

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 88 OF 2013

OTTO METHODIUS PACIFIC.....APPELLANT

VERSUS

EDYLINE SABRINA PACIFIC.....RESPONDENT

CORUM: HONORABLE JUSTICE A S NSHIMYE JA

HONORABLE LADY JUSTICE SOLOMY BALUNGI BOSSA JA

HONORABLE JUSTICE GEOFFREY KIRYABWIRE, JA

JUDGMENT OF THE COURT

The appellant and respondent were married on June 14, 1997. The respondent filed for divorce in the High Court and sought for orders for dissolution of the marriage on grounds of adultery and cruelty; a grant of share in the matrimonial properties at Plot 427 Naalya Housing Estate and Najeera and the household items; alimony in the sum of USD 10,000; and other orders as the court might deem fit. The respondent opposed the petition and in his cross petition sought among others orders for divorce and for the children of the marriage, a girl then aged 12 years and a boy aged 7 years and 10 months, to spend equal time with each of the two parents.




In the respondent's reply to the cross petition, she stated that she had no objection to joint custody.

The learned trial Judge granted a decree in favour of the respondent and granted her full and sole custody of both children restricting the appellant

to access the children once a month in a judgment dated 7/2/2013. The appellant being aggrieved with that order filed this appeal on the following grounds;

- 5 1. *The learned trial judge erred in law and in fact in his application of the welfare principle to the circumstances of the case resulting in him wrongly awarding sole custody of the children Evander Pacific and Evangeline Pacific to the respondent.*
- 10 2. *The learned trial judge erred in law and in fact when he failed to properly evaluate the evidence and pleadings on record and wrongfully exercised his discretion to award sole custody to the respondent and restricted the appellant access to the children to only once a month.*
- 15 3. *The learned trial Judge erred in both law and fact and wrongfully exceeded his jurisdiction when he disregarded the contractual agreement between the appellant and the respondent and Bank of Africa (U) Limited and ordered that the loan be fully repaid within one year from the date of judgment.*

The appellant asked for orders that the judgment be set aside in part and for the following orders;

- 20 (a) The order awarding sole custody of the children to the respondent be set aside.
 - (b) The order restricting the Petitioner's access to the children to once a month be set aside.
 - 25 (c) The appellant and respondent be awarded joint custody of the children.
 - (d) The petitioner be granted weekly access to the children or such access as the Honorable Court may deem reasonable.
 - (e) The order directing that the bank loan be repaid within one year be set aside.
 - 30 (f) Costs of the appeal.
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Mr. Peter Nkurunziza appeared for the appellant and Mr. Elijah Wante for the respondent.

Submissions of Counsel for the appellant

5 Counsel abandoned ground 3 relating to the loan. He stated that it had been overtaken by events. He then argued grounds 1 and 2 together.

10 Counsel relied on the decision of the Supreme Court in the case of **Ugandan Development Bank v. National Insurance Corporation and G M Combined SCCA No. 28 of 1995**, which quoted the case of **Mbogo v Shah [1968] EA 93** as authority for the proposition that a first appellate court may interfere with the exercise of discretion. He further submitted that it was a misdirection on the part of the learned trial Judge to fault the appellant as being unworthy of custody of the children because he applied for joint custody. He relied on **Articles 31 (5) and 34** of the **Constitution** and argued that the said provisions seek to permit children
15 to be in the care of their parents unless there are clear grounds that it would not be in the best interests of the children.

20 Counsel also cited **Section 3** of **the Children Act** which emphasizes the welfare principle and children's rights set out in the **First Schedule** to the Act and argued that the welfare principle should be the guiding principle in making any decision based on the **Children Act**. He relied on the case of **Rwabuhemba Tim Musinguzi v. Harriet Kamakume Court of Appeal Civil Appeal No. 142 of 2009** to underscore the importance of **Article 31** in giving equal rights to both parents to care for their children unless there are clear grounds that it would not be in the best interests of
25 the children. He concluded that the learned trial Judge did not properly evaluate the evidence before applying the welfare principle and did not properly exercise his discretion.

