IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(KIGOMA SUB-REGISTRY)
AT KIGOMA

JUVENILE APPEAL NO. 1 OF 2023

JUMA ATHUMANI ..... APPELLANT

VERSUS

PILI HARUNA ..... RESPONDENT

(Appeal from the Ruling and drawn order of the Juvenile Court of Kigoma at Kigoma)
(E. B. Mushi, SRM)
Dated 3rd day of April 2023
In
(Civil Application No. 5 of 2023)

JUDGMENT

Date: 25/04 & 24/05/2024

NKWABI, J.:

This appeal should refresh anyone's memory on a number of aphorisms. The first being, *"It takes a village to raise a child."* Feasibly, that is why parties to this appeal are before this Court. Another aphorism that is relevant between the parties to this suit is, "*Faults are thick where love is thin."* It appears that parties to this appeal their love is thin, that is why each one criticizes the other. All they ought to have always kept in their mind, withal, is the saying that goes, *"Coffee and love teste best when hot."*

The marriage between the appellant and the respondent as could be derived from the claim for matrimonial house as the respondent stated in her testimony that, *"... I also claim for the title deed of the house located*

at Mlole as it's a matrimonial property and he used to say that he wants to sell it." What caused their marriage to turn sour is not very clear. The respondent filed the matter in the trial court claiming for maintenance at T.shs 200,000/= per month for Sada Juma (PW.2), their child, who was born in 2006. She said he had stopped maintaining her since October 2022. She also claimed for the arrears. She further stated that the appellant's salary is at T.shs 2,000,000/= per month at TANESCO. PW.2 Sada added that the appellant does not maintain her and that he maintains her with difficult. The trial court ordered the appellant to maintain PW.2 at T.shs 150,000/= per month.

What may have triggered the appellant to bring this appeal could be two decisions of this Court, the first is **Saidi v. Msamila** [1970] H.C.D. No. 228 (PC), in which Makame Ag. Judge, as he then was, held that:

> *"Respondent was responsible for the maintenance of the child. However, the figure the primary court magistrate fixed, Shs. 150/- per month was* ***arbitrary*** *in the absence of any knowledge of the respondent's salary."* [Emphasis mine].

The second one is **Abdallah Salimu v. Ramadhani Shemdoe**, [1967] H.C.D. No. 431 (PC), where, Saidi Judge, as he then was, stressed that:

"... If there is a dispute over the amount of such maintenance costs between the parties, evidence may be taken from independent and reliable village elders. Such evidence should be certified and sent to this Court to enable it to assess the proper sum to be refunded by the appellant as maintenance ..."

As it can be seen, aggrieved with the decision of the trial court, the appellant filed a memorandum of appeal which has three justifications of the appeal that I reproduce:

1. That the honourable court erred in law and in facts by deciding that the appellant should maintain the parties' child one Sada Juma at one hundred and fifty thousand shillings (Tzs. 150,000/=) per month without considering the evidence of both parties the evidence which proved that the appellant has five dependent children, three wives and his salary is subjected to statutory and loan deductions and that if he is to maintain all his dependents at Tzs. 150,000/= he cannot afford.
2. That, the honourable court erred in law and facts by not considering the evidence by DW.2 (biological child of the respondent) who proved before the Court to have been maintaining the respondent, the child and other parties' children with the age of majority and

that all of the dependents are living in the appellant's house and the child has got health insurance cover issued by the appellant vide his employment/salary.

3. That, the honourable court erred in law and facts for its misdirection in scrutinizing the evidence on records where the respondent herself claimed for the maintenance alleging that the appellant has not maintained the child for about four months something which proves the evidence that the appellant was maintaining the respondent and the child at Tzs. 150,000/= monthly even though the PW.2 aged 17 years claimed not to have been maintained by the appellant since birth.

The appeal was argued by way of oral submissions. The appellant had the services of Mr. Sadiki Aliki, learned counsel. The respondent appeared in person, unrepresented.

Mr. Aliki argue all the three grounds of appeal together. It was his firm contention that the Juvenile Court Kigoma ordered that the child be maintained at T.shs 150,000/= per month. That amount is exorbitant and did not well consider the earning of the appellant who is an employee of TANESCO, beefed up Mr. Aliki. He took a stand point that the trial court did not consider that the appellant has other dependents who are five

children and three wives and the salary is being deducted on loan instalments.

Mr. Aliki pointed out that, at the 5th page of the judgment on the last paragraph, the basis for the amount of maintenance was prior maintenance at that amount, but to him still that amount is exorbitant.

It was also added by Mr. Aliki that the social welfare officer did not consider that the applicant has retired since 01/01/ 2024. Further respondent has been paying for education for Sada Juma and Medical insurance. He prayed the court to revise the amount from T.shs 150,000/= to 50,000/= per month. Mr. Aliki also prayed for any other relief as the Court would deem just.

In rebuttal explanation, the respondent pointed out that she is very considerate to the appellant. She recounted that she has been in consultation with the appellant. She added that, had the appellant been paying for the maintenance of the child, she would have not been complaining. Be that as it may be, Mr. Aliki had nothing in replication.

