

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA SUB REGISTRY
AT ARUSHA**

CIVIL APPEAL NO. 54 OF 2022

(Original Civil Application No. 04 of 2022, in the Juvenile Court of Arusha at Arusha)

NEEMA ALFRAELI NNKOAPPELLANT

VERSUS

FRANK CHARLES MSAKI RESPONDENT

JUDGMENT

28th April & 26th July, 2023

KAMUZORA, J.

This appeal originates from Juvenile Court of Arusha at Arusha (the trial court) in Civil Application No. 4 of 2022. Briefly, before the trial court, the Respondent applied for parentage and custody of two children; Prisca Frank Msaki and Steven Frank Msaki. He sought to be declared father of children, granted full custody of the children and be involved in their maintenance until they attain the age of majority while the Appellant was be granted only access to the children. The Respondent's prayers were granted by the trial court but the Appellant

herein was aggrieved hence preferred this appeal on the following grounds: -

- 1) That, the trial court erred in law and in fact by ruling in favour of the Respondent herein without considering the Best Interest of the Children.*
- 2) That, the trial court erred in law and in fact for failure to evaluate the evidence as adduced.*
- 3) That, the trial court erred in law and fact in ruling in favour of the Respondent herein while the Appellant was not heard at the family meeting hence against the principle of natural justice.*

On the date scheduled for hearing Mr. Sylvester Kahunduka, learned advocate appeared for the Appellant while the Respondent was dully represented by Mr. Godwin Ngongi, learned advocate. Parties opted to argued the appeal by way of written submissions and they both complied to the submissions schedule.

Submitting in support of the first ground of appeal the counsel for the Appellant argued that the trial court did not consider the best interest of the child but rather considered the best interest of the Respondent. He explained that the Appellant and the Respondent were blessed with two children in extra marital affairs as the Respondent has legal wife. That, when the children were born, the Respondent deserted the Appellant and went back to his family. That, the Appellant as a

single mother, she was residing at Arusha and raised her children by herself until they attained the age of 10 and 7 years. That, since the Appellant was able to raise her children up that time, there was no need of granting custody to the Respondent.

The counsel for the Appellant added that, the Respondent's wife and other children resides at Dar es salaam while he works and resides at Dodoma with the Appellant's children. That, most of the time the Respondent travel to Dar es salaam leaving Appellant's children under the care of houseboy and house girl. He was of the view that for the best interest of children, the Appellant should be granted custody. He referred the cases of **Rosy Jacob Vs Jacob A Chakramakkal** (1973)¹ SCC 840 quoted with approval in the case of **Alice Mbekenga Vs. Respicious P Mtumbala**, Civil Appeal No. 68 of 2020 HC at Dar es Salaam and Section 4(2) of the Law of the Child Act.

Submitting for the 2nd and 3rd grounds, the counsel for the Appellant argued that the trial court gave much weight to exhibit C2, the minutes of family meeting which was the document prepared by the Respondent who was the secretary of the said meeting and the Appellant was not involved in any way in the said meeting and that was against the principle of natural justice on right to be heard.

He was of the view that, had the trial court properly considered and analysed the evidence adduced before it, could have noted that at one point in life the children were under the custody of the Respondent by mutual agreement of the parties but they were subjected to harassment by houseboy and house girl and when they reported the matter to the Respondent they were punished. He therefore prayed that the Appellant be granted custody of children and the Respondent be ordered to maintain them.

Opposing the appeal, the counsel for the Respondent submitted for the first ground that the trial court considered the best interest of the child when granted custody to the Respondent as required by section 8(1) of the Law of the Child Act R.E 2019. That, in granting custody to the Respondent, the trial court considered that the Respondent is a suitable person compared to the Appellant. That, the Respondent is the biological father of those two children and he can maintain them by providing basic need including food, shelter, wearing apparel and education as required under the law.

He added that even during the family meeting held on 31/08/2018 and 31/12/2019 custody of the children was placed to the Respondent who is capable of providing them with basic needs and security. That

since January 2021 the Respondent sent children to school that is Martine Luther and Feza Primary school and has been paying for their school fees. That he has also secured health insurance for them and employed housekeepers to take care of children.

On the argument that the children are left with house girl and house boy he submitted that the Respondent is married to another woman and the children are living with their step mother. That, the children are schooling and they spent most of their time at school than home. That, placing children under the custody of the Appellant will force the Respondent to take care of two families and will disturb children in their studies.

Responding to the second and third grounds, the counsel for the Respondent submitted that the family meeting was convened to assist the parties settle their differences and the Respondent was the secretary to the said meeting. That, the Appellant was involved in the said meeting hence estopped from denying the same. For this, reference was made from the case of **Bytrade Tanzania Ltd Vs Assenga Agrovat Company Ltd & another**, Civil Appeal No 68 of 2018 CAT

On the claim that the children while under the Respondent's custody were harmed, he replied that the said issue was not raised at

the trial court and was not reported at any institution by the Appellant hence, false statement. The Respondent concluded with a prayer to maintain custody of the children.

