IN THE HIGH COURT OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

PC CIVIL APPEAL NO. 50 OF 2022

(Arising from Matrimonial Appeal No. 10 of 2021 of Temeke District Court at One Stop Judicial Centre Originating from Matrimonial Cause No.15 of 2021 of Ilala Primary Court)

TUMAINI OMBENI MNZAVA .....APPELANT

VERSUS

AGNES LEDMAN NGOYE.....RESPONDENT

JUDGMENT

Date of last order: 22/09/2023
Date of Judgment: 09/10/2023

OMARI, J.:

This is a second appeal arising from the decision of the Temeke District Court at the One Stop Judicial Centre at Temeke in Matrimonial Appeal No. 10 of 2021 which originated from the decision of the Ilala Primary Court in Matrimonial Cause No. 15 of 2021. The background of this matter is that the Respondent petitioned for divorce at the Ilala Primary Court seeking for divorce, division of matrimonial assets and custody of the couple's two children. Having heard the parties, the trial court made an order that the marriage is irreparably broken down under section 107 (2) (c) of the Law of

Marriage Act, CAP 29 RE 2019 (the LMA). It also ordered the matrimonial properties to be divided amongst the parties; the house at Tabata Mawenzi to be divided at the ratio of 70% to the Appellant and 30% to the Respondent. For the rest of the properties the court ordered that the parties to each take the properties that are registered in their names that is, the plots. Regarding custody of the children, the younger child was placed in the care of his mother and the father was ordered to pay TZS 50,000 per month as maintenance. And, the older was child to remain in the care of his father, the Appellant.

The Appellant was aggrieved and instituted Matrimonial Appeal No. 10 of 2021 seeking for orders that the appeal be allowed, the decision of the primary court be set aside, the court to hold and give custody of the children to the Appellant and for this court to evaluate and issue properly the distribution of all the matrimonial properties as per the evidence on record. He sought for these orders on the basis of three grounds of appeal to wit:

1. That the trial court erred in law and in fact by giving custody of the child to the Respondent herein without considering the best interest of the child and the evidence in record adduced by the Appellant during the trial.

2. That the trial court, erred in law and fact by failing to evaluate them properly and properly distributing matrimonial properties which were recorded in the trial and awarded most of them to the Respondent without justifiable reasons and following the law.
3. That the trial court erred in law and in fact by issuing an order which is incompatible with a law.

The first appellate court was of the view that the above grounds of appeal had no merit, ordered both children to be in the custody of the Respondent, access for the Appellant and that he is responsible for their maintenance under section 129 of the LMA that is to pay TZS 70,000 for the childrens' upkeep until they reach the age of majority and the Respondent is also responsible for the educational and healthcare needs. Still aggrieved, the Appellant came to this court preferring a second appeal on five grounds as follows:

1. That the District Court, erred in law and fact they giving custody of the children to the Respondent herein without considering the best interest of the child and the evidence in record adduced by the Appellant during the trial.
2. That the learned principal resident magistrate erred in law and fact by not properly evaluating the weight of the fact that the Respondent

abandoned the children while they were younger and went to be married to another man when the trial was proceeding.

3. That the magistrate erred in law and in fact by holding that the Appellant is not the proper party to live with the children while it was vivid in the records that the mother abandoned them and they have been happily living with the appellant ever since.
4. That the district court erred in law and in fact by failing to evaluate and properly distribute the matrimonial properties which were recorded in the trial and to award them all to the respondent without justifiable reasons and following the law.
5. That the trial magistrate erred in law and in fact by not considering the high contribution of the Appellant to matrimonial properties and overlooking the fact that the Appellant was the only one working and with stable income to provide for the family while the respondent was a house mother.

It is on the basis of the above grounds that the Appellant is seeking the appeal to be allowed, this court to hold and give custody of the children to the Appellant and for this court to evaluate and issue properly distribution of all the matrimonial assets as per the evidence in records and any other relief that this court may deem fit to grant.

On the date set for hearing the Appellant had the services of Kabura Elinihaki while the Respondent had the services of Victoria Mgonja both learned advocates.

When he took the floor the Appellant's counsel informed the court that in arguing the five grounds of appeal he would combine the first, second and third grounds of appeal to argue them collectively and combine the fourth and fifth grounds of appeal which he would also argue collectively, basically making the grounds of appeal only two.

Submitting on the first ground, the Appellant's counsel argued that the first set of grounds is primarily on the issue of custody of the children. He went on to say that it is on record that the parties were blessed with two children the older child being 12 years old currently but he was 11 during the trial. The younger child is now eight years old but was seven during trial and both of them are in school.

