

CHARITY SHIRIDZINODYA
versus
SAMUEL SAMANYANGA

HIGH COURT OF ZIMBABWE
KARWI & UCHENA JJ
HARARE, 26 November 2009

Civil Appeal

M. Magaya, for appellant
T. Mutero, for respondent

KARWI J; This is an appeal against the decision of the learned Magistrate in terms of which respondent was granted custody of his two minor children following the breakdown of the parties unregistered customary union sometime in May of 2009. The breakdown of their marriage had resulted in respondent moving out of the matrimonial home in Queensdale, Harare. Appellant remained behind and respondent continued to pay rentals for his wife and children as well as maintaining them. The couple had been blessed with twin boys who were seven years old at the time of the parties' separation. Sometime after separation, respondent says he got a request from his wife's landlady, one Mrs Chideme who insisted that respondent moves the appellant from her house as she alleged that the appellant was turning her lodgings into a brothel. According to Mrs Chideme, the appellant was bringing different boyfriends to the house, having drinking escapades and sometimes leaving the young twin boys unattended with nobody to cook for them. Respondent said he had tried to talk to appellant into apologizing to Mrs Chideme but appellant would not have anything of it. He says the appellant proceeded to dump the children at respondent's uncle's place in Caledon at around 6 am only to return at 8 pm. She had not left anything for the children to eat. On getting to know the circumstances of his children, respondent took care of them and proceeded to apply for their custody at the Magistrates Court. Appellant also applied for the custody of her children at the same court. The two applications were consolidated and the matter was heard. After consideration of all the issues raised by the parties, the court granted the respondent custody of the children. It is that order that the appellant is seeking to be set aside.

Appellant's grounds of appeal are that the court *a quo* had erred in not taking into consideration the fact that the twin children were of tender age and that it was in the best interest if

the children that their custody be awarded to appellant. Appellant had also stated that the learned trial Magistrate had erred by not taking into consideration the fact that she had always been staying with the children even after the respondent had abandoned the family in April 2009. She further alleged that the respondent was of a violent character and had on many occasions conducted himself violently in the presence of the children and that she was under a protection order granted by the Magistrates Court.

In her reasons for judgment, the learned trial Magistrate thoroughly considered all the issues which were raised during the trial. She clearly formulated the view that by abandoning the children for the whole day and without any food was an abuse of the minor children. The learned Magistrate correctly found that the appellant's conduct was not in the best interest of the children. The Court *a quo* further found the appellant's conduct on the day in question to be akin to what the appellant in *Makamure v Makamure* HH 143/86 did by dumping a child at the airport at which the respondent in that case was to arrive in a short period from overseas. SANDURA JA refused a request by the appellant for the return of the child.

It seems to me that the Court *a quo* did not err in any manner. The court considered all the issues which both parties raised during the trial and correctly arrived at the decision it did. For example, the Court considered the affidavit deposed to by Mrs. Chideme, the landlord at the house where the family was evicted from after the departure of the respondent. After carefully considering the said evidence as contained in the affidavit of Chideme, the Court correctly concluded that the appellant was not a proper and fit person to be custodian of her two minor children. Mrs. Chideme had narrated occasions when the respondent turned her one roomed quarters into a brothel. He mentioned many incidents when the respondent attended musical shows at night and later brought men who would share her bed with her and the children. She named some of the boyfriends by name. On one occasion, Mrs. Chideme found a man naked in the respondent's bed sharing the bed with the children whilst the respondent was having a bath. She later saw the children sharing the remains from a Pilsner beer bottle. She also reported of occasions when the children were left alone unattended for more than a day without food. Mrs. Chideme's affidavit left an impression of an irresponsible and non caring mother, who is not a fit and proper person to be custodian of the children. This is the same impression the Court *a quo* held. There was no err or misdirection on the part of the Court *a quo*. The appeal therefore cannot succeed.

It is accordingly ordered that the appeal be and is hereby dismissed.

Legal Aid Directorate, appellant's legal practitioners

Justice for Children Trust, respondent's legal practitioners