

TANZANIA / JUDGMENT

MWADASIRO TANZLII OCR

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(TEMEKE HIGH COURT SUB-REGISTRY) ONE-STOP JUDICIAL CENTRE AT TEMEKE CIVIL
APPEAL NO. 11267 OF 2024 (Originating from Civil Application No. 962 of 2024 of the Juvenile
Court of Dar es Salaam at Temeke) MAURICE MICHAEL MCHAINA.....
APPELLANT VERSUS MARIAM NASSORO MWADASIRO..... RESPONDENT

JUDGMENT

Date of last order: 10/10/2024 Date of Judgment: 24/10/2024 OMARI, J. The Appellant is dissatisfied with the Ruling of the Juvenile Court of Dar es Salaam at Temeke in Civil Application No. 962 of 2024, he has come to this court seeking the said ruling be quashed and set aside on two grounds to wit:

1. That the trial court erred in law and in fact denying the Appellant access to his child for reasons that the Appellant sexually assaulted the child without any evidence to prove the sexual assault.
2. That the trial court erred in law and in fact denying the Appellant access to his child basing on the opinion of the child without taking throughout and the Respondent was denying the Appellant access hence there is a possibility that the child would have been coached to refuse to see the appellant. The matter was heard by way of written submission. The parties drew and filed their submission. In his submission the Appellant traversed both grounds of appeal. As regards the first ground of appeal, he commenced with faulting the allegations of sexual assault raised by the child during trial stating the trial court had no jurisdiction to deal with the allegation for it is clearly of criminal nature. However, despite not being proved, the trial court relied on the child's assertion that she is reluctant to meet with her father because of the sexual abuse. He argued that no evidence was tendered to prove this allegation nor is there any criminal matter filed. The Appellant further argued that the law provides for the procedure of taking the evidence of a child of tender age through section 127 of the Evidence Act, Cap 6 RE 2022 and as explained in the case of *Geoffrey Wilson v. Republic*, Criminal Appeal No. 168 of 2018. He then went on to fault the trial court's decision stating proceedings do not reflect the nature of which the child gave the statement alleging sexual assault, thus, the trial court should not have fully relied on the child's opinion without other evidence for corroboration. The Appellant argued further that the because there was no complaint before he lodged the application for access. On the second ground of Appeal,

the Appellant asserted that he has been denied access to his child for almost 10 years without justification thus, his resort to filing the Application. He elucidated that the child being under the sole custody of the Respondent makes her amiable to the Respondent's influences. To augment his point, he cited the case of Prudence Mganga

- v. Janeth Joseph Moshi (Civil Appeal No. 9 of 2022) (2022) TZHC 100666 where this court observed that when children are too young to give an independent opinion they may easily be coached to lie or express the opinion of the parent who has custody which means the court cannot rely on the child's opinion to decide their welfare. He further emphasized that because the Respondent had custody for more than 10 years, then it was possible to influence the child. The Appellant then concluded his submission praying that this court allows the appeal. In her submission, the Respondent opposed the grounds of appeal stating that the Appellant has misdirected himself in his submission on the first ground of appeal. She argued that the trial court was not trying a criminal case rather it took cognizance of the views of the child who had broached that subject (of sexual assault) stating she does not want to see her father Mnyonge Idrisa v. Kiumbe Hussein, PC Matrimonial Appeal No. 4 of 2020 where this court observed that when dealing with custody and access courts should consider the children. Further, the nature of the child's statement is as per Rule 70(5) of the Law of the Child (Juvenile Court Procedure) Rules, 2016 (the Rules). Moreover, the trial court was also acting under the provisions of Rule 77(1) of the Rules, thus, it considered the best interests of the child in its determination. As for the second ground of appeal the Respondent explained at 17 years the child is grown up and knows what is good and bad and as a result refused to see her father out of her own free will. She went on to distinguish the cited case of Prudence Mganga v. Janeth Joseph Moshi {supra} stating that in that case, the children were 4 and 5 years old while in the one at hand the child in question is 17 years old. She concluded her submission praying that the appeal be dismissed with costs. Having considered the parties submission for and against this appeal I am fortified that there is only one issue for my determination; that is whether the appeal is meritorious or not and the way forward. I shall consider the two grounds of appeal jointly for they relate. I have gone through the trial court's file. The brief background of this matter is that the Appellant filed for access to his child under Rule 63(1) of main reason being the accusations of sexual assault. It is in the Ruling of the trial court that, in the course of the hearing the trial magistrate spoke to the child as per Rule 77(1) (c) of the Rules and the said child who was at the time 17 years expressed that she is not ready to be in communication with her father as they have a bad history and meeting him will remind her of the incidences. The Juvenile Court magistrate was not oblivious to the fact that the Respondent tendered no evidence of the allegation of sexual abuse. However, she explained that since she is required to consider the feelings and the wishes of the child as per the Mnyonge Idrisa v. Kiumbe Hussein (supra) case found the Application without merit and dismissed it. I have also gone through the Social Inquiry Report (the SIR), that the trial magistrate had ordered as per section 45 of the Law of Child Act, Cap 13 RE 2019 (the LCA) and Rule 72(1) of the Rules. After the Social Welfare Officer interviewed both parties and the child in question considered the

