under the following grounds:

- 1. That the learned Resident Magistrate erred in law and fact in not order the children to be in custody of the appellant. (sic)*

  
Page 1 of 7

2. *That the maintenance order of Tshs 100,000/= per month in respect of both children is insufficient regarding the economic status of the appellant/father.*
3. *That the trial Magistrate erred in law to order the children to be under custody of respondent when the said children are more than seven years old capable of being placed under custody of his father.*
4. *That the social inquiry report is very contradictory to the evidence on record thereby prejudicing the children and the court entered findings on presumptions.*

The appeal was argued orally and both parties were unrepresented.

The appellant submitted to the effect that he was aggrieved by the decision of the trial court in respect of maintenance of children due to his income. He claimed to have other children from another mother. Thus, he prayed for custody of children so that they may share whatever he gets even if it is small. He added that, he wanted his children from both mothers to know, love and value each other which can be achieved by staying together.

Further to that, the appellant stated that another reason for applying for custody is school. He believed that if all his children are under his custody, they will be able to study well giving example of one of his children who resides with the respondent but does not attend studies regularly arguing that such child may even miss the school twice a week something which pains him a lot.

In reply, the respondent submitted that the appellant is capable of maintaining his children since he managed to marry another woman. He is also well off as she stayed with him almost 21 years. He is a fisherman

and has a ferry project which enables him to earn not less than Tshs 150,000/- per day.

The Respondent admitted that sometimes their daughter does not attend school regularly but it's only when she is on menstruation period.

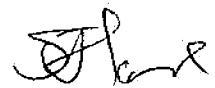
Further to that, the respondent argued that her children are young, they cannot stay with a step mother while she is alive. She averred that; the appellant is not responsible for anything. When the children are sick, he says that they should use mwarobaini. Even the children have no affection with their father as he is rude to them.

In his rejoinder, the appellant claimed to have evidence to prove that he maintains his children. Concerning the social inquiry, he claimed the same to be unfair to him since they inquired from the children instead of inquiring at school.

I have carefully gone through the records of the trial court proceedings, judgments and grounds of appeal as well as the submissions of both parties. In determining this appeal, I will deal with the 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal jointly, since all of them fall under the issue of custody and the 2<sup>nd</sup> ground of appeal which is about maintenance.

Under the 1<sup>st</sup> ground of appeal, the appellant faulted the magistrate for placing the custody of children to the respondent. His reason was that, he wanted all his children to be together so as to share what he gets. The respondent disputed the same on the ground that her children cannot stay with a step mother while she is alive.

The law is very clear on the issue of custody. Under **section 26(1)(a)(b) and (c) of the Law of the Child Act, Cap 13 R.E 2019**, any child has



Page 3 of 7

a right of living with their parents when their parents are separated or divorced. **Section 39 (1) of the Law of a Child Act** (supra) has established what should be considered before placing the custody to any parent. For ease reference the provision reads:

*39.-(1) The court shall consider the best interest of the child and the importance of a child being with his mother when making an order for custody or access.*

*(2) Subject to subsection (1), the court shall also consider -*  
*(a) the rights of the child under section 26;*

*(b) the age and sex of the child;*

*(c) that it is preferable for a child to be with his parents except if his rights are persistently being abused by his parents;*

*(d) the views of the child, if the views have been independently given;*


*(e) that it is desirable to keep siblings together;*

*(f) the need for continuity in the care and control of the child;*  
*and*

*(g) any other matter that the court may consider relevant.*

**Section 125 (2) (a) and (b) of the Law of Marriage Act, Cap 29 R.E 2019**, also outlines the key factors to be considered by courts in determining under whose custody the issues of marriage should be placed.

The court has always emphasized that in making the order of custody the court should consider the best interest of the child. See the case of **Sajjad Ibrahim Dharamsi & Ally Jawad Gulamabas vs Shabir Gulamabas Nathan, Civil Appeal No 42 of 2020** (HC) at Dar es Saiaam(unreported).



The Court of Appeal of Tanzania in the case of **Ramesh Rajput v. Mrs Sunanda Rajput [1988] TLR 96**; held among other things that:

*"The most important factor in custody proceedings is the welfare of the child."*

In placing the custody to the respondent; the learned trial magistrate in her judgment at page 03-4 considered the principle of best interest of a child. She also considered the fact that the mother (respondent) is the one who is taking care of the children at the moment. She was of the view that changing the custody may affect the children psychologically. She also considered that the appellant deserted the respondent and he was convicted for that.

Basing on these findings of the trial court, I do not see any reason to conclude otherwise and these are my reasons:

It is not correct for the appellant to presume exclusive rights over his children on the reason that he would like his children to stay together. When it comes to custody there are factors to put into consideration before awarding custody as per **sections 39 (1) of the Law of the Child Act** (supra) as rightly decided by the trial magistrate.

In the present case, the fact that it is the respondent who used to stay with the children, and considering that the appellant once deserted them and was convicted for the same, I am of considered view that the trial court considered the issue of the best interest of a child over the factor of keeping siblings together as contended by the appellant. The fact that the appellant has another family and children from another mother, and the fact that the respondent has children from the same father only, it won't be prudent to place custody of children under the appellant. As rightly

decided by the trial magistrate, changing the custody will affect the children psychologically. In that respect therefore, I find no reason to fault the findings of the juvenile court in respect of custody.

Concerning the 2<sup>nd</sup> issue of maintenance; The trial court was of the view that since the appellant is a fisher man, he is able to pay Tsh 100,000/= per month and paying for school fees. The appellant is faulting this order on the ground that such amount is high compared to his financial ability and considering that he has other children.

It is a trite law that both parents have obligation of providing for their children. This is provided under **sections 8 (1) and (2), 9 (1) and (3) and 26 (1) of the Law of the Child Act**. Therefore, despite the fact that all the three children were placed under the custody of the respondent, as a father the appellant has to provide for them. Having in mind the fact that maintenance includes food, shelter, clothing, medical care including immunization, education and guidance, play and leisure as per **section 8(1)**, then it is just and fair for the amount of Tsh 100,000/- to be paid for all these needs for three children.

Regarding the social welfare report, the appellant under the 4<sup>th</sup> ground of appeal, claimed that the said report is contradictory to the evidence on record. However, the appellant did not point out the alleged contradiction. I have perused the said report, I failed to note any contradiction. In his submission he also complained that the said report inquired from the children instead of school. With due respect, this contention is wrong since the inquiry was done to different people including the appellant and the respondent. Even the **Law of a Child** has no limit in respect of places of conducting inquiry.



While I find all the other grounds of appeal to be baseless, I find it worth to discuss shortly on the issue of the appellant's accessibility to his children. The appellant being a father of the children has a right to access his children. Thus, the appellant is allowed to see his children during holiday.

It is on the basis of the above findings, that I find no reason to fault the juvenile court's decision. Hence, I hereby dismiss this appeal with no order as to costs.

Dated and delivered at Moshi this 6<sup>th</sup> day of April, 2022.



**S. H. Simfukwe**

**Judge**

**6/4/2022**