IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(SUB - REGISTRY OF SHINYANGA)
AT SHINYANGA

MATRIMONIAL APPEAL NO. 67 OF 2023

(Arising from Civil case No.65 of 2022 Kahama District Court, Originating from Matrimonial Cause No. 20 of 2022 of Kahama Urban Primary Court)

JOVIN JUSTUS MUTA.....APPELLANT

VERSUS

BEATRICE FEDRICK SAANANE.....RESPONDENT

JUDGMENT

20th May & 21st June, 2024

Massam J:.

This appeal originates from Matrimonial Appeal No. 65 of 2022 at the District Court of Kahama where the Respondent Beatrice Saanane had appealed against the decision of the Primary Court of Kahama Urban in Matrimonial Cause No. 20/2022, Aggrieved, the appellant herein preferred an appeal to this court against the decision of the District Court.

At the Primary Court, the respondent herein had filed an action against the appellant herein seeking dissolution of marriage, custody of children, division of matrimonial assets. She alleged that her Christian marriage with the appellant started in the year 2008 and blessed with two children had gone sour and was no longer reparable. The Primary Court

decision culminated into a decree of divorce, custody of children in favour of the appellant herein and division of matrimonial assets.

With regards to the division of matrimonial assets, the trial court gave the appellant a house at Igomelo Kahama, on the other hand the respondent was given a house at Bugarama, and for the other properties the trial court held that the appellant had contributed more to the acquisition of the assets than the respondent and that the respondent could not prove the existence of other properties she claimed to be acquired during the existence of their marriage.

As for the custody of children the trial court ordered the custody of children to the appellant herein.

Dissatisfied with the relief granted, the respondent appealed to the District Court which maintained that in regard to the matrimonial properties the appellant (herein the respondent) failed to prove the existence of the said matrimonial properties and proof of the joint ownership, further to this the appellate court granted the respondent custody of his two kids which resulted to this appeal.

In Matrimonial Appeal No. 65 of 2022 the appellant herein faulted the decision of the District Court on three grounds which I take the liberty to reproduce as follows:

1. *That the learned 1st appellate magistrate erred in law and in fact in ordering custody of the infant child Levin Jovin Muta to respondent only because of his age without considering other factors.*
2. *That the learned 1st appellate magistrate erred in law and in fact in ordering/granting the car known as RAV 4 to be given to the respondent while the said car was not properly described.*
3. *That the learned 1st appellate magistrate erred in law and in fact in taking and considering the car make RAV 4 as matrimonial property contrary to the evidence on record.*

During the hearing of this appeal the appellant herein was represented by Mr. Bakari Chubwa learned counsel, whereas the respondent enjoyed the services of Mr. Shaban Mvungi learned counsel and they both agreed to be heard by way of written submission.

In support of the appeal the appellant withdrew the 3rd ground of appeal and in regards to the 1st ground he submitted that the respondent failed to prove her known income for the wellbeing of the child, and that she moved to the streets renting a room for residential purpose where cannot be said to be safe for the welfare of the child. He referred this court the case of **Daniel Hamilton Mwakio Vs. Pelagio Masu Kijuu**,

Civil Appeal No. 88 of 2021, HC (Dar) at page 8 and 9. He further submitted that the factors provided in the mentioned case were no considered by the court below, and that the first appellate magistrate did not consider that the child was turning seven in February 2023 hence his age was apparent. He argued this court to step into the shoes of the courts below and make its decision.

In respect to the 2nd ground he submitted that, the first appellate court was in default to make division of the said motor vehicle known RAV4 without any description offered to it, he added that in her testimony the respondent testified to have left behind her car make RAV 4 DRF without any further description hence no executable decree can be issued to effect the same, he contended that the first appellate court misconceived the evidence of the appellant at page 23 of the typed proceedings to have recognized the car but he merely said that he purchased the respondent a car mark RAV 4 without any description.

He therefore prayed this court to dismiss the appeal and quash the decision of the fist appellate court.

On response to the appellant's submission the respondent submitted that on the first ground that the child has the right to reside with the parent whom the court deems capable of providing the best

upbringing and support in the child's interest. He cited Section 26 (2) of the Law of the Child Act, [Cap 13 R.E 2019] which establishes a rebuttable presumption that, for children below the age of seven years, it is in their best interest to be with their mother.

