IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CIVIL APPEAL NO. 13 OF 2022

(Originating from the Decision of Juvenile Court of Kilimanjaro at Mwanga, in Civil Application no. 5 of 2022 dated 30/09/2022)

DIANA JOHN SULE..... APPELLANT

VERSUS

EMMANUEL MVUNGI .....RESPONDENT

JUDGMENT

14th March & 17th May 2023

A.P.KILIMI, J.:

The two opponents mentioned above sometime in 2018 contracted Christian marriage at Ugweno Parish. During this union they sired a child which is subject to their dispute in this matter, it was the end of 2019 their relation depraved and they separated each other from the said sacrosanct unity. Later on, 27th September 2022 the appellant filed a claim against the respondent at the Juvenile Court mentioned above seeking to be granted custody of the child who was in the custody of the respondent.

Upon hearing the two above, their witnesses, the opinion of the child and considering the social investigation report, the trial Juvenile court came to a conclusion that it is in the best interest of the child that the custody be vested to the respondent. The said court further gave the appellant the right to visitation to the child.

Dissatisfied by the findings and orders thereto of the trial court, the appellant has preferred the present appeal equipped with three grounds of appeal and prays the appeal to be allowed and the Ruling of the trial court be quashed and set aside, and further this court should make an order granting the custody of the child to her. These grounds advanced were as follows;

1. That, the trial court erred in law and in fact by ordering the custody of the child to respondent whiles the child is still young with the age of four (4) years, he is supposed to stay with his mother.
2. That the trial court erred in law and in fact for failure to take into consideration the best interest of the child as the result the child is now living in bad environment, his not attending to school, his health is not good and he is living with his step mother who fail to take good care of him.
3. That the trial court erred in law and in fact by failure to evaluate properly the evidence of the parties including social welfare officer hence it reached to un reasonable judgment.

When the matter came for hearing on 19th January 2023, both parties agreed to argue this appeal by way of written submissions, I ordered the scheduling orders for filing the same, according to the record it seems on the same day the respondent filed a notice of preliminary objection and being a lay person did not disclose it during the scheduling orders meeting. That objection raised was to the effect that, the appeal hopeless filed without consider Rule 123(3) of the Law of the Child (Juvenile Court Procedure) GN No. 182 of 2016. Nevertheless, both parties had argued it in their submissions, therefore in my view it was communicated to both parties and I will also proceed determine it concomitantly with this appeal.

In her submissions, the appellant acknowledged that it is true that, per Rule 123(3) (a) and (b) of the Juvenile Court Procedure (supra) requires that, the memorandum of appeal shall be lodged with the court which heard the matter in the first instance. But what the trial court told the appellant, she has to file her appeal to the High Court and that why the appellant file it to this court, therefore prays this court for the sake of Justice, be pleased not to struck out the appeal but rather hears the part since it is a serious issue concerning the child.

The appellant further, submitting for the first ground avers that, it is not true that the appellant is irresponsible parent to make sure the best interest of the said child as the respondent alleged since the appellant, she has been employed as the cleaner house and she has an oral contract by her employer who known by the Name of Grace Stanley and also is a business woman, she possesses a plant of leafy vegetables which helps her to gain money for a better life. She further added that it is not true that, the appellant deserted her child when aged one as the respondent alleged since at that age the one who was taking the child to the clinic was the appellant and not the respondent as he alleged. To support the above, she prayed leave to look the clinical card showing attendance of the appellant attached with this appeal as annexure.

In the second ground, the appellant maintains that, the child is now aged four years and three months but he is not attending school, but she has discovered the respondent is taking him to Madrasa (Islamic religion pre-school) The appellant further states that the child is no longer attending to clinic since the respondent has failed to do so, thus endangering the child's health.

Lastly, the appellant submitted in respect to the third ground that, it is not true that, the child was afraid to stay with the appellant as the respondent alleged since the respondent was the one, who was taking the child to the clinic as the clinic card shows, but also the welfare officer interviews the child without her presence. Not only that but also the report from the social welfare officer which the trial court take it into consideration which inter alia indicated that the appellant is irresponsible mother, was also not true since she works for gains as stated above, so she gains money to run a better life.

Replying the above arguments, the respondent in his submissions contended that, according to the objection raised the appellant should have filed her appeal to the court which heard the matter as per Rule 123(3) (a) and (b) of the Juvenile Court Procedure (supra) and that being a purely point of law it should be determined first as per the case of **Mukisa Biscuits Manufacturing Limited v. Eastern Distributors Limited** [1969] E.A. 696.

The respondent further submitted that, the trial court rightfully gave custody of the child since the circumstances proved that the appellant did not take good care of the child and at sometimes, she did not breast feed

the child. He added that the best interest of the child was well addressed by the trial court since it found no need to disturb movements of the child from one place to another.

The respondent further submitted that, he has made it possible for the infant to live in a quiet and serene environment by providing the basic needs of the child. In doing so he is assisted by his mother and he has hired a maid who do all the household responsibilities and helping in caring for the child.

