IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 42 OF 2020

SAJJAD IBRAHIM DHARAMSI ---------- 1ST APPELLANT

ALLY JAWAD GULAMABBAS JIVRAJ ---------- 2ND APPELLANT

VERSUS

SHABBIR GULAMABBAS NATHANI ---------- RESPONDENT

Date of Last Order: *11/08/2020*

Date of Judgment: *30/10/2020*

JUDGMENT

L. M. MLACHA, J.

This appeal raises important questions in respect of the applicability of the Law of the Child Act, 2009 (the Act) and International Instruments in the safe guard of child rights in this country. It is all about the straggle for the custody of an 11 years old child born in the United States of America (the US) with an American father but who had a Tanzanian mother. The child obtained the US nationality by virtue of the birth but soon later shifted and lived in Tanzania and has not returned back to the US. He is a product of a broken family, a child who has not lived with his father but his step

father and maternal uncles for many years. He is now under pressure to be repatriated to the land of his father, the US following the death of his mother. His step father who is a Tanzanian and who has developed an attachment to him is resisting. His maternal uncles and Tanzanian grandparents are also resisting. He is also resisting to go there.

The court is invited to make an interpretation of the law governing the situation which is also connected to some International Instruments and say who between the two contesting sides has a right to get hold of the child. A number of cases were referred by counsel, both local and foreign to defend their respective positions. What are the details and who are the parties is what is to follow now.

The appeal was filled by SAJJAD IBRAHIM DHARAMSI and ALLY JAWAD GULAMABBAS JIVRAJ against the respondent, SHABBIR GULAMABBAS NATHANI. It seeks to set aside the ruling and orders of the Juvenile Court of Dar es Salaam at Kisutu made in Miscellaneous Application No. 194 of 2019. In that ruling, the Juvenile Court reviewed its earlier ruling and orders made in Miscellaneous Civil Application No. 139 of 2019 which had given the first appellant, Sajjad Ibrahim Dharamsi, custody of the child Alihassan Nathani. The court

had in mind that, the right person to stay with the child was not the first appellant who is a step father of the child but the respondent, Shabbir Gulamabbas Nathani, who is the biological father of the child. The second appellant Ally Jawad Gulamabbas Jivraj who is a maternal uncle of the child joined forces with the first appellant to get hold of the child.

It is a fact not disputed that the mother of the child Sajjida Gulamabbas Jivraji was married to the respondent long before she had her second marriage to the first appellant. The marriage was celebrated in Dar es Salaam Tanzania on 02/01/2004. They thereafter moved and stayed in the US. The child Alihassan was born in the US on 24/02/2009. Difficulties developed in the marriage. His mother came with the boy to Tanzania and filed Matrimonial Cause No. 30 of 2019 at Kariakoo Primary Court, Ilala District. The court granted divorce on 21/05/2010. She got married to the first appellant on 15/06/2014. The child who was born in the US and who is an American citizen, has lived in Tanzania since 2010 to date. He came to Tanzania with his mother while still very young in 2010 and have been living in Tanzania with his mother, the deceased and later with the first appellant as

his step father to date. The first appellant took care of him for all the years up to now.

No proceedings were filed in any court to claim for the child or seek custody of him before the death of his mother. He lived with the first appellant's family peacefully for all the years. He used to visit his grandparents unrestrictedly. The respondent has been visiting him during his annual leave (summer). He claims that he made efforts to get the boy through family meetings without success. And that, while still negotiating following the death of his mother, he discovered that there were orders to place him to the first appellant made in Miscellaneous Application No. 139 of 2019. He was not happy hence the move to seek revocation of the orders. The lower court revoked the orders which had placed the child to the first appellant arguing that the respondent being the father and surviving parent was the right person to get hold of the child. The appellants did not see justice in the decision hence the appeal.