He argued that the first appellate court was correct to grant the respondent custody of the child in question, he went further that the cited the case by the appellant of **Daniel Hamilton Mwaiko vs Pelagio Masu Kijuu,** [2021] TZHC TanzilII, cannot be applied in this circumstance since the child in the mentioned case was above the age of seven and that in this case there was no social inquiry report to which the two court would have considered in reaching their decision.

In regard to the second ground in relation to the description of the car Mark RAV 4, the learned counsel submitted that this issue was not discussed during the trial and therefore this is a new fact hence not allowed on appeal stage. He cited the case of **National Bank of Commence Limited Vs Lake Oil Limited,** [2016] TZHCComD 26 TanzLII, at page 11 where it was held; *"An issue not raised at the trial will not be entertained on appeal……"*

Submitting on the last ground, he recounted that the appellant's counsel did not submit on this ground but he proceeded to respond the

same with reference to the case of **Asile Ally Said Vs Irene Redentha Emmanuel Soka,** [2022] TZCA 523 TanzLII at page 7 gave the position that,

> *"It is now settled law that, a property acquired by a husband or wife during the subsistence of their marriage, is a matrimonial property. Irrespective of the fact that where purchased, the purchase money is provided by one spouse, that property is taken to have been acquired through their joint efforts"*

He therefore added that the first appellate court was correct in regard to the said motor vehicle which the appellant herein also admitted at page 23 of the typed Kahama Urban Primary Court's proceeding to have bought the same to the respondent herein.

In conclusion, Mr. Mvungi prayed for the appeal to be dismissed for want of merit.

In his rejoinder, the appellant reiterated his submission in chief in respect to the fist ground and insisted that the third ground is abandoned and therefore the respondent was wrong to reply the same.

On the second ground, he replied that the respondent has not replied on merit and that the respondent mentioned the said car in the examination in chief and in cross examination without giving description of the said car RAV 4. He further replied that this issue was raised at the first appellate court level therefore this issue is not new as contended by the respondent.

Having heard the submissions by both learned advocates and after perusing the proceedings and judgment of the Lower Courts, now the point for determination is ***whether this appeal is competent.***

To begin with ground number **one** which avers that, the learned 1st appellate magistrate erred in law and in fact in ordering custody of the infant child Levin Jovin Muta to respondent only because of his age without considering other factors.

The authority is vital as it depicts the universal principle on the paramount of the best interest of the child in determination of custody and in all legal matters pertaining to children. The principle as embodied under Article 3 of the United Nations Convention on the Rights of Child, 1989 as well as Article 4 of the African Charter on the Rights and Welfare of the Child (ACRWC), 1990 forms part of our law as it is enshrined in Law of the Child Act [Cap 13 RE 2019] and the Law of Marriage Act [Cap 29

RE 2019 that in any event dealing with a child the primary consideration shall be on the best interests of the child.

I refer to section 4 (2) of the Law of the Child Act, No. 21 of 2009 (hereafter Act No. 21 of 2009) read together with section 125 (1) of the Law of Marriage Act, Cap 29. This position has been recited in several cases, of course there is a rebuttable presumption that it is in the best interest of a child below the age of seven years to be with his mother, This presumption is stated under section 39 (1) of the Act No. 21 of 2009.

However, in deciding whether the said presumption applies to the facts of a particular case, the court shall have regard to the undesirability of disturbing the life of the child by changes of custody. This view is echoed under section 26 (2) of the Act No. 21 of 2009.

In cases of this kind the best interest of the child is determined in consideration of such factors as the age and sex of the child, the independent views of the child, the desirability to keep siblings together; continuity in the care and control of the child, the child's physical, emotional and educational needs, the willingness of each parent to support and facilitate the child's ongoing relationship with the other parent (see section 26, 39 (2) of the Law of the Child Act and Rule 73 (a) to (i)

of The Law of the Child (Juvenile Court Procedure) Rules, GN No. 182 of 2016 (hereafter referred to as the Juvenile Court Rules).

