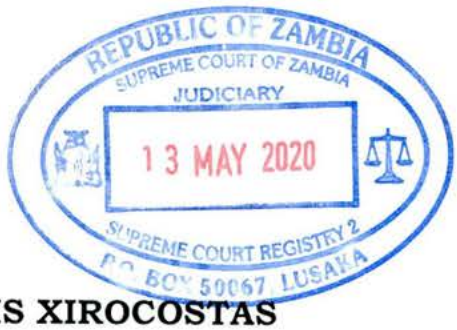
IN THE SUPREME COURT OF ZAMBIA **Appeal No: 206/2013**

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

ANDREAS PANAGIOTIS XIROCOSTAS **APPELLANT**

AND

YOLANDA GUIZADA POMA **RESPONDENT**

CORAM: Mambilima, CJ, Kabuka, Chinyama, JJS.
On 12th July, 2016 and 13th May, 2020.

FOR THE APPELLANT: Mr. W. A. Mubanga, Messrs Mumba S. Kapumpa, Advocates

FOR THE RESPONDENT: Ms T. Marietta, Messrs Sharpe and Howard Legal Practitioners

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JUDGMENT

KABUKA, JS, delivered the Judgment of the Court.

Cases referred to:

1. J v C (1969) 1 All ER 788.

2. D v M (Minor Custody Appeal) (1982) 3 All ER 897.

3. Elizabeth Nadine Smith Wesson v Brian Sydney Stroud, SCZ No. 35 of 1998.

Legislation and Other Works referred to:

1. Matrimonial Causes Act No. 20 of 2007 Section 75 (1) (a) and (b).
2. Lowe, N. & Douglas, G., Bromley's Family Law, 10th Edition, 2007, Oxford University Press, New York.

Introduction

1. The appellant appeals against a judgment of the High Court dated 11th June, 2013 which awarded custody of the parties' four (4) year old daughter to the respondent.

Background

2. The history of the case is that the appellant who is a Greek national resident in Kitwe, Zambia, on 28th June, 2008 married the respondent, a Peruvian woman, who at the time had been living in Zambia for about three years. The marriage was solemnised from the Civic Centre at Kitwe.
3. Six months after contracting the marriage, on 28th January, 2009 the respondent gave birth to their daughter, Maria Lucia, from Care for Business Medical Centre, in Lusaka. This was the respondent's second child, as she had another

daughter, Ciby Ariana Rivera, from a previous relationship. That child was aged 7 at the time, having been born in Peru, on 27th November, 2002.

4. Following their marriage, the couple lived with the two children of the family at Lusaka and Kitwe. Whilst in the process of settling into married life, marital problems engulfed them, as a result which the appellant left the matrimonial home.

Proceedings before the High Court

5. On 15th January, 2010 the appellant went and filed a petition for divorce in the Kitwe High Court District Registry. The petition was accompanied by an application seeking an *ex-parte* order for interim custody of his biological daughter, Maria Lucia, who was only eleven months old at the time. The appellant was granted the order sought, subject to an *inter-partes* hearing.

6. Following the *inter-partes* hearing, the trial judge by her ruling delivered on 21st May, 2010 reversed her earlier *ex-parte* order by which custody of the child had been granted to the appellant. Interim custody, care and control of Maria

Lucia was now given to the respondent, pending the hearing and final determination of the divorce petition.

7. The *inter partes* order allowed the appellant access to the child, on terms which were left to the parties to agree. In default of such agreement, the court itself was to make the determination. The record shows there were a number of applications thereafter, at the instance of the appellant, seeking a review of the interim custody order and terms of access to the child, on which the trial judge rendered her rulings.

8. On 27th May, 2011 the appellant was granted a decree nisi for divorce, following which he applied for an order seeking final custody of the child, Maria Lucia.

9. At the hearing of the said application, the appellant's evidence was that, he is an Engineer by profession and employed as the Director of Takkis Panel Beaters, a family business based in Kitwe. His parents and older sister are also ordinarily found working from the premises of the same company. The record shows it was the appellant's further evidence that he lived alone but had a maid who works for

him three times a week, a gardener and a guard. That when Maria Lucia stayed overnight at his house, he would be alone with her and was the one who bathed her.

10. At other times they would stay at his parents' house, who live within the same neighbourhood, where the child has her own bedroom. When he had access to the child during the day, he would take her with him to his Workshop where they could mix motor vehicle paints together an activity the child, apparently, enjoyed doing.

