

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(DAR ES SALAM SUB REGISTRY)  
AT DAR ES SALAAM  
CIVIL APPEAL NO. 391 OF 2021**

(Arising From a Ruling of the Juvenile Court of Dar es Salaam at Kisutu in Misc. Civil  
Application No. 422 of 2021)

**FRANSISCA ALMASI.....APPELLANT**  
**VERSUS**  
**MOSES DAVID MSIMBE ..... RESPONDENT**

**RULING**

Last Order: 22/8/2022  
Ruling: 2/9/2022.

**MASABO, J.:-**

In this appeal, I have been invited to determine a dispute over custody of a girl child aged 9. At the trial court, the respondent who is the biological father of the child successfully convinced the court that he was best placed to have the custody of the child compared to her biological mother who is the appellant herein. The reasons advanced in support of the application was that the appellant's living environment is unpleasant to the child's mental wellbeing and best interest. In further exemplification it was stated that the appellant lives under poor conditions. She does not have enough time to take care of the child as she works until late hours and the child is made to stay at her working place until late hours. As a result, the child's performance in school has deteriorated which threatens her intellectual growth and best interest. The application was ardently disputed by the appellant who

asserted that the child has been living in a safe and healthy environment. Hence, there is no need for change of custody. At the conclusion of the application, the court found and held in the favour of the respondent. The appellant was displeased. She has come to this court armed with one ground of appeal that the court erred in law and fact in placing the child under the custody of the respondent while ignoring the best interest of the child.

When the parties appeared in court on 13<sup>th</sup> July 2022, the appellant who enjoys *probono legal aid* services from Women Leal Aid Centre (WLAC) prayed that the hearing proceed in writing. Leave was granted and the schedule for submission of written submissions was set. The appellant was to file her submission on 27/7/2022 and the respondent was to file his reply on 10/8/2022. On 27/7/2022, the appellant filed her submission which is basically in a form of a letter.

In her submission, the appellant discloses that she has been advised by her counsel that the appeal is devoid of merit but she still intends to pursue it hence her personally drafted submission which is difficult to comprehend as it does not address itself to the ground of appeal. All what the submission

has is a narration of the factual background of the application and the judgment appealed against. Of relevancy to the appeal is her lamentation that the court erred in holding that her environment is uncondusive whereas it did not pay her a visit to ascertain the reliability of the allegations made by the respondent. The respondent did not have much to submit in reply. His counsel, Mr. Moses David Msimbe, briefly submitted that the appeal should be dismissed as the appellant has failed to submit in support of her appeal.

Much the appellants failure to submit in the support of the appeal suffices as a good ground upon which to dismiss the appeal, considering the nature of the matter, I have found it prudent to determine the appeal guided by the principles applicable in first appeals and in particular, the principle that a first appeal is in the form of re-hearing as stated in **Emilian Aidan Fungo@ Alex & George John Mwagange v Republic**, Criminal Appeal No. 278 of 2008 CAT (unreported). The appellant in a first appeal is entitled to the first appellate court's own consideration and view of the evidence as a whole and its own decision thereon. Also, the first appellate court is entitled to re-evaluate the evidence on record from both sides and to come out with its

own conclusion which may coincide with the trial court's decision or may be different altogether (Also see **Makubi Dogani v Ndogondogo Maganga**, Civil Appeal No. 78 of 2019, CAT and **Mapambano Michael @ Mayanga v Republic**, Criminal Appeal No. 268 of 2015 CAT (all unreported).

Thus guided, I have consulted section 4(2) of the Law of the Child Act [cap 13 RE 2019] which sets the roadmap on determination of custody and in all legal matters concerning children. This provision which has domesticated the universal principle on the 'best interest of the child' as embodied under Article 3 of the United Nations Convention on the Rights of Child, 1989 and Article 4 of the African Charter on the Rights and Welfare of the Child (ACRWC), 1990 provides that:

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.

With regards to custody, of specific relevant is section 37(4) of the same law which underlines the need for courts to be guided by the best interests of the child in all matter pertaining to custody of children. As per the law, the best interest of the child is determined by looking at such factors as the age

and sex of the child, the independent views of the child, the desirability to keep siblings together; continuity in the care and control of the child, the child's physical, emotional and educational needs and the willingness of each parent to support and facilitate the child's ongoing relationship with the other parent (see section 26, 39(2) of the Law of the Child Act and Rule 73 (a) to (i) of The Law of the Child (Juvenile Court Procedure) Rules, GN No. 182 of 2016 (hereafter referred to as the Juvenile Court Rules).

In the present case, the custody contested is of a girl child of the tender age. Thus, it is desirable that she be placed under the custody of a female parent unless there are grounds to believe otherwise. During the trial, it was uncontroverted that the child has at all material time since birth been under the custody of the appellant. The respondent's case was that it was no longer in the best interest of the child to remain under the custody of her mother as her living condition was no longer supportive of the best interest of the child. One of the ground advanced by the respondent and supported by the appellant and the child whose independent opinion was obtained at the hearing stage was that, the appellant is an entrepreneur/self-employed. She runs a food business which operates daily and she stays at her business until

20hours. In line with the respondent's discontentment, the appellant told the court that when the child returns from school she goes direct to her business and remains there until when she is picked by a maid. On her part, the child stated that she usually remains at the appellant's business place up to 20 hours and sometimes she has to return home alone without a company of an adult. She disclosed further that, most often, the appellant and the maid who also assists the appellant in her business returns home at 23hours when she is already asleep. As the appellant did not disclose the time at which the child was picked by the maid, the trial court had no option than to believe the narration by the child that she used to remain at the appellants business up to 20hours. Under the premises, I find no reason to fault the trial magistrate.

I am aware that the decision made by the trial court is inconsistent to the social investigation report which suggested that the best interest of the child stands not to be affected if she remains under the custody of the appellant. I have had time to read the report. Just as the trial magistrate, I have found it to be highly unreliable as it does not address the pertinent issues. No visit was made to the appellant's home or her business to determine their

suitability and no other person, apart from the parties and the child was interviewed to ascertain the truth or otherwise of the assertions. With these deficiencies, it is not surprising why that the trial magistrate found no basis of appending any weight to the report. In any case, it need not be overstated that the social investigation report is merely advisory and not binding upon the court.

For these reasons, the appeal is dismissed for want of merit. This being a custody issues, there are no orders as to costs.

DATED at DAR ES SALAAM this 2<sup>nd</sup> day of September 2022.

9/2/2022

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Signed by: J.L.MASABO

**J.L. MASABO**

**JUDGE**

