

IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 126 OF 2023

(Originated from Juvenile Juvenile Civil Application No.01 of 2023 before M.B

Mmanyamba RM)

NDESHUKURWA J. NDOSI.....APPELLANT

VERSUS

HAMISI SOMBWERESPONDENT

JUDGMENT

15th April & 9th May, 2024

MWANGA, J.

The appellant, **NDESHUKURWA J. NDOSI** is the grandmother of the children Rahma Hamisi Sombwe (16), Shani Hamisi Sombwe (13), and Mussa Hamisi Sombwe (7). She has been living with the said children before and after the death of their mother. The respondent who was divorced from the respondent sought prudence to take custody of the children after the death of their mother. Hence, he instituted Juvenile Civil Application No.01 of 2023 at the District Court of

Bagamoyo at Bagamoyo where, after the conclusion of the hearing, the respondent was given custody of the children.

In its decision, the court held that it is in the best interest of the children that custody be vested to the respondent as a parent. The court also considered the views of the elder child and found out that it is desirable to keep siblings living together. Above all, the court took into account the need for continuity in the care and control of the children.

The appellant was aggrieved with the decision. Hence, she faulted the trial court decision on the following grounds;

1. That, the trial magistrate erred both in law and fact in placing the custody of the children to the respondent without observing the best interest of the children.
2. That, the trial magistrate erred both in law and fact to provide the ruling in favor of the respondent without regarding the opinion of the social welfare officer and providing for that.
3. That, the trial magistrate erred both in law and fact to rule out and place the custody of the children to the respondent without taking into consideration the views of the two children who were capable of providing for their opinions.

4. That, the trial magistrate erred both in law and fact in providing the ruling in favor of the respondent which is contrary to the law.

During the hearing, parties were represented by the learned counsels. The appellant was represented by Yusuph Mkanyage, advocate whereas the respondent was represented by advocate Zuberi Kamugisha. In the course of the hearing, the counsel for the appellant dropped the 3rd and 4th grounds of appeal, hence reliance was placed on the first and second grounds of appeal.

To be more precise, the first ground of appeal is based on the argument that the Juvenile Court did not consider the best interest and welfare of the children as required in section 39 of the Law of Child Act, Cap. 13 R.E 2022. The counsels said that in deciding on the best interest of the child, the court ought to look at the requirements provided under items (a) to (g) which include, the rights of the children, sex, ages, wishes of the children, and the need for children staying together. As to the question of the views of the children, the counsel insisted that the trial court considered the views of one child only, Rahma Hamisi Sombwe. His position is that the failure of the court to consider the views of the other children is fatal. He argued further that, the reasoning of the trial court that the elder child would take care of the

other two younger children violated Section 39 of the Law of Child Act Cap. 13 R.E 2022.

Per contra, the counsel for the respondent took a different course regarding this ground of appeal. He contends that the best interests of the children were considered. According to him, all views of the children were taken and the elder child told the court that they wanted to live together with their father.

Without much ado, the first ground of appeal is grounded on non-compliance with section 39 (2) (d) of the Law of the Child Act, Cap. 13 R.E 2022. That is custody of the children was granted to the respondent without observing their best interest. I have considered this first ground of appeal and wish to highlight the relevant provision for granting custody to the child. Provision of section 4(2) of the Law of the Child Act, provides for general regard that;

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

Because of the above, consideration of the best interest of the child before determining custody of the child is mandatory. See also the

case of **Glory Tobias Salema v. Philemon Mbagu**, Civil Appeal No 46 of 2019 [2020] TZHC 3794 (13 November 2020). Again, in arriving at its decision as to whom custody of the child should be given, the court should take into account the relevant provisions of section 39 of the LCA which is left to speak as follows:

"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 a child should 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.

I have given careful consideration to the submissions of the parties regarding the trial court decision. I have also revisited the trial court findings which focused on the fact that it is desirable to keep siblings together; the need for continuity in the care and control of the child; and that the elder child shall take care of the young children. I wish to state that, the best interest of the child encompasses all aspects of the life of the child including a child's specific health condition and care, and it applies to decisions affecting children such as health or welfare. The best interests of the child are a primary consideration. This recognizes that other interests can be considered, but that the child's interests are the most important.

As a matter of fact, after the death of the mother of the children, ultimately the father is entitled to custody of the children. However, since he was not living with the said children, consideration regarding their best interests must be taken into account. The fact that the respondent is a father and the only parent remaining and the fact that he has an income capable of managing the children are not enough to entitle him the custody of the children. This was the time when the court ought to satisfy itself that the respondent could take care of the children

while at home or has a person who could be trusted to take care of the children.

