THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CIVIL APPEAL NO. 32 OF 2022

(ARISING FROM CIVIL APPEAL NO. 001 OF 2022)

(ARISING FROM FAMILY CAUSE NO. 001 OF 2022)

BIRUNGI NICHOLAS :: APPELLANT

VERSUS

KAKYO PAMELA :: RESPONDENT

BEFORE HON. JUSTICE VINCENT WAGONA

JUDGMENT

Introduction:

The Appellant brought this Second Appeal against the Judgment of His Worship Kule Moses Lubangula, Chief Magistrate Fort Portal, in Civil Appeal No. 1 of 2022 asking the High Court to set aside the Judgment and Orders of the Chief Magistrate and in lieu thereof, issue Orders:

1. That the Custody Order in respect of the minor, Itungo Wilbroad be set aside and the same be granted to the Appellant.
2. That the Maintenance Order in respect of Birungi Drucilla, aged 19 years be set aside.
3. That Maintenance Orders in respect of the minor, Itungo Wilbroad be varied and substituted to fit the financial means of the parties.
4. That the Respondent pays costs of this Appeal.

Background:

The Appellant and the Respondent are parents of Birungi Drucilla now aged 19 years and Itungo Wilbroad who is currently aged four and a half years.

The case of the Respondent in the Lower Magistrate Grade II Court:

On the 14th day of February 2022, the Respondent who is a mother to both **Birungi Drucilla** and **Itungo Wilbroad** (subsequently cited as **"B"** and **"W"** respectively), filed an application for maintenance in the Family and Children's Court of Kibiito. The Respondent contended that she was singly providing maintenance to **"B"** and **"W"** through hardship as the Appellant married another woman and was not providing maintenance for **"B"** and **"W"**. That the Appellant was a Sub-County Chief in Kiyomba Sub County in Bunyangabo District earning a monthly salary should provide maintenance for **"B"** and **"W"**. That **"B"** and **"W"** could not stay with the Appellant who was hostile against them and had no known home. That **"B"** and **"W"** were unable to provide for themselves with: (a) School fees for **"B"** who was a student at Makerere University Business School (MUBS) offering BBA (b) **"W"** who was aged four and a half years and a pupil in nursery school in middle class. It was the position of the Respondent that she had no stable income at the moment and thus unable to continue maintaining **"B"** and **"W"**. She thus prayed for orders of maintenance against the Appellant and for custody of **"B"** and **"W"**, maintenance arrears, visitation rights for the Respondent and costs of the suit.

The case of the Appellant in the Lower Magistrate Grade II Court:

In response, the Appellant averred that **"B"** and **"W"** were his children with the Respondent with whom he had cohabited for 6 years till 2018 when they developed misunderstandings leading to their separation. That for the time he lived with the

Respondent, he provided for the family since he was gainfully employment as a radio presenter and running other small businesses. That in May 2020, he was appointed a Sub-County Chief and he earned a monthly gross salary of UGX 900,000/= a net of UGX 700,000/=; that the Respondent enrolled **"B"** to university without consulting him and without due consideration to his present financial status. That amidst the small salary, he had other personal needs including looking after his wife and daughter, his ill mother and aging grandmother and was servicing a loan with Centenary Bank with a minimum monthly deposit of UGX 360,000/=. That he was not in position to pay school fees in the way the Respondent desired with his small salary. That he made a contribution of UGX 1,020,000/= as part of tuition for **"D"** an indication that he had not neglected supporting his children despite disagreements. That he had gone to pay school fees for **"W"** and found the Respondent had already paid. That the Respondent operates a clothes selling shop at Fort portal, Mpanga market which was started by the Appellant and he transferred some other stock from his other shop to the said shop. That since the Respondent had demonstrated her incapacity to look after the children despite a stable income, he prayed for custody of the **"W"** and committed to abide by the orders to be issued by court but prayed for visitation rights in the alternative.

The Orders of the Lower Magistrate Grade II Court:

The Trial Magistrate entered Judgment in favour of the Respondent with orders that:

(a) Custody of **"W"** was granted to the Respondent.

(b) The Appellant was to pay Pregnancy maintenance of UGX 375,000/=

(c) Delivery by C-Section of UGX 1.850.000/=

(d) Baby maintenance for four years of UGX 1,500,000/=

(e) School fees so far paid for early bird school for **"W"** of UGX 950,000/=.

(f) The Appellant was also to pay school fees and scholastic materials for **"W"**.

(g) Pay a monthly packaging fee of UGX 326,400/=for **"W"**.

(h) The Respondent was to provide shelter, food and clothes/beddings for **"W"**.

(i) Costs of the suit were awarded to the Respondent.

(j) Maintenance for **"D"** was denied.

The Appeal to the Chief Magistrate's Court:

The Appellant being aggrieved with the decision of the learned Magistrate Grade II, appealed to the Chief Magistrate sitting at Fort Portal. The Chief Magistrate:

(a) Agreed with the Magistrate Grade II that custody of **"W"** was properly granted to the Respondent on ground that she was the one who raised **"W"** single handedly and was the person who had been looking after **"W"**.