Counsel stated that both children are currently living with their father and the records indicate that they were living with him even before the trial for three years after the mother had left the matrimonial home. He stated further that the record also depicts that the Appellant has been the one providing for the children's needs including shelter, food, clothing, education, healthcare. Additionally, counsel averred that the younger child is a special

needs child and needs special care due to a hearing impairment. The hearing impairment according to counsel, has necessitated for frequent medical checkups which the Appellant has been organizing and fending for. Counsel argued that it is from those facts that they seek to challenge the decision of the trial court and of the district court of giving full custody of the children to the Respondent while Respondent has clearly shown she is not fit to maintain the children.

The Appellant's counsel argued that it was argued during the trial and this can be seen at page 2 and 3 of the trial court's judgment and has been raised as a ground of this appeal that the Respondent has on numerous accounts abandoned the children and left home to unknown places for a long time. Counsel stated that even during trial the Respondent's address of residence was unknown and therefore was not proper for the court to award her custody of the children. He further stated that doing so offends section 4 of the Law of the Child Act, CAP 13 RE 2019 (the LCA) which insists on the best interest of the child and as can clearly be seen that decision of the district court was not in the best interest of the child.

The Appellant's counsel continued to argue that the said decision is premised on section 125(2) to the LMA as can be seen at page 5 of the judgment. He went on to say it is his humble submission that the provision

has not been adhered to because, in looking at the conditions the wishes of the parents will be irrelevant since the parents are in conflict, the wishes of the children were not considered although the children are at an age where they can express themselves but their opinions were not sought.

The advocate then went on to talk about the customs of the community and stated that since the Respondent is married to another man then it would be not accordance to the customs of the parties for the other man to care for children that are not his regardless it is also and disputed that the Respondent is unemployed therefore dependent on her new husband. This according to counsel defeats the best interest of the children. Furthermore, the trial court did not disclose where the Respondent resides and just granted custody without considering the other factors. He went on to add that they have found out that the Respondent resides in Chanika which is quite far from the boy's schools and especially the younger boy who attends a special school in Buguruni due to his hearing impairment and this school is nearer his father's residence in Tabata Mawezi.

Counsel prayed for this court to bear in mind the fact that the older child is in standard six with only one year left for his primary education due to sit for a national examination in the coming year and transferring schools will affect his academic performance and the trial court did not consider all of

these facts while granting custody just as it did not consider the issue of the Respondent abandoning the children.

Counsel went on to dispel the allegations that in the Appellant's home there is no female figure and therefore the children are likely to suffer abuse; this according to him is a result of the Social Welfare Officer visiting the parent's home when the children were in school and speaking to the Appellant via phone and therefore the fact that the Appellant's mother who is now retired is living with the Appellant was not disclosed in the Social Inquiry Report despite being addressed to the Social Welfare Officer. Moreover, counsel argues that the said Social Inquiry Report does not disclose the considerations that the Social Welfare Officer made in suggesting and considering that the Respondents residence was the proper one for the children. He argued further that children can face abuse anywhere so the only thing needed is for communication and care and this is what the parent has been providing for the past five years.

Counsel finished his submission on this set of grounds by stating that in his opinion the court was misguided when granting custody of the children to the Respondent therefore both the court and the Social Inquiry Report falls short of the requirement of the law to protect the best interest of the child.

On the second set of grounds which comprises of the fourth and fifth grounds of appeal which are centered on the distribution of the properties counsel for the Appellant started by arguing that the record indicates that during the union the parties were able to obtain assets and liabilities however it is noted that the Respondent was unemployed while the Appellant was working. He argued that the assets are three landed properties and a liability of TZS 19,000,000. However, counsel argued that the trial court also included a house owned by the Appellant and called for it to be divided while it was addressed that the same was obtained before marriage. He stated that in the judgment the same house is identified as being obtained before marriage yet the court did not explain how the same should be subject to distribution of matrimonial property nor did the Respondent explain her contribution anywhere. In his view the court should have only addressed itself on the remaining assets which were obtained during the marriage and were in the name of the Respondent. He went on to argue that since the Respondent was unemployed her income was limited but the court invoked blindly the provisions of section 56 and 58 of the LMA to the effect that since the properties were registered in the Respondents name thus they shall remain to be hers.