A total of 14 grounds of appeal were lodged. They were drafted in a length language and were a bit repetitive. They are reproduced if full for easy of reference as under: -

1. That in arriving at the impugned ruling and order sought to be appealed, the court a *quo* erred in law and fact by imparting undue prominence to the biological nexus between the respondent and the child unleavened by any consideration of the several factors disclosed in the evidence on record and which are germane to the best interests of the child.
2. That in predicating its decision on custody on the respondent's *"right"* as a biological father, the court a *quo* accorded presumptive importance to the rights of the respondent as a biological father and failed to undertake a broadly gauged assessment of all the circumstances bearing on the best interests of the child as evinced in the evidence on record and therefore detracted from the paramountcy of the best interest of the child as a sole determinant of custody.
3. That in arriving at its decision to repose the custody of the child with the respondent, the court a *quo* erred in law and fact by assigning surfeited deference to the wishes of the respondent as a biological father *tout court simpliciter* and on the

need to reunite the child with its agnatic relatives a the expense of a meaningful consideration of all the circumstances disclosed in the evidence on record impinging on the best interests of the child and whether the foregoing is in fact congenial to the best interests of the child.

4. That the court a *quo* reliance on the respondent's purported *"right"* to custody of the child based on a biological tie with the child is misconceived and lacks any mooring in the law pertinent to custody and detracts from a holistic consideration of the custodial arrangement most congenial to the best interests of the child.

5. That in reaching its decision to vary the original order of 17th July, 2019, the court a *quo* failed to adverts its mind to the best interests of the child and relied on factors with exiguous relevance to the best interests of the child and which were raised by the court a *quo* on its own motion without inviting the parties to be heard on those issues.

6. That in varying the original order of 17th July, 2019, the court a quo relied exclusively on the

respondent's *ipse dixit* without further dispositive evidence in concluding that the 1st appellant despite representations to the court disavowing knowledge of the whereabouts of the respondent, had in fact known of the presence of the respondent in Dar es Salaam at the time that the original custodial proceedings were filed.

7. That the court a *quo* erred in law and fact by concluding that the mere fact the child stayed intermittently with its grandfather after the passing of its mother is contravention of the conditions of custody granted to the 1st appellant by dint of the order of 17th July, 2019 without any evidence as to whether the foregoing was a change of a serious magnitude as to adversely impinge on the best interests of the child or detracts from the parenting ability of the 1st appellant to ensure the best interests of the child.

8. That having accepted the evidentiary factum that the child had lived almost its entire life with the appellants and maternal grandparents, the court a *quo* erred in law and fact by failing to draw the

necessary inferences open from such evidence bearing on the best interests of the child.

9. That in making the impugned custodial determination in favour of the respondent, the court a *quo* failed to advert its mind to the statutory desiderata to ensure the continuity of care and maintenance of the features that anchor the stability and security of the child who is a subject of a custodial proceeding and also failed to consider the adverse impact on the child portended by the discontinuance of the child's current living arrangement entailed by the court's impugned custodial decision.

10. That in arriving at the impugned custodial decision, the court a *quo* misdirected itself by failing to consider the whole tenor of the independent wished of the child as expressed to the court by the child and disregarded them based on a tendentious and selective assessment of the child's expression of its wishes and also failed to consider whether the wished expressed by the child were plausible when weighed on the fulcrum of

circumstances bearing on the child's best interest as evinced in the evidence on record.

11. That having ordered the preparation of a social inquiry report by a court appointed social worker, the court a *quo* erred in law and fact by failing to impact any weight to the said report without a plausible justification and cavalierly dismissed the report and the attachments thereto without adverting her mind as to whether the report and the recommendations broached therein further or detract from the best interests of the child.

12. That the court a *quo*, erroneously pretermitted any consideration of the need to maintain the continuity of care of the child and reposed blithe confidence in the ability of the respondent to protect the child from the rebartive psychological and emotional consequences that the child will suffer as a result of its displacement from its habitual milieu without any evidence on the parenting ability and temperament of the respondent, the nature of the respondents current familial setting and relations and whether the said setting would be sufficient and appropriate to

buffer the child from the adverse impact of change of its current living arrangement.

