IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY]

AT ARUSHA

CIVIL APPEAL NO. 46 OF 2019

(Originating from Civil Application No. 23 of 2018 at the Juvenile Court of Arusha at Arusha Urban Primary Court)

GLORY THOBIAS SALEMA.....APPELLANT

Versus

ALLAN PHILEMON MBAGA.....RESPONDENT

JUDGMENT

23/10 & 13/11/2020

MZUNA, J.:

The appellant applied for an order of custody in respect of one P.A.M (the child to hide his identity) at the Juvenile Court of Arusha at Arusha Urban Primary Court (trial court). The trial court having heard evidence from the parties granted custody to the respondent on the ground that the child was already above seven years of age and living with the respondent.

Aggrieved, the appellant has preferred this appeal on five grounds of appeal namely: **One,** that the trial court erred in holding that the appellant dumped the child. **Two,** that trial court erred in ignoring the fact that the respondent had unjustifiably given the child away to another woman. **Three,** that the trial court's decision was based on extraneous matters. **Four,** that the trial court erroneously analyzed the adduced evidence leading to an

erroneous conclusion. **Five,** that the trial court erred both in law and in fact in denying the appellant's custody of the child. The above grounds bolds down to three issues:- First, whether the award of custody of the child to the respondent was supported by the available evidence on record or otherwise? Second, who as between the two parties deserves to be given custody, if so, why?

Ms. Magdalena Sylister, learned counsel appeared for the appellant whereas Mr. Aggrey Kamazima also learned counsel appeared for the respondent.

The background story is that the appellant and respondent had some extramarital relationship leading to the birth of the said child P.A.M. There was no good relationship between the two parents. The situation became worse when the child was of three months when (according to the respondent) it was dumped at the gate where the respondent works but was rescued by the watchmen. The matter had the intervention of the Social Welfare Officers and sometimes parties reported their dispute to the police. It is also said that the child had since then been under the care of one Ester who according to the respondent is his wife, a fact which has been strongly disputed by the appellant. The appellant says the said Ester had at one time

attempted to apply for adoption of the said child but it became abortive after her intervention. So, the wrangle between the two (i.e the appellant and the respondent) is who should be given the custody? Let me start with the first issue. The question is, are there justifiable reasons to grant custody of the child to the respondent?

Submitting in support of the appeal, Ms. Magdalena Sylister challenged the decision of the Juvenile court of Arusha for the reasons:- That there is no evidence the appellant dumped the child as alleged. That the father does not live together with Ester as they are not legally married as they have no marriage certificate. That the attempted adoption by Ester is proof that they are not legally married. That, a Juvenile court should not be used to legalize their marriage. That Ester signed the purported consent pretending to be of the appellant and then erased it. That, the respondent has a right for custody but never applied for it. According to her, he must apply for legitimization first citing the case of **Zaina Ismail vs. Said Mkondo** [1985] TLR 239. That the child had been wrongly given a notion that his biological mother is dead. She touched as well on the affidavit to challenge the aborted adoption by Ester. The learned counsel invited the court to grant custody to the appellant.

In reply, Mr. Kamazima for the respondent submitted that the appellant dumped the child and the allegation of forgery with regard to adoption consent had not been proved to the required standard. That it is true the appellant dumped he child twice as well shown in exhibit D2 from the social Welfare Officer. That the child was never snatched from her. He insisted that the respondent and Ester are married couples. That becoming economically stable is not a factor to grant custody to the appellant. On the issue of legitimization, the learned counsel said that that is not a governing factor but the best interest of the Child citing the case of **Charles Lunyembe vs. Mwajuma Salehe** [1982] TLR 305. That what matters is the welfare of the child citing the case of **Ramesh Rajiput vs Sunandra Rajiput** [1988] TLR 96.

He disputed as well the alleged forgery. It was his view that since the child said does not know her (i.e the appellant) changing custody will be undesirable and not ideal citing the case of **Amina Bakari vs. Ramadhani Rajabu** [1984] TLR 41. It will disturb life of the said child. It may affect him educationally and psychologically citing the case of **Festo Kimbutu vs. Mbaya Ngajimba** [1985] TLR 42. The respondent invited the court to dismiss the appeal on ground that the respondent had been taking care of

the child ever since when he was aged 3 months. Now he is aged about 8 years and is schooling at Moshi International school where he is doing well academically.

In resolving this issue I shall determine whether the trial court considered the best interests of the child and the adduced evidence. In order to adequately resolve this issue, the following questions must be resolved. **One,** whether the applicant dumped the child at the respondent's gate, and, **two,** whether the trial court evaluated the evidence adduced by the parties herein.

I have read the submissions by the parties herein in line with the grounds of appeal filed by the appellant. It is undisputed that the appellant had disagreement with the respondent over the care and custody of the child. In that, several cases were reported and some prosecuted against one another.