Reverting to the appellant's submission on the first ground that the first appellate magistrate erred in law and in fact in ordering custody of the infant child Levin Jovin Muta to respondent only because of his age without considering other factors, the appellant urged this court that the respondent had not given her income for wellbeing of the child and that she was in renting room for residential purpose which cannot be safe for the child on the other hand the respondent insisted that the child is under 7 years and so should be under the custody of his mother.

The trial court ordered the custody of the child under the appellant herein for the reasons that first, his capital is stable which is 8,000,000/= per month, second the appellant will remain in their matrimonial home which the two kids have been living in before their parent's separation hence comfortable for them and third, the appellant is willing to take care of his children which guarantees their best interest, on the contrary the first appellate court insisted that the child in question was under seven years and so the trial court offended section 26 (1) of Cap 13.

Now in resolving this issue I shall determine whether the first appellate court considered the best interests of the child in reaching its

decision, and in doing so I am fascinated by the decision of the Supreme Court of India in **Rosy Jacob v. Jacob A. Chakramakkal** (1973) 1 SCC 840, where it empathically stated thus: *"The children are not mere chattels: nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them."*

As stated above, the paramount consideration in deciding the custody of the child is the best interest of the child, It is not disputed in this case that the child was six turning seven by the time, which made the first appellate court to reach its decision basing solemnly on the rebuttable presumption that it is the best interest of a child below the age of seven years to be with his mother as per section 26 (1) of Cap 13, which also provides further that when the court is applying to this presumption shall have regard to the undesirability of disturbing the life of the child by changes of custody.

In this case the said child had been living with his parents and his brother at their home for over six years of his life and even after the respondent had left their matrimonial home the appellant had been with both children and his mother who takes care of them. Placing the child under the respondent's custody, he will be subjected to the new life which will disturb him emotionally because he will be in new environment and away from his brother. Similarly, the said child is male, it is my considered view that, him being under the custody of the appellant (his father) it will help him to have a father figure in his life considering the world we live in today. Also respondent failed to tell this court her address and the environment she is living in order this order to give her custody. And in her prayers respondent prayed to this court to order the appellant to pay school fees and other expenses if she will be granted the custody but the appellant show the wiliness of staying with his children without depending any assistance from respondent especially school fees, and other expenses.

Therefore, I approve the trial court's decision that it is for the best interest of the said child to be placed under the appellant's custody since his brother will also be under his custody which will help them to stay together as siblings in a home they have been raised, also staying

together will make them bonding and help each other in different issues than living in different houses and environment.

This takes me to the second ground that, the learned 1st appellate magistrate erred in law and in fact in ordering/granting the car known as RAV 4 to be given to the respondent while the said car was not properly described.

In his submission the appellant contended that the respondent mentioned the car make RAV 4 with registration number DRF without giving its description as the result there will be no executable decree can be issued to affect the same. In response the respondent submitted that this issue was not discussed during the trial and therefore this is a new fact hence not allowed on appeal stage.

First of all, I will disagree with the respondent's advocate that this is a new issue since it was discussed in both lower courts. It is also from the trial proceedings at page 10 the respondent mentioned a car Toyota RAV 4 DRF among other cars to belong to her, and on the other hand the appellant at page 23 admitted the existence of the said car. I quote: **"...hakuna magari tuliochangia, yeye alikua na magari yake na mimi nilikua nina magari yangu. Yeye nilimnunulia gari moja aina ya RAV 4....."**

It is this admission which led the trial court not to disturb their agreement during the existence if their marriage that everyone will own their properties. The assertion by the appellant that the respondent failed to describe it, was an afterthought because during trial the appellant was aware of the car the respondent was referring to, that is RAV 4 which he did not dispute its existence and the ownership.

Therefore, I will hold hand with the first appellate court that the appellant admitted the respondent was the sole owner of the said Toyota RAV 4 and that is the reason he did not claim the same to be distributed as matrimonial property, hence the respondent was not bound to prove its existence by describing it since the appellant admitted the same.

Based on the reasons stated above, I hereby allow the appeal to the extent explained. In regard to the nature of the case no order to the costs.

It is so ordered.

DATED at **SHINYANGA** this 21st day of June, 2024.

R.B. Massam
JUDGE