

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 88 OF 2021

(Arising from the Decision of the Juvenile Court of Dar es Salaam Region at
Kisutu in Civil Application No. 326 of 2020 before Hon. R. Msoffe, **RM**
dated 21st January, 2021)

DANIEL HAMILTON MWAKIO APPELLANT

VERSUS

PELAGIO MASU KIJUU..... RESPONDENT

JUDGMENT

13th July, 2021 & 06th, Aug 2021.

E. E. KAKOLAKI J

In this appeal the appellant is aggrieved with the decision of the Juvenile Court of Dar es Salaam Region at Kisutu in Civil Application No. 326 of 2020, handed down on 21/01/2021 that dismissed his application filed against the respondent. The appellant had filed in court the application for custody of the biological child which he sired to the respondent. Prior to the filing of the application the appellant in the year 2010 had contracted marriage with the respondent under Christianity rites to whom he begotten a male child born on 22/09/2010, before he estranged her for four (4) years until when the two formerly divorced in April 2014. At the hearing of the application it was

claimed by the appellant that, the respondent who remained in custody of the child after divorce of the parties has no time and means to take care of the child as she has no permanent job and in most of the time has been leaving the child in the care of her parents when she is away. That it is in the best interest of the child to grant custody of the said child to him as he has an established family with financial ability to handle and take care of all needs of the child while integrating with his siblings at the same time. The respondent who resisted the application with all forces, denied the appellant's assertion testifying that she had time and means to take care of the child and not otherwise as claimed by the appellant. She told her tale on how she fought for the custody of the child whom she was denied with by the appellant at infant stage as he was taken to Moshi at the age of 6 months before she regained the custody and managed to raise him up to now. And that the child is provided with all necessary needs at his best including education in which the school fees is partly paid by the appellant save for the medical insurance which he has none. On the assertion of being jobless she testified to have secured a job contract which she was due to start on December, 2020. She added it was in the best interest of the child to leave him in her custody and the appellant be allowed continued access of the child as it is now and provision of maintenance as his legal obligation. As stated above the trial court adjudged in her favour hence the present appeal in which the appellant is equipped with five grounds of appeal two of which were abandoned during the hearing and retained the following three grounds:

1. That, in view of the age of the child the subject of the dispute the trial Juvenile Court ought to have granted custody of the issue of marriage to the appellant.
2. That, in view of the evidence tendered before the trial Juvenile Court the child's welfare tilts in the appellant's custody.
3. That, basing and relying on the evidence tendered before the trial J Juvenile Court, the court erred in law and fact by denying the appellant custody of his son.

With those grounds of appeal the appellant is beseeching this court to allow the appeal by quashing the proceedings and setting aside Ruling and orders of the trial Juvenile Court with costs.

By consent parties prayed and were granted with leave of the court to argue the appeal by way of written submissions. Both parties were represented as the appellant hired the services of Mr. Joseph Sang'udi and respondent is represented by Ms. Judith Patrick Kyamba, both learned advocates. Submitting on the first ground of appeal Mr. Sang'udi argued, custody of the child ought to have been granted to the appellant had the trial court considered the best interest of the child. Citing the case of **Celestine Kilala and Halima Yusuph Vs. Restituta Celestine Kilala** (1980) TLR 76 he submitted, in deciding the custody of the child the paramount duty placed to the court is to consider the best interests of the child, in which one of the factors to be considered is the age of the child and his opinion. He argued under section 125(1) of the Law of Marriage Act, [Cap. 29 R.E 2019] where the child is above the age of 7 years and can express his independent opinion it is mandatory for the trial court to collect his opinion as to where and whom

does he want to stay, the law which the trial court violated when failed to take the child's opinion before deciding on his custody. To him that occasioned a gross miscarriage of justice to the child given the requirement of the law for consideration of child's best interests. None compliance of that provision of the law renders the whole proceedings, ruling and orders thereto a nullity, Mr. Sang'udi stressed and implored this court to so find while referring it to its decision in the case of **Chiku Ismail Vs. Mugisga Rweyemamu**, Matrimonial Appeal No. 26 of 2020 (HC-unreported), where this court overemphasized on the need of the trial court to consider the expressed wishes of the child before or when granting custody of the child. Another aspect banked on by the appellant was the sex and age of the child which Mr. Sang'udi argued, was so vital factor for consideration in this case as the child was above the age of 7 years with male sex therefore better placed to be raised by the appellant. On this stance he referred the court to the case of **Judith Augustino Simon Vs. William Isaya Mpinga**, Civil Appeal No. 79 of 2019 (HC –unreported) where this court considered sex of the child as the determinant factor when deciding where to place custody of the child. He therefore entreated the court to find there in merit in this ground and proceed to allow the appeal.

