IN THE HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CIVIL APPEAL NO. 12 OF 2022

(Arising from Kilimanjaro Juvenile Court of SIHA in Misc. Civil APP. NO. 2 of 2022)

MWANAID ADAM MWANGA..... APPELLANT

VERSUS

ELISANTE GODSON KESSY.....RESPONDENT

JUDGMENT

16th December 2022 & 16th February, 2023

A.P.KILIMI, J.:

The appellant and respondent had relation out of marriage, during the said relation they got one child born on 26th March, 2020. On 4th July,2022, the Respondent filed in the Kilimanjaro Juvenile court of Siha at Siha the application for custody of the biological child aged two (2) years which he sired to the appellant. He moved the trial Court under Rule 63 (1) of the Law of the Child (Juvenile Court Procedure) G.N.182 of 2016. The reasons he stipulated in the said application at the trial court were; first, the child is not living with his parents instead taken care with his grandmother; second,

he has been restricted to visit the child; second, the child lacking early childhood development skills that may be the reasons for delaying speech and social engagement and fourth, he is a biological child.

The trial court granted the application as sought, and the Appellant was given access to the child any time she wishes to see and talk to her. The Appellant was aggrieved by the said grant of custody of his son to the Respondent. He preferred this appeal basing with three grounds of appeal. Which are as follows: -

1. That, the learned magistrate erred both in law and fact by granting custody of the child XY (in pseudonym), to the Respondent without considering the best interest of the child who is under seven years to be under her mother as required by the law.
2. That, the learned magistrate erred both in law and in fact by failing to consider that the appellant is suitable and capable person to stay with his child and there was no valid reason to deny custody of the child to the appellant.
3. That, the learned trial magistrate erred in law and fact by relying to the Social Worker Officer report which is bias and its finding ware not considering the best interest of the child.

At the hearing of this appeal, the appellant was represented by Mr. Wilhard Kitali learned advocate while the respondent enjoyed the service of Felix Kinabo learned advocate. Submitting in support of this appeal Mr. Kitali prayed to argue the said grounds simultaneously and contended that, the child is two years old now, it is the spirit of the Law the best interest of child shall be the primary consideration in all matter concern the welfare of child, it is also the requirement of the Law, that the child under the age 7 years old is to be with her mother as per section 4(2) and 26(2) of Law of Child Act Cap 13 R.E.2019.He further submitted that, the wisdom behind these two sections is that the child who is under the age of seven years old need a special care from her mother also need a special love from her mother compare to any person else, the foundation was put it in any exceptional circumstances must be stated. That is why even the Law of marriage Act Section 125(3) continue to insist a child below 7 years, be under custody of her mother.

The counsel for appellant further submitted that, there is no special circumstances that denied his mother from the custody of his son. the appellant who is the mother is of sound mind, physically fit and capable to

take care of her child. Therefore, the best interest is paramount and to removal a child from her mother there must be very strong reasons, the child of 2 year is too young to miss love of her mother and closer care, also when the child is growing the mother is the nearest person than any anybody else. The counsel backing up this contention cited the case of **Alisi Mbekenge v. Respicius P. Mtambala.** Civil Appeal no 68 of 2020 H/C DSM, **Robert Leo Daud v. Sesilia Maginga Bunga** Civil Appeal N. 67 of 2018 H/C DSM, **Victor C. Kanyoro v. Neema Kalibobo** Civil Appeal NO. 13 of 2021 H/C Bukoba, **Joseph Cyphrian Masimba v. Maulid Said Mnimbo** Civil Appeal No. 55 of 2019 H/C DSM (both unreported) and **Halima Yusuf v. Restituta Celestine Kilala** (1980) TLP 76.

In respect to second ground of appeal, Mr. Kitali submitted that, according to the records appellant who is the mother left from Mwanza where a child born Kilimanjaro being five days and she has managed to stay with her now is 2 years old, she is financially and socially fit. No evidence that she mistreats, she is not a lunatic or give him bad care, however he insisted best interest of child is not only food and schooling but the Court has to consider other factors of welfare of a child.