13. The court a *quo* failed to impart any consideration on the need to maintain the continuity of the child's currents living arrangements based on the unwarranted supposition that the respondent had forged a relationship with the child by dint of his regular visits of the child without satisfying itself as to whether the evidence on record contains any basis to support the illation that the relationship between the respondent and the child was strong and of a quality to withstand any disruptive consequences to the child as a result of the change of its current living arrangements.

. That in granting access to the 2nd appellant and the paternal grandfather of the child, the court a *quo* failed to advert her mind to the efficacy of the access rights granted to the 2nd respondent and the grandfather and was oblivious of the complexity of cross-jurisdictional access and abdicated its responsibility to ensure the efficacy of the access rights to the 2nd appellant and the grandfather of the child by directing them to enlist

the assistance of a nebulous "*the next social worker*" in the United States of America in the event of any difficulties with the enforcement of their access rights.

The appellants' prayers are as under;

(i) That, the HonourableCourt be minded to reverse the decision of the Juvenile Court of Dar es Salaam at Kisutu dated 18th December, 2019.

(ii) That, the court issue and order for the custody of the child Alihassan Nathani to vest with Sajjad Ibrahim Dharamsi, the 1st appellant.

(iii) That, in the alternative, the court be minded to issue an order granting the custody of the child Alihassan Nathani to Ali Jawad Gulamabbas Jivraji, the 2nd appellant.

(iv) That, the court grant access to the respondent within the geographical encincture of the United Republic of Tanzania.

(v) That, in the alternative, should the court be minded to grant access to the respondent outside Tanzania, that, such access should be granted subject to the latter furnishing the court with a

mirror order from a competent court in the United States of America replicating the terms of the order to be issued by this court and barring the respondent from seeking a fresh custody from any court in the United State of America and acknowledging the finality of the custody decision of the High Court of the United Republic of Tanzania and also acknowledging the High Court of Tanzania as the court with the exclusive jurisdiction over the custody of the child.

(vi) Costs of this appeal.

(vii) Any other reliefs that the honourable court deem to be apposite.

Counsel for the parties had time to file written submissions on the ground of appeal. They filed length submissions attached with various authorities to support their respective positions. Mr. Hussein Mohamed appeared for the appellants while Mrs. Nakazael Tenga appeared for the respondent. I had time to read and examine the submissions closely. I got a lot of assistance from the submissions and the attached authorities. I thank the counsel for the research and industry.

Mr. Hussein Mohamed made a general overview before making submissions on the grounds of appeal. He said that, the ruling of the Juvenile Court in Miscellaneous Application No. 194 of 2009 placed undue prominence to the biological nexus between the respondent and the child without considering other factors which are germane to the best interest of the child. It put presumptive importance to the parental rights of the respondent as a biological father and failed to accord a broader assessment of evidence and therefore detracted from the paramountcy of the principle of the best interests of the child, he said. He proceeded to say that the lower court put the wishes of the respondent as a biological father and the need to reunite the child with its agnatic relatives without considering other factors which are equally or more important. He argued that giving custody of the child simply because the respondent is a biological father was wrong and a misconceived idea. He said that, the court failed to address itself to the best interest of the child as required by the Law of the Child Act. It instead decided the case based on new issues raised suo mottu without inviting the parties to address it. The court relied on the information given by the respondent alone, he said.

Having made these general observations, Mr. Hussein divided the grounds of appeal to 4 groups and made joint submissions. He started by grounds Nos. 1, 2, 3 and 4. He submitted that, the court erred in holding that once a natural parent is established, custody should follow. He said that there must be a balanced assessment of all the circumstances bearing in mind the best inters of the child. He said that the court failed to observe the provisions of section 39(1)(2) of the Law of Child Act which carry the principle of the best interest of the child. He argued that the law does not say what is the best interest of the child. It has left the matter to the court to say what is the best interest of the child after weighing all the circumstances and facts involved.

