IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

PC CIVIL APPEAL NO. 41 OF 2020

(Arising from the Judgment of the Juvenile Court of Nyamagana District at Mwanza in Misc. Civil Application No. 64 of 2019, dated 4th April, 2020.)

PILI ABDALLAH SHIMILE ..... APPELLANT

VERSUS

VENANCE DAUDI MGETA ..... RESPONDENT

RULING

22nd October & 8th December, 2020

ISMAIL, J.

The appellant herein featured as the respondent in an application in which the respondent prayed for custody of ABC (in pseudonym), a boy of six years of age. The child was born out of a mother who was the appellant's daughter she passed away in July, 2019. The respondent is the child's father. Following the mother's demise, the child remained in the custody of the appellant. News of the demise of the child's mother was reported to the social welfare office and police's gender and children's desk. Both guided that the child should be placed in the temporal custody of the respondent as the parties sorted out some family issues. The record

further informs that the appellant grabbed the child and clandestinely sent him to Dar es Salaam where he has been residing since September, 2019.

It is after this incident that the respondent instituted an application, praying for custody of the child. The appellant opposed the application, arguing that the child's deceased's mother left an instruction that the child should never be placed in the respondent's custody until he attains the age of majority. The appellant contended that she did not have any trust that the respondent would take a good care of the child.

Guided by the social welfare report, the trial court ordered that custody of the child be placed in the hands of the respondent whose ability to take care of the child's interest was proven. The office of the social welfare in Shinyanga municipality was directed to conduct regular visits with a view to monitoring development of the child.

This decision brought an outrage on the part of the appellant who holds the view that the decision was erroneous and inconsistent with the requirements of the law. The petition of appeal filed her has raised four grounds of appeal which are reproduced with all their grammatical challenges as follows:

1. *That the trial magistrate erred in law and facts in failure to observe that the child was of the age of the sixteen (sic) years as requirement of the law that he should be placed with his or her mother.*

2. *That the trial magistrate erred in law and fact in failure to regard to the wishes of the mother upon her death that the infant should be placed to her sister/grandmother.*

3. *That the trial magistrate erred in law and fact in failure to observe and take into consideration the wishes of the child.*

4. *That the trial magistrate erred both in law and fact in basing his decision only on the recommendations of the welfare officer in reaching its decision.*

At the hearing of the appeal, Mr. Beatus Linda, learned advocate represented the appellant, whilst Mr. Linus Munishi, learned counsel appeared for the respondent.

Mr. Linda kicked off the discussion by praying to abandon ground four of the appeal, opting as well, to argue the rest of the grounds in a combined fashion. Punching holes on the decision of the trial court, Mr. Linda contended that the custody order was not consistent with the provisions of section, 26 (2), 36 (1) (2) (a), (b) and (d) of the Law of the Child Act, Cap. 13 R.E. 2019; section 125 (2) and (3) of the Law of Marriage Act, Cap. 29 R.E. 2019; and Rule 72 (2) (b) and 73 of the Juvenile Court Rules, GN. No. 182 of 2016. He argued that these provisions guide on what should be considered by courts before they grant custody

orders. He submitted that courts are obliged to consider age of the child, interest of the child, his wishes and wishes of the parents. He contended that the law provides that a child below the age of seven years should live with his mother. Referring to the proceedings that bred this appeal, Mr. Linda argued that it was wrong for the court to grant custody to the respondent over a child who was six years of age. While submitting that section 126 (2) of Cap. 13 and section 125 (3) of Cap. 29 were not absolute, the learned counsel argued that the exception is where special circumstances allow the child to be in the father's custody. When that happens, strong reasons must be adduced. He submitted that none were adduced in the impugned decision, thereby rebutting the presumption.

Citing Rule 73 (d) GN. No. 182 of 2016, the appellant's counsel argued that, wellbeing of the child is likely to be in jeopardy because the evidence is clear that during the period in which the child was in the appellant's custody, no communication existed with the respondent. The learned counsel contended that, in this case the, provisions of section 39 (1) (2) (a) (b) of Cap. 13 were not complied with, as interests of the child were not considered. He fortified his argument by citing the case of ***Ramesh Rajput v. Sunanda Rajput*** [1988] TLR 96 (CA) in which it was

held that the most important character in granting custody is the wellbeing of the child.

On the wishes of the mother, Mr. Linda contended that the deceased left a declaration of intent that the child should not be in the custody of the respondent, and that the wish was consistent with section 125 (2) (a) of Cap. 29. He argued that the trial court ought to have taken that into consideration. He held the same view with respect to the wishes of the child and, on this, he cited Rule 73 (a) of GN. No. 182 of 2016 which emphasizes that wishes of the child should be considered. The learned counsel contended that the social welfare officer's report was silent on the wishes of the child, arguing that such omission offended Rule 72 (2) (b) of GN. No. 182 of 2016. To bolster his argument, Mr. Linda cited the case of ***Mariam Tumbo v. Harold Tumbo*** [1983] TLR 293, wherein it was held that wishes of the child are of paramount importance. The learned counsel argued that the trial court failed to conduct any test on the wishes of the child. Mr. Linda contended that this appeal is meritorious and he prayed that the same be allowed with costs.

