

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

**ARUSHA SUB REGISTRY**

**AT ARUSHA**

**CIVIL APPEAL NO. 3948 OF 2024**

**SARA ANTHONY ..... APPELLANT**

**VERSUS**

**PHILEMON STEPHANO .....RESPONDENT**

**JUDGMENT:**

*6<sup>th</sup> & 21<sup>st</sup> June 2024*

**MKWIZU,J:-**

This case involves a minor child and is a dispute between the biological mother and the biological father of the child at issue. They got married on 21<sup>st</sup> October 2017 in Arusha and soon after, on 7th November 2017, they had a child. Their marital relationship was good for about a year and a half before it turned sour. In 2023, the mother filed for divorce, custody, and child support, among other things, in matrimonial Cause No 3 of 2023 at the Resident Magistrate court of Arusha. The trial magistrate approved the divorce and granted custody of the 6-year-old child to the respondent. The appellant was given visitation rights. The appellant was unhappy with this decision and filed an appeal on the following grounds

1. *That, the trial court erred in law and in fact when ordered the respondent to have custody of the issue of the marriage without regarding to the best interest of the child and the need not to disturb the custody of the child bearing the fact that he has never been in custody of the said child and he has no any support to that effect as a result a bad decision was given*
2. *That, the trial court erred in law and in fact when ordered custody of the child to be given to the respondent while the child himself opted to stay with the appellant as a result a wrong decision was given*
3. *That, the trial court erred in law and in fact when ignoring social welfare report and wrongly subjected the same examinations a result a bad decision was given*
4. *That, the trial court erred in law and fact when failed to properly analyses, scrutinize and evaluate the evidence brought against her as result a bad decision was given.*

During the hearing, counsel Richard Manyota represented the Appellant while Counsel Happy Mlacha represented the Respondent. Mr. Manyota condensed all the grounds of appeal into a single point as follows:

*The trial court erred in law on deciding on the custody of the child without taking into account the best interest of the child and not to disturb the infant from his previous place of residence*

The appellant's counsel criticized the trial magistrate for granting custody to the respondent, pointing out that the respondent had never shown love for the child, provided for the child's needs, or shown concern for the child's well-being. The counsel referred to a specific incident mentioned on page 3 of the court proceedings where the respondent fed the child dove birds and even requested the mother to feed the child stool. It was argued that the trial court failed to consider the unsuitability of the respondent's residence for the child's well-being, disregarding the observations in the social inquiry report recommending the appellant as the best candidate for custody.

He went further stating that despite leaving the child with her mother, the appellant was able to ensure the child's well-being, as the child was reported to be healthy and in good care with the grandmother while the appellant was in Dar es Salaam, working to provide for the child and in preparation to take the child with her. It was contended that the trial court's decision was made without due regard for the child's best



interests. He cited the decision of **Nacky Ester Nyange V Mihayo Marijani**, Civil Appeal 169/2019, CAT DSM (Unreported) urging the court to quash the order of custody by the trial court, grant the custody to the Appellate, Order the Respondent to maintain the child with a visitation rights.

On her party, Ms. Mlacha, argued that the trial Magistrate was justified in granting custody to the respondent. She claimed that the appellant's whereabouts were unknown, suggesting that the appellant did not have a stable place of abode, and had left the child with her mother (the child's grandmother) after the divorce. This, according to her, indicated that the appellant was not taking care of the child and was therefore unfit for custody. Ms. Mlacha further argued that there was no evidence that the appellant was financially capable of caring for the child while the respondent's economic stability and his consistent support of the child since the divorce was established through evidence. She mentioned that the respondent lives with his brother and sister and argued that there was no evidence proving that the appellant's residence provided a suitable environment for the child. Ms. Mlacha supported the trial court's decision based on the evidence presented in court. Banked on the case of **Danie Hamighton Mwakio v Pelagio Masu Kijuu**, Appeal No 88 of 2021, she

emphasized on the importance of considering the best interests of the child when determining custody.

To her the social inquiry report was biased because the officials did not visit the appellant's home to determine its suitability. She opposed the appeal and requested it to be dismissed with costs.

I have guardedly considered the grounds of appeal, rival submissions, the lower court's records and the impugned decision. One issue is open for resolution, whether the custody order by the trial court was premised on the principles governing the child's rights. I have read the impugned decision. In granting the custody to the respondent, the trial court said:

*"The only issue lies in the custody of the now seven years child who to date resides with the mother of the petitioner, but the respondent provides basic needs thereto including school fees for the child. It is the child's right to live with one of the parents and not the grandmother, **the facts stated by the petitioner that she is now preparing herself to shift with the child to Dar es salaam is still a myth as she still depends on the Respondent for child's support, her whereabouts in Dar es salaam are unknown as she is still trying to settle.** It is from the above reason that I grant the custody of the child to the*

*respondent as he has a **known address and stable economy to take care of the child** and right of visitation is granted to the petitioner."*

I am not convinced by the reasoning provided. **Firstly**, the statement by the trial magistrate that the appellants' whereabouts in Dar es Salaam is unknown is not supported by the records.

