THE REPUBLIC OF UGANDA

IN THE REPUBLIC OF UGANDA AT KAMPALA

CASE NO 0037 OF 2003

PETER DDUNGU MATOVU ..... PETITIONER

VERSUS

DOROTHY DDUNGU MATOVU..... RESPONDENT

28th June 2004

BEFORE: HON. MR. JUSTICE JBA KATUTSI:

JUDGMENT:

This is an appeal against part of the decision of a Magistrate Grade 1 Her Worship BAINE – OMUGISHA seating at Mengo on the 25/06/2003.

The Appellant here was the petitioner before the lower court. He filed a petition for Judicial Separation Orders on the 2/6/1999 against the respondent on grounds of desertion. In the same petition appellant sought an order of custody of the children of the marriage.

Four issues were left to court for determination, viz;

1. Whether the petitioner is entitled to a decree of separation.
2. Which of the parties is entitled to custody of the children.
3. Who of the parties should maintain the children; and
4. What visitation arrangements should be made for the non custodial parent.

At the trial the following facts were admitted, viz;

1. That the parties profess the catholic religion.
2. That they were lawfully married at Namagunga Parish.

3. That they lived together at Namagunga, Lubiri and Wandegeya.
4. That they have four children together namely: ANTHONY YAGENDA MATOVU, JOSEPH MATOVU SIZOOMU, STEVEN MATOVU ZILITWAWULA and RITA NAIGA BASILIKA.

The respondent cross-petitioned on the grounds of adultery and constructive desertion.

In her judgment the learned trial magistrate found for the cross-petitioner now the respondent and awarded custody of the children to her. Hence this appeal.

Only one ground has been argued on this appeal. This is that:

> "The learned trial magistrate erred in law and fact when she granted custody of the four children to the respondent."

From the bar, the court was informed that the appellant has no interest in the custody of the eldest son Anthony Gyagenda Matovu. Before me, Mr. Balukuddembe learned counsel for the appellant complained that the learned trial magistrate refused to have the three children before for purposes of ascertaining their individual wishes. Mr. Kabito contended that having the children before her would not have served any useful purpose because appellant who was staying with them had had them brain washed against their mother the respondent.

I proceed now to inquire whether this court should interfere with the order made by the learned trial magistrate.

This is a very unfortunate case involving two highly educated individuals who have failed to lead a happy marriage. The appellant is said to be a lecturer at a medical school while respondent is a holder of a "Diplome" in Journalism and Mass Communication from the University of Fribourg which Makerere has equated to a masters Degree of that renown university. It would appear that with all their learning, they have not been acquainted with the writings of BOWLBY (1951) and (1973) and others who regard disruption of parent – children relationship as severely damaging to children. But that is a by-the-way.

It is trite to say that the expression 'custody' in relation to children theoretically encompasses more than "care" and "control". It includes power to make decisions on important matters of the child's education and upbringing. Hence the need for courts to be cautious before awarding an order of custody to either of the two claimants.

Throughout the civilized world, in making decisions about custody of children, it is an acceptable principle that the court is to treat the welfare of the child as paramount. The welfare principles have received statutory recognition in The Children Act (Cap 59) Laws of Uganda, where in section 3 it is stated:

> "The welfare principles and the children's rights set out in the first schedule to this Act shall be the guiding principles in making any decision based on this Act."

Custody of children is provided for in section 73 of the Act. Paragraph 1 of the first schedule to the Act provides as follows:-

> "Whenever the state, a court, a local authority or any person determines any question with respect to:
>
> (a) the upbringing of a child; or
>
> (b) …….

The child's welfare shall be of the paramount consideration. Paragraph 3 of the said schedule is on the criteria for decision. It provides as follows:

> "In determining any question relating to circumstances set out in paragraph 1 (a) and (b), the court or any other person shall have regard in particular to:-
>
> (a) the ascertainable wishes and feelings of the child concerned considered in the light of his or her age and understanding;
>
> (b) the child's physical, emotional and educational needs;

(c) the likely effects of any changes in the child's circumstances;

(d) the child's age, sex back ground and any other circumstances relevant to the matter;

(e) any harm that the child has suffered or is at the risk of suffering;

(f) where relevant, the capacity of the child's parents, guardians or others involved in the care of the child in meeting his or her needs.

In her judgment the learned trial magistrate said:

> "…… when determining the issue of custody of children, their welfare must be given paramount consideration." This

Clearly shows that she was quite alive to the most important principle to be borne in mind. Then she continued:

> "Having borne the above principle in mind, I must point out that much as the petitioner has lived with these children since 1996 and has been the provider of the greatest portion for the financial needs of the children, its only fair, in the interests of the children and of justice that custody of all the four children be and is granted to the respondent."

She was writing her judgment in 2003. At that time the children in question had been living with their father for a period of 7 years. She did not assign any reasons why she was disrupting their stay with their father the main "provider of the greatest portion for the financial needs" of these children. Before making the drastic order that she did, she had to be satisfied in the words of KNIGHT BRUCE V-C in ***In Re Fynn 2 De G & Sam U57 At P474:*** "…….. that the father has so conducted himself, or has shown himself to be a person of such description, or is placed in such position, as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost or suspended – should be superseded or interfered with. If the word "essential" is two strong an expression, it is not much too strong."

During cross-examination respondent said:

"I live with a relative called Mrs. Malo Kweza. We permanently live in the house four people.

1. Mrs. Malokweza
2. Two cousins of mine – Charles and Tofil Malokweza
3. Myself

…… I started living with my auntie when I joined Kampala International University. I have been looking for a suitable house (considering security issue) but have not yet found a secure and decent house and affordable one ……."

That means and can only mean that by the time she was granted the custody of the children, she had no indecent and secure place of abode of her own. Was that in the interests of the children?

Respondent continued: "I stay with my auntie with her consent." What if for one reason or the other her auntie withdrew her consent? What would happen to the children?

When children are of an age to express an opinion (as it appears in this case) to which the court can give sympathetic consideration, they ought to be heard, and their views respected.

Not only that. The policy of maintaining the child's residence has prevailed over counter veiling consideration such as the opinion that young children are better with their mothers then with their fathers. Since the learned trial magistrate did not assign any reason as to why she was disturbing the residence of these children, that order cannot be allowed to stand. These children should have remained where they were as indeed they have dispute the order of the lower court. Let me end by echoing the words of LORD MACDERMONT in ***J.V.C. (1970) AC 668 at P 670***:

> "Some authorities convey the impression that the upset caused to a child by a change of custody is transient and a matter of small importance. For all I know that may have been true in the cases containing data to that effect. But I think a growing experience has shown that it is not always so and serious harm even to young children may on occasion, be cause by such a change. .... a child's future happiness and a sense of security are always important factors and the effects of a change of custody will often be worthy of the close and anxious attention which they undoubtedly receive in this case." I pose here

to observe that that was a case where the court granted custody to the foster parents as against the biological parents!

The sum total of my judgment is that the custody of the three children is granted to the father. There will of course, be reasonable access for the mother, and I trust that it can be arranged amicably in the best interests of the children. As I said earlier on these two individuals are highly educated. Surely they ought to know what is in the best interests of their children.

Each party will bear his/her costs of this appeal and in the court below. I order accordingly.

J.B.A. Katutsi

JUDGE

28/06/2004

Katabarwa for applicant.

Respondent absent but represented.

Nabatanzi clerk.

Judgment read.

J.B.A. Katutsi

JUDGE

28/06/2004