Counsel argued further that this is the wrong interpretation of the law as provided in the case of **Hammid Amir Hamid v. Maimuna Amir** 1977 LRT 55 where it was observed that where dissolution is ordered the question of distribution of matrimonial assets should not be settled until the question of the extent of contribution to the acquisition for each of the spouses is established. He argued that since the parties had contracted a Christian marriage where it is believed that marriage is considered a divine covenant founded on love, affection and trust between the spouses expected to last for their lifetime. However, couples go through rough patches which if left unattended lead to divorce, this, according to counsel, is the sanctity of marriage, the reality of which is that in good times parties contract transact based on trust and love and sometimes they do not even keep documentation.

Therefore, according to the Appellant's counsel the Appellant should not be blamed for not appearing in the documents of the said properties what should be considered is that he was the sole income earner that's the sole contributor to development of the family. According to counsel this causes the answer to the question as to what was his contribution to be in the affirmative, yet the same cannot be said for the Respondent whose only contribution is participating in the sale and her name being on the document

with no monetary contribution that can be proven still the court awarded her listed plots of land not being mindful they were acquired by joint efforts.

Counsel beseeched this court to apply section 114 of the LMA and properly distribute the matrimonial properties then went on to submit on the liability which is TZS 19,000,000 which was used to treat the younger child when he was an infant the Appellant had taken a loan which during trial he stated he was still paying; yet nothing was said in the trial court's judgment. It is on this basis that counsel requested this court to investigate, reevaluate and reanalyze these facts since the trial court failed to do so. He then ended his submissions by repeating the prayers in the memorandum of appeal.

When it was her turn, Ms. Mgonja, counsel for the Respondent went straight on and said it is not true that the first appellate court did not consider the best interest of the child pointing at page 4 of the judgment stating that the court ordered a Social Inquiry Report to ascertain the children's welfare and the report proposed that the children stay with their mother as per section 45 of the LCA. Counsel went on to state that the allegations as to the Respondent abandoning the children are untrue as it was stated in the trial court that the Respondent was facing abuse from the Appellant and this is reflected in the proceedings and this is what made her leave so she did not go away for leisure she was running away from abuse. He added that there

misguided and therefore led the court to reach a wrong decision. He went on to explain that the report is not binding and the trial magistrate has discretion to vacate it rather than being misguided.

As regards to the allegations of abuse that the Respondent was suffering from the Appellant the counsel argued that there is a principle that the second appellate court should not go into issues of the first court as those were the business of the first appellate court therefore making averments of such kind is against the law and procedure. He went on to state that the issue of violence was never on record in the first appellate court however, the issue that the mother abandoned the children was raised as a ground and submitted on. He went on to state that while it was true that couples do quarrel and have arguments in this particular case there was no physical violence and this was stated in the submission of the Appellant in the district court however it was not taken on board for the judgment. In addition, he submitted that that Respondent's counsel accused him of stating that the Respondent was not a good mother what he did say is that she is unfit to be granted with custody as it would be challenging for her to care for them.

On the issue of the debt counsel submitted that section 114(2) (c) of the LMA is relevant and the said debt is in the submission of the Appellant in the

first appellate court and the same is also in the judgment. He then went on to state the prayers that the memorandum of appeal be granted.

Having considered the parties submissions and the lower courts' records there is only one issue for me to determine in this appeal, that is if the appeal is meritorious. In doing so I shall go through the grounds of appeal as presented and argued by both counsels as well as the lower courts' decisions and record. I am alive to the principle that the first appellate court is obliged to re-evaluate the evidence adduced in the trial court and this has been the subject of many decisions. See for instance; **Rashid Abiki Nguwa v. Ramadhan Hassan Kuteya and Another,** Civil Appeal No. 421 of 2021.

I have gone through the record and judgment of the first appellate court and hold the view that its judgment is reached after proper evaluation of the evidence adduced in the trial court. I am also alive to the fact that this being a second appellate court is not expected to disturb the lower courts' concurrent findings unless there is a misapplication of the law or misdirection of the evidence as was held in **DPP v. Jafari Mfaume** [1981] TLR 149. See also **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v. A.H Jariwalla t/a Zanzibar Hotel** [1980] T.L.R 31.

This appeal hinges on two questions that of the custody of the couples two children and the distribution of matrimonial assets.

Commencing with the later question, the trial ordered the house at Tabata Mawenzi to be divided the ratio of 70% to the Appellant and 30% to the, Respondent the rest of the properties which are the plots the court ordered that the parties to each take the properties that are registered in their names. The first appellate court found the ground related to the division of matrimonial assets unmeritorious.

