IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CIVIL APPEAL NO. 307 OF 2021

(Arising from the decision of the Juvenile Court of Dar es Salaam at Kisutu, in Civil Application No. 267 of 2021, by Hon. J. Lyimo-RM dated 23rd day of August, 2021)

PETER SHANGANI HEMEDI.....APPELLANT

VERSUS

GISELA MHAGAMA.....RESPONDENT

JUDGMENT

23rd February, & 18th March, 2022

ISMAIL, J.

This appeal arises from the decision of the Juvenile Court of Dar es Salaam at Kisutu, in respect of Civil Application No. 267 of 2021. At stake in the said proceedings was an issue of custody of the child born out of the intimacy between the parties herein. The said proceedings were instituted at the instance of the respondent who moved the court to grant custody of the said child. The court acceded to the prayer and granted custody, while allowing the appellant to have time with the child during the latter's school holidays. One of the grounds for the decision is that the wish of the child

was not considered, as what was contended as the wish of the child was a coached statement which did not amount to wishes and cannot be considered as such. The court took the view that the appellant had choreographed a plan to alienate the child from the respondent.

The decision by court did not sit well with the appellant. Contending that the decision is laden with decisional errors, an appeal has been instituted to this Court, and six grounds of appeal have been raised by the appellant. These are:

1) *That the trial Magistrate erred in Law and in fact by disregarding the entire evidence adduced by the appellant herein;*

2) *That the trial magistrate erred in law and in fact by erroneously declaring the child to be coached by the appellant on what to say;*

3) *That the trial magistrate erred in law and in fact by disregarding the child's views and wishes.*

4) *That the trial magistrate erred in law and in fact by failing to apply and consider the best interests of the child.*

5) *That the trial magistrate erred in law and in fact by declaring that the respondent did not have access to see the child.*

6) *That the trial magistrate erred in law and in fact by erroneously granting custody to the above-named respondent.*

At the hearing of the appeal, the appellant was represented by Ms. Neema Mbaga, learned counsel, while the respondent enjoyed the services of Mr. Francis Munuo, learned counsel.

Submitting on ground four, Ms. Mbaga argued that best interests of a child were not considered as provided for under sections 4 (2), 26 (1) (b), 37 (4) and 39 (1), (2) of the Law of the Child Act, Cap. 13 R.E. 2019, read together with rule 73 (a) – (i) of the Juvenile Court Procedure Rules. Ms. Mbaga implored the Court to be persuaded by its decision in ***Alice Mbekenga v. Respicious Mtumbala***, HC-Civil Appeal No. 68 of 2020 (unreported). Counsel contended that the court disregarded independent views of the child. She added that the contention that the child was coached had no justification and that the learned magistrate misdirected himself in that respect.

The appellant's other argument is that the court failed to consider the question of desirability and continuity of the child who is in school, while at the same time attending some religious teachings. Ms. Mbaga contended that all of that will be disrupted if the child is uprooted from his lovely home, and it is likely to touch on the physical and emotional needs of the child. She took the view that best interests will be well covered if the child remains in the appellant's custody.

Regarding grounds 2 and 3, the contention by Ms. Mbaga is that the court indulged in travesty when it failed to give the child an opportunity to express his view. She took the view that this was contrary to the position of the law as set in ***Mariam Tumbo v. Harold Tumbo*** [1983] TLR 293; and ***Allen David Massawe v. Adeline Nehemiah Majule***, HC-Civil Appeal No. 388 of 2019 (unreported).

With regards to grounds 1 and 5, the view taken by Ms. Mbaga is that no social welfare report was produced or considered by the court, while on access to the child, the appellant argued that he has been willing to ensure that the respondent meets the child.

On ground 6, Ms. Mbaga's take is that it was erroneous for the trial court to order custody in the respondent's favour.

Mr. Munuo, learned counsel for the respondent began his onslaught by taking a swipe at the appeal, holding that the same is devoid of merit. With respect to ground 4, his argument was that wishes of the child should only be considered if they were independently given, and that the court has discretion to disregard the views if such views do not express the child's independent wish. In this case, the child expressed such views before he was asked. On communication with the respondent, the child allegedly spoke to her occasionally because the appellant, on whose phone the

communication is done, is always busy. Mr. Munuo contended that the child lives with a certain Mr. Patrick Rashid and it is impossible for the child to want to live with a parent he doesn't live with if he hadn't been coached. He argued that a stranger has taken over custody of the child, and that the appellant has neither time nor resources to take care of the child. He found nothing blemished in the court's decision.

Arguing on the rest of the grounds, Mr. Munuo began by contending that the name of the child had changed without prior communication to the respondent, and that no reasons were given for the change. He argued that the change was intended to conceal identity of the child from the respondent.

Still on the appellant's ability or otherwise to take care of the child, learned counsel argued that the appellant failed to disclose any occupational status that would convince the court that he had what it takes to take care of the child. This is unlike the respondent, a primary school teacher and a fit person to raise the child. He argued that there is no social welfare report on the visitation plan between the child and the respondent.

