

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CIVIL APPEAL NO. 3 OF 2022

(C/O Mpanda District Court, Civil Application No. 2 of 2022)

(G. B. Luoga, RM)

DELEFINA D/O KIBOMBA APPELLANT

VERSUS

LUCA S/O BENARD RESPONDENT

JUDGMENT

Date: 08 & 13/04/2022

NKWABI, J.:

This civil appeal was filed under a certificate of extreme urgency. The appellant was dissatisfied with the ruling of the District Court in which it ordered her infant child be placed in the custody of the respondent under the supervision of the Social Welfare Officer. The appellant was told, by the District Court, was at the liberty to visit the child anytime as she wishes. The trial Resident Magistrate had these to say in his short ruling:

"I have taken into consideration on the submission of the SWO, I have also looked on section 16(b) (c) and (e) together with section 20 of the Law of the Child Act No. 21 of 2009. According

*to circumstances of this application I am convinced that the child is in danger and harm situation. Now for the best interest of the child, I hereby order the child **ALLEN LUCA** be placed under the care of his father one **LUCA MWACHALI** under the supervision of SWO where the mother is at liberty to visit the child anytime as she wishes."*

The appellant, as shown above, was discontented with the ruling, orders and proceedings of the District Court hence this appeal. She listed four grievances which are:

1. That the trial court erred in law and facts by arriving at the decision in favour of the respondent without granting the appellant an opportunity to be heard.
2. That trial court erred in law and fact by granting the application to the respondent after merely stating that it is convinced that the child is in danger and harm situation without analyzing any evidences to establish under what extent and circumstances the life of the child is at peril if he remains under the custody of the appellant.

3. That the trial court erred in law by granting the application to the Respondent without considering the age and other best interests of the child.
4. The trial court erred in law and facts by granting the application to the respondent without considering and comparing the life styles, family relations of the Respondent versus that of the appellant.

It is for the above grounds the appellant is praying this court to set aside the ruling, custody of the Child to remain under the appellant as it was before. Costs of the appeal and any other relief this Honourable Court may deem fair and equitable to grant.

On the hearing date, the respondent did not appear. He had written a letter to this court asking for adjournment of the hearing as he was sick suffering from severe flue. As he did not attach any medical chit, I refused the request for adjournment of the hearing. As intimated above, this appeal was filed under a certificate of extreme urgency. During the hearing of this appeal, the appellant appeared in person, unrepresented.

In the hearing, the appellant contended that she appealed since she was not heard. She was not supplied with pleadings and the magistrate did not give her a chance to explain. The child was still sucking milk. The respondent deserted the child. She prayed for the orders she prayed for in her appeal be granted.

This appeal shall not unnecessarily detain me much. I intend to dwell only on the 2nd ground of appeal which I believe disposes of the appeal. The 2nd ground of appeal is couched *that trial court erred in law and fact by granting the application to the respondent after merely stating that it is convinced that the child is in danger and harm situation without analyzing any evidences to establish under what extent and circumstances the life of the child is at peril if he remains under the custody of the appellant.*

The trial magistrate seems to have acted under section 16(b) (c) and (e) together with section 20 of the Law of the Child Act No. 21 of 2009. But was he justified to have acted and issued the orders as he did? The pertinent question I pose here is, did the District Court act on any evidence when it decided as it did?

I have gone through the court record, I have found that the document that initiated the application is the letter dated 08/02/2022 written to the Resident Magistrate of District Court of Mpanda with title: YAH: **MGOGORO WA MATUNZO YA MTOTO ALLEIN LUCA MWACHALI.**

What followed are mere submissions of Mr. Mwilafu who is the Social Welfare Officer, the submission of the appellant who said that the respondent is not maintaining the child and thus she has no interest to live with the said child and said let it be in the care of his father. Then followed by the submission of the respondent in this appeal where he submitted that he agreed to take care of his child and said his mother could take care of the said child.

If matters in explanation of a delay requires affidavit evidence as per **Bartholomeo Albert v. Mutagobwa [1970] H.C.D. no 102(PC) 286,** why not in an application of this nature? It is increasingly clear that the trial court acted without having any evidence. With the profound respect to the District Court, that is not in accordance with the law. In that regard, the 2nd


ground of appeal is merited. As such, I under the provisions of section 29 (a) of the Magistrates' Courts Act, Cap. 11 R.E. 2019 which cloths this court with appellate powers, I hereby use such powers and quash the proceedings, reverse the ruling, and set aside the orders of the District Court. The application which is the basis of this appeal was incompetent for lack of any evidence be it affidavit, oral or documentary.

The culmination of the above deliberation, I hold that this appeal has merits. I allow the appeal with costs. I order, that in the meantime, the child be in the custody of its mother, immediately, as it was before prior to the decision of the District Court. If the respondent is still interested in applying for custody or protection of the child, he may apply to the District Court for such orders.

It is so ordered.

DATED at SUMBAWANGA this 13th day of April, 2022




J. F. NKWABI
JUDGE