circumstances by analyzing the facts and juxtaposing them to the law; they made the following recommendation: "For the best interest of the child; I recommend for your honorable Court not to grant access of the child to her father and the best interest of the section 37(4)... "(Emphasis supplied) When filing the SIR, the Social Welfare Officer attached with it a chit which is written by the child stating that she does not want to "see" her father. What was before the trial court was an Application for access. The parties were the Appellant and the Respondent herein. However, the law provides and allows a court to order a SIR and seek the opinions of the child. When doing so the court is not taking evidence it is rather taking the views of the child. A court is guided by both the LCA and the Rules on how to consider the said views. In other words, the Appellant's contention that the trial court failed to follow the procedures of taking the evidence of a child of tender age is unfounded. This was a peculiar case, the child in question was 17 years old at the time of hearing of the Application therefore she was not a child of tender age. The Appellant is complaining that the court ought to have taken cognizance of the fact that the child having lived with the Respondent since the parties separated in 2014 was prone to being influenced by the Respondent and perhaps projecting what the Respondent has been feeding her. However, at 17 years it is also clear this is a young person with a mind of her own, who even if can be manipulated it would be in congruence with her age and not because she is too young to understand the veracity of her words or actions. This would be possible at age four for instance as was the case child when she spoke to the Social Welfare Officer whose report the trial court also relied upon in reaching its decision, she reiterated what the Respondent had stated in the court. Therefore, it was not merely the views of the child but also the SIR which under Rule 72(4) of the Rule is required to be considered before deciding on access. Additionally, if the court were to depart from the recommendations in the SIR it is obligated to state the reasons for doing so. It is my view that considering the child's views and the SIR the trial court arrived at the decision it did and not only relying on the child's views and especially an unproved allegation of sexual assault. The Rules are also very clear in terms of what are the considerations that the trial court ought to have when making a custody and access order. Rule 73 of the Rules reads: "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)capable each parent and any other person in relation to whom the court considers the question relevant is of 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 on-going relationship with the parents. "(Emphasis supplied) This means in making an order like the one the Appellant was seeking the court had among other things, take into consideration the wishes of the child, which in this case she articulated clearly to the Social Welfare Officer during the SIR and in writing. It would seem she also did the same before the trial

magistrate however, there is no record of this. For clarity, the learned magistrate did opt to have the child brought before her, however, she did not record the proceedings albeit considering them in her Ruling. Since it is not reflected on the record I shall not dwell on the same. The magistrate's omission albeit being near fatal, is cured by the fact that, the child has been interviewed by the Social Welfare Officer and expressed her views as documented in the SIR, I find the views and feelings of the child valid to be considered from that source and not the undocumented sit down with the learned magistrate. The other considerations are such as the background, which in the SIR is very clear and even the Appellant admits the child has been with the Respondent since they parted ways when the child was around 10 years. There is also the question of the child's emotional needs which in this case associate with the father for reasons she has stated and because of the harm she had suffered (see Rule 73(c) and (g) of the Rules) these in my view are enough to uphold the decision of the trial court as ordering otherwise would be going contrary to the provisions of section 26(2) and 39(1) of the LCA and the provisions of Rules 73 of the Rules. A court's role in these kinds of proceedings is to analyse the evidence before it and decide whilst upholding the best interests of the child which also includes the right of the child to have access and contact the non-custodial parent; if and only if; it is in the child's best interest to do so. Section 4 (2) of the LCA provides as follows: "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"{Emphasis supplied) This means, in this matter the trial court was charged with the role of balancing the competing interests that is the rights of the non- custodial parent to have access to his child, but more importantly the best interests of the child. Before, I end, I would like to comment that having had the opportunity to go through the record of the lower court; it is important that the parties find it in themselves to do a bit of contemplation as to the psycho-socio sexual abuse are true or not; is seemingly traumatized. It is in the record that the custodial parent has been trying to deal with the child's trauma, perhaps in a manner she thought best. However, it would be neglectful of me to fail to state that the said child needs professional help, thus, the parents and the Social Welfare Officer should take it upon themselves to guide her to the requisite services. Having discussed as above, I find the appeal is without merit. I dismiss it. Due to the nature of the matter, I make no order as to costs. Judgment delivered and dated 24th day of October, 2024 in the presence of the Appellant and Ms. Theresia Shehe -RMA. A.A. OMAR JUDGE 24/10/2024

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