(b) Confirmed the award of UGX 5,001,400/= as maintenance arrears for **"W"**.

(c) Confirmed the award of packaging expenses for **"W"** till he completes his education, whose correct sum was UGX 326,400/= but wrongly recorded the amount as 350,000/=.

(d) Directed the Appellant to pay the taxed costs in the lower court.

(e) Directed the Appellant to pay tuition for **"D"** at University.

The Appeal to the High Court:

The appellant being aggrieved with the Judgment and the Orders of the Chief Magistrate lodged this Second Appeal on the following grounds:

(1) **The Learned Chief Magistrate erred in law when he failed to properly re-evaluate the evidence on record regarding custody of the minor thereby occasioning a miscarriage of justice.**

(2) **The Learned Chief Magistrate erred in law when he re-tried and allowed a claim on maintenance in respect of an adult girl now aged 20 years old, Birungi Drucilla thereby occasioning a miscarriage of justice.**

(3) **The Learned Chief Magistrate erred in law when he made maintenance orders against the appellant which are excessive in nature thereby occasioning a miscarriage of justice to the appellant.**

(4) **The learned Chief Magistrate erred in law when he granted maintenance arrears to the Respondent in respect of their 4-and-a-half-year-old son Itungo Wilbroad in the absence of a prior order thereby occasioning a miscarriage of justice.**

(5) **The Learned Chief Magistrate erred in law when he upheld the trial court orders on costs of the suit thereby occasioning a miscarriage of justice.**

Representation:

M/s Mugabe – Luleti & Co. Advocates represented the Appellant while **M/s Kasasa Kiwanuka & Co. Advocates** represented the Respondent. Both parties filed written submissions which I have considered.

Duty of this Court:

This is a second appeal. In **Milly Masembe vs Sugar Corporation (U) Ltd and Another, Supreme Court of Uganda Civil Appeal No. 1 of 2000**, it was held inter-alia that on second appeal, the court was not

required to re-evaluate the evidence in the same manner as a first appellate court would as doing so would create unnecessary uncertainty. It was sufficient to decide whether the first appellate court on approaching its task has applied the relevant principles properly. See also **Francis Sembatya Vs Alport Services Ltd, SCCA No.6 of 1999** and **Banco Arabe Espanol v Bank of Uganda, Supreme Court Civil Appeal No.8 of 1998.**

Consideration of the Appeal:

Ground 1: The Learned Chief Magistrate erred in law when he failed to properly re-evaluate the evidence on record regarding custody of the minor thereby occasioning a miscarriage of justice.

Submissions of the Appellant:

Counsel for the Appellant submitted that Section 3 of the Children Act Cap. 59, provides that the welfare principles and children rights set out in the First Schedule shall be the guiding principle in making any decision in matters involving children. That the same principle was re-echoed **In the matter of Edith Nassazi (An Infant) Adoption Cause No. 9 of 1997** where court emphasized that the paramount considerations in matters of children is the best interests of the children and their welfare. Counsel submitted that the Chief Magistrate erred when he relied on the fact that the infant was not staying with the Appellant to deny him custody. That in **Anne Musisi Vs Hebert Musisi (2008) KALR 594** Court held that the welfare principle of children is paramount and supersedes considerations such as who of the parents has a superior right to the children. It was contended that the

welfare is served better where both parents are involved in the upbringing of the children. Counsel argued that the trial court did not carefully examine the evidence on record and if it had done so, it would not have found the Respondent a fit and proper person to remain in custody of the minor merely on account that she is the mother. That the denial of custody of the minor to the Appellant was in breach of Article 31 of the 1995 Constitution as amended which emphasizes equal rights of both parents. Counsel also submitted that the trial court did not ascertain the wishes of the child by asking the child where he wanted to stay. That the trial court also relied on the report of the probation and social welfare officer who is a relative of the Respondent which report was biased. Further that the Appellant was not given an opportunity to cross examine the Probation and Social Welfare Officer on the said report. That this violated his right to a fair hearing and he cited the case of **Triloknath Bhandari & Anor. Vs. S.R Gautama [1964] 1 E.A 606**to back up his argument. Counsel also pointed out that whereas the learned Chief Magistrate referred in his ruling to the fact that the Respondent sought leave to tender the said report, that there was no record to that effect and Counsel wondered which record the Chief Magistrate referred to since they applied for the same and it was denied.

Submissions of the Respondent:

In response Counsel for the Respondent argued that the trial magistrate properly evaluated the evidence as regards grant of custody of W to the Respondent. That the Appellant did not prove that he had a home and the relationship between the appellant and the Respondent was on and off for the last 20 years and the Appellant did not provide any child support. It was submitted that the Appellant failed to prove that he was a fit and proper person to be granted custody. That the best interest of the minor would be better served if he was left to stay with the

Respondent whom he has known since childhood and given his tender age, the best person to be granted custody was the Respondent. Counsel for the Respondent also submitted that the report of the probation and social welfare officer was not biased and the Appellant did not seek leave to cross examine him and that in matters of children, the procedure is informal and the paramount consideration should be the welfare of the child. Counsel asked court to disallow this ground of appeal.

