IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

CIVIL APPEAL NO. 67 OF 2021

(Arising from Civil Application No. 08 of 2021 at Ilemela Juvenile Court.)

HABBY LONGO----------APPELLANT

VERSUS

DOTTO KIFIZI----------1st RESPONDENT

DIANA KIFIZI----------2nd RESPONDENT

JUDGMENT

Last Order: 21.04.2022
Judgement Date: 27.05.2022

M. MNYUKWA, J.

This is the first appeal arising from the decision of Ilemela Juvenile Court in which the appellant, Habby Longo appealed against the decision delivered by Hon. Sivonike, Resident Magistrate sitting at Ilemela Juvenile Court. The appellant who was also the applicant at Ilemela Juvenile Court aggrieved by the decision of the trial court in Misc. Civil Application No 8 of 2021.

Going through the appeal, I find it apt to give the background to what transpired resulting to this appeal. It goes that; the appellant filed a claim against the respondents on 30/08/2021 at Ilemela Juvenile Court over the custody of the child who was born on 26th August, 2008 who was in the custody of the respondents. It was alleged that, the appellant who is the father of the child, had a love affair with the mother of the child who is now a deceased and that their love affairs resulted into the birth of the child that the appellant seek to be granted custody. The claim over the custody of the child came in after the death of the mother of the child as he claimed that the child is under the custody of persons who are not related to the child in any manner.

The respondents who are the brother and sister of the child's mother sternly resisted the application through a joint counter-affidavit filed in the juvenile court claiming that during the lifetime of their deceased's sister, they were never introduced by her that the appellant is the father of the child as the child bears the surname of Kifizi. That they were living with the child since 2010 when her mother was living and working for gain at Shinyanga. They also claimed that even if the appellant was indeed the father of the child on whose custody is in issue, it is not in the best interest of the child for the custody to be given to the appellant as they used to

stay with the child ever since she was born, they are the ones who are taking care of the child in terms of food, clothing, shelter, and education together with her mother who is now the deceased. They further stated that, the appellant is incapable of taking care of the child since for the past 14 years he failed to support and take care of the child.

Upon hearing the parties and taking the opinion of the child and evaluating the social investigation report, the trial court came to a conclusion that it is in the best interest of the child that the custody be vested to the second respondent as opted by the child and ordering the appellant to maintain the child at the rate of Tsh. 100,000/= per month, clothes, medication, paying the school fees and other necessary stuff for the child. At the same time, the trial court made an order for the appellant to have the right to know the school which the child is studying and allow him the right to visitation.

Aggrieved by the factual findings of the trial court and believing that the trial court reached a conclusion based on wrong legal premises, he preferred the present appeal armed 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 this court should make an order granting the appellant custody of the child. The grounds advanced by the appellant were;

1. *The Hon. Juvenile Court erred in both law and fact in dismissing the applicant's applications for custody of a child.*
2. *The Non. Juvenile Court erred in both law and fact for failure to properly analyse the circumstances of the case and consequently arriving at a wrong conclusion.*
3. *The Hon. Juvenile Court wrongly evaluated the evidence on record thus reaching into a wrong decision.*

At the hearing of the appeal, the appellant afforded the service of Mr. Elias Hezron, learned counsel while the respondents appeared in persons, unrepresented.

Submitting first, the counsel for the appellant prays to argue both grounds jointly. He avers that the appellant is the biological father of the child and that they lived together as husband and wife with the mother of the child who is now a deceased and that during their lifetime the child was living with her mother that's why he seeks custody of the child.

The counsel for the appellant refers this court to section 39(2)(c) of the Law of Child Act, Cap 13 R.E 2019 which states that it is preferable for the child to be with his parents unless his right is persistently abused by his parents. He added that, as per court records there is no evidence which endangers the best interest of the child and its growth if the child

will be placed under the custody of his father, the appellant. He also referred to section 42(1)(a) of the Law of the Child Act, Cap 13 R.E 2019.

