

JENNIFER NYAMAKURA  
versus  
AGRIPPA MUZENGI

HIGH COURT OF ZIMBABWE  
CHITAKUNYE & MAWADZE JJ  
HARARE, 22 June 2011 & 10 May 2012

### **Civil Appeal**

*T. Deme*, for the appellant  
Respondent in person

MAWADZE J: This is an appeal against the judgment of the Harare Magistrates Court delivered on 17 February 2010 in which the court *a quo* granted the following order:-

“Custody of the two minor children is hereby awarded to the respondent with the appellant having reasonably access”.

The facts giving rise to this appeal can be summarised as follows:-

The appellant and the respondent entered into an unregistered customary law union sometime in 2001 and two children namely Blessed Muzengi (born on 14 September 2001) and Gracious Muzengi (born on 1 June 2006) were born out of the union. The appellant apparently fell ill sometime in 2009 and she had to go to her parents' home for treatment which culminated in the separation between the parties and consequently the dissolution of the union. At that relevant time the two minor children remained in the respondent's custody on account of the appellant's ill health. It would appear from the facts that before the parties separated the appellant had obtained a maintenance order in respect of the two minor children.

When the appellant had recovered she apparently failed to obtain custody of the two minor children and proceeded on 28 January 2010 to file an application for custody of the two minor children with the Magistrates Court. In her affidavit in support of the application for custody the appellant stated that it is in the best interest of the children that she be awarded custody and briefly gave the following reasons;

- (i) That the two minor children are of tender age (then 11 years and 4 years respectively) and as such need the care of their mother.

- (ii) That the appellant had the means to contribute to the welfare of the two minor children as she is now engaged in horticulture business in Shamva and is able to provide to a great extent for the daily upkeep of the minor children.
- (iii) That the respondent is not a suitable parent to have custody of the minor children as he has no time for the children and has neglected the children and had taken the eldest child to his parents in rural Chivhu.
- (iv) That the two minor children have a right to a family and hence should not be separated from each other.

The record of proceedings reflects that the respondent did not file any opposing affidavit although during the brief hearing in the court *a quo* the respondent seemed to make reference to "his papers filed of record". However on the hearing date on 11 February 2010 the respondent opposed the application by the appellant and gave the following reasons:-

- (a) That the parties separated due to irreconcilable differences and the appellant left the children in his custody.
- (b) That when the appellant recuperated she asked for the children on 14 December 2009 and that the children were to be returned to him after the new year since he had paid some cattle to the appellant's parents as "chiredzwa".
- (c) That he subsequently reached an agreement with the appellant that the appellant would have custody of the younger child but the appellant later reneged on this promise as she also wanted custody of the elder child which prompted the respondent to take the elder child to his parent's rural home in Chivhu.
- (d) That the elder child has always been staying with the respondent's parents in rural Chivhu since the time he was weaned and that he is more close to the respondent's mother than the biological mother the appellant.
- (e) That the appellant is not a suitable parent to look after the children as she has in the past misused the money paid by the respondent as maintenance for the children, has failed to ensure that the children attend school at all material times and at one point assaulted one of the minor children.

The appellant in response vehemently denied that she ever agreed to surrender custody of the minor children to the respondent and that the arrangements made were temporary as the appellant was unwell. The appellant said the elder child was to attend

school in Harare and not to be taken to rural Chivhu where the respondent's parents are supposed to take care of the child. The appellant denied assaulting any of the minor children and instead said it is the respondent who assaulted the child and boasting that he could do as he pleases since the child was his.

It was after hearing the brief oral submissions outlined above from the parties that the court *a quo* without giving reasons granted the order referred to *supra*. On 25 March 2010 the appellant asked for the reasons for the ruling made on 17 February 2010 to enable the appellant to pursue the matter on appeal. The trial magistrate responded on 29 March 2010 and gave the following reasons for the order granted on 17 February 2010:

“After having considered submissions made by both sides, the court is of the view that it will be in the best interests of the children for custody to be awarded to the respondent”.

