IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 22 OF 2021

(Arising from the Judgment of the Juvenile Court of Dar es salaam at Kisutu in Civil Application No. 245 of 2018 before Hon. E.S. Missana, **RM** dated 15/08/2019)

SHARIFA MAGGID NASSOR.....APPELLANT

VERSUS

DASSU MOHAMED MUSSA.....RESPONDENT

JUDGMENT

21st Oct, 2021 & 26th Nov, 2021.

E. E. KAKOLAKI J

Before this court the appellant is challenging the decision of the Juvenile Court of Dar es salaam at Kisutu in Civil Application No. 245 of 2019, handed down on 15/08/2019, refusing to grant her monthly maintenance allowance for the child at the requested rate and issuance of orders not prayed for in the application before the trial court. She has thus advanced five grounds of appeal going thus:

1. That the Resident Magistrate erred in law and fact by making determination based on incompetent Social Inquiry Report.
2. That the Resident Magistrate erred in law and fact by reaching her decision based on assumptions.
3. That the Resident Magistrate erred in law and fact by making determination on matters which are not in dispute between parties.
4. That the Resident Magistrate erred in law by reaching her decision using policy and not the law.
5. That the Resident Magistrate erred in law and fact in making determination and issuing a ruling on matter presided over by another magistrate.

Briefly the appellant sometimes in 2015 had love relationship with the respondent that gifted them with a baby girl on 11/07/2016, whom for the purpose of protecting her identity in preservation of her rights is referred by her initials A.S. It appears the respondent was providing for her maintenance at the tune of Tshs. 200,000/ per month in which the applicant considered insufficient as it could not meet her monthly upkeep costs, pay for her school fees in the school of her class, medical care and other basic needs. When asked to increase the monthly maintenance allowance to Tshs. 400,000/-

per month, pay for the school fees of nursery school at Aghakhan Primary School, pay for medical insurance and other basic needs, the respondent was adamant to heed to the request on the ground that he could not afford covering all those costs which he considered to be on the higher side than his monthly income bearing in mind that he has other dependants to serve and take care of apart for the child, subject of this appeal. It is from those facts the appellant approached the Juvenile Court for Dar es salaam and filed the application in Misc. Application No. 245 of 2018, seeking among others orders for:

(a) Medical Health Care (Medical Health Insurance)

(b) Provision of school fees (Aga Khani Nursury School) and,

(c) Provision of Tshs. 400,000/- as monthly up keeping allowance for the child.

The respondent vehemently challenged the application on the basis of inability to cover all of the claims by the appellant as his salary was Tshs. 900,000/- only and he has six other dependants to take care of apart from the child at issue in this matter. He submitted, the monthly allowance provided is sufficient enough to maintain the child and he was ready to have the child taken to the public school and pay for NHIF medical insurance in

which he claimed the appellant was not ready to accept. Having been heard on merits and considering both parties submission and evidence adduced as well as the social inquiry report (S.I.R) the trial court was satisfied that the Tshs. 200,000/- currently provided by the respondent is sufficient to cover maintenance costs of the child, reasoning that both parents are duty bound to maintain their child. Further to that it issued orders and placed custody of the child to the appellant and issued access orders to the respondent plus the schedule and time for accessing her. Subsequent to that it was ordered the child be enrolled in the Government schools and both parents should share the costs. As regard to the medical insurance provision it was ordered since the child was under 5 years old, the category of people in which medical care is provided for free, the trial court ordered the child should enjoy that free services. It is from that decision the appellant being aggrieved preferred this appeal under the grounds afore mentioned.

Hearing of the appeal proceeded orally and both parties were represented as the appellant hired the services of Mr. Michael Mahende while the respondent fended by Mr. Ali Jamal, both learned counsels. Submitting in support of the grounds of appeal Mr. Mahende from the outset intimated to the court of his intention to argue all of the grounds save for the fourth

ground which he silently abandoned. In this judgment I am also intending to consider and determine them all if need be, though not in order by starting with the first and third grounds. On the first ground Mr. Mahende informed the court that the provisions of section 45(1) of the Law of the Child Act, [Cap. 13 R.E 2019], when read together with Rule 85(e) of the Law of the Child (Juvenile Court Procedure) Rules, GN. No. 182 of 2016, empowers the court to order for the Social Inquiry Report (S.I.R) and consider it before determination of the issues of maintenance. The purposes of requiring preparation of S.I.R according to Rule 45(1) of the Rules he argued are two. One, to assess the ability of the parents to provide for maintenance and secondly, to ascertain the accuracy of the parent's statement with regard to the ability to provide for maintenance. The S.I.R in this case he submitted does not meet the two criteria for bearing single sided parent's statement and want of validation of the accuracy of the information contained therein. Mr. Mahende submitted for instance the claim by the respondent that he was earning Tshs. 900,000/- per month was not validated by the social welfare officer who prepared the report for want of salary slips as well as the contention that he has six (6) dependants for want of birth certificates. He added that, most of the information in the report was extracted from the