Having narrated what transpired in this appeal, I wish to start with the preliminary objection raised by the respondent, I have considered its nature, it has motivated me to ask myself whether the violation to abide on the said rule prejudice or causes any injustice to the adverse party or the jurisdiction of the court? According to the rule and for the sake of clarity I reproduce hereunder;

> *"(3) The memorandum of appeal shall-*
> *(a) be lodged with the court which heard the matter in the first instance; (b) within 30 days upon receipt, be transmitted with the High Court, together with the complete record of the Court proceeding to which the appeal relates."*

In my view the intention of the law was to make sure the record and the memorandum have to reach the High Court within prescribed time. In this matter the appellant being a lay person filed her memorandum at the High Court and I have observed the record, anything required for this appeal were before this court in time. It is thus my view the respondent was not prejudiced by the said anomaly, moreover, I am also basing on the principle of overriding objectives which urges towards expeditious and timely resolution of all matters (see The Written Laws (Miscellaneous Amendments) (No.3) Act, 2018 (Act, No.8 of 2018). For the circumstances above I found pertinent to invoke this principle in this matter which will not occasion injustice to any party, and failure to invoke it will amount to overreliance on procedural technicalities which is prohibited by our law of the Land. In view thereof the preliminary objection raised is hereby struck out forthwith.

Now I turn to the grounds of appeal raised by the appellant, for convenient purposes I will start with the second ground which states that is the trial court erred in law and in fact for failure to take into consideration the best interest of the child as the result the child is now living in bad environment, is not attending to school, his health is not good and he is living with his step mother who fail to take good care of him.

According to typed record of the trial court at page 2, it displays the testimony of the appellant, the facts that the child's health is not good and he is living with his step mother who fail to take good care of him was not stated and proved by her, therefore are new facts. Furthermore, a new fact was that the child is attending Madrasa also was not testified by her at the trial. It is settled position of the law prohibiting the appellate court from taking up new matters which were not part of the pleading. (See the case of **Kisanga Tumainiel vs Frank Pieper and Another,** Civil Appeal No. 139 of 2008 (unreported). I that regard I am of considered opinion submissions by the appellant were misconceived for raising new facts which were not part of the record. I thus proceed to decline considering them; hence this ground fail.

In the remaining grounds it is my convenient be argued together since they enter related, before dwelling into them, I wish to highlight the law for granting custody to the child. section 4(2) of the Law of the Child Act, Cap 13 R.E 2019 provides for general regard that;

> *"The best interests of the child shall be a primary consideration in all actions concerning children whether undertaken by public or private social welfare institutions, courts or administrative bodies".*

(See also the case of **Glory Thobias Salema v. Philemon Mbaga,** Civil Appeal No 46 of 2019 [2020] TZHC 3794 (13 November 2020).

In determining the issue of custody, the law put clearly further on other factors to be considered; that is the trial court taking into consideration the opinion of the child as provided for **under section 39(2) (d)** of the Law of the Child Act, Cap 13 R.E 2019 and considering the undesirability of disturbing the life of the child by change of custody as it is provided for **under section 39(2) (f)** of the Law of the Child Act (supra). And when necessary, may direct the social welfare officer to prepare a social inquiry report. **(See rule 72 (1)** of the Law of the Child (Juvenile Court Procedure) (supra).

In my perusal of the court record, the evidence reveals that the child started to stay under custody of the respondent since he has the age of one year and six months, until this case lodged, he was having 4 years old, and he managed to do so with the help of his mother, the grandmother of the child. The evidence by the respondent side and social inquiry report also reveals that the appellant deserted the child since then.

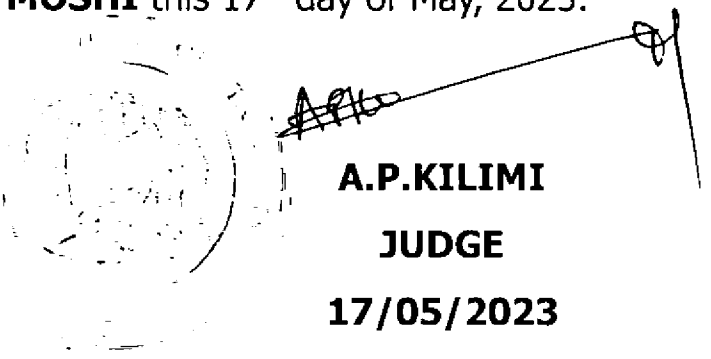
According to the typed trial court Judgment at page 4, 5 and 6. The learned trial Magistrate considered the evidence in relation to the above factors for granting custody or access and was of the view changing the circumstances of his childhood to another place will affect his psychological, physical and mental wellbeing.

I have considered the entire evidence on record, the parties' submissions on this appeal, the fact that the appellant is trying to insert the evidence of clinical card in this appeal which was not tendered at the trial court to my view might be an afterthought after failing at the trial court. Second; I am forced to believe, that the respondent who is the primary caregiver and watchful for the child in dispute have a persistent bond with the child which in my view being stopped by changing the circumstances at this time will affect the betterment and mental of the child, this is corroborated with the Social Inquiry report which also considered in the opinion of the child himself who opted to stay under the custody of the Respondent. Nonetheless, nothing strong has been raised and proved by the appellant which shows that the best interest of the child will be in jeopardy when is in custody of the respondent.

In the final analysis, and to the extent of my observations above, I am satisfied that the trial Magistrate properly analyzed the evidence availed before him and reached to an appropriate conclusion, hence there is no justification to interfere with that decision. In view of the aforesaid, I find the entire appeal to be devoid of merit. It thus, hereby dismissed forthwith. As the matter involves a matrimonial cause, I order that each party shall bear his own costs

It is so ordered.

DATED at **MOSHI** this 17th day of May, 2023.



A.P.KILIMI

JUDGE

17/05/2023