

TANZANIA / JUDGMENT

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1 January 1971

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- / 00 IN THE HIGH COURT OF TANZANIA ATMWANZ (PC) CIVIL APPEAL NO. 1 OF 1975
(From the •decision of the District Court of Mwariza at MWANZA in Civi*Appeal. No. 13
Before B.D. Chipeta Esq., oo . o . o . 0 00000SoRoMo Mwana Urban Pr4 Court C.0
54/74) .UGUSINC MREMA..., •••• 0 0000 0000 000 0 0 000000000 OAPPELLANT versus
JUDG:ENT. • KATITI. A, J.: •meaeilantAuguWeMrema .ues.si-]ly.sued .the.eponefl. in Mwanz
Urban Primary Court for custody , of a child born ou- Qf wed- lock but iesultant from
concubinary , cohabitation) of the part.es. f'he Primary Court unanimously found in favour
of the appellant0 Tb1p, res- oorident aggrieved, soi'ht to and actually appealed to he District
Court against the decision of the 'rimary Curt. The District Court cfter a careful
consideration of the case allowed -te appoa wth costs against the fespondent. The appellant
çbvously aggrieved seeks to appeal against the judgment of . the DistrictCourt. The
appellant's groud of appeal have received deserved consideration and I am equally
indebted to the able arguments of the learned defence counsel Mr. Tukunjoba. A
recapitulation *f the evidence in this case is perhaps necessary. The faces a.re short and
straiht-forward. The appellant and the responden.€.'rnet' . andstruk..1OvebëtWeefl them and
lived in love together for a periodofyars, Their love was blessed with a chii, the object of
these proceedings.. The appellant contended in the Primary Court that he should be given
custody of the same. From the available record it could not be said that the parties did go
through any ceremony of marriage - either customary, civil or Islamic. In such a situation
the child so born cannot be said to have been in wedlock. ,The parties association can only
be as was described
- i. concubinage association. Since it is on record that both parties agree that the child was orn
of them, and therefore the father known then Rule 178 of the Law of Persons G.N. 279/63
applies. This rule provides:- "Children hbt born in wedlock biong to their maternal family
i.e., to their mother's father." However if the father of the child is known as is the position in
this case then that father has the right to legitimise the child. In deciding this he has two
options - 1.3. (1) by marrying the mother or
- (2) by payment of Shs0 100/= to the girl father before the child is weaned. -2- \.nd as to who has
the custody of the child so dealt with as above and as of course provided by rule 181 A an ,B
is also provided by rule 181

(c) thus:- "The place where the child is brought up shall be agreed by its father and mother or if they cannot agree it will be fixed by the order of the Court. In any case the father shall be responsible for the maintenance of the child." In this case it was contended, by the learned defence Counsel the appellant has not effected legitimation either by the child's mother or by payment of Shs. 10,000, to the mother's father. In this event rule 181(c) would not apply and the child remains as provided by rule 178 quoted above, " - The appellant contended in ground No 4 that having stayed together for 8 years the marriage should be presumed under section 160 of the Marriage Act 1971. As was pointed out this is a rebuttable presumption and as the appellant himself points out the respondent having sent the child home without the appellant's sanction one is tempted to conclude that no marriage was ever contemplated by the parties at all and there is therefore no basis for the presumption. "It is not only the number of years that matter but also circumstances must show that the parties have acquired the reputation of husband and wife. On record I see nothing of the kind. -- The appellant further argues that the District Court erred in applying customary law to the situation without regard to the provisions of sub-section (2) of Section 165 of the Marriage Act 1971, With due respect while I do commend the appellant for his efforts in this appeal, but where the law cited is clearly misconstrued and misapplied, this Court has to say so. The above cited saving subsection is not applicable to the situation in point. In conclusion and on the above grounds this appeal is bound to fail and it has so failed and therefore dismissed with costs. .. W. KATITI Ag. JUDGE --

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