**Secondly**, the underlying principle in determining child custody is the "best interest rule" aimed at promoting the child's mental, emotional, physical, religious, economic, and social needs as embodied under section 4 of the Law of the Child Act, Cap....RE 2019 providing that:

*"4. (1) A person belows the age of eighteen years shall be known as a child.*

*(2) The best interests 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 section emphasizes the best interests of the child, regardless of the status of the battling parents. Furthermore, the act provides guidance on determining a suitable parent for a custody order in cases where the child's parents are separated. Section 26 states:"



"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.

(2) There shall be a **rebuttable presumption** that it is **in the best interest of a child below the age of seven years to be with his 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.** "(bold is mine)

And section 39 of the same Act provides s for the facts to be considered in assessing the suitable party for custody. The section 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 right is 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 section tallies the provisions to section 125(2) and (3) of the Law of Marriage Act, (Cap 29 R.E. 2019.) And in appropriate situations, the social welfare report under section 45 of the law of the child Act and Rue 72 of the Juvenile court's rules are also applied in assessing what would be the best interest of the child. In all the situation above the primary concern is the welfare of the child, special consideration given to



what is best for the child's overall well-being, including their mental, emotional, and physical health, and who is best suited to care for the child. The choice is on the parent who can provide the child with the best upbringing, regardless of their economic, social, or political status.

As a first appellate court, I will conduct a fresh analysis of the evidence and arrive at an independent conclusion if necessary. I have reviewed the evidence in the record as well as the filed social welfare report. I must admit that contrary to what was stated by the respondent's counsel, the social welfare report contains adequate information to assist the court in assessing the suitability of the custody of the child in question.

It is undisputed that the respondent has a known address, is economically stable, and is paying for the child's school fees and other needs. The key question, however, is, are these facts adequate to justify the trial court's decision? In my opinion, no. A mere known domicile of a party does not make a place conducive, nor does it automatically make the owner of the place fit for the child's custody. Further clarification was required in this case. I believe the respondent is a male individual who frequently moves, as admitted in his testimony, and does not have a wife. The social welfare report mentions two other individuals with whom the respondent lives, but it does not provide sufficient detail on how these two employed

individuals are willing to support the upbringing of a 7-year-old child. The respondent has also emphasized his availability for the child, even after the child was left with his grandmother, to the extent of noticing a significant decline in the child's health. However, this information lacks clarity on the actions taken to address the situation. The conclusion also fails to explain why the respondent did not take any steps to relocate the child to his home, even after being granted custody in 2023.

There is no dispute that the parties went their separate ways in 2019. The appellant has been living with the child before, during, and after the divorce, for more than five years now. She has informed the court that she has moved to Dar es Salaam and intends to take the child with her.

It is important to note that the best interest of the child is determined by considering various factors, including the child's needs, their relationship with their parents and other significant figures in their life, and the potential impact of any changes in their circumstances. And the court's duty is to weigh the competing interests of the parents and the child to make a decision that serves the child's best interests.

A carefully review of the evidence, social welfare report, and the entire relationship between the parties involved, I am convinced that the child has a stronger and clearer bond with his mother and the maternal side

compared to the other party. Considering that the child is only 7 years old, it would not be in the child's best interests to disrupt this bond. This decision will also ensure continuity in the existing care and control of the child by the mother. The relocation of the appellant to Dar es Salaam is not a concern for me, as no evidence has been presented to prove that this relocation has had any negative impact on the child's care and control. Ultimately, what matters is not the physical presence but the overall care and control of the child to ensure their utmost well-being in all aspects of their development.

I strongly believe that the trial magistrate made a mistake by focusing solely on the respondent's material possessions, rather than considering the best interests of the child, she totally disregarded the child's relationship with the mother, the child's age, and other factors described by the law.

As a result, the appeal is allowed. The custody order of the trial court is reversed, with an order granting custody rights of the child in question to the appellant. The father, who is the respondent, is given visitation rights. Furthermore, the respondent is ordered to provide monthly maintenance of 100,000, in addition to covering education and healthcare expenses for the child.



Given the nature of the proceedings, each party is ordered to bear own costs. Order accordingly

**Dated at ARUSHA, this 21<sup>st</sup> day of June 2024.**

  
**E.Y. MKWIZU**

**JUDGE**

Right of Appeal fully explained.



  
**E.Y. MKWIZU**

**JUDGE**