Counsel argued that, the Law of the Child Act does not put any significance to parental rights of custody against the best interests of the child. Referring to section 4(2) of the Act, he said that, all the parental claims must be subordinate to the best interests of the child. He argued that, much as parental ties are important but are only an integer in the best interests' equation. They cannot supplant the best interests of the child. He said that, the child is not **a**

chattel in which its parents have priority interest. It is a human being to whom serious obligations are owed under the relevant law. He went on to argue that natural parents have no automatic right to custody. Their importance lies in furtherance of the best interest of the child, he said. Assuming biological ties without the best interest of the child is misconstruing the law, he argued. While addressing the need to maintain uniform standards, counsel argued that, the parliament could not have enacted a law which is inconsistent with International Law instruments. He went on to say that, when interpreting statutes enacted to enforce rights under International Instruments as is the case for the Law of the Child Act, interpretation should be done in accordance with the terms of International Instruments. It argued that, the parliament could not have intended to enact a law that detracts or contradicts its obligations towards children provided under International conventions.

Referring to the decision of the House of Lords in **Garland V. British Rail Engineering Limited [1982] UKHL 2** and the decision of United Kingdom Supreme Court in **Assange V. The Swedish Prosecution Authority [2012] UKSC 22** he said that, domestic legislation, whose enactment is precipitated by International Instruments should be interpreted in a

manner that avoids disjuncture between domestic legislation and International Instruments. Referring to the **General Comment No. 14 (2013)** Para 3 and 4 of the **United Nations Committee on the Rights of Children**, he said that, the assessment of the rights of the child should be individualized, flexible and should consider all contextual exigencies bearing on those interests. He then invited the court to see the interpretation given by courts in UK, Canada, Australia and India, saying that he could not find a local case on the subject.

Citing the decision of the House of Lords in **JV. V (an Infant) [1969] UKHL 4**, he said that the court was to decide a case of custody between a natural parent and his foster parents and granted custody to the foster parents because it found it difficult to disturb the existing arrangements for the child. In Canada, counsel submitted, the Supreme Court had the same decision in **Gordon V. Goertz [1996] S.C.R. 27 and Young V. Young [1993] S.S.C.R.3** ruling against importing presumptive or decretal significance to biological ties which are not connected to the best interests of the child. Counsel submitted that a similar position was held by the House of Lords in **Re: G (children) (FC) [2006] UKHL 43** where it was

said that, there is no presumption in favour of natural parents. The determination of custody must be predicated on evidence not presumptions. And that, the welfare of the child should be of paramount consideration more than anything else. Further reference was made to the decision of the House of Lords in **Brixey V. Lyna** [1996] UKHL 17 and decisions of the English Court of Appeal in **W (a child)** [2016] EWCA Civ 793 and **Re: E.R (a child)** [2015] EWCA Civ 405 with similar observations.

Counsel referred the court to **Hodak Newman Hodak [1993]** FLC 92-421, **Rice V. Miller [1993]** FLC 92-415 and **Re: Evelyn [1993]** Fam CA 55 which are decisions from Australia on the subject. Referring to the decisions he said that, while the fact of parenthood is not be trifled with and should be regarded as an important and significant factor in considering which proposals are better to advance the welfare of the child, such facts does not establish a presumption in favour of natural parents or general preferential position in favour of natural parents. This was also the position in India as per **Gaurav Naggpal V. Sumadha Nagpal, Civil Appeal No. 5099 of 2017**, he said.

Submitting in grounds 5, 6 and 7, he said that, the court has power under S. 37(3) of the Law of the Child Act to grant

custody but it is subject to the best interests as per S.37(4). He argued that, the court did not follow S. 37(4) of Law of the Child Act. He said that, the court failed to consider the best interests of the child before varying the order. It varied the order without satisfying itself to the exact nature of the change. It failed to assess the best interests of the child before varying the order, he submitted. It also erred in failing to consider the social Inquiry Report. It relied on irrelevant matters in varying the order, he argued.