pleadings instead of the interviews by the parties and the same was not even signed, thus unauthentic and incapable of being relied on to base the decision of the court. He concluded there was no legal report for the trial court to base its decision on, thus this ground has merit. In rebuttal Mr. Jamal while conceding on the purpose of the S.I.R as submitted by Mr. Mahende contended, the allegation that the information therein is not verified has no legal basis as the officer who prepared it had the right to source the information from the pleadings and rightly did so since the pleaded facts by the respondent in his counter affidavit were never challenged by the appellant. He said the appellant's act of raising that complaint at this stage is nothing but an afterthought as he failed even to explain how was she affected or prejudiced when the trial court based its decision on such report. He therefore submitted the ground lacked merits and ought to be dismissed. In his rejoinder submission Mr. Mahende reiterated his earlier submission while adding that the report affected her as it was the base of all consequential orders entered by the court.

It is true as submitted by Mr. Mahende the trial court under Section 45(1) of the Law of the Child Act and Rule 85(1) of the Rules may order a social welfare officer to prepare a social inquiry report before consideration of an

application for an order for maintenance, custody or access of the child. It should be noted however that under section 45(2) of the Law of the Child Act, when the S.I.R is ordered the court is enjoined to consider it when making orders for **maintenance**, custody and access of the child. Section 45(2) of the Act reads:

> *(2) The **court shall, in making such order, consider the social inquiry report** prepared by the social welfare officer. (Emphasis supplied)*

In this court it is not in dispute the trial court after ordering for preparation of the S.I.R took it into consideration in arriving into its decision. My perusal of the said S.I.R has revealed that, **one**, it is the appellant (applicant) only who was interviewed contrary to the provision of Rule 85(2) of the Rules which presupposes that, before making any inquiry the social welfare officer has to issue both parent/party with custody of the child and the other without, a written notice signifying his/her intention to make such inquiry, meaning that both parties must be interviewed. In this matter since the S.I.R contains information and statement of the appellant only, I hold it could not in any way provide genuine and authentic information concerning the respondent as submitted by Mr. Jamal for the Respondent since the

information concerning him were extracted from the pleadings as rightly submitted by Mr. Mahende. Secondly, the same is not signed something which compromises its authenticity hence unreliable. It is from these two shortfalls I confidently hold it was not a genuine and authentic document for the trial court to rely on to base its decision as per requirement of the provision of section 45(2) of the Act and therefore any decision based on it is fatal. Thus the first ground of appeal has merit.

Next for consideration is the third ground in which Mr. Mahende submitted the trial court was in error to make determination on matters which were not at dispute and issue orders thereto without considering the fact that parties were not heard on them. He mentioned the orders as orders for custody and access of the child including the visiting schedules to the respondent. He argued the trial court should not have issued the said orders which were not at dispute as were uncalled for, pressing the court to find the ground meritorious. In his reply submission Mr. Jamal contended the said orders were consequential orders given the nature of the dispute. So to him the same were in the powers of the court to issue and rightly so invoked as the appellant failed to explain as to how the same affected her given the fact that in the application, she prayed for other reliefs in which the said

orders were part of them. He concluded as long as the said orders did not affect her the ground remains unfounded and ought to be dismissed. In his rejoinder submission Mr. Mahende reiterated his earlier submission and had nothing to add.