In regard to the third ground, Mr. Kitali submited that, the trial Court decided basing on the report of Social welfare, which did not consider both sides, thus, it did not regard the best of interest of child. It did consider on the economic status of the appellant, he further said, the said report said the wife of the respondent has agreed to live with the child. But he sees no reasons established to confiscate a custodian of appellant and sent him to live with step mother. He urge this court to visit the case of **Alice Mbekenga** (Supra). Hence the counsel concluded that the commission of social investigation who is primary work is to assist the court to see best interest of child, with respect the report did not do that duty.

Responding to the above submission Mr. Kinabo contended that the provision citied S. 26 (2) of Law child Act, sets a rebuttable presumption to the child being with mother, so if evidence is adduced to the contrary that the mother is unfit the Court is allowed to decide otherwise. Since it clearly stated by the appellant that she does not live with the child. The child resides with the appellant parents. Appellant took the child from Mwanza to Kilimanjaro at the age 5 days. The record shows the appellant intended to take away growing of him under the care of his father, the counsel added that, it is in law parental responsibility is shared responsibility, both parents

have the same right, nobody is superior right, he then supported his contention by citing the case of **Masalu Mapembe v. Paulina Romanus Masonga** PC Matrimonial Appeal No. 3 of 20121 HC Mwanza

Mr. Kinabo further submitted that, the Trial court clearly stated that the appellant was not living with the child and did not state financial position of grandparents to make life of the child to be in conducive environment. Also, the counsel said, the trial court stated that the welfare of child requires to be in hands of either parent and not grandparents, appellant took away being grown under the custody of his father and in the end decided to run with him and placed to her parents. Therefore the Trial Court was justified granting custody to his father who is the respondent in this Appeal, this was contrary to the best interest of child, in support he has referred the case of **Halima Kahema v. Jiyantiral J. Karia** 1987 TLR 147 and **Ramesh Rajput v. Mr Sundar Rajiput** (1988) TLR 98.

Mr. Kinabo further contended that, the appellant has decided to change the religion and name of the child. In regard to section 4(2) and 6(3) of Law child Act, it puts a joint duty to register the name of child, so the Acts of the appellant to change the name alone was not best of interest of child, therefore the trial Court was right to say the appellant is unfit to take care.

It is also evident at page 2 of the ruling, the present child is facing underdevelopment, due to the fact the child is being hidden by grandparents from engaging with his fellow children, the child has failed to develop such as talking in the age of two years. Taking to consideration the appellant is not residing with the said child, and he has taken the right from growing with his father, and live with grandparents thus, make the interest of child contrary to the Law.

In respect to second ground of appeal, Mr. Kinabo contended, the child is living with grandparents. It is clearly appellant is not suitable to stay and trial gave the justified reasons, so prayed this ground be dismissed for want of merit.

Lastly, in respect to the third ground of appeal, Mr. Kinabo contended that, it is pure after thought the appellant has an opportunity to object the content of social welfare report, she decided to remain quiet, her failure to examine on crucial facts amount to accept truthfulness of the said fact so the counsel cannot at this stage say the report is bias. He further added that, the social welfare report considers that the child live with grandparents, and the report did not only consider economic status but the environment the child was living.

In rejoinder Mr. Kitali insisted what he said in submission in chief and briefly contended the said child was born out of marriage is a crux to their relation, the appellant is still living with her parent, she got the child from the respondent who is living with his real wife, in that circumstances the Appellant can't alienated herself from her family. In respect that the child failed to talk, the appellant said at the trail Court, that child is still young to talk therefore that is not reasonable ground. Mr. Kitali further distinguished the case of **Halima Kahema** (Supra), that the circumstance of that case is different with this case ,in that case the mother said that is incapable, but in this case the appellant is saying that she is capable to maintain her child.

Having narrated the submissions, I now turn to consider the merits of the appeal basing on both parties' submissions, evidence on record and the law. In view of the above grounds of appeal in consideration of the prayer sought and granted at the trial court, it is my opinion these grounds be dealt together, and it is my convenient one issue appear very crucial which is nothing but whether the best interest of child was considered by the trial court in granting the prayer sought by the respondent.

