IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT SUB – REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 27803 OF 2023

(Originating from the decision of the Juvenile Court of Dar es Salaam at Kisutu in Civil Application No 371 of 2023)

CALVERT CANUTE GILMORE---------- APPELLANT

VERSUS

JOY SAMWEL MASSAWE---------- RESPONDENT

JUDGMENT

Last Order: 20.02.2024
Judgment Date: 09.04.2024

M. MNYUKWA, J.

This is the first appeal emanates from a dispute on maintenance of a child who was the product of a love relationship between the parties. The dispute originated from the decision of Juvenile Court of Dar es Salaam at Kisutu (as it was then) where respondent made an application under certificate of urgency which mainly centred on maintenance of a child born out of their love relationship as I stated earlier. Initially, respondent denied paternity of a child which compelled the trial court to order DNA test. Luckily, the result were positive where respondent gens matched with the child in issue.

It is irrefutable that after delivery of a child, the appellant was maintaining her. A dispute arose when the two parted away and became no intense when appellant lost his employment after being terminated. While appellant claimed that he is incapable to maintain the child the way he used to, respondent believed that appellant is capable to maintain the child the way he used since he is an expert on Information Technology (IT) as he provides consultancy service to different international companies on IT related issues.

It is on record that, the trial court gave opportunity to both parties to prosecute the case where appellant in his counter affidavit attached an email correspondence from his employer tried to prove that he was terminated from employment and therefore incapable to contribute on a monthly maintenance of a child to the tune of Tsh 3,100,000 as prayed by respondent. Appellant's evidence through his counter affidavit deponed that he is capable to contribute to monthly maintenance of a child at the rate of Tsh 200,000.

In rebuttal, respondent attached mobile money transactions done by the appellant to assert that appellant is capable to maintain a child on the amount prayed considering the fact that appellant is an IT consultant providing consultancy services to different international companies.

After hearing both parties, the trial court ordered the social inquiry report to be conducted and the same were submitted as ordered. However, in its Judgment the trial court did not make any reference to the report to show that she had considered it in awarding the monthly maintenance to appellant. Finally, the trial court ordered appellant to pay Tsh 600,000 as monthly maintenance. It also ordered appellant to enroll a child under medical insurance or cover full medical expenses and shall continue to cover education expenses of a child. Whereas, applicant was also ordered to contribute to child maintenance by providing shelter and clothes.

Unhappy with the decision, appellant appealed to this court with three grounds of appeal which are

i. *That, the Hon. Magistrate erred in law and facts by giving the order of monthly maintenance to the tune of Tsh 600,000 per month without considering the financial capability of the appellant.*
ii. *That, the Hon. Magistrate erred in law and facts for failure to properly consider the evidence adduced by appellant and admitted by the respondent and went on to deliver erroneous decision.*
iii. *That the Hon. Magistrate erred in law and facts by giving the duty to prove financial capability on the appellant without considering the fact that it was the respondent who alleged the same.*

Wherefore, appellant prays the Ruling and the drawn order of the trial court be quashed and set aside, respondent suit be dismissed and appellant be ordered to contribute monthly maintenance at the rate of Tsh 200,000/-.

During the hearing appeal parties agreed the same to be disposed by way of written submissions. The appellant was represented as he afforded the services of Jelis Law Chambers while respondent appeared in person, unrepresented.

Arguing in supporting the appeal, appellant's counsel consolidated and argued together the 1st and 2nd grounds of appeal. He started his submission by referring to section 44 of the Law of the Child Act, **Cap 13 R.E 2019** (the Act) which requires the court before making an order for maintenance to consider some factors stated in the above section.

The appellant's counsel blamed the court for its failure to consider the social inquiry report despite of ordering the same as it is reflected on page 13 of the trial court's proceedings. He argued that, the social inquiry report is of great importance as it enable to assess the financial capabilities of parents towards child maintenance.

Attacking the order of the trial court which require appellant to contribute monthly maintenance of Tsh 600,000 the counsel for appellant

was of the opinion that, the same does not consider the evidence adduced by both parties during trial.

He further submitted that, it is neither the trial court nor the social welfare officer who did a comprehensive assessment of the financial capability of the parents towards maintenance particularly the financial capability of the appellant.

