**IN THE HIGH COURT OF TANZANIA**

**(IN THE DISTRICT REGISTRY)**

**AT MWANZA**

**PC: MATRIMONIAL APPEAL NO. 06 OF 2020**

*(Arising from Matrimonial Cause No.6 of 2017 of the District Court of Ilemela)*

**TAUSI SHABAN ..... APPELLANT**

**VERSUS**

**MAFTAH HAMIS ..... RESPONDENT**

**JUDGMENT**

*Last Order: 22.05.2020*

*Judgment date: 29.05.2020*

**A.Z.MGEYEKWA, J**

The appellant Tausi Shaban has lodged this appeal to challenge the decision of the Ilemela District Court issued on 13th May, 2019 in respect of Matrimonial Cause No.6 of 2017.

For purposes of understanding the gist of this appeal, it is necessary to give the following background. The appellant and respondent contracted an Islamic marriage in 1993 and were blessed with four issues; Musa Maftah 22 years old, Jamal Maftah 17 years,

Shaban Maftah 14 years old, and Abdul Maftah 7 years old. The record reveals that the appellant and respondent lived a peaceful and harmonious life until 2012 when misunderstandings between the started. The main reason for their misunderstanding is due to the fact that the respondent had completely stopped to provide maintenance for the children and denial of conjugal right to the appellant. The appellant complained that the desertion caused her mental and psychological torture. Thus the appellant decided to file a Petition for Divorce before the Ilemela District Court, whereby after a full trial the trial court was of the view that the marriage between the appellant and the respondent had irreparably broken down and granted; a divorce thereto. The trial court further ordered the respondent to provide Tshs. 200,000/= each month as maintenance of two children, paying for school fees on time and all other needs and requirements pertaining to schooling.

Being aggrieved by that decision of the Ilemela District Court, the appellant filed this appeal, which consisted of three grounds of appeal as follows:-

1. *That, the trial court erred in law and facts for allowing the respondent to provide maintenance for only two children of marriage while their four children are still depending on the respondent.*
2. *That the trial court erred in law and facts for wrongly assessing the amount of Tshs. 2000,000/= the respondent should provide maintenance for both children in a month.*
3. *That the trial court erred in law and facts for not ordering the respondent to provide maintenance to the appellant who is her entire life depended on the respondent who married her at the age of 17 years old who is now disabled.*

The hearing was done by way of written submission whereas, the applicants filed the written submission as early as 11th May, 2020 and the respondent filed a reply as early as 18th May, 2020. Both learned counsels complied with the court order.

Arguing on the first ground of appeal, the learned counsel for the appellant argued that the appellant and respondent have four children and all solemnly depend on the respondent. He referred this court to section 8 of the Law of the Child which provides that education, food, shelter, maintenance are essential needs for the development of a child. He went on to argue that the Law of the Child Act did not cover maintenance of the other children but they still schooling and were expelled for failure to pay school fees as a result they are staying at home. He added that it is upon their parents to provide for educational support since we need a generation of elites.

As for the second ground of appeal, Mr. Kiboga argued that the trial court erred in law and facts to wrongly provide an amount of Tshs. 200,000/= per month as maintenance for both children. Mr. Kiboga argued that the trial court miscalculated the amount of maintenance of the two children who are under 18 years old without obtaining an opinion from the Welfare workers. He added that Tshs. 200,000/= means each child Tshs. 100,000/= per month which is equivalent to Tshs. 3,000/= per day which he thinks is not enough to fulfill the child's needs on daily bases. To support his submission he cited section 8 of the Law of the Child Act, No. 21 of 2009 which provides for the best interest of the child which includes education and health which are

essential. Mr. Kiboga also referred this court to section 26 (1) of the Law of the Child which provides that children be provided for maintenance and education of the same quality that was provided before divorce or separation.

Concerning the third ground of appeal, the learned counsel for the appellant argued that the appellant was a house wife in the whole period of marriage, she depended on the respondent who catered for domestic chores as a wife. He went on to argue that the appellant cannot maintain herself as a woman, she has no business or any economical venture that can help her carter for her daily need since she is disabled.

In conclusion, Mr. Kiboga urged this court to allow the appeal with costs and quash the lower court decision and order the respondent to pay for children's maintenance a total of Tshs. 1,000,000/= per month and Tshs. 500,000/= for the appellant's maintenance per month and each child to get justice.