The counsel for the appellant went on to submit that the trial court erred in considering the allegation that the biological father was not maintaining the child when she was living with her mother and the opinion of the child who stated that she wants to live with the second respondent. Admittedly the opinion of the child is one of the criteria in deciding as to whom the custody may be granted, but claimed that the child's opinion is not viewed in isolation taking into consideration that on the day when the child gave her opinion, she was coming from the respondents.

He attacked the allegation that, the appellant was not maintaining her child as it was not proved in court since the appellant's affidavit shows that he was maintaining the child through her biological mother who is now a deceased. He added that, even the child's grandparent (a mother of the deceased) evidence, collaborated the appellant's argument that the appellant was maintaining his child. He ended up submitting that even the report of the social welfare officer recommends the child to be placed into the custody of his father as there is no evidence that the father abuses his right.

Responding, the first respondent avers that he believed the trial court properly decided the matter as the child whose custody is in issue was under their custody since her birth and that the trial court considered the opinion of the child who stated that she was living with the respondents. He ended by stating that the evidence of the trial court shows that the child was maintained by her mother and after her death, they were taking care of the child by paying school fees and other necessaries of life to the child.

On her part, the second respondent avers that, the trial court properly analysed the evidence of both parties and that they were living with the mother of the child at their home and when the mother of the child was working at Shinyanga they stayed with the child, that is to say, the child was under their custody. She claimed that, the appellant was abusing the child that is why she was not given custody and that the appellant was not maintaining his child as he failed to bring any exhibit to prove the same.

Rejoining, the counsel for the appellant stated that, it is not on record that the respondents were living with the child and therefore the said assertion should not be considered. He insisted that, when referring to page 7 of the trial court's proceeding, the respondents admitted that

the appellant has the right to stay with the child. He ended up by referring this court to sections 39 and 26 of the Law of the Child Act, Cap 13 R.E 2019.

After hearing the submission from both parties, this court has one issue to answer as to whether the appeal is meritorious. In answering the above issue this court will decide as to whom the custody of the child should be placed as the main controversy between the parties is on the custody of the child.

In determining this appeal, I find it pertinent to start by quoting section 4(2) of the Law of the Child Act, Cap 13 R.E 2019 which corresponds to Article 3 of the United Nations Convention of the Rights of the Child, 1989 and Article 4 of the African Charter on the Right and Welfare of the Child. 1990 in which Tanzania is a signatory and ratified them. The above-cited section provides that:

> *4(2) "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".*

The above provision provides that the best interest of the child shall be the determinant factor in any decision concerning the child. (See also the case of **Glory Thobias Salema v Philemon Mbaga,** Civil Appeal No

46 of 2019 [2020] TZHC 3794 (13 November 2020). However, 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.

Thus, the court is duty-bound to ensure that its decision focuses on the child's best interests. Therefore it will be the duty of the court to properly evaluate the evidence presented by the parties before it and if need arise, require a social welfare officer to prepare a social investigation report so as to make an informed decision that will be for the best interests for a child.

I have decided to briefly highlight on the phrase best interests of the child because, it is a determining factor in our appeal at hand, as to whom the custody of the child should be placed between the appellant and the respondents. The decision will either confirm to the trial court's decision or quash and set it aside as prayed by the appellant.

Reverting to our appeal at hand, it is the submission of the appellant's counsel that, the appellant as a father of the child should be granted custody as section 39(2)(c) of the Law of the Child Act, Cap 13 R.E 2019 provides that in making consideration for custody it is preferable for a child to be with his parents except if his right is persistently being abused by his parent. He further submitted that, the evidence on record does not show if the appellant who is the biological father of the child, abused the child in whatever manner. He also added that, the appellant is capable of maintaining the child and that it is now an opportune time to be given custody after the death of her mother who had the custody of the child.

The above submission was strongly opposed by both respondents who submitted that they were living with the child since when the child was two years. That they were closely follow up on the child's upbringing and development and supervised her development in education when she was studying at primary school in Mwanza and that since the mother of the child, the deceased was living and working at Shinyanga, they are the better persons to be granted custody as it was decided by the trial court.

From the submissions of the parties in this court and that of the trial court which also took the opinion of the child and as I have earlier on stated, the battle between the parties is on the issue of custody.

