IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
DODOMA DISTRICT REGISTRY
AT DODOMA
CIVIL APPEAL NO. 01 OF 2023

(C/F Juvenile Civil Application No. 1 of 2022 before the District Court of Chemba at Chemba)

SUBIRA YEREMIA .....APPELLANT

VERSUS

JOSEPH ELIA .....RESPONDENT

JUDGMENT

Last Order: 07th November, 2023
Judgment: 08th December, 2023

MASABO, J.:-

The appellant is aggrieved by a ruling and order of the District Court of Chemba in Juvenile Civil Application No. 01 of 2022 which was decided in her disfavour on 30th November 2023. The brief background of the matter is that the parties were a married couple. They contracted a customary marriage in 2019. On 30th March 2019, they were blessed with a baby boy namely JJE (name withheld) who is the subject of the present appeal. The two separated in November 2021. The appellant took the child to her parents and later on, she lodged a claim to the social welfare office claiming maintenance for the child. The respondent was ordered to pay a monthly maintenance fee of Tsh. 25,000/=. However, the appellant declined to collect it claiming that it was inadequate. Later on, the respondent moved the court for an order of custody claiming that the appellant was not responsible as she dumped the child at her mother's home while she went to Kidoka village. The respondent emerged

successful after his application was granted. Aggrieved by the decision of the trial court the appellant has filed this appeal on the following grounds:

1. That, the trial court erred in law and facts to pronounce a decision without considering the facts that the child JJE was required to be under the custody of the appellant.

2. That, the trial court erred in law and facts by pronouncing a decision in favour of the respondent while ignoring that the child was born on 30/3/2020 thus he is two years old.

3. That, the trial court erred in law and facts by not considering the weight of the credible evidence adduced by the appellant at the trial instead considered the evidence adduced by the respondent in trial tribunal which was weak and contradictory thereto

4. That, the trial court erred in law and facts since it pronounced irrational decision tainted with irregularities.

5. That, the trial court erred in law and facts since it pronounced an irrational decision.

On 7th November 2023, the appeal was scheduled for hearing. The appellant was represented by Mr. Lucas Komba, learned Advocate whilst the respondent appeared in person. Mr. Komba consolidated the first, second and the third grounds of appeal and argued them jointly as they all deal with evidence. He argued that for the court to grant custody it must consider the best interest of the child as required by section 4 (2), 26 and 39 of the Law of the Child Act, Cap. 13 R.E 2019. It was his

submission that the record shows that the child lives with the appellant's mother. Therefore, since there is no evidence that the environment at the appellant's mother is difficult for the child, it is in the interest that he remains there. He added that the respondent did not state how he will take care of the child. He did not state if he has family or wife to take care of the child. Thus it is in the interest of justice that the child remains with his grandmother. It was his submission further that the respondent stated that the child is under the custody of the grandmother who is elderly but he did not state the age of the grandmother to enable the court to rule in his favour that the interest of the child will be protected if he is placed under the respondent's custody. He added that much as his grandmother is a peasant, peasantry does not bar her from taking care of the child. She can do shamba work and still take care of her child.

The counsel argued further that, the allegation that the child was once lost was not supported by any evidence. Hence they are mere allegations made in the absence of a police loss report to back it up. He prayed that the respondent should demonstrate how the child stands to benefit if he is placed under his custody and he underscored that, it is in the interest of justice that the status quo be maintained by leaving the child under the custody of the appellant's mother.

On the fourth and fifth grounds of appeal, he submitted that the provision of Rule 63(1) of the Law of the Child (Juvenile Court Procedure) Rules, GN. No. 182 of 2016 prescribes a form for lodging applications for custody. To the contrary, the application was brought by way of chamber summons

hence offensive to the law. Based on the above, he prayed for the appeal to be allowed.

In reply, the respondent submitted that the decision of the trial court is correct. The child lives with his grandmother, not the appellant. Regarding the question of whether his environment is conducive and supportive for the child, he submitted that his environment is very conducive for the child as he is married and lives with his parents and a wife. He argued that the child should not be placed under the custody of the appellant as when he was placed under her custody she was ordered to live him and not otherwise but he did not comply with the order. Instead of living with the child he abandoned him and placed him under the custody of her mother who is unable to take care of the child. In the foregoing, he argued that it would not be in the best interest of the child to place him under the appellant as that would entail placing him under the appellant's because the appellant will dump him there as she has been doing hence leaving the child with no proper care. On the fourth and fifth grounds of appeal, he had nothing to submit. He left them to the court for its decision.

