JOSEPHINE MATEMERA
and
JAMES CHIRIMUUTA

HIGH COURT OF ZIMBABWE
MUCHAWA, MANYANGADZE JJ
HARARE, 11 January and 25 March 2022

Civil Appeal

Mr L Ziro, for appellant,
Mr P Musimwa, for respondent

MUCHAWA J: This is an appeal against the decision of the Magistrates Court which awarded custody of a set of twins, Jordan Chirimuuta and Jillian Chirimuuta, born on 22 February 2020, to the respondent. These children are otherwise known as Atipaishe and Anotidaishe, to the appellant.

The respondent was in a relationship with one Pamela Matemera who died immediately after delivery of the twins. They had an elder son, Jayden who was then four years old. There is a dispute between the parties as to the nature of the relationship between the respondent and the late Pamela. Whereas the respondent claims that he was in a customary law union with the late Pamela, appellant alleges that they were just cohabiting.

The appellant is a cousin to the late Pamela Matemera. Upon the discharge of the twins they were discharged into the hands of the appellant and the respondent. The respondent says the children remained with the appellant whilst he attended their mother's burial. He then applied for custody of the children in the court *a quo* when appellant did not hand them back to him upon demand. When custody was awarded to the respondent, the appellant made an application for review and an urgent chamber application seeking to retain custody of the twins pending the determination of the application for review under case HC 1296/21. The order was granted in appellant's favour with the respondent being awarded supervised access on specified terms. At the moment, the children are in the appellant's custody.

Disquieted with the magistrate's decision, the appellant filed this appeal on the following grounds;

1. The court *a quo* erred on a point of law and fact in granting the application for custody in finding that the applicant was the remaining natural guardian of the minor children and as such had inherent custody to the minor children.
2. The court *a quo* erred on a point of law and fact in granting the application for custody in failing to consider that the best interests of the children were to be best cultivated with the applicant.
3. The court *a quo* erred on a point of law and fact in granting the application for custody in failing to consider that the reports were made with favour to the respondent and prejudice to the appellant

It is prayed that the order granting custody to the respondent, be set aside and appellant retains custody with the respondent enjoying access as per the provisional order. The appeal is opposed. It appears to me that there are three issues arising for my determination. These are as follows:

1. Whether the respondent as the remaining natural guardian of the minor children has an inherent right of custody over the minor children.
2. Whether the court *a quo* properly considered the best interests of the minor children in awarding custody to the respondent
3. Whether there was bias in the probation officer reports, and if so, effect thereof.

I proceed to deal with each of these issues in turn below

Whether the respondent as the remaining natural guardian of the minor children has an inherent right of custody over the minor children.

Both probation officers' reports state that the respondent was customarily married to Pamela Matemera, a fact vehemently denied by the appellant who asserts that there was a cohabiting relationship between the parties. The respondent, in his founding affidavit on record p 35 also asserts that he had a customary law marriage with the late Pamela. It was argued for the appellant that the twins were born out of wedlock and the respondent did not have an inherent right of custody thereof based on case law authorities such as, *Cruth* v *Manuel* 1999 (1) ZLR 7 (S), *Douglas* v *Meyers* 1991 (2) SA 200 and *Tiwandire* v *Chiponda* HB 12-04. The legal position in such cases is captured in *Tiwandire* v *Chiponda supra* as follows;

> "----held that under common law all rights in respect of a child born out of wedlock are vested in the mother and she has the same rights as those of the parents of a legitimate child. The father of a child born out of wedlock has no rights at all in relation to the child. Such a father is the same as a third party in relation to the child. To hold that the father of a child born out of wedlock has rights in respect of the child would be to elevate the legal status of the father of such a child to that of a spouse in a divorce and allow unwarranted interference in the mother's rights over the child."

In the instant case, the court *a quo* stated as follows;

> "The court was wary of the cases which were cited by counsel for the respondent and their reference to the terms child born out of wedlock or illegitimate child. There has been a paradigm shift from this notion as it has been held that such terms constitute unfair discrimination on children. A child should not be defined by whether she/he was born in or out of wedlock or out of an extra-marital relationship. All children are equal when it comes to their rights to parental care."

The court *a quo* proceeds to quote from the case of *Dangarembizi* v *Hunda* HH 447-18 as follows;

> "Clearly by denying an extra-marital child access to and custody and guardianship of his or her biological father, the law infringes the child's right to human dignity. It implies that in the eyes of the law an extra-marital child is not human enough to be granted access to, and custody or guardianship of both parents. This may also be linked to the equality argument in the sense that by differentiating between the children on the basis of their parents' marital status the law creates the impression that it does not attach the same inherent worth to extra-marital children as it does to legitimate children."

