

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CIVIL APPEAL NO 13 OF 2021

(Originating from in the of application for custody of children under the law of the Child Act 2009 [CAP 13 R.E 2019])

VICTOR C. KANYOROAPPELLANT

VERSUS

NEEMA KALIBOBO.....RESPONDENT

JUDGMENT

21st February & 23rd February, 2022

Kilekamajenga, J.

The appellant and respondent are husband and wife who contracted their Christian marriage in 2002 and were therefore blessed with five issues. Currently the first child is 17 years old, the second child is 16 years old, the third child is 11 years old, the fourth child 9 is years old and the last child is 4 years old. In 2019, their marriage went through perennial squabbles which led to their consensual separation without an order of the court. It is further alleged that during the period of separation, they attempted several reconciliation measures at the office of the welfare officer. At the end, the wife (respondent) left all the five children in the hands of the husband (appellant). However, the appellant scatted the children to his relatives including his sisters something which irritated

the respondent. The respondent did not contain the act of seeing her children in the hands of other persons who are not parents; she approached the District Court of Bukoba claiming for custody of three younger children together with an order for maintenance. The District Court, after hearing the parties with a keen eye, granted custody of the three children, namely Arsenius Victor (11 years old), Vivian Victor (9 Years old) and Iman Victor (4 years old), to the respondent. The Court further ordered the appellant to pay costs for maintenance to the children at the tune of Tshs 100,000/= each month. The court further ordered the appellant to have access to the children in case he wants.

Aggrieved with the decision of the trial court, the appellant approached this court armed with seven (7) grounds of appeal which are however drafted haphazardly. Having the appeal in place, this court invited the parties to argue the appeal. Both the parties appeared in person and without legal representation.

In his oral submission, the appellant had no better reasons than to object the order of the court that placed the three children into the custody of the respondent. He urged the court to return the children in his hands because they will be living under harsh environment if placed in the custody of the respondent.

He further alleged that the children called Arserius Victor and Vivian are not willing to stay with the respondent.

In response, the respondent objected the allegation that she is living under hazardous environment which does not support the upbringing of the children. She further averred that, she applied for the children because the appellant failed to live with them and scattered them to his sisters. In her view, the appellant wanted the children so that he may scatter them to his relatives. She believed, it would be against the welfare and wellbeing of the children if they (children) live away from the parents. She finally urged the court to grant custody of the three children and order of maintenance to the children.

When rejoining, the appellant indicated his willingness to pay Tshs. 100,000/= as maintenance to the children.

Having considered the ground of appeal and oral submission given by the parties, it is evident that all the grounds of appeal and oral submission revolve around the issue of custody of children. While the appellant objects the custody of the three children to be placed into the custody of the respondent, the respondent insists to have the custody so that the wellbeing of the children may

not be prejudiced. I have carefully considered this matter because it directly touches the wellbeing and interest of the children who are, all of them, below the age of majority. The major point for determination is whether the trial District Court was right in granting custody of three younger children to their mother (respondent). As earlier stated, the youngest child is 4 years old, followed with a 9 years old girl and the third is 11 years aged boy. However, the respondent does not claim custody of the two other children who are 17 and 16 years old. In my view, the youngest child who is 4 years old should stay with his mother because he is too young to miss the motherly care. On the other hand, the law encourages children under the age of seven years to be placed in the custody of the mother unless the court finds good reasons to the contrary. For clarity and easy reference and understanding, I wish to reproduce **section 125 of the Law of Marriage Act, Cap. 29 RE 2019** which provides that:

125.-(1) The court may, at any time, by order, place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare.

*(2) In deciding in whose custody a child should be placed the paramount consideration **shall be the welfare of the child** and, subject to this, the court shall have regard to-*

(a) the wishes of the parents of the child;

(b) the wishes of the child, where he or she is of an age to express an independent opinion; and

(c) the customs of the community to which the parties belong.

*(3) There shall be a rebuttable presumption that **it is for the good of a child below the age of seven years to be with his or her mother** but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of the child by changes of custody.*

(4) Where there are two or more children of a marriage, the court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each independently. (Emphasis added)

See, also section **26 of the Law of the Child Act, Cap. 13 RE 2019.**

In line with the above provisions of the law, it would be of greater interest to the child to be in the custody of the respondent because I failed to grasp any good reason for the appellant, who is the father, to stay with the child of 4 years.

In respect of the second child who is a girl aged 9 nine years old, I also find desirable for this court to grant the custody to the respondent. There are two reasons for this child to be with her mother; first, she is not old enough to be in the hands of the appellant. The girl of this age, her wellbeing and future may be determined by the person nurturing her. In my view, her mother might be the

right person to take care of her rather than the appellant (father). On the third child, this court was well informed that he was schooling at Nyakato Primary in standard VII. The school is closer to the respondent's new place of residence. He was later lured and finally snatched by the appellant and taken to the appellant's sister at Karagwe. When parties appeared before this court, this child had missed school for almost three weeks trying to roam around different courts supporting the appellant's allegation that he (child) does not want to stay with his mother. In my view, the child is in standard VII and therefore needs a conducive environment to allow his concentration for this final year before proceeding to the next level. Placing the child under the custody of the appellant might need his transfer from the current school which, in my view, may exacerbate inconveniences. The child is, undoubtedly, suited to the school and made friends favourable for his education career. For the interest and wellbeing, he should therefore be under the custody of the appellant. I therefore find good reason to place the three children in the custody of the respondent.

Now, having granted custody of the three children to the respondent, the other obligation, which automatically comes into play, is the issue of maintenance to the children. The law clearly imposes an obligation to the husband to maintain his children according to his economic position and station in life. The wife can

only provide costs for maintenance where the husband is dead or his whereabouts are not known. I take the discretion to reproduce **section 129 of the Law of Marriage, Cap. 29 RE 2019** thus:

*129.-(1) Save where an agreement or order of court otherwise provides, it shall be the duty of a man to maintain his children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education **as may be reasonable having regard to his means and station in life** or by paying the cost thereof.*

(2) Subject to the provisions of subsection (1), it shall be the duty of a woman to maintain or contribute to the maintenance of her children if their father is dead or his whereabouts are unknown or if and so far as he is unable to maintain them.

See, also section **26 of the Law of the Child Act, Cap. 13 RE 2019**.

In this case, so long as the appellant, who is father of the children is alive, the obligation to provide the necessities for the children shall remain on him. As ordered by the trial District Court, I also insist that, the appellant should provide Tshs. 100,000/= every month as maintenance to his children. Such money should be given to the respondent every month. Based on the above brief analysis, I hereby dismiss the appeal and uphold the decision of the District Court. I further insist the following: the three children namely Arsenius Victor,

Vivian Victor and Imani Victor should be under the custody of the respondent. The appellant should provide a monthly maintenance costs to the children at the tune of Tshs. 100,000/=. The appellant is at liberty to visit the respondent and see the children without causing any breach of peace or snatching them away. This order shall remain valid until reversed or altered by other orders of the court or where the children attain the age of majority and they are no longer schooling. It is so ordered.


Dated at Bukoba this 23rd February 2022.




Ntemi N. Kilekamajenga
JUDGE
23/02/2022

Court:

Judgment delivered this 23rd February 2022 in the presence of the parties. Right of appeal explained.




Ntemi. N. Kilekamajenga
JUDGE
23/02/2022