On the second ground of appeal it was Mr. Sang'undi's submission that as the evidence adduced during the trial stand, it is obvious the respondent has no permanent job, thus lack of means of raising and supplying the child with all basic needs such as medical insurance as she confessed during hearing when testified that the child has not NHIF card. Further to that he argued, the respondent who was working with the NGO used to travel in most of the time leaving child's care under his grandparents thus missing essential

material and psychological needs and support from his male parent, things which are all in appellant's capacity to provide if the child's custody is placed under him. He concluded the child's best interests are in jeopardy if he is left to live with the respondent. On the third ground it was submitted by Mr. Sang'udi that, basing on the evidence and submission made in both preceding grounds of appeal it is evident the trial court erred in fact and law in denying the appellant of the custody of his son. In summing up the court was invited to allow the appeal with costs.

Retorting the appellant's submissions Ms. Kyamba for the respondent started with the issue of jurisdiction which was not even canvassed by the appellant as he abandoned that ground right from the beginning, when submitted that the issue of custody of the child having been determined in the divorce petition without mentioning the case number, the trial court had not jurisdiction to determine it for being res judicata. On the first ground of appeal she argued the ground lacked merit particularly when the appellant made reference to the provisions of Law of Marriage Act as when it comes to determination of matters pertaining to custody of the child the Juvenile Court is not guided by the Law of Marriage Act but rather the Law of the Child. On the issue of wishes of the child to be obtained first she said, the burden of proving that it was the child's wishes to stay with the appellant under provisions section 110 of the Evidence Act, lies on the appellant himself who failed to discharge it. She said, the provisions of the law governing determination of child's custody are section 39 of the Law of the Child and Rule 73 of the Law of the Child (Juvenile Court Procedure) Rules, GN. No. 182 of 2016. The court was informed that, the trial court when making the order of custody of the child to the respondent considered the

importance of the child being under his mother's custody for furtherance of his best interests as per the dictates of section 39(1) of the Law of the Child Act. And that the child's wishes, life background, the undesirability of disturbing his life by changing his custody, physical, emotional and education needs were all considered by the court as per the requirement of Rule 73 of the Rules before granting his custody to the respondent. She submitted, with the respondent's custody the appellant is still provided with access to visit and provide the child with all necessary provisions. As there was no any other evidence to prove otherwise Ms. Kyamba invited this court to find the ground is without merits.

As to the second ground of appeal she countered, there was no evidence to prove that child's life was at risk under respondent's custody on assertion of her being incapable to provide him with necessary needs since basically it is the duty of the appellant to provide him with maintenance. She said the appellant was twisting the facts to mislead the court that, the child is left under care of the respondent's parents in most of the time when the respondent is away forgetting the fact that she is staying with her parents who takes care of the child responsibly with love. Unless there was evidence of the child being at risk physically and mentally while under custody of her parents which is not the case, there was no substantial grounds established by the appellant for the trial court to order otherwise as the respondent apart from receiving support of child's school fees from the appellant, she has been providing most of the child's basic needs including payment of his medical bills in cash, Ms. Kyamba submitted. In that regard Ms. Kyamba prayed the court to find the ground lacks merits, thus deserves to be dismissed. And on the third ground she submitted, the appellant has failed to prove that the

respondent lacks financial capability, mental and moral capacity to fully take care and discharge a motherly role to the child, thus no threat to the best interests of the child. In line with the above arguments and the cited provisions of the law Ms. Kyamba submitted, the appellant's appeal lacks merit and implored this court to dismiss it with costs.

In brief rejoinder Mr. Sang'udi attacked the respondent's submission particularly on the jurisdiction of the trial court to entertain the application for custody of the child as misleading, despite the fact that the said point was not canvassed by the appellant when submitting on his grounds of appeal. He said while issuing a divorce decree between the parties, the Resident Magistrate Court in Matrimonial Cause No. 53 of 2012 never made any order concerning custody of the child, thus the trial court Juvenile Court had jurisdiction to entertain the application. As regard to the reply submissions on the first issue while admitting that it is section 39(1) of the Law of the Child Act and the Rules GN. 182 of 2016 which are applicable when deciding custody of the child before Juvenile Court and not the Law of Marriage Act, Mr. Sang'udi insisted the age and wishes of the child as to whom between the two parents he would wish to stay with ought to have been considered by the trial court failure of which renders the entire proceedings, ruling and orders thereto a nullity. On the submission of the appellant's failure to discharge the burden of proving the child wished to stay with him Mr. Sang'udi submitted, in the situation of this case that duty lied to the court and not the appellant owing to the nature of the proceedings when hearing the application where the appellant had no opportunity of calling him (child) as a witness but rather the court. As the court failed to so act he submitted, the proceedings were rendered nullity. On the rest part of

reply submissions by the respondent he reiterated his earlier submissions and prayed the appeal to be dismissed with costs.