30 The appellant was a good father and there was no evidence disentitling him from having custody of the children. Counsel also submitted that the appellant's evidence did not show any fact disentitling him from having

5 custody of the children. The learned trial Judge looked only at the age of the children and did not describe the appellant. The evidence on record indicated that he had a lot of time for his children. He did not evaluate any evidence on the breakdown of marriage. He only considered which parent was suited to have custody without considering what the best interest of the children was. He did not apply the criteria for the welfare of children set out in the **1st Schedule of the Children Act**. Visiting access once a month without giving reasons is a manifestation of misdirection.

10 On the authority of the cases of **Atwal v. Amrit [2011] 2 EA 20**, and **CX v. CY (Minor, Custody and Access) 2006, 4 LRC 1**, he asserted that joint custody was appropriate. He prayed that this court reviews the evidence and authorities, allow the appeal, set aside the order of the High Court granting sole custody to the respondent, and substitute it with an order granting joint custody to both appellant and the respondent. He also
15 prayed for costs both in this Court and the High Court.

Submissions of Counsel for the respondent

20 Counsel submitted that the learned trial Judge evaluated the evidence and properly addressed the guiding principles relating to the welfare of the children as enshrined in **section 3 of the Children Act**, the **First Schedule** to the same Act and **Article 31 of the Constitution**.

25 He submitted that the learned trial Judge looked at the character of the two parents, especially demeanour, occupation, and time available to each parent. He was very much impressed with the character of the respondent and concluded that the respondent was best suited to have custody of the two children. Children need parental care and attention. The girl being
30 feminine needed a mother because of her age and feminine matters would be better handled by mother instead of a man. Even the boy was of very tender years and needed motherly care. He gave the appellant restricted access to the children. The decision was not arbitrary but based on evidence.

On joint custody, he submitted that it presupposes cooperation and communication between the parties. The appellant and respondent neither corresponded nor talked.

5 The learned judge found that the appellant was a manager at National Water and Sewerage Corporation and therefore could not even find time by nature of his job to look after the children. Counsel submitted that the state of affairs between these 2 parties is not conducive to having joint custody as the two are not on talking terms. The appellant does not pick the respondents' calls and does not talk to her which makes it impossible
10 for them to have joint custody.

On restricted access, once a month is reasonable time, considering all the circumstances of the case. The learned trial Judge's orders should be upheld and the appeal should be dismissed with costs.

Applicable law

15 ***Article 31 Constitution***

(4) It is the right and duty of parents to care for and bring up their children.

(5) Children may not be separated from their families or the persons entitled to bring them up against the will of their families or of those persons except in accordance with the law.

20 ***Article 34(1) Constitution***

Subject to laws enacted in their best interest, children shall have the right to know and be cared for by their parents or those entitled by law to bring them up.

Children Act

Section 3. Guiding principles

25 *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.*

Section 4. Child's right to stay with parents

(1) A child is entitled to live with his or her parents or guardians.

(2) Subject to subsection (1), where a competent authority determines in accordance with the laws and procedures applicable that it is in the best interests of the child to separate him or her from his or her parents or parent, the best substitute care available shall be provided for the child.

5 **Section 5. Duty to maintain a child**

(1) 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) Immunisation;

(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

First Schedule

Guiding principles in the implementation of the Act.

1. Welfare principle.

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 administration of a child's property or the application of any income arising from it,


The child's welfare shall be of the paramount consideration.

2. Time being of the essence

In all matters relating to a child, whether before a court of law or before any other person, regard shall be had to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child.

3. Criteria for decisions

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_

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- (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;*
- 5 (d) *The child's age, sex, background and any other circumstances relevant in the matter;*
- (e) *Any harm that the child has suffered or is at 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.*

10 **Section 4. Rights of the child**

A child shall have the right_

- (a) *To leisure which is not morally harmful and the right to participate in sports and positive cultural and artistic activities;*
- (b) *To a just call on any social amenities or other resources available in any situation of armed conflict or natural or man-made disasters;*
- 15 (c) *To exercise, in addition to all the rights stated in this Schedule and this Act, all the rights set out in the United Nations Convention on the Rights of the Child and the Organization for African Unity Charter on the Rights and Welfare of the African Child with appropriate modifications to suit the*
- 20 *circumstances in Uganda, that are not specifically mentioned in this Act.*

United Nations Convention on the Rights of the Child 1989

Article 18(1)

State parties shall use the best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.

