THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

DC.CIVIL APPEAL NO. 2 OF 2022

(Originating from the Juvenile Court of Mtwara at Mtwara in Civil Application No.6 of 2021)

GEORGE EDUARD MGONJA ..... APPELLANT

VERSUS

HADIJA HARUNA KIBILA ..... RESPONDENT

JUDGMENT

13th & 27th June 2023

LALTAIKA, J.

The appellant herein, **GEORGE EDUARD MGONJA** is dissatisfied with the judgement of the Juvenile Court of Mtwara at Mtwara in Civil Application No.6 of 2021. He has appealed to this Court on the following three grounds.

1. *That the Juvenile Court erred in fact and law by awarding custody of children to the respondent while the appellant is capable of taking care of them.*
2. *That the appellant is of different religion to the respondent.*
3. *That the appellant belief that the children will not be raised in a conducive environment hence the respondent is married to other man.*

When the appeal was called on for hearing on the 13th of June 2023, both parties appeared in person, unrepresented. The next part of this judgement provides a contextual and factual backdrop followed by

summarized the arguments by both parties for and against the three grounds of appeal.

George and Hadija (the appellant and respondent respectively) were High School Sweethearts. They studied Science subjects Physics, Chemistry and Mathematics at the Benjamin Mkapa High School in Dar es Salaam. Their love progressed to a higher level albeit without any formal celebration. The duo lived together happily and was blessed with two issues Junior and Joan. Whereas after completion of his high school studies, the appellant studied Business and obtained formal employment, the respondent went straight into entrepreneurship, allegedly to support the appellant's further studies and their needs before the appellant obtained a job.

Trouble in the family started when the couple decided to move from Dar es Salaam to Mtwara. The appellant, by then an employee, claims to have opened a business for the respondent and even gave her access to his personal bank account where his monthly salary was deposited. Frequent misunderstandings, bitterly narrated by the respondent, seem to have been the cause of diminished love among the former high school love birds. In the meanwhile, the respondent enrolled for degree studies at a local university, allegedly "sponsored" by the appellant, met a man she loved (more) and got pregnant.

The rest of the story is irrelevant here. Suffices to say that the respondent remarried. She left the appellant in their matrimonial home. She took with her, not just the love that once decorated their home but also Junior, Joan and another issue Samir, not biologically linked to the appellant.

Having been left alone in their matrimonial home, the appellant knocked on the doors of the District Court of Mtwara. It was on 28/12/2021 only a day after boxing day where he would have probably shared gifts with Junior and Joan. In his application, the appellant prayed for custody of the three issues. The Juvenile Court, upon application by parties, ordered a DNA parentage test to prove paternity of the third issue. The results, as anticipated by the respondent probably with certainty, excluded Samir from the application. After a protracted legal battle, the Juvenile Court decided in favour of the respondent. She walked out with Junior, Joan, and Samir.

As can be gleaned from the three grounds reproduced above, this appeal is narrowly on child custody. I will explain later why it is important for this court, at least for this particular appeal, to take this restrained approach and confine itself to the grounds of appeal even though, from the look of things, a few steps shouldn't have been taken by the parties on their own, before seeking court's intervention.

Arguing for the first ground of appeal, the appellant stated that the respondent is unable to take care of the children. He claimed that the respondent is currently living with another man and is completely dependent on him. According to the appellant, everything relies on the goodwill of that man, and the fate of his children is determined by the love between the respondent and her new husband.

The appellant disagreed with this arrangement because he believes he is capable of taking care of the children himself. He further expressed his

conviction that a child should be raised in close proximity to his/her father and emphasized that he is present and available.

The respondent responded to the appellant's argument by disagreeing with the claim that she is dependent on her new husband. She mentioned that even when she was married to him, she was the one taking care of the children. The respondent explained that she has been financially supporting the children, as she was running a business provided by her husband.

She stated that she is currently working even harder and earning a regular income, which enables her to pay for their expenses. She also mentioned that since they left the appellant's place in 2020, he has contributed nothing except donating three books. According to the respondent, the children now have a stepfather (her current husband) who cares for their needs.

Regarding the second ground, the appellant argued that his children are Christians and emphasized the importance of continuing their faith. He expressed concern that the respondent sometimes gives the children Islamic names and tries to influence their religious beliefs. The appellant believed that it is crucial for the children to learn about their faith namely Christianity.

