

GHANA / JUDGMENT

BALINIA VRS DANJARA (UE/NA/DC/A6/11/2023) [2024] GHADC 508 (28 August 2024)

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IN THE FAMILY TRIBUNAL HELD AT NAVRONGO IN THE UPPER EAST REGION ON
WEDNESDAY THE 28TH DAY OF AUGUST, 2024 BEFORE HIS WORSHIP FAMOUS YAO AMANYO
(DISTRICT MAGISTRATE) , MR ANTHONY AWIAH AND MADAM ROSEMARY KADUA AWIAH
(PANELIST) SUIT NO. UE/NA/DC/A6/11/2023 GABRIEL ADOBI BALINIA
PETITIONER V GRACE DANJARA RESPONDENT

JUDGMENT

[1]On the 6th April, 2024 the Petitioner filed petition for custody of the children and any other order(s) the family Tribunal deems fit. Respondent also filed her response on the 8th August, 2023 and cross petitioned for custody of the children and any other order(s) as the family Tribunal deems fit. [2]The facts are that Petitioner is a senior Administrative Assistant of the C.K. Tedam University of Technology and Applied Sciences and resides at Navrongo Chief's Palace. Respondent is a Teacher living at Bekwai in the Ashanti Region. Petitioner and Respondent cohabited and lived together at Navrongo and were blessed with two children namely Leger Webakoba Atudiku Balinia aged 9 years and Gracia Welam A. 1 Balinia aged 10 years. The relation of Petitioner and Respondent broke down in 2018 and the Respondent left the matrimonial home without the children. Later in 2020, Respondent went for the children who have since been living with her. [3]The issue is whether or not Petitioner or Respondent deserves custody of the two children. [4]The case of Petitioner is that he married Respondent in 2010 and the marriage broke down in 2018. The Respondent left the matrimonial home when the children were 4 and 5 years old. Respondent left the children with him but had access to them until she relocated to Ashanti Region. In 2021 Respondent came for the children without his knowledge. He reported the matter to Police. The police directed him to Social Welfare where it was agreed that the children should be in his custody. Access to children was granted to Respondent. [5]On 15th December, 2022 he gave Respondent GH¢400.00 to transport their second child to Navrongo. Respondent took the money but did not pay the lorry fare. Instead she begged the driver to allow the child to sit on a stool from Kumasi to Navrongo. On 9th March, 2023 Respondent took the children away from the Petitioner without his knowledge but later gave text message to inform him. Meanwhile

he paid for the children's school fees, books and other necessities to aid their learning.

[6]According to Petitioner, Respondent's behavior shows she does not care about the welfare of the children. She prevented the children from writing their term exams. She also failed to take the children's books, clothing and health insurance cards, in spite of the fact that one the children is asthmatic. 2 [7]Petitioner emphasized that he as Senior Administrative Assistant, at the University is entitled to medical cover for his children; therefore the children will get better medical care. And that he is a responsible father and can take very good care of the children. He has been responsible for the maintenance, health care, clothing transportation cost of sending the children to school and back and provision of their basic needs. The children are comfortable and happy staying with him together with their step brother. And that if the children are with Respondent, they will be deprived of learning and taking part in the traditional practices that they perform as royals. [8]Petitioner states further that he is currently married to another woman and she and her mother have been helping him to take care of the children. So he is the proper person to be granted custody. Respondent should be given access. [9]Petitioner did not call any witness. He tendered in evidence exhibits A, A1, B, C, C1, C2, D, D1, E, F, F1, F2, F3, F4, F5, G, G1 G2, G3, G4, G5, G6, H, H1, H2, H3 H4, H5, H6 and J. These exhibits are the photo copies of mobile transaction histories, mobile phone conversations, official receipts, prescription form, terminal report cards and National Health Insurance cards of the children. [10]It is the case of Respondent that after the birth of their second child she and Petitioner started having problems with their relationship. The problems were due to Petitioner's demand that she should abort the pregnancy which she refused. Petitioner started drinking, sleeping outside and bringing girls into their bedroom and had discussions with the girls concerning their private matters. [11]According to Respondent Petitioner maltreated her and beat her on any little misunderstanding. He once came to her mother's house and almost strangled her to 3 death and was rescued by her brother. And that it was due to Petitioners maltreatments, threats and beatings that led her to seek transfer to Bekwai because she was teaching at Doba. Petitioner does not have time for the children. He always leaves the children with their step mother and she always maltreats them and does not feed them well. And that because of Petitioner's carelessness the children had been having sex with each other. At times, they do not go to school. So she is in position to take proper care at the children. Respondent tendered into evidence exhibits 1,2,3,4,5, 5a, 6, 6a, and 7 being the police medical form, receipts, prescription form, terminal reports and National Health Insurance cards. [12]The Respondent filed witness statement of one witness but did not call the said witness to testify hence the court could not use the said statement in this decision. [13]The probation officer also filed his enquiry report. The Social enquiry report repeated respective versions of the case of the parties. According to the report, the children stated that the Petitioner has been taking good care of them. Anything they asked him he provides. The children however wanted to be with their mother because their step mother does not allow them to roam and go to their grandmother in the market. They concluded that they will go to their father during vacations. Based on these, the officer recommended that custody may be granted to Petitioner and access to Respondent during vacations. [14]Since both parties claim for custody they have equal burden of proving their respective cases on the preponderance of probabilities. 4 [15]Section 11(1) of the Evidence Act, 1975 NRCD 323 provides "For the purpose of this decree, the

burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid ruling against him on the issue.” [16]Section 12 (1) “except as otherwise provided by law the burden of persuasion requires proof by preponderance of probabilities.” [17]Section 14 except as otherwise provides by law, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting. [18]In *Majolagbe v Larbi* [1959] GLR 190 at page 192 Ollennu J (as he then was) noted that “proof in law is the establishment of fact by proper legal means. Where a party makes an averment capable of proof in some positive way e.g by producing documents, descriptions of things, reference to other facts, instances or circumstances and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on oath, or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the court can be satisfied that what he avers is true”. [19]In *Ababio v Akwesi III* [1994-1995] GBR 777 Aikins JSC held “.....a party whose pleadings raised as issue essential to the success of a case assumed the burden of proving such issues. The burden only shifted to the defendant when plaintiff has adduced evidence to establish the claims”. [20]Again in *Sarpond (Deceased) (substituted by) Koduah v Jantuah* [2017-2020] I SCGLR 736 it was held in holding 4 as follows:- 5 “the principle enunciated in the *Majolagbe v Larbi* [1959] GLR 190 did not mean a party should not or could not repeat what had been pleaded in evidence. What that principle means was that, that party should lead such evidence as would constitute proof in law. Since a party was required to stick to his pleadings when giving evidence, there were nothing wrong where that party repeated on oath what had been pleaded, the only consideration of the court was to ascertain whether what the party had said on oath was sufficient to discharge the burden of persuasion that laid on him”. [21]I now proceed to deal with the issue as to whether the petitioner or respondent deserves custody of the two children. Section 2 (1) (2) of the Children’s Act, 1998(Act 560) provides “(1) the best interest of the child shall be paramount in matters concerning a child.

- (2) The best interest of the child shall be the primary consideration by a Court...”. [22]The provision above was further emphasized and other factors added in section 45
- (1) (2) of the Children’s Act, 1998 (Act 560) as follows:- “(1) A family tribunal shall consider the best interest of the child and the importance of a young child being with the mother when making an order for custody or access.
- (2) In addition to subsection (1), a family tribunal shall consider
- (a) the age of the child, (b)that it is preferable for a child to be with the parents except where the rights of the children are persistently being abused by the parents,
- (c) the views of the child if the views have been independently given, 6 (d)that it is desirable to keep siblings together, (e)the need for continuity in the care and control of the child, and (f)any other matter that the family tribunal may consider relevant”. [23]In *re Thain (An infant);Thain v Taylor* [1926] Ch 676 CA upheld decision of Eve J who held at page 684 as follows:- “... in as much as the rule laid down for my guidance in the exercise of the this