Responding, Mr. Laurean spiritedly argued that the first ground of appeal is misconceived, unfounded and the same lacks merit. He argued that the other two children are above 18 years old and the appellant remarked them as jobless thus it is not a reason to be maintained since they are adults who can provide for themselves. He went to argue that the appellant testified that the elder child is 24 years old and the other one is 21 years old and the two other children are under 18 years old are both of them are schooling and the respondent covers all the school requirements. Mr. Laurean fortified his argumentation by referring this

court to section 129 of the Law of Marriage Act, Cap.29 [R.E 2019] that it is the duty of a man to maintain his infant children.Mr. Laurean referred this court to section 129 (1) of the Law of Marriage Act, Cap. 29 [R.E 2019].

On the second ground of appeal, the learned counsel for the respondent argued that this ground lacks merits. He argued that the assessment of the amount for maintenance is solely the duty of the Court, as stated under section 129 of the Law of Marriage Act, where such maintenance needs to be reasonable having regard to the means and station in life of the man. He went on to submit that the trial court did not fault itself for not involving the Social Welfare opinion as stated section 136 (1) of the same Law of Marriage Act provides that whenever is practicable the Court may take the advice of some person but shall not be bound to follow such advice. He went on to submit that section 136 (2) of the Act provides that no proceedings shall be invalid because of no-compliance with the provisions of subsection (1).

It was his further submission that the Trial Magistrate was in a good position and rightly ordered the amount of maintenance after hearing both sides and the circumstances of their dispute. He added that the records reveal clear that both the appellant and the respondent subscribed to the averment that the respondent provides for his family.

He referred this court to page 34 of the typed proceedings which confirms that the respondent is paying school fees for the children who are still schooling and they have a good shelter in which the respondent never disturbed her or chased her out. He continued to submit that most

of the time the children are at school and both are in a boarding school where the respondent provides all the necessities. Mr. Laurean went on to submit that the amount ordered for maintenance of the two issues is fairly justified. He alleged the appellant that she is trying to enrich herself by use of the claim for maintenance.

In conclusion argued that with a lack of evidence to support the aforesaid reasons, the second ground should fall too.

Concerning the third ground of appeal, the learned counsel for the respondent submitted that it is trite law that parties are bound by their own pleadings. Mr. Laurean fortified his submission by referring this court to the case of **Antony Ngoo And Another v Kitinda Kimaro, Civil Appeal No. 25 of 2014, CAT at Arusha,** (unreported) in which Mjasiri, J.A stated that:-

*"The law is settled that the parties are bound by their own pleadings."*

He also cited the case of **James Funke Gwagiro v The Attorney General** [2004] T.L.R 161, it was held that:-

> *"In order for an issue to be decided it ought to be brought on record and appear from the conduct of the suit to have been left to the Court for decision".*

Mr. Laurean further submitted that the appellant's petition of appeal does not plead anything concerning maintenance to the appellant and she has not adduced any evidence to that effect. He went on to state that the maintenance to the former wife is not an automatic right.

However, the Court in the exercise of its discretionary power may place its order to that effect per section 115 (1) of the Law of Marriage Act.

In conclusion, the learned counsel for the respondent valiantly argued that the appeal is devoid of merits and urged this court to dismiss it with costs.

Having digested the parties' submissions, and the record of the case, I am settled that, the main issues for determination at this juncture are *whether the subordinate court correctly determined the maintenance of children.*

Addressing the first ground of appeal that the trial court erred in law and facts for allowing the respondent to provide maintenance for only two children of marriage while four children of the marriage are still depending on the respondent.

When it comes to maintenance of child the law is clear that the children who need maintenance are those who are below 18 years old and a child is defined under section 4 (1) of the Law of the Child Act, No.21 of 2009 as a person who is below the age of 18 years old. Therefore, the maintenance of two children who were under 18 years old is as prescribed by the law and maintenance is governed by the Law of the Child Act, No.21 of 2009 specifically section 8 (1) which provides that:-

> "*8.-(1) It shall be the duty of a parent, guardian or any other person having custody of a child to maintain that child in particular that duty gives the child the right to – (a) food; (b) shelter; (c)*

*clothing; (d) medical care including immunization; (e) education and guidance; (f) liberty; and (g) right to play and leisure."*

Similarly, section 129 (1) of the Law of Marriage Act, stipulates that maintenance is meant for infants. Section 129 (1) of the Act state that:-

> *"129 (1) Save where an agreement or order of court otherwise Duty to maintain provides, it shall be the duty of a man to maintain* ***his infant children****, whether they are in his custody or the custody of any other person, children either by providing them with such accommodation, clothing, food, and education as may be reasonable having regard to his means and station in life or by paying the cost thereof."*