In response, the respondent stated that when the appellant approached her, he was aware that she is a Muslim. She clarified that they never conducted a formal marriage, and therefore, the child's religious affiliation cannot be determined as either Muslim or Christian. The respondent explained that it is up to the child to decide their faith when they reach the age of 18. She emphasized that any faith that leads to a fear of

God is important and denied the appellant's claim that she is swaying the children's beliefs. The respondent mentioned that the children were baptized in the community "jumuia" and assured that she has their best interests at heart, as she carried them in her womb for nine months.

Moving on to the third ground, the appellant claimed that the children's appearance has changed since the divorce, asserting that they are experiencing a decline in their health and academic performance, particularly the girl. The appellant expressed his strong concern for their academic well-being, stating that they require supervision for their homework and tuition. He believed that taking care of children involves both their school and home life, and he observed significant changes in them.

In response, the respondent denied preventing the appellant from visiting the children's school. However, she mentioned that her home is off-limits to him. She stated that even when they were married, the appellant rarely spent time with the children and would return home drunk and abusive. The respondent disagreed with the appellant's claim about the children's health, stating that they are normal but may face occasional growth challenges. She emphasized that, as a mother, she is closer to the children and spends more time with them than the appellant, who frequently visits local bars.

The respondent expressed her emotional pain over leaving everything behind, including a house and several cars, and accused the appellant of selling her possessions. She asserted that she could take care of her own

children and criticized the appellant for causing disturbance in court. She further mentioned that he now only possesses one car, which is up for sale.

In his rejoinder, the appellant addressed some points raised by the respondent. He clarified that the respondent having a salary is not an issue. He claimed to have opened an account for her and delegated his responsibilities as a man to her, providing her with his bank card for her fee payments. He denied selling anything, stating that he only wanted to change his car, and his decision to sell it has no connection with any problems.

The appellant stated that whether he is baptized or not is irrelevant, as his upbringing in a mixed religious family influenced his desire for his children to be Christian. He emphasized that his focus is on the best interests of the children.

I have dispassionately considered arguments by both parties and examined the Juvenile Court's records. In the simplest of expressions, the appellant is before me in this court asking me to reverse the decision of the Juvenile Court. His wish is that I make an order that Junior and Joan hitherto under custody of the respondent, for the past half a decade, I would say, 2020 to the present, be taken back to him.

I consider the above prayer extremely daring. Before I consider it on merit, it is imperative to state the obvious that the powers of this court to interfere with decision of the lower courts are not without limits. It cannot, for example, act on "extraneous considerations" See **STEPHEN MALIYATABU & ANOTHER VS CONSOLATA KAHULANANGA** (Civil Appeal No. 337 of 2020) [2023] TZCA 132 (22 March 2023). Apparently,

there are general principles upon which an appellate court can interfere with the exercise of discretion of an inferior court or tribunal. In **MBOGO AND ANOTHER v. SHAH (1968) EA 93** the erstwhile Court of Appeal for Eastern Africa outlined the following conditions

> *(i) If the inferior court misdirected itself; or*
> *(ii) It has acted matters it should not have acted; or*
> *(iii) It has failed to take into consideration, and in so doing, arrived at a wrong conclusion. Other jurisdictions have put it as "abuse of discretion" and that an abuse of discretion occurs when the decision in question was not based on fact, logic, and reason, but was arbitrary, unreasonable or unconscionable-See **PINKSTAFF VS BLACK & DECKTZ** (US) Inc. 211 S. 361."*

As alluded to earlier, the crux of the dispute between the parties both in the Juvenile Court and at this appellate stage is on **custody of the issues**. The learned Magistrate proceeded to determine the subject matter of the application, namely custody of the children. Although as narrated above, the respondent had since been married to another man, the learned magistrate should have determined the nature of the relationship that parties had been in throughout the time they were blessed with Junior and Joan. Obviously, their marriage was not solemnized but did it amount to presumed marriage? If the answer is in the affirmative could a decree of divorce be issued?

There is no doubt that in the light of the above omission, the District Court misdirected itself. The learned magistrate proceeded to stage two before checking the box for stage one. Although, admittedly, parties prefer to describe themselves as high school sweethearts whose relationship was never "grounded" in the way that a formal marriage or even a presumed

marriage would be viewed, I think the learned magistrate should have been a little bureaucratic for the sake of sanctity of marriage.

When a man and a woman, on their own accord, come together to form a family their decision must be jealously guarded. This is because a family is the most essential building block for communities and nations. It is also in the interest of children and their future that families are protected from meddlers and arbitrary decisions of their parents. Safety valves such as reconciliation boards have been put in place to ensure that, should parties choose to rethink their decision to part ways, a second chance is provided.

