

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF KIGOMA)
AT KIGOMA**

CIVIL APPEAL NO. 11 OF 2022

(Arising from Juvenile Civil Application No. 7 of 2022 of the Juvenile Court of Kigoma
before Hon. Mwakitalu - RM)

YUSUPH RAFAEL **APPELLANT**
VERSUS
MONIKA YOSHUA..... **RESPONDENT**

JUDGMENT

28/2/2023 & 28/4/2023

L.M. Mlacha,J.

The appellant, Yusuph Rafael is the father of the child Crevason @ Kravera now under dispute with the respondent, Monica Yoshua who is the mother of the child. The appellant and the respondent married in 2016 and lived at Mkabogo village, Kigoma district and later moved to Dar es salaam. The child was born on 19/9/2016. It is said that life was difficult and they decided to return home. They soon quarreled and separated leaving a record of only 9 months in marriage. The respondent returned to her home village (Kalinzi) within Kigoma district but was soon picked by another man who took her back to Dar es salaam. She left with the child. She lived with the child with the other man in Dar es Salaam for some years.

The respondent (PW1), Monica Yoshua and her mother Magdalena Christopher (PW2) said that in December 2021, the child came back to Kigoma for a short visit. The appellant approached PW2 and prayed to go and stay with the child for two days. PW2 allowed him to pick the child for a single day visit. He took the child but refused to take him back.

The appellant (DW1) had a different story. He said that PW2 called him in January 2022 and asked him to pick the child. He came and gave him some gifts. His son told him that he was assaulted by his mother and burnt with fire. He showed him the scars on the back. He added that his son is not ready to live with his mother or grandmother because his mother and his step father were assaulting him.

Each side prayed for custody.

The child was called to express his views and told the court that he preferred to live with his father than his mother. He had this to say during cross examination with his mother as recorded in page 13 of the proceedings:

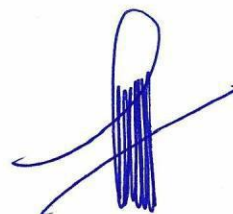
"Between you and my father, it is my father who love me. My father took from Kalinzi. It is 'Mjomba' who took me from Kalinzi. 'Mjomba' loves me. You were torturing me. You were beating me with sticks...you

used to beat me, you burnt me with a hot "sufuria" on my leg. You were torturing me. ... I want to live with my father!" (Emphasis added)

The social inquiry report filed by the social welfare officer of Kigoma (Saada S. Amani) was in favour of the respondent. She had this to tell the court.

- 1) That, the child has been placed in care and custody of different people from time to time by the respondent (now appellant) due to his failure to provide the child with proper custodianship contrary to section 8 subsection (1) (b) of the Law of the child Act (cap 13 R.E 2019).*
- 2) That, the child is under seven years old and she is under the custody of the bachelor father contrary to section 8 subsection (1) (b) of the Law of the child Act (Cap 13 R.E. 2019) and*
- 3) Respondent deprived children right to visit and stay with the applicant contrary to section 26 subsection (1) (c) of the LLA (Cap 13 R.E. 2019)"*

The trial Magistrate, K.V. Mwakitalu SRM found for the applicant (now respondent) basing his decision on the opinion of the Social Welfare Officer, the magistrate handed the child to the respondent without an order for maintenance saying that it was not prayed for. He allowed visitation during



afternoon hours of weekends. Aggrieved by the decision, the appellant has now come to this court by way of appeal.

The grounds appeal may be put as under.

1. That, the evidence of PW1 and PW2 did not carry any weight to support the grant.
2. That, the district court erred to find that the child might have been coached to turn against her mother, the respondent.
3. That, the district court failed to consider the best interests of the child.
4. That, the social inquiry report of social of the social welfare officer was wrongly relied by the district court.

The parties appeared in person and made oral submissions to support their respective positions. The court could also hear the child again who was accompanied by the appellant and his grandfather. It was the submission of the appellant that he took the child because he was beaten and wounded. He was beaten by his mother and the stepfather. He had burnt wounds which were shown to the magistrate. He went on to state that the boy is living with him now and is in standard two (2).

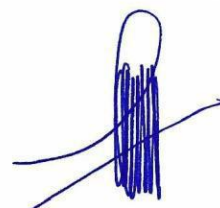
Submitting in reply, the respondent said that she lived with the child in Dar es salaam for all the years. She took care of the child from two months without support of the appellant. She added that her husband loves the child. He used to pay for his school fees, she said. And that, he was picked by the appellant when he visited Kigoma contrary to her wishes.