25 *Parents, or as the case may be, legal guardians have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their concern.*

Duty of the first appellate court

This court as a first appellate court has a duty to reconsider the entire

30 evidence on record and subject it to a fresh and exhaustive scrutiny and make its own conclusion, bearing in mind that it did not have the opportunity to hear or see the witnesses and should make due allowance in that regard (see ***Pandya v. R [1957] EA 336; Ongom and Another v.***

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Francis Binega Donge, SCCA No. 10 of 1987; Kifamunte Henry Vs Uganda SCCA No. 10 of 1997.

Rule 30 of the Court of Appeals Rules also in essence reflects the same principle. It provides;

5 **30. Power to reappraise evidence and to take additional evidence.**

(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may_

(a) Reappraise the evidence and draw inferences of fact; and

(b)...

10 We also recall that an appeal against the exercise of discretion of a trial judge in matters concerning children is considered on similar principles as any other appeal. It will only be interfered with where the discretion was exercised on wrong principles or where the decision is manifestly wrong (see **Atwal v. Amrit [2011] 2 EA 20** Court of Appeal Kenya and **CX v. CY [2006] 4 LRC** Court of Appeal of Singapore). This court will therefore
15 only interfere where the exercise of discretion was wrong or where the court plainly applied the wrong principles.

This court is also enjoined, by the provisions of the **Children Act, Section 3** to apply the welfare principles and the children's rights set out in **the**
20 **First Schedule** to this **Act** as the guiding principles in making any decision based on this Act. The welfare principle as stated therein is that whenever the State, a court, a local authority or any person determines any question with respect to the upbringing of a child, among other things, **the child's welfare shall be of the paramount consideration.**

25 The Supreme Court has reaffirmed this principle in the case of **Re M (an infant) Adoption Cause No. 9 of 1995** that in all matters relating to children, the welfare and best interests of the child shall be paramount.



This court in the case of ***Rwabuhemba Tim Musinguzi v. Harriet Kamakume Civil Application No. 142 of 2009***, has also made a similar statement that;

5 *Parents have a fundamental right to care and bring up their children. This is a constitutional right. Of course it is not considered in isolation. The welfare of the child is a consideration to be taken into account, and at times may be the paramount consideration. A parent can only be denied the right to care for and raise her children when it is clear and has been determined by a competent authority, in accordance with law, that it is in the best interest of the child that the child be separated from the*
10 *parent...both parents have similar and equal rights with regard to their child.*

Therefore, this Court considers that in resolving the issues in this case, the welfare of the children is the first and paramount consideration.

Resolution of the issues

15 Counsel for the appellant has faulted the learned trial judge for exercising discretion improperly in granting custody to the respondent and for failure to evaluate the evidence.

It is trite law that in deciding custody and issues of upbringing, the court must have regard to the welfare of the child as the first and paramount consideration.

20 Furthermore, the considerations for granting custody lie in statutory provisions, case law and the particular facts of each case. The ***Constitution***, the ***Children Act*** and international law emphasize the right and duty of each parent to care for and bring up their children. They also emphasize ***Article 34(1)*** of the ***Constitution*** on the right of children to
25 know and be cared for by their parents or those entitled to bring them up. This has prompted countries like England and Australia to abolish the concept of custody.

In Uganda, parents have a fundamental right to care and bring up their children. ***Rwabuhemba Tim Musinguzi v. Harriet Kamakume***
30 ***(supra)***

The Singaporean Court of Appeal of Singapore in the case of **CX v. CY [2006] 4 LRC** has given a clearer definition of custody. It has stated thus;

5 **Custody as a general concept is divided into two smaller packages, i.e. 'care and control' and residual 'custody. In this context, residual 'custody' is no longer the same concept as our general understanding of custody. Instead, residual 'custody' is the package of residual rights that remains after the grant of a care and control order that dictates which parent shall be the daily caregiver of the child and with whom the child shall live. To put it**
10 **simplistically, 'care and control' concerns the day-to-day decision-making, while residual 'custody' concerns the long-term decision-making for the welfare of the child. As was appropriately summarises by Anthony Dickey in Family Law 3rd ed. 1997, pp. 326-327:**

