THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CIVIL APPEAL NO. 27 OF 2020
(Arising from the Juvenile Court for Kyela District in Civil Juvenile Application No. 1 of 2020)

ANYINGISYE MLAWA.....APPELLANT

VERSUS

TUKULAMBA KIBWEJA.....RESPONDENT

JUDGMENT

Dated 24th September & 5th November, 2021

KARAYEMAHA, J

The appellant, Anyingisye Mlawa who is the father of Silavin Anyingisye Mlawa (herein the child), seeks to obtain custody of the child. Currently, the child is in the custody of the respondent Tukulamba Kibweja his mother.

The appellant lived in concubanage with the respondent from 2013 till 2016 when disputes crept in their relationship. During the subsistence of their cohabitation they were blessed with one issue (the child) aforementioned. Although the trial Magistrate made a guess of the child's age, in my view his age is obvious. Being born on 26/02/2013, he

was 7 years, 4 months and 28 days on 18/07/2020 when the appellant filed the application in the Juvenile Court. Apparently, by then the appellant and the respondent were no longer living under the same roof. The appellant averred that on 09/10/2019, since the child was in the respondent's custody, signed an agreement with the respondent. The agreement which was entered before the Village Executive Officer reveals that the respondent was to hand over the child to the appellant on 26/02/2020 and that the appellant was to leave with him from Kyela District, his mother's place, to Ubaruku Mbalali Mbeya. However, when time was ripe, the respondent changed her mind. She averred in her counter affidavit in paragraph 4 that:

> *"... the applicant is not in the suitable position to make (sic) custody of the child. The applicant has no sufficient reasons to convince this court to grant custody of the child."*

She averred further in paragraph 5 that:

> *"... It is stated the letter by VEO could not validate the applicant to take (sic) the custody of the child due to unsuitable environment for the child otherwise the child could suffer a lot and could lose his rights."*

I have painstakingly navigated through the respondent's submission he made at the trial court. I have not seen even a word trying to substantiate the allegations aired up in paragraph 4 and 5.

However, after hearing both parties, the trial Magistrate dismissed the application on the reason that the applicant did not show those things which might be more appropriate for his child in his homestead compared to the residence of the respondent. Aggrieved the appellant has appealed to this court armed with a memorandum of appeal raising five (5) grounds.

The matter was ordered to be canvassed by way of written submission. Parties appeared in person, unrepresented. The appellant made it clear in his submission that he was abandoning the 2nd, 3rd, 5th and 6th grounds and was going to submit on the 1st and 4th grounds.

Submitting in respect of the first ground, the appellant drew the attention of the court that in determining the custody of a child, his/her wishes are of paramount importance. He placed reliance in the decision of the High Court in the cases of ***Mariam Tumbo v Harold Tumbo*** [1983] TLR 293 and ***Chiku Ismail v Mugiga Rweyemamu***, Matrimonial Appeal No. 26 of 2020 (unreported) which unfortunately he did not provide. Similarly, he called to his aid section 39 (1) (d) of the Law of the Child Act, Cap 13 R.E. 2019), Regulation 73 (a) of the Law of the Child (Juvenile Court Procedure) GN. No. 182 of 2016. He faulted the trial Court for deciding to place custody of the child in the respondent without giving him an opportunity to express his wishes.

In respect of ground four, the appellant submitted that the trial court erred to order the appellant to pay Tshs. 90,000/= per month as maintenance to the child and ensure that the food is available and the child is having clothes without making findings on his income. He submitted further that his decision contravened section 44 and 45 of the Law of the Child and Regulation 84 (1) of the juvenile Court Procedure

In her reply, the respondent conceded that the Law of Marriage Act and the Law of the Child require the infant to give his wishes before being placed in the custody of any parent. She referred to section 125 (3) of the Law of Marriage Act to underscore her view that before placing the child in the custody of any parent the court should consider the welfare of the child by considering factors making undesirable that the child be entrusted to either parent.

I have anxiously considered the submissions by both parties and the record as a whole whether or not the trial court in reaching to its decision considered the best interest of the child.

My starting point is Section 98 (1) (b) of the Law of the Child Act, Cap 13 R.E 2019 and Rule 3 of the Law of the Child (Juvenile Court Procedure) Rules, 2016 which give powers to the Juvenile Court to hear and determine among other things, applications for custody. the court is further endowed with powers to place custody in any parent whenever it

is satisfied that there are favourable conditions suiting the best interest of the child.

