IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO.17 OF 2021

(Originating from the Juvenile Court of Arumeru. Civil Application. No. 15/2020)

NEEMA MNDEME.....APPELANT

VERSUS

SARA SWAI.....RESPONDENT

JUDGMENT

16th May & 17th June 2022

TIGANGA, J.

In this appeal, the appellant who is a biological mother of the child subject to the order of custody, hereinafter referred to as the child, appeals against the ruling and proceedings of the Juvenile Court of Arumeru in Civil Application No. 15/2020, which ruling granted the custody of the child to the respondent who is the paternal grand other of the child. The appeal is contained by the memorandum of appeal putting forward the following grounds of appeal as follows;

i. That, the Hon. trial Magistrate erred in law and facts in rejecting social welfare enquiry report which by then it queried both parties and the child on unfounded excuses.

ii. That, the Hon. trial Magistrate erred in law and in facts for relying on documents (receipts) which were rejected during admission process.

iii. That, the Hon. trial Magistrate erred in law and in facts for the failure to analyze evidence and as a result denied custody of the child to the Appellant. In alternative, the Hon. Trial Magistrate erred in law for failure to consider appellant testimonies and only considered the testimonies of the defendant only in the course of composing his ruling.

iv. That, the trial Magistrate erred in law and fact for denying custody to the appellant (Mother of the child) for the solely reason that she is economically unwell.

v. That, the trial Magistrate erred in law and in fact for failure to make determination on the four (4) framed issues.

The background of this matter is that the respondent filed Civil Application No. 15 of 2020 before the Juvenile Court of Arumeru at Arumeru,

in which the then applicant Sara Swai prayed for custody of the child one *Felchesmi Felician Swai,* her grand child. On 11/12/2020 the Juvenile Court allowed the application and placed the custody of the child to be under Sara Swai, (the respondent in this appeal) who is the child's grandmother.

The appellant Neema Mndeme being aggrieved by the said decision appealed before this Honourable court raising the above listed grounds of appeal.

The appeal was argued orally where the Counsel for the Counsel for the appellant submitted in support of ground number one of appeal, that the trial court disregarded the social welfare report when decided that the custody of the child be under the respondent who is the grand mother of the child.

The counsel further submitted that, disregarding a social inquiry report led to the miscarriage of justice by the trial Juvenile Court, and it is contrary to section 39(1) of the Law of the child Act, which requires a child's opinion on his custody to be taken into account. He also submitted that, Rule 72 of the Law of the child (Juvenile Court Procedures) Rules, GN. 182 of 2016 requires a court in deciding the custody of the child to consider a social

inquiry report. Therefore, in his view, failure to follow the law renders the decision a nullity. He invited this this court to rely on the case of **Daniel Hamilton Mwakio vs Pelagio Masuu Kijuu,** Civil Appeal No. 88 of 2021, High Court Dar Es Salaam, Hon. Kakolaki, J.

He further submitted in support of the second ground of appeal that, the trial court erred in law by relying upon the documents which were denied during the admission process. He further submitted that, the trial Magistrate relied on school receipts to deny the custody of the child to be under the appellant. In his view the which is not admitted as exhibit must not be relied upon as exhibit in the decision. In support of that argument he cited the case of **JICA vs Khaki Complex Ltd**, Civil Appeal No. 107 of 2020.

The while submitting in support of the third ground of appeal, the counsel stated that, the trial Magistrate did not consider the appellant's evidence. According to him, among the evidence which was disregarded was not only the social inquiry report but also the fact that, the moment the deceased was alive he intended to contract a Christian marriage with the appellant, but the respondent did not support such marriage but to the contrary he abused the appellant to be unfit to marry the deceased, the son of the respondent.

She further stated that, the moment her son (the deceased) was alive the said child lived with the appellant, but following the death of the deceased who was the father of the child whose custody was sought, the respondent needs the Child's custody to be under her. All these facts have not been considered by the trial court. Following that non consideration, the counsel asked the evidence be analyzed and re evaluated afresh. In support of that proposition, he cited the case of **Peter vs Sunday Post** [1958] EA 424 that the first appellate Court may revisit the evidence, he prayed the court to buy the same dicta.

The appellant further submitted in support of the fourth ground of appeal which raises the complaint that; it was wrong for the court to deny the custody of the child to the appellant by relying on the ground that, the appellant is poor but also has bad behavior without any justification. He reminded the Court of the principle under section 110 of the Evidence Act [Cap 6 R.E 2019] that he who allege must prove. In this case according to him, there is no proof of bad behavior and the law does not provide that the matter may be denied the custody on the ground of poverty. He cited Joseph **Cyprian Masimba vs Maureen S. Mnimbo**, Civil Appeal No. 55 of 2019.