Submitting in grounds, 8, 9, 10, 11, 12 and 13, counsel submitted that, the court failed in seeing the need to maintain continuity of care to the child. That the child had formal attachment to the appellants and it was not correct to remove him and place him to the respondent who was not used to him. It even failed to consider the wishes of the child. He referred the court to section 39(2) (d) of Law of the Child Act on the need to consider the wishes of the child. He invited the court to seek assistance from the case **RES (contact children views)** [2002] IILR 1156 on the need to hear children who can express themselves. He said that, the older the child the more serious they should be heard as was said in **Re: L (contact Domestic, Violence ets)** [2002 2

FLR and **Re:(a child)** [2009] EWCA Civ 445. He then argued the court to grant the appeal as prayed. Counsel argued the court to allow the appeal with costs.

Mrs. Nakazael Tenga started by giving the background of the matter according to her version. She said that the respondent and the late Sajjida were husband and wife. They lived in the US where the child Alihassan Nathani was born. Both the respondent and the child Alihassan Nathani are American citizens. That, in 2014, Sajjad and the child travelled to Tanzania for a visit. She then filed divorce proceedings in Tanzania which were heard ex-parte without the knowledge of the respondent. She proceeded to live with the first appellant as her husband without knowledge to the respondent. On noticing, the respondent went to religious leaders to claim for the child and was adviced to wait till when the child will be 7 years old. When he came to request for the child after 7 years, Sajjida refused. Access for the child was very difficult, he said.

Counsel proceeded to submit that Sajjida died on 07/02/2019 leaving the child with the appellant. The respondent came a week later to send condolences to the family. He requested for a meeting to discuss the fate of the

child without success. He then approached the Juvenile court for a redress only to be told that there was a prior application which had given custody to the first appellant. And that it was done ex-parte. He wondered why he could not be consulted or served as he was in Dar es Salaam in those days. He then lodged the application which vacated the earlier ruling. Counsel could not see any problem with the ruling and orders of the lower court.

Counsel submitted that the cases cited by the counsel for the appellants cannot assist the court because they lack material facts. It is also not clear if the provisions under discussion are in parimateria with our Law of Marriage Act. She argued in support of the decision of the lower court saying that it was made according to the Law of the Child Act. He referred the court to section 39(1)(2)(c) and (e) of the Act. Citing subsection (c), she said that, it is preferable for a child to stay with his parents except if his rights are persistently being abused by his parents. She submitted that there is no evidence that the respondent abused the child's rights. She referred the court to subsection (e) and argued that it was desirable for the child to stay with the other children of the respondent's family given the requirements of the law that siblings must stay together.

Counsel referred the court to section 37(1)(3)(4) of the Act saying that the respondent has a right to stay with the child as a parent. She took the court to section 9(4) of the Act which provides that where biological parents of the child are deceased, parental responsibility may be passed to a relative of either parent or a custodian by way of a court order. She said that in our case, the father is alive so there is no reason of giving custody to other people. She referred the court to the case of **Halima Kahema V. Jayanlal G. Kiria [1987] TLR 147** where it was said that the welfare of the child requires it to be in the hands of either parent not child's grandparent. The next case was the case of **Bharat Dayal Velji V. Chandni Vinesh Bharat**, Civil Appeal No. 45 of 2017 where it was said that the best interest of the child carters far behind financial ability. The children need love, affection and care which the mother (father) is in the best position to offer, she said. She argued that the respondent is married and have 2 other kids which can easily receive the child.

Counsel requested the court to observe the provisions of section 7(1)(2)(a)(b) and (c) which provide that the child is entitled to live with his parents or guardians. And that he should not be denied that right. She argued that it was

wrong to handle the child to the first appellant whose integrity is questionable. Giving details he said that the first appellant allowed the child who was under him as a care taker to stay with his grandparents. That contradicted rule 75(3), she said.