11. The appellant contended that the respondent should not be granted custody, as she was in the habit of going out at the weekends and entrusting care of the child together with her sibling, Ciby Ariana Rivera, to the maid. The respondent was also said not to be in regular employment; had no stable source of income or a stable home. As a result of these circumstances, she once lived with the children in a servant's quarters, in the Makeni area of Lusaka. The appellant further claimed that the respondent was taking drugs and had suicidal tendencies.

12. For her part, the respondent in her evidence on the various allegations made by the appellant against her, testified that, she had been looking after the children on her own with the help of a live-in maid. That she cares and loves her children and never leaves them alone. She always ensures they are fed, bathed and provided with food and shelter in the best way that she could. She denied taking drugs and claimed that, these were unsubstantiated allegations.

13. It is against that backdrop of evidence that the trial judge considered the social welfare report she had earlier called for. According to this report, the respondent was said to be an aggressive and argumentative person who had previously threatened to kill the appellant. That she was of no fixed abode, had no family in Zambia other than the appellant's and she had neglected her baby previously, by leaving her with her said in-laws, on at least three occasions.

14. Regarding the appellant, the report stated that he loves the child Maria Lucia and his step daughter, Ciby Ariana Rivera. He was of fixed abode, lived in a nicely furnished house, had a good job and family that can help him take care of the

child. In the final analysis, the social welfare report recommended the appellant, as the parent who was better placed to take care of the child, in a way that would promote its best interests.

15. In her judgment on custody, the learned trial judge in weighing the appellant's circumstances against those of the respondent also considered evidence, that there was a special bond between Lucia and her half-sister Ciby. She was of the view that, this bond should not be disturbed particularly as the respondent had established a daily routine for the two children regarding, amongst many others, time for taking their meals and going to bed.

16. The learned judge was also not for the idea that a man should bath his own daughter as the appellant had been doing and found the practice not only morally reprehensible but considered it one capable of influencing the child's views in future. She was further unimpressed with what she considered the apparent irresponsible attitude the appellant had exhibited towards his step child, Ciby Ariana Rivera, whom she felt he had chosen to disregard in the custody

matter. The judge found that the appellant was determined to make the respondent's life difficult and his reluctance to assist the respondent financially, had compounded her struggles in maintaining the two children.

17. The learned judge expressed her disapproval of the practice of taking the minor child to the appellant's Workshop where she was allowed to mix paints, as she considered them to be pollutants that could cause her harm. She also considered the possibility of there being equipment or machinery at the appellant's Workshop, that could be dangerous or harmful to the child. The fact that the appellant did not like to have black or coloured maids care for the child in the trial judge's view did not assist the situation as the appellant would be forced to take the child to work or to his mother or sister when he was not available.

18. The judge similarly took into account the circumstances of the respondent and found that the child Maria Lucia had stayed with her mother for 3 years during which period she had been raised well and was in good health. The learned judge did not accept the allegations in the social welfare

report, suggesting that the respondent was on drugs that affect how she takes care of the children. Her observations on allegations that the respondent likes going out, leaving the children with her maid were that, such conduct did not make her irresponsible, as many responsible parents do leave their children sometimes for months on end, with maids or family members. The trial judge found, there was no evidence suggesting that the maid had been neglecting the minor child. She also found the social welfare report, to be biased against the respondent, as nothing was said about the appellant's going out or taking alcohol.

19. The learned trial judge further referred to the provisions of the **Matrimonial Causes Act section 75 (1) (a) and (b)** and the cases of **J v C[1] and D v M (Minor Custody Appeal)[2]** which re-state the principle that, when determining issues of custody of young children, the paramount consideration is the welfare of the child.

20. On the evidence before her, the learned trial judge in resolving the question as to which parent should be granted custody, determined that, the appellant was incapable of

taking care of the child on his own and that a child of tender age is better off raised by the mother rather than the father. Her conclusion was that, it would not be in the best interests of the child to order joint custody, but for the child to remain in the custody of the respondent, its mother. The appellant's application for final custody of Maria Lucia was declined for those reasons.

Grounds of appeal to this Court

21. Aggrieved with the judgment, the appellant appealed to this Court advancing four grounds of appeal, stated as follows:

1. **The learned trial judge erred in law and in fact when she based her decision not to grant custody to the appellant on a wrong conclusion that the appellant was racist.**

2. **The learned trial judge erred in law and in fact when she concluded that the appellant's action to take his daughter to his work place exposed her to danger.**

3. **The learned trial Judge erred in law and in fact when she referred to the appellant as irresponsible for not specifically requesting for the custody of the respondent's other child who was not the appellant's child.**

4. **The learned trial judge erred in law and in fact when she rejected a joint custody on the basis that the appellant lacked a conducive environment to look after a young child.**

Arguments presented by the parties

22. In his written arguments filed on record learned counsel for the appellant on ground one of the appeal, assailed the trial judge for her conclusion that the appellant does not like black or coloured maids or that he is looking for a white maid. Counsel contended that, a very critical reading of the conduct of the appellant, shows all he wanted, was for the respondent, his wife then, to undertake the role of looking after their daughter at an early age and not for her to be raised by a maid whether, white, black or coloured. That the appellant still maintained that position, his only request being, he should also be allowed to fully participate in raising his daughter.

