IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APEAL NO.24 OF 2021

KAVITA KANJI----------APPELLANT

VERSUS

VISHAL SOLANKI----------RESPONDENT

Date of Last Order: *16/07/2021*

Date of Judgment: *20/08/2021*

J U D G M E N T

MGONYA, J.

Aggrieved by the decision of the Juvenile Court at Kisutu, the Appellant has approached with this Court with **six (6) grounds** of appeal that appear below:

1. ***That, the trial Magistrate erred in iaw by varying the decision of the previous Court which allowed the Appellant to have access of her daughter each end of the week from Friday to Sunday evening placed it to end of the month Friday to Sunday.***
2. ***That the Trial Magistrate erred in iaw and fact by delivering her ruling in favour of the Respondent without considering that the child choose to stay with her mother.***

3. ***That, the Trial Magistrate erred in law and fact by delivering the ruling in favour of the Respondent without taking into consideration that the child claimed to be abused in his father's custody part of her body shows some injuries/wounds.***
4. ***The Trial Magistrate erred in law and fact basing her decision on hearsay evidence adduced by the Respondent that the Child was touched her private parts by her Aunty without need of any proof that Aunty or other person.***
5. ***That, the Trial Court erred in law and fact in delivering her Ruling in favour of the Respondent without considering that the Appellant is a biological Mother to the Child.***
6. ***That, the Trial Magistrate erred in law and fact by granting only one week for the Appellant to stay with the child during the holidays.***

In cause of hearing this appeal both parties were represented by learned Advocates. The Court ordered that the matter be disposed of by written submissions. After the scheduling order on filing written submissions, parties adhered to the Court order, hence this Court is in the position now to determine this appeal.

From the **six (6) grounds** of appeal raised by the appellant as listed above, it is my opinion that from the nature of the grounds of appeal some of the grounds are the same but constructed differently by change of words. However, the same connotes the same meaning. It is from that observation, I, have decided to consolidate grounds **1 & 6,** and **3 & 4** and determine them jointly while the 2nd and 5th grounds will be determined separately.

Having thoroughly and carefully gone through the judgement and the lower court's records together with the rival submissions by the parties of which I do not intend to reproduce, I will proceed to determine the Appeal as hereunder. Let both parties with their respective Advocates be assured that their respective submissions have been taken into consideration in determining this Appeal.

First to begin with the **first and sixth grounds of appeal,** the Appellant states that the Court erred in granting her access to see her daughter at the last Friday of the month from when she could see her every Friday to Sunday of the month (weekends). The same is reflected to only being availed to one week for spending with her daughter at the time of her holidays. These two grounds are both challenging the time the Appellant has been granted to spend time with her daughter who is in custody of the Respondent.

It is the Appellant's observation that the Court's decision infringed her right to that respect. The Respondent on the other side is of the view that the Court was right to have decided the same and the Respondent has never made it a hard task for the Appellant's access to her daughter as ordered by the Court.

Having gone through the records of the lower Court it came to my knowledge that the parties were married and divorced. By the time of the divorce the daughter was **26 days** old. After the daughter attained the age of **2 years and 6 months,** they changed residence of the daughter to the Respondents until in **2016** when the Appellant filed for custody and the Court ordered that the Child was to be in custody of both parents. The Appellant was to be with the child on Friday to Sunday and the Respondent Monday to Friday.

Again, when the child in issue had attained about **8** years, the Appellant filed an application seeking for full custody of the child setting forth reasons that she is the biological mother, the child is being abused, the child being a female need to spend more time with her mother and that a girl has a lot to be taught by her mother than the father.

