IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM REGISTRY

AT DAR ES SLAAM

CIVIL APPEAL NO 54 OF 2022

(Originating from the decision of Juvenile Court of Dar es Salaam at Kisutu in Civil Application No. 107 of 2022)

RAJAB SHABAN BWANGA .....APPELLANT

VS

LILIAN RICHARD HAULE.....RESPONDENT.

Date of last order: 15/06/2022
Date of judgement: 11/07/2022

JUDGEMENT

MANGO, J

The Respondent, Lilian Shaban Haule, filed an application for custody of her baby boy named Fahad Rajab Bwanga aged 4 years and ten months. She moved the trial Court under Rule 63 (1) of the Law of the Child (Juvenile Court Procedure) G.N.182 of 2016. The reasons that caused the Respondent to file an application for custody of her beloved son are as follows: -

1. The father (the respondent at trial court) refuses the mother (Applicant) access of the child.
2. The child is very young by then having only 4 years and ten months so needs the love of her mother

3. She is able physically and economically, willing and suitably equitable to take adequate care of the child and protect him as biological mother
4. Being a biological mother, she has a legal right to have custody and capable of maintaining her kid.
5. A kid needs a close supervision and care from her mother basing on fact that he is still very young

The application was granted as sought, and the Appellant was given access to the child only on weekends from 10:00 to 5:00pm and during school holiday of a child, half-holiday. The Appellant was aggrieved by the grant of custody of his son to the Respondent. He preferred this appeal armed with nine grounds of appeal. The nine grounds are as follows: -

i. The Trial Court erred in law and fact for non-adherence of natural justice for not giving a chance for the Appellant to make his rejoinder neither in oral submission nor rejoinder in written submission.
ii. The Trial Court erred in law and fact by failing to apply and consider the best interest and welfare of the child.

iii. The Trial Court erred in law and fact by erroneously granting custody to the above named respondent who disserted the child in issue to the appellant.

iv. The Trial Court erred in law and fact by deciding the case basing only on submission and rejoinder of the respondent while the appellant was not given a chance to submit his rejoinder.

v. The Trial Court erred in law and fact by not allowing/order the social welfare officer to visit and inquire environment of the Respondent residence for the best interest and welfare of the child.

vi. The Trial Court erred in law and fact by not considering the present conductive environment where the child has been leaving for the past 9 months with his father, young brother, grandmother, stepmother etc.

vii. The Trial Court erred in law and fact by not considering the fact that the respondent herself submitted the child to his father after realizing her living condition is not conducive to the child.

viii. The Trial Court erred in law and fact by disregarding the academic struggle that the child is facing whereby he was shifted to a special class of students with less performance due to poor academic background when he was living with the respondent (appellant submitted the letter from school).

ix. The Trial Court erred in law and fact by not considering the fact that the respondent has never been denied access to the child as the child was been taken to the respondent's place many times and sometimes taken to the respondent's work place because of the respondent time constraints of working overtime up to 10 :00PM up to 05:00 PM.

On 15th June 2022 when the appeal was called for hearing, the Appellant was represented by Method Ezikiel Garran, learned Advocate and the Respondent was represented by Pascal Mshanga learned advocate.

During hearing Method Ezekiel, counsel for the Appellant, dropped the first and fourth grounds of appeal and renumbered the remaining grounds of the appeal accordingly. Submitting in support of the appeal, he submitted mostly on the Court's duty to consider best interest of the child, welfare of the child

and capacity of each party contesting for custody of the child to take care of the child. He argued that, the trial Court did not consider the best interest and welfare of the child contrary to section 26(2) of the Law of the Child Act and Rule 73 of the Juvenile Court procedural rules. He explained that, the Appellant is a biological father of the child and he used to live with his son. He added that, nothing has happened to the child while in the Appellant's custody to necessitate change of custody of the child. According to him, the child improved his speech capacity while in custody of the Appellant and he is now struggling to improve his learning ability after the same has been affected when he was under the Respondent's custody. He is of the view that, it is the best interest of the child to live with his father, the Appellant than his mother, the Respondent herein.

Submitting on the capacity of the parties to take care of the child, he tried to convince the Court that, the Appellant is more capable of taking care of the child than the Respondent. The reasons for his assertion are both financial and social. He argued that the Appellant is financially and socially sound compared to the Respondent. According to him, the Respondent does not earn much, she resides in a single room and she is so busy at her work place to enable her have time for the child. The Appellant on the other hand,

has a family, he has a wife and another child, he also lives with his mother (grandmother of the child). He added that, the Respondent has handled over custody of the child to the Appellant willingly because she was unable to take care of the child due to her busy work schedules. Thus, it is the best interest of the child to continue living with the Appellant than the Respondent.

