Judicial implementation of the principle of the best interests of the child in matters relating to custody: a case study of court decisions from Ilala district, Dar es Salaam, Tanzania

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Declaration

I, Leticia Rweyemamu, do hereby declare that this dissertation is my own work and has not been submitted to any other university.

Signature……

Date……

Supervisor's signature……

Date…….

Dedication

This work is dedicated to those who administer justice and those who are in the frontline in defending people's human rights, especially children's human rights.

Acknowledgements

I have every reason to send my special gratitude to the very special people who contributed to making this work a reality.

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I am also thankful to the Registrar, Court of Appeal, for allowing me to conduct my research into the courts within Ilala District in Dar es Salaam region, that is, Kisutu resident magistrate's court, Ilala district court and Kariakoo primary court.

My other special thanks go to the Ministry of Labour, Culture and Sports, the Social Welfare Department, TAWLA (Tanzania Women Lawyers Association) and all the people who contributed to the success of this work.

Abstract

This study centres on the judicial implementation of the principle of the best interests of the child in matters relating to custody in Tanzania. The study aims to explore the factors that are taken into account by the judiciary in implementing the best interests of the child criterion in matters relating to custody.

In this regard the study perused court records on custody of children as a starting point. Investigation of the law relating to child custody was also conducted to assess its adequacy.

The study also stresses that child custody is a human rights issue that needs special attention from all stakeholders.

It is therefore hoped that this study will have implications for change in relation to the gaps or problems identified (if any) for the judiciary when implementing the best interests of the child criterion in custody matters or law.

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CHAPTER ONE

Introduction

> 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration' (Convention on the Rights of the Child, 1989).

What inspired me to research this topic arose from the questions I asked myself about custody of the child after reviewing the law and literature related to it. I asked myself a number of questions referring to the Tanzania Law of Marriage Act, Act No.5 of 1971. Is the principle of the best interests of the child really implemented by the judiciary? Is it really the child's best interests or someone else's interests? Does the child say what he or she really thinks is in his or her best interests or it is influenced from outside? Does the consideration taken by the judiciary in awarding custody regarding the financial situation of parents and customs of the community to which the parties belong, serve the best interests of the child? It is therefore from these questions that I decided to undertake this study to explore the judicial implementation of the principle of the best interests of the child in custody matters and get to know what is happening on the ground as far as this principle is concerned and with regard to the adequacy of the law on child custody in Tanzania.

I also wanted to focus on child custody because children are the victims of their parents' conflict so I wanted to find out how the welfare of the child is best taken care of by the judiciary when it comes to custody issues.

I also had to change my topic a bit from 'marital child' to 'child' to make a comparative study of how custody cases concerning both children born in wedlock and those born out of wedlock are handled by courts.

Therefore, in this study I will examine the judicial implementation of the principle of the best interests of the child as a primary consideration when a court decides custody matters.

The thesis is organized into seven chapters. Chapter one deals with the introduction to the study where definition of terms, statement of the problem and objectives of the study are covered. Other aspects included in chapter one are research assumptions, research questions, significance of the study, limitations of the study and demarcation of the study. The methodological framework of the study including the methodology adopted and methods of data collection used are covered in chapter two. Chapter three covers review of related law and literature. Chapter four deals with findings and in particular factors that the judiciary considers in awarding custody are included and analyzed. Chapter five presents voices of women and men on child custody and children's preferences, as they are the ones who are affected by court decisions in the light of child custody. Chapter six, by way of summary concludes this thesis and, lastly, chapter seven presents recommended possible solutions to the problems/gaps arising there from implementing the best interests of the child criterion in matters relating to custody.

Definition of terms

- 'Implementation' means application.
- A 'child' means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier (article 1 of the Convention on the Rights of the Child, 1989).
- 'Child custody' is simply the right to have a child with you, especially when that right is granted through an order issued by a court hearing dissolution of marriage case (*Legal Term.Com*, 2005).
- The 'best interests of the child' is the criterion employed in determining whether the decision reached in accordance with the needs of the child in question (Davel, 2000).

