

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**IN THE SUB-REGISTRY OF DAR ES SALAAM**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 12 OF 2022**

**MBWANA NYABUTA MALIMA ..... APPELLANT**

**VERSUS**

**EVA MGANGA ..... RESPONDENT**

***(Appeal from the decision of the Juvenile Court of Dar es Salaam  
at Kisutu in Civil Application No.421 of 2021)***

**JUDGMENT**

21<sup>st</sup> April & 11<sup>th</sup> May, 2022

**KISANYA, J;**

This is an appeal against the decision of the Juvenile Court of Dar es Salaam at Kisutu in Civil Application No. 421 of 2021 in which the respondent, Eva Mganga was granted an order for custody of two issues of marriage with the appellant, Mbwana Nyabuta Malima.

It is gathered from the record that, the appellant and respondent were husband and wife. Their marriage was blessed with two issues. While the first child was born on 20<sup>th</sup> June 2016, the second child was born on 18<sup>th</sup> June, 2018. Following a matrimonial dispute, the duo (appellant and respondent) separated. It was the respondent's claim that, when the matrimonial proceedings were pending in the Primary Court of Buguruni, the appellant took the children with him from her house/home. Therefore, the respondent was inclined to institute the application seeking

the custody of the two children. She averred that it was for the best interest of the children to live with her, among others, on the reason that they were still young and uncomfortable to live with the appellant. The respondent further deposed that she had reliable source of income to maintain both children.

The appellant contested the application. He contend that the children were comfortable to live with him.

Upon hearing the parties and after due consideration of the social inquiry report, the trial magistrate held the view that, it was in the best interest of the children to grant custody in favour of the respondent. The appellant was given access of the children on two weekends per month and during holidays. It was further ordered that either party may wish to apply for variation of the said order after expiration of six months.

Dissatisfied, the appellant appealed to this court with three grounds of appeal as paraphrased hereunder:-

1. That the trial court erred in law and fact by ordering custody to the respondent while she is not a good mother.
2. That the trial court erred in law and fact by deciding the case without considering the best interest and welfare of the children.

3. That the trial court arrived to the wrong verdict by failure to scrutinize the evidence adduced by the appellant.

When this appeal was called for hearing, both parties appeared in person unrepresented.

Arguing in support of the appeal, the appellant submitted that the trial court granted custody of the children in favour of the respondent without considering that the latter is not a good mother on their welfare. He contended that the respondent was not faithful and that she did not take care of the children during their marriage life.

Submitting on the second ground of appeal, the appellant argued that the trial court did not consider the best interest and welfare of the children. His argument was based on the reason that one of the children has been diagnosed with the mental health problem. That being the case, the appellant contended that, no person who can take care of him and that, the respondent is not a fit person to care for the said child.

And lastly on the third ground of appeal, the appellant did not have much to submit, he briefly submitted that during the trial they were not accorded with the right to give evidence.

In view of the foregoing submission, the appellant prayed for this court to quash and set aside the decision of the trial court and place the custody of the children under him.

The respondent contested the appeal. With regard to the first ground of appeal, she submitted that the trial court was correct to place custody of the children under her. Her submission was based on the undisputed fact that the children are below seven years and thus, they are required to live with their mother. The respondent denied the appellant's allegation that she is not a good mother. She urged me to consider that the trial court was satisfied that she is a good mother.

As regards the second ground of appeal, the respondent submitted that the trial court considered the best interest and welfare of the children. She contended that the social welfare report suggested that the appellant was not in a position of taking care of the children.

On the third ground of appeal, the respondent submitted that the trial court accorded them with the right to give evidence and that the said evidence was duly considered. Therefore, she was of the firm view that there was no illegality in the proceedings of the trial court. In conclusion the respondent asked this court to dismiss the appeal and issue an order it seems fit to grant.

In his rejoinder submission, the appellant admitted that the children are below seven years. However, he submitted that the respondent was not entitled to live with the children. He also reiterated his submission in chief the respondent had failed to take care of the children.

Having gone through the record and given due consideration to the oral submissions from both parties, I now turn to consider the merits of this appeal.

It is my considered view that the first and second grounds of appeal can be tacked together. Both grounds raise the issue whether the best interest of the children was considered when the trial court made an order of custody of the two children in favour of the respondent.

The starting point is the position of law on the issue under consideration. In terms of section 4 of the Law of the Child Act, Cap. 13, R.E. 2019 (The LCA), the primary consideration in all actions concerning children is the best interests of a child.