The law is well settled that in any event dealing with a child the primary consideration shall be on the best interests of the child. I refer to section 4 (2) of the Law of the Child Act, No. 21 of 2009 (hereafter Act No. 21 of 2009) read together with section 125 (1) of the Law of Marriage Act, Cap 29. This position has been recited in several cases, some have been cited by the

counsels for both parties. Of course there is a rebuttable presumption that it is in the best interest of a child below the age of seven years to be with his mother. This presumption is stated under section 39 (1) of the Act No. 21 of 2009. However, in deciding whether the said presumption applies to the facts of a particular case, the court shall have regard to the undesirability of disturbing the life of the child by changes of custody. This view is echoed under section 26 (2) of the Act No. 21 of 2009.

I have considered the law governing custody of children. I have also gone through the record. Under section 39 (2) of the Act No. 21 of 2009 **'the views of the child, if the views have been independently given'** must be taken into account before making the order of custody and under paragraph (g) **'any other matter that the court may consider relevant.'**

The record shows that the appellant filed a case against the respondent claiming for custody of the child after she was released from remand on charges of malicious damage to property connected to their dispute over the child. On the allegation that the appellant dumped the child at a gate, it is undisputed from the record (see exhibit D2). Based on the

evidence on record, it appears that the trial juvenile court was right in finding that the appellant in fact dumped the child at the respondent's gate.

The record shows that the appellant told the trial court that the child physically looks different from other children of his age. The appellant prayed the child be called to testify. To cure that anomaly since the trial court granted the prayer but same was not complied with, this court saw it ideal to summon him. He was categorical that he is not prepared to stay with the appellant because he was told he dumped him when he was "still young." The view of the child supports the finding now being challenged.

There has been long submission on the dispute that Ester should not be given custody of the child. There is no order to that effect. The order was given in favour of the respondent. The argument that he must legitimize him first is not covered under the law of the Child which as above shown provide the governing factor is best interest and undesirability factor as well arguec by Mr. Kamazima, the learned counsel. The record shows that the child is schooling at International School of Moshi. The child was brought in court tc express his views. He looked in a jovial and cheerful mood. He was very happy with high level of expressing himself independently. To disturb him at this hour will be not to his best interest. The allegation that the trial court

never considered the evidence and therefore arrived at the erroneous decision lacks any merit.

Now to the second issue. Who as between the appellant and the respondent should be granted custody of the child in question?

The appellant said should be given custody she being a biological mother. Most of the cases cited by the appellant supports the idea that the child under seven years of age be with his mother. Even the cited case of **Zaina Ismail vs Saidi Mkondo** (supra) held that:

"...the respondent cannot claim it (child) now as he never legitimized it in time by application through the Law of Persons, G.N. 279 of 1963".

Issue of legitimization in view of that case and the case of **Beatrice Njowoka vs Evaristus Nambunga** 1988 TLR 67 (HC), application must be made before it weaned. The child was taken and possessed by the appellant before it weaned. The circumstances never allowed such application as he was dumped. The cited cases are therefore distinguishable and not applicable.

To put the record right, the child is now aged eight years and has ever since when he was aged three months, been staying away from her. Much

as I agree with that proposition that mother has the first option to stay with a child who is under 7 years, however, each case is decided depending on its peculiar facts.

Similarly, the allegation that there was blessing of marriage by a back door is not supported by evidence otherwise there could have been joint custody which is not the case here. Further, it is not true that the child was wrongly told his mother is dead. He said very categorically that he knows her as her mother. He saw her at Ilboru Hotel, a big hotel, in his words. The appellant admitted had been visiting him even at school before. There should be close contact to develop relationship, of course with knowledge of the respondent who I am sure cannot deny a fact that no one can deny a fact that a child has right to know his biological mother Glory (not Ester of a European origin).

In the trial court, custody was given to Allan Philemon Mbaga based on the best interest of the child. The appellant was given full and unrestricted right to visitation to the child subject to proper arrangement with the respondent, the right which however should not be unreasonably and unjustifiably exercised. There was also an order that the appellant should be updated on the wellbeing especially sickness and health.

I should add to the above orders that the said child should not be adopted by another person be it Ester or otherwise. Further, the said child should not be taken outside Tanzania without knowledge, consent and approval of the appellant. The respondent should monitor closely on the care of the child including the hair style of the said child to be in line with the Tanzania Tradition of social life (including combing his hair).

The order of the trial court granting custody to the respondent is hereby confirmed. The argument that the child has even changed the name is not a governing factor to deny the respondent right to custody based on the overriding principle of best interest of the child. Appeal stands dismissed with no order for costs.

M. G. MZUNA,

JUDGE.

13. 11. 2020