Statement of the problem

It is difficult to determine the best interests of the child. As Palmer (1996) observes, the application of the best interests criterion is always difficult because it is hard to know which factors to take into account when deciding what is in the child's best interests. There are some factors which the judiciary considers in issues of custody, such as the customs of the community to which parties belong, the behaviour of the parents and their financial situation, which can limit or deny the best interests of the child in custody matters. From the literature I read, it seems that the courts do not often call for the opinion of the child and as a result they give more weight to the custodian's parent's views. Hence, the study seeks to find out how the judiciary implements the best interests of the child criterion in matters relating to custody, using court decisions from Tanzania as examples.

Objectives of the study

The overall objective of the study is to investigate how courts apply the best interests of the child criterion in issues of custody in light of courts' decisions. The specific objectives are as follows:

1 To investigate factors taken into account by courts in deciding custody;

2 To investigate how courts apply the law relating to custody, its adequacy and compliance with human rights instruments;

3 To investigate problems or gaps in implementing the best interests of the child criterion by the judiciary in custody matters;

4 To recommend possible solutions to the problems arising in implementing the best interests of the child criterion in matters relating to custody.

Assumptions

In designing the research, the following assumptions have been formulated to meet the objectives of this study.

1 The judiciary considers the best interests of the child in custody matters secondary to the custodian parent's interests.

2 The judiciary tends to give preference to parent with a better financial situation in custody matters, which may contribute to the denial of the best interests of the child.

3 Judicial considerations of the customs of the community to which parties belong in terms of how they deal with issues of custody limit the child's best interests.

4 Judicial considerations of a woman's behaviour and role in marital breakdown often make women lose custody of child.

Research questions

1 Whose interests are taken into account by courts in awarding custody?

2 To what extent is the financial situation of the parent taken into account by the judicial officers in awarding custody?

3 To what extent do the customs of the community to which parties belong affect and influence issues of custody when considered by judicial officers?

4 To what extent does a woman's behaviour and her role in marital breakdown influence issues of custody?

Significance of the study

This study focused on the application of the best interests of the child criterion by judicial officers in custody matters. It also looked at the application of the law relating to custody matters by judicial officers and the problems or gaps in implementing the best interests of the child criterion in custody matters, thus it aims to assist in finding the solution to such problems or gaps.

Limitations of the study

The following are the difficulties I encountered during my research.

1 Inaccessibility of litigants in courts

There were very few cases on custody of the child from Kisutu resident magistrates' court, Ilala district court and Kariakoo primary court and some cases were adjourned because most of the magistrates were on leave. There was also one magistrate who was sick during the day of hearing a custody case so she was not around and the case was adjourned. I only managed to interview one litigant (a mother) at Ilala district court. I did not manage to interview her husband because he had already left after the case was adjourned, I only found the wife outside the court's gate. At the time of the hearing of this case that I interviewed the mother about, there was a similar custody case going on in another court room, hence it was difficult for me to attend that case. I therefore interviewed mothers and fathers from the street who had disputes on custody and people from the Tanzania Women Lawyers Association (TAWLA).

Inaccessibility of men/fathers

It was difficult for me to find as many men as I had planned to interview; I had planned to interview ten men but only ended up interviewing four. When I asked women/mothers I interviewed from TAWLA when they came for legal aid, if I could also interview their husbands, they told me that it wasn't possible for them to call their male counterparts as they were living separately and were not on good terms. Others told me that their male counterparts were very aggressive so they would not come for the interview. I was also denied access to mothers and fathers from the social welfare office as I was told that parties' issues are confidential so they could not tell people who come before them that there was someone who wanted to interview them.

Courts' records are not detailed

Most of the courts' records I perused, particularly those on issues of child custody, are not detailed about how the court arrived at the decision. I found most of them included sentences like: 'The court entered judgment for the petitioner as prayed' or 'The welfare principle, in the circumstances of this case prohibits granting custody to the respondent. The child will be in the custody of the petitioner.' Therefore I had to depend on the few cases which were somehow more detailed.