The Appellant is contending that the Respondent being unemployed had no income to purchase the said properties, it was his money that purchased the said properties albeit being registered in the Respondents name, which is what lead the trial court to conclude that each party to remain with the properties in their name. The Respondent through her counsel without much ado submitted that it was stated in trial court that she had connected electricity into the house which is the house and this was not disputed by the Appellant and trial court's judgment explained the rationale for the division it ordered. The Respondent through counsel also argued that the Appellant did not adduce any evidence that the said plots were matrimonial

properties and asserted that she had a right to own property as per section 56 of the LMA.

This essentially means the trial court agreed with the Respondent and did not consider the said properties as matrimonial properties that is why it did not order their division.

Matrimonial property or matrimonial assets as a concept is not defined under the LMA but through case law including that of **Habiba Ahmad Nangulukuta and 2 Others v. Hassan Ausi Mchopa and Another,** Civil Appeal No. 10 of 2022, CAT (unreported) and that of **Bi Hawa Mohammed v. Ally Sefu** [1983] T.L.R 32. In the case of **Yesse Mrisho v. Sania Abdul**, Civil Appeal No. 147 of 2016 (unreported) in describing what matrimonial properties are, it was stated that:

> *'Matrimonial properties are also those which may have been owned by one party but improved by the other party during the marriage on joint efforts.'*

Moreover, in the case of **Gabriel Nimrod Kurwijila v. Theresia Hassani Malongo**, Civil Appeal No. 102 of 2018 (unreported) on matrimonial property the Court of Appeal had this to say:

> *'On the other hand, the phrase matrimonial property has a similar meaning to what is referred as matrimonial*

asset and it includes a matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage.'

This means matrimonial properties are properties jointly owned by the parties and acquired by them during the subsistence of the marriage. That said, the LMA vests courts with the powers to order division of the properties jointly acquired when issuing a decree of divorce or separation, section 114 (1) of the LMA provides:

'...the Court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, ***to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or*** *to order the sale of any such asset and the division between the parties of the proceeds of sale.'* (emphasis supplied)

From the record the properties subject of this appeal are in the name of the Respondent. It is the Appellant's argument that the Respondent was unemployed her income was limited but the court invoked blindly the provisions of section 56 and 58 of the LMA to the effect that since the properties were registered in the Respondents name thus, they shall remain to be hers. For avoidance of doubt section 56 of the LMA provides:

A married woman shall have the same right as has a man to acquire, hold and dispose of property, whether movable or immovable, and the same right to contract, the same right to sue and the same liability to be sued in contract or in tort or otherwise.

Section 58 of the LMA also provides as follows:

Subject to the provisions of section 59 and to any agreement to the contrary that the parties may make, a marriage shall not operate to change the ownership of any property to which either the husband or the wife may be entitled or to prevent either the husband or the wife from acquiring, holding and disposing of any property.

From the Appellant counsel's submission one could discern that the Appellant is aware that the said properties are in the Respondent's name, thus, his argument that in spite of that fact the trial court should have considered his contribution for he was the sole breadwinner and the said assets were registered in the Respondent's name for he is the one who bought the same during the time when they were in good terms and there was bliss in their marriage thus the registration in the Respondent's name.

The Appellant did not adduce any form of evidence to the effect that the said properties albeit being in the name of the Respondent were supposed

to be jointly owned or anything of the sort. As much as the Appellant is complaining that the trial court blindly applied the provisions of section 56 and 58 of the LMA to conclude that the disputed properties belong to the Respondent he has failed to consider that section 114(1) of the LMA only gives the court power to divide properties that are matrimonial properties and not otherwise.

From section 114 of the LMA and the case of **Pulcheria Pundungu v. Samwel Huma Pundungu** [1985] T.L.R 11 and that of **Samwel Moyo v. Mary Cassian Kayombo** (1999) T.L.R 197, in exercising the powers conferred under section 114 of the LMA a court has to ensure that when dividing property; that the assets set for distribution must be matrimonial assets, they must have been acquired by the parties during the subsistence of the marriage and they must have been acquired by the joint efforts of the parties. The court may also consider property that belongs to either spouse and has been substantially improved by the other see this court's decision **Anna Kanugha v. Andrea Kanugha**, 1996 TLR 195 HC and the Court of Appeal of Tanzania in **Hidaya Ally v. Amiri Mlungu,**Civil Appeal No. 105 of 2008(unreported).

