IN THE HIGH COURT OF TANZANIA

(ARUSHA SUB- REGISTRY)

AT ARUSHA

CIVIL APPEAL NO. 45 OF 2022

(*Originating from the Ruling issued on 14/09/2022 by Hon. G. A.Mwakalinga, SRM, in Civil Application No. 13 of 2022 in Juvenile Court of Arumeru at Arusha*)

WILBROAD ANTHONY MARIWA ..... APPELLANT

VERSUS

EVALINE EVARIST MAZANI ..... RESPONDENT

JUDGMENT

Date of Last Order: 18/06/2024
Date of Judgment: 24/06/2024

B. E. K. Mganga, J.

Brief facts of this appeal are that, Wilbroad Anthony Mariwa, the abovenamed appellant and Evaline Evarist Mazani, the above named respondent, were living as husband and wife from 2011 to 2021 though they did not have marriage certificates. It is undisputed by the parties that, during their stay as husband and wife, they were blessed with two children, who I find unnecessary and to the best of their interest, not to mention their names in this judgment. It is alleged that, in 2021, appellant being a secondary school teacher, deserted the respondent with her two children aged Seven(7) and three(3) years old respectively and went to reside in another area. It is undisputed that, on 12th May

2022, respondent filed Civil Application No.13 of 2022 before Juvenile Court of Arumeru at Arusha praying the appellant be ordered to pay TZS 250,000/= monthly as maintenance of the two children. On 14th September 2022, the trial court ordered the applicant to pay TZS 150,000/= monthly as maintanence.

Appellant was aggrieved by the said order hence this appeal. In the memorandum of appeal, appellant raised two issues namely:-

1. *That, the trial Juvenile Court of Arumeru District did not consider the Social Welfare Officer's Report and hence the order of maintenance to the extend of contributing TZS 150,000/= monthly for custody of the children prejudiced the appellant.*
2. *That, the trial Magistrate did not evaluate the evidence on record and hence he wrongly reached in its findings.*

When the appeal was called on for hearing, the parties appeared in person.

During hearing, appellant submitted generally to the above grounds that he has been sending money and food and TZS 20,000/= to the social welfare as part of maintenance of his two children as it was agreed by the parties. He submitted further that, he used to pay for school uniforms, shoes, clothes and other needs of the said children. It was submissions of the appellant that, sometimes the respondent does not permit him to be close with his two children. He further submitted

that, his monthly salary is TZS 455,926.46 and that, he has other children who also need his maintenance. Appellant prayed the court to allow him to pay TZS 20,000/= and provide food to the said children instead of TZS 150,000/= monthly he was ordered to pay by the Juvenile Court. He argued that, the said money may be used by the respondent for her own use and not for the children.

On the other hand, respondent prayed the appeal be dismissed for want of merit. In her submissions, respondent submitted that, initially, while before the Social Welfare Officers, the parties agreed that, appellant should pay TZS 20,000/=, buy rice, sugar and floor monthly and handover to the Social Welfare officers in favour of the said two children. Respondent went on that, appellant did not comply with the said agreement, which is why, she filed an application in court praying for maintenance. When probed by the court, respondent stated that she is owning and runing her own restraurant.

I have considered submissions of the parties in this appeal and what was adduced and submitted before the lower court and find that, it is undisputed that, on 23rd September 2021, appellant and the respondent signed an agreement before Josina Mlaki, the Social Welfare Officer, Arusha Municipal. The said agreement reads:-

"… Bwn. Wilbroad Anthony atanunua Mchele (5kg), sukari(4kg), unga(Sado 3), unga wa ngano(kg 5), mafuta (3l) pamoja na 20,000/=(elfu ishirini ***kwa mwezi kwa muda ambao Bwn. Wilbroad atakuwa anafuatilia makazi mapya hadi pale atakapokuwa tayari kuishi na familia yake****."* (Emphasis is mine).

In fact, in her application, respondent indicated in paragraph 3 that, while at Social Welfare officers at Sekei, the herein appellant agreed to pay TZS 20,000/=monthly as maintenance to pay and buy rice, floor, sugar etc.

It is clear in my mind that, the source of the dispute between the parties is transfer of the appellant from one workstation to the other because, after being transferred, appellant left the respondent and her two children to his former workstation. This is clearly reflected in the above quoted agreement and paragraph 1 of the respondent's application before the Juvenile court. In the said paragraph 1, respondent clearly stated that, in December 2021, appellant was transferred from his duty station to a new station and left her with the said children to his former duty station. It was also stated by the respondent at the juvenile court that, appellant was given a house by the school before being transferred, but, after his transfer, she was chased from the said house, as a result, she had no where to go with her children.