Consideration of Ground 1 of the Appeal: Whether the Learned Chief Magistrate failed to properly re-evaluate the evidence on record regarding custody of the minor thereby occasioning a miscarriage of justice.

The concept of custody in family causes dates back to the efforts by Nations to create an environment that allows children grow up in a friendly and loving environment. The first effort at a global forum to have an International Instrument that recognizes the rights of children was when the League of Nations was created after World War I. On 26th September 1924, the League of Nations adopted the Geneva Declaration of the Rights of the Child. The import of the Declaration is best brought out in the preamble to the Declaration thus:

'By the present Declaration of the Rights of the Child, commonly known as "Declaration of Geneva," men and women of all nations, recognizing that mankind owes to the Child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed'

The above preamble re-affirmed a duty upon mankind to give the best it has which includes an environment that promotes the best interests of the child. This is ably brought out in the first declaration where it was agreed and reaffirmed by members

thus: *"The child must be given the means requisite for its normal development, both materially and spiritually"*

The above Declaration explicitly brought out the obligation on all people to provide an environment that allows a child to grow both materially and spiritually.

The efforts to protect children were continued after the World War II and the dissolution of the League of Nations and the birth of the United Nations. In 1959, the UN General Assembly adopted the UN Declaration on the Rights of the Child. The 1959 Declaration recognized the Declaration of 1924 by the League of Nations and re-affirmed the continued effort by human kind to offer the best it can to children. The Proclamation to the Declaration captured the need to protect children thus: ***"Proclaims** this Declaration of the Rights of the Child to the end that he may have a happy childhood and enjoy for his own good and for the good of society the rights and freedoms herein set forth, and calls upon parents, upon men and women as individuals, and upon voluntary organizations, local authorities and national Governments to recognize these rights and strive for their observance by legislative and other measures progressively taken in accordance with the following principles"*

The above Proclamation clearly brought the universal need by both society and parents to provide an environment that allows children to have a happy childhood that enables them to enjoy the rights and freedoms guaranteed in the UN Charter.

The efforts to protect the rights of children continued to 1967 during the adoption of the International Covenant on Economic, Social and Cultural Rights where it was indicated under Article 10 of the said Covenant that state parties had an

obligation to protect the family unit and dependent children. Further under article 10 it was elaborately stated that special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. This provision captures the obligations on states to develop measures geared towards protection of children and young persons without discrimination.

The remarkable break through at an international forum with regard to the rights and protection of children is when the UN adopted the Convention on the Rights of the Child (herein abbreviated as CRC) adopted by the UN General Assembly on 20th November 1989 and came into force in 1990.In my view the CRC is the international bible as regards the protection of the rights of children. It is one of the most highly ratified treaties with most State Parties to it having adopted domestic legislation that reinforce its provisions. What is key in the CRC is article 3 that introduced the concept of "best interest of the child" as the paramount consideration in all actions and aspects that affect or relate to children. Article 3(2) of the same Convention imposes an obligation on State Parties to ensure that a child is accorded such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. Article 3(2) in my view clearly engulfs the aspect of custody of children as an aspect within care and protection of children and balancing the interests of parents, guardians and those legally responsible for taking care of children. This article introduces the balancing test when considering custody of children that is between the interest of the child and the rights and duties of parents, guardians or those taking care of children.

In response to its international obligations, Uganda being a signatory to the International Covenant on Economic, Social and Cultural Rights and the CRC, made efforts to domesticate its obligations under international law. The first visible effort is in articles 31 and 34 of the 1995 Constitution of the Republic of Uganda as amended. Article 31 allow person of majority age to marry and found a family with equal rights during marriage and even after its dissolution and article 34 details the rights of children. Sub article 2 of Article 34 is the most relevant in the issue at hand. It states that Subject to laws enacted in their best interests, children shall have the right to know and be cared for by their parents or those entitled by law to bring them up. This provision in my view imposes a strong obligation on both parents and those entitled to bring up children to provide care and a loving environment that allows them to exploit their full potential. Those entitled to bring up children may include parents, guardians, those related to the child or organizations looking after children.

To further operationalize article 34 of the 1995 Constitution, Parliament enacted the Children Act Cap. 59as amended. The Act from the preamble was intended to reform and consolidate the law relating to children, to provide for the care, protection and maintenance of children among other things. Section 3 of the Act sets out the universal consideration in all matters involving children being the welfare and best interest of the child. In ascertaining the best interest of the child reference should be made to Section 3(3) of the Act which sets out some of the considerations to include; (a) the ascertainable wishes and feelings of the child concerned, with due regard to his or her age and understanding; (b) the child's physical, emotional and educational needs; (c)the likely effects of any change in the child's circumstances; (d) the child's sex, age, background and any other circumstances relevant in the matter;(e)any harm that the child has suffered

or is at the risk of suffering; and (f) where relevant, the capacity of the child's parents, guardian or any other person involved in the care of the child, and in meeting the needs of the child. These are some of the considerations that court should take into account in making decisions in relation to children.