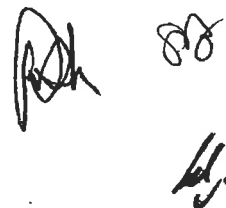
15 **'At common law, care and control concerns the right to take care of a child and to make day-to-day, short-term decisions concerning the child's upbringing and welfare. Custody without care and control (that is, custody in its narrow sense) concerns the right to make the more important, longer-term decisions concerning the upbringing and welfare of a child.'**

20 Guided by the above definition, we consider that custody is not only about care and control and access. It also involves the right to make long term decisions like education, religion, major healthcare decisions and others relating to a child.

On the custody orders relating to the two children, the learned trial Judge had this to say;

25 **It is very clear from the petitioner's pleadings that she did not seek an order for the custody of the children. That alone would have disqualified her or settled this matter of custody. For a person is supposed to stick to his or her pleadings. (see Talikuta v. Nakendo [1979] HCB 276.**

30 **However, for some unknown reasons, the respondent does not trust himself fully in the area of custody of his own children. For that reason, his pleadings and evidence clearly show that he prefers joint, equal custody for the two children (i.e. between himself and the petitioner).**

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Bearing in mind the rather confusing state of affairs above and the existing problems in the petitioner's and the respondent's home, Court has this to say: it seems the best option we have in this area of custody for the said children is the welfare principle.

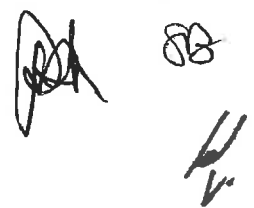
5 This Court will therefore use the above principle in order to determine who should take custody of the said children (See section 3 of the Children Statute (cap 59); and item 1 of the First Schedule to that Statute). Be that as it may, it is not disputed that the children in question are both minors (i.e. the girl is about 12 years old and the boy is 7 years and 10 months old). The
10 boy in particular is very young and delicate. The girl will soon enter that phase of life (i.e. her teens) where she will require close advice in many feminine matters from a reliable person.

For the above reasons, this Court must ensure that it places the two children in very safe hands. Indeed, Court had the opportunity to observe both the
15 petitioner and the respondent as they testified. It thinks that only the petitioner can provide such hand for the two children. For unlike the respondent, the petitioner impressed court as a calm, firm, reasonable, well meaning, persevering and dependable person. Besides by the nature of her business engagements, she has had and is likely to have much more free
20 time to spend with the said children than the respondent.

For the respondent, as a Manager at National Water and Sewerage Corporation must be a very busy individual who is not likely to find much time for the two children. All in all therefore, it would be in the best interests of the said children for the petitioner to have their full custody; and it is so
25 ordered.

First, we observe that it is not true that the respondent did not ask for custody in her petition. In paragraphs 12-14, the respondent requested for custody of both children.

30 Second, we note that the *Constitution* in *Article 31* provides that it is the right and duty of parents to care for and bring up their children and that children may not be separated from their families or the persons entitled to bring them up against the will of their families or of those persons except in accordance with the law.

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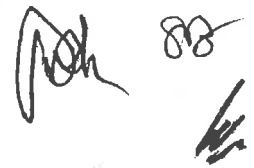
We further note that **Article 34(1) Constitution** provides that children shall have the right to know and be cared for by their parents or those entitled by law to bring them up.

5 Further more, Uganda is signatory to the **United Nations Convention on the Rights of the Child 1989. Article 18(1)** imposes a duty on State parties to use the best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. All United Nations member states, have ratified the Convention except for the United States and South Sudan. Some of
10 the provisions of this Convention have been domesticated into Ugandan law, with appropriate modifications under **Section 4(1) of the Children Act.**

15 These are life long responsibilities, which some countries like the United Kingdom and Australia now impose on parents, having abolished custody orders and acknowledged that it is in the interests of the child to have both parents involved in a child's life.