I have internalised the submissions by the learned counsels on this ground. It is uncontroverted fact that the application before the trial court was for maintenance brought under Rule 83(1) of the Rules praying for orders for medical health insurance of the child, provision of school fees and payment of Tshs. 400,000/- as monthly up keep allowance for the child. It is also undisputed fact that when granting the reliefs sought by the appellant extended to grant for the orders for custody of the child to the appellant and access to the respondent which were not part of the reliefs sought by the appellant. The submission by Mr. Jamal that the consequential orders originate from any other reliefs as prayed by the appellant in the application with due respect is without factual and legal backings. I so say as firstly, it is not stated anywhere in the application that, the applicant prayed for any other reliefs as Mr. Jamal would want this court to believe. Secondly, the application for custody and access is made under Rule 63(1) of the Rules filed through JCR Form No. 8 different from the one for maintenance subject

of this appeal preferred under Rule 83(1) of the Rules through JCR Form No. 7. The two reliefs being preferred under different provisions of the law it cannot be stated the orders for custody and access in the present matter were consequential orders to the reliefs of maintenance which was under consideration before the trial court. If the trial magistrate thought that the same were necessary reliefs to be considered by the court should have called the parties to address it on them. By proceeding to make orders without availing parties with an opportunity to address the court on it, I hold the parties were denied of their right to be heard. In the case of **Abbas Sherally and Another Vs. Abdul Sultan AHji Mohamed Fazalboy**, Civil Application No. 133 of 2002 (CAT-unreported) on the right to be heard Mroso, JA (as he then was) had this to say:

> *"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions.* ***That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same would have been reached had the party been heard, because the violation is considered to be a breach of the principles of natural justice****. For example, in the case of* ***General Medical Council Vs. Spackman****, [1943] A.C 627, Lord Wright said:*

"If principles of natural justice are violated in respect of any decision, ***it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision****."*

Similarly in the case of **Mbeya-Rukwa Auto Parts and Transport Vs. Jestina Mwakyoma** [2003] TLR 251 when faced with more or less similar scenario to the present one the Court of Appeal had this to say on the right to be heard:

"It is a cardinal principle of natural justice that a person should be condemned unheard but fair procedure demands that both sides should be heard: audi alterm partem. In ***Ridge Vs. Baldwin*** *[1964] AC 40, the leading English case on the subject it was held that a power which affects rights must be exercised judicially, i.e. fairly. We agree and therefore hold that it is not a negation of justice, where a party is denied a hearing before its rights are taken away. As similarly stated by Lord Moris in* ***Furnell Vs. Whangarel High School Board*** *[1973] AC 660,*

"Natural justice is but fairness writ large and judicially."

In light of the authority in **Mbeya-Rukwa Auto Parts and Transport** (supra) it is clear to me that denial of the right to be heard vitiates the proceedings even in a situation where the same decision would have been

arrived at had the party(ies) been heard on merits for the only one reason that his natural right of being heard has been negated before its rights are taken away. In this matter since the orders for custody and access were entered by the trial court without affording parties with the rights to be heard on the reliefs, I hold the anomaly was fatal and vitiated the entire proceedings and the Ruling. Similar course was taken by the Court of Appeal in the case of **M/S Flycather Safaris Limited Vs. Hon. Minister for Land and Human Settlement Development and AG**, Civil Appeal No. 142 of 2017 (CAT-unreported) where the court after being satisfied that the decision was arrived at without according the parties with the right to be heard on that issue first and before nullifying the proceedings had this to say:

> *"**Failure to accord the parties the right to be heard** on the propriety of the power of attorney in question **denied the parties the right to be heard on the issue** and we are satisfied this **anomaly is fatal and vitiated the proceedings and Ruling**. See, **Dishon John Mtaita Vs. DPP**, Crimina Appeal No. 132 of 2004 and **Scan Tan Tours Ltd Vs. The Registered Trustees of the Catholic Diocese of Mbulu**, Civil Appeal No. 78 of 2012 (all CAT-unreported)" (Emphasis added)*

It is from the above deliberation I hold the third ground of appeal has merit and I uphold it. I further hold the two grounds of appeal deliberated on have the effect of disposing of this appeal and I see no reason of labouring my efforts on the rests of the ground as the exercise will remain futile.

That said and done, the appeal has merit and the same is allowed. Since the proceedings of the trial court are vitiated I proceed to quash them and set aside the ruling thereto. In the interest of justice, I order the case file to be remitted to the Juvenile Court of Dar es salaam at Kisutu to be heard on merit after the authentic social inquiry report is procured by the welfare social officer. I further order the case to be heard before another competent magistrate.

I order each party to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 26th day of November, 2021.

E.E. KAKOLAKI

JUDGE

26/11/2021

Delivered at Dar es Salaam in chambers this 26th day of November, 2021 in the presence of Mr. Richard Magaigwa holding brief for Mr. Michael Mahende, advocate for the appellant, and Ms. Asha Livanga, court clerk and in the absence of the respondent or his advocate.

Right of appeal explained.

E.E. KAKOLAKI

JUDGE

26/11/2021