In addition to the above, Section 4 (1) provides for every child's right to live with his parents or guardians. Section 6 (1) adds that every parent or guardian shall have parental responsibility for his or her child. This parental responsibility includes parents having custody of their children and this was emphasized by the Hon. Lady Justice Kentra Katunguka in **Sarah Kiyemba Vs Robert Batte, Divorce Cause No. 127 of 2018,** that parents hold the primary right to custody of their children and both parents have similar and equal rights with regard to their child and the same position was emphasized in **Rwabuhemba Tim Musinguzi vs. Harriet Kamakune (Civil Application No. 142 of 2009) [2009] UGCA 34).**

In the event parents are staying apart and court is making considerations as to who to grant custody, court should take into account the spirit of international law whose main aim is to ensure that there is a secure environment for children and the welfare principles as emphasized in the CRC and the Children Act. In my view when court is confronted with the issue of determining custody of children, the fundamental consideration should be the best interest principle. Court should make a detailed scrutiny of all facts presented to it as to who of the parents will better serve the interest of the child in issue. The key concern for court should be finding an environment that is favorable for the child involved to grow in a loving, caring and a non-harmful environment that will allow a child realize his or her full potential. Where the child is in custody of one of the parents, there must be compelling reasons why custody should be given to another parent and not the one

who has been in custody of the issue involved. Such reasons may include for example where the one in custody of the child engages himself or herself in acts of immorality case in point prostitution or pornography or where such a parent pays little attention to the care of the issue involved or where such parent is a convict of charges involving child abuse, then these may be some of the considerations that court may consider is ordering that custody be removed from such parent to another. In the absence of such compelling reasons, it is my view, that the parent who has been in the life of the issue involved and who has been looking after him or her should retain custody of the same in the event of separation of the parents. This is done on account that such parent understands better the needs and weaknesses of such child and the child would not struggle getting accustomed to a different environment than the one he or she has been used to. Financial position and or economic station of life of the parent, his political aspirations and influence in society should not be the overriding factor. Such other parent of means can be ordered to continue paying maintenance while the child is in custody of the other parent.

It is also trite that not in all cases custody of minor should be granted to the mothers. The general societal construction that mothers are the best care givers and thus should be granted custody of children was severed by Article 31 of the Constitution that granted equal parental responsibility to both men and women which must be enjoyed without any discrimination. The court must examine and asses the facts of each case carefully before arriving at that decision. In my view there are instances where a father or male relative or guardian may be the best to be granted custody taking into consideration the facts of the case. Courts should guard against being consumed into the discriminatory ideology that mothers or female guardians are the ones who are better placed to be granted custody. Court

must make an independent evaluation of the whole case and the station in life of the child involved and his best interest in determining who to be granted custody.

In this case, the Appellant contended that the trial magistrate rushed an award of custody of **"W"** to the Respondent without a careful analysis of the facts on record. I have considered the evidence on record and the judgment of the trial magistrate. It was admitted by the Appellant that from birth, **"W"** lived with the mother. That even after separation with the Respondent in 2018, **"W"** remained in custody of the Respondent. The Appellant did not adduce any evidence to warrant removing custody of **"W"** from the Respondent to him. He never raised any complaint about the conduct of the Respondent in terms of either mistreating **"W"** or not putting the interests of **"W"** first. The record on the other hand speaks volumes in the view about the Respondent being fit and proper to be granted custody of **"W"**. Since **"W"** was born, he has been in custody of the Respondent who has looked after him materially and even went ahead to pay school fees when the parents separated in 2018. The Respondent has also gone ahead to follow up on the Appellant to provide maintenance for **"W"** who appears to have taken welfare of **"W"** for granted. In comparison with the Respondent, he did not adduce any evidence of how best he can look after **"W"**. He married another woman and they happen not to have a secure home per the evidence on record. His other relatives who would have supported him, that is his mother is sick per the affidavit filed by the Appellant and the grandmother is equally sick. The appellant did not adduce pieces of evidence on which the trial court would base for an order for change of custody from the Respondent to the Appellant. It is also not true that the trial court premised its decision on the report of the probation and social welfare officer in granting custody as erroneously submitted by the respondent. What comes to my mind from the reading of the pleadings is that the Appellant wanted to circumvent

providing maintenance by fronting his own custody of the minor as his saving and winning card.

I thus find after re-evaluating all the evidence as a whole, that the trial Court and the Chief Magistrate rightly evaluated the evidence on record before granting custody of W to the Respondent. In my view, taking into account the best interest of W, his welfare will be better catered for if custody is granted to the Respondent. I therefore find no merit in this ground and it fails.

