JOYCE MAKUMBE
versus
ANDRISON MUNZVENGA

IN THE HIGH COURT OF ZIMBABWE
MUTEMA AND MOYO JJ
BULAWAYO 2 FEBRUARY 2015 AND 19 FEBRUARY 2015

Civil Appeal

Miss J. Mugova for the appellant
Respondent in person

MOYO J: This is a custody dispute. The appellant is the mother of the minor child whose custody is the subject matter of this appeal. The respondent is the father of the said minor child. The child, namely Tafadzwa Munzvenga, is a female who was aged 2 years at the time the custody dispute was dealt with by the magistrates court. The magistrates court sitting at Bulawayo on 16 of July 2014 awarded the custody of the minor child to the respondent who is the father of the child.

Dissatisfied with the order of the court *a quo* the appellant then approached this Honourable court.

The grounds of appeal are as follows:

1) The court *a quo* erred in fact in finding that it was in the best interests of the minor child that the two year old female minor child be removed from its mother, the appellant and custody be awarded to the respondent.
2) The court *a quo* erred in law in finding that this case constituted an exception to the general rule that mothers are custodians of children born out of wedlock.
3) The court *a quo* erred in fact in holding that the appellant once attempted to abort the minor child while no evidence was led to that effect.
4) The court *a quo* seriously misdirected itself in holding that the appellant did not enlighten the court as to where the minor child would be staying, the security and health

environment under which the minor child would survive, whereas the appellant had clearly told the court as to where she was staying with the child.

5) The court *a quo* erred in law in failing to make a specific order of access of the child by the appellant.

It is important at this juncture to note that this is a case where the parents of the minor child are not married to each other and therefore we are dealing with the issue of custody as it relates to the rights of parents of children born out of wedlock.

The crux of the matter in our view is whether the respondent as the father of a minor child born out of wedlock has any claim or entitlement to the custody of his minor child. The legal position is that in Zimbabwe custody rights in relation to a child born out of wedlock vest in the mother of the child. The father of such a child is equated to any third party and as such the custody rights that vest in the mother can only be interfered with if the mother is not exercising such rights properly.

We can not put it any better than the case of *Cruth* vs *Manuel* 1999 (1) ZLR 7 (SC). In that case at 14E – G this is what MUCHECHETERE JA
(as he then was) had to say:

> "The rights of legitimate parents and those of the mother of a child born out of wedlock cannot be interfered with ordinarily. Third parties (including the father of a child born out of wedlock) are placed in the same category, and can only interfere with those rights in the interests of the child when they are not being exercised properly. In my view it should first be appreciated that it is the rights of the parents and the mother which the third parties would seek to interfere with, and they cannot interfere with another's rights if the other person is exercising them properly. The trigger that only warrants interference must therefore be an allegation that the rights are not being exercised properly and it is therefore in the interests of the child that these rights be interfered with. The welfare of the child in cases of this nature only becomes an issue when there is an allegation that the exercise by the mother of her rights raises some concern. It therefore follows, in my view, that a father of a child born out of wedlock cannot come to court and simply allege that because he is the father of the child, or he is richer than the mother, or he pays maintenance etc, it is in the interests of the child that the rights of the mother should be interfered with."

The learned Judge further states at page 15A that:

> "This would in my view, be elevating the legal status of an illegitimate father to that of a spouse in a divorce situation and negating the accepted principle of law that he has no inherent right in the child born out of wedlock."

EBRAHIM JA had this to add at page 16A:

> "The court is being asked to substitute its own decision for that of a person in whom the parental authority of the minor child concerned vests where such person has not been shown to be incompetent to make such a decision. I do not believe that the function of the court as the upper guardian of all minors embraces the right to assume such a role. The mere fact that the court may reach a different conclusion as to where the best interests of the minor child lie does not automatically make you the best arbiter of such an issue. Accordingly it is my view that the starting point in conducting an enquiry of this nature is whether the third party instituting the enquiry has provided some basis on which a finding could be made that the court is more competent than the person having parental authority to make the decision. If no such basis exists the enquiry can proceed no further, whether the third party is the father of a minor child born out of wedlock or otherwise. If the law is to be changed with regard to such fathers the decision must be that of the legislature not the court."

The aforestated case lays the following foundation in our law:

1) That the father of a child born out of wedlock has no inherent rights of custody as opposed to the mother in whom parental authority in such a situation vests.
2) That the father of a child born out of wedlock is equated to any third party competing for custody rights.
3) That for the father of a child born out of wedlock to challenge the custody rights vested in the mother with success, he should lay a proper foundation, like any other third party would for the interference with the mother's custody rights.

In his founding affidavit the respondent stated that he lived with the child from when the child was 8 months old as the mother attended a nursing school. He also says he fears that the mother would expose the child to human trafficking and baby dumping. He further states that he is permanently employed and can fully support his daughter.

It is our considered view, that the respondent's affidavit that was filed before the court *a quo,* barely lays any ground or foundation for this court to interfere with the parental rights that are vested in the appellant as the mother of a child born out of wedlock.

It is clear that, in launching the application in the magistrates court, the respondent was of the view that he is at par with the appellant in so far as parental authority is concerned. Respondent did not appreciate that his position is in fact similar to any third party who wants to wrestle custody rights from the mother. His founding affidavit falls far short of meeting the test as clearly stated in the case of *Cruth* vs *Manuel (supra*).

It is for these reasons that we find that there is no single reason on the court record that warrants an interference with the parental rights that vest in the appellant as the mother of the child. We accordingly find that the learned magistrate misdirected himself in awarding custody of a child born out of wedlock to the father without first making sure that the father had sufficiently tabulated before the court, cogent reasons why the appellant as a mother of a child born out of wedlock, should be stripped of such rights.

We accordingly allow the appeal. The issue of maintenance immediately arises as the father of the minor child has a legal duty to provide for the upkeep of the minor child. The appellant has claimed maintenance in the sum of $300 per month. We however are not in a position to deal with the issue of maintenance as all the relevant factors and considerations have not been canvassed. It is our view that the matter should be remitted back to the Magistrates Court sitting as the Maintenance court for an award to be determined therein after all the relevant factors, that is the child's needs, the parents' respective means and their respective expenses, have been taken into account.

We accordingly make the following order:

1) The order of the court *a quo* is set aside and substituted with the following:

a) The custody of the minor child namely Tafadzwa Munzvenga be and is hereby awarded to the appellant.

b) The issue of maintenance for the child is hereby referred back to the magistrates court for a proper assessment to be made after consideration of all the relevant factors.

c) That the respondent pays the costs of this appeal.

Lazarus and Sarif, appellant's legal practitioners

Mutema J agrees…….