

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM SUB DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 62 OF 2021**

*(Originating from Civil Application No. 3 of 2021)*

**EVARISTO EMMANUEL KILUMBI.....APPELLANT**

**VS**

**CHRISTINA DEO KAJUMBE..... RESPONDENT**

*Date of Last Order: 21/10/2022*

*Date of Judgment: 03/03/2023*

**J U D G M E N T**

**MGONYA, J.**

The Appellant herein being aggrieved by the Ruling and Orders of the Juvenile Court at Kibaha has filed before this Court a number of 3 (three) grounds of appeal to wit:

- 1. That, the learned trial Magistrate erred in law and fact to provide temporary order for maintenance of the Children before committing them to DNA test as both demanded.***
- 2. That, the learned trial Magistrate erred in law and in fact to order for payment of a total amount of Tshs. 80,000/= per month without considering the income of the Appellant and his dependants.***
- 3. That, the learned trial Magistrate erred in law and in fact to order temporary contributions, medicine,***

***school fees and uniform to the children who is not a biological father.***

The matter before this Honourable Court was heard by way of written submissions. In the circumstance of this matter the Respondent was served and did not file her reply to the Appellant's submission hence the appeal being determined *ex parte*.

On the **first ground** of appeal, the Appellant stated that the Court erred to have ordered for maintenance while both the parties sought for a DNA test to be conducted since the Appellant had denied that the children referred to are not his. It was also his contention that it is a fundamental principle that where there are issues raised and touches the roots of the main case, the said issue should first be resolved then other issues follow.

The Appellant further, stated that the Court not granting the parties prayer on DNA test and ordering the appellant to maintain the said children is unlawful and unjust.

On the **second ground** of appeal, the Appellant submits that, the Court erred in ordering the Appellant to pay maintenance to the sum of **Tshs. 80,000/=** per month without inquiring on the income and wealth of both parties as directed by **section 44 (1) of the Law of the Child Act 13 of 2019**. The Court also failed to consider that the Appellant has seven children and two

dependants who are his parents. **Tshs. 80,000/=** is a huge amount compared to his income which is **Tshs. 300,000/=**.

Submitting on the **third ground** of appeal, it was the Appellant's argument that the Court erred in ordering temporary contribution on medicine, school fees and uniform to the children by the Appellant while the two children were intended to be subjected to a DNA test is an infringement of his rights. Wherefore such order in absence of the DNA test contravenes **section 43 (1) of the Law of the Child's Act**.

Having gone through the submission of the Appellant and in absence of the submission of the Respondent it is at this juncture that this Court determines this instant appeal.

In determination of the grounds of appeal, this Court will consolidate the **first and third grounds** of appeal together. In the same, the Appellant is aggrieved by the Court awarding temporary maintenance to the children in absence of a DNA test. Maintenance is a legal requirement as provided for under the law. The Act under **section 8 (1) of the Law of the Child** states:

***"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”.***

The above provision is clear that it shall be the duty of a parent to maintain a child. A parent from the above section, I believe is to be a biological parent. Therefore, for the interest of justice since parentage has been challenged in the circumstance of this case and a DNA test was requested without being objected, the Court had the duty to grant such prayer in a first place for the truth to be revealed so that justice is seen to have been done.

Moreover, the results of a DNA test are one of the ways to prove parentage as provided for under section **35 (e) of the law of the Child Act**. It is my belief that the Court ought to have given weight to such requirement as requested by the Parties so as to have orders that are justifiable and not infringe the right of the maintainer and the ones to be maintained.

The Court had the powers to order for the said test to have been done before finality of the matter being determined. That way there would have been avoidance of multiplicity of suits. It should at all times be taken into consideration that timely justice is of utmost importance. Granting the orders for temporary maintenance pending a DNA test is not timely justice. It is so since the parties will have to appear before the Court for a permanent order after the DNA test result are positive for the

temporary order will not automatically change to be a permanent order.

It is from the above that I find the Court's failure or omission to have granted the prayer for a DNA test to have been conducted to be a misconception. **It is from the above that I find the first and third grounds of appeal are meritorious.**

On the **second ground** of appeal, the appellant confronts the amount ordered by the Court as maintenance. The Appellant states contends that the Court ordered a payment of temporary Maintenance **Tshs. 80,000/=** as maintenance for the two children alleged to be his without inquiring on his income or wealth together with the Respondent. **Section 44 of the law of the Child Act** provides that:

***"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".***

It is from the above, I am of the firm view that the legislature had a firm purpose in construing such a provision. The Court has no other choice than to comply with the said provision so as justice should be seen to have been done. The Court's failure to adhere to the said provision renders the maintenance order

unlawful for being contrary to the requirements of the above provision therefore making this ground of appeal meritorious.

**Having said all of the above, this appeal is hereby allowed. I quash the proceedings and set aside the orders of the trial Court. I order the Respondent to file a new Application before another Magistrate. And the matter be heard expeditiously.**

It is so ordered.

Right of appeal explained.



**L. E. MGONYA**

**JUDGE**

**03/3/2023**