The Law of the Child Act, 2019, is the law that governs all matters concerning the child within the jurisdiction of this Land together with its Regulations. The matter argued by the

parties is on custody of the child. **Section 37 (1) of the Law of the Child Act (supra)** has provided for custody of the child. The same states:

> **"A parent, guardian or relative who is caring for a child may apply to a Court for Custody of the Child."**

It is from the above, that the action by the Appellant applying for custody of the child was her right that she persuaded. The Child Act went further under the Provisions of **section 39 (1) and (2)** to provide for things to be considered on custody and access. The primary requirement is emphasized to **be for the best interest of the child being with his mother when making an order for custody or access.** The same section under the provisions of **sub section (2) (a-f)** of **The Child Act** has listed a number of factors to be considered. That not being enough, the act again directs us to the provisions of **section 26** of the same Act which provides for the rights of the child. **Section 26 (1), (a – c)** contains the rights of the child and **sub section (2)** provides for a rebuttable presumption of the child being with his/her mother of which the Court shall have regard to the undesirability of disturbing the life of the child by changes of custody. All of the above is as well stipulated under **The Law of the Child (Juvenile Court Procedure) under regulation 73 (a-i).**

Having said all of the above, it is at this juncture it has to be noted that custody is a very sensitive aspect between parents. Custody also requires the Court to be very careful when considering who and why one has to be granted with custody of the child. It stretches to a number of factors including extending into parent's individual personality. From the records before this Court, I have noted that at the trial Court, a number of pieces of evidence were tendered and admitted by the Court including the Social Welfare Report, the medical report, pictures and the parties' testimonies through their respective submissions. All these were considered by the Court in determination of the Application as evidenced in the decision. It is trite law that once a Court has a Social Welfare Report in it, **shall** consider the same at the time of making its decision. It is in the Judgment of the Court that the same was considered.

I am of the firm view that the Social Welfare Report to any reasonable person entails a lot of information since the Social Welfare Officer is the only person lawfully required to investigate of what really transpires between the parents, the child and even the surroundings that a child spends most of her/his time. In the circumstance of this Court, the Social Welfare Report entails information that gives this Court fear and doubt of the Appellant's behaviour and conducts. The child has been observed at school to have behaviours that are not

favourable and the same are reported to be acquired when the child goes for the weekends to the Appellant's home. This Court from the records of the lower Court finds that the main aspect which is **the best interest of the child** was well considered and that the consideration on custody and access were intensively adhered to for the Court to have reached its decision. **It is from the above I do not find the grounds of appeal holds water. Hence the 1st and 6th grounds of appeal are hereby found to be meritless.**

In determination of the **2nd ground** where the Appellant was not satisfied by the Court's decision on not considering that the child choose to stay with the mother (Appellant herein), the Appellant states that the child when appearing in Court gave her wishes before the Court that it is her wish to stay with the mother. The Respondent countered the ground by stating that on that material day, the Child showed that she is happy to be with both parents. It was also the Respondent's contention that the Court will not only consider the wishes of the Child without considering other factors. The child's wish that she wants to stay with the mother was fed into her to be stated in Court.

It is the requirement of the law that an independent view of the child should be considered when it comes to matters of custody. This has been provided under **section 39 (2), (d) of**

The Child Act, 2019 and **rule 73 (a) of The Law of the Child (Juvenile Court Regulations)**. The requirement of the law is that a child's wish is to be considered but only if the wish is independently given.

From the decision the trial Court it is stated that on the material day that the Child appeared in Court, the first thing she told the Magistrate is her wish that is she wishes to live with her mother. This was noted by the Court not to be an independent wish. It also guides to the question how did the child know what were required of her by her presence in Court even before she was asked? It should be remembered that the trial Court was a competent Court and the Magistrate sitting before the same was at a better and best position to observe the demeanour of the child to have reasoned of the wish and having reached the decision it had reached. The wish by the child before the Court and the timing it was stated appears to be questionable before this Court. Since this wish that the Appellant refers to be "an independent wish" loses quality to be the same in accordance to the manner of which the same is stated to have been obtained. **I hereby find the 2nd ground of appeal devoid of merits.**

With regards to the **3rd and 4th grounds** of appeal, it is the Appellant's concern on the trial Court failing to consider the abuse of the child as testified in the trial Court. The Appellant

testified that the child is being abused while in the custody of the Respondent. To support this contention, evidence of photographs were produced to show what the Appellant stated to be bruises found in the Childs' body. And again, she states that the Court was misguided by considering hearsay evidence that showed the Child was touched in her private parts. The Respondent states this is an abuse of Court process for the grounds by the Appellant are baseless and vexatious for there is no proof of what the Appellant has alleged.