Being the first appellate court, I am mindful, it is trite law that a first appeal is in the form of a rehearing. The first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary. See the decisions of the Court of Appeal in **Future Century Ltd v. TANESCO,** Civil Appeal No. 5 of 2009, and **Makubi Dogani v. Ngodongo Maganga,** Civil Appeal No. 78 of 2019 (all unreported). The Court of Appeal held in **Future Century Ltd v. TANESCO,** (supra) that-

> *"It is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial."*

According to the Law of the Child Act Cap. 13 R.E. 2019 requires first under the provision of section 39(1) when making an order for custody of the child is consideration of the best interest of the child and the importance of the child to be with his mother, but also other factors for considered are provided under section 39(2) of the said Act and for purpose of clarity I reproduce them 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****.*

[Emphasize supplied]

Furthermore, rule 73 of The Law of Child (Juvenile Court Procedure) Rules GN No. 182 of 2016 provide as follows:

73. In determining whether to make a custody or access order, the court may consider in addition to the factors contained under Section 39(1) and s.26(2) of the Act the following–
(a) the ascertainable wishes and feelings of the child;
(b) the background and any characteristics of the child which the court considers relevant;

(c) the child's physical, emotional and educational needs;

(d) the undesirability of disturbing the life of the child by changes of custody;

(e) the likely effect on the child of a change of circumstances;

(f) how capable each parent and any other person in relation to whom the court considers the question relevant is of meeting the child's needs;

(g) any harm the child has suffered or is likely to suffer;

(h) the willingness of each parent to support and facilitate the child's ongoing relationship with the other parent; and

(i) the willingness of any non-parent to support and facilitate the child's

[Emphasize supplied]

In my view of the trial court ruling, it relied on two points, first, is that the law does not give priority to the grandparents in making orders as to custody of the child. And second, relied on the social welfare inquiry report submitted before it. To reflect these, the trial court at page 3 of the ruling had this to say:

" in making orders to the custody of the child, the law does not give priority to the grandparents....., I have an ample time to pass through the social welfare inquiry report prepared by Peter Msaka (SWO). Having inquire about the economic status of the applicant and the environment he is living as per the report, the applicant is a businessman residing at Mwanza. He is a married man. His wife agreed to live with child. It is also in the report that, the respondents' parents are not in good term with the applicant. Thus, he recommended that custody of that child be under her father (applicant). ***I find myself to have no reason to resist or to object his views.*** *"*

[Emphasize supplied]

Social inquiry report is prepared under section 45(1) of the Law of the Child Act. Cap. 13 R.E.2019, the said provision provides;

"(1) A court ***may order a social welfare officer to prepare a social inquiry report before consideration of an application to make an order for maintenance custody*** *or access.*

(2) The court shall, in making such order, consider the social inquiry report prepared by the social Welfare Officer."

[Emphasize supplied]

Moreover, according to rule 72 of The Law of Child (Juvenile Court Procedure) Rules GN No. 182 of 2016 provides as follows:-

72.-(1) Where there is a contested application for custody or access, ***the court may direct the social welfare officer to prepare a social enquiry report****.*

(2) A social welfare officer shall, in preparing the report consult-

(a) ***all the parties to the proceedings separately****; and*

(b) the child separately and, if necessary, with the parents or other relevant persons.

(3) In providing recommendations for custody or access the best interests of the child shall be the paramount consideration.

(4) ***The court shall consider the social enquiry report before making a decision*** *on custody or access.*

(5) ***The social welfare officer who prepared the social enquiry report shall make himself available to the court to give evidence, if the court or a party to the proceedings so requests.***

(6) Where a court decides not to accept the recommendations contained in the social enquiry report it shall state the reasons for the non-acceptance.

[Emphasize supplied]

The above provisions establish the following principles; First, in applications for custody, the commissioning of social investigation whose primary aim is to assist the court to determine the interest of the child, is not mandatory. The court presiding over a contested custody application, may commission the investigation if it finds it necessary. Second, in conducting the investigation and drawing the report, the social welfare officer shall obtain the views of the parties to the proceedings, and the independent views of the child if he is of the age capable of forming an independent opinion taken separately or in the presence of the parents or other relevant persons. Third, in conducting the investigation, the social welfare officer shall assess the

best interest of the child and provide recommendations. Fourth, when the investigation is conducted and a report thereto drawn and filed, it shall be mandatory for the court to consider the recommendations in its finding and give reasons for not accepting it.