The appellant further submitted in support of the fifth ground of appeal that, the trial Magistrate did not determine all four framed issues. In his view, the law is very clear under Rule 5 Order XX of the Civil Procedure Code, Cap 33 R.E as interpreted in the case of **Bank of Africa Tanzania Ltd vs Maliana Maghembe Chiwanyi,** Civil Appeal No. 43 of 2021 at page 4. He submitted that failure to consider all issues framed is fatal as the decision has to base on the issues framed.

In reply submission, the Counsel for the respondent replied regarding the first ground of appeal that, the consideration and reliance on social inquiry report is not mandatory. He further submitted relying on rule 73(6) of the Law of the Child (Juvenile Court Procedure) Rules, (supra) which provide that the court can reject the social welfare report upon reasons, provided that it has established reasons for so doing. He cited the case of **Veronica Augustina Shirati vs Issa Ramadhani Kisibo**, Civil Appeal No. 09 of 2020 High Court Musoma, Kisanya, J

He further submitted in disputing the second ground of appeal that, the appellant allegation that the trial Magistrate relied on rejected documents hold no water, since the appellant has not shown the documents he alleges to have been rejected. He also stated that, the respondent via the alleged

documents proved that she is economically capable to live with her child as it is clearly shown at page 15 of the trial court's judgment.

While replying on the third ground of appeal, the Counsel for the appellant submitted that, the trial Magistrate looked and considered the evidence of both parties. By such evidence, the respondent managed to prove that she is capable enough to take care of the child that's why the trial Magistrate ordered for custody to be under the respondent. Despite the fact that the court ordered the custody to be under the respondent, it has also permitted the appellant to have access to the child without disturbing her studies, also there is no proof that the appellant is employed.

While replying to the fourth ground of appeal, the learned Counsel also submitted that, the trial Magistrate gave custody of the child to the Respondent basing on the best interests of the child not otherwise, hence it is as good to say the trial Magistrate did not deny the custody and access of the child to the appellant, he submitted.

Regarding the fifth ground of appeal he replied that, since the issue in dispute was the custody of the child, the Trial Magistrate based upon it but he also considered all other framed issues. In his view, this ground also lacks

merits. In support of his argument, he cited the case of **Sajjad Ibrahim Dharamsh & Anothervs Shabbir Gulamabbas Jivraj**, Civil Appeal No. 42 of 2020

In rejoinder, the Counsel for the appellant rejoined to the first ground of appeal that, under rule 72(6) of the Law of the Child (Juvenile Court Procedure), Rules, (supra) there is nowhere it is provided for the time within which the social inquiry report should be filed, the cited case in that respect is distinguishable, social inquiry report is not mandatory but opinion of the child is crucial in deciding the custody and the procedure to obtain such opinion is through social welfare report.

In rejoining the second ground of appeal, the appellant reiterated the submission in chief on that ground and further stated that, even the respondent party agreed that some documents were rejected but the trial Magistrate relied on them in his judgment. In rejoining to the third ground of appeal, the appellant reiterated that the respondent lacks proof to the poor economic status of the appellant. The appellant further rejoined the fourth ground of appeal, that in determining the best interest of the child the child's opinion is unavoidable. Lastly in rejoining the fifth ground of appeal, we reiterate that the court did not consider all framed issues.

That being a summary of the submission made in support and against the appeal, a close scrutiny of the submissions, I find the second, third and fourth ground of appeal to be raising the complains of commonality, therefore they will be discussed together while the first ad fifth grounds will each be discussed and resolved separately one after the other due to their nature.

Regarding the first ground of appeal, on the glance of the record and arguments making reference to the trial Court judgment at page 15 and 16, at which the trial Court said concerning the social inquiry report;

> *"Regarding the social welfare report as per rule 72(6) of the juvenile Rules(supra) the court herein have decided to depart from the social inquiry report, though the report was not brought herein court in time as scheduled by the court with no reason from the social welfare officer whom has been not attending properly the court as ordered by the court establishing some prejudice feelings to the parties that's not a reason for this court to depart from the said report, the reasons are that the environment the applicant is living, the respondent confesses that she has been living there too with the child after the parties decided to burry their differences, reason for the respondent to leave was not the environment for living that it is surrounded by bars but because the applicant started abusing her.*

The court further stated that, the social welfare inquiry officer did not bother to ask the respondent the documentary evidence to prove her means test it was a mere story with unfounded research."

From the above extract from the trial court's judgment, it is clear that the court departed from such report due to the fact that, the social welfare inquiry officer did not ask respondent the documentary evidence to prove her means test but made a mere conclusion with unfounded research. It is the view of this court that, the issue of the custody of a child lays in compliance of the principle of the child's best interests in the sense that, the one granted the custody of the child must be he with capability of ensuring the best interest of the child which includes but not limited to the basic needs. In line with the aspect of custody, in making sure that the courts is well informed for it to decide on the issue of custody of the child, social inquiry report which encompass the opinion of the child is an unavoidable legal requirement. This court is of the view that, any departure from this requirement must be supported by concrete reasons and if based on the information there must be evidence on how the court obtained the said information. The reasons must be strong and capable of replacing the social

inquiry report. Where the child is capable of expressing independent opinion or must be substituted by the child independent opinion sought and obtained which will be reflected on the record.

