IN THE HIGH OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 55 OF 2019

(Originating from Matrimonial Cause No. 11 of 2017 at the Resident Magistrate Court of Morogoro)

JOSEPH CYPRIAN MASSIMBA .....APPELLANT

VERSUS

MAUREEN SAID MNIMBO.....RESPONDENT

JUDGMENT

MASABO, J.L.:-

At the Resident Magistrate Court of Morogoro, the respondent Maureen Said Mnimbo petitioned against the Appellant, Joseph Cyprian Massimba, for divorce and subsequent orders for division of matrimonial asset and custody of the issue of marriage one, Christian Joseph Massimba and maintenance of the same. After full trial the court entered judgment in favor of the petitioner. The petitioner was granted custody of the infant whereas the Appellant herein was granted an unimpeded access to the infant. Disgruntled the appellant has appealed to this court contending that the trial magistrate erred in law by granting custody of the issue to the respondent without considering the evidence showing the inability of the respondent to do the same and that the Resident Magistrate failed to consider that such order will disturb the routine of the issue of marriage.

The appeal was heard in writing and both parties were represented. Ms. Aziza Mahenge, learned Advocate appeared for the Appellant and Mr. Benjamin Jonas, learned Counsel represented the Respondent.

In support of the Appeal, Ms. Mahenge opened her submission with a caution that the life of the issue of marriage which is now at 11 years of age is susceptible to being disturbed by desires of parents and not the child's needs. She submitted that, the Respondent is not a suitable custodian of the infant as there is evidence to the effect that she has never been responsible for the care of the issue since its birth and that throughout the subsistence of the marriage it was the housemaids, and not the respondent, who took care of the infant. That, it is on this basis, the Social Welfare Department granted custody of the infant to the Appelant. Further she argued that, the respondents is not of good moral hence it would be inappropriate to entrust the issue under her care.

She argued further that section of section 125 of the Law of Marriage Act RE 2018 requires the courts while granting custody to have due regard to the undesirability of disturbing the life of the child by change of custody and to give paramount consideration to the best interest of the child [**RAMESH RAJPUT V MRS S RAJPUT** [1988] C.A TLR 96.

Regarding the undesirability of the Respondent, Ms. Msangi submitted that the respondent deserted the matrimonial home in 2016 leaving the issue behind under the custody of the appellant who has since then taken good

care of him in the assistance of house maids. That, there was a time the Respondent tried to snatch the issue from its father but was prevented the by the Social Welfare Department which decided that due to the Respondents unbecoming behavior it was best for the issue to remain under the custody of the appellant. Lastly, she argued that the change of custody from the Appellant to the Respondent will disturb the child both mentally and morally. The appellant's Counsel cited the case of **Mariam Tumbo v Harold Tumbo** [1983] T.L.R 293 where it was held that in matters of custody the welfare of the infant is of paramount consideration.

For the Respondent, Mr Jonas submitted that it is a settled principle of law that the appellate court cannot interfere with the findings of facts unless it is shown that the lower court acted on a wrong principle (**Mary Wanjiku V Gachigi V Ruth Muthoni Kamau** (2003) 1EA 69.) Based on that principle, he argued that the appeal does not show if the trial court acted on a wrong principle to arrive at its decision being appealed from hence there is no justification for this court to interference with the trial court's finding on those factual matters raised by the Appellant. He further submitted that, as rightly pointed by the appellant's counsel, the paramount consideration in granting custody is the welfare of the child and the undesirability to disturb the life of the child by change of custody as per section 125 of The Law of Marriage Act (Cap 89 RE 2002). He also submitted that, in addition to these two considerations, section 39 of the Law of the Child Act No 21 of 2009 which enjoins the court to take into account that it is be with his mother.

Regarding the desirability of the Respondent, he submitted that the allegations raised by the Appellant are vexations and self-styled to condemn the Respondent as unsuitable as there is no evidence from the Social Welfare Department to support the allegation that she was found to be of immoral character. That, in making its finding, the trial court took into consideration the fact that the child was being taken care by housemaids and that no evidence was rendered to impeach the Respondent's character and no proof was rendered to show that she neglected the child at any material time. That, the child being of the age of 11 it is desirable that she remains under the custody of the mother.

Regarding the undesirability of disturbing the life of the child, Mr. Jonas submitted that prior to the separation the child stayed with both the Appellant and the respondent, therefore the granting custody to the respondent will not disturb the child. He finally dismissed the submission that the child's view was not considered in determination of custody. He reasoned that the Appellant had the chance to bring the child to court for it to express its view on the custody but chose not to hence his complaint on this issue is unfounded.

I have given due regard to the submission made by all counsels. The main issue for determination is whether or not the trial court while making orders of custody erred by failing to consider the character of the Respondent, undesirability of disturbing the life of the child and by failing to give due regard to the view of the child.

Section 125 (2) (a), (b) of the Law of Marriage Act, Cap 29 R.E. 2002 enunciates the key factors to be considered by courts in determining under whose custody the issue of marriage should be placed. According to this section:

> "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."