Without prejudice to the above, there is no doubt that the high school lovebirds are no longer in love. Consequently, there is absolutely nothing that courts of law can do to rekindle that heartwarming romance that once existed and bound the two souls together. In the case of **JOHN DAVID MAYENGO V. CATHERINA MALEMBEKA** (PC) CIVIL APPEAL NO. 32 OF 2003, this Court (Kaji J. as he then was) articulated this fact of life in the following paragraph full of wisdom:

> *"It is the parties themselves who are the best judges on what is going on in their joint lives. A crucial ingredient in marriage is love. Once love disappears, then the marriage is in trouble. There is no magic one can do to make the party who hates the other to love her or him."*

In the case of **TUMAINI M. SIMOGA VS LEONIA TUMAINI BALENGA** (Civil Appeal 117 of 2022) [2023] TZCA 249 (12 May 2023) the Court Appeal cited with approval the above High Court decision. Faced with a more or less similar situation in **MARCEL KICHUMISA VS MERY VENANT KABIRIGI**

(Civil Appeal 52 of 2020) [2023] TZCA 218 (4 May 2023) the Court of Appeal observed:

> *"We are of the view that justice demands that we should leave the matter as it is and not disturb what has already been done. If there are any loses suffered, they should lie where they have fallen."*

I think it is neither appropriate nor desirable to turn the clock back. In Kiswahili they say *maji yakimwagika hayazoleki.* It is difficult to picture the respondent, for example, who is remarried and even has a third issue with another man being summoned, to spend countless hours in court arguing for or against a decree of divorce. In all practical purposes, both the love and the marriage (if at all it was ever there) have disappeared to the oblivion. If, as a result of this unceremonious form of parting ways, there are any loses suffered, "**they should lie where they have fallen**" to borrow the phrase from the Apex Court of our land in **MARCEL KICHUMISA (supra)**

Coming back to the grounds of appeal, the complaint in the first ground is that the lower court did not take into consideration the appellant's ability to take care of the children. Unfortunately, the ability or inability to take care of the children, real or perceived, comes much later after consideration of the best interest of the child. The impugned decision of the Juvenile Court is in line with section 39(2), (a)(b)(c)(d)(e)(f) and (g) of **THE LAW OF THE CHILD ACT** [CAP. 13 R.E. 2019]. See the rare, intellectually rich, and **well-expressed** reasoning of this Court (**Mlacha J.)** on applicability of this Act in **SAJJAD IBRAHIM DHARAMSI AND ANOTHER VS SHABBIR GULAMABBAS NATHAN** (Civil Appeal No. 42 of 2020) [2020] TZHC 3703 (30 October 2020).

Both the appellant and the respondent boasted of their ability to take care of Junior and Joan. The Juvenile Court exercised its discretion to accept the respondent's version of the story. It considered many factors including the motherly warmth that young children require during their formative years. The appellant's assertion that boarding schools would have come to his aid does not add up. To this end, I see no merit to the first ground.

On the second ground that the appellant is of a different religious belief, I am unconvinced. As the respondent had clearly stated, any faith that leads to a fear of God is important to the children. No particular faith or religious environment holds the winning card for the best interest of the child. The woman that the appellant chose to be his wife was born and raised and indeed remains a staunch adherent to the faith he is suspicious about. I see no logic at all to this ground and the same is dismissed for lack of merit.

The third complaint is simply distrust with the stepfather. It bears similarities with the second ground. I have given some thought to the ground in the wider context of posterity of Junior and Joan. I think it makes more sense to subscribe to the Juvenile Court's reasoning on this. Junior and Joan are in the good and caring hands of their mother. Those loving arms of their mother have obtained support from her "new" husband father to Samir her latest issue. It does not take much thought to realize that such a homely environment cannot be compared to that of the appellant who hasn't made up his mind yet to go walk down the aisle (once again?) to create a friendlier condition for Junior and Joan albeit under a stepmother. This ground of appeal is equally without merit.

All said and done, I dismiss the appeal in its entirety. The decision of the Juvenile Court of Mtwara at Mtwara is hereby upheld. I make no orders as to costs.

It is so ordered.

E. I. LALTAIKA
JUDGE
27.06.2023

Court

Judgement delivered by hand and the seal of this Court this 27th day of June 2023 in the presence of both the appellant and the respondent.

E. I. LALTAIKA
JUDGE
27.06.2023

Court

The right to appeal to the Court of Appeal of Tanzania fully explained.

E. I. LALTAIKA
JUDGE
27.06.2023