

**IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

MATRIMONIAL APPEAL NO. 26 OF 2020

*(Arising from Matrimonial Appeal No. 6 of 2020 of the District Court of Nyamagana,
Originated from Matrimonial Cause No. 70 of 2018 at Mkuyuni Primary Court)*

CHIKU ISMAIL APPELLANT

VERSUS

MUGISHA RWEYEMAMU RESPONDENT

JUDGMENT

Date of Last Order: 11.02.2020

Date of Judgment: 12.02.2020

A Z. MGEYEKWA, J

Chiku Ismail; the appellant and Mugisha Rweyemamu; the respondent was, respectively, husband and wife. They were married in 2005 and blessed with three issues. In addition to the three children out of that union, they owned one matrimonial house. It appears their marriage went on well all

along until the year 2019 when the relationship started to go sour after the endless misunderstandings between the two. Feeling that she could not stomach the bitter relationship any longer, the appellant decided to move file a case before Mkuyuni Primary Court in Mwanza.

On 26th February, 2020 the appellant successfully petitioned for separation at the Mkuyuni Primary Court in Mwanza. After hearing both parties, the trial Court issued an order for separation and the custody of children was placed to the appellant, the respondent was ordered to provide maintenance and to pay Tshs. 100,000 every month. The respondent was not happy with the trial court decision thus, he lodged an appeal before the District Court of Nyamagana. The first appellate court among other things ordered that the children be placed under the custody of the respondent.

Undeterred, the appellant preferred this appeal before this Court. The appeal is predicated on two grounds of appeal as follows:-

- 1. That, the trial Magistrate erred in law and fact by granting custody of children to the respondent without considering the welfare of the children.*

2. That, the trial Magistrate erred in law and fact when he reached the decision by not taking into consideration the appellant's evidence on the record.

In prosecuting this appeal, the appellant afforded the service of Ms. Hidaya Haruna, learned counsel whereas the matter proceeded *ex parte* against the respondent who was served to appear through substitution of service but still did not show appearance.

Prosecuting the appeal, the learned counsel opted to combine the two grounds of appeal and argue them together. Ms. Hidaya submitted that the first appellate court placed the custody of children to the respondent in Appeal No.06 pf 2020. She further submitted that the first appellate court misdirected itself to issue such an order since it was contrary to section 39 (1) of the Law of the Child Act. Ms. Hidaya went on to state that the court was required to consider the welfare of the child. She added that the one who could provide those basic needs was required to stay with the children. Insisting, she referred this court to section 125 (1) of the Law of Marriage Act, Cap.20 [R.E 2019]

It was Ms. Hidaya's further submission that the trial court before ordering the custody of children observed the welfare of the child. She added

that the appellant stayed with her children for more than 13 years and even when the two were separated, the appellant was taking care of children all by herself. Ms. Hidaya went on to submit that at the trial court, the trial Magistrate asked the children with whom they want to stay and all the three children opted to stay with their mother. The learned counsel continued to submit that the first appellate Court in its findings considered the interest of the children but surprisingly, he ended up granting the custody of the children to the respondent. To fortify her submission she referred this court to page 4 of the first appellate court proceedings.

On the strength of the above submission, Mr. Hidaya beckoned upon this court to consider the appellant's grounds of appeal, quash the decision of the District Court of Nyamagana, and uphold the trial court decision.

Having gone through the trial court record, grounds of appeal and their rival submission of the learned counsel for the appellant the issue for determination is ***whether the appeal is meritorious.***

I wish to state at the very outset of my determination that this being a second appeal, the Court is only entitled to interfere with the concurrent findings of fact made by the courts below if there is misdirection or non-

direction made by the courts below on the evidence. The same was held in the case of **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR.

Having stated the above, I am now set to confront the grounds of contention as enumerated above, all grounds of appeal are intertwined, and therefore I will determine them together. I am in accord with the learned counsel that in the custody of children the court is required to consider the best interest of the child. As for the issue of custody and maintenance of the children, I must say that the law under Section 125 (1) (2) of the Law of Marriage Act, (supra) is very clear that, in determining the issue of custody, the paramount consideration shall be on the welfare of the child. The same was observed in the case of **Celestine Kilala and Halima Yusuf v Restituta Celestine Kilala** (1980) TLR 76 the Court of Appeal of Tanzania observed that:-

"...the court's paramount consideration is the welfare of the child more than anything."

In addition, Tanzania has ratified the UN Convention on the Welfare of the Child, (CRC), 1989 and domesticated the same by enacting the Law of the Child Act, No. 21 of 2009. The main objective of this Act, among others,

is to stipulate the rights of the child and promote, protect and maintain the welfare of a child to give effect to international and regional conventions on the rights of the child. Section 4 (2) of the Law of the Child Act, (supra) provides that:-

" The best interest of a child shall be the primary consideration in all actions concerning a child whether undertaken by public or private social welfare institutions, court or administrative bodies."

Additionally, 125 (2) (b) of the Law of Marriage Act, Cap. 29 [R.E 2019] provides that the child who is above 7 years can opt as to who she/he wants to stay with. Section 125 provides that:-

" 125.- (2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and, subject to this, the court shall have regard to-

(a) the wishes of the parents of the child;

*(b) **the wishes of the child, where he or she is of an age to express an independent opinion.***" [Emphasis added]

Based on the above provision of law, it is my considered opinion that in the circumstances of this case and reading the records of the trial court the appellant's Advocate submitted that the children were placed under to the

appellant. The first appellate court revised the order and placed the custody of children to the respondent.

I have revisited the trial court records and found that the children were bold and eloquent when they expressed their wishes to be with their mother. The trial court considered the expressed wishes of the children and made a decision that will be in their best interest by granting custody to the appellant.

Gathering from the record and the appellant's Advocate submission, it is clear that the first appellate court when determining the appeal concentrated on the issue of division of matrimonial property, and surprising the court ended up ordering the three children to stay with their father (the respondent) without stating any reason of its decision.

I had to revisit the trial court proceedings and find out what transpired, I found that the trial court summoned the children and they were asked them questions to find out they want to stay with whom between the two parents. The children replied that they want to stay with their mother (the appellant). Therefore, the children's wishes are to live with their mother that is where the assurance of care is. The records reveal that when the two were

married the children were residing with their mother all the time that means they recognize the effort taken by the appellant in caring for them. Therefore, the first appellate court was required to consider the children's wishes.

Therefore, in my considered view, I find that the trial court misdirected itself to provide the custody of the children to the respondent without referring to the evidence adduced at the trial court. These grounds are answered in the affirmative.

In the circumstances and for the foregoing reasons, the appeal is allowed. Thus, I quash the decision of the 1st appellate court and uphold the trial court decision and its orders, I proceed to give the following orders:-

1. All three children are placed under the custody of the appellant.
2. The appeal is allowed without costs.

Order accordingly.

DATED at Mwanza this 12th February, 2021.


A.Z.MGEYEKWA

JUDGE

12.02.2021

Judgment delivered on this 12th February, 2021 in the presence of the appellant.



A.Z.MGEYEKWA

JUDGE

12.02.2021

Right to appeal fully explained.