Having narrated the submissions and evidence in extensor, I now turn to consider the merits of the appeal basing on both parties submissions, evidence on record and the law. To start with the first ground of appeal, the issue for determination before this court is whether the child's age and wishes were considered by the trial court when deciding the custody of the child in which Mr. Sang'udi submits was not as per the mandatory requirement of section 125(1) of the Law of Marriage Act. Conversely Ms. Kyamba says the child's age and wishes were considered by the trial court when applying and considering the provisions section 39(1) the Law of Child Act and Rule 73 of Rules GN. No. 182 of 2016 as the provisions of the Law of Marriage Act do not apply in the proceedings before the Juvenile Court. It is true and I agree with Ms. Kyamba that the Law of Marriage Act is not applicable in the proceedings before the Juvenile Court when determining the custody of the child. I say so as it requires no certificate of law or expertise to interpret the unambiguous provisions of section 125(1) of the Law of Marriage Act which was intended to apply in deciding custody of the child after grant of an order for divorce or separation of parties when the trial court is dealing with matrimonial cause and not otherwise. As regard to the complaint of court's failure to consider age and wishes of the child before granting the custody of the child to the respondent, I don't find merit on it. What the Law of the Child Act requires first under the provision of section 39(1) when making an order for custody of the child is consideration of **the best interest of the child and the importance of the child to be with his mother**. Other factors for consideration are as provided under section

39(2) of the Act such as **the rights of the child, age and sex, independent views of the child, right of the child to be with his parents and keep siblings together** among others. Section 39(1) and (2) of the Law of the Child Act provides thus:

*39.-(1) The court shall consider the **best interest of the child and the importance of a child being with his mother when making an order for custody or access.***

(2) Subject to subsection (1), the court shall also consider –

*(a) **the rights of the child** under section 26;*

*(b) **the age and sex** of the child;*

(c) that it is preferable for a child to be with his parents except if his right are persistently being abused by his parents;

*(d) **the views of the child**, if the views have been independently given;*

(e) that it is desirable to keep siblings together;

*(f) the need for continuity in the care and control of the child;
and*

(g) any other matter that the court may consider relevant.

My perusal of the assailed ruling has revealed that, when deciding the custody of the child the trial court considered the best interest of the child, the undesirability of disturbing the life of the child by changing his custody as well as the need of the child to stay with his mother as provided under

section 39(1) and 26(2) of the Law of the Child Act. To colour the wisdom of the learned trial magistrate when making such decision, I quote part of the typed judgment at page 3 where she said:

"By considering the provision of section 39(1) and section 26(2) of the Law of the Child Act, for the best interest of this child as provided under section 4(2) of the Law of the Child Act, I grant custody of this child to his mother, that is the respondent herein and access to the applicant..."

What satisfies the court further is the fact that the trial magistrate based her decision on the social inquiry report prepared under section 45(1) of the Law of the Child Act. A glance of an eye to the said report has exhibited that the child's independent opinion was obtained by the social welfare officer to the effect that he wanted to live with her mother. Since there is a proof that the child's opinion was included in the social inquiry report I am of the view failure of the court to summon the child and record his opinion before deciding on his custody though important aspect did not occasion any injustice as his opinion was included in the social report and therefore the omission cannot vitiate the proceedings as Mr. Sang'udi is pressing this court to find. Had the court failed to consider the said report then I would have held otherwise. With all such abundant evidence I hold the first ground of appeal lacks merits and I dismiss it.

Next for consideration is the second ground where the complaint is that the respondent has no financial means to sustain the child's basic needs and that she is irresponsible for leaving the child in the care of his grant parents thus denying him parental care. I do not find merit too in this complaint for want

of evidence. I so find as on the lack of financial means the appellant in his testimony before the trial court testified the respondent is working with NGO's meaning that, she is able to earn for her living and support the child. In absence of any other evidence to the contrary I don't see how the trial court could have appreciate the appellant's complaint that the respondent has no financial means. As regard the child being put under care of the respondent's parents in most of the time thus missing parental care as rightly submitted by Ms. Kyamba the appellant failed to discharge his duty of so proving as required under section 110 of the Evidence Act. During the hearing of the application the trial court was told by respondent that she is staying with her parents who depend on her and that they have close bond with the child as they love him a lot. And further that the appellant has been provided with access of the child as he can take him to his home and return him though sometimes in the late night. To appreciate the gist of her evidence is quote the excerpt from page 4 of the typed proceedings where she said:

"....Also I stay with my parents as they depend on me. They have a great attachment with the child, they love him a lot. Also the applicant once take the child, he used to return him at 12.00 in the night..."