Guided by the said conditions this court has to interrogate whether the properties in dispute are indeed matrimonial property and whether the Appellant has any claim to the same. There is nowhere in the record where the Appellant adduced evidence that the properties are matrimonial properties other the averments he paid for them.

Before penning off I would also like to comment on the TZS 19,000,000 that the Appellant is contending the trial court should have considered as a liability of the couple. The Appellant stated that this is a loan he took out for their son's treatment. The Respondent averred that there was no where on record that the Appellant spoke of the debt during trial. As a second appellate court is not mandated to deal with issues not canvassed in the first appeal then this is not a matter I can entertain. See the case of **Kassim Salum Mnyukwa v. The Republic** Criminal Appeal No. 405 of 2019 and that of **Godfrey Wilson v. The Republic** Criminal Appeal No. 168 of 2019 as quoted from **Hassan Bundala @Swaga v. R.,** Criminal Appeal No. 386 of 2015 where the court was of the view that a matter that was not at issue at the trial cannot be brought up at the appeal stage, see also **Richard Majenga vs Specioza Sylivester**, Civil Appeal No. 208 of 2018 where the Court of Appeal held:

'It is a settled principle of the law that at an appellate level the court only deals with matters that have been decided upon by the lower court.'

In this case at the trial court, the Appellant did not mention anything regarding the alleged TZS 19,000,000 debt. Having discussed the above, it is my considered view that nothing suggests that the Appellant has any claim over the properties nor is there any evidence of a TZS 19,000,000 loan. Thus, I find this ground as unmeritorious and dismiss the same.

On the second question as to the custody of the two children. The trial court ordered the older child to remain with the Appellant and the younger one was placed with the Respondent. The first Appellate court after re-evaluating the evidence ordered that both children be placed with the Respondent. Currently both children are with the Appellant as he has not allowed the Respondent to have the children. The Appellant's argument is that the Respondent once abandoned the children and he has lived with them since then. He also argued that the Respondent has since remarried and it would not be proper for the children to live with a stepfather which according to him would be against the traditions and customs. Furthermore, he contended that the Respondent lives in Chanika which is far from the school of younger child who attends a school for children with special needs and that of the

older child who is in his last stages of primary school education. The Respondent's contention is that what the Appellant is averring is untrue since she left the matrimonial home due to abuse from the Appellant and argued that she is a good mother and it was in the best interests of the children to be with her as ordered.

Before determining custody, I believe it is worthwhile to comment on two things as follows.

The first is the fact that what is to be considered in the determination of custody is the best interest of each child, in this particular case the younger child having a hearing impairment presents added vulnerability for the said child; thus, their best interests go beyond that of any other child but this court has to be mindful that this is a differently able child with multiple vulnerabilities see section 8(6) of the LCA.

The second is the fact that Respondent married and living with another man. I find it important to put it to pen that while granting an order as to custody a court is required to have regard to section 125 (2) (a) (b) and (c) as well as consider the rights of the child as enumerated in section 26 of the LCA, none of those provisions stipulate that where a mother is married to or living with a man who is not the children's father she cannot be awarded

custody as the Appellant seems to suggest. The determination should be on the basis of what is in the best interests of the child and not otherwise.

Section 26 (1) of the LCA provides for rights to the child (a child's rights) where parents separate or divorce. For avoidance of doubt, I reproduce the section here under:

> *'Subject to the provisions of the Law of Marriage Act, where parents of a child are separated or divorced, a child shall have a right to— (a) maintenance and education of the quality he enjoyed immediately before his parents were separated or divorced; (b)* ***live with the parent who, in the opinion of the court, is capable of raising and maintaining the child in the best interest of the child;*** *and (c) visit and stay with other parents whenever he desires unless such arrangement interferes with his schools and training program.'* (Emphasis supplied)

A court is not only empowered to grant custody to a party or in exceptional circumstances a third person, it also has to bear in mind that the child has the right to live with the parent (person) who in the opinion of the said court is capable of raising and maintaining the child in a manner that supports the best interests of the said child. The above section should be read together with section 125 (1) of the LMA which in part states:

> *'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—....'* (Emphasis supplied)

The Appellant's counsel intimated other factors that the court should look at when determining custody including the wishes and traditions of the parties. This is provided for in section 125 (2) of the LMA which states as follows:

> *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.*

From the above provision it can be seen the there are other considerations that a court can have regard to, however the paramount consideration is still the welfare of the child, which is to be read as the best interests of the child when all things are considered. Clearly, what a court should aim at is a placement that is in the best interests of the child. Such mandatory requirement in determining all issues involving children as provided for under section 4(2) of the LCA, the section reads:

