

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY

AT TABORA

CIVIL APPEAL NO. 8 of 2020

(Originated from Civil Application No. 8 of 2022 in the Juvenile Court of Tabora)

LUCAS JONATHAN KULYAAPPELLANT

VERSUS

CHIKU MZEERESPONDENT

JUDGMENT

Date 22/2/2023 & 10/3/2023

BAHATI SALEMA, J.:

The respondent **Chiku Mzee** lodged an application under Rule 83(1) of the Law of the Child (Juvenile Court Procedure) GN No.183 /2016 seeking an order of maintenance of her child born on 29/07/2018.

The trial court ordered the respondent to make a contribution towards the maintenance of the child and other reliefs. The respondent was also advised to apply for a DNA test and the court will determine once and for all who is the biological father.

The appellant was aggrieved by the decision in Misc. Civil Application No. 6 of 2022 in the Juvenile Court of Tabora dated 28/07/2022 paraded the grounds to wit;

1. *That the learned trial magistrate erred in law and fact in ignoring the appellant's prayer for a DNA test before granting the order of maintenance to the child;*
2. *That the learned trial Magistrate erred in law and fact in concluding that the appellant is the biological father of the said child;*
3. *That the learned trial magistrate erred in law and in fact in ignoring the appellant's prayer for a DNA test while both parties were ready for the DNA test.*
4. *That the learned trial magistrate erred in law and fact in concluding that since the birth certificate of the child bears the name of Lucas Jonathan Kulya, then the father of the child bears the names of Lucas Jonathan Kulya, then the father of the child is, in fact, the said Lucas Jonathan Kulya.*

In 2017, the appellant and the respondent started living together under the same roof and were blessed with a child. The child was born on 29th July 2018 at Kitete Hospital in Tabora. The child was born with disability. Later around July, 2020 their relationship got sour to the extent of parting ways and the appellant stopped paying the maintenance of the child.

When the matter was up called for hearing, the appellant was represented by Ms. Joyce Nkwabi, learned counsel whereas the respondent was unrepresented.

Submitting on the 1st and 3rd grounds of appeal collectively, the counsel for the appellant stated that the trial magistrate ignored the test of DNA which was requested by the appellant. She submitted that on page 7 of the typed proceedings, she stated that even the respondent was ready for a DNA test. Therefore it was not proper for the trial court to reject it.

As to the second ground of appeal, he submitted that the trial court was not correct to say that the appellant was not right to state that the appellant was the real father of the child without considering the doubts which were stated during the hearing in terms of names which the respondent mentioned at the social welfare office as Yusuph Mohamed in respect of the real father and before this court she named Lucas Jonathan Kulya as the father of the child.

On the last ground she submitted the court erred to authenticate the birth certificate of the child which was written in the name of Jonathan Kulya, she stated that any person could name a person. Hence it was not proper for the trial court to use that criterion as there were already doubts. She advanced further that even the respondent was ready for a DNA test. She prayed this court to allow the appeal.

Responding, the respondent being a layperson stated that the trial court was correct to make such a decision since the appellant is the real father and she used other clan names instead of his name. She prayed for this court for the maintenance of her child.

I have keenly considered the competing arguments of both parties and also perused the entire record of this appeal. The issue for determination is therefore whether this appeal has merit. In answering this main issue, I will therefore be answering the issue of whether DNA was a new issue raised at the trial court and the legality of the respective order by the court.

From the outset, I find merit in this appeal, the application was indeed centered on the maintenance of the child. However, following the contradiction between the parties, this court having examined through the proceedings of the trial court noted that during the submission by the respondent now the appellant it was submitted that when the case was brought before the office of social welfare, the applicant christened Yusuph Mohamed as the father of the Child and before the Court a Lucas Jonathan Kulya the father of the child then the respondent requested to the court to order for a DNA test to ascertain who was the actual father of the child but the prayer was not granted. I have noted that this issue of DNA was requested at the trial court but it was never granted by the trial court following the reason that the matter

before her was of maintenance and not on DNA test, and the court advised the respondent to apply for the parentage and not on the application for the maintenance. The court ruled out that, had the applicant not attached the birth certificate, then the court would issue an order for a DNA Test.

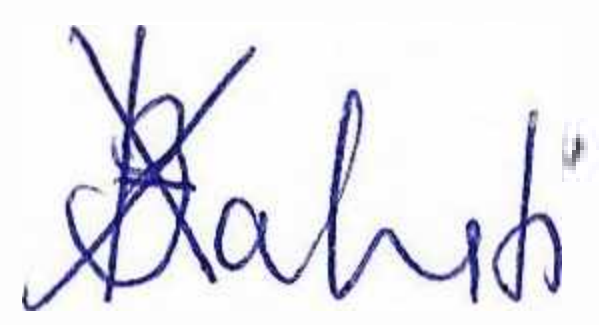
In this matter at hand, I am aware that section 35 (b) of the Law of the Child Act, Cap 13 [R.E. 2019] provides factors useful to establish the paternity of a child. Under this part section 35 of Law of the Child Act, provides that DNA result is one of the evidence of parentage. Nevertheless since there is an argument regarding the father of the Child and both parties are ready for DNA test, I would have thought for interest of justice this application be granted to arrive at the conclusive decision of maintenance.

I understand that a person may make an application to get an order from the court for maintenance if the person who is eligible to maintain a child or contribute towards the welfare of a child failed to do so. The application for maintenance can be made whether by the parent's contracted marriage or not. Logically it is the practice of the court to strike out new grounds which were not raised at the trial. However, I am thus convinced that the suit before the trial court and the issues thereon rested on maintenance could be proved in many ways including DNA of

the child where in the record it is reflected that the respondent requested such an order and the court refused to order accordingly.

Therefore, for the above reasons, this appeal is allowed, and the proceedings and the decision of the trial court are hereby nullified with an order of retrial before another magistrate with competent jurisdiction.

Order accordingly.



A. BAHATI SALEMA
JUDGE
10/03/2023

Court: Judgment delivered in presence of both parties.



A. BAHATI SALEMA
JUDGE
10/03/2023

Right of Appeal fully explained.



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10/03/2023