From the above excerpt it is not in dispute that the respondent is staying with her parents and that the child has close attachment to the grand parents who love him. And that at times the appellant used to pick the child to his home and return him later to the respondent's home. By staying with her parents to me is a proof that not all of the time the respondent is away from home thus denial of the parental care to the child. As such there is no

evidence that the grand parents have been mistreating or mishandling the child in absence of her mother so as to pose any physical or psychological threats or risk to the child. As the parents of the respondent like what it would be to the parents of the appellant have a right to bond with their grandson and see him growing, I don't find any problem of the child being left in custody the respondent's parents when his mother is away on official duties. All considered I see no reason to fault the trial magistrates' finding as she also considered control and continuity of child's care under her mother and satisfied that to hold otherwise would interfere with his school and training programs something which would be in contravention of the law as dictated under section 26(1)(c) and 39(2)(f) of the Law of the Child and contrary to the best interest of the child as the appellant can still access the child for any care of his choice and maintenance provisions. The second ground of appeal also has no merit too and I dismiss it.

As to the third ground, having considered what has been discussed and found in the first and second grounds of appeal I also find it to have no merits. The trial court having considered the best interests of the child and the need to stay with his mother as paramount factors before deciding to put him in the custody of the respondent had no any other evidence or facts to lead it decide otherwise. Further to that it granted the applicant with access of the child on very recommendable schedule that will assist the child to bond with his father as well as the siblings. It is the principle of the law that appellate court cannot interfere with the findings or opinion of the subordinate court unless there is misdirection on important matters or point of law, non-consideration of some fact, evidence or law and non-acting or acting on matters or aspects which it has no powers to do as it was held in

the case of **Credo Siwale Vs. The Republic**, Criminal Appeal No. 417 of 2013 when cited with approval in the case of **Mbogo and Another Vs. Shah** (1968) EA 93, the Court said:

"(i) If the inferior Court misdirected itself; or

(ii) It has acted on matters it should not have not have acted; or

(iii) It has failed to take into consideration matters which it should have taken into consideration,

And in so doing, arrived at wrong conclusion. Other jurisdictions have put it as "abuse of discretion" and that an abuse of discretion occurs when the decision in question was not based on fact, logic, and reason, but was arbitrary, unreasonable or unconscionable - See PINKSTAFF VS BLACK & DECKTZ (US) Inc, 211 S.W 361."

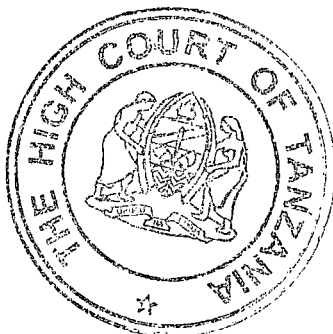
In this case as the court's finding based on the submitted evidence as well as the social inquiry report before forming its opinion to grant the child's custody to the respondent and since there was no misdirection on matters of law or fact, or failure to take into consideration some factual evidence or that the trial court acted on matter which it ought to have not acted on, I have no reason to interfere with its finding rather uphold it. The third ground also has no merits and I dismiss it.

In the premises and for the fore stated reasons, cited law and authorities, I hold the grounds of appeal raised in this appeal are wanting and therefore the appeal is hereby dismissed.

Each party to bear its own costs of this appeal.

It is so ordered.

DATED at DAR ES SALAAM this 06th day of August, 2021.



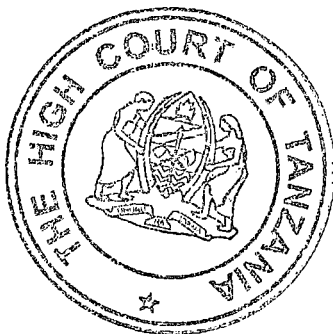
E. E. KAKOLAKI

JUDGE

06/08/2021

Delivered at Dar es Salaam in chambers this 06th day of August, 2021
in the presence of Mr. Joseph Sang'udi advocate for the appellant and Ms.
Asha Livanga, court clerk and in the absence of the respondent.

Right of appeal explained.



E. E. KAKOLAKI

JUDGE

06/08/2021