In rejoinder, Mr. Komba reiterated his submission in chief and prayed that the appeal be allowed.

I have dispassionately gone through the trial court records including the findings of the impugned ruling alongside the rival submissions for and against the appeal raised and I am now ready to determine it. I will start with the fourth and fifth grounds of appeal. In support of these two grounds, the appellant's counsel has argued that the application was

offensive to Rule 63(1) of the Law of the Child (Juvenile Court Procedure) Rules, GN. No. 182 of 2016 as it was preferred by way of chamber summons and not the form prescribed under this rule. I outright reject this argument for the following two reasons. First, the argument is inconsistent with the two grounds it purports to support. As it is crystal clear from the wording of these grounds which I have reproduced above for easy of reference, they both challenge the merit of the court's finding and through them, the appellant prayed that the ruling of the trial court be quashed and set aside for being irrational. None of these two grounds questioned the competency of the application before the trial court.

Order XXXIX rule 1 of the Civil Procedure Code, Cap. 33 RE 2019 which regulates appeals from subordinate courts to this court, requires the appellant to set out his/her grounds of appeal in the memorandum of appeal and bars the appellant from arguing in support of a ground other than the ones set out under the memorandum of appeal. Arguing on new grounds not set out in the memorandum of appeal is offensive to this rule and cannot be tolerated. Accordingly, since the competence of the application was not set out under the memorandum of appeal, the appellant is precluded by law from submitting on such a new ground. In the foregoing, I attach no weight to the respective submission. Second, even if this was not the case, the argument advanced would not stand as the document used in moving the trial court is a chamber application for custody and it is substantially similar to Form JCR Form No. 3 as prescribed under the Third Schedule to the Law of the Child (Juvenile Court Procedure) Rules.

Turning to the first second and third grounds which the appellant's counsel consolidated and argued jointly, it is clear from these three grounds and the parties' rival submissions that the main issue is whether, the respondent established that the best interest of the child would be guaranteed if he is placed under his custody.

Resolving this issue requires me to navigate through the evidence and the principle of the best interest of the child as enshrined under Article 3(1) of the United Nations Convention on the Rights of the Child (CRC) which states that:

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

Contextualizing this principle, the Committee on the Rights of the Children which is the enforcement body for the CRC has through its General Comment No. 14 (2013) underscored that, the concept of the best interest of the child as enshrined in the above provision:

> ".... is flexible and adaptable. It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs. For individual decisions, the child's best interests must be assessed and determined in light of the specific circumstances of the particular child."

As for the expression best 'primary consideration' which is the threshold to be applied, the Committee through paragraph 37 and 40 of its above stated General Comment provided the following guideline:

37. The expression "primary consideration" means that **the child's best interests may not be considered on the same level as all other considerations.** This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness.

40. Viewing the best interests of the child as "primary" **requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned.** [the emphasis is mine].

In our jurisdiction, the principle of best interest of the child was domesticated through section 4(2) of the Law of the Child Act, Cap 13 RE 2019 which states that;

> 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 bodies.

Applying the principle in **Jackson Davis vs. Republic,** Criminal Appeal No. 127 of 2005 [2009] TZCA 2 TanzLII, the Court of Appeal had this to say on the best interest of child:

> We are fortified in our view by the provision of article 3(1) of the United Nations Convection on the Rights of the Child (CRC), 1989, which Tanzania has ratified. Article 3(1) of the CRC places an obligation on courts to give the best interest of the child paramount importance in the child matters by starting:-

> Article 3(1) in all action concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, the best interests of the child shall be primary consideration.

Therefore, any court when dealing with a matter concerning a child is obligated to have the best interest of the child in mind and to accord such interest the deserving priority. The trial court was consequently duty duty bound to give a priority consideration to the best interest of the child. Whether or not that was done is a question for the next determination.