Demarcation of the research area

Geographically the study was limited to Dar es Salaam region with specific reference to courts within Ilala district, that is Kisutu resident magistrates' court, Ilala district court and Kariakoo primary court. The research was limited to the judicial implementation of the best interests of the child criterion in relation to custody matters.

CHAPTER TWO

Research methods and methodology

Several methodological approaches were used to investigate the assumptions and objectives of this study. These approaches included women's law, grounded theory, legal pluralism and semi-autonomous social fields, legal aid, human rights and gender and law.

Methodology

In carrying out the study, I employed the following theoretical approach:

Women's law approach

Women's law is a grassroots-oriented research methodology that takes the woman as a starting point following through all other experiences that shape her life (Bentzon, 1998). It is multidisciplinary and hence it covers many issues, in this case: the effects of child custody on the woman as mother and on the man as father; women's position in relation to men's in issues of custody; and the roles of the mother and father in issues of custody. Child custody therefore has a lot to do with women's law, particularly because it is generally perceived that the interests of the children and those of women are closely linked (Kwariko, 2004: 4). Moreover, child custody affects a woman as a mother directly because she is the one in whose custody her child may or not be, as far as the court's process is concerned. The same applies to the man or father. Since a mother is regarded as the primary caretaker of the children, her role is vital when it comes to issues of custody. Also, the father plays an important role as breadwinner when it comes to issues of custody. Therefore in employing this methodology, secondary sources such as court records were used to link child custody and the roles of mothers and fathers, to see how they are affected by courts' decisions with regard to who deserves custody of the child and why. In this regard I perused 30 cases. For example, as far as my second research question was concerned, which was to see the extent to which the financial situation of the parents was taken into account by the judicial officers in awarding custody, I found that some of the fathers were granted custody of the child simply because they were financially capable. Also, mothers who deserted the matrimonial home lost custody of the child, as far as my fourth research question on the extent to which a woman's behaviour and her role in the marital breakdown often cause women to lose custody of the child concerned. This approach was useful to me as it helped me discover how women as mothers and men as fathers, were affected by child custody decisions taken by the judicial officers, as far as my research questions were concerned. It also helped me understand how the courts handle custody matters as far as the best interests of the child criterion is concerned.

Grounded theory approach

In carrying out this study, I wanted to observe the courts' process so as to know what is happening on the ground as far as my research questions were concerned, which were:

- Whose interests are taken into account by courts in awarding custody?
- To what extent is the financial situation of the parent taken into account by the judicial officers in awarding custody?
- To what extent do the customs of the community to which parties belong affect and influence issues of custody when considered by judicial officers?
- To what extent does a woman's behaviour and her role in marital breakdown influence issues of custody?

I only managed to observe one case and I did a one to one interview with one litigant (a mother). As regards my observations, the trial magistrate handled the case fairly as both parties were given equal rights to be heard. They were also given an opportunity to express their wishes as regards custody of the child whereas both of them wanted it. Since there were so few custody proceedings in the courts, I had to develop my grounded theory by finding other places where related cases were handled. I wanted to know what was happening on the ground and to better understand the lived realities of the parents involved in custody disputes and to hear their views on handling of custody cases by relevant institutions, as far as my assumptions were concerned. Therefore I went to the social welfare office which also takes care of cases of this nature but I was denied access to parties whose cases related to my topic as I was told that their information is confidential.