In the instant appeal, the trial court ordered the respondent to maintain the two children who are below 18 years old and excluded the other two children who were above 18 years old. However, I have a different view when it comes to the maintenance of the other two children who are above 18 years old in cases where the parents are separated or do not live together. I understand that a child above 18 years does in certain situations have a legal right to be maintained even though the Law of Child Act, No. 21 of 2009, and the Law of Marriage Act, Cap. 29 [R.E 2019] stipulates that maintenance is payable until the age of 18 years old. Following the legal position, circumstances of the case and the lifestyle of many families whereas, some children above 18 years are still schooling; some of them are in boarding school or day school and they are living with their parents waiting to be employed at that time they need to be maintained. The law is silent on this, but I think it is prudence to consider the children over 18 years old who solely depend on their parents.

In the instant appeal, these two young children who are above 18 years might depend on their parents they are in their early twenties; that is why the appellant is claiming for their maintenance they might be unemployed and have no shelter. Now, I am asking myself who should take care of them and in case all parents are neglecting them, where should they go? The bottom line in a situation like this, these children also need shelter and food. Parents should come forward and make sure that these two young children though the law does not carter for their necessities, but parents cannot run away from maintaining them. In my view, in exceptional cases like this at hand, I think both parents should unite and provide maintenance.

Concerning the second ground of appeal, that the trial court erred in law to and facts for wrongly assessing the amount of Tshs. 200,000/= as maintenance for both two children who are below 18 years old per month. It is on record that the trial Magistrate reached such a decision after considering that the two children are staying in boarding school and their father (respondent) is the one who is paying for school fee and provides them with other necessities as per the requirement of section 129 (1) of the Law of Marriage Act Cap.29 [R.E 2019]. Section 129 of the Law of Marriage Act, which provides that: -

> *" ... it shall be the duty of a man to maintain his children whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food, and education as may be reasonable having regard to his means and station in life or by paying the costs thereof " [Emphasis added].*

Therefore and pursuant to the above provisions of the law, the trial court was justified to order the respondent to provide for their maintenance and the amount of Tshs. 200,000/= was based on the fact which I have explained above. Therefore, the trial court order on the amount of maintenance of the two children is upheld.

On the 3rd ground that the trial court erred in law and fact for not ordering the respondent to provide maintenance to the appellant who entirely depends on the respondent. I have observed that in the appellant's Advocate has raised a new ground which never featured in the pleadings, I have labored to go through the prayers before the Ilemela District Court and found that the appellant (original petitioner) prayed for the following orders:-

i) Decree for divorce as the marriage between the petitioner and the respondent has broken down beyond repair.
ii) An order for maintenance of the four children to a tune of Tshs. 150,000/= per day.
iii) Costs of the suit be borne by the respondent.
iv) Any relief as the court my fit to grant.

Based on the above prayers the appellant did not include a prayer for the respondent to maintain. This is not acceptable in law, as a case is built up by pleadings that are before the Court. It is a principle of the law that parties are bound by their pleadings and are required to stick to their pleadings. In the case of Philips **Anania Masasi v Returning Officer Njombe North Constituency and Others**, Misc. Civil Cause No. 7 of 1995, Songea (Unreported) where Samatta, J (as he then was) stated that:-

*"Litigation is not a game of surprise."*

Likewise, the appellant in this case is required to stick to his pleading. I have perused both the handwritten and typed proceedings of the trial court there is nowhere shown that the appellant raised the said issue before the trial court, raising new ground and issue at the time of submission is not acceptable, as will only prejudice the respondent, who will be taken by surprise. As such, this ground of appeal submitted by the appellant, which is not part of the pleadings, is hereby disregarded.

In the circumstances and for the foregoing reasons, the appeal is partly allowed. I partly uphold the 1st trial court decision and give the following orders: -

1. The two children who are above 18 years if they have no shelter and unemployed, they are at liberty to leave with their father or mother and both parents to provide maintenance.
2. I make no order to costs each party to shoulder his/her own costs.

Order accordingly.

DATED at Mwanza this 29th day of May, 2020.

A.Z.MGEYEKWA

**JUDGE**

30.04.2020

Judgment delivered on this 29th day of May, 2020 via audio teleconference, and both Mr. Kiboga, learned counsel for the appellant and Mr. Laurean, learned counsel for the respondent were remotely present.

A.Z.MGEYEKWA

**JUDGE**

30.04.2020

Right to appeal is fully explained.