The next point for consideration in my view, is whether the said report abided to the law. I have entirely scanned the said report, it shows the date of investigation to be June,2022. Moreover, the record shows that this application for custody was filed at the trial court on 4th July.2022. This in my view means the said report was inquired and prepared before this matter was filed at the trial court. Rule 72(1) quoted above provide, where there is a contested application for custody or access, the court may direct the social welfare officer to prepare a social enquiry report. My interpretation of the rule is that it is the court direct the social welfare officer. According to the trial court record. I excerpt from of the typed proceedings dated 29th August, 2022, where shows;

> *"**Court:** This is a Juvenile Court involve Juvenile proceeding which require the presence of the Social Welfare Officer. Since the Social Welfare Officer is absent the matter is adjourned till another date."*

To my understanding, despite the fact the social Welfare Officer was not ordered to prepare the report, be as it may, even if is taken to have been directed on the said date which is 29th August, 2021. The report he submitted before this court was prepared in June 2022, which is more than two months ago. In view thereof it is my considered opinion the said report did not consider the current status when the court required its presence. I am saying so because in her written reply to the application, which was filed on 4/8/2022, this was the date before the hearing. The appellant contended that;

> *".....am not ready to let my son to be under care of stepmother while I have love, energy and passion to take care and rise well my son* ***and also now I have already completed my studies which was made me to stay far from my child."***
> [Emphasize supplied]

In my view this assertion by the appellant in his reply at the trial court, was not considered in the said report, and this is obvious because the report was made before even the matter is in court, therefore, I am settled that it missed

the current status of the appellant, that she has completed her studies, actually what the report stated is that the appellant is on studies at St Augustine University.

Furthermore, according to the record, the mode of hearing this dispute selected by the learned trial Magistrate was submission mode, he started the respondent submission followed by the Appellant reply and finally the social welfare Officer. Thus, to my view the appellant did not have any opportunity to do cross examination after Social Welfare officer submitted. However, when he tendered the said report, the trial court did not provide for an opportunity to object or say anything. In my view according to the law, the court is required to inform the party whom the report is tendered against him/her whether he/she need to object or cross examined the expert tendering the said report. I think this is the gist of rule 72(5) The Law of Child (Juvenile Court Procedure) Rules GN No. 182 of 2016., which I reproduce hereunder;

> ***"72(5) The social welfare officer who prepared the social enquiry report shall make himself available to the court to give evidence, if the***

court or a party to the proceedings so requests."

In absence of any other evidence to the contrary, I don't see how the trial court could have considered the appellant's evidence, that she has completed studies and has capable means to take care of the child.

It is a trite law that, the appellate court cannot interfere with the findings or opinion of the subordinate court unless there is misdirection on important matters or point of law, non-consideration of some fact, evidence or law and non-acting or acting on matters or aspects which it has no powers to do. (See the case of **Mbogo and Another v.Shah** (1968) EA 93) and **Credo Siwale v. The Republic**, Criminal Appeal No. 417 of 2013 (unreported).

In the present case, there is no doubt that, the finding of the trial court reckoning with the recommendations of the social investigation report which as shown above did not obtained in accordance to the law, thus, with respect the trial court erroneously relied upon the Social Investigation Report. I thus hereby expunge it to be considered, having said so I find the remaining evidence cannot support the custody of the child be granted to the respondent.

In the final analysis, I, in the exercise of powers vested in this Court on appeal from subordinate courts, the proceedings of the Kilimanjaro Juvenile Court at Siha in Misc. Civil Application No. 2 of 2022 are hereby nullified and consequently its Ruling and drawn order if any are also hereby quashed and set aside. Moreover, considering the welfare of the said child in this case is still undecided, I order re-trial of this case at the Juvenile Court. The case for re-trial be heard by another Magistrate, and if that juvenile court will ask for Social Welfare Inquiry report, also be made by another competent Social Welfare Officer. No order for costs granted.

It is so ordered.

DATED at **MOSHI** this 16th day of February. 2023.

THE HIGH COURT OF TANZANIA

A. P. KILIMI

JUDGE

16/2/2023