No factual finding was therefore made on whether the twins' parents were married or not and the court simply proceeded on the basis of the father being the natural guardian of the minor children and inherent custodian in assessing the best interests of these children.

Mr *Ziro* argued that the court *a quo* erred by assuming that the respondent as the natural parent has an inherent right of custody. It was argued that the court should have been guided by the decision in *Cruth v Manuel supra* which was a Supreme Court decision which asserted that the father of children born out of wedlock does not have an inherent right to custody. The court was dissuaded from being persuaded by High Court decisions until the Supreme Court position in *Cruth supra* is set aside. Mr *Ziro* could however not point us to any decisions by the Supreme Court after the Constitution of Zimbabwe Amendment (No 20) 2013. It was further argued that there is no discrimination in this case as it is a fact that the respondent was not married to Pamela and it is not unfair to differentiate the legal status of the respondent who was allegedly and electively in cohabitation instead of a marriage and would not carry legal obligations such as support.

Mr *Musimwa*, on the contrary contended that the cases relied on by the appellant were decided before the 2013 Constitution which now provides a non-discrimination clause in s 56. It was submitted that though the question of whether the respondent was married to the late Pamela was not decided, the law has since changed and has placed a child born out of wedlock at par with a child born in wedlock in issues of access, custody and guardianship per *Dangarembizi* v *Hunda supra.*

It appears to me that the appellant is mistaken in thinking that the exclusion of a father to the custody of a child born out of wedlock would visit such father with negative consequences. It is in fact the children who would bear the brunt of growing up without a solid relationship with their father. The obligation to support a child does fall on both parents of children born in or out of wedlock. This is because the children have absolutely no say in the form of marriage arrangement they are born into and the law should ensure they are not penalized for choices they did not make. This is why the 2013 Constitution has taken care of this as analyzed below.

In *Sadiqi* v *Muteswa* HH 249/20 ZHOU J held as follows:

> "The adoption of the concept of the best interests of the child as the paramount consideration in all matters concerning the access, guardianship or custody of minor children changed the approach to these rights. The Constitution of Zimbabwe Amendment (No. 20) Act 2013 protects the rights of children. Section 81 provides the following:
> "(1) Every child, that is to say every boy or girl under the age of eighteen years, has the right –
>
> - To equal treatment before the law, including the right to be heard;
> - . . .
>
> (2) A child's best interests are paramount in every matter concerning the child."
> There is also an equality and non-discrimination provision in the Constitution. Section 56 states as follows:
>
> "(1) All persons are equal before the law and have the rights to equal protection and benefit of the law.
> (2) . . .
> (3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, **or whether they were born in or out of wedlock**.
> It is unfair discrimination to deny a child the benefits of associating with his or her biological father, which is an aspect of parental care, on the mere ground of the marital status of the parents at the time that he or she was born. The principle of the common law in this respect is inconsistent with s 81(1) (a) and s 56(1) and (3) of the Constitution of Zimbabwe."

The above case is the one properly applicable herein and not the *Cruth supra* line of cases which came before the new Constitution. It would be improper to proceed on the basis of the marital status of the twins' parents. The appellant cannot continue to argue that the respondent is a third party as he was not married to Pamela. That issue is no longer relevant in cases of this nature. What is evident is that there is need for a balancing of the rights of children as spelt out in the Constitution and laid out above, as against parental rights set out in the same Constitution. In s 80 (2), the Constitution provides that women have the same rights as men regarding the custody and guardianship of children, but an Act of Parliament may regulate how those rights are exercised. Section 81(2) makes a child's best interests the paramount consideration in every matter concerning the child as does the Guardianship of Minors Act.

The best interests principle which has also been the criteria used by our courts in matters concerning children now not only finds constitutional expression but also exists amidst certain rights given to children by the Constitution. Thus, the principle of the best interests of the child, said to be paramount in every matter concerning the child under s 81(2) of the Constitution is now also better placed to take its specific character and meaning from the rights that are accorded children by our Constitution- per TSANGA J in *Hale v Hale* HH 271/14

Who is better placed to serve the best interests of the children between the appellant and the respondent?

It was submitted for the appellant that she is better suited to cater for the children's best interests as her evidence went to show she is already providing parental care for the children by expressing love to them, monitoring them due to their special needs and attending to their daily care by bathing and feeding them, washing and ironing their clothes, playing with them, amongst other things. The parental care was said to be not rooted in biological origin but function and should not matter that she is a cousin and not biological sister to the late Pamela. Attention was drawn to the two reports from the Harare and Mount Darwin probation officers which commended the appellant for taking good care of the twins. It was contended that either provisional or final custody should be awarded to her with access being granted to the respondent.