Ground 2:The Learned Chief Magistrate erred in law when he re-tried and allowed a claim on maintenance in respect of an adult girl now aged 20 years old, Birungi Drucilla thereby occasioning a miscarriage of justice.

Submissions of the Appellant:

Counsel for the Appellant submitted in support of this ground that the trial court rightly declined to pronounce itself on the custody and maintenance for **"D"** who was aged 19 years on account that she was an adult at the time the application was filed.

Counsel for the Appellant faulted the first appellate court (Chief Magistrate) on ground that he re-tried the issue of maintenance for **"D"** yet it was never appealed against by the said order. That if the Respondent wanted to consider the same, she should have included a cross appeal so that court pronounces itself on the same.

Counsel further submitted that section 76 (4) (b) of the Children Act only caters for maintenance for children below the age of 18 years and it was thus illegal for the first appellate court to consider maintenance for **"D"** who was above 18 years.

Counsel also submitted that article 34(2) of the 1995 Constitution as Amended provides for basic education and it was erroneous for the Chief Magistrate to order the appellate to pay university fees for **"D"**.

Counsel also argued that the Appellant has always been willing to support his daughter but that however, his challenge is that the Respondent's financial demands are high and she does not consider his limited financial resources viz-a-viz his family obligation for he has another daughter and wife to look after. That the respondent is not willingly to have a conversation with the appellant over the education of the children and he was not involved in the decision where D was taken to Kampala for University education.

Counsel thus prayed that court be pleased to set aside the order of the Chief Magistrate and allow the appeal.

Submissions of the Respondent:

In response Counsel for the Respondent submitted citing the decision of **Sanyu Lwanga Musoke Vs. Sam Galiwaga SCCA No. 48 of 1995** that an appellate court has a right to consider all the evidence of the lower court and it can make decisions of its own.

Counsel for the Respondent agreed with the Appellant's Counsel that Section 76 of the Children Act limits maintenance to children below the age of 18 years and that the Chief Magistrate did not order for maintenance of D but ordered him to pay her university fees. Counsel for the Respondent cited the case of **Graham Vs. Graham 597 A.2d 355 (App DC 1991)** where it was held that under exceptional circumstances parental support may continue past the age of majority if it is to provide child support for secondary education. It was submitted that under Ugandan traditional laws, it is only after one has acquired the necessary skills and capable of sustaining self that parental responsibility ceases. That it is the obligations of parents to support children who are in school and thus asked court to disallow this ground.

Consideration of Ground 2 of the Appeal: Whether the Learned Chief Magistrate erred in law when he re-tried and allowed a claim on maintenance in respect of an adult girl Birungi Drucilla now aged 20 years old, thereby occasioning a miscarriage of justice.

Who is a child under the law? Article 1 of the CRC defines a child to be a person under the age of 18 years unless the domestic legislations state otherwise. Section 2 of the Children Act gives a similar definition where a child is defined as a person below the age of 18 years.

Does the Children Act apply to persons above the age of 18 years? The long title to the Children's Act provides that it is an Act to reform and consolidate the law relating to children; to provide for the care, protection and maintenance of children; to provide for local authority support for children; to establish a family and children court; to make provision for children charged with offences and for

other connected purposes. In my view the framers of the Children Act envisaged that the Act was to apply to children as per the definition under section 2 of the Children Act. Any action for care and maintenance for someone above the age of 18 years cannot be entertained under the provisions of the Children Act in its current state as doing so would amount to extending the definition of a child which has been accepted globally. I thus agree with the submissions of Counsel for the Appellant that maintenance orders as provided for under section 76 of the Children Act only apply to children as defined under section 2 of the Act.

The fundamental question that follows then is: what happens to those who have turned 19 years but are still in need of care, protection and maintenance or other special needs from their parents? What happens to those who have turned 19 years but are still in need of financial support to complete University education started with support from their parents?

The Children Act may not provide for special circumstances under which parents may be ordered to keep offering support to children upon becoming of majority age. However, the same Act does not bar parental support to children who attain majority age.

In my view, court may invoke Section 33 of the Judicature Act and Section 98 of the Civil Procedure Act that empower the High Court to provide remedies that meet the ends of justice.

Article 10 of the International Covenant on Economic, Social and Cultural Rights elaborately stated that special measures of protection and assistance should be taken on behalf of all **children and young persons** without any discrimination for

reasons of parentage or other conditions. This provision captures the obligations on states to develop measures geared towards protection of children and young persons without discrimination.

