

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA**

CIVIL APPEAL NO. 09 OF 2022

(Originating from Juvenile Civil Application No. 26/2021 of the District Court of Bukoba)

PUDENCE MGANGA.....APPELLANT

VERSUS


JANETH JOSEPH MOSHI.....RESPONDENT

JUDGMENT

27th May & 27th May 2022

Kilekamajenga, J.

The appellant and respondent got married five years ago and their marriage was officiated in the office of the District Commissioner. Soon thereafter, the marriage turned sour and they could no longer stay together. In their marriage, they were blessed with two issues namely, Valence Pudence Mganga (6 years old) and Venossa Pudence Mganga (4 years old). When their relationship broke – up, the husband (appellant) relocated with the children to Bukoba from Dodoma. Later, the wife (respondent) applied for the custody of the children at the District Court of Bukoba. Finally, the trial Court ordered the first child (Valence Pudence) to remain in the custody of the appellant whereas the young child (Venossa Pudence) was placed in the custody of her mother. The appellant was unhappy with the decision of the trial Court hence this appeal. Before this Court, the appellant advanced four grounds of appeal coached thus:



1. *That, the trial Court erred in law and facts for failure to identify that the respondent didn't prove before the Court her ability to maintain the child in all basic needs.*
2. *That, the trial Court erred in law and facts for failure to ascertain wishes and feelings of the children before reaching its decision.*
3. *That, the respondent failed to prove that, the best interested of the child was jeopardised by them being under respondent custody.*
4. *That, the trial Court erred in law and facts for failure to identify that the separation of the children and change of custody is likely to affect their physical, emotional and educational needs and disturbance of their life generally.*

When the case came for hearing, the parties appeared in person and without representation. In expounding the grounds of appeal, the appellant argued that, **first**, the District Court's decision was made in the absence of a social welfare inquiry report. **Second**, the appellant argued that, the respondent failed to prove whether she owns any business as there was no business licence tendered to prove the allegation. On the **third** ground, the appellant argued that, the Court failed to consider the opinion of the children on where they want to stay. The wishes of the children ought to be considered before granting custody of children. On the **fourth** ground, the appellant argued that, the respondent failed to prove whether the children are living in an environment unfavourable to their

wellbeing. The appellant further argued that the separation of the children will affect them psychologically. He told the Court that, he operates a motorcycle business and he is a networker and his monthly income is about Tshs. 100,000/=. He insisted that, the children should be left in his hands.

In response, the respondent prayed for the Court to grant custody of the two children in her custody as she can pay their school fees and other living expenses. She told the Court that, she owns businesses in Dar es Salaam including running a stationary, *tigo-pesa* business and she also sells home gas cylinders. Her total income per month is about Tshs. 800,000/=. She insisted that, the appellant is not a responsible person hence she is praying for the custody of the two children. She further argued that, the appellant should not be exonerated from the responsibility of maintaining the children.

When rejoining, the appellant insisted that, the respondent cannot pay the children expenses.

Thereafter, the Court ordered the appellant to come with the two children to the Court. On the next day, the parties appeared and the two children were also present. I inquired the older child (Valence) and he had the following to say:- He told the Court that he stays with his grandmother and uncle (Baba Mkubwa). Currently, he is at a Boarding school though he was not happy with the Boarding

school life. He only meets his young sister at school. He also told the Court that, he washes her own clothes at school. On her part, Venossa was too young to express her opinion than telling the Court that she is four years old and she was happy to see her mother.

Now, having considered the submission from the parties and opinion from the first child, I have no hesitation to determine the instant appeal as soon as possible because, so far, the same was brought under certificate of urgency. I have carefully considered the grounds of appeal advanced by the appellant and it is apposite if I determine them accordingly. On the first ground, the appellant argued that, the respondent failed to prove before the trial Court on whether she can maintain the children. In addressing this ground, I wish to consider the provisions of **Section 129 (1) of the Law of Marriage Act, Cap. 29 RE 2019** which provides that:

*"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 costs thereof.*

(2) Subject to the provision 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.

As clearly stated in the above provision of the law, the appellant (husband) has the duty to maintain his own children. The wife can only do so where the husband is dead, not known about his whereabouts or where he is financially incapacitated. In the circumstances where the wife gets custody of the children, she will be duty bound to maintain them. However, the husband is not exonerated from the duty to maintain the children on the simple reason that the children are in the custody of the wife, guardian or other person. **Section 8 of the Law of the Child, Cap. 13 RE 2019** insists on the parental duty to maintain the children who are in his/her custody. The section provides that:

*8.-(1) It shall be the **duty of a parent**, guardian or any other person having custody of a child to maintain that child in particular that duty gives the child the right to-*

- (a) food;*
- (b) shelter;*
- (c) clothing;*
- (d) medical care including immunization;*
- (e) education and guidance;*
- (f) liberty; and*
- (g) play and leisure.*

(2) A person shall not deprive a child access to education, immunisation, food, clothing, shelter, health and medical care or any other thing required for his development.

(3) A person shall not deny a child medical care by reason of religious or other beliefs.

(4) A person shall not deprive a child the right to participate in sports, or in positive cultural and artistic activities or other leisure activities, unless in

the opinion of the parents, guardian or relatives such participation or activity is in the best interest of the child.

(5) A person shall not treat a child with disabilities in an undignified manner.

(6) A child with disabilities shall have a right to special care, treatment, afforded facilities for his rehabilitation and equal opportunities to education and training wherever possible to develop his maximum potential and be self-reliance.

