

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO. 4 OF 2019

(Originating from the Juvenile Court of Arusha at Arusha Civil Application No 01 of 2019)

JULIUS JOHN SWAI..... APPELLANT

VERSUS

JOINA MINJA..... RESSPONDENT

JUDGMENT

9th & 27th May, 2022

TIGANGA, J.

In this judgment, the appellant Julius John Swai being dissatisfied with the decision of the Juvenile Court of Arusha herein after referred to as the trial court, where the respondent petitioned for the custody of the two children begotten by the parties during their marriage. The trial court partly allowed the application by ordering the elder child to be under the custody of the appellant while the younger one to be under custody of the respondent. Following that decision, the appellant filed this appeal by advancing the following grounds of appeal.

1. That, the learned trial Magistrate erred in law for determining the matter without considering evidence on record as adduced by the appellant during the trial, thus arriving to an erroneous decision.
2. That, the learned trial Magistrate erred in law for vesting the custody of JEMINA JULIUS to the respondent herein without considering her best interests thus arriving to an erroneous decision.
3. That, the learned trial Magistrate erred in law for failure to properly assess and analyse evidence adduced by the appellant herein arriving to an erroneous decision.

Gleaned from the record, the historical background of this bone of contention goes as follows; the appellant and respondent contracted Christian marriage in 2005. In that lovely union, the parties were blessed with two issues of marriage namely Joel Julius and Jemina Julius. Unfortunately, their marriage went short of love and therefore serious matrimonial misunderstanding between them ensued.

In 2015, they had a voluntary separation following that separation, in 2019, the respondent filed an application to the Juvenile Court of Arusha at Arusha seeking the custody of both children. By the time the

application was made, Joel Julius had attained or almost attaining the age of nine years, while Jemina Julius was about 8 years old. The trial court in its legal findings reached to the conclusion that, Joel Julius be in the custody of his father while Jemina Julius was placed in the custody of her mother, the respondent. The appellant was also ordered to maintain Jemina Julius at the tune of Tsh 65,000/= monthly. The reasons for separating custody of those two children were, according to the trial court their best interests. That since the older child is somehow matured enough to take care for himself remain in the custody of the father compared to the young girl who still highly required assistance from her mother.

As said, submissions for both parties were very brief and unbacked up probably due to the fact that parties had no service of Advocates. However, despite such shortage of the material, this court cannot fold its hands and only decide on the unpacked facts. It is duty bound to substantiate its legal reasoning with various authorities on the facts adduced.

During hearing, the appellant prayed this court to adopt the grounds of appeal and consider them as the contending facts, therefore reasonable arguments justifying his appeal.

His counterpart, the respondent submitted that, she is comfortable with the decision given by the trial court. She further added that, both children currently are living with her after being handed over by her husband's sister who was taking care of them as they were deserted to her by the appellant. She further fortified that, both children are currently schooling unlike at the time when they were residing with the appellant. The respondent went on arguing that the appellant does not take care of the children and also, he does not provide maintenance and necessities of their lives. Therefore, the respondent lastly prayed this court to grant her custody of both children and order the appellant to provide maintenance.

In rejoinder, the appellant admitted both children to have been staying with the respondent. The reason for such stay according to him was due to the outbreak of the pandemic deadly disease COVID 19 whereby, he gave children to his maternal aunt and subsequently voluntarily consented them to go and stay with their mother.

Lastly, the appellant asked this court to consider the interests of justice and best interests of those children as currently there is a filed case at police station in which the relatives of the respondent are accused of raping them.

After going through those submissions and the record of the case, I think, the issue for determination is whether this appeal is meritorious. However, looking at all three grounds of appeal, it can be noticed that, the grounds have some commonalities, therefore they can be dealt with jointly. That being the case they will be considered and dealt with together. Reading the Law of the Child Act, [Cap. 13 R.E 2019]

26.-(1) Subject to the provisions of the Law of Marriage Act, where parents of a child are separated or divorced, a child shall have a right to- (a) maintenance and education of the quality he enjoyed immediately before his parents were separated or divorced;

(b) live with the parent who, in the opinion of the court, is capable of raising and maintaining the child in the best interest of the child; and

(c) visit and stay with other parents whenever he desires unless such arrangement interferes with his schools and training program.

The Law of the Child Act continues to provide that;

*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 rights 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. (The emphasis is mine).

According to those provisions of the law, the position underlying the matter at hand is very apparent. The question of interests of the child in deciding as to whom the custody of the child shall be granted is of paramount importance. The law also emphasises that it is very important when granting custody, the court to consider the child being with his mother, and of course, with much consideration to the age and sex of the child.

On this point, I am persuaded by the decision of my brother His Lordship Kilekamajenga, J in the case of **Victor C. Kanyoro vs Neema Kalibobo**, Civil Appeal No. 13 of 2021 (Unreported), where the High Court of Tanzania at Bukoba, had the following observation in regard to the sex and age of the child in consideration during granting custody.

"In respect of a girl who is aged 9 years old, I also find desirable for this court to grant custody to the respondent. There are two reasons for this child to be with her mother; first, she is not old enough to be in the hands of the appellant. The girl of this age her well being and future may be determined by the person nurturing her. In my view, her mother might be the right person to take care of her rather than the appellant (father)."

In my settled opinion, the position set by the court in the above case law is quite endorsed and fully subscribed. It is very awkward to give the custody of the girl child to the father especially when the mother is not outrageously living. Imagine, for the girl child who might be undergoing puberty stage living with the father who is not married like the appellant in this case as gleaned from the record, in my view, the work might be harder than when that child is in the hands of the mother. Biologically, the girl of eight years is not so much far from attaining such stage. By the way, there is nothing on record which suggests that the respondent is of social misconduct bizarre to justify custody of the said child girl to the appellant.

In the meantime, there are complaints from the appellant that respondent's relatives are alleged raping the children. Such allegation cannot be left idle as it is affecting livelihood of those children and

therefore contrary to the enshrined principle of *best interests*. The appellant in his submission went further contending that, there is a pending case before police station whereby those relatives are accused of the said case. Unfortunately, he did not even say what is that police station under which the case was filed let alone, adducing any document or evidence fortifying the accusation. This mere allegation is completely unfounded. It cannot be justifiably proved to convince this court turn down the decision of the trial court.

Nevertheless, during rejoinder the appellant has admitted to voluntarily handing over the children including the one who was given custody to him by the trial court to the maternal aunt and lastly the maternal aunt gave the said child to the respondent at the consent of the appellant. He says, it was so because of hardships occurring due to outbreak of COVID 19. Again, in my settled view this is another sign of failure to the appellant to take care of the issues of marriage. The caring parent is not expected to be able to take care of the children only when things are okay, or during good times, a good carer is expected to care in all situation for good and for worse.

Gathering from what I have discussed herein above, one question can be posed here, will it be prudent and legally founded to differ the

order of custody for the respondent who sustained economic pressure and down fall during the outbreak and give it to the none? Obvious, the answer is in the negative. In principle, the respondent who did not desert those children, stands the better chance than the appellant who thought burdened and threw them off.

For the foregoing analysis and reasoning based on legal percept and authorities, I hereby dismiss this appeal with no order to costs regarding the nature and relationship of parties so existed.

Order accordingly.

It is accordingly ordered.

DATED at **ARUSHA**, this 27th day of May, 2022



A handwritten signature in blue ink, appearing to read "J.C. Tiganga", is written over a horizontal line.

J.C. TIGANGA

JUDGE