The child came on the next day and had no advantage of knowing what was said by his parents to me. When I asked the child to tell me the place where he wanted to stay he said;

"I wish to stay with my father"

Thereafter followed a struggle between the parties each trying to convince the court that he/she was the right person to take stay with the child. I will respond to them in the course of discussing the ground of appeal.

Before examining the grounds of appeal, I think it is important to say examine the relevant law in matters of child custody. Apparently, it is agreed that there was no formal marriage between the parties. And if any, it has long been dissolved locally so there is no issue of divorce or division of matrimonial assets. We just have the child and two parents who are struggling for custody of the same. In such a situation and in all other cases



of custody of the child, the court has to be guided by provisions of section 4(2), 37, 26 (2) and similar provisions of the Law of Marriage Act cap.29 R.E. 2019.

The principle of the best interest of the child is reflected in section 4 (2) of the Act which states:

*"The best interests of a child shall be a **primary consideration in all actions concerning children** whether undertaken by public or private social welfare institutions, courts or administrative bodied". (Emphasis added)*

Section 37 has the right to apply for custody. It reads thus:

*"(1) **A parent, guardian or a relative** who is caring for a child may apply to a court for custody of the child.*

(2) The court may, in the same proceedings for the declaration of parentage, grant custody of the child to an applicant on such conditions as it may deem fit.

(3) The court may, at any time, revoke the grant of custody to one person and grant the custody to another, approved residential home or an institution, as it may deem necessary.

(4) In reaching its decision under subsection (2) or (3), the court shall primarily consider **the best interests of the child.**"

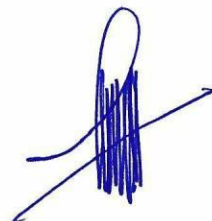
Section 37 must be read with section 26(2) of the Act which reads:

"There shall be **a rebuttable presumption that it is in the best interest of a child below the age of seven years to be with his mother** but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of the child by changes of custody". (Emphasis added)

Section 125(3) of the Law of Marriage Act, cap 29 R.E. 2019 has similar provisions. It reads:

"There shall be a rebuttable presumption that it is for the good of **a child below the age of seven years to be with his or her mother** but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of the child by changes of custody."

So, it is the parent, guardian or relative who can apply for custody, and in making the decision, the court must be guided by the principle of the best interests of the child and the rebuttable presumption that a child under seven



years must stay with the mother. What it means by a rebuttable presumption is clear; that it may not always so, it depends on the circumstances of each particular case. That is whether the mother can be given custody will depend on other factors.

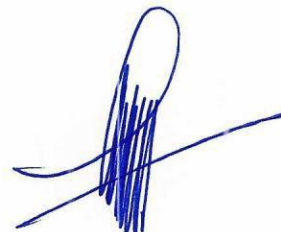
What is the best interest of the child is not defined, the statute is silent.

This was the observation of this court in **Habby Longo V. Dotto Kifizi**, Civil Appeal No. 67 of 2021, (HC- Mwanza, M, Mnyukwa, J.).

The court had this to say:

*"... it is neither the United Nation Convention on the Rights of the Child nor the African Charter on the Rights and Welfare of the Child as well as the Law of the Child Act, Cap 13 R.E 2019, which defined the phrase best interests of the child. It is my understanding that, **the term means and includes all what is be best suited to a child in a particular circumstance in terms of services and orders that will ensure the child survival, development and upbringing in terms of physical, psychological, emotional and spiritually.**"*

(Emphasis added)



See also **Sajjad Ibrahim Dharamsi v. Ally Jawad Gulamabbas Jivraj**, Civil Appeal No. 42 of 2020, Page 28 where it was said thus:

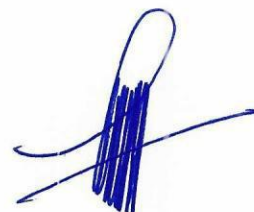
*"In my perusal of **General Comment No. 14 (2013)** Para 3 and 4 of the **United Nations Committee on the Rights of Children**, I have come across elements which must be taken into account when assessing the child's best interests. They are 7 namely; The child's views, child's identity, preservation of the family environment and maintaining relations, care, protection and security, situation of vulnerability, child's right to health and child's right to education."*

The court went on to say the following at page 30-31.