23. The submission on the point was that, there was no basis whatsoever, for the trial court to conclude that the appellant does not like black maids and that he may be looking for a white maid. According to Counsel, that finding was a serious misdirection on the part of the learned trial judge.

24. The argument on ground two, was that, the conclusion of the trial judge that the appellant's panel beating Workshop

was a dangerous place for the child Maria Lucia, was arrived at without any evidence. Counsel contended that, the name 'Takkis Panel Beaters' itself, implies this is not a factory with heavy machinery. Hence, the mixing of paints by Maria Lucia was done in an open area with plenty of fresh air; and the adult family members who were always present, would not have done anything which could expose the child to any danger. He pointed out that, what the appellant did, is what is now being encouraged world over. The submission was that, the learned trial judge made a fatal error in fact and in law and an absolute misdirection in law, when she ordered that the appellant should never take the child to his work place.

25. On ground three, counsel's submission was that the appellant should not have been condemned as an irresponsible person for not asking for the custody of a child whose father is alive, as the trial judge appeared to do. That the respondent in her own evidence given at the trial (page 141 lines 4 and 5 of the record) infact indicated she does not

expect the appellant to provide for this child after their divorce and had made other arrangements in that regard.

26. Finally, on ground four, faulting the trial judge for rejecting a joint custody order on grounds that the appellant lacked a conducive environment. The gist of the submission was that, the appellant in his evidence explained, the reason he takes the child with him to his work place is for him to get to spend more time with her, as his terms of access only allowed him to keep the child during the day, up to 17.00 hours, which is the time he knocks off from work. He referred to the appellant's evidence (at page 149 of the record lines 13-20) where the appellant stated that, if he were given time to at least stay with the child for 3 months continuously, he could make adjustments and allow the maid who comes in 3 times a week, work full time.

27. In their written response, the arguments by counsel for the respondent on ground one, was that the respondent repeatedly contended that, the appellant did not want the youngest child of the family to be cared for by 'black maids' and there is evidence of this in the respondent's affidavit at

page 42 of the record. The same view is also repeated at pages 422 and 425. It was further argued that, the respondent's testimony on the issue was categorical and cannot be inferred. That the trial court had the advantage of assessing the demeanour of both parties, understood the respondent's testimony in the words expressed, which words the appellant could not now seek to interpret for her.

28. The submission on ground one was that, if indeed the appellant had been comfortable with black maids, he would not have proposed that his sister or mother care for the child in his absence but would have instead proposed that the child be cared for by a maid, in the security and comfort of his home.

29. On ground two, counsel submitted that, the trial judge's finding of the unsuitability of the appellant's workplace for a girl of tender age must not be interfered with as the lower court properly exercised its primary obligation to consider the welfare of the child as of paramount importance. That the appellant's insistence of taking the child to his Workshop

shows his quest to have the child with him at all costs, even to the child's own detriment.

30. On ground three, the submission was that, the other child was for all intents and purposes a 'child of the family' and recognised as such, by the appellant himself. Counsel's further argument was that, it would be unjust and contrary to the interest and welfare of the two children to be separated for long periods, as this will have psychological repercussions on both of them.

31. On ground four and the appellant's proposition that he would only consider a full time maid if he had the child for a period of 3 months or longer, counsel argued that, the appellant was unwilling to make adjustments to his work life and living arrangements to accommodate the child. Learned counsel pointed out how, faced with the same challenge, the respondent had time and again, taken all necessary steps to ensure the safety and wellbeing of both children irrespective of her work demands. The submission was that, any variation of the order would only serve to have a negative

impact on both children of the family and expose the younger child to unnecessary risk and hazard.

Consideration of the matter by this Court and decision

32. We have considered the record of appeal, written heads of arguments, submissions and the brief oral augmentation made by counsel at the hearing. For convenience, we propose to first deal with grounds one and two in that order, after which we will proceed to consider ground four and conclude with ground three.