To bolster his argument on the issue of conducting of the social enquiry report, appellant's counsel referred to the case of **Marysia Festo Kessy v Ludovick Vincent Kessy,** Civil Appeal No 385 of 2021 and the case of **Veronica Agostino Shirati v Ramadhan Kisibo,** Civil Appeal No 9 of 2020. He also insisted that section 44 and rule 85 of the Law of the Child (Juvenile Court Procedure) Rules 2016 must be considered when the court ordering maintenance of a child.

On the third ground, he argued that the trial court wrongly shifted the burden of proof to appellant while the law is settled that the one who alleges must prove. He referred to section 110 (1) and (2) of the Law of Evidence Act, Cap 6 R.E 2019 and the Court of Appeal decision in **Paulina Samson Ndawavya v Theresia Thoms Madaha,** Civil Appeal No 45 of 2017. He retires and prayed the appeal to be allowed and respondent be condemned to pay costs of the suit.

Contesting, respondent argued the 1st ground separate and argued altogether 2nd and 3rd ground of appeal. In the 1st ground, she submitted that it is the duty of the parents to maintain a child as it is provided under section 9(3) of the Act, And, that it is specifically a duty of a man to maintain his child as it is provided under section 129 (1) of the Law of Marriage Act, **Cap 29 R.E 2019**.

Respondent' submissions in response to the social inquiry report relied on section 45 of the Act and rule 85 of the Law of the Child (Juvenile Court Procedure) Rules 2016 where she states that the Act does not make it mandatory for a court to us the social enquiry report as it depend on the circumstances of each and every case. She was of the view that since in our case at hand the evidence for a trial magistrate to reach a decision, she was not obliged to use a social enquiry report because the evidence on record enabled her to make decision.

Respondent went on to submit that it is the duty of the juvenile court to consider financial status of both parents when ordering maintenance. She referred the decision of this court in **Denis Elias Nduhiye v Lemina Wilbad,** Juvenile Civil Appeal No 1 of 2019. She added that, in our case at hand it was obvious that the trial magistrate did not make any inquiry on the income of the appellant but it is the duty

of a father to maintain his child as it is provided for under section 129 of the Law of Marriage Act, **Cap 29 R.E 2019**. She referred to the case of **Assah A. Mgonja v Eliaskia 1 Mgonja,** Civil Appeal No 50 of 1993 to cement that a father has a duty to provide maintenance to his child.

In regards to the 2nd and 3rd grounds of appeal respondent admitted that it is the duty of the trial court to evaluate the evidence on record and that it is the trite law that the one who alleges must prove. However, she mistakenly stated that this court analysed the evidence and reached to the conclusion while that was done by the trial court. Respondent referred to section 110 and 111 of the law of Evidence Act, **Cap 6 R.E 2019** and the case of **Antony M Masanga v Penina (Mama Mgeni) and Another,** Civil Appeal No 118 of 2014 to support her argument that in civil cases the burden of proof lies on a party of whoever alleges.

She retires in her submission by insisting that appellant is an IT expert who works as a consultant in various international companies therefore he is capable to contribute monthly maintenance at the rate of Tsh 600,000/-. She therefore prays the appeal to be dismissed.

Re-joining, appellant's counsel mainly reiterated what he had submitted in chief. He insisted that as per the provision of section 45 of the Act and rule 85 of the Law of the Child (Juvenile Court Procedure)

Rules 2016, the trial court should have considered the social inquiry report before making maintenance order.

After considering the available record and submissions of the parties, the main issue for determination is whether the appeal has merit. In answering the above issue I will determine the 1st and 2nd grounds of appeal altogether for they are related and the first ground separate.

Before I embark to determine the merit of appeal, it is crucial at this juncture to state that parties in this appeal did neither undergo formal marriage nor lived under presumption of marriage. For that reason, the Law of Marriage Act, **Cap 29 R.E 2019** is not applicable to them. I say so because respondent referred some provisions in the above mentioned law to emphasis her argument that appellant as a man is duty bound to maintain his child.