Jurisprudence from the Commonwealth and from countries within the East African Community contributes in the development and growth of our domestic jurisprudence and can provide some insights. In Kenya, their current Children Act No. 29 of 2022, under section 35(1) provides that parental responsibility in respect of a child may be extended by an order of the Court after the date on which the child attains the age of eighteen years if the Court is satisfied, either of its own motion or on application by any person, that special circumstances exist with regard to the welfare of the child that would necessitate the making of such extension. Section 35(2) provides that the special circumstances referred to in subsection (1) include cases where the child is in need of extended parental responsibility by reason of special needs arising from severe disability or developmental disorder. The Courts have taken a broad interpretation of special needs to include education. This was discussed by the High Court of Kenya in **Civil Appeal No. 21 of 2018, CM vs. SWA** where the Hon. Justice L.A Achode noted that court may order for a parent to continue giving support even after the child attains the age of majority and such exceptions may include education support.

I am inclined to take the view that the High Court may in exceptional/special circumstances direct parents to continue offering support to children after attaining the age of majority age. The exceptional circumstances may include children with disabilities or development challenges who even after attaining the age of majority may not be able to survive on their own. The next category is for school going

children who attain the age of majority while still in school and it is of utmost importance to give them support in order to complete their education, especially for the phase that started with support from their parents or guardians while they were still under 18 years of age, or was started with the expectation from the beneficiary that the support would continue to the end of the course. These should be considered based on the merits of each case; as an example, it may be required to demonstrate that the parents have the capacity to continue the financial and other support. There is no universal obligation on parents to continue providing support to children upon attaining majority age merely because they are still in school. The facts of each case must be assessed independently. Where a parent has on his own volition made commitment to support the child upon attaining majority age with school fees for university education stops without any justifiable cause, then upon application by such person or parent, the High Court may upon assessing all the facts of the matter direct such parent to continue giving support.

In this case, the Appellant through his affidavit in reply to the application, clearly intimated that he is willing to support **"D"** and even paid UGX 1,020,000/= as part of tuition for **"D"** for the first semester and is still willing to offer her support. The Appellant should not surely stop doing so on the ground that the law does not provide for maintenance to children above the age of 18 years. It would be unfair and unjust at this stage to discontinue parental support for the education of **"D"**, a young adult at the age of 19 years. Both the Appellant and the Respondent should share this obligation and see to it that **"D"** finishes her education.

I find that this is a fit and proper case where this court should order for support or maintenance from both parents for **"D"** to complete her Bachelor of Business Administration at Makerere University Business School (MUBS).

I therefore substitute the order of the Chief Magistrate and direct that the Appellant pays University tuition and all other University dues and academic expenses for **"D"** while the Respondent shall be responsible for hostel fees and other attendant costs for her stay at the hostel. Both parents should work together to see to it that their child **"D"** gets parental and other support and finishes school. This ground partially succeeds.

Ground 3: The Learned Chief Magistrate erred in law when he made maintenance orders against the appellant which are excessive in nature thereby occasioning a miscarriage of justice to the appellant

Submissions of the Appellant:

Counsel for the Appellant submitted that the Chief Magistrate erred when he awarded maintenance of UGX 737,400/= for **"W"**. without taking into account his earnings. That he was a civil servant earning a sum of UGX 900,000/= per month with a wife and a daughter, a mother and grandmother who are ill and need support. That the amounts ordered to be paid are excessive and cannot be afforded by the Appellant. Counsel further argued that Section 76 (7) (a) of the Children Act is to the effect that when making orders of maintenance, court should take into account the ability of parents to afford the same. That the trial court did not take into account this fact thus ended up awarding a sum that is exorbitant.

Submissions of the Respondent:

In response Counsel for the Respondent argued that indeed section 76 (7) of the Children Act mandates courts to take into account the financial ability/means of

either parents in making orders of maintenance. He submitted that the Respondent has been the sole provider of W since childhood until her business was affected by the COVID-19 lockdown. That the school proposed by the Appellant (Buhinga Primary School) was congested and the same was suggested to annoy the Respondent. That it was not true that the Appellant was directed to pay maintenance of UGX 737,400 but rather, he was directed to pay a sum of UGX 326,400. That the appellant receives allowances on top of his salary, as such he can afford to pay the monthly maintenance sum ordered.

Consideration of Ground 3 of the Appeal:Whether the Learned Chief made maintenance orders against the appellant which are excessive in nature there by occasioning a miscarriage of justice to the Appellant

It is my view that parental responsibility is for both parents and both must contribute to the growth and development of the child subject to the financial capacity or ability of either parents in contributing towards maintenance of children (See Section 76 (7) of the Children Act). There is no law that imposes a sole obligation on the male parents to look after the children. Both parents must strive to ensure that their children live and must create an environment that is full of love and peace for the minors to dwell in to ensure healthy child development.

Further to the above in making orders of maintenance, court should not be divorced from the prevailing reality. Courts should pay due regard to the financial standing of the parents and should made orders which can be satisfied given the financial standing of the parent involved. Parents should not be punished for giving birth to children. The orders issued should be commensurate to the parent's

liquidity taking into account that such a parent may have other defendants and needs to attend to.