Mr. Munishi began by submitting that the child in question is not in the custody of the appellant who is seeking to reverse the trial court's decision. Instead, the child is in Dar es Salaam and that his mother passed

away. He argued that, after the demise of the child's mother, the only surviving parent is the respondent, the child's biological father. Referring to section 7 of Cap. 13, the learned counsel argued that the same provides that a child is entitled to live with his parents or guardians. He further argued that section 26 talks about the best interests of the child. On the fitness of the appellant to take custody of the child, Mr. Munishi argued that at no point in time did the appellant apply for custody of the child, opting instead to flee to Dar es Salaam and place the child in the hands of another person, contrary to the requirements of section 40. On that ground, contended the learned counsel, the appellant is not the right person to be entrusted with the custody of the child.

Submitting on section 26 (2) of Cap. 13, Mr. Munishi contended that the presumption under the said provision cannot operate now with the passing away of the child's mother. He argued that the report of the social welfare officer was submitted to the court and the same was the basis for the decision that granted custody to the respondent, arguing that the report made recommendations that took into consideration the best interests of the child. Mr. Munishi asserted that the trial court was moved by the requirements set out in section 26 (1) of Cap. 13. The learned counsel argued that the report clearly showed that the respondent's

income and that of his wife, a medical doctor, was enough to take care of the child with ease. That was unlike the person under whom the child is in custody, whose income does not exceed TZS. 100,000/- with 8 members of the family. Mr. Munishi submitted that issues to be considered before custody is granted are provided for in Rule 73 of GN. 182 of 2016.

Arguing on the wishes of the child's mother, the learned counsel contended that there is no evidence to prove that such declaration was given by the deceased. With regards to the wish of the child, Mr. Munishi contended that at the age of five years, the child would not give any rational answers if he was put to test on what he wished. The respondent's counsel urged the Court to dismiss the appeal and uphold the trial court's decision.

In rejoinder, Mr. Linda argued that section 7 of Cap. 13, cited by the respondent's counsel, provides for the persons under whose custody the child should be placed, and that the legislature envisioned occurrence of circumstances such as the present case. The learned counsel argued that the child has been living with his mother and the appellant since his birth. On the appellant's failure to apply for custody, Mr. Linda held the view that the argument is baseless, adding that there is no evidence that the child was forcibly removed from the respondent's custody.

With respect to the recommendation of the Social Welfare Officer, the learned counsel contended that there is no evidence that the respondent had a wife and that he was able to maintain the welfare of the child. With respect to consultation with the child, Mr. Linda maintained that the law had been flouted. He reiterated his call that the appeal be allowed.

From these contending submissions, the issue to be resolved is whether this appeal has raised anything that can be said to be flawed to warrant reversal of the trial court's decision.

As I begin the disposal journey, let me state from the outset that this appeal does not present any credible contention that can move the Court to depart from the trial court's decision. I shall demonstrate.

It is noteworthy that the Law of the Child Act (supra) has set out rights that a child should enjoy to ensure that his welfare is assured. One of such rights is that which is provided for under section 7. This is the right to live and grow up with parents, guardian or family. This underlying right can only be dispensed with in the circumstances enshrined in section 7 (2). These circumstances are if living with the parent or guardian or family may-

(a) Lead a significant harm to the child;

(b) Subject the child to serious abuse; or

(c) *Not be in the best interest of the child.*

This is the provision which was used by the trial court to order that custody of the child be placed in the hands of the respondent and the court was satisfied that, in the absence of the circumstances enumerated above, the respondent was the right person in whose hands custody of the child should be placed. The appellant's counsel has contended that the trial court did not consider the requirements set out in Rule 72 (2) (b) and Rule 73 of the GN. No. 182 of 2016. My unfleeting review of the record of the proceedings in the trial court does not give me anything that can make me believe that any of such provisions was flouted. The decision of the trial court was based on the Social Welfare Inquiry Report which came up with glowing remarks and recommendations that were the basis for granting custody to the child.

The appellant's counsel has invoked the provisions of section 125 (2) and (3) of Cap. 29 as the basis for his contention. I hasten to submit that these provisions are only applicable where the parties were once husband and wife and they are now estranged, and not in a case where, as it is here, the parents were never married. I take the view that the argument premised on these provisions is misplaced.