It was submitted for the respondent that the welfare of the children should be the predominant consideration per *Makuni* v *Makuni* 2001 (1) ZLR 189 (H) at 192A. Mr *Musimwa* submitted that the best interests of the children would best be served by growing up within their

nuclear family to ensure stability in growth. It was alleged that the appellant is a third party, a mere cousin to the late Pamela, and the court should serve the children's best interests and not those of the appellant. The fact that the children's parents were not married, it was argued, should not be used against the children's interests. The respondent's case was that he, as the biological parent, should be given custody as the appellant was not an immediate relative but a mere cousin to the late Pamela. He stated that custody would only be withdrawn from him if it was shown that he would be a danger to the children's lives.

Mr *Musimwa* submitted that the appellant can only be considered custodian if awarding custody to the natural parent is detrimental to their wellbeing. The respondent argues that he is well able to care for the children beyond the expectation that he would channel monetary maintenance. He wants to influence the children's personalities, character and life by spending time with them and to be involved in making choices about their lives and future.

In addition, it was submitted that if he was awarded custody, the twins would be able to grow in the company of their then four year old brother. Regarding the arrangements for accommodation, it was the respondent's case that he was moving to Mount Darwin to stay with his brother and sister in law who were already staying with Jayden and were willing to take him in with his three children. They had a spacious home, stable jobs as a policeman and nurse. He also said he had employed a maid to take care of the children whilst he, his brother and sister in law were at work.

Both before us and in the court *a quo,* the appellant made the case that the respondent is in fact not the one applying for custody, but it is his brother. On p 31 of the record, the brother Jack Chirimuuta says the following,

> "The applicant as the surviving parent should have custody of these minor children since unfortunately the mother to the children passed away. When we sat down as a family we agreed that the children are delicate and need extra care. I agreed to take on the challenge of sheltering him and the children and also assisting him to take care of the children. I have the shelter. The way I looked after him is the way I will assist him look after his children. I cannot just look and smile whilst my family member is in need. I know he is capable. As a family we are ready to assist if he gets custody."

Mr *Ziro* argued that the respondent is relying on a third party who is married and is already taking care of the other minor child. This position, if juxtaposed with that of the appellant, in the

context of the matter and the age of the children, was said to favour retaining the *status quo* as the respondent is clamouring to experiment with the children. In addition, it was pointed out that the probation officer's report considers the environment of the brother, his immovable property and circumstances, more than the respondent's. It was contended that the respondent has no capacity to provide for the welfare of the minor children but seeks to rely on the benevolence of his brother. The fact that the respondent is of no fixed abode was traced through the record particularly page 28 where the respondent said he was in transit to Mount Darwin, was residing in Ruwa, based (for business) at 101 Kaguvi street. On p 17 of the record he is said to be staying in Kuwadzana 3 by the appellant. It was argued that it is not in the best interests of the minor children to be in the custody of a parent who moves so much as there were up to four addresses, all in 2020.

In response to this, Mr *Musimwa* stated that the respondent does not own any immovable property in Zimbabwe and as a tenant, he moves around. It was explained that he indeed used to stay in Kuwadzana during Pamela's lifetime but had since moved. The Mount Darwin address is said to be the fixed address where the first child is staying with his brother who therefore has custody and he has since joined them and hopes to have custody of all his three children and be based there. The nature of the respondent's job as a mechanic was alleged to also account for his moving from place to place.

The respondent harped on the need not to have the twins separated from their brother Jayden. It is indeed desirable to keep siblings together. In an ideal situation, the three children would have been staying together with their parents. Unfortunately, in this case, the children never stayed together due to the death of their mother.

The Mount Darwin Probation officer's report reveals that the respondent's family is not up to speed on the health of the twins as shown by the Harare probation officer report. The twins are not on any long-term medication and are in good health with tests confirming that they are HIV negative. They have received proper medical attention whenever necessary. The report goes on to show that the children were growing normally and exhibiting age appropriate behavior. The Harare probation officer who made a home visit described the appellant's home as spacious, tidy and as providing a secure environment to raise the children. The appellant was said to be taking good care of the children as they looked tidy, healthy, warmly and smartly dressed.

It appears to me that the appellant's love, affection and emotional ties with the twins, cannot be questioned. Her capabilities, character and temperament have not been put in issue. She seems to be communicating well with the twins as she bathes and plays with them, and by two years of age now she is the one who must have taught them to speak. Their mental and physical health is catered for in her custody. The stability of the children's existing environment having regard to the desirability of maintaining the *status quo* is an important factor.