Further to that, it is pertinent also at this stage to say that this being the first appellate court, I am enjoined to re-evaluate the evidence on record and come with my own analysis and conclusion based on the available facts. (See the case of **Tom Morio Vs. Athumani Hassan (Suing as the administrator of the Estate of the late Hassan Mohamed Siara & 2 others)** Civil Appeal No. 179 of 2013 CAT)

Coming now to the appeal at hand, the submissions of both parties is featured with the primary duty of a parent to maintain a child. In their respective submissions, both parties admitted that the Act primarily placed a duty to maintain a child to a parent. In his evidence at the trial court as well as his submissions to this court, appellant is willing to pay monthly maintenance to his child as he is duty bound by the law to do so. However, the tag of war to him and respondent is on amount of monthly maintenance ordered by the trial court for him to pay. While appellant is of the view that his income for now allows to pay monthly maintenance of Tsh 200,000/- respondent believed that the amount ordered by the trial court is a correct one considering the fact that appellant is an IT expert who works as a consultant in different international companies.

The above contentious between the parties makes the determination of the 1st and 2nd grounds of appeal crucial in this appeal. It is settled that when ordering maintenance of a child, the court shall consider among others, factors provided under section 44 of the Act. The Act provides that:

> 44. *A court shall consider the following matters when making a maintenance order:*
> *(a) the income and wealth of both parents of the child or of the person legally liable to maintain the child.*

(b) any impairment of the earning capacity of the person with a duty to maintain the child

(c) the financial responsibility of the person with respect to the maintenance of other children

(d) the cost of living in the area where the child is resident, and

(e) the rights of the child under this Act.

Considering the above, it come clear in mind that the court cannot order maintenance of a child in a vacuum. It goes without say that it has to consider the factors stated in the above section and any other factor which is appropriate to reach just and fair decision.

In our case at hand, through their evidence in the affidavits, parties adduced evidence on the amount of monthly maintenance. It is appellant's evidence that he is capable to maintain a child to the rate of Tsh 200,000 per month since his financial position for now is not well after being terminated in his employment contract. He attached an email to prove that fact. This evidence of appellant's employment contract being terminated was not disputed by respondent who in alternative alleged that appellant as an IT expert provides consultancy service to different international companies but she did not substantiate her words with any proof.

In determining the dispute at the trial court, the trial magistrate disregarded appellant's email attached to his affidavit for a reason that the same did not meet the threshold of electronic evidence as it is provided for under section 18 of the Electronic Transaction Act, **Cap 442 R.E 2022**. It is my understanding that appellant attached an email proving her averment deponed in his affidavit that he was terminated his contract by his employer. The email meant to prove what he alleges. As it is the practice in any other application, it is the duty of the deponent to substantiate his fact in the affidavit with proof. Thus, to my view, it was improper for trial court to say that the email did not meet the threshold of the Electronic Transaction Act, Cap 442 R.E 2022.

In her submissions at the trial court, respondent argued the trial court to get the truth in the financial capability of the appellant through the social enquiry report believing that the social welfare officer will be in apposition to get information concerning appellant's ability to pay taking into consideration that he is a foreigner and working for gain in some of the international companies. Perhaps it is from this cry where the trial court ordered the social inquiry report to be filed and the same was indeed filed as it is part of the trial court record.

I also understand that the trial court ordered the social inquiry report to be filed pursuant to section 45 of the Act which provides that:

> *Section 45(1) – A court may order a social welfare officer to prepare a social inquiry report before consideration of an application to make an order for maintenance, custody or access.*
>
> *(2) The court shall in making such order consider the social inquiry report prepared by the social welfare officer.*

The above section can be read together with rule 85 of the Law of the Child (Juvenile Court Procedure) Rules 2016 which states that:

> *85(1) The court may, before granting an order for maintenance in accordance with section 45 of the Act, request a social welfare officer to prepare a social enquiry report for the purpose of*
>
> *(a) assessing the ability of parents to provide for the maintenance and care of the child; and*
>
> *(b) ascertaining the accuracy of any statements relating to income and outgoings and liabilities*

I have settled mind that in the above provision of law, it is within the discretionary power of the court to order the social welfare officer to prepare the social inquiry report. In preparing the social inquiry report, as far as the issue of child maintenance is concerned, the social welfare

officer is expected to inquire into a party's financial capability and other factors affecting his ability to pay. The social welfare officer has a wider chance to inquire to a party's earning in a formal and informal work and vis versa. For a parent who is working, the social welfare officer may inquire his financial capability even to his employer as it is provided for under section 85 (2)(c) of the Law of the Child (Juvenile Court Procedure) Rules 2016.