In this case the monthly salary of the appellant was disclosed during hearing to be a gross pay of UGX 900,000/= and the net pay of UGX 700,000/=. No other additional source of income was pointed at by the Respondent or any allowances as alluded to in the Respondent's submissions. The Appellant also indicated that he had other beneficiaries who derived sustenance from him including a wife, a daughter, his mother and grandmother and these were not disputed by the Respondent. I believe if the trial magistrate and the Chief Magistrate had taken into account all these facts in relation to the monthly earning of the respondent, they both would have arrived at a finding that the sum awarded as monthly packaging is harsh and excessive. In addition, taking into account that the appellant was to pay tuition for **"D"**, it was unfair for court to make such award which in my view is excessive in the circumstances.

I therefore set aside the monthly award of UGX 326,400/= as packaging for **"W"** and in lieu thereof order that the Appellant shall make a monthly contribution of UGX 100,000/= payable with effect from 1st April 2022 until otherwise revised by court given the unique demands of **"W"**.

The argument by the Respondent that the school proposed by the appellant is congested in my view has no merit. What is paramount is for W to go to school.

I therefore direct that both parents agree on a school that is affordable to both of them. In the event they fail to agree on the school, this court directs that W be taken to Buhinga Nursery and Primary School which is affordable to the Appellant.

If by the beginning of the year 2023 the two parents fail to agree on the school that W should attend, the order afore-stated shall become operational, namely, that W be taken to Buhinga Nursery and Primary School which is affordable to the Appellant.

The orders issued by the Trial Magistrate and later confirmed by the Chief Magistrate on appeal shall remain binding and deemed to have been confirmed by this court since they are not contested by the Appellant. The appellant should therefore proceed to pay school fees for W for this term that is ending in December 2022or earlier and onwards.

Ground 4: The learned Chief Magistrate erred in law when he granted maintenance arrears to the Respondent in respect of their 4-and-a-half-year-old son ItungoWilbroad in the absence of a prior order thereby occasioning a miscarriage of justice.

Submissions of the Appellant:

Counsel for the Appellant submitted that court erred in law when it awarded a sum of UGX 5,001,400/= in the categorization of (a) Pregnancy maintenance of UGX 375,000/=, (b) Delivery by C-Section of UGX 1,850,000/=, (c) Baby maintenance for four years of UGX 1,500,000/= and School fees so far paid for early bird school for **"W"** of UGX 950,000/=. Counsel argued that there was no order directing the Appellant to pay such maintenance and thus the trial magistrate and the Chief Magistrate erred on appeal when they made such award.

Submissions of the Respondent:

Counsel for the Respondent argued in response that court is enjoined under Article 126 (2) (e) of the Constitution to administer substantive justice without undue regard to technicalities. That the main purpose of litigation is to try as much as possible to promote justice so that matters in controversy are fairy adjudicated upon and determined and he cited the case of **Baligasiima Vs. Kiiza& others, Misc. Application No. 1495 of 2016.**That the award made was commensurate to the expenses incurred by the respondent and the appellant did not make any contribution towards those expenses. That she attached evidence of such expenses and court rightly awarded the same. That it was not true that the Appellant started a business for the Respondent but instead it was the Respondent who started her own business. Counsel thus prayed that the ground fails.

Consideration of Ground 4 of the Appeal: Whether the learned Chief Magistrate erred in law when he granted maintenance arrears to the Respondent in respect of their 4-and-a-half-year-old son Itungo Wilbroad in the absence of a prior order thereby occasioning a miscarriage of justice.

Article 34 read together with Articles 31 and 21 of the Constitution puts both man and woman on equal footing in all spheres of life including parentage. This implies that both parents have equal obligations to see to it that children are looked after.

Section 5 of the Children Act settles the controversy at hand in providing that:

"It shall be the duty of a parent, guardian or any person having custody of a child to maintain that child and, in particular, that duty gives a child the right to— (a) education and guidance; (b) immunization; (c) adequate diet; (d) clothing; (e) shelter; and (f) medical attention.

(2) Any person having custody of a child shall protect the child from discrimination, violence, abuse and neglect."

The above provision in my view imposes an obligation on the parent, guardian or any person having custody of the child to maintain that child. This duty includes ensuring that the child goes to school, he or she is immunized, he or she is given adequate diet, clothing, shelter and medical attention. This obligation is not pegged on any relationship that one has with a child. What is key, is that if one in custody of the child, Section 5 imposes obligations against such person towards the child and what is key is being in custody of the child. Whether there is an order for maintenance or not, that duty thrives.

It was contended by the Respondent that she was the one in custody of the **"W"** from the time of birth until the date of making the application. This implies that the Respondent was in custody of **"W"** and thus was under a legal obligation to look after him as commanded under section 5 of the Children Act. I have found no law or basis to the effect that if a parent looks after a child, he is entitled to seek recovery of what he or she spent on the child against the other parent. This in my view confirms that the respondent was in position to look after **"W"**. If she needed maintenance from the appellant on ground that he was not offering the same, she would have applied for an order for maintenance to that effect.