Before I move on to that question, since the appeal emanates from an application for custody, it is of paramount importance to note that, one of the numerous components of the best interest of the child is its right to live with both parents and not to be separated with them unless it is necessary and not in the best interests of the child to remain with the parents (See Article 9 of the CRC). In cognisance thereof, section 7 of the Law of the Child Act, specifically guarantees this right. Where, as in the present case, the separation is rendered necessary due to the separation of the parents, the provisions of section 26(1) (b) of this Act and section 125(3) of the Law of Marriage Act Cap. 29 R.E 2019, shall be activated. These two provisions were extensively discussed in **Nacky Esther Nyange vs Mihayo Marijani Wilmore** (Civil Appeal 169 of 2019) [2022] TZCA 507, TanzLII where the Court of Appeal instructively held that:

> The principle of the best interest of the child is embodied in our laws. Section 125 (2) (a), (b) of LMA articulates that 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. In the LCA, section 4 (2) states:

> "The best interests o f 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'.

With regards to custody of children, section 26 (l)(b) of the LCA states:

"live with the parent who, in the opinion of the court, is capable of raising and maintaining the child in the best interest of the child."

The Court stated further that:

> Moreover, section 37 (4) of the LCA requires the courts when granting custody to primarily consider the best interests of the child. In applications for custody, the best interest of the child is determined in consideration of such factors as; the age and sex of the child, the independent views of the child, the desirability to keep siblings together, continuity in the care and control of the child, the child's physical, emotional and educational needs, the willingness of each parent to support and facilitate the child's ongoing relationship with the other parent (see sections 26 and 39 (2) of the LCA and Rule 73 (a) to (i) of the Law of the Child (Juvenile Court Procedure) Rules, GN No. 182 of 2016 (hereafter referred to as the Juvenile Court Rules).

Thus guided, I now revert to the question I had previously shelved as to whether the interest of the child was considered. To put the matter into perspective, the available undisputed record is that, the child in question is male, aged four (4) years having been born in 30th March, 2019. Thus it is desirable that he be placed under the custody of his mother. When parents separated, the mother who is the appellant herein took the custody. However, instead of living with the child under her custody, she placed the child into the care of her mother while she left for another place/village where she is currently domiciled and working in a restaurant. As a result, the child was separated from both parents, a separation which can only be tolerable if there are exceptional circumstances.

Deferming the application before her, the trial magistrate correctly held that, as the child in issue is below seven years of age, it was desirable to place him under the custody of the mother. However, considering that the mother abandoned him and placed him under the custody of her mother at Ombili village while she resides and works for gain at Kindoka village and only visits the child over weekends, she found it proper to place the child under the custody of the respondent who is its biological father. In arriving at this conclusion, the court subsequently took into account the respondent's submission that there was a time when the child was sick and had no one to take care of him and that, on 26th October 2022 the respondent received a call from a priest notifying him that his child was lost but found by a person who took him to the priest's office. As correctly submitted by the appellant's counsel such matters were not listed as grounds for the application for custody hence, they ought not to have been considered.

Be it as it may, I am of the firm view that, much as the trial court was not mandatorily required to order a social investigation into the matter, the peculiar circumstances of the case and especially, the tender age of the child, necessitated commissioning a social investigation to ascertain whether the environment of the respondent was conductive and suitable for the child as compared to that of the grandmother. The report thereof would have assisted the trial magistrate in drawing a balance sheet between the right of the child to live with his parent's vis a vis his needs for protection and care which broadly encompass non-exposure/protection from different forms of physical, mental or sexual violence as well as access to basic materials and emotional care which are all necessary for the general well-being and development of the child.

I say so mindful that, the respondent is a young man and the record is silent whether he has a family hence questionable how he would guarantee the wellbeing of the child. Although the respondent has stated in his submission before this court that he has a wife and lives with his parents who could help him to take care of the child, such information is new as it was not disclosed at the trial stage. Thus, I am constrained to say, as I hereby do, that the decision to place the child under the respondent's custody was not based on concrete information on whether, apart from having a primary duty and right of custody, the respondent's environment is conducive and capable of guaranteeing the child's best interest

In the foregoing, I allow the appeal. The ruling and order of trial court are quashed and set aside. The case file is remitted back to the trial court

with instructions to the trial magistrate to commission a social investigation and upon receipt of the report thereof, compose a fresh ruling. Order accordingly.

DATED and **DELIVERED** at Dodoma this 8th day of December 2023

J. L. MASABO

JUDGE