Responding to the submission that the lower court disregarded the wishes of the child, the counsel for the respondent referred the court to the views of Fitzgibbon LJ in **Re: O'hara [1990]** 21R 2323 who said that the wishes of a child of tender age must not be permitted. These views, she submitted were adopted by Muruke, J in **Rosemary Stella Chambe Jairo V. David Kitundu Jairo**, High Court, Civil Appeal No. 79 of 2013 who said that the child may be coached, she argued.

She ended by referring the court to the case of **DG Jackson** [2001] ZASCA 139, a decision of the Supreme Court of South Africa which said that an appellate court should not interfere with the decision of the trial court lightly because it has a chance to see and measure the credibility of parties. She argued the court to dismiss the appeal with costs.

Mr. Mohamed Hussein filed a rejoinder submission and joined issues with the counsel for the respondent in all fours.

He insisted that the appeal has a lot of merits and must be allowed with costs.

I have taken time to consider the submissions closely. Primarily the court is invited to see if the lower court had directed itself properly on the provisions related to custody of children before varying its orders. Whether it was proper so to say, to revoke the order of custody of the child which was given to the first appellant and give it to the respondent in the circumstances of this case.

I agree with the counsel for the appellants that the Law of the Child Act 2009 was enacted to full international standard contained in the UN Convention on the Rights of the Child to which Tanzania is a signatory. I also agree with him that in interpreting the provisions of the Act the court must take into account the meanings and opinions expressed in UN instruments on the matter. We also have a duty to see what has been said by other courts. We are not bound but we have a duty to see what they are doing. Where persuaded as we shall see later the court must not hesitate and follow. I have been impressed so to say, buy the decisions of foreign courts referred in the submission. I also got some assistance from the decisions of this court

cited, though with respect, did not carry the weight of the foreign judgments which were more direct on the subject under discussion.

Apart from the cases cited by the counsel, my look at the submissions has shown me that, the counsel had references to provisions of the Law of the Child Act with diverging opinions. The battle was on sections 4(2), 7(1)(2)(a)(b)(c), 9(4), 37(1), (3) and (4) and 39(1)(2)(c)(d)(e). They are also at longer heads on rule 75(3) of the Law of the child (Juvenile court) Rules 2016 GN 182/2016 which were applied to this court by virtue of GN 154/2019. I have tried to go through these provisions closely. I could not get difficulty in understanding them. They are all relevant in the subject under discussion, the best interests of the child.

Section 4(2) carry the best interests of the child principle. It states that it shall be the primary consideration of any public or private institution, court or administrative body to take into account the best interests of the child in anything they are doing about children. Section 7 carry the right to grow with parents. It states that the child has the right to live with his parents or guardians. Subsection (2) says that a person shall not deny a child to live with his parents, guardians or

family and grow up in a caring and peaceful environment unless it is decided by the court that living with his parents or family shall lead to significant harm to the child, subject the child to serious abuse or it is not in the best interests of the child so to do. The emphasis here is that the child has a right to live in a family. It can be the family of his parents or that of his guardian. He should live there except where it is found that living there has caused or is likely to cause harm to him, subject him to a serious abuse or it is no longer in his best interest. My understanding of this provision is that, he has a right to live in the family of his parents or guardians but he cannot live or continue to live with his parents or guardians if by living there, he is subjected to harm, serious abuse or it is not in his best interests so to do. It is a provision which gives him the right to stay in the family and give circumstances under which he can be removed.

Section 9 carry the parental duty and responsibility. Subsection (1) say that children have a right to life, dignity, respect, leisure, liberty, health, education and shelter from his parents. Subsection 2 restrict the right to the guidance and ability of parents. That is to say, they will enjoy the rights as far as their parents can afford. Subsection (4) which is at issue says that where the biological parents are deceased,

parental responsibility may be passed to on to a relative of either parent or a custodian by way of a court order or a traditional arrangement. The argument of the respondent here is that so long as the respondent (father) is not dead, custody should be left to him. The appellants are saying no arguing that the court should observe other factors as well. I will respond to this question later.