The law is very clear on issues pertaining to the custody of the child that in deciding on the custody of a child, the court's paramount consideration is the welfare of the child more than anything else. This is now a law in Tanzania. Courts have been lead by this principle and in my considered view it has worked. In the case of ***Glory Thobias Salema v Allan Philemon Mbaga*** (Civil Appeal No. 46 of 2019) [2020] TZHC 3794; (13 November, 2020) the court took a similar stand and held that the law is well settled that in any event dealing with a child the primary consideration shall be on the best interests of the child. The principle of best interest of the child was given a broad meaning in the case of ***Bharat Dayal Velji v Chandni Vinesh Bharat***, (Civil Appeal No. 45 of 2017) [2018] TZHC 45; (23 April, 2018) in which the High Court held that the best interest caters far beyond financial ability since children need love, affection and care of which the mother is in a better position to offer to her children against the whole world.

From the foregoing judicial decisions it is pretty clear to me that in custody disputes, it is axiomatic that the paramount criterion is the welfare and wellbeing of the child. In arriving at its decision as to whom custody of the minor should be given, the trial court had to predicate its

decision on this guiding principle and take into account the provisions of section 39 of the LCA which is left to speak as follows:

> *"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."*

The letter of the foregoing provision makes it incumbent upon the trial court be satisfied that when placing a child in the custody of either parent or relevant relative these conditions must be met. It is imperative to add here that the child's rights contemplated under section 26 of LCA, as reflected under section 39 (2) (a) of the LCA are; (a) maintenance and education of the quality he enjoyed immediately before his parents were separated or divorced; (b) 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; and (c) visit and stay with other parents whenever he desires unless such arrangement interferes with his schools and training program.

The arising question is how a court can get to know about the requirements of section 39 and 26 of LCA. It may be difficult for the court to know about all these by itself in my considered opinion. It is at this juncture I think the social welfare officer becomes crucial. After all, in circumstances of this nature, the law requires the trial court to involve the social welfare officer in the trial and require him make an enquiry and finally submit a report on custody of the child. In doing so, the trial court complies with Rule 72 of the Law of the Child (Juvenile Court Procedure) which says it all that:

> *"72 (1) where there is a contested application for custody or access, the court may direct the social welfare officer to prepare a social enquiry report'*
>
> *(2) A social welfare officer shall, in preparing the report consult-*
>
> *(a) all the parties to the proceedings separately; and*
>
> *(b) the child separately and if necessary, with the parents or other relevant persons.*
>
> *(3) in providing recommendations for custody or*

access the best interests of the child shall be the paramount consideration.

(4) the court shall consider the social enquiry report before making a decision on the custody or access.

(5) the social welfare officer who prepared the social enquiry report shall make himself available to the court to give evidence, if the court or a party to the proceedings so requests.

(6) Where a court decides not to accept the recommendations contained in the social enquiry report it shall state the reasons for the non-acceptance."

Taking on board the above requirements of the law, section 39 (2) (d) of the LCA makes it mandatory that in considering the best interest of the child and the importance of a child being with his mother when making an order for custody it shall ensure that child's views are taken and considered if the same have been made independently. This means that no parent solicits, induces or makes promises to the child to give a certain view in his/her favour. The best way to get these views, in my view is to have the social welfare involved for making sure that the child is not induced and making him/her comfortable.

In the present case, the trial curt's record testifies that the trial Magistrate did not take into consideration guiding conditions and requirements under section 39 of LCA. Apparently, the age of the child was not stated categorically. The trial magistrate made a general but not

specific reference to his age. I think if he had made reference to the child age he could have invited him to give his wishes. In similar vein, it was imperative on him to involve the social welfare officer as indicated hereinabove. It is in doing so the best interest of the child would be said to have been dully considered.

Failure to give the infant who was more than seven (7) years, chance to state his wishes as to whom he referred to live with and involve the social welfare in the process, was a clear violation of the law as the appellant contended. I therefore, find the first ground having merits.