*"... in assessing the best interests of the child the court must be guided by the following things. **one**, the child needs protection to his life. This is the first thing and primary. He must live in an environment which will guarantee safely to his life. He shall not live in any environment which is likely to cause his death or endanger his health. **Two**, he must live in an environment which will ensure that he grow well physically, mentally and psychologically. **Three**, he must also grow spiritually, with a sense*

*and fear of God. He must grow in a certain religion. **Four**, he gets basic material things regard being on food, shelter, clothing, education and medical care. Food, shelter, clothing, education and medical care are comparative. They are not similar from one community to another. The child must get the best services available in his community from his parents or guardians. **Five**, to grow with parents or a parent or with a guardian in a family which can ensure that number one, two, three and four exist."*

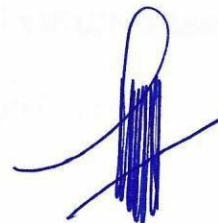
Looking at the preamble of the Law of the child Act which carry the purpose, one can find that the statute seeks to stipulate rights of the child and to promote, protect and maintain the welfare of the child with the view to giving effect to international and regional conventions and similar matters. I think this takes us to the child (and not the applicant) and invite us to see what befits him more as pointed in the above cases. We look at his basic needs; i) the right to life and protection of life, ii) the right to physical, mental and psychological care, iii) the right to education, religion and better social care, iv) better provisions of shelter, clothing and food. We look at the place where he can get the best combination of these elements and not the name of the one who applies to the custody.



See also, **Nacky Esther Nyange v. Mihayo Marijani Wilmore**, Civil Appeal No. 169 of 2019 where the Court of Appeal had this to say at pages 12-13:

*"... in deciding in whose custody an infant should be placed the paramount consideration shall be the welfare of the infant, and subject to this the court shall have regard to the **wishes of the parent, the wishes of the infant, where he or she is of an age to express an independent opinion** and the custom of the community to which the parties belong". (Emphasis added)*

Those are the guiding principles. I will now move to examine the grounds of appeal starting with ground two; that the child might have been coached by the appellant. The trial Magistrate had this fear but when I looked at the record and the child, I could not see that element. The record did not contain that element. The child appeared to have sufficient knowledge. He was calm and firm. He repeated what he had told the lower court to me. He said that he preferred to stay with his father. Those were his words suggesting that the life with his step father was not pleasing him. The respondent's move to get her back might have been moved by her inner feelings as a mother other



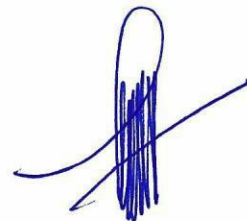
than the material on the ground. The Ground two is thus baseless and dismissed.

Next is ground one and four which will be discussed together. Ground one was on the weight of oral evidence and ground four was on the weight of the social inquiry report. Now can we say that there was good evidence from the respondent and his mother to support the order which was issued? I would hasten to say no. PW2 did not say anything more than the fact that the appellant asked her to stay with the child shortly but later refused to get him back. PW1 did not say any reason as to why the child should not go to the appellant but her. She just said that she wanted her back because her step father loved her. The evidence that the step father was in love with the child was eroded by the child himself who said that he lived under torture and beatings from both the mother and the step father. All what was said by PW1 in favour of her custody was eroded by her own son in court. And when I looked at the child I did not see any coaching. He did not want to be in favour of the Dar es salaam trip but Kigoma. The trial magistrate neglected the views of the child because of the opinion of the social welfare office. The opinion was contrary to the views of the child and the material on the ground and thus useless. The court was supposed to know that the social welfare

report is an opinion of an expert which is not binding the court. The opinion of an expert assists the court in reaching its decision but does not bind the court. Where it is against the evidence in totality as was in this case must be rejected. See **Hilda Abel v. Republic**, (CAT), Criminal Appeal No. 119 of 1993.

The district court did not address its mind to the evidence on record. I put undue weight to the social inquiry report leading to an erroneous decision. If it had done a good analysis it could find that, there was good evidence to give custody of the child to the appellant and not the respondent. He was better placed as the father of the child. He had a home and parents who also had desire to receive the child. The child appear to be happy to stay with him and is schooling. He appears to be well physically and psychologically. He must not be disturbed. This takes us to the best interest of the child which is the subject of ground three. Grounds one, three and four are thus resolved in favour of the appellant as well.

Based on what has been said above, the appeal is allowed. The appellant is given custody of the child. The respondent is given a right of visitation during leave upon a reasonable notice to the appellant. It is ordered so. No order for costs.





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L.M. Mlacha

Judge

28/4/2023

Court: Judgment delivered. Parties present. Right of Appeal Explained.



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L.M. Mlacha

Judge

28/4/2023

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