Section 37(1) say that a parent, guardian or relative who is caring for a child may apply to a court for custody of the child. Subsection (2) gives the court power to give orders of custody. Subsection (3) gives the power to revoke the grant and grant it to another person. Subsection (4) put a requirement to revoke subject to the best interests of the child. The argument of the appellant is that the court did not observe the requirements of subsection (4) in the course of revoking the grant. The respondent is saying that the requirements were complied with so long as he is the biological father of the child. The appellants are arguing that being a biological parent is just one factor. There are other factors as well which must be considered.

Section 39 has the conditions for custody or access. The contravery is on subsection (1)(2)(c)(d)(e). Subsection (1)

require the court to consider the best interests of the child and the importance of the child being with his mother when making the order. The respondent is arguing that the word mother must be replaced with father to mean the respondent. The appellants are saying no. Having examined the whole section, I have the view that the legislature did not intend the word mother to be interchangeably with the word father. If that was the case, it could have been written so specifically. Or else the word parent could be used instead. Subsection (2) carry other considerations. They include the rights of the child as provided under section 26 which are rights of children in case parents separate. That is not the case here. The age and sex of the child, that it is preferable for the child to live with its parents except if his rights are abused are also key factors. The views of the child if given independently and the need for continuity of care and control of the child must be observed. The argument of the respondent is that he has not done any harm to the child and therefore entitled for custody. The appellants are arguing in favour of continuity of care and the wishes of the child expressed to the Social Welfare Officer that he was not ready to go with the respondent. The respondent while recognizing the

requirements of respecting the wishes of the child have the view that, the child might have been coached.

I have considered the applicability of the above provisions and arguments advanced by the parties carefully. I also had ample time to read the cases cited to me and International Instruments referred to. As correctly pointed out by counsel, the Law is silent on what is the best interests of the child. Counsel has the view that, the question was left to the court to create flexibility and decide cases according to the circumstances of each case. I agree with counsel but I think there must develop some yard sticks to guide the court, points for cross checking while examining the best interests of the child.

In my perusal of **General Comment No. 14** (supra) have come across elements which must be taken into account when assessing the child's best interests. They are 7 namely; The child's views, child's identity, preservation of the family environment and maintaining relations, care, protection and security, situation of vulnerability, child's right to health and child's right to education.

Under the heading of care, protection and safety of the child we have the following: -

"The terms "protection and care" must also be read in a broad sense, since their objection is not in limited or negative terms (such as to protect the child from harm) but rather in relation to the comprehensive ideal of ensuring the child's "wellbeing" and development. ***Children's wellbeing in a broad sense includes their basic material, physical, education and emotional needs as well as needs for affection and safety. Emotional care is a basic need of children;*** *if parents or other primary care givers do not fulfil the* ***child's emotional needs****, action must be taken so that the child develop a secure attachment.* ***Children need to form an attachment to a care giver at a very early age*** *and such attachment, if adequate, must be sustained over time in order to provide the child with a stable environment.*

Assessment of the child's best interests must also include consideration of the child's safety, that is the right of the child to protection against all forms of physical or mental violence, injury or abuse (art 19), sexual harassment, peer pressure, bullying,

degrading treatment, etc as well as protection against sexual, economic and other exploitation, drugs, labour, armed conflicts *etc.*

Applying a best interests' approach to decision making means assessing the safety and integrity of the child at the current time, however the precautionary principle also requires ***assessing the possibility of future risk and harm and other consequences of the decision for the child's safety****". (emphasis added)*

Having examined the Law of the Child Act and the International Convention on the Rights of Children and the above comments, I have the view that in assessing the best interests of the child the court must be guided by the following things; **one**, the child needs protection to his life. This the first thing and primary. He must live in an environment which will guarantee safely to his life. He shall not live in any environment which is likely to cause his death or endanger his health. **Two**, he must live in an environment which will ensure that he grow well physically, mentally and psychologically. **Three**, he must also grow spiritually, with a sense and fear of God. He must grow in a certain religion.

