

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

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO.178 OF 2022**

*(Appeal from the ruling and order of the Juvenile Court of Dar es Salaam at  
Kisutu dated 20<sup>th</sup> September, 2022 Hon. O.S. Mtae, RM in Civil Application  
No. 420 of 2022)*

**AZAMELA DICKSON SAROTI.....APPELLANT**

**VERSUS**

**HOSNEY MUBARAK HASSAN.....RESPONDENT**

**JUDGMENT**

*Date of last Order: 13/12/2022*

*Date of Judgment: 28/02/2023*

**POMO; J**

The Appellant is aggrieved with the ruling and order of the resident Magistrate's Court of Dar es Salaam in Civil Application No.420 of 2022 which was handed down on 20/09/2022 against her favour. She was the Applicant in that application.

The brief background to the matter is that, the appellant and the respondent are the parents of Shayna Hosny Mubaraka. They lived together

with their child at Kawe area within Kinondoni municipality in Dar es Salaama Region. In April, 2022 the Appellant deserted the Respondent. In so deserting the appellant went with the child. According to the record obtaining from the pleadings filed before the trial court speaks that the time the Appellant deserted the Respondent their child was only three and a half years old.

The Appellant's parents reside at Majohe in Gongo la mboto area within Ilala municipality in Dar es Salaam region. Shayna the child was kept by her mother under custody of the Appellant's mother. While the Appellant was away from the country, the respondent repossessed the child from the Appellant's parents, the repossession which led the Appellant to file the said Civil Application No.420 of 2022 against the Respondent before the Juvenile Court of Dar es Salaam at Kisutu. The Application ended up being decided against the Appellant's favour hence the appeal herein which contain four grounds of appeal.

The grounds of appeal are as follow: -

- 1. That, the trial court erred in law and in fact by placing the custody of the child Shyna Hosny Mubarak aged 4 years to the Respondent in total disregard of the said tender age of the child*

2. *That, the trial court erred in law and fact by placing the custody of the child who is below 7 years to the Respondent on the basis of extraneous matters which were not proved in court*
3. *That, the trial court erred in law and fact by placing the custody of the child to the respondent on the basis of mere assertion that the child had been under the custody of the respondent since March, 2022 to the date of institution of the application and that change of custody will disturb the child's life without taking into consideration the mode used by the respondent to acquire such custody*
4. *That the trial court erred in law and fact by denying the applicant's custody of the child on the basis of un-proved allegations that the appellant has been frequently traveling outside the country and tried to flee away the child to South Africa without any evidence whatsoever to that effect*
5. *That, the trial court erred in law and fact to hold that the respondent met all qualities concerning the best interest of the child as against the appellant biological mother*

When the appeal was called on for hearing on 30 November, 2022, the appellant was represented by Mr. George Mshumba, learned advocate while Ms Diana Sing'ombe, the learned advocate appeared holding brief of Mr. Robert Chuwa the Advocate for the Respondent. I ordered the appeal be

argued by way of written submission the order which parties have complied with. Thankful to the learned counsel for their industrious submission in support and against the Appeal.

In arguing the appeal, the counsel for the Appellant combined the first and second grounds of appeal and submitted that there is no dispute that the child in issue is only four years old and under section 26(2) of the Law of the Child, Act No.21 of 2009 the best interest of the child below the age of seven years old is to be under custody of her mother. The best interest which is rebuttable. Following that the learned counsel faulted the ruling by the trial court in that while it acknowledged the child in issue is of tender age the decision was against the appellant, the mother of the child in issue. That, according to the first paragraph of page 10 of the typed ruling the time the respondent was given the child in issue for custody the appellant was outside the country. The appellant argues that this is a finding which is unsupported by any evidence on record. Also, according to her, the finding that the appellant is a person who frequently travel outside the country thus the child in issue should be best served if is under custody of the respondent is unsupported as the appellant travelled only once.

The second argument advanced is that, in denying the appellant the child in issue the trial court had a view that the respondent lived with the child in issue for at least three months at the date of institution of the application for custody of which if the child is to be placed under custody of the appellant will change the child's life. It is the Appellant's argument that the three months has to be weighed against the three and half years the appellant lived with the child in issue. That even the three months the respondent is asserting to have lived with the child in issue is nothing but the time counted from when the child in issue was forcefully taken by Respondent under police supervision.

That, there is neither evidence tendered showing the child was not well taken care of during the appellant's short spell of travelling outside the country nor is there any evidence that the appellant stays outside the country.

