



**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL APPEAL CAUSE NO. 50 OF 2020**

BETWEEN:

.....**APPELLANT**

-AND-

.....**RESPONDENT**

CORUM: HONOURABLE JUSTICE R.M CHIANGWA

Ottober	Appellants Counsel
Nankhuni	Respondents Counsel
Nyirenda	Court Clerk

JUDGEMENT

Introduction

1. This is an appeal against the decision of First Grade Magistrate sitting in Lilongwe following an application by the appellant (who was the plaintiff in the lower court) for custody of two children of the union, a male child then aged 8 and a female child then aged 4.
2. In its decision pronounced on 12th September 2019, the lower court dismissed the appellants application. The lower court found that there was no evidence that the respondent is totally unsuitable to care for their children; that the respondent is violent in the home; that the respondent has delegated parental care of the two children to her mother

in Biwi location. Further the court found that both parties had agreed that both the children are enrolled at a good school in Malawi having been chosen by both parties and that the respondent drives the children to and from school and helps them with their homework.

3. In granting the respondent custody the lower court stated that: *'looking at the ages of the children in issue, one is a male aged 8 while the second one is a female aged 4 years, one can clearly see that they are all young for all interest and purposes. Therefore, motherly care and love would be most appropriate. As it is, court is satisfied that the best interest of both children would be better served if the children continued to stay with the respondent.'*

Grounds of Appeal

4. The appellants grounds of appeal were as follows:
 - a) The learned Magistrate erred in law and in fact to hold that the best interest and welfare of the children of the marriage between the appellant and respondent lay in granting custody of the children of the marriage to the appellant.
 - b) The learned magistrate erred in law and in fact in failing to hold that quality education and the children's happiness were relevant factors to consider when determining the best interest of the children of the marriage between the appellant and the respondent.
 - c) The court erred in law in failing to hear the views of the children of the marriage before proceeding to grant custody of the children to the respondent.
 - d) The decision of the lower court was against the weight of the evidence.

Determining the Appeal

5. It is trite law that in an appeal the court does not rehear the witnesses but subjects the evidence recorded in the lower court to fresh scrutiny.
6. In the lower court the appellant herein was the plaintiff and the respondent herein was the respondent. They were the only witnesses in the application for custody. They gave their evidence through written statements as summarized below.
7. This court on appeal has to determine which parent is to have physical custody of the children?

The Evidence

8. The appellant (plaintiff in lower court) stated that he married the respondent on 4th November 2006 and they have two children, a boy, born on 27th March 2011 and a girl born on 28th February 2015. The appellant is currently working in Geneva and the respondent carries out a small-scale business. He added that he had requested the respondent to fill visa forms but she refused and is thus denying the appellant to stay with the children and get an education in Geneva. He argued that the respondent ferries the children to and from school; has delegated parental responsibility to her mother in Biwi; has been violent to the appellant and the children.
9. The respondent (defendant in lower court) in evidence confirmed the parties were married on 4th November 2006. In May 2016 the appellant told the respondent that he would take up a new job in Geneva in September 2016. The respondent asked the appellant about his plans for the family and he responded by saying that the appellant should think about it and tell him her thoughts. Later the appellant packed his belongings. On the way to the airport the appellant told the respondent that he hoped the separation would help their relationship. After two years the appellant sent papers for the family to move to Geneva without having a discussion with the respondent on the relocation. According to the respondent, her move to Geneva was on condition that the appellant change his adulterous behavior having known of his extra marital affairs to which the appellant apologized. She added that she has never denied the appellant access to the children; she and the children have never been invited to visit Geneva save for a promise to the boy child which never materialized; she made efforts to call the appellant but the same was not reciprocated by the appellant as he only called to talk to the children; she has never been violent to the children nor appellant; the appellant has arranged for his niece, who has questionable behavior and has never spent time with the children in Malawi, to relocate to Geneva to take care of the children; the appellant travels a lot around the world. She further added that the children were enrolled at Christian Heritage which is a good school.

Analysis of law and Evidence

10. In Section 8 subsections (3) and (4) of the CCJP Act 2010 the court in considering a custody dispute is called to consider
 - a) the best interests of the child

- b) the importance of the child, on account of age, being with his mother
- c) the views of the child
- d) that it is desirable to keep siblings together; and
- e) any other matter the child justice court may consider relevant.

11. In summary the grounds of appeal center on the argument that the lower court did not consider quality education and the children's happiness as relevant factors in determining what is in the best interest of the child. Secondly the lower court did not hear the views of the children.

12. The evidence before the court does reveal an underlying issue in the family of the parties herein. This is said having noted several facts. The parties are married and are neither separated nor divorced; the appellant has relocated to Geneva whilst the respondent is in Malawi since the year 2016; the children are going to school in Malawi and live with their mother in Malawi; the appellant does visit and live with the children and the respondent in the same house when he is in Malawi; the respondent does attempt to call the appellant; the appellant does attempt to call the children. On the face of these facts, one would wonder why then is the custody of the children in issue when the parents are not legally divorced nor separated and seemingly lead normal lives. They both seem to care for their children (sending them to a good school by Malawian Standards; they both live with the children despite their marital issues, the respondent is willing to relocate if the marital issues are resolved; the respondent wants the children in a school in Geneva) as they want the very best for them. The only thing that has changed the equation is the relocation of the appellant to Geneva to which the respondent refused because of the appellants allegedly non repentant adulterous character. The appellant did not comment on this matter in his evidence. It is this courts view that the inability of the parents to solve their relationship issues has brought about the custody wrangle. It is this courts view that the parties are encouraged to seek counselling to enable them address their differences in a bid to secure a relationship that would enable the children to grow and live with both parents. A sound relationship between parents fosters the best interest of the children.