Dissatisfied with the reasons given by the court *a quo* the appellant caused a notice of appeal to be filed with this court on 29 March 2010 on the following grounds of appeal:-

“GROUND OF APPEAL

1. The magistrate erred and misdirected herself by *mero motu* awarding the custody of the two minor children to the respondent when there was no application by the respondent placed before the court as for the Guardianship of Minors Act [Cap 5:08] s 5(3)(b) for custody of the two minor children.
2. The magistrate further erred and misdirected herself by denying the appellant the natural mother of the minor children custody when there were no special and or extenuating circumstances placed before the court or proved by the respondent which warranted the appellant being denied her inherent right to custody of the two minor children more so considering their tender age and need for motherly love, care and attention”.

I now turn to the merits of this matter

There are a number of irregularities in this matter. The court *a quo* despite the request by the appellant did not give meaningful and well reasoned basis for granting custody of the two minor children to the respondent. The reasons for judgment are bereft of any reasoning process for arriving at the decision made. From the facts of the matter which I summarised at length it is clear that there were serious disputes of facts between the parties which could not be resolved on the mere word of one party against the other. It is clear from the record that the parties did not give any evidence, that is, sworn testimony for

the court to properly assess the facts in dispute. It would also appear that the record of proceedings is incomplete as the respondent's "papers filed of record" are not in the record.

The court *a quo* fell into error by failing to identify properly the issue before the court in relation to the provisions of the Guardianship of Minors Act [Cap 5:08] with specific reference to s 5 which deals with the special provisions relating to custody of minors.

It is common cause that the two minor children in this case were born out of wedlock. The position of the law in relation to the rights of the parents in respect of guardianship and custody is very clear. The mother of a child born out of wedlock has the sole rights of custody and guardianship. See *D v M* 1986(1) ZLR 188(H), *Cruth v Manuel* 1999(1) ZLR 7(S), *Katedza v Chunga* 2003(1) ZLR 470 (H).

In terms of s 5(3)(b) of the Guardianship of Minors Act [Cap 5:08] the court may grant custody of minor children born out of wedlock to the father upon such an application. In *casu* the respondent did not make such an application for custody before the court *a quo* but merely alleged that he had *de facto* custody of one of the minor children. In fact even in his submissions before this court on appeal the respondent was clear that he only had custody of one minor child Blessed and that the appellant had custody of the younger child Gracious. It therefore boggles the mind why the court *a quo* granted custody of the two minor children to the respondent in the absence of such an application by the respondent. This constitutes a misdirection.

As already stated the court *a quo* failed to state reasons as to why it would be in the best interests of the minor children to deprive the appellant of custody of minor children born out of wedlock and award such custody to the respondent. It is trite law that in dealing with the question of custody of minor children the court should be guided by the best interests of the children. See *McCALL v McCALL* 1994(3) SA 201 at 204-05, *Makuni v Makuni* 2001(1) ZLR 189 (H) at 192, *Galante v Galante* (3) 2002 (2) ZLR 408 (H), *Jere v Chitsunge* 2003 (1) ZLR 116 (H) at 118 C-E.

The respondent did not make an application for custody of the minor children but was awarded custody. The reason or reasons for this are not given. Both parties submitted before the court *a quo* that they were suitable parents to be awarded custody of the minor children without giving any further details in that regard. No submissions were made by the parties on the suitability or otherwise of the appellant as a parent for her to be deprived of custody of the

minor children. No submissions were made that the best interests of the minor children will be best served if the custody of the children was awarded to the respondent, albeit without even making such an application. The reasoning process to show how the trial magistrate arrived at the decision made is none existent and not supported by the submissions made by the parties. It is a decision arrived at out of the blues with no basis or rationality at all.

In terms of s 5(11) of the Guardianship of Minors Act [*Cap 5:08*] this court has wide discretionary powers on appeal to confirm, vary, set aside decision appealed against or grant any other appropriate order. This court is of the view that it has not been shown why the appellant should be deprived of custody of the two minor children. The decision to award custody of the minor children to the respondent is not supported by the law or the facts.

Accordingly for the above reasons the following order is made:-

1. The appeal is allowed.
2. The order of the court *a quo* is hereby set aside.
3. Custody of the two minor children namely Blessed Muzengi (born on 14 September 2001) and Gracious Muzengi (born on 1 June 2006) is hereby awarded to the appellant.
4. There shall be no order as to costs.

CHITAKUNYE J: agrees