In resist to pay TZS 250,000/= monthly as maintenance, at the juvenile court, appellant stated that, he has rented a house at his new working station and that he is paying rent. Appellant while before the lower court also stated that, he has other children to maintain. In other words, appellant stated that he has established a new relationship with another woman and now he has other children apart from the ones he has with the respondent.

From what was submitted by the parties at the juvenile court, it is unknown as to when appellant rented the said house and whether it is the appellant or the respondent who was unwilling to stay together with their children in the said house. In absence of that evidence, it cannot be concluded that, appellant deserted his children. I am of that view because, the quoted agreement is clear that, the said maintenance was for the period appellant was looking for a house. It is my view that, the Honourable magistrate at the juvenile court was supposed to consider that fact at the time of issuing an order for maintenance because, there is a possibility that, it is the respondent who refused to join the appellant to his new duty station and thereafter filed an application for maintenance. It may be due the said refusal, appellant found another shelter. The other possibility is that, after being transferred to his new station, appellant found another woman whom he fell in love and did not

want the respondent to join him at his new workstation believing that respondent will disturb his new relationship with that woman. In my view, the two possibilities attrack different treatment at the time of considering the amount of maintenance to be paid in favour of the two children. I am of that view because, if proven that, it is the respondent who refused to join the appellant at his new workstation, then, the court may consider to lower the amount. I am of that view because, the respondent may have refused to join the appellant in new workstation based on her own reason and thereafter filing an application for maintenance just to make sure that appellant will maintain the said two children and indirectly benefiting from that maintenance. In my view, that should be discouraged because that denies the two children to be close to their further. In short, that is against the interest of the children and the court should ensure that the said interest is protected. Again, if proven that it is the appellant who refused respondent to join him at his new workstation, then, the amount of maintenance should be higher because, appellant established new relationship with another women knowing that he can maintain both the children he left with the respondent and the ones he obtained from his new relationship with the new wife.

It is my further view that, the lower court was also supposed to consider income of both the appellant and the respondent. I am of that view because, it is undisputed that, appellant is a secondary school teacher and that respondent owns and runs restaurant hence both have a source of income. In issuing the order, the lower court was supposed to consider the provisions of section 8(1) and 44(a) of the Law of the Child Act, [Cap. 13 R.E. 2019] that provides the duty to parents to maintain the child. Therefore, maintenance of the said two children, is the duty of both the appellant and the respondent. The logic behind the said provision to require parents to maintain their children, in my view, is clear that, the said children are a result of love enjoyment of the two parents hence they cannot leave that duty to any other person. In other words, parents having enjoyed their love in their previous good moments, both should carry also the burdern of maintaining their children who are the result of the said previous enjoyments. That burdern cannot be left to one parent. There is a litany of case laws that maintenance of a child is a duty of the parents. See for example the case of ***Joseph Bahhi v Beath Agustino*** (Juvenile Civil Appeal No. 2 of 2023) [2023] TZHC 19680 (16 June 2023), ***Rose Harun Sogod vs Dominic Godfrey Shayo*** (Matrimonial Appeal 3 of 2021) [2021] TZHC 7419 (15 November 2021)and ***Anyingisye Mlawa vs Tukulamba***

Kibweja (Civil Appeal 27 of 2020) [2021] TZHC 7104 (5 November 2021) to mention but a few.

In the appeal at hand, there is no explanation or justification as to what lead the trial court to order the appeallant to pay TZS 150,000/= monthly to the respondent as maintenance. In short, the court did not consider the provisions of section 44 of Cap. 13 R.E. 2019 (supra). Prior to issuing the said order, the court was supposed to invite the parties to bring evidence that could have enabled it to comply with the provisions of section 44(a) of Cap. 13 R.E. 2019 (supra). In my view, maintenance order cannot be issued without adhering to clear provisions of the law.

For the foregoing and considering interest of the two children, I hereby nullify proceedings, quash and set aside the ruling and the order arising therefrom. I direct that the parties should go back to the juvenile court for the application to be heard afresh and consider *inter-alia* right of the children to have access to both parents.

Dated at Arusha on this 24th June 2024.

B. E. K. Mganga
JUDGE

Judgment delivered on this 24th June 2024 in Chambers in the presence of Wilbroad Anthony Mariwa, the Appellant and Evaline Evarist Mazani, the Respondent.

B. E. K. Mganga
JUDGE