In rejoinder, the counsel for the Appellant reiterated his submission in chief and added that the agreement was that the children were given to the Respondent for him to send them to a boarding school. That, the Respondent did not comply to that agreement and instead left the children to be cared by the house girl. He added that the Respondent has no permanent address or residence and his wife resides in Dar es salaam. That, the Respondent started paying for school fees as he wanted to lodge application for custody but he has never been responsible for his children before. The Appellant's counsel distinguished the case of **Bytrade Tanzania Ltd** stating that it is irrelevant from the current case.

There is no doubt that the Respondent is the father of two children Prisca Charles Msaki and Steven Charles Msaki. What is dispute between the parties is custody of the two children. While the Appellant claim that the children are not safe living with their father, the Respondent believe that he is capable both financially as a parent to take care of the children.

From what I have endeavoured to gather from the record, I have realised that the parties to this appeal have been in long time love battle and they have been using children as their instruments of war. From the Appellant reply before the trial court the Respondent made promises which he could not fulfil as they both knew that they were having extra marital relationship as the Respondent was legally married to another woman. The Appellant however believed that their relationship was eminent but it was not the same with the Respondent. The Appellant therefore felt that she was used by the Appellant just to get children he desperately needed.

It was also disclosed that after the second child (a boy) was born, the Respondent stopped relationship with the Appellant and went back to his family. All these aggrieved the Appellant who in turn decided not to give the Respondent access to the children. They even had family meeting to resolve their differences to no avail hence, the dispute ended in court. This battle in my view is to the detrimental of their children as it does not reflect civilised upbringing of their children. I say so because, the misunderstanding between the parties had led to the transfer of children from one school to another, no enjoyment of parental love as their parents are always fighting over them, being forced to choose

between their parent at the age they need care of both parents and being forced to live to the convenience of their parents even though it is not their wish.

Having pointed out all those, this court finds that it is the time for assessing the best interest of children as raised in the first ground. The Law of the Child Act Cap 13 R.E 2019, section 4 (2) states that;

"The best interests of a child shall be a primary consideration in all action concerning children whether undertaken by public or private social welfare institutions, courts or administrative bodies."

It is the Appellant's claim that by placing two children under custody of the Respondent, the trial court did not consider the best interest of the child. What should be measured in assessing the best interest of the child is embodied under section 39 of the LCA which reads: -

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 above listed condition must be tested before the court could grant custody of children. While I am aware that mothers are basically considered best parents for infants, that cannot be an exclusive factor in granting custody. The above provision is clear that other factors have to be considered and they include; the rights of the child under section 26 of the Act, the age of the child, the living environment, the view of the child, the desire to keep siblings together, the need for continuity in the care and control of the child and any other matter that the court may consider relevant.

In the current appeal, the trial court made a finding that the Appellant's conducts of denying the Respondent access to the children was not to the best interest of children. The rights of the child stipulated under section 26 (1)(b) of the LCA include; maintenance and education, 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 visit and

stay with other parents whenever he desires unless such arrangement interferes with his schools and training programs.

It is a fact that children referred in this appeal are now 10 and 7 years of age. Prisca is aged 10 and when she was asked to give her opinion, she stated that their father travelled for three days and they were beaten by the house girl. She did not raise any complaint of mistreatment from her father. Steven is 7 years and when asked to give his opinion he expressed his wish to live with his father. He however stated that they were beaten by house girl when their father travelled. Both children accounted positively of their father that he was taking them to board the school bus every day before he could go to work.

From the children opinion, one could draw conclusion that they had no problem living with their father except that they were beaten up by the house girl. That in itself cannot be a reason for discrediting the Respondent's capacity in taking care of the children. The record reveal that the Respondent demonstrated that he is a good father capable to ensuring that the children receive all necessary needs. He pointed out that he is a public servant and the record shows that he enrolled his children to the best schools in Dodoma. He was escorting his children to

board school bus before he could go to work. He allowed the Appellant to go with children during holyday.

To the contrary, the Appellant did not allow children back to their father and instead she has been trying to separate them from their father. More grievance was triggered by Appellant's conducts of denying the Respondent access to his children. In my view, by denying the Respondent access to the children, the Appellant denied the children from enjoying their rights stipulated under section 26 of the Act.

On the second and third ground that there was no proper evaluation of evidence by the trial court, I find this argument baseless. Although relied on minutes for family meeting, the trial court considered other circumstances in granting custody to the Respondent.

In my view, at their age, the children can live with their father and in the need to keep siblings' bond, they cannot be separated. The fact that they were beaten by house girl can be resolved by the father by setting conducive environment to ensure their security. In that regard, the trial court rightly considered that it will be in the best interest of the children if custody is placed to their father.

In the upshot, and in considering all what has been elaborated above, I find no merit in this appeal. However, in addition to the orders

made by the trial court, the Appellant will have access right to children and right to stay with children during school vacation. The appeal is therefore dismissed but in considering that parties have a parental relationship, no order for costs is made.

DATED at ARUSHA this 26th Day July, 2023




D.C. KAMUZORA

JUDGE