Four, he gets basic material things regard being on food, shelter, clothing, education and medical care. Food, shelter, clothing, education and medical care are comparative. They are not similar from one community to another. The child must get the best services available in his community from his parents or guardians. **Five**, to grow with parents or a parent or with a guardian in a family which can ensure that number one, two, three and four exist.

The question now is whether, living with is a father or mother alone can be said to be the best interests of the child. The answer, in my view is NO. Here is where the relevance of the cases cited by Mr. Hussein came in. I have borrowed a lot of wisdom from the decisions. They are all valid because they interpret the principle of the best interests of the child as reflected in their respective statutes but as are reflected in the Convention on the Rights of a Child which is the foundation to our Law of the Child but for which we are signatory. I have found them to be useful to this court. I feel proud to be guided by the decisions from Australia (supra) which laid the principle that, while the fact of parenthood is not to be trifled with and should be regarded as an important and a significant factor in considering which proposals are better to advance the welfare of the child,

such facts does not establish a presumption in favour of natural parents or general preferential position in favour of natural parents. There must be a combination of factors, some of which I have mention above, so as to meet the best interests of the child.

In this case, the child was born in the US on 24/02/2009. He lived in the US shortly. He came to Tanzania in 2010. His mother got married to another person. He has lived in Tanzania since 2010 to date. He has lived with his mother, the deceased, and the first appellant since then. He also had a chance to visit his uncles (wajomba) and grandparents. He had never returned to the US since then. He has been meeting the respondent rarely during holidays. When he was asked by the Social Welfare where he wanted to stay, he never said yes to his father the respondent. He mentioned the appellants. The lower court neglected the views of the child and recommendations of the social welfare officer. I have considered the reasoning of the magistrate and with respect I think he was in error. Much as children can be coached as observed by Muruke, J. in the case cited above, but there is no evidence in this case that

he was coached. I think he was just saying what was inside himself given the background.

Further to that, the record is loud that his mother and the respondent were in difficult in the US. They were not in good terms. I am not convinced that the deceased come to Tanzania on a visit as alleged by the respondent. I think she was running away from quarrels at the matrimonial home. No wonder she did not hesitate to file divorce proceedings soon after arrival. She thereafter moved to marry the first appellant. If things were well in the US as alleged, she could not decide to file divorce soon after arrival and get married to another man.

The facts before me reveal that the child left the US in a situation of conflict. Her mother run away to Tanzania and was not ready during her life time, to release the boy to the US. She knew what could happen to her son. If her mother could not agree to release the child while alive, it will not be wise for us who do not have the details of the life of the respondent to release the child to the US. I think it will not be in the best interest of the child so to do. I think it is safer to leave him in Tanzania until such time when he will attain the age of majority where he can decide whether to return to

the US or process a Tanzanian citizenship and proceed to live in Tanzania. This will serve the life and up brings of the child.

Again, there is a new family which has developed in the US. The respondent is not alone. He is living with another woman whom he has two children. We have no evidence that the other woman is ready to accept the child and live with him. Much as the respondent may be willing but if his wife is not ready, the child will end up living in a difficult condition something which may not be in his best interests.

It follows that, the lower court erred varying its earlier orders and making new orders in favour of the respondent. I think, if it had directed its minds properly, now that, the relation between the appellant and the child's mother have ended following the death and in view of the closeness between the child and his uncles (wajomba) and grandparents, it could vary the orders in favour of the second appellant. It could also make some orders in respect of costs of living (especially on education and health) for it is obvious that, the respondent still have a duty under the law to maintain his child as a father.

It is ordered so. No order for costs.

L. M. MLACHA

JUDGE

30/10/2020

Court: Ruling delivered in presence of Steven Urasa, Mohamed Hussein and Aluy Habib Salim, Advocates for the 1st and 2nd Appellant and Greyson lazier, Advocate for the Respondent.

L. M. MLACHA

JUDGE

30/10/2020