The respondent was looking after **"W"** as a parent who was under a legal obligation to do so because she was in custody of **"W"**. Therefore, it was irregular and illegal to seek maintenance arrears where there was no order directing the appellant to pay the same and he defaulted. The child belongs to both and no parent should charge the other for doing something for spending on the child.

I therefore agree with the appellant that the award of UGX 5,001,400/= as maintenance arrears in the categorization of (a) Pregnancy maintenance of UGX 375,000/=, (b) Delivery by C-Section of UGX 1,850,000/=, (c) Baby maintenance for four years of UGX 1,500,000/= and School fees so far paid for early bird school for **"W"** of UGX 950,000/= was illegal. I therefore set aside the same and allow this ground of appeal.

Ground 5: The Learned Chief Magistrate erred in law when he upheld the trial court orders on costs of the suit thereby occasioning a miscarriage of justice.

Submissions of the Appellant:

Counsel for the Appellant submitted that given the nature of the case, it was not proper to award costs. He cited the case of **Prince J.D.C Mpuga Rukidi Vs. Prince Solomon Kioro & other, Civil Appeal No. 15 of 1994** where the Supreme Court held inter-alia that where court is of the view that owing to the nature of the suit, the promotion of harmony and reconciliation is necessary, court may order each party to bear own costs. That since both the Appellant and the Respondent are parents of the issues involved, it was fair not to award costs since it would not promote harmony amongst the two parents.

Submissions of the Respondent:

In response Counsel for the Respondent argued that Section 27 of the Civil Procedure Act provides that costs follow the event and save in exceptional circumstances the same is always granted. Counsel cited the decision of **Trade**

Agencies Ltd Vs. Paphos Wine Industries Ltd (1951)1 ALL ER873 where it was held that the ordinary rule is that where a plaintiff has been successful, he ought not to be deprived of his costs. Counsel submitted that the Respondent struggled from the Probation Officer inBunyangabo for settlement which the appellant ignored and she came to court and thus she was entitled to costs. Counsel asked court to dismiss this ground.

Consideration of Ground 5 of the Appeal: Whether the Learned Chief Magistrate erred in law when he upheld the trial court orders on costs of the suit thereby occasioning a miscarriage of justice.

The general principle is that costs follow the event and a successful party is entitled to costs. However, grant of costs is discretionary. Where it is in the interest of promoting harmony among the parties as was guided by the Supreme Court in **Prince J.D.C Mpuga Rukidi Vs. Prince Solomon Kioro & other, Civil Appeal No. 15 of 1994,** court can order each party to bear own costs.

I believe court's top duty in family matters is to ensure that harmony returns among the disputing parties with a view of creating an environment that favors children. Courts should be reluctant to award costs in maintenance cases because they tend to widen the gap between the disputing parties and in the end the effect goes to the children involved.

I have also looked at the lower court file and there is no taxed bill as held by the Chief Magistrate. What is on record is a bill filed by the Respondent. I have not found any taxed copy. I believe the Chief Magistrate made such an order without proper perusal of the file.

Therefore, in the interest of promoting harmony between the Appellant and the Respondent who are parents of D and W whose main focus should be looking after the W and D, I hereby set aside an order awarding costs by the trial court and order that each party bears its own costs in the trial court.

In totality this appeal partially succeeds with the following Orders:

(a) **That custody of "W" is granted to the Respondent herein as ordered by the trial court.**

(b) **That both the Appellant herein and the Respondent herein are to offer parental support for "D" whereby the Appellant shall pay University tuition and other university dues and academic expenses for "D" while the Respondent shall pay hostel fees and other attendant costs for her stay at hostel, with effect from the date of her admission, including any pending arrears, until "D" completes her Bachelor of Business Administration at Makerere University Business School (MUBS).**

(c) **That the Appellant shall with effect from 1st April 2022, make a monthly contribution towards maintenance of "W" of UGX 100,000/= until otherwise revised by Court.**

(d) **That all the other orders issued by the trial court and confirmed by the Chief Magistrate on appeal shall remain binding on the parties save as directed herein. That is, the Appellant herein shall pay medical bills for "W" at an agreed medical facility, pay school fees and scholastic**

materials for "W" while the Respondent is to provide shelter, food, clothing, bedding for "W".

(e) That both the Appellant herein and Respondent herein shall agree on the school where "W" is to attend starting in the First Term of 2023, or alternatively take him to Buhinga Nursery and Primary School that is stated to be affordable to the Appellant, where the Appellant shall pay all the relevant school dues.

(f) The appellant is hereby directed to pay school fees for "W" for this term that is expected to end in December 2022 or earlier.

(g) An order granting maintenance arrears to the Respondent herein to the tune of UGX 5,001,400/= is hereby set aside as well as the order granting costs to the Respondent in the lower Court.

(h) Each party shall bear own costs of this appeal and in the Courts below.

I so order.

Vincent Wagona
High Court Judge
FORT-PORTAL
11.11.2022