33. The issue raised in ground one is whether the trial judge refused to grant joint custody to the appellant on the basis that she considered him to be racist. The Oxford English Dictionary defines a racist as:

> *"..... a person whose words or actions display prejudice or discrimination on the grounds of race."*

34. A perusal of the record of appeal reveals the respondent in her examination-in-chief testified that, they had experienced many problems with maids during the short span of their marriage as the appellant did not want black or coloured maids touching the baby. The respondent in that regard,

referred to an incident when she was not at home and the appellant refused to leave the baby with the maid. She was compelled to drive back home to take care of the baby, as a result. As this evidence which is on record was not challenged by the appellant, we see no basis for faulting the learned judge, for her observations on his attitude towards black maids.

35. The appellant on appeal, in fact argued that he did not want his child being raised by a maid, whether white, black or coloured. That position, in our view, does not aid the appellant on the real point the trial judge was actually trying to make, being that, the appellant who lives alone has no one to assist him look after a very young child. Particularly so, a girl child who was too young to bath herself. The respondent on the other hand, was assisted by a live-in maid who is always available. She was thus, better placed to take care of the child. Evidence on record shows that those were the reasons that informed the trial judge's exercise of discretion in favour of granting custody to the respondent. It was not based on considerations that the appellant is racist

as alleged in ground one of the appeal. Ground one accordingly fails.

36. This brings us to the issue raised in ground two of the appeal, faulting the finding that taking the child to his place of work exposed her to danger. In his affidavit evidence on record, the appellant's explanation for his said conduct was that, this was the only opportunity he had to be with the child, as he was only allowed access to her during working hours. The appellant further stated that when he took the child to his Workshop he let her help him out with mixing of motor vehicle paints which she enjoyed doing. That evidence suggests the appellant's schedule, without adjustment, could not allow him to be with the child during the day. He also had no one to assist him in caring for the child when he was busy and was forced to take the child to the Workshop which may not have been conducive for her.

37. If, as argued by learned counsel in his submissions, the real reason the appellant took the child with him to work was to keep up with the modern trend of encouraging parents to expose their children of the opposite sex to their work

environments; the record shows this was not the appellant's evidence at the hearing. Even assuming it was, the reality still remains that, the particular environment must not pose any risk to the particular child on account of the age, health, physical safety and such other factors. Common sense would actually dictate that certain environments are not generally, suitable for children at all.

38. We also take judicial notice of the fact that, the practice of taking children to work environments is for the purpose of exposing them to career paths that may interest them. It is not intended to be a convenient option, for parents or guardians to use as day care centres, where children can be looked after on an on-going basis.

39. Counsel's further submissions that, Takkis Panel Beaters is not a dangerous place or factory with heavy machinery and the mixing of paints was done in an open area with plenty of fresh air is not supported by the evidence on record. In the event, the said submissions made from the bar, cannot fill the *lacuna* in the evidence, no matter how convincing they may sound.

40. Counsel for the appellant also argued that, there were other adults who could look out for the child to apparently re-inforce its safety. These were the appellant's parents and sister who were said to be "*usually at the Workshop looking after the family business.*" In our view, those adults' primary focus was clearly to run a business and not child care.

41. It is also worth noting, that the paramount duty of a trial judge under **section 75 (1) (a) of the Matrimonial Causes Act, 2007** is to make orders that would promote a child's welfare and best interests. We are inclined to accept that this is what the learned trial judge sought to do in the particular circumstances of this case. We are fortified in that regard by the learned writers of **Bromley's Family Law, 10th Edition** who in discussing the meaning of welfare of a child under the welfare principle at pages 467-478 state that:

> **"...the welfare of a child is not to be measured by money alone nor physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.**
> **.....it is sometimes said that in applying the welfare principle the court must act in the child's best interests and indeed, that is the phrase used by Article 3 (1) of the UN Convention on the Rights of the Child..... it should be appreciated that a judge is not dealing with what is ideal**

for the child but simply with what is the best that can be done in the circumstances".

42. The trial judge was considering the welfare of the child and what she deemed to be in the child's best interest at the time. She found that a mechanical workshop was not a conducive environment for looking after a four (4) year old child. We are unable to fault that finding. Ground two of the appeal must equally fail.