I then had to go to Tanzania Women Lawyers Association (TAWLA) which provides legal aid to women and children as one of its functions, and I am also a member there, to find out if custody issues appear in the context of providing legal aid. There I found women who wanted custody of their children; some had already filed their cases in court but most of them had not done so yet. In this case, I interacted with them in one to one interviews and managed to get their views on child custody and the courts' handling of custody cases as far as my assumptions were concerned. I didn't stop there; I also had to find parents, particularly fathers on the street, who had been part of cases of this nature. I also engaged in one to one interviews with fathers from Kunduchi and Boko within Kinondoni district, so as to get their stories, their views on child custody and the handling of custody cases by relevant institutions. These categories of analysis were important to my research as they helped me find out about other institutions that deal with custody cases, like the social welfare office. For example, Mr Y, a contractor from Kunduchi, whose case was handled at the social welfare office, told me that he was denied his right to be heard as he was told that he wasn't called for arguments but only to say if he had forgiven his wife. He said that his wife was given an opportunity to express herself but he was denied, hence the matter was referred to the court where he was given his right to a fair hearing. Mr B, a farmer from Boko, whose case was also handled at the social welfare office, told me that the matter was handled fairly as he, his wife and their children were all called to express their wishes. His children chose to stay with him because of the behaviour of their mother as she was not spending time with them because she is promiscuous; she decided to abandon the children and him too. Therefore, the social welfare officer granted custody to the father.

Although I was denied access to the parties at the social welfare office, TAWLA helped me to talk to women who had similar issues related to my topic so that they could add value to my research. Women as mothers were valuable to my research and were among the people I initially planned to interview since they are affected by custody cases. I needed their opinions and their information on issues like the financial situation of the parent, the effect of a woman's behaviour and her role in the marital breakdown, which judicial officers take into account in custody matters. For example, some of them were believed that not only the financial situation of the parent should be taken into account but also his or her character as well.

Legal pluralism and semi-autonomous social fields

One of my research question was on the extent to which the customs of the community to which parties belong, in terms of how they deal with issues of custody, limit the child's best interests. I used this approach to find out how courts, through court records, apply customary law in custody cases. Therefore, I perused 30 cases but found no case where customary law was applied. Using court records, I also looked at how state laws related

to child custody, such as the Law of Marriage Act, were applied by courts in custody disputes. The approach was useful to me as it gave me insights into how courts applied the Law of Marriage Act since all the 30 cases I perused were covered by it, being custody cases that arose as part of a divorce. I was also able to find out how parents understand the law relating to child custody by interacting with mothers and fathers in one to one interviews. For example, through court records I found out that the courts misinterpreted the tender age presumption provided for under section 125 of the Law of Marriage Act and considered the interests of the child secondary to the custodian's parent's interests, as my assumption one states – giving parents automatic right over custody of the child.

I also looked at other institutions that deal with issues of child custody, like the social welfare office, and engaged in one to one interviews with social welfare officers. I also interacted in one to one interview with fathers whose cases were handled by the social welfare officers. It was useful as I was able to discover how these cases are handled apart from in the court.

Actors and structures approach

As far as my research questions were concerned, I used this approach to interact with the magistrates, my key informants, from Kisutu resident magistrates' court, Ilala district court and Kariakoo primary court, in one to one interviews. In this regard, I wanted to get information on the factors they take into account in deciding custody of the child as some of my research questions were: *whose interests are taken into account by courts in deciding custody of the child?; to what extent is the financial situation of the parent taken into account by judicial officers in custody matters? And also to what extent do the customs of the community to which parties belong affect and influence issues of custody when considered by judicial officers?* For example, my assumption three states that the judicial considerations of customs of the community to which parties belong in terms of how they deal with issues of custody, limit the child's best interests. I used this approach to get information from the magistrates to find out why the customs of the community to which parties belong were not considered by courts in custody cases after I found no case where this applied. The approach was useful to me as it gave me insights into why customs were no longer applied and I found out that one of the reasons was that customs infringe women's rights to have custody of their children. I also used this approach by interacting with the magistrates in one to one interviews, by way of the 'second person' method in order to find out if children were ever called to court to express their wishes and preferences. I was told, for example, that children prefer to stay with a parent who spends time with them. Assumption one states that judiciary consider the interests of the child secondary to the custodian parent's interests and I needed to check the validity of this assumption.