13. Be that as it may this court still has to determine the appeal within the given law.

14. To begin with the court has to consider what is in the best interest of the child. The term 'the best interest of the child' has not been defined by the Child Care Justice and Protection

Act 2010. In number of cases the courts have attempted to define this phrase. In **Kamangira v Kamangira** [2004] MLR 135 (HC) the court held that in considering what is in the best interest of a child, the courts must examine all issues surrounding the custody of the child before deciding which party must have custody. **Section 7 of the Children's Act of South Africa** is more informative as regards what the court can consider when determining what is in the best interest of the child. It states that *(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely—*

(a) the nature of the personal relationship between—

(i) the child and the parents, or any specific parent; and

(ii) the child and any other care-giver or person relevant in those circumstances;

(b) the attitude of the parents, or any specific parent, towards—

(i) the child; and

(ii) the exercise of parental responsibilities and rights in respect of the child;

(c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;

(d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from—

(i) both or either of the parents; or

(ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;

(e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;

(f) the need for the child—

(i) to remain in the care of his or her parent, family and extended family; and

(ii) to maintain a connection with his or her family, extended family, culture or tradition;

(g) the child's—

(i) age, maturity and stage of development;

(ii) gender;

(iii) background; and

(iv) any other relevant characteristics of the child;

(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;

(i) any disability that a child may have;

(j) any chronic illness from which a child may suffer;

(k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;

(l) the need to protect the child from any physical or psychological harm that may be caused by—

(i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or

(ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;

(m) any family violence involving the child or a family member of the child; and

(n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

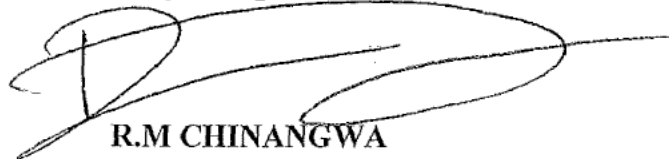
15. This court finds the South African law on what is in the best interest of the child to be a better guide and all encompassing, sufficient to assist the court in making a decision. It is clear that the information required to assist the court in determining what is in the best interest of the child is wholistic. The evidence provided to the lower court through the appellants and respondents witness statements did not capture much. The appellant's evidence was too brief. On the other hand, a good part of the respondent's evidence centered on the unhealthy relationship that the appellant and respondent have. It is this courts view that more evidence in line with section 7 of the Children's Act of South Africa is required to help the court determine what is in the best interest of the child: section 22 (d) of the Courts Act.
16. The other ground of appeal relates to the legal requirement of having a child heard in heard in a custody dispute. The lower court record does not show that the views of the children were heard. The law relating to custody as quoted above has made it mandatory that a child's views must be heard by using the word 'shall' in the text of the law. However, what the law is silent on is should the age of the child matter where a court is called to hear the views of the child. How are the views of a child, especially where they are young, to be obtained? From the lower court record, the children were 8 and 4 years old at the time of the hearing in the lower court. Justice Fiona Mwale made some suggestions on how views of a child may be obtained in **The Department of Social Welfare v Shenaz Almeida** Child Justice Review Case Number 1 of 2020 in which issues of care and protection were in issue. The court observed that, *'the court should also provide room for the voice of the child to be heard and either appoint a GAL (who can either be an independent expert or a child protection worker) or order that additional information should also be collected from persons close to the child, as their in-depth knowledge of the child is very valuable for the best interests of a child determination. These persons may be neighbours, teachers, friends, community leaders/workers, as their knowledge of the child can be valuable for the court process. Such persons may either swear statements or be called to appear before the court'*. In **M v M** (15986/2016) [2018] ZAGPJHC 4 (22 January 2018), the High Court of South Africa, Gauteng Division, Johannesburg in a custody wrangle which centered around relocation of one parent to another country the court observed that, *'Since the children who are affected in this matter are very young, I did not think that it would be*

beneficial to acquire their direct inputs. Section 10 of the Children's Act has been adhered to in those the children's views were canvassed by the experts, including the Family Councilor'. It is this courts view that an expert or family counsellor with requisite skill would be best placed to obtain the views of the children since the children are young now aged 10 and 6 years old in this year.

Finding

17. Under section 22 (d) of the Courts Act, this court orders the Child Justice Court take additional evidence to assist the court determine what is in the best interest of the child being closely guided by section 7 of the Children Act of South Africa. In addition, the views of the children should be heard through guardian ad litem (independent expert or social welfare officer) considering the young age of the children.
18. Each party is to bear its own costs.

Pronounced this 22nd day of September 2021 at LILONGWE

A handwritten signature in black ink, consisting of a large, stylized 'D' followed by a horizontal line and a large loop.

R.M CHINANGWA

JUDGE