43. Regarding ground four of the appeal, the learned judge's decision not to grant custody to the appellant appears, as earlier found at paragraph 36, to have been informed by considerations that are set out at page 21 from line 9 of the record where she opined as follows:

> *"I further find that the (appellant) is incapable of personally taking care of the special needs of the child.*
> *In view of the cited authorities and all the circumstances of the case, it would not be in the best interests of the child to order joint custody." (underlining for emphasis only)*

44. The above quote makes it clear that the learned judge's decision not to grant joint custody, was ultimately informed by the tender age of the child at the material time. In the cases of **J v C**[1] and **D v M (Minor Custody Appeal)**[2] as

indeed in a decision of this Court in **Elizabeth Nadine Smith Wesson v Brian Sydney Stroud**[3] the best interests of the child, was underscored as the prime consideration in determining issues of custody. In granting custody of a very young child to the mother, we there made the following observations:

> **"In the best interests of the child and considering that the child is of a tender age, we will allow this appeal and set aside the order of joint custody and we award custody, care and control to the mother, the petitioner, with access to the respondent on terms to be agreed by the parties' failure to which terms will be ordered by the Court."**

45. Ground four, contending that the appellant was denied custody for reasons that he lacked a conducive environment to look after a young child is clearly not supported by the evidence on record and it fails for that reason.

46. Turning to the last ground to be considered, being ground three of the appeal, it is obvious that counsel for the appellant gravely misconstrued the remarks made by the learned judge which were made in passing as mere *obiter dicta*. The words complained of can be found at page 17 of the record from line 25 and read as follows:

> *"Ciby was staying with the petitioner and respondent before they became estranged. She was accepted as a member of the family. It is unfortunate that the Petitioner has chosen to disregard her, and that the respondent condones his irresponsible behaviour towards this child."*

47. In our view, the remarks as quoted above, were made to emphasise the point that, both children need stability and should not have their lives unnecessarily disrupted. We are in that regard fortified by the case that was relied upon by the trial judge of **D v M (Minor Custody Appeal)[2],** where in discouraging breaking of a child's established bonds, the court had this to say:

> **"In the first place, it is generally accepted by those who are professionally concerned with children that, particularly in early years, continuity of care is a most important part of a child's sense of security and that disruption of established bonds is to be avoided whenever it is possible to do so."**

48. Further, it is evident from the record that Ciby Ariana Rivera was accepted in the marriage as a child of the family. The relevant parts of **section 5 (1) (c) of the Matrimonial Causes Act,** that was also referred to by the learned trial judge defines 'a child of the family' as:

> **"(c) a child of either the husband or wife, including a child born outside wedlock to either one of them..... if at the relevant time the child was ordinarily a member of the**

household of the husband and wife and accepted by both as a member of the family;"

49. In view of the meaning ascribed to 'child of the family,' as quoted above, the interests of Ciby Ariana Rivera, whose life would equally be disrupted if her sister was taken away from her to live elsewhere, could not be totally ignored when deciding the issue of custody. We, accordingly, fail to appreciate counsel for the appellant's arguments suggesting that her interests were irrelevant as she was not the appellant's biological daughter. The objective of the trial judge to determine the custody application in a way that would be in the best interest of both minor children of the family is captured by her observations appearing at page 20 of the record lines 5 to 11 as follows:

> *"It is clear from the unchallenged evidence of the respondent that there is a special bond between Lucia and Ciby. It is in the best interest of the child that that bond is not disturbed. The respondent has established a programme for the children to follow as regards times to eat, bath, watch television, go to school, play and go to bed. That is good for the stability of both children and should not be disturbed also. It is clear that Lucia has from time to time gotten disoriented upon visiting her father. Both parents should avoid that by following a certain pattern of life for the child."*

50. Ground three is clearly attacking a pure finding of fact that is supported by the evidence on record and cannot be sustained, for that reason.

51. Although the net effect is that the entire appeal fails, we are mindful of the fact that Maria Lucia, who is still a minor, is now 11 years old and not as young as she was at the time the application for variation of interim custody was initially made by the appellant. It is on those considerations, that we vary the custody order to allow the appellant visitation rights and to have the child during school holidays, mid-term school breaks and long weekends. The child may, however, only be removed from this jurisdiction by either party with prior consent of the other.

52. We further wish to underscore the point that, interim custody orders are not cast in stone. The law recognises that various circumstances relevant to the issue of custody sometimes do change for either or both parties, as indeed do the needs of a growing child. The parties thus, retain the liberty to apply for variation of custody orders, before the High Court (Family Division).

53. As the variation we have ordered is not anchored on any of the grounds of appeal put forward by the appellant which were all unsuccessful, the respondent will have her costs of the appeal, to be taxed, in default of agreement.

Appeal dismissed.

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I. C. Mambilima
CHIEF JUSTICE

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J. K. Kabuka
SUPREME COURT JUDGE

.....
J. Chinyama
SUPREME COURT JUDGE