Legal aid approach

Two of my research questions related whether judicial officers take into account and are influenced by the parents' financial situation or the woman's behaviour and her role in the marital breakdown in their custody decisions. I used this approach to provide legal aid to mothers in custody disputes at TAWLA so as to get their views about the above issues and also about the courts' handling of custody cases. In this regard, I interacted with women in one to one interviews. The approach was useful to me as I was able to interview eight women who told me their stories and their views about the courts' handling of custody cases, particularly on the issues mentioned of the parents' financial situation and the woman's behaviour and role in the marriage breakdown. For example, of eight women interviewed, two suggested that the courts shouldn't take into account the financial situation of the parent in custody matters.

Human rights framework

As one of my objectives was to investigate the adequacy of the law related to child custody and its compliance with human rights instruments, I used different human rights instruments related to child custody. These instruments were mainly the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). This approach was useful as it gave insights into the Law of

Marriage Act and I found out that some of its provisions do comply with the above human rights instruments. For example, the best interests of the child criterion which is the guiding principle of both the human rights instruments, is also the guiding principle of the Law of Marriage Act in matters related to custody.

Gender and law approach

One of my research questions was on the extent to which the financial situation of the parent is taken into account by judicial officers in awarding custody of the child. In this regard, I used the gender and law approach to compare women and men's positions in perusing 30 matrimonial cases. The approach was useful as I was able to ascertain who between a mother and a father in custody disputes, tends to be granted custody of the child as far as the financial situation is concerned. For example, in most custody decisions it was fathers who got custody of the child because of their financial position which was seen to be better than that of their female counterparts.

Methods of data collection

Qualitative and quantitative techniques were used in this study for data collection. Quantitative research methods were used to obtain statistical data on the number of the respondents interviewed while qualitative research methods were used throughout the research in collecting data from the respondents by engaging in one to one interviews and key informants interviews.

Records

Court records were used as secondary sources. Court records locate themselves within a court process as a starting point and then continue on to other spheres. In this case therefore, 30 cases were perused from the years 2000–2005 from Kisutu resident magistrates court, Ilala district court and Kariakoo primary court, as shown in the table opposite:

Table I

Year	Kisutu RM's Court	Ilala District Court	Kariakoo Primary Court
2000	2	2	
2001	7	1	
2002		2	
2003	4	4	
2004	2	3	
2005	1	1	1
Total	16	13	1

They were the magistrates' records and they were useful as they gave me insights into how courts implement the best interests of the child criterion and which factors are taken into account in awarding custody, for example, whether they were influenced by the financial situation of the parent. The matrimonial cases files were not seen at Kariakoo primary court where I only managed to peruse one case.

Interviews

Key informants interviews were used as shown in the following table:

Table II:

Place	Magistrates Female	Male	Litigants/Mother	Social Welfare Officers Female	Male
Kisutu Resident Magistrates' Court	6	2			1
Ilala District Court	2		1		
Kariakoo Primary Court	3				
Lumumba-Head Quarters				2	
Total	11	2	1	2	1

The reason for interviewing nine women magistrates is that all the courts are occupied mostly by women magistrates rather than male magistrates. For example, there are no male magistrates in Kariakoo primary court; all seven magistrates are women.

In-depth interviews are shown in the following table:

Table III:

Place	Mothers	Fathers	Children/Female
Kunduchi	2	3	1
Boko		1	
TAWLA	8		2
Restaurant			2
Total	10	4	5

Observations

I used observation for the court process. I observed one matrimonial (divorce) case which also included issues of custody at Ilala district court and noted how the court handled the case in terms of equality between the parties. I observed that both parties were given equal opportunity to be heard and express their wishes with regard to custody and they were able to try to convince the court that they deserved custody of the children. The matter was heard in chamber. The magistrate, before coming to the issue of divorce, asked the parties if they still loved each other and if they could continue with their marriage and maintain their children together. They both said no and that they wanted the marriage to be dissolved. With regard to custody, the wife said she wanted custody because her husband had remarried their housemaid and his new wife was very harsh with the children when they went to their father's place. The father said he wanted custody because the mother did not take care of the children, she didn't cook for them or wash their clothes, since she left home early in the morning and came back at night; he said he was the one who cooked for the children. The case was closed and was set for judgment on 15 February 2006, at which point I was already back in school for my write up. But what I also observed is that the magistrate did not bother to call for the views of the children despite the fact that both parents wanted custody. The couple had four children born in 1991, 1993, 1995 and 1997.