As far as custody of children is concerned, section 26 (1)(b) of the LCA, a child has the right to live with the parent who, in the opinion of the court, is able to raise and maintain him or her (child) in the best interest of the child. Further to this, sections 37(4) and 39(1) of the LCA requires the courts to consider the best interest of a child before arriving

at a decision related to application for custody of the child. The law provides further that the importance of a child being with his mother is one of the factors for consideration when making an order for custody of children. Other factors are, the rights of the child; age and sex of the child; independent views of the child, desirability to keep siblings together; continuity in the care and control of the child; child's physical, emotional and educational needs; willingness of each parent to support and facilitate the child's ongoing relationship with the other parent. This is pursuant to section 39 (1) and (2) of the LCA which is reproduced as hereunder:-

*"39.-(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."*

In view of above cited provisions, it is clear that the court is enjoined to consider the best interest of the child and that the child must be placed under custody of his or her mother unless there are cogent reasons to discredit her (the mother). This stance was also taken in the case of **Elizabeth Nkwimba Masanja vs Cosmsa Michael Machibya**, Matrimonial Appeal No.23 of 2020, HCT at Mwanza (unreported) when this Court held that:-

*"What matters in the custody of a child is the best interest and welfare of the child. Children of tender years are kept under the custody of their mothers unless there is sufficient evidence to discredit the mother....."*

The question that arises is whether the trial court considered the law. As indicated earlier, the appellant contends that the trial court did not consider the best interest and welfare of the children. One of the reasons fronted by the appellant is to the effect that the respondent is not a good mother because she was not faithful and failed to take care of the children. It is on record that during trial, each party contended that

the other side was not fit to be given custody of the children. While the appellant claimed that the respondent used to return home in the middle of the night and that she was not able to care of the children, the respondent contended that the appellant was an alcoholic. In that regard, the trial court found it apposite to engage a social welfare officer whose inquiry report revealed, among others, that upon separation, the children were under custody of the respondent until when the appellant took them by force. The report shows further that given the nature of the appellant's job, the children were left with a domestic assistant for five days.

In view of the foregoing, the trial court was of the considered view that the best interest of the children would be taken care if their custody is placed in the respondent.

I find no reason to fault the trial court's decision. It is my considered view that the trial court considered the best interest of the child when granting the order of custody of children. Considering the children's age, it is clear that their best of interest and welfare were to be taken by their biological mother (the respondent) instead of the appellant who used to leave them with his domestic servant. See also the case of **Bharat Dayalli Velji vs Chadni Vinesh Bharat**, Civil Appeal No.45 of 2017 (unreported) in which this Court held that:-



*“The children need love, affection and care of which the mother is in a better position to offer to her children against the whole world.....”*

In the present case, the social inquiry report did not indicate that the respondent was not a good mother.

I have considered further the appellant took the children from the custody of the respondent without an order of the court. In so doing, he contravened the provision of section 40 of the LCA which stipulates:

*“Any person who unlawfully removes a child from lawful custody of another person, an approved residential home or instituting commits an offence.”*

The appellant further contend that the respondent has no means of taking care of the children and that one of two children has mental problem. The fact that one of children has mental problem was not stated during trial. Thus, it cannot be raised at this stage. Given the fact that the trial court directed either party to apply for variation of the order for custody after six months, that issue may form a ground for variation of the custody order made by the trial court.

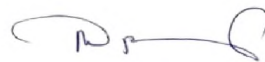
From the above scrutiny, I find no merits in the first and second grounds.

With regard to the third ground of appeal, the appellant faults the trial court for failure to consider and analyze his evidence. In view of what I have stated in the previous grounds, I am convinced that both parties' positions were considered. Further to this, the appellant's contention that he was not accorded the right to be heard is not supported by the record which displays that each party was given the right to submit in support of his case. Thus, the third ground of appeal fails.

In the end, I am settled that this appeal is devoid of merit, and I hereby dismiss it. In view of the nature of this appeal, I order that the parties shall bear their respective costs.

It is so ordered.

DATED at DAR ES SALAAM this 11<sup>th</sup> day of May, 2022.



S.E. Kisanya  
JUDGE  
11/05/2022

**Court:** Judgment delivered this 11<sup>th</sup> day of May, 2022 in the presence of the respondent and in the absence of the appellant. B/C Zawadi present.

Right of appeal explained.



A handwritten signature in black ink, appearing to be 'S.E. Kisanya'.

S.E. Kisanya  
JUDGE  
11/05/2022