Before all else, I should speak the unmistakable, this Court, being a first appellate court, is mandated to re-evaluate (closely examine) the evidence that is in the record and make its own finding. I find solace on

that position of the law in **Selle & Another v. Associated Motor Boat Company Ltd & Others** [1968] 1 E.A. where it was stated that:

> *"... An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions ..."*

I will start with the analysis of the evidence done by the trial magistrate at page 5 of the ruling where she stated that:

> *"... and the social welfare officer recommended such amount as reasonable one, this court is here by partly allow the application and order ..."*

I have perused the proceedings of the trial court, there is nowhere the social welfare officer gave testimony in court. What appears to have been relied on by the trial court to have a stance like the above is the Social Welfare Officer's report which is in the case file. But that report was not tendered and admitted in evidence. The proceeding is silent as to when that report entered the court file. The social welfare officer did not testify, thus, it was wrong for the trial court to rely on the report when it was making its findings because the report was not part of the evidence. I place my reliance on **Shemsa Khalfa & Others v. Suleiman Hamed**

Abdalla, Civil Appeal No. 82 of 2012, CAT, (unreported) where it was held that:

> *"At this juncture, we think our main task is to examine whether it was proper for the trial court and other subsequent courts in appeals to rely upon, in their judgments, the said document which was not tendered and admitted in court. We are of the considered opinion that, it was improper and substantial error for the High Court and all other courts below in the case to have relied on a document which was neither tendered nor admitted in court as exhibit. We hold this to be a grave miscarriage of justice."*

I expunge the report from the record. At this point in time, I consider the available evidence to determine whether the evidence supports the decision of the trial court.

In his submissions, Mr. Aliki suggested that the decision of the trial court was not supported by the evidence. The respondent, on her side, in reply submission, stated that she is very considerate to the appellant. I am not moved by her words, though they appear attractive. As a saying goes, *"Don't think there are no crocodiles because the water is calm."* The

respondent is proved false by the testimony of DW.2 Haruna, her son who was recorded to have testified as follows:

> *"It is after my relatives and my mother invade you and defence you by saying*
>
> *'Wewe sio Baba yangu Duniani na ahera.'*
>
> *'Wewe ni Mwanaume Suruali.'*
>
> *'Wewe ni mwanaume mwenye kuingiliwa nyuma (msenge)."*

The above statements cannot be taken as being considerate. In the situation, what ought to have been done by the trial court? That was stated in the case of **Salimu** (supra) to get evidence from independent persons such as employer of the appellant, including documentary exhibit (salary slip) or the like. My stance, I hope, is supported by **Edward Petro v. Republic** [1967] H.C.D. No. 296 where it was held that:

> *"S. 61 of the Tanzania Evidence Act 1967 provides that all facts except the contents of documents may be proved by oral evidence. ..."*

See also **Zuberi Augustino Mugabe v. Anicet Mugabe** [1992] T.L.R. 137 CAT and **Alfred Fundi v. Geled Mango & Two Others** [2019] T.L.R. 42 where, in the latter case, it was stated that:

"In the instant case, the Appellant had not produced any documentary evidence to substantiate and justify the claim. As such therefore, there was no verifiable evidence to prove that the appellant incurred costs. There should have been proof that he actually sustained those injuries following the said accident and consequently he incurred specified costs and medical expenses for his injuries and such costs and medical expenses should have been supported by respective medical receipts. These supporting documents were not produced before the trial court."

DW.1 had said that when some money is given to the respondent for maintenance of the family, the respondent uses it to VIKOBA. That piece of testimony appears to be supported by the testimony of DW.2. Haruna, who defended his father and said that the appellant used to maintain the family of the respondent but on 28th November 2022 the respondent refused to receive the money because it was given to her son instead of herself.

The above being the position of this case, I have considerably explored what relief I should avail to the parties to this appeal. Lucky enough, Mr.

Aliki prayed for any other relief as the Court would deem just, that was the stand point of the respondent, too, in her reply to the petition of appeal apart from asking this Court to dismiss the appeal and uphold the decision of the trial court. I should confess that I was at cross-roads, but the case that came to my assistance in time of need is **Joseph Kimera v. Idd Hemedi** [1968] H.C.D. No. 355, in which Seaton Judge, as he then was, held that:

> *"The failure to frame the issues at the outset was not in itself fatal. However, the combination of the various procedural irregularities amounts to a mis-trial and a failure of justice. Case remanded for retrial."*

I hastily follow that example and decide that this was a mistrial owing to considering as evidence a document which was not part of the evidence, how it entered into the court record, and the failure to demand relevant piece of evidence (salary slip) be tendered or brought in evidence.

For the above reasons, I partly allow the appeal as it is merited. The amount of maintenance determined by the trial court is arbitrary. I quash the proceedings and ruling of the trial court. Further, I set side its orders. I order that the case file be remitted to the trial court for retrial before

another magistrate of competent jurisdiction. As the case involves family members, I make no orders as to costs.

It is so ordered.

DATED at **KIGOMA** this 24th day of May, 2024

J. F. NKWABI

JUDGE