responsible jurisdiction does not state that the welfare of the infant is to be the sole consideration but the paramount consideration, it necessarily contemplates the existence of other conditions". [24] Again in *Attu v Attu* [1984 -1986] 2 GLR 743-752 Brobbey J (as he then was) held in holding 2 as below: "The principle that in determining whether to grant custody to an applicant or respondent the welfare of the child or children should be the fundamental or paramount consideration had been given statutory backing..... which however provided that the welfare of the infant should be the "Primary" consideration. Whether "primary" meant paramount, or whether the two were used synonymously, both words connoted a situation which admitted of the existence of other factors to be taken into account in resolving issues of custody....." [25] In this case, petitioner wanted custody of the children because he is entitled to medical cover at the university. He also stated that if the children are with Respondent they will be deprived of learning and taking part in the traditional practices that they perform as royals. Petitioner further stated that his wife and his mother will assist him in taking care of the children. 7 [26] Exhibit D, D1 and E show attendance at the University hospital of Atudiku Gracia, one of the children of the parties. Exhibit E shows prescription of medicine, whiles exhibit D and D1 show payment for laboratory test and drugs of the said child. So the medical cover Petitioner talked about is not clear. If really there is medical cover for the children petitioner would not have paid for laboratory test and drugs as shown in exhibit D and D1. If the argument was that there was a refund or there will be a refund (which is not on record) there should be another document showing that when Petitioner made expenses at the hospital he was refunded or will be refunded. [27] Apart from what was observed above, Petitioner tendered exhibit J which is the photocopy of the National Health insurance (NHIS) Cards of the two children. It therefore stood to good reason that the children cannot attend the hospital for free without holding or having registered under the NHIS. This being so, I do not see the genuineness of Petitioner's medical cover argument. [28] Petitioner's assertion that the children will be deprived of learning and taking part in the traditional practices they perform as royals is not well founded. The issue of the welfare of the children has nothing to do with chieftaincy matters. Moreover, Petitioner failed to demonstrate how the children will be deprived in the face of opportunity for access of the children to him. [29] Petitioner's reliance on third parties as the people who will assist him to take care of the children is questionable. This shows his unpreparedness to provide proper care of the children. It was held in *Aikins v Aikins* [1979] GLR 223 as follows: "...I do not think I should give custody to a parent whose purpose is to deliver the children to another." 8 [30] Respondent has shown that she is now a teacher. She did not intend to live in Kumasi but due to maltreatment and beatings she was subjected to by petitioner. To substantiate this, Respondent tendered exhibit 1 showing that she was assaulted by Petitioner. [31] Respondent made an allegation in her evidence in chief that the children were having sexual intercourse with each other at the time they were in the custody of petitioner. Respondent however did not plead this fact to enable Petitioner respond appropriately in his reply. She also failed to call her witness to corroborate what she stated. The Social enquiry report did not also disclose any interaction with the children regarding the children's sexual relationship. However under cross examination of Respondent by

petitioner the following transpired: Q. You cannot tell the court how the children were being treated. Not so. A. I can tell. Because people saw them. Q. So your evidence is based on hearsay. A. No the children themselves told me they were having sex with each other. Q. You never saw the children having sex with each other. A. That is correct. [32]As a tribunal of fact, although Respondent did not prove her allegation, I had an opinion that we would not gloss over this sensitive matter which could one day lead these children to criminal prosecution. So we invited the children and below are what they stated: Leger Webakoba A. Balinia: We now live with our mother. When we were with our father in Navrongo I and my sister once had sexual intercourse. It has been a long time. It was my sister who reported me to my mother. Since then we never engage in such 9 act. I would like to stay with my mother so that I can learn cooking and other house hold chores. Gracia Welam A. Balinia: I like to stay with my father because my brother beats me all the time. I cannot remember having sexual intercourse with my brother. The above exercise is in line with section 45(2)(c) and section 37 of the Children's Act, 1998 (Act 560). It was provided under section 45 that a family tribunal shall consider the views of the child if the views have been independently given. Section 37 also provides that the proceedings of the family tribunal shall be by enquiry and not by adversarial procedures. [33]Since any sexual activity between brother and sister is punishable under our criminal Act, it was prudent on the part of Respondent who had noticed it early and prevented these children from the said act, to act the way she did by taking them away from that environment where they were engaging in the alleged conduct. These children needed proper monitoring to enable them shy away from the said act which may one day land them into trouble. [34]On the totality of evidence before me I find as fact that: (a)Petitioner does not have absolute control over the children when they were with him; the children were rather under the control of their grandmother and step mother. (b)The children had intercourse with each other under the roof of petitioner but Petitioner pretended not to know about it. (c)The Petitioners claim of medical cover for the children has not been proved. (d)Both petitioner and Respondent are gainfully employed. (e)The presence of the children with Respondent cannot deprive them of learning royal traditional practices. 10 (f)The Social enquiry report does not interrogate the crucial issue as to whether the children have been having intercourse so I am unable to accept its recommendation that custody may be given to petitioner. [35]I therefore hold that the Respondent has demonstrated that she is in a better position to give the children proper monitoring and care they deserve. [36]In the result I hereby grant custody of the two children to Respondent. Petitioner is granted access to the children during school vacations. [37]No order to cost. SGD..... HW FAMOUS YAO AMANYO (DISTRICT MAGISTRATE) ANTHONY AWIAH I agree ROSEMARY KADUA AWIAH I agree REPRESENTATION NO LEGAL REPRESENTATION FOR PARTIES. 11 12

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