It is also important that, the court accord due consideration to the undesirability to the undesirability of disturbing the life of an infant by changes of custody (section125 (3)). Also, significantly, relevant is the provision of section 39(1) of the Law of the Child Act, which mandates the court, while determining issues of custody, to give due consideration to the best interest of the child and the importance of a child being with his mother.

Thus, the principle in the case of **Ramesh Rajput v Mrs S Rajput** (supra), **Mariam Tumbo V Harold Tumbo** (supra) and **Otti V Otti (1992) 7 NWLR** (supra) collectively represent the interpretation the law as it applies in our jurisdiction. The question therefore is whether or not the trial court heeded to these principles. The answer to this is found in the page 5 of the judgement where the learned trial magistrate while considering the issue of custody made the following findings:

"Considering the custody of the child, I have considered the evidence that the child was taken care by the house maids, and not the respondent, it would be the same as when the custody is granted to him. The Respondent forgets that his wife was schooling almost most of their marriage life and there is no evidence that the petitioner willful neglected to take care of the child.....
In addition to that I have considered the age of the child and that he requires mother attention and care, I find that it will be just the custody of the child.....be granted to the petitioner.

It is vivid from this excerpt that the trial magistrate had in mind the best interest of the child as a paramount consideration in awarding custody to the Respondent. While it is true that there is no indication that the child was not accorded an opportunity to express his views as regards custody, in my opinion, that alone cannot defeat the courts findings if it is established that the decision was made with due regard to the principle of best interest of the child which is the paramount consideration in similar cases. My view, is further reinforced by the fact that the child is of tender age and may not be in a position of making rational choices as to his best interest and wellbeing. It is in this context in **Festina Kibutu v Mbaya Ngajimba [1986] TZHC 23**, the court quoted with approval the case of **RE O' HARA** (1900) 2 IR2323 where it was held that the wishes of a child of tender age must not be permitted to subvert the whole law of the family or to prevail against the desire and authority of the parent, unless the welfare of the child cannot be secured. Based on these parameters, I am of the settled view that the failure

to solicit the independent opinion of the child who was at the material time 10 years old did not occasion any miscarriage of justice.

The argument that the mother is of immoral and unsuitable for custody, is devoid of any merit. The appellant's submission on this point and his testimony discernible from the records is without support and full of contradictions. As rightly held by the trial court the lamentation that the Respondent was not responsible for the care of the child and left all the responsibility to house maids disregards the fact she was studying most the time, a fact which is well acknowledged in the Appellant's testimony in the trial court. There is also uncontroverted testimony by the Respondent that when travelling, the Respondent used to send her mother to take care of her son in her absence. Considering the fact that the appellant seeks to impeach the character of the Respondent, it was pertinent for him to render tangible evidence of the Respondent's immoral behavior and her undesirability for custody. As rightly held by the trial court there is no record that she willfully neglected the child and here is equally no evidence that she mistreated him which would make he undesirable for custody.

The argument by the Respondent that the house maids are best placed in taking care of the child is incomprehensible considering that no proof has been rendered on the what is alleged to be the Respondents immorality. I am fully aware of the fact that the principle of best interest counterbalances the notion of the importance of the natural love and affection of the mother which in the past outweighed other considerations in custody determinations

and which in some cases tendered to overlook the suitability of the mother as custodian. The best interest rule under section 125 of the Law of Marriage Act and Section 39 of the Law of the Child Act accords the courts an opportunity to determine what provisions and terms would best guarantee an opportunity for the child involved to grow, to mature, and be responsible citizens regardless of the desires and preferences of the respective parents. Without distorting the rationale behind rule, the provision of section 39 (1) of the Law of Child Act further implies that at least where the pertinent factors are evenly balanced and child's welfare and security will be guaranteed if placed under the custody of any of the two parents, preference should be accorded to maternal custody. In other words, where the natural love and affection of the mother is not outweighed by other elements constituting the best interest of the child, the child should be placed under its mother so that she can continue to enjoy the he natural love and affection of its mother. But, where the circumstances are such that other factors outweigh mothers love, custody should not be granted to the mother. Thus, in the instance, had there been concrete evidence on the allegations marshaled by the Appellant regarding the Respondent's character, this court would not have been hesitant to overturn the decision of the trial court and ordering instead that custody vest in the father.

The appellants submission that the change of custody will disturb the life of the child is also not based on any material evidence. What we have are blanked statements from the appellant. In the absence of tangible evidence

showing the anticipated disturbance, this court finds no basis upon which to to fault the finding of the trial court.

Based on what I have endeavored to state above, this appeal, is found to be devoid of merit. Accordingly, I dismiss it in entirety. The parties are to bear their respective costs.

DATED at DAR ES SALAAM this 10th day of February 2020.

J.L. MASABO

JUDGE

Judgment delivered this this 10th day of February 2020 in the presence of Mr. Abdul Ali Bwanga, counsel for the Appellant and the absence of the Respondent.

J.L. MASABO

JUDGE