Mr. Munuo gave three reasons as to why the appellant is not a suitable person to be handed custody of the child. These are; that the appellant has changed the name of the child; that the appellant has not put any effort to

make the child know his mother; and that, the appellant has abandoned the child to Patrick Rashid, a stranger. He concluded by urging the Court to hold that the respondent is a fit person to live with the child.

Submitting in rejoinder, Ms. Mbaga took the view that there was no couching, while with respect to access, the position is that the respondent had ample time to meet and speak to him. Learned counsel maintained that the respondent has not stated how placement of the custody in her hands will be beneficial to the child. She argued that the child is receiving his best interest where he lives.

The parties' contending view breed two key issues for determination by the Court.

(i) Whether the trial magistrate was right to disregard opinion given by the child on the custody; and

(ii) Whether evidence adduced by the respondent was enough to order that custody of the child be handed to the respondent.

I will begin by disposing of grounds 2 and 3 in a combined fashion. The gravamen of complaint by the appellant is that the court went overboard, and without any justification, in contending that wishes of the child were not independently expressed as the said child was coached.

As both counsel unanimously submitted, interests of a child take a centre stage in any proceedings in which matters pertaining to custody and maintenance are concerned. This paramount need has been expressed in several provisions of the law. Section 4 (2) of Cap. 13 provides as follows:

> *"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."*

The foregoing stance has been echoed in section 125 (2) (a) (b) of the Law of Marriage Act, Cap. 29 R.E. 2019, which provides as hereunder:

> *"In deciding in whose custody a child should be the welfare of the child and, subject to this, the court shall have regard to-*
>
> *(a) the wishes of the parents of the child;*
>
> *(b) the wishes of the child, where he or she is of an age to express an independent opinion."*

Narrowing down to custody, which is the subject of the parties' contention, it is what obtains in section 39 (1) of cap. 13 which is relevant. It states:

> *"(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."[Emphasis added]

That views of the child must be independently expressed, by the child, was underscored by the Court in Glory ***Thobias Salema v. Allan Philemon Mbaga***, HC-Civil Appeal No. 46 of 2019 [2020] TZHC3794. It was held:

"Under section 39 (2) of the LCA, if the views of the child have been independently given, they must be taken into account by the Court before making the order of custody."

The view taken by the magistrate is that what is said to be the child's views in this case were coached words of the appellant and, as such, they do not constitute independent views of the child. They cannot be relied upon. The magistrate's rejection is discerned from the following excerpt, gathered from page 7 of the ruling:

"I am also aware that when considering custody cases, the Court has to consider the wishes of the child. I am of the view that the child was couched (sic) by the respondent on what to say. He directly said he wants to live with his father and during schoo' holidays to visit the mother. I am afraid his wishes cannot be considered by this Court."

The stance taken by the magistrate is in sharp contrast with what the said child told the court when he was invited to address the court. At no point in time did he say that his preference was to live with his father, the appellant, or that he would be going to visit his mother during school holidays. It is fair to state that the words *"He directly said he wants to live with his father and during school holidays to visit the mother"* were the magistrate's own creation and not part of the record. A glance at the proceedings reveals that, at page 5, the said child stated as follows:

"I live at Sabasaba, I live with my mother and father. We have shifted at another place at sabasaba. My dad sells bicycles and charcoal. I do ask my grandmother to speak to my mother when I got for holiday. I can't ask my father because he is too busy. I didn't know my mother until last week. My father tells me "mama yangu yupo yupo" we live in a two bedroom house at "Mpanda Shaa." During the School days I live with my uncle and sometimes my father takes me during the weekend. My uncle is called Patrick

Rashid. My father told me to call him uncle. I cannot cross the roads that's why I stay with my uncle. During holidays I go to Tanga. At school I am called Ambrosinn Peter Mwilombe my father is called Peter Mwilombe. I don't know who Peter Shangai Hemedi."

Nothing conveys any sense that the child expressed the wish of staying with the appellant as to insinuate that there was a coaching by the appellant or at all. This means that the magistrate's decision to award custody to the respondent was based on either a non-existent feeling of coaching or extraneous matters which are not the basis for consideration in the matter.

In so doing, the magistrate defied the basic principle in the adjudication process. This is the cherished principle of the sanctity of the record which requires that the trial court record must accurately represent what happened in court See: ***Halfan Sudi v. Abieza Chilichili***, CAT-Civil Reference No. 11 of 1996; and ***Flank Alphonce Masalu @ Singu & 4 Others v. Republic***, CAT-Criminal Appeal No. 366 of 2018 (both unreported).

The inevitable conclusion in this respect is that the contest was settled based on the magistrate's own figment of imagination and not what was gathered during the submission. My piece of mind in this respect is that the magistrate stripped into an error, and the appellant is justified to cast

aspersion on the magistrate's comprehension of what was before him. It is simply that the magistrate overstepped his duty when he chose to invent what was not presented by the parties.

As I allow these grounds of appeal, I hold the view that, on these grounds alone, the appeal is meritorious and I allow it. I quash or set aside the impugned decision and remit the matter back to the Juvenile court for trial *de novo* before another magistrate.

No order as to costs.

It is so ordered.

Rights of the parties have been duly explained.

DATED at **DAR ES SALAAM** this 18th day of March, 2022.

M.K. ISMAIL

JUDGE