Again, it is the appellant's submission that the findings by the trial court relied upon in granting the respondent the custody of the child in issue is that the respondent is the businessman living for gain. The appellant faults the findings in that being a businessman has never been a consideration for awarding custody of a child. According to her, the paramount consideration

is the best interest of the child and becomes more important once the child is of tender age. That, the court will always direct who has means to provide maintenance. He concluded by arguing that it was wrong for the trial court to deny the appellant the custody of her child.

That, the findings by the trial court that the appellant was about to flee to South Africa, according to the Appellant, is unfounded because there is no evidence tendered in proof thereof. It is her contention that holding a travelling passport and that of a child in issue is not enough to prove the intention to flee to south Africa. No travelling visa or air ticket were produced in court in proof thereof.

That, as to the findings by the trial court in granting custody of the child in issue to the Respondent that the child has a right to grow with her biological parents, the appellant argued that she is also a biological parent of the child in issue more particularly being her mother.

That, the findings by the trial court that the life and safety of the child was to be with the respondent, however there was no evidence tendered showing the life of child will be in danger if custody is given to the appellant the biological mother.

In the end, it is the appellant's submission that the above submission covers also the third and fourth grounds of appeal. Nothing is said about the fifth ground of appeal. I deem it to be a dropped ground of appeal as correctly so submitted, in my view, by the Respondent in his reply submission

In his reply submission, the respondent counted the appellant's submission thus: -

That, the court do not consider the age of the child but also the best interest of the child as is so provided under section 4(2) of the Law of the Child Act [Cap 13 R.E.2019]. That, in the best interest of the child in issue it was correct for the trial court findings to grant the respondent the custody of the child despite her age. This is because the Appellant deserted the child and left to South Africa without informing the Respondent neither did she live the child under the respondent's care instead she left the child to the Appellant's parents while the biological father is still alive and ready to accommodate the child

The Respondent further argues that, under section 39(2)(c) of the Law of the Child Cap.13 R.E.2019 the child has to live with his parents. That, the Respondent being a biological father of the child in issue has that right of

custody of the said child. Arguing against the appellant submission backed up by section 26(2) of the Law of the Child to which the appellant is basing her right to be given custody of the child in issue for being of tender age, the Respondent argued that the court in granting custody of the child is not bound to rely on the status of being a biological mother as the section has to be read with section 37(1) of the Act where it is provided a parent, guardian or relative who is caring for a child may apply to a court for custody of the child. That the respondent is not a stranger but a biological father of the child in issue. That he has all the right to be granted custody of the child in issue irrespective of her age. This is because, the Appellant who is the mother of the child once deserted the child in issue and left outside the country

That, in giving custody to the Respondent the child in issue the court didn't only consider the time the respondent stayed with the child , the three months for that matter, but also considered other factors and evidence to that effect was adduced, the best interest of the child being the most consideration. That having known the appellant to have deserted the child the respondent made several effort to access the child in issue but the appellant's parents denied him access the fact which led him to report the



matter to the respective authorities as evidenced by **annexture "A"; "A2"; "A5"; "B1"** tendered before the trial court. That, the appellant was in a process of fleeing with the child in issue to South Africa as evidenced by annexture **"D1"** and **"D2"** a letter by the appellant she wrote to the immigration office asking for travelling permit of the child in issue and the passport thereto respectively. In the end the respondent prayed the appeal be dismissed with costs

I have dispassionately gone through the trial court records including the findings in the impugned ruling. Equally so, I have considered the rival submissions for and against the grounds of Appeal raised. It is my observations that the appellant argued the grounds of appeal generally and dropped her fifth ground of appeal. This is because nothing is argued by her on the same.

Looking into the parties submissions, the controversy in this appeal is centered on whether it was in the best interest of the child, Shayna Hosny Mubaraka to be placed under custody of the Respondent who is her biological father instead of the appellant who is her biological mother.

In resolving the issue, the need to discuss the best interest of the child ensues. The best interest of the child is a principle which is provided under the international conventions as well as the law of the land.

In **Jackson Davis Versus Republic, Criminal Appeal No. 127 of 2005, CAT at Mtwara (Unreported) at pp.9-10** the Court of Appeal had this to state on the best interest of the child: -

*"We are fortified in our view by the provision of **article 3(1) of the United Nations Convention on the Rights of the Child (CRC),1989, which Tanzania has ratified. Article 3(1) of the CRC places an obligation on courts to give the best interest of the child paramount importance in child matters by stating: -***

***Article 3(1)** In all action concerning children, whether undertaken by Public or private social welfare institutions, **Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be primary consideration".***

Likewise, under Section 125(3) of the Law of Marriage Act, [Cap. 29 R.E.2019] it is provided as follows: -

***"S.125(3): - There shall be a rebuttable presumption that it is for the good of a child below the age of seven***

*years to be with his or her mother **but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of the child by changes of custody***".