Mr. Linda has raised an argument that the impugned decision does not embody reasons as to why custody should be given to the father, and

that such absence means that the respondent has failed to rebut the presumption set under section 26 (2) of Cap. 13 and section 125 (3) of Cap. 29. As I said earlier on, section 125 (3) has no application in the instant case. But even assuming that the said provision finds relevance in our case, I take the view that the reason lies in section 7 of Cap. 13, and the trial magistrate has sufficiently explained that, as gathered from pages 4 and 5 of the ruling in which the trial magistrate is quoted as saying:

> *"..... since the child' mother is no longer alive, the only close surviving relative is his father, the applicant hence it is the best interest of the child to be lived (sic) and placed under the custody of his father, the applicant."*

I consider this to be a sufficient reason that is derived from the requirements set under section 7 of Cap. 13.

The appellant's counsel has cited Rule 73 (d) of GN. 182 of 2016 as the basis for her decision to cling on to her desire to keep the child away from the respondent. In my considered view, this need cannot supersede all other requirements under that rule, including the requirement set under item (i) which requires an assurance that there will be willingness of any non-parent to support and facilitate the child's on-going relationship with the parents. From what I gathered through the counsel's submission, the appellant is not willing to cede any ground which would allow blossoming

of the child's relationship with the respondent. This explains why she is persistent and determined to challenge the custody order while the child is in the hands of another person, a stranger to these proceedings.

The appellant's counsel has implored me to be enjoined to the holding in ***Ramesh Rajput's case*** (supra), in which it was held that the most important consideration for granting custody is the wellbeing of the child. While I fully agree with that reasoning, I hold the view that, whereas the social welfare report has taken the view that wellbeing of the child is more assured if the child stays with his father, the picture painted in respect of the person under whose custody the child is, currently, gives little or no assurance that well-being of the child will be upheld. The appellant has not stated with any semblance of precision that the person she has entrusted with the custody is financially endowed to meet all obligations that are necessary for the child's development. The same decision cited by the appellant's counsel went further to hold that a child of such age should be with his mother unless there are very strong reasons to the contrary. In the circumstances where the mother is deceased, applicability of this requirement becomes irrelevant since, in this case, the child's mother has passed away. This passes over the responsibility to the surviving parent, the respondent.

The appellant's counsel has taken an exception to what he contended as failure by the trial court to consider wishes of the child. In that regard, the counsel holds the view that Rules 72 (2) (b) and 73 (a) of GN. No. 182 of 2016 and the reasoning in ***Mariam Tumbo*** (supra) were flouted. I take the view that the learned counsel's interpretation of the cited provisions is flawed. What the law directs is that wishes and feelings of the child must be those that are ascertainable and, at his age, it would not be possible and would be expecting too much to have him express independent wishes that are for posterity. Reading the social welfare report, I get the impression that parents and guardians were engaged and each one of those gave their social and economic status and the kind of life they lead. In my considered view, this was enough to conform to the spirit of the law.

With respect to ***Mariam Tumbo*** (supra), ascertainment of the wishes of the child was conditional. The Court held:

> *".... in matters of custody the welfare of the infant is of paramount consideration, but where the infant is of an age to express an independent opinion, the court is obliged to have regard to his or her wishes."*

In our case, the child was below the age of six when the matter was instituted in court. It would be incomprehensible to think that at his age, his opinion, if sought, would be independent. I take the view that

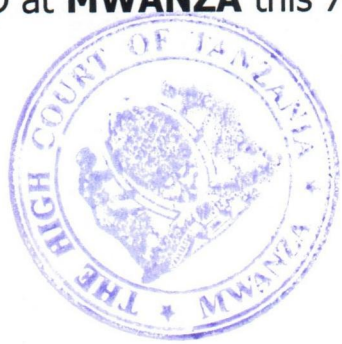
circumstances of this case would not allow relying on the wishes of the child.

Overall, I am convinced that the decision of the trial court that granted custody of the child in the hands of the respondent was quite in order and devoid of any blemishes, and I uphold it. Consequently, I dismiss this appeal and order that the trial court's order and directives be complied with.

It is so ordered.

Right of appeal duly explained to the parties.

DATED at **MWANZA** this 7th day of December, 2020.



M.K. ISMAIL

JUDGE

Date: 08/12/2020

Coram: Hon. M. K. Ismaili, J

Appellant: Mr. Beatus Linda, Advocate

Respondent: Mr. Idrisa Jum, Advocate for Mr. Linus Munishi, Advocate

B/C: B. France

Court:

Judgment delivered in chamber, in the presence of Mr. Beatus Linda, Counsel for the appellant and Mr. idrisa Juma, learned Counsel for Mr. Linus Munishi, Advocate for the respondent, this 08th day of December, 2020.

M. K. Ismail

JUDGE

At Mwanza

08th December, 2020