Turning to the 4th ground of appeal, the appellant invited this Court to fault the trial court for failing to consider the paramount conditions in ordering the maintenance of the child. I think the appellant has a point. The judgment shows that the trial magistrate after ordering the child to remain in the custody of the respondent, he continued to order that:

> *"The applicant is given right of access whenever he wishes to visit and see his child. The applicant shall continue to pay the sum of Tsh. 90,000/= per month as maintenance. In addition, he shall ensure his child's food, clothes, accommodation and school fees are furnished to his child whenever he is required to do so."*

In view of these findings, undisputedly, the trial Magistrate contravened sections 44 and 45 of the LCA which provide as follows:

> *"44. A court shall consider the following matters when making a maintenance order-*
> *(a) the income and wealth of both parents of the child or of the person legally liable to maintain the child;*
> *(b) any impairment of the earning capacity of the person with a duty to maintain the child;*
> *(c) the financial responsibility of the person with respect to the maintenance of other children; (d) the cost of living in the area where the child is resident; and*
> *(e) the rights of the child under this Act."*

It is provided further under section 45 that:

> *"45.-(1) A court may order a social welfare officer to prepare a social inquiry report before consideration of an application to make an order for maintenance custody or access.*
> *(2) The court shall, in making such order, consider the social inquiry report prepared by the social welfare officer."*

In view of the foregoing provision, the trial Magistrate was first to make an inquiry concerning the income and wealth of both parents of the child. The report would enable him to offer a just and fair order of maintenance. this was emphasized in the case of ***Denis Elias Nduhiye v. Lemina Wilbad***, Juvenile Civil Appeal No. 1 of 2019, the High Court of Tanzania at Kigoma was tasked to determine the key issues of the

Duty of a Juvenile Court to consider financial status of both parents in maintenance. It observed as follows:

> *"When a court orders maintenance of a child; it should consider the financial status of both parents of the child, and if they are of the equal economic status, they should be under equal footing in maintaining their child."*

In Tanzanian legal system, the child's right to be maintained by his parents arises from the duty of a parent or guardian to maintain him. The maintenance may include the provision of necessary needs for survival and development of a child. The case of Assah A. Mgonja v Elieskia I. Mgonja, Civil Appeal 50 of 1993, High Court of Tanzania at Dar es Salaam observed that the father has duty to provide for the children needs. Reiterating on this when the duty shifts, the court stated as follows:

> *"The duty to provide for the needs of children lies upon their father unless he is unable to do so, for reasons of physical or mental ill-health."*

The duty of a father to maintain a child is provided under Article 27(2) of the CRC, Article 20(1) of the ACRWC, section 129 of the Law of Marriage Act, Cap 29 R.E 2019, section 8(1) and 41 of the LCA. In ***Denis Elias Nduhiye v. Lemina Wilbad***, Juvenile Civil Appeal No. 1 of 2019, the High Court of Tanzania at Kigoma was tasked to determine

the key issues of the Duty of a Juvenile Court to consider financial status of both parents in maintenance. It observed as follows:

> *"When a court orders maintenance of a child; it should consider the financial status of both parents of the child, and if they are of the equal economic status, they should be under equal footing in maintaining their child."*

In the current case, it is obvious that the trial magistrate did not make any enquiry into the income of the appellant. Although it is the duty of the father to provide for the children needs unless he is unable to do so for reasons of physical or mental ill-health, the court has no automatic powers to order amount of maintenance prior making enquiry in terms of section 44 and 45 of the LCA.

On the strength of the foregoing therefore, I am constrained to conclude that the trial magistrate erred in ordering the maintenance as he did. Similarly, the agreement made before the WEO had no valid force because it was made contrary to the guiding Law of the Child.

As a whole, the whole proceedings and the decision of the trial court have errors material to the merits of the case involving injustice. They are ultimately nullified.

Having so found, I thus invoke revisional powers endowed to this court under section 44 (1) (b) of the Magistrates Courts Act [Cap 11 RE 2019] and revise the proceedings and there by quash the proceedings

and set aside all orders made there under. It is ordered further that this matter be remitted to the trial court for a retrial with a view of considering the procedure and basic principles of placing custody of a child to either parent and order of maintenance. The application should be heard expeditiously, that is, within 60 days from the receipt of this order by another Magistrate with competent jurisdiction.

It is accordingly ordered.

DATED at **MBEYA** this **5th** day of **October, 2021**

J. M. KARAYEMAHA

JUDGE