From the records before me, I took a glance of the photographs alleged to show bruises that entail that the Child is being abused. The photos show a picture of a child's hand, a knee and part of a thigh but the same do not display the face to show the identity of who the photos were taken from. However, the parts just show some reddish spots and one shows a rush or a pimple. If the Appellant was sober to have taken the photographs by being concerned of the child being abused, then it is my question as what other legal steps did she undertake and what was the outcome? Was it proved that the images were proof of an abuse? Or where did she report the alleged abuse. The world at large advocates for violence against children. If the Appellant had noticed the abuse and her being the biological mother ought to have taken further legal actions against whoever would have been abusing the child. The allegation from the records were seen to have been

encumbered by lacunas and hence leading the Court into finding that there was no evidence to prove the same and the same could not be held against the Respondent. This Court as well finds that the trial court's records lacked evidence to prove the allegations on abuse. **I find this ground of appeal holds no water and is therefore meritless.**

Lastly on the **5th ground** of appeal, the Appellant challenges the decision of the trial Court for not considering the fact that she is the biological mother of the child and hence would have granted her custody of the child in that respect. It was the Appellant's view that the provisions of **section 39 (1) of the Law of the Child Act** supports her argument. The Respondent on the hand states that being the biological mother is not the only consideration, further there are other factors such as responsibility of the mother. It is the Respondent's concern that, he mother in this circumstance has never stepped foot to the school where the child is schooling. The provisions of **section 8 and 9 of The Law Child** were reproduced to show the duties of a parent. From the argument above it is said that there is hesitation of granting the Appellant custody of the child regardless of being biological mother. Further that, it is in the direction of the law that a mother should be the first one to be considered to be granted the custody of the child, but other legal conditions should be considered such as being responsible to the child.

It is from the same, Respondent instead that, being a biological mother is not the only factor to be considered to be granted custody of the child. And, if it was the intention of the Legislature for that to be the only consideration, the same would have stated that without inclusion of all the other factors.

In ascertaining this ground, I took time to read the reports filed as evidence before the Court and from the reports, various factors were encountered that shows that Appellant has never visited the child's school. Moreover, when approached for consent for the child to be taken to South Africa for treatment, the Appellant refused to consent. It is from that, the Respondent had to acquire the same from a Court order, since the Appellant has not been cooperating with the teachers nor the school psychologist to ensure that the treatment of anxiety suffered by the child is settled. The report to meet encumbrances to comment on certain facts as a result of the Appellant non-cooperation, indicated that, the Appellant did not show any efforts to encourage the child to embrace education. **The Law of the Child (Juvenile Regulations Procedure) under Regulation 73** states:

> **"In determining whether to make a custody or access order, the Court may consider, in addition to the factors contained under**

section 39 (1) and s. 26 (2) of the Act the following:

(c) the child's physical, emotional and educational needs;"

The law has recognised that one of the factors to be considered in the welfare of the child is education, to make sure that the child gets education, being among the best interest of a child. As are all know is that, the best inheritance a parent can pass to a child which is a life time asset is education. From the record, the Respondent has proven to be the one supervising the child's education alignment better than the Appellant.

From the above, the decision of the trial Court, I find that the court made proper analysis from the evidence and the law to decide the custody of the child in the favour of the Respondent who is also the biological father. **This ground of appeal lacks merits.**

In the event therefore and from the above analysis, the appeal before this honourable Court is meritless and is hereby dismissed.

In the event therefore, **the decision and orders from the District Court should remain intact** and therefore **uphold**.

It is so ordered.

Each party to bear their own costs.

L. E. MGONYA

JUDGE

20/08/2021

Court: Ruling delivered in chamber on 20th day of August, 2021 before **HON. C. M. MAGESA, DEPUTY REGISTRAR** in the presence of L. Minga, Advocate for the Appellant, C. Cuthbert for the Respondent and Mr. Richard, RMA.

L. E. MGONYA

JUDGE

20/08/2021