In our case at hand, the social welfare officer prepared and filed a social inquiry report. However, in its Judgment the trial court seems to have not used it. I say so because I didn't see if a trial magistrate extends appreciation the way the social enquiry report was conducted leave alone a comment to show that she had referred it. I think, that might be a reason why appellant in his submissions argued that the trial magistrate ought to have used the social enquiry report in reaching her decision.

I had time to revisit the record and only to find the social enquiry report which to my view is not much useful to the trial magistrate to rely on making an order for maintenance. The same does not feature what is provided for under rule 85 of the Law of the Child (Juvenile Court Procedure) Rules 2016. May be, that could be a reason why the trial Magistrate did not consider it.

I understand that, when the social enquiry report is ordered to be conducted, the court shall have to use it. But, considering the social enquiry report filed at the trial, I will not make use of it since the same does not provide detailed information on the assessment of financial capability of the appellant in maintaining a child. Admittedly, the social welfare officer states the figure which is subject to maintenance, but I wonder how does she arrived at that figure. Thus, as I have said I will not consider it.

The question now is whether the monthly maintenance of Tsh 600,000/- ordered by the trial court for appellant to pay is justifiable. The answer to this issue is in negative. I hold so because it is not known which criteria does the trial court used to order the amount of maintenance. In her evidence, respondent (the then applicant) generalize that appellant is IT expert and works as a consultant in different international companies and therefore capable to maintain a child for the amount stated in her affidavit at the trial court. Unfortunately enough, this fact was not proved by respondent by mentioning even a single company which appellant works for. Contrary to that, she admitted that appellant's employment's contract was terminated. For that reason, I entirely agree with him that he is incapable to pay a monthly maintenance of Tsh 600,000/-. I thus

agree with him to pay the amount he stated to be capable to pay of Tsh 200,000/- as monthly maintenance. Thus, the 1st and 2nd grounds of appeal have merit and I allow them. I therefore revise the trial court order of monthly maintenance as stated above.

On the third ground of appeal, I don't think if the same need to detain me much. It is trite law that the one who alleges must prove. The law is settled under section 110 of the Law of Evidence Act, **Cap 6 R.E 2019** which provides that

> *S. 110 whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exists.*

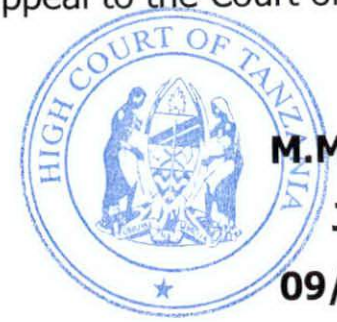
The submissions of both parties are in agreement that the burden of proof is on a party who alleges. Since it was the respondent who alleges, she was placed with a duty to prove her allegations. It is clear that in this case respondent failed to discharge her duty at the trial court as she failed to substantiate her claim. I therefore, finds that respondent failed to prove her duty and for the circumstances of our case at hand this duty cannot be shifted to appellant. Thus, this ground has merit too and I hereby allow.

Before I conclude, I have to comment on the order of the trial court which is medical insurance or health cover and education of a child. In his evidence, appellant is not disputing to provide medical cover to a child. Since education is one among the basic need to a child, I don't vary with the trial court decision for appellant to cover education costs for a child. I hold so since respondent's will be responsible to other costs for upbringing of a child.

In the event, I allow the appeal and revise the order for monthly maintenance to the amount stated therein. No orders as to costs since parties were related.

It is so ordered.

Right of appeal to the Court of Appeal explained to the parties.



M.MNYUKWA

JUDGE

09/04/2024

Court: Judgement delivered on this day 9th April 2024 in the presence of appellant's counsel and respondent in person.

M.MNYUKWA

JUDGE

09/04/2024