The Appellant's counsel also submitted on the alleged failure of the trial Court to order social inquiry which would have assisted the court to determine the application fairly and in the best interest of the child. He argued that, it is the legal requirement under section 31(3) of the Law of the Child Act and Rule 72 of the Juvenile Court Rules that, in determining custody of the child, the social welfare officer should inquire on the contemplated residence of the child. Unfortunately, in this case the social welfare officer did not do so and the Court determined the application without having a social inquiry report to assist it in reaching into a fair decision, the decision that considered the best interest of the child.

He concluded by reminding the Court that, there is no rule that compels custody of the child below 7 years to mothers, therefore, the Court need to

consider best interest of the child and welfare of the child in determining custody of children below 7 years.

The Respondent counsel, Pascal Mshanga considered the grounds of appeal raised by the Appellant to have one major issue, that is, whether trial Court was correct to grant custody of the child to the Respondent. According to him, the Trial Court correctly determined the custody of the child and granted custody of the baby to the mother. He submitted that, in reaching to such a decision, the court considered submissions by both parties and evidence adduced by the parties, social inquiry report and the law as reflected at page 3 paragraph 2 of the trial Court judgement.

He submitted further that, the trial Court did consider welfare of the child in determining the application for custody which was filed by the Respondent. He referred this Court to the findings of the trial court at page 4 of the trial Court Judgement as evidence that the Court considered welfare of the child while determining the application. He explained that, the child has not been staying with his father as alleged. He referred the Court to the proceedings of the lower Court in which the Respondent testified to the effect that, the child was under her custody and was studying. He added that, proceedings establish that, the child was using health insurance issued by the

Respondent's employer and the Respondent used to pay school fees for the child. On access to the child, learned counsel submitted that, the Respondent used to give the Appellant access to his child peacefully. According to the Respondent's counsel submission, the misunderstanding regarding custody of the child between the Respondent and the Appellant arose on 9th January 2022. It is alleged that, on the mentioned date, the Appellant took the child in a usual manner but decided not to return the child to the Respondent. Efforts by the Respondent to have her baby back into her custody failed. The Respondent had nothing to do than seeking court's intervention by filing a formal application for custody of her baby.

The learned counsel submitted further that, the Respondent has been conscious of the academic issues of the child and she used to take the child to school as reflected in the proceedings of the trial court at page 2.

He challenged the relevance of the alleged disturbance to the child due to change of custody. In this he submitted that, no disturbance will be caused to the child by being returned to his mother's custody as he has always been under his mother's custody. He argued that, although the Court has powers to revoke custody of the child, in doing so, the Court must consider the best interest of the child. He is of the view that, the Appellant has not explained

how the best interest of the child will be affected by granting custody to his mother.

The Respondent's counsel argued that, best interest of the child is not limited to monetary issues. He urged that, a number of issues need to be considered collectively in determining best interest of the child in each scenario. He submitted on how the Courts have considered the issue best interest of the child. He refered this Court to three cases. First, the case of **Mnyonge Idrisa Vs Kirumba Hussein** PC Matr. Appeal No. 04 of 2020 High Court of Tanzania at Mwanza in which the court held that;

> *the best interest of the child is not only food, shelter and schooling, but the court should consider other factors such as; age and sex of the child, care, and emotional development.*

Second, the case of **Joseph Cyprian Massimba Vs Maureen Said Mnimbo** Civil Appeal No. 55 of 2019 High Court of Tanzania at Dar es Salaam in which the Court held that, when there is contested custody between two parents capable of taking care of the child, preference should be given to the mother.

The third case was the case of **Rameth Rajput Vs Mrs. Sunanda Rahaput** (1988)96 in which the Court of Appeal of Tanzania dismissed the

appeal and held that custody of the child aged two years should be under custody of his mother unless there are serious reasons.

He linked the findings of the Court in the cited cases and the appeal at hand where, the child's mother who is capable and willing to take care of her baby, is struggling to have custody of her child aged 5 years. He is of the view that the trial Court correctly granted custody of the child to the Respondent.

The Respondent's counsel submitted on the Respondents capacity to take care of the child. He submitted that, the Respondent is now earning more than before, she is now residing in a big house where the child can have his own bedroom. Thus the Respondent is now more capable to take care of the child both financially and socially. The learned counsel argued that, even if the Respondent was residing in a single room, the same couldn't have any effect to the child aged 5 years.

On the alleged absence of the social inquiry report, the learned counsel, disputed the alleged absence of social enquiry report. He submitted that the social inquiry report was filed and considered by the court as reflected in the judgment. The social welfare officer recommended that custody of the child be granted to the Respondent and the Appellant be given right of access to the child.

He contended further that, even if the social inquiry report was not there the remedy was to order retrial.

In rejoinder, the Appellant reiterated his submission in chief. He maintained that, the child was under his custody and the Respondent has not established any reason to warrant change of custody than her alleged recently acquired capacity to take care of the child. He is of the view that, the grant of custody to the Respondent will cause disturbance that will affect the child academics and social wellbeing. He insisted that it is in the best interest of the child that he remains in the Appellant's custody.