Taking into account the above jurisprudence, which we have found to be of persuasive value, the Constitutional provisions cited and the **Children Convention** provisions, and considering that the needs of children are the
20 same world wide and that this might explain why the **Children Convention** is the most ratified instrument world wide, we are of the view that the custody order needs to be reviewed, with respect to its meaning and effect.

25 Based on what the learned trial judge observed of the demeanour of the appellant and respondent during trial, he concluded that the appellant was not reliable, and that his hands were not safe enough. With the greatest respect to the learned trial Judge, there was no evidence on which such a conclusion could be based. Indeed in her evidence, the respondent spoke well of the appellant's parenting skills. Her evidence at page 10 of the
30 proceedings was;

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I want my children to be well cared for, safe and happy, their potential maximized. I would love to have their custody and would permit their father to see them. That is a mother's wish, but I can't deny the respondent, he is a good father. However, he has not shown much responsibility in the house. I think I would provide a better environment for the children in the house.

The respondent therefore conceded that the appellant was a good father.

The Singaporean Court of Appeal of Singapore in the case of **CX v. CY (supra)**, whose reasoning we have adopted, has recognised that in any custody proceedings, it is crucial that the courts recognise and promote joint parenting so that both parents can continue to have a direct involvement in the child's life. It has laid down the following principles on joint custody. After noting that; parental responsibility is for life; that the courts should endorse the concept of joint custody, and should not assume that sole custody orders should be made simply because parents display animosity towards each other, the Court in that case observed that;

1. The making of a joint or no custody order encouraged the parent who did not reside with the child to continue to play his or her role in joint parenthood and that joint custody could still be ordered even if there was apprehension that the parties might be unable to agree. A joint custody order only gave the parent the residual right to decide on the long-term matters affecting the child's welfare.
2. The fact that the parties cannot agree during divorce proceedings did not necessarily mean that they would be unable to agree on the future long term interests of the child, particularly where the allegations against each other arose from being unhappy with each other.
3. Where a parent has care and control over a child, and the other parent has access to the child, and is also obliged to pay or contribute towards his or her maintenance, it is appropriate for the child to be placed in their joint custody. It is only when it is evident that joint custody will not work that an alternative order should be made.

4. Courts are no longer inclined to assume that sole custody orders should be made simply because parents display animosity towards each other in the midst of litigation.

The Court relied on its decision in the case of *Chan Teck Hock David v. Leong Mei Chuan [2002] 1 SLR 177 at p. 12*, which it quoted as follows;

It is our opinion that the interest of the children demands that both parents should be involved in determining what is best for them in that regard. While as between the parties there is bitterness, it does not necessarily follow that his would spill over in determining the educational needs of the children. The court should not decree an arrangement which gives an impression to a child that either the father or mother does not care about his welfare. As we have no doubt that both parents have and will continue to have the children's interest at heart. We do not think that there would be any insurmountable difficulties. In the unlikely event that an impasse should arise, the assistance of the court could always be sought.

Viewed from this perspective therefore, sole custody should be exceptional, and should be granted only where for example physical, sexual, or emotional abuse by one parent is established.

We consider that the order given by the learned trial Judge entrusted the total responsibility of care and control of the children solely to the respondent. We have failed to trace in the judgment that portion that gives the appellant access (visitation rights) to the children. The evidence available on record mainly concerned the breakdown in the marriage and sought to establish this fact. The learned trial Judge summed up it up as follows;

Right from (sic) the very beginning, the petitioner's and respondent's marriage was riddled with problems. Those problems, at one point, required Mr. Annada (PW2) to travel all the way from India to Uganda so that he could try to help the petitioner and the respondent to sort them out.

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Unfortunately, fifteen years down the line the above problems persist. In fact they have turned into big family issues. For presently, there is total breakdown of normal life in the petitioner's and respondent's home.

5 For example, although the two (i.e. the petitioner and respondent) live under the same roof, they do not sleep in the same bed-room. They do not talk to each other; and have not had sexual relations with each other for years.

According to Mr. Annada (PW2), even the petitioner's and respondent's children are suffering in the above confusion. For as one parent tells them to do this, the other countermands the instructions.