In determining the issue of custody in this appeal the governing law is the Law of the Child Act, Cap 13 R.E 2019 and its Rules made under it. When I revisited section 39 of the Law of the Child Act, Cap 13 R.E 2019, I find the factors that the court should have considered when making an order for custody of a child. Apart from taking into consideration section 39(2) (c) of the Law of the Child Act, Cap. 13 R.E 2019 as claimed by the counsel for the appellant, the court may also consider other factors like the views of the child, if the views have been independently given and the need for continuity in the care and control of the child as it is provided for in the above section under subsection (2) (d) and (f) respectively.

Upon my perusal of the court record, I find that the appellant is not well familiar with the child to whom he is seeking custody as his submission reveals that he saw the child when she was celebrating her one-year birthday. He stayed with her for a month when she visited her mother at Shinyanga and he met again at the burial ceremony of the mother's child. This submission corroborates with the submissions of the child when she was giving her opinion that the appellant is not well familiar to her as she was introduced by her mother in 2015 and that she never used to see the appellant. I can understand that it is difficult for

a child to know if her father attended her first-year birthday as she was an infant.

The available record also suggests that the respondents and particularly the second respondent is well familiar with the child as she used to stay with the child at their home from when she was two years old as she was schooling at Mwanza and that at sometimes when she get married the child was still at their home and that together with the first respondent, they supervised the child development in her education and they also ensure the well being and upbringing of the child. This submission corroborates with the submission of the child when giving her opinion in the trial court when she opted to be placed into the custody of the second respondent.

It is from the submissions of the parties as available in the court records this court formed the view that the respondents who are the primary caregiver in our case at hand have a bond and attachment with the child and that bond can not be easily broken and nothing strong on record shows that the best interest of the child is in jeopardy.

On the other side of the coin, it is true that legally a child has a right to stay with her parents. However, in making an order for custody the court shall consider the best interests of the child and 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, Cap 13 R.E 2019.

Moreover, the child's opinion on to whom the custody should be granted cannot be easily undermined. Upon going to the available records and based on the age and maturity of the child as she was 13 years when giving her opinion in court, I am satisfied that she had sufficient age and capacity to comprehend and therefore her opinion is independently given against the claim of the appellant who avers that since the child was coming from the respondents' house on the day she gave her opinion, the opinion cannot be independent. I find this argument is an afterthought as nothing has been shown to give weight to his assertion. Thus, I joined hand with the findings of the trial court by 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.

It is worth to note that, section 37(1) of the Law of the Child Act, Cap 13 R.E 2019 mentioned the category of persons who can make an application for custody including a parent, guardian or relative who is caring for a child. When one critically examined this section, may have come into the conclusion that the mentioned persons can be granted custody of the child so long as the best interest of the child is a priority.

In our case at hand, it is the averment of the counsel of the appellant that, the appellant being the biological father of the child is placed in a better position to be granted custody. From this argument, it is my strong view that the primary factor that the court considers is the best interest of the child which can be established by various things including but not limited to the bond, attachment and well upbringing of a child.

Before I conclude, I find it pertinent to state that being financially capable is not determining factor in granting custody. I say so because the appellant's affidavit states that the respondents are incapable of meeting the needs of the child. As it was rightly decided by the trial court and by the support of section 8(1) of the Child Act, Cap 13 R.E 2019, the appellant being a parent of a child is duty-bound to maintain her child. (See the case of **Sajjad Ibrahim Dharamsi & Ally Jawad Gulamabas v Shabir Gulamabas Nathar,** (Civil Appeal No 42 of 2020) [2020] TZHC 3763; (30 October 2020)

In addition to that, I had time to go through the social investigation report prepared by the social welfare officer, I have nothing to fault the trial magistrate's reasoning as to why she did not consider the report.

For the foregoing discussion, I don't see any reason to disturb the findings of the trial court decision. In the upshot, the appeal is hereby dismissed and due to the relationship of the parties, I make no order as to costs.

It is so ordered.

Right of appeal to the Court of Appeal explained to the parties.

M.MNYUKWA

JUDGE

27/05/2022

Court: Judgement delivered on this day 27th day of May, 2022 in the presence of the parties.

M.MNYUKWA

JUDGE

27/05/2022