> *'The **best interests of a child shall be a primary consideration in all actions concerning children** whether undertaken by public or private social welfare institutions, courts or administrative bodies.'* (Emphasis supplied)

A court, before it can pronounce which of the two parents (or even a third party) is to be granted with custody of a particular child it has to make an assessment to determine the best interests of each child in the specific situation. This assessment, therefore, can be made by bringing in the Social Welfare Officer and ordering a Social Inquiry Report to assist with the assessment and ensuing determination. This is clearly stipulated under section 136 (1) of the LMA. The said section states:

> *'When considering any question relating to the custody or maintenance of any child, the court shall, whenever it is practicable, take the advice of some person, whether or not a public officer, who is trained or experienced in child welfare but shall not be bound to follow such advice.'*

Although the learned magistrate in the trial court choose not to order a Social Inquiry Report/Investigation nor speak to the two children to hear them out, the first appellate court ordered the conduct of a social inquiry by a Social Welfare Officer. Upon going through the said report in file this court was of

the opinion that the same was inadequate for it did not consider the younger child's disability and or were the children involved. And, in the circumstances, since time had already passed and circumstances could have changed this court therefore ordered another Social Inquiry Report. The trial court ordered the younger child to remain with the Respondent and the older one with the Appellant. The first appellate court varied this and ordered both children to be placed with the Respondent. The Appellant not being satisfied with this has refused to surrender the children to the Respondent and according to the Social Inquiry Report has also refused her access for the past two years.

Before progressing, I find it prudent to state that I am aware and very mindful of the importance of continuity of care for children and more so a child with disability. However, the continuity of care principle is only relevant where there are no impeding circumstances and where it is in the best interests of the child, see **Renson Elisonguo Mrema v. Shiloo Paul Msuya**, PC Civil Appeal No. 59 of 2022 [2023] TZHC 59.

The Appellant though subtly, was contending that he has been the one caring for the children and he is the one fending for the medical treatment of the younger child, the older child is also in school and according to him it

would be undesirable for him to move schools. He augmented this argument by insisting that the Respondent lives far from both of the children's schools. Section 125 (3) of the LMA which is worded in the same manner as section 26 (2) of the LCA, calls for courts to have regard to the undesirability of disturbing the life of the child by changes of custody, however the said section is worded in the context of children who are below the age of 7 years.

The first appellate court in addition to considering that there was no evidence adduced in the trial court that it is not in the best interests of the children to live with the Respondent, therefore awarding custody of both children to the Respondent went on to vary the order for maintenance of the children.

In the present appeal, as already pointed out elsewhere in this judgment the both children reside with the Appellant albeit the Respondent being given custody of the children.

Based on the Appellant's contention he has been living with the two children since their mother, the Respondent left the matrimonial home. The Respondent's submission is that she is better placed to take care of the children for she is their mother and because she is at home and she can care for the younger child who has a hearing impairment.

The Respondent also contended that since there was no female person in the Appellant's home which makes the children prone to abuse as they are being cared by a male domestic helper, a house boy who lives with the Appellant and is the one who is home with the children as the Appellant goes to work for most of the day.

The Appellant disputed this stating that children can get abused even in households where there are females and added that his mother who is retired lives with him so he is still better suited to have custody of the children as the Respondent is dependent on her husband. Based on the record of the trial court and on the Social Inquiry Report the Appellant lives with a male domestic helper or a house boy who according to the Social Inquiry Report was observed to likely suffer from cognitive problems. Upon being interviewed by the Social Welfare Officer both children opted to live with the Respondent however both children wanted to be able to see the Appellant.

Having discussed as above I find that the second ground of appeal is with no merit and dismiss it. For clarity, both children are to remain in the custody of the Respondent who I order to be under the supervision of a Social Welfare Officer responsible for the Kinyerezi Ward for a period of 12 months.

The Appellant shall be allowed access in the following terms; the first two weeks of long school holidays, first half of short school holidays and the first and third weekend of every month. The other orders of the first appellate court remain undisturbed.

Consequently, the grounds of appeal are all unmeritorious and the prayers by the Appellant cumulatively untenable. The Appeal is dismissed. This being a matrimonial matter no order as to costs.

A.A. OMARI

JUDGE

09/10/2023

Judgment delivered and dated 09th day of October, 2023.

A.A. OMARI

JUDGE

09/10/2023