In line with the above view of this court, this court cited **Rule 72 of the Law of the Child (Juvenile Court Procedures) Rules GN No. 182 of 2016** which says it all that:

> *"72 (1) where there is a contested application for custody or access, the court may direct the social welfare officer to prepare a social enquiry report' (2) A social welfare officer shall, in preparing the report consult;*
>
> *(a) all the parties to the proceedings separately; and*
>
> *(b) the child separately and if necessary, with the parents or other relevant persons.*
>
> *(3) in providing recommendations for custody or for access the best interests of the child shall be the paramount consideration.*
>
> *(4) the court shall consider the social enquiry report before making a decision on the custody or access.*
>
> *(5) the social welfare officer who prepared the social enquiry report shall make himself available to the court to give evidence, if the court or a party to the proceedings so requests.*

(6) Where a court decides not to accept the recommendations contained in the social enquiry report it shall state the reasons for the non-acceptance."

Section 39(2)(d) of the Law of Child Act, [Cap 13 R.E 2019] requires when considering the issue of custody, the view of the child to be taken into account where the same is independently obtained not a mandatory legal requirement to order the same to be conducted and submitted.

From the above legal position, it is clear that the social inquiry report is not a mandatory legal requirement to order the same to be conducted and submitted. However, it is a settled principle that once it has been prepared and submitted, then the court must consider it. but if the court wants to disregard it, it must give reasons, and in lieu of it, independent views of the child subject to an order for custody must be obtained or the trial court ought to have called the persons that it thought important to address it on such matters which were not addressed in the social enquiry report as the alternative means to gather information which the trial court expected from the social inquiry report. The danger of relying on the Parties' evidence only is that, they might mislead the court so as to achieve what they are contesting for.

In line with the above position established under rule 72 of the Rules (supra), there is also under section 39 of Act, established demand of opinions from the child himself, parents and any other person/ Persons contesting for the custody and the law is very clear that the opinions should be taken separately. The purpose is obvious in engaging the social welfare officer to research and come out with report which will help the court to properly decide where to place the custody of the child.

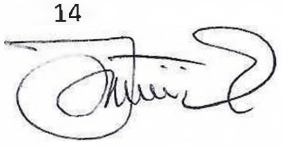
That being the case without considering the social inquiry report or soliciting the independent views of the child the court can not be taken to have properly directed itself in awarding custody. This is the position in the case of **Anyingsye Mlawa vs Tukulamba Kibweja,** civil appeal No. 27 of 2020, the High court at page 8 held inter alia that;

> *"Section 39 (2) (d) of the LCA makes it mandatory that in considering the best interest of the child and the importance of a child being with his mother when making an order for custody it shall ensure that child's views are taken and considered if the same have been made independently. This means that no parent or party should be allowed to solicits, induces or makes promises to the child to give a certain view in his/her favour. The best way to get these views, in my view is to have the social welfare*

involved for making sure that the child is not induced and making him/her comfortable"

From all above discussed principles, it goes without saying that the trial Court failed to use its powers as it is obliged by the law to order the social inquiry officer to make inquiry and give opinion as to the custody of the child. Even when the court realized that there are some faults in the report, it was it is duty bound to reconsider the report as a vital requirement by instructing the social welfare officer on what exactly the court wanted from him via a report. Therefore, I find merit in the first ground of appeal and I allow it.

Regarding the second, third and the fourth grounds of appeal, it is my considered view that they have some commonalities as they raise the complaints of either non considering the evidence of the defence, or failure to evaluate the evidence or relying on the documents which were not admitted in evidence. all these if decided and found meritorious will not yield different results. I hold so because they all talk of the flouting of the procedure all of which have similar result. Having said as I have, I find it to be very un economical to continue discussing them while the first ground has already determined the appeal. This holding is also relevant to the fifth



ground of appeal which raises the complaint for failure to resolve all the issues framed. That said, it goes without saying that, the findings of the trial court can not stand, and since the appeal is allowed for the trial court flouting the procedure which left out important evidence. under the principle in the case of **Mount Meru Flowers Tanzania Limited vs Box Board Tanzania Limited**, civil appeal No. 260 of 2018, the Court of Appeal of Tanzania, at page 11, the 2nd paragraph held *inter alia* that;

> *"The principle that justice is better than speed should be observed because justice is the paramount goal to be achieved"*

That said, the proceedings are hereby quashed and the decision is set aside, the file is remitted to the trial court for retrial before another magistrate of competent jurisdiction.

It is accordingly ordered.

DATED at **ARUSHA**, this 17th day of June, 2022.

J.C. TIGANGA

JUDGE