On Page 13 of the proceedings, the child Musa Hamis (8) told the court that they did not know the environment of their father's house and could not even tell whether it was their father's house or not. Also, the child Shani Hamisi Sombwe (13) said that they lived with their grandmother even before the death of their mother and the respondent had never taken them to his house, and he did not know what it looked like. Likewise, Rhama Hamisi Sombwe (16) stated that since her parent's divorce, they had never lived with their father. My point in narrating the children's positions is that, whether it is in the best interest of the children to live with their father, respondent, or not cannot be decided by the court without the assistance of the report of the social welfare officer. The place where the children are going to live, the person who is going to take care of them at home, and when they come back to school, and the surrounding conditions are also important for the court to satisfy itself and determine the significant risk factors or complex issues present, including abuse, neglect, high conflict between the parent, family violence, mental health issues or where there are allegations made as to the views of a child, and the child is of a mature

age to express their views. At best the court has to consider different variables including the opinion of the child, the best interest of the child, the capacity of the parties, and so forth, to consider.

For instance, the trial court on page 5 of the typed proceedings was convinced and accepted the elder child's view that she would live with her father and she would be taking care of her younger relatives. I entirely agree with the counsel for the appellant that such grounds defeat the spirit of the law of the child. It is not right for the court to grant custody to the respondent on the basis that the elder child shall have the obligation to take care of the other children.

Given the above, I am inclined to hold that the court was not provided with the material necessary to decide whether it was in the best interest of the children for the respondent to be given custody.

The second ground of appeal is about the failure of the court to consider the opinion of the social welfare officer and provide for that. The counsel for the appellant cited the persuasive authority in the case of **Alis Mbekwenga Vs Respicious P. Mtumbale**, Civil Case No. 68 of 2020 (HCT-Unreported) where it was held that the social welfare officer shall obtain independent views of the child, the best interest of the child, and provide recommendations. He argued that if the court

disregards the opinion of the social welfare officer the reasons must be given.

On the other hand, Mr. Zuberi admitted that the views of the social welfare officer were not considered because there was no order for the conduct of the inquiry under rule 72(1) of the Juvenile Court Rules. He strongly defended that, the social welfare report is not mandatory, hence the case cited by the fellow counsel is distinguishable.

Having gone through the learned counsel submission, I wish to state that the law is settled that consideration shall be given to the wishes of the child and it is of paramount importance. The underlined Section 39 (2) (d) of the Law of the Child provides, thus;

39(2)-Subject to subsection (1), the court shall also consider-

(d) the views of the child, if the views have been independently given;

The above provision stipulates the requirement that the court should consider the views of the child and shall not be taken lightly. Again, it must be established that such views were independently taken. In this appeal, it appears that the views of the children were indeed taken. This is reflected on pages 13 and 14 of the typed proceedings.

However, it is prudent to state that Rahma Hamisi Sombwe (16) stated before the court that she wanted to live with her father. The rest of the children preferred to live with their grandparents, the appellant herein.

As I have stated earlier, the law under section 39 (b) of the Law of the Child Act, requires not only taking the views of the child but also be independently given. After perusing the records available the court did not state why it did not consider the views of other children who had different opinions from that of the elder child. I know that it is best to consider the views of the elder child, however, reasons must be given as to why the views of other children were not considered. Otherwise, there would be no need to tell their views.

The other legal issue is taking the child's views independently. Looking at page 12 of the typed proceedings, it appears that the Juvenile Court took views of the children before the court in the presence of the appellant, respondent, and their advocates. This does not suffice for taking views independently. I have borrowed leave from the case of **Anyingisye Mlawa versus Tukulamba Kibweja**, Civil Appeal No. 27 of 2020 (HCT-Unreported) where the court had this to say;

*"Failure to give the infant who was more than seven (7) years old, a chance to state his wishes as to whom he referred to live with **and involve the social welfare in the process, was a clear violation of the law** as the appellant contended. I, therefore, find the first ground having merits."(emphasis is mine).*

For the foregoing, I am also inclined to state that the failure of the trial court to involve a social welfare officer and obtain an independent view of the children was a clear violation of the law. The law requires the trial court to involve the social welfare officer in the trial and require him to make an inquiry and finally submit a report on custody of the child. This requirement was not met. The report should be prepared by an independent third party, usually an experienced social worker, who examines the dynamics of a parenting relationship and makes recommendations intended to promote the child's best interests. These independent reports are helpful pieces of evidence for the court to consider. That being said, I find the 2nd ground of appeal also has merit.

That being said and done, I am confident that this appeal will succeed. Thus, I invoke revisional powers endowed to this court under section 44 (1) (b) of the Magistrates Courts Act [Cap 11 RE 2019] and

revise the proceedings and thereby quash the proceedings and set aside all orders made there.

I order further that, this matter be remitted to the trial court for a retrial to consider the procedures and basic principles of placing custody of a child or children to either of the parties and order of access, and consequently, the trial court shall compose a fresh ruling. The application shall be heard expeditiously. Each party should bear its costs.

Order accordingly.



H. R. MWANGA

JUDGE

9/5/2024