IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 53 OF 2022

(Appeal from the decision of District Court of Temeke, One Stop Judicial Centre at Temeke in Matrimonial Cause No. 104 of 2022)

TALE MPINGA AMBU.....APPELLANT

VERSUS

KYARUA ROBERT MFINANGA.....RESPONDENT

JUDGMENT

22nd September & 03th November, 2023

BARTHY, J:

The appellant aggrieved by the decision of the district court knocked the door of this court by way of an appeal, against the decision of the district court in Matrimonial Cause No. 104 of 2022 of the District Court of Temeke, One Stop Judicial Centre at Temeke (to be referred to as the trial court) on the following grounds;

1. *That, the trial magistrate erred in law and in fact for ignoring the weight of appellant's evidence by giving the respondent permanent residence of the issues and*

erroneously granted the custody of said issues to the respondent.

2. *That, the trial Magistrate erred in law and fact for ignoring the weight of appellants evidence by giving custody of the third infancy who is under age (6 years) and erroneously granted the custody of said issue to the respondent.*

The appellant prays for her appeal to be allowed and for the judgment and decree delivered by the District Court to be quashed and set aside and any other relief that the court deems fit to be awarded.

Before I proceed to determine the grounds of this appeal, it is best to provide brief factual background of this matter leading to the present appeal.

The appellant and the respondent were husband and wife respectively, who celebrated Christian marriage in 2006. Their union was blessed with three issues, two girls and a boy aged 15yrs, 12yrs and 6yrs at the time the petition was lodged before the court.

The happiness of their marriage was short lived as they experienced marital snags and a lot of misunderstanding. Their marriage faced issues,

including allegations of infidelity, alcoholism, stinginess, misuse of funds, and extramarital affairs. The appellant who was the respondent before the trial court denied all the allegations.

The respondent claimed they had voluntary separation for three years and he petitioned for a divorce, custody of the children, and distribution of matrimonial assets. The trial court issued a divorce decree, granted custody of the children to the respondent as the primary home, and ordered shared access and maintenance and distribution of their matrimonial assets.

At the hearing of this appeal, Stephen Msuya represented the appellant and Greyson Laizer represented the respondent. By consensus the parties agreed to proceed with written submissions, although the appellant's counsel did not file his rejoinder submission.

Submitting for this appeal, Mr. Msuya stated that, the trial magistrate had discussed in great deal about shared custody of the children, but in the end, he granted the custody of those issues to the respondent and granted the appellant an access right to those issues.

Mr. Msuya argued that the trial magistrate granted custody to the respondent, citing the appellant's relocation for employment and leaving

all the children with the appellant to be among the factors for consideration and the welfare of their children.

On the second ground Mr. Msuya argued that, the child's age was below the legal threshold for expressing an opinion and that the welfare of the child should take precedence as per section 125(3) of the Law of Marriage Act, Cap 27, R.E 2019, Cap 27 (to be referred to as the LMA). Reference was also made to the case of **Halima Kahema v. Jayantilal G. Karia [1987] TLR 96.**

He further insisted that, the wishes of the child of tender age should not be permitted to subvert the law or prevail against the desire and authority of a parent, unless the welfare of the child cannot otherwise be secured. He added that the appellant is able and willing to take care of Ivan who is the child of tender age. He thus prayed for his custody as provided under section 125(2) of the LMA.

Mr. Laizer countered these arguments by stating that the children were in the custody of the respondent during the trial, and the appellant had the right to access to them. Until when the appellant took them and denied the respondent to see them.

Mr. Laizer argued that the trial court complied with the provision of section 39(2) the Law of Child Act and emphasized the importance of the child's ability to express independent opinions. He therefore requested the dismissal of the appeal.

He went on to confront the argument that the trial court erred take his opinion the child who was below seven years in terms of section 125(2)(b) of the LMA.

After reviewing the records and submissions, it is clear that the appeal centers on the issue of child custody. The two grounds will be consolidated into one, focusing on whether the trial court properly evaluated the evidence to determine child custody.

Mr. Msuya argued that the custody order for the youngest child was not in the child's best interest and cited the child's age as a factor. He made reference to the provision of **s**ection 125 (2) (b) of the LMA, which provides;

> *"(2) In deciding in whose custody, a child should be placed the paramount consideration shall be the welfare of the child and, subject to this, the court shall have regard to;*
>
> *(a)N/A*

(b) the wishes of the child, ***where he or she is of an age to express an independent opinion".***

[Emphasis is supplied].

To this issue, Mr. Msuya had submitted that, Ivan Robert Kyarua when testifying in court he was only 6 years old. This assertion brought to the attention of this court Exh. P2 (the birth certificate of Ivan) showing that he was born on 20th July 2015 and that made him to be 7 years when he as expressing his opinion before the trial court.

Upon examining the evidence and the children's wishes to stay together and with their respective parents. The provision of section 125 of the LMA requires the court to consider number of factors in granting custody of the child. It is not only the wishes of the child that should be considered, but the paramount consideration shall be the welfare of the said child.

Considering the need to have best growing environment and desirability of siblings to grow together; I find no need to disturb the life of the infant and other children by changing their custody as provided under section 125(3) of the LMA. As the custody of those children was already placed in the hands of the respondent.

In the case of **Nacky Esther Nyange v. Mihayo Marijani Wilmore** (Civil Appeal 169 of 2019) [2022] TZCA 507 (16 August 2022), where the court observed on desirability of siblings to live together as another factor to be considered in the custody of children.

Having also considered that it was the respondent was the one staying with those children at Makabe and carter for all their needs, with the circumstances of this case according to the evidence tendered the respondent should have the custody of all children.

That being said and done, in conclusion, I find no reason to overturn the trial court's decision on child custody. Therefore, I dismiss the appeal for lacking merit, and no costs are awarded, given the nature of the parties' relationship.

It is so ordered.

Dated at **Dar es Salaam** this 3rd November, 2023.

G.N. BARTHY

JUDGE

Delivered in the presence of Mr. Msuya learned advocate for the appellant and Mr. Mfinanga learned advocate for the respondent and record management assistant Bernadina; but in the absence of both parties.