

EPHIAL STANLEY TAFADZWA DEWA
versus
IRENE CHANAKIRA

HIGH COURT OF ZIMBABWE
TSANGA & MUSITHU JJ
HARARE, 31 May 2023

Civil Appeal (Reasons)

Mr A Dracos, for appellant
Mr N Mupure, for the respondent

TSANGA J: On 14 March 2023 this High Court allowed an appeal granting the appellant, Ephial Stanley Tafadzwa Dewa, custody of his minor child. The reasons were given *ex tempore*. Written reasons have been requested and these are they.

Background facts

The facts to the appeal were fairly straightforward. The appellant had filed an application for custody in the Magistrate's Court, of his minor child born on 22 October 2020. The mother of the child was the respondent's daughter, the now late Rutendo Natalie Eugenia Chanakira to whom the appellant was married to in an unregistered customary law union. She had been staying together with the appellant up until sometime in February 2022 when left the matrimonial home in light of domestic disenchantments. She had died some two weeks later. When she left the matrimonial home together with the child she had gone to stay with her mother, Irene Chanakira who was the respondent to the application.

Following her daughter's death, the respondent had refused to return the child to the appellant on the grounds that she had been given custody by her late daughter. The appellant's argument in approaching the Magistrate's Court with the application had been on the basis that the late Rutendo did not have sole custody and guardianship and therefore could not have dispossessed him as the other parent, of his rights.

The respondent had opposed his application on the basis that the appellant had never been there for his child financially or emotionally following Rutendo's death. She had also argued in the court below that the child was young and was more accustomed to her than him.

She had also argued that it was not automatic that the other parent should get custody. She had further pointed out that as the child is female and was only two years old at the time, she was better off with her. She additionally had objected to him having custody on the basis that the appellant still lived with his mother and would simply be getting custody to have his mother look after the child.

In its ruling which was in favour of the respondent, the lower court had been cognisant of the fact that a surviving parent cannot just be deprived of custody and also that it is not enough to say the other party has better resources. It had also understood as was evident in the judgment that a grandparent can only be awarded custody if it is detrimental and undesirable for the infant for the other party - that is the parent, to have such custody. In other words, the lower court acknowledged that as a parent the appellant stood on firmer ground. A probation officer's report had also materially been availed and considered in which the probation officer had unequivocally following an assessment, recommended that the father be given custody. However, the court had considered the age and the gender of the child and that the father of the child is employed and would not be available all day. For these reasons the custody to the minor child had been granted to the respondent.

The appeal grounds

The appellant appealed on the grounds that:

1. The court *a quo* erred in denying appellant custody of the minor child in circumstances where there was no finding that he was unworthy to have such custody.
2. The court *a quo* erred in denying appellant custody of the minor child on the basis of irrelevant considerations in particular that appellant was a working father, the gender of the parties, and, the age and the gender of the child.
3. The court erred in failing to take into account recommendations by the probation officer.
4. The court *a quo* erred in denying appellant custody in circumstances where no compelling grounds were established by the respondent

The reasons for granting the appeal

We granted the appeal. The lower court had not found that he was not a suitable parent or that it would be detrimental to give him custody as a parent. He had been deprived of custody of this child mainly because of the age and the sex of the child and the fact that he would be at work. These considerations do not make him an unsuitable parent. Despite the

fact that his own mother would be available to help him, the court preferred the respondent as the grandmother who already had the child above the interests of the biological parent. The father could not have been deprived of custody of his child on those grounds. The case law is clear on the rights of a natural parent to their child and this was brought to the attention of the respondent. As stated in *W v W* 1981 ZLR 243:

“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....”

We drew the respondent's attention in particular to *Josephine Matemera v James Chirimuuta* HH 188/22 with similar circumstances where in granting custody of twins to their father following the death of their mother, the court stated thus:

“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.”

Indeed on appeal, in the absence of any real adverse findings against the appellant as a father by the lower court that would endanger the interests of the child, the probation officer's report was considered as a weighty as the magistrate had not taken any issue with it. Also against the backdrop of case law, it was just as supportive of giving custody to the father for the same reasons among others of the need to create a parental bond as being in the best interest of the child. The lower court was clear that its reasons had nothing to do with him being a bad parent. Going to work or the gender of the child should not disqualify him. Moreover, the child is growing and would need to be in preschool and therefore the argument that the father would not be available to all day to look after the child made no sense. As custodial parent it would be well within his rights to enlist his mother's help. The fact was he is capable and is willing to look after his own offspring as the parent and to make his own child minding arrangements as a parent. There was therefore no reason for us to go against

the grain of established case law on the rights of a surviving parent to have custody of their child.

It was for these reasons that the appeal was granted and the order was as follows:

1. The appeal is allowed with each party paying their own costs.
2. The whole judgment of the court *a quo* is set aside and in its place substituted with the following:

“The application is granted”.

TSANGA J:.....

MUSITHU J:.....Agrees

Honey and Blanckenberg, appellant’s legal practitioners
Machiridza Commercial Law Chambers, respondent’s legal practitioners