Therefore, according to the above provisions of the law, the appellant has the duty to maintain his children even if such children are in the custody of the respondent. The appellant has no justification of shifting his duty to the respondent. I find no merit in this ground.

On the second ground, the appellant argued that the trial Court decided this matter without ascertaining the wishes of the children. I was prompted to consider section 125 of the Law of Marriage Act in resolving this issue. The section 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).

In the case at hand, the children were too young to give an independent opinion. As stated earlier, the older child is six years old and has not even started standard one. The second child is four years old and is attending kindergarten. Considering the age of the children, it could not be easy for the trial court to secure an independent opinion from the children. The children at that age may easily be coached to lie or express the opinion of the parent who has custody. In fact, that is what happened when the children came before this Court. As the boy entered the office, he uttered that he loves his father! He gave this response without my question. Under such circumstances the court cannot rely on the child's opinion in deciding the welfare of the child. According to the above cited provision of the law, I find no any anomaly committed by the trial Court for not soliciting opinion from children. What is important is for the court to considered

their welfare and decide judiciously than relying on the child's opinion of that age.

On the third ground, the appellant argued that the best interest of the children will be jeopardised if placed under the custody of the respondent. This is the most important point for consideration when deciding custody of a child. Under **Section 125 (2) of the Law of Marriage Act**, the law clearly provides that, in deciding custody of children, "*the paramount consideration shall be the welfare of the child*". In determining this point, I was prompted to consider the life of the children and likelihood of their future. According to the information garnered from their parents and also confirmed by Valence (the older child), the children are in the custody of the appellant. However, Valence is living at Bugandika with his grandmother called Bibi Ester and his uncle (Baba Mkubwa) while his father lives at Bunazi. Currently Valence is at a Boarding school and he only meets his young sister at school. Before this Court, Valence was not ashamed to tell the court that he is not happy with the boarding school life and he could be happy if he can be attending school and go back home. He also told the court that, he always washes his own clothes at school.

It is therefore evident that, Valence is at the boarding school and lives with his grandmother and uncle (Baba Mkubwa) during the leave. Venossa lives with her grandmother though she attends the same school with Valence. Though the

father may be paying school fees for the children, I am worried about the welfare of Valence who, at the age of six, has joined a boarding school even before starting standard one. If this child is not placed under the custody of a responsible parent, his welfare will be determined by the boarding school life. In my view, having considered the age of Valence, it is not in the best interest of this child to live in a boarding school. At his age, he needs a motherly care which, I believe, cannot be achieved at a boarding school. He definitely need the care of his parents and the mother may be an appropriate person to take care of him.

On the side of Venossa, I am worried, soon, she may also be registered in the boarding school. As stated above, it may not be in the interest of the children to live in a boarding school in their entire life as if they are orphans. So long as their parents are alive, the most responsible parent should be given custody. In my view, the appellant has proved that, he is not a responsible person; he has taken the older child to the boarding school and the other one in the hands of her grandmother.

This Court of justice cannot deprive the children the right to parental care and entrust them to the boarding school or to any other person while their mother is alive and she needs them. Detaching these young children to their parents will

be contrary to the law as they have the right to grow-up with their parents as provided under **Section 7 of the Child Act** that:

- 7.-(1) A child shall be entitled to live with his parents or guardians.*
- (2) A person shall not deny a child the right to live with his parents, guardian or family and grow up in a caring and peaceful environment unless it is decided by the court that living with his parents or family shall-*
- (a) lead a significant harm to the child;*
 - (b) subject the child to serious abuse; or*
 - (c) not be in the best interest of the child.*
- (3) Subject to the provision of subsection (1) and (2), where a competent authority or a court determines in accordance with the laws and procedures applicable that it is in the best interest of the child to separate him from his parents, the best substitute care available shall be provided for the child.*

In deciding the custody of the children, the other consideration should be their age. Under **Section 125(3) of the Law of Marriage Act**, generally it is for the best interest of the child under the age of seven years to be with his/her mother. Furthermore, under **Section 39(1) of the Child Act**, in deciding custody of the child, the court is obliged to consider the possibility of such child to remain with his/her mother. The section provides:

- 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.*

In the case at hand, the children are too young to be separated from their mother. In my view, they need more of the motherly care than anyone else. I have carefully and deeply considered the welfare and age of the children, and I am of the opinion that the appellant is not the right person to be given the custody of such young children. The appellant has dumped one of the children to a boarding school. I am also of the opinion that, it is not in the best interest of these children to be separated. The two children should stay together under the custody of their mother. I have also considered the future of the children which may be affected if left in the hands of the appellant. I am confident that change of environment of the children at this stage may not have any serious consequences. In fact, leaving them under the care of the appellant may be more detrimental. I therefore find no merit in the appeal and dismiss it. I uphold the decision of the trial court and further order the following:

1. The two children namely Valence Pudence (6 years old) and Venossa Pudence (4 years old) should be in the custody of their mother (respondent);

2. The appellant shall pay the school expenses for the children;
3. The appellant shall provide monthly maintenance to the children at the tune of Tshs. 100,000/=;
4. The appellant will have the right to periodic access to the children after communication with the respondent;
5. For the best interest of the children, the appellant should hand-over the children to the respondent on 30/05/2022.

It is so ordered.

Dated at Bukoba this 27th May 2022.

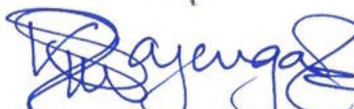



Ntemi N. Kilekamajena
Judge
27th May 2022

Court:

Judgment delivered this 27th May 2022 in the presence of the appellant and respondent and the children. Tight of appeal explained.




Ntemi N. Kilekamajena
Judge
27th May 2022

