IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR E SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 68 OF 2020

(From Civil Application No. 8 of 2019 before the Juvenile Court for Dar es Salaam at Kisutu)

ALICE MBEKENGA.....APPELLANT

VERSUS

RESPICIOUS P. MTUMBALA.....RESPONDENT

JUDGMENT

Date of Last Order: 4/5/2021
Date of Judgment: 26/5/2021

MASABO, J.:-

In this appeal, I have been invited to determine a dispute over custody of a boy child currently aged 16 years. What can be divulged from the memorandum of appeal and the trial court record is that the parties have since 2005 been in a stalled wrangle over maintenance, custody and at a certain point, paternity of the child. The wrangle turned ugly in 2018 after the respondent forcefully obtained custody of the child without approval of the appellant. In 2019, the respondent moved the Juvenile Court through Application No. 8 of 2019 praying for a custody order.

The appellant sternly resisted the application through a counter affidavit filed in court on 11th February 2019. She blamed the applicant for being an irresponsible father who neglected her when she was pregnant and after the birth of the child, he contributed nothing to his maintenance and educational needs. She stated further that, sometimes in 2007 she sought intervention of the Social Welfare Offices whereby the respondent voluntarily agreed to pay a monthly maintenance fee of Tshs 45,000/= but he vanished thereafter. As result, she raised the child, paid his school fees and provided all his needs single-handedly with no help from respondent until 2018 when he resurfaced and forcefully removed the child from her custody. By then, the child had just complete standard seven in Uganda where she had sent him for studies.

Upon hearing of the parties and evaluating the social investigation report and results of a DNA test commissioned at the request of the parties, the trial court came to a conclusion that it is in the best interest of the child that the custody vest in the respondent while allowing the appellant visitation rights.

Believing that the findings of the trial court was based on wrong factual and legal premises, the appellant has moved this court armed with five grounds of appeal on the basis of which she prays that the ruling of the trial court and its respective orders be quashed and subsequently set aside. The five grounds are that the trial court erred by:

1. failing to considered that the respondent started to live with the child in 2018 after he forcefully kidnapped him;

2. omitting to call the child and obtain his views in determining his best interest;
3. failing to consider that the appellant took care of the child single-handedly until 2018 when the respondent forcefully kidnapped him;
4. failing to consider that being a biological father is not the sole ground for granting custody;
5. placing reliance on the social welfare report in deciding in whose custody the child should vest.

At the hearing, the parties who both appeared unrepresented, did not make any valuable account on the legal principles allegedly violated by the court in its finding. On the appellant's part, she repeated the grounds with a thin layered addition. With regard to the first ground of appeal, without divulging much information she told the court the child was forcefully removed from her custody in the circumstances which exhibit conspiracy between the respondent and members of his family. When prompted by the court, she stated that the conspiracy is inferred from the manner through which the respondent got wind of the presence of the child at her mother's place at Kibaha and the manner in which her family handled the dispute in favour of the respondent.

On his part, the respondent insisted that the appellant is the cause of all the problems as she is violent to the child, she does not allow him custody to the child and she took the child to study in Uganda without his consent. On

the allegations that he removed the child from the appellant without her consent, she refuted and narrated that the child is the one who went to his home and his attempt to return him failed as he refused to return to his mother's home.

As I embark on the task ahead of me, I was captivated by the decision of the Supreme Court of India in **Rosy Jacob v. Jacob A. Chakramakkal** (1973) 1 SCC 840, where it empathically stated thus:

> The children are not mere chattels: nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

The authority is vital as it depicts the universal principle on the paramountcy of the best interest of the child in determination of custody and in all legal matters pertaining to children. The principle as embodied under Article 3 of the United Nations Convention on the Rights of Child, 1989 as well as Article

4 of the African Charter on the Rights and Welfare of the Child (ACRWC), 1990 forms part of our law as it is enshrined in Law of the Child Act [Cap 13 RE 2019] and the Law of Marriage Act [Cap 29 RE 2019]. Section 125 (2) *(a), (b)* states of the Law of Marriage Act states that 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.

The Law of the Child Act which has domesticated the CRC and the ACRWC into our jurisdiction and which is the primary law on matters pertaining to children in our jurisdiction is replete with provision on the best interest of the child. Section 4(2) of this law sets the ground by categorically stating that:

> The best interests of a child shall be a primary consideration in all actions concerning children whether undertaken by public or private social welfare institutions, courts or administrative bodies.

With regards to custody, Section 26 (1)(b) of this law enshrines the right of a child to live with the parent who, "*in the opinion of the court, is capable of raising and maintaining the child in the best interest of the child*". Further, section 37(4) requires the courts when granting custody to that *primarily consider the best interests of the child*. In applications for custody, the best

interest of the child is determined in consideration of such factors as the age and sex of the child, the independent views of the child, the desirability to keep siblings together; continuity in the care and control of the child, the child's physical, emotional and educational needs, the willingness of each parent to support and facilitate the child's ongoing relationship with the other parent (see section 26, 39(2) of the Law of the Child Act and Rule 73 (a) to (i) of The Law of the Child (Juvenile Court Procedure) Rules, GN No. 182 of 2016 (hereafter referred to as the Juvenile Court Rules)

Reverting to the grounds of appeal as expounded in the memorandum of appeal, in the first ground of appeal, the appellant has complained that, the trial court committed a manifest error by failure to consider that the child was removed from her custody without her consent. The records from the lower show that, this assertion was raised by the appellant at the trial court but was partly refuted by the respondent to the extent that, although the appellant did not consent that the child move to his house, he is blameless as it is the child who left the appellant's home and went to live with him and when he tried to make him return to the appellant's home he ardently refused. As a result, he continued to have him under his custody as he could not forcefully evict him.