I am grateful for intensive submissions by both parties. From the submission by the parties, the main issue that need to be determined in this appeal is **Whether the Trial Court did not consider the best interest of the child in the course of determining his custody.** I hold so because all submissions are centered on welfare of the child, each party alleging to be more willing and capable of taking care of the child than the other.

Before determining the appeal, it should be noted that the duty to ensure welfare of the child is primarily vested in the parents of the child. Parents who contest for custody of children should consider the best interest of their

children before the Court comes in to consider the same for the second time. Parents should be moved to contest custody of their children by considering what will be in the best of interest of the child. They should not be driven by their personal injuries resulted from broken relationship to use child's custody as a means of revenge to their partners.

In this, I am persuaded by the decision of the supreme court of Indian in the case of **Rosy Jacob v. Jacob A. Chakramakkal** (1973) 1 SCC 840, which was quoted by my sister, Hon.Masabo, J. in the case **Alice Mbekenga vs Respicious P. Mtumbuka**, Civil Appeal No.68 of 2020, High Court of Tanzania at Dar es Salaam. In the cited case, the Supreme Court of India held that:

> *'The children are not mere chattels: nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian Court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between*

the requirements of welfare of the minor children and the rights of their respective parents over them'

Parents need to perform their duties towards children responsibly. They should think and consider welfare of their children before they approach the Court for orders that may affect welfare of the children.

In the appeal before me, it was not disputed by both parties that, a yard-stick in determining custody of the child is the best interest of the child. Our law, the Law of the Child Act provides for such mandatory requirement in determining all issues involving children under section 4(2) of the Law of the Child Act, [Cap 13 R.E 2019]. The section reads;

'4. (2) 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.'

Guided with the cited section it is mandatory for the Court to consider best interest of the child. The Appeal at hand originates from an application for custody of the child between two parents of the child, the mother and the father. It is expected that, in application of this nature each party, especially the party that prays to be granted custody against the other will avail the court with evidence that will assist the court in determining the application.

Evidence that will make the Court grant the prayer against the other parent judiciously.

Evidence on record does not contain any information that would have assisted the Court in determining the Application. Record contains unsworn testimonies of the Appellant and the Respondent with rival allegations without any proof. There are also documents that seems to be part of evidence tendered by the parties but the same are not borne by the proceedings as there is nowhere in record that their tendering and admission as evidence was recorded. With the unsworn testimonies of the parties and rival arguments without any evidence to prove or disapprove the same the Court cannot be considered to have taken on board the best interest of the child.

I understand that, application for custody of a child under Rule 63 (1)of the Juvenile Court Procedure Rules does not require any kind of affidavit or sworn testimony in order to simply the procedure. However, in applications for custody, the Court deals with adults who desire to be granted custody of the child and the Court is mandated to consider best interest of the child who, in most cases, does not have capacity to make a meaningful choice. I am of a considered view that, the Court need to have reliable evidence to

act upon while determining applications that may affect welfare of the child. Simplicity in applications for custody of the child to the extent of acting on unsworn testimony in my view, is against the best interest of the child as it does not protect the child from untrustworthy persons who may prefer such applications for their own benefits.

Aside of testimonies by the parties and their witnesses if any, the law also sets some procedural requirements to assist the Court in determining what will be in the interest of the child in proceedings involving children. Among the requirements, is to order social inquiry report provided under Rule 72(1) of the Juvenile Court Procedure Rules. A social investigation report may assist the Court to establish a number of issues that are important in ascertaining best interest of the child in a particular case. Ordinarily, the social inquiry report contains interviews of a number of persons who will be responsible with the child if custody will be granted to either parent and the child's choice if he is capable of making a meaningful choice.

In the Appeal at hand, the trial Court ordered, the social investigation be conducted and the report was submitted on 16th March 2022. Unfortunately, the contents of the report submitted are not comprehensive as required by the law. The report does not contain interviews of the persons who were

interviewed if any. It only contains a historical background of the relationship that existed between the Appellant and the Respondent and reasons advanced by the parties to persuade the court in determining custody of the child. It is not clear how the Social Welfare Officer obtained such information as it is not reflected when the Social Welfare Officer interviewed any of the parties. The contents of the report suggest that, the Appellant might be correct that no social inquiry was actually conducted.

A detailed social inquiry report would have assisted the court to consider best interest of the child in determining his custody. In absence of the social inquiry report and reliable evidence regarding capacity of the parents contesting custody to ensure welfare of the child and other factors that may affect the child's welfare, the Court cannot be considered to have taken into consideration the best interest of the child before determining the application.

For those reasons I find it to be in the interest of justice to have the matter tried afresh so that parties can avail the court with evidence that will assist in determining custody of the child. Therefore, I hereby quash and set aside the decision of the trial Court and order re-trial of the application preferably

before a different Trial Magistrate. If the Court will order a social inquiry the same be conducted by a different Social Welfare Officer.

Judgment delivered this 11th day of July 2022 in absence of parties

Z. D. MANGO

JUDGE