Child rights when parents separate are provided under **section 26(1) of the Child Act, [Cap 13 R.E.2019]**. This section provide as follows: -

*"**S.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***

In **Nacky Esther Nyange Vs Mihayo Marijani Wilmore, Civil Appeal No. 169 of 2019 CAT at Dar es Salaam (unreported) at pp.12– 13** the Court of Appeal gave a detailed discussion on the principle of the best interest of a child. It had this to state, I quote verbatim: -

*"The principle of the best interest of the child is embodied in our laws. Section 125(2) (a), (b) of LMA articulates that **in deciding in whose custody an infant should be placed the paramount consideration shall be the welfare of the infant**, and subject to this the court shall have regard to the wishes of the parents, the wishes of the infant, where he or she is of an age to express an independent opinion and the custom of the community to which the parties belong. In the LCA, section 4(2) states:*

*"the best interest 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".*

The court went on to state thus:

*"**With regards to custody of children**, section 26(1)(b) of the LCA states:*

*"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"*

In the end, the Court of Appeal stated thus: -

*"Moreover, section 37(4) of the LCA requires the courts when granting custody to primarily consider the best interests of the child. **In application for custody, the best interest of the child is determined in consideration of 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, the willingness of each parent to support and facilitate the child's ongoing relationship with other parent (see sections 26 and 39(2) of the LCA and Rule 73(a) to (i) of the Law of the Child (Juvenile Court Procedure) Rules, GN No.182 of 2016 (hereinafter referred to as the Juvenile Rules)". End of quote and emphasis in bold supplied*

Guided by the above position of the law and case laws on the best interest of the child, I need now to find out in the impugned decision if the learned trial magistrate decided in the best interest of the child or otherwise in giving custody of a child in issue to the respondent

From last paragraph of Page 7 to page 14 of the impugned trial court decision is where the findings by the trial court is seen. At paragraph 2 of page 9 the trial court stated as follows in its findings:

*"To start with, it has to be noted here that both parties herein are biological parents, and it is not a dispute that the presumption covered under section 26 of the Act that it is for the best interest of a child under seven years to be under mother custody do favour the mother herein as the child is about four years of age. **Despites above observation but I still hold the same view that for the best interest the child be placed under her father custody**".* End of quote

The above findings by the trial court was followed by asserting reasons/factors for so deciding. These included one, the appellant's abandoning the child for three months when she went to South Africa leaving behind the child to the Appellant's parents. Two, her preparation to flee and reside in South Africa with the child without the Respondent's consent. This one gain support from the trial court proceedings. At page 10 last paragraph of the typed trial proceedings, the Appellant, under oath, had this to state:

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*"Concerning passport, I did not prepare or make an application for it for travelling with the child. Therefore, **I prepared it so that in case I travel***

*and I decide to reside in South Africa I will go with my child because respondent was not maintaining the child”.*

The reason for the Appellant to apply for custody are provided under paragraph 7 of the Application that the child lives in uncondusive environment since the respondent has no permanent place to live the facts which turned out to be wrong as evidenced by paragraph 10 of the Respondent’s counter affidavit and the social welfare report dated 12/9/2022 to the trial court, the report which have to be prepared by order of the court in compliance of **section 45 of the Law of the Child Act** read together with **Rule 72(1) of the Juvenile Court Rules**.

Both the social welfare report, evidence on record adduced carries more weight as to the best interest of the child in issue to be better served when custody of the child in issue is granted to the Respondent rather than the Appellant. Placing the custody of the child in issue into custody of the Respondent was based in the opinion of the court given to it under section 26(1)(b) of the LCA which states:

*“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”.*

Looking the appellant's submission in support of the appeal in tandem to the evidence on record together with the position of the law on the best interest of the child as expounded above, I find nothing advanced in the grounds of appeal to fault the findings by the trial court.

In the upshot, I uphold the trial court finding and dismiss this appeal for being devoid of merit. No order as to costs

It is so ordered

Right of Appeal explained

Dated at **Dar es Salaam** this 28<sup>th</sup> day of February 2023.



**MUSA K. POMO**

**JUDGE**

**28/02/2023**