The law does not condone the obtainment of custody by force. A parent who intends to remove a child from the custody of a co-parent he/she must obtain the consent of such parent. Where the consent, is as in the instant case, not obtained, the parent from whose custody the child was removed, may apply

to the Juvenile Court under Rule 66(1) of the Juvenile Court Rules for an emergency order return of the child to his/her custody. The removal may also attract criminal charges if it is done in contempt of a court order for custody. Therefore, in the present case, the appellant had an option to move the court for an order for return of her child pending determination of the application for custody but she never availed herself to this relief. By failing to move the court to determine the lawfulness of the removal of the child, she not only forfeited her right but denied the court an opportunity to investigate the lawfulness or otherwise of the removal.

This aside, it is worth noting that, even if the court had directed itself to this issue and made a finding that indeed the appellant did not consent to the removal that would not solely disqualify the respondent. Needless to emphasise, the paramount consideration in custody applications is the welfare of the child determined by looking at, among others, the factors expounded in section 39 and Rule 72 of the Juvenile Court Rules. Thus, much as removing a child from the custody of a co- parent without the consent of such parent reflects negatively on the parent who so removes the child, if upon examination of the circumstances of the case the court is of the opinion that the welfare of the child will not be best served if the child continues to be in the custody of the parent from whose custody the child was removed, it may vest the custody into such other parent.

The 3rd and 4 grounds of appeal will not detain me because, neither is the respondent's biological relation with the child nor is the appellant's role in

raising the child single-handedly overriding factors in determination of custody. As stated above, the paramount consideration in all custody applications is the best interest of the child. The decision of the trial court as depicted from page 10 to 11 of the trial court ruling vividly confirm that, the trial court decision was not solely based on the grounds above. The trial court mainly upon the views of the child and the social investigation report. Unless it is established that the views of the child was irregularly obtained or was not obtained as alleged by the appellant or that the social investigation was irregularly commissioned, there will be no reason to fault the trial court finding.

This takes me to the 2nd and 5th grounds of appeal. In the second ground, the appellant's major complaint is that the trial did not obtain the independent view of the child and in the fifth ground she has complained that, the court erroneously relied upon the Social Investigation Report. Regarding the social investigation, in custody applications, the commissioning, conducting and drawing of social investigation report is regulated by section 45 of the Law of the Child Act, and Rule 72 of the Juvenile Court Rules. The following principles obtain from these provisions. **First,** in applications for custody, the commissioning of social investigation whose primary aim is to assist the court to determine the interest of the child, is not mandatory. The court presiding over a contested custody application, may commission the investigation if it finds it necessary. **Second**, in conducting the investigation and drawing the report, the social welfare officer shall obtain the views of the parties to the proceedings, **and**

the independent views of the child (if he is of the age capable of forming an independent opinion) taken separately or in the presence of the parents or other relevant persons. **Third,** in conducting the investigation, the social welfare officer shall assess the best interest of the child and provide recommendations. **Fourth,** when the investigation is commissioned, conducted and a report thereto drawn and filed, it shall be mandatory for the court to consider the recommendations in its finding. Any deviation from the recommendation should be accompanied by reasons.

In the present case, there is no doubt that, the finding of the trial court tally with the recommendations of the social investigation report which strongly recommended that the child be placed under the custody of the respondent. The judgment shows that, the reasons applied by the court draws mainly from a hand written statement loosely appended to the report. In my scrutiny of the report and the statement I have observed a manifest irregularity in the report and the statement. As alleged by the appellant, the views of the child were neither obtained nor considered in the social investigation report. At page 6 of the social investigation report, the Social Welfare Officer stated that she did not meet with the child as the child was in boarding school at Same and that, owing to the absence of the child she solely relied on information obtained from the parties and the appellant's brother.

The hand written statement loosely appended to the report, seems to have been procured to cure this irregularity. The credibility of this

document is fault as the magic with which it landed into the court file was unveiled. The statement is in a separate hand written sheet loosely appended to the report with a heading "statement for a child." The author of the document is unknown neither is its date disclosed. Assuming that the statement was procured from the child, the magic by which it reached the court file ought to be unveiled because, as stated earlier, the social welfare officer who prepared the report disclosed that she could not procure the views of the child as he was away on boarding school. In the absence of expiation of how this document was obtained, I find and hold that the court erred in placing reliance on this document. As its source entry into the record is not established, I subsequently order its expungement.

Considering the fragility of the matter and the fact that the child is of an advanced age and capable of forming an independent opinion, it was paramount that his independent views be obtained and considered before arriving at the decision. In view of this, I quash the ruling and order of the trial court and order that, the file be remitted to the trial court for it to be placed before another magistrate with competent jurisdiction for purposes of obtaining the independent views of the child before preparing a fresh ruling.

In avoidance of any inference or disturbances of the child's routine and academics, I order that, arrangement be made to obtain his independent views during the school holidays in June 2021.

Meanwhile, the child shall remain under the custody of the respondent and the appellant shall enjoy visitation rights.

In the upshot, the appeal is partially allowed to the extent above stated. Costs are to be shared by the parties.

DATED at DAR ES SALAAM this 26th day of May 2021

J.L. MASABO

JUDGE