The deciding factors are laid out in *W v W* 1981 ZLR 243 and I can do no better than quote therefrom;

> "The power to award custody to a third party does not involve or justify the adoption of a test or approach that anybody concerned becomes a candidate or claimant. Compared with parents, grandparents and others may often be able to provide superior material advantages and unlimited time and attention, they may also be endowed with greater wisdom and even patience. These attributes and assets would not, however, entitle them to custody in competition with natural parents who may not possess the same advantages. In deciding what is in the best interests of a child, the Court generally has regard to relative merits only of the parents. Grandparents are considered useful baby-sitters and a source of help in times of need or mere convenience. They are also "first reserves" when natural parents or a surviving parent are held not to be proper persons to whom to award custody. The natural affinity and emotional bond and attachment between parent and child are generally irreplaceable and an accepted fact of life. Such an association benefits and promotes a child's emotional security and feelings, normality, whilst the award of a child's custody to a third party places him in a distinctly unusual or abnormal category.
>
> A court will only deprive natural parent of custody and award it to a third party upon special grounds. Such special grounds include detrimental or undesirable effects or influences upon the physical, moral, psychological or educational welfare of a child. The test is still not whether a third party can provide better materially or possesses more desirable attributes, but whether the parent or parents should be deprived of custody for any reason involving harm or danger to the child's welfare as mentioned above (See *Calitz v Calitz*, 1939 AD 56, *Short v Naisby*, supra, 3 at page 575; *Horsford v de Jager and Another*, 1959 (2) SA 152 (N). at 154, *Petersen and Another v Kruger and Another*, 1975 (4) SA 171 (C):at 1741."

Granted, the appellant has indeed been a useful source of help of the twins during a very dire period when they lost their mother. Her care has been applauded. But the real question is whether there are any special reasons to deprive the respondent of the custody of his children. Are there any special grounds which include detrimental or undesirable effects or influences upon the physical, moral, psychological or educational welfare of the twins? None were shown. The only complaint appears to be that he handed over the children when he went for their mother's burial and has not contributed to their maintenance. He however immediately followed up requesting their custody. The mother died on 22 February 2020, the children were discharged on 24 February 2020. He says he initially followed up on 3 March but was denied custody. He even visited one Lavender Matemera on 7 March but could not locate the children and was referred to the appellant.

Thereafter, the application for custody was filed. Such conduct cannot be said to have rendered him an unsuitable person so as to justify depriving him of the custody of the twins.

Placing the children in their father's custody will necessarily cause a change in their environment. Many children have to get accustomed, and do get accustomed, to new environments. The twins are only around two years now. Now is a good, if not a better time, for change to be made rather than later.

Still taking a leaf from the case of W v W *supra;*

*"*While each case depends on its own facts, it is of interest to refer to cases where children have been out of their parents' care for a considerable period but were nevertheless ordered to be returned to their natural parents. In Bam v Bhabha, 1947 (4) SA 798 (AD), the court held that a seven-year-old girl who had stayed with her grandparents for practically all her life had to be returned to her mother, the court being satisfied that the latter would properly care for the child. It was not disputed that the child was happy with her grandparents who were devoted to her. In the case of Horsford v Jager and Another (supra,) young children had stayed for a period of five and a half years with an uncle and aunt and away from their mother. The children were happy there. Although the Court was of the view that the children would experience a "considerable emotional upset" if placed in the care of the mother, the latter's application to have the children was nevertheless granted. FANNIN, AJ, also emphasised the probability of children who are in custody of third parties adopting the belief "than' their real mother is an unworthy person who abandoned them without just cause" (at B 158E). See also *Re R (M)* (an infant.) [1966] 3 All ER 58 and *Re F* (a minor) [1976] 1 All ER 417, *Petersen & A nor v Kruger and Another* (*Supra)* at 175."

What is the deciding factor in this case is the natural affinity and emotional bond and attachment between parent and child which are generally irreplaceable and an accepted fact of life. Such an association benefits and promotes a child's emotional security and feelings, normality, whilst the award of a child's custody to a third party places him in a distinctly unusual or abnormal category. If custody is awarded to the father, the twins will not grow with a sense of abandonment by their mother who died at their birth and rejection by their father who did not care enough to stay with them. In the long term, this is more important for the twins' wellbeing. This accords with the recommendations from the two probation officer reports and the court *a quo*'s decision. The issue is not whether the appellant can provide better materially. It is whether the respondent is unsuitable as a custodian. He has not had an opportunity so far but the arrangements he has put in place should well cater for the children's best interests.

It is my finding that the best interests of the twins are better served by the respondent getting custody.

Ground of appeal 3: Whether the Probation officer reports were biased against the appellant.

As is evident from the probation Officers' reports, there is no bias as they commended the appellant as someone who was taking good care of the twins. In any event, such reports are meant to assist the court and they merely provide recommendations. Following my finding on ground 2 of appeal, nothing turns on this point.

As this matter concerns custody of children, there will be no order as to costs.

Accordingly, the following order is made:

1. The appeal be and is hereby dismissed with each party bearing its own costs

MANYANGADZE J AGREES----------

Dzoro and Partners, appellant's legal practitioners
Justice for Children, respondent's legal practitioners