10 It is apparent from the above that the parties in this case were unhappy with each other. The confusion in the home concerning the children was a creation of both the appellant and respondent according to PW2. When one parent said one thing to the children, the other parent said another. There was no communication between the two.

15 Be that as it may, the decision to give sole custody to the respondent with minimal access/visitation rights to the appellant amounted to excluding the appellant from the upbringing of his children, without legal basis for doing so and without evidence that he was not suited for the job. The visitation rights could not even qualify as reasonable access. The test should not be
20 which parent is best suited to be granted custody but **what is in the best interests of the child** (see the case of *Atwal v. Amrit supra*).

25 The learned Judge did not give reasons why he gave such little time to the appellant with the children, even during holidays, when the evidence pointed to the fact that both parents love the children. The time and opportunity given to the appellant to be with the children is so little that no meaningful input in their upbringing or bondage with them children can take place.

30 As the appellant had requested for joint custody and the respondent did not oppose it in her evidence, the learned trial judge should have considered it. A court should not intervene unnecessarily in the parent-child

relationship where there is no actual dispute between the parents over any serious matters relating to the child's upbringing.

5 No investigation was made on the workability or impossibility of a joint custody order. The learned trial judge based his decision on speculation on what might be, based on the demeanour of the parties at trial. There were no exceptional circumstances established to warrant sole custody. Grant of a sole custody order was therefore misdirection and a misapplication of the welfare principle.

10 Finally, the learned trial Judge decided not to seek the views of the children in the matter. At page 44 of the record, Counsel Kawuma asked whether the children could have a say in the proceedings. Mr. Nkurunziza responded that he would abide by the court's decision on the matter. The appellant then stated;

15 **I am opposed to this. The problem is between the 2 of us. We should protect the children and get them out of this disagreement.**

The learned judge then stated as follows;

Let us leave out the children, I believe with or without them court will not be unable to make the right decision.

20 We would like to underscore the requirements of the **First Schedule** to the **Children Act**, particularly **Rule 3** that concerns the criteria for decisions. It provides;

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_

25 ***(a) The ascertainable wishes and feelings of the child concerned considered in the light of his or her age and understanding;***

In our considered opinion, the learned trial Judge should have proceeded to determine, in accordance with the above provisions, whether the children's level of maturity enable each of them to have their wishes considered, based on independent reports e.g. from probation and welfare

officers. Nothing of the sort was done. We consider that this was an error on his part.

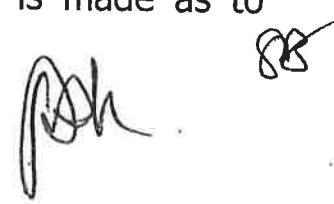
Conclusion

5 Based on the above, we therefore conclude that the learned trial Judge exercised his discretion wrongly when he misapplied the welfare principle to the circumstances of the case resulting in him wrongly awarding sole custody of the children to the respondent. He also failed to properly evaluate the evidence and pleadings on record and wrongfully exercised his discretion when he unduly restricted the appellant's access to the children to only once a month.

10 In the result, the appeal is allowed. We therefore set aside the trial judge's order granting sole custody to the respondent and replace it with an order of joint custody to the petitioner and respondent. We further make the following orders;

- 15 1. The respondent will take care and control of the children.
2. The appellant is granted access to the children at all reasonable times at least once a week and the children should spend at least one school holiday once a year with the appellant to facilitate his right to care for and bring up his children and the right of the children to be accessed by their father and mother equally.
- 20 3. Both the appellant and respondent are to continue to have direct involvement in the children's lives and to make long term decisions affecting the children's upbringing and welfare in consultation with each other, taking into account the welfare of the children as the paramount consideration.
- 25 4. To reduce acrimony between the parties, no order is made as to costs in this court and the one below.

We so order.



11th
Dated this 11th day of March, 2015

Signed by; 

5 **HONORABLE JUSTICE A S NSHIMYE JA**



HONORABLE LADY JUSTICE SOLOMY BALUNGI BOSSA JA

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HONORABLE JUSTICE GEOFFREY KIRYABWIRE, JA

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