Second person method

Initially I wanted to interview children who are called to court to express their wishes but I did not come across a custody case where the children's views were sought. Hence I decided to use the second person method of interviewing magistrates and asking them if they happened to seek the views of the children, so as to get information about children's preferences and how the court handled these cases.

The method was useful as it gave me insights into the age children can be called to court to express their wishes and about children's preferences when it comes to issues of custody. I was also able to find out if the children are asked where they prefer to stay in the presence of their parents and, if so, whether they feel intimidated or not when they are asked to choose between their parents. For example, most of the magistrates told me that they ask the children in the presence of their parents and in chamber so as to make parents who were mistreating the children start to behave themselves. Some children freely express their wishes in the presence of their parents and others are afraid but they still have to express their wishes in the presence of their parents so that justice is not only done but is seen to be done; the parents need to hear what their children have to say. The disadvantage of this is that I could not personally observe the court process as regards children's views, I had to rely on secondary information.

CHAPTER THREE

Literature review

This chapter examines a variety of literature related to child custody. Most of the literature on child custody is from outside Africa. However, there is some literature on child custody from Africa in general and from Tanzania in particular. Thus different publications related to the best interests of the child in matters relating to custody were examined in order to derive a problem for research. Some of these publications are discussed below.

Wallace Mlyniec (1978: 4-6,) examining child custody in private custody disputes in America, argued that there is no hard and fast rule for determining what factors will ultimately assure the future welfare of the child. He continued that each case must be considered in the light of all of the facts and circumstances. However, he observed that the biological fact of motherhood is an important factor to be considered in regard to very young children. According to him, a custody decision must be made with reference to the child's best interests. But in most custody cases, decisions are made by reference to generalities, without a statement of specific findings in the decision. He pointed out that:

> 'One rare judicial definition of "in the best interests" states that the child has the right to the best available home environment and to the pleasure and benefit of friendly association with both parents unless it is harmful or impractical.'

This would appear that the child has a right to the company of both parents in some fashion once the family unit is dissolved. Mlyniec also mentioned the factors that courts consider for determining custody of the children and these are: social, spiritual, psychological and economic environments in the different homes; the educational and religious opportunities; the child's physical and mental health; the bonds of love and understanding; the age of the child and parties; and the amount of time available for rearing. He added that the sex of the child may be relevant since most courts assume that the interests of a daughter are best served by placing her in the mother's custody and the interests of a son, old enough to no longer require a mother's constant care, are best served by placing him in the father's custody. In effect, these factors that are considered by the courts may relate either to traditional proof of parental unfitness or to the investigation of the best interests of the child. He also pointed out that the changing focus of the proceeding, the replacement of old standards and the expansion of children's rights has increased the number of people involved in custody proceedings. Hence, social workers have been asked to make reports to the court and psychiatrists and psychologists have been called as witnesses to testify at the proceeding so the judge can render an intelligent decision. However, the addition of these persons has not made the judge's task any easier. He added that, since these experts have failed in their roles, an attorney, guardian *ad litem* or friend of the court has been introduced into the proceeding to represent the interests of the children.

Christina Sachs (1973: 38-39), examining children's rights in England, was of the view that in the context of matrimonial breakdown, an important aspect of the situation is the welfare of the children of the family that is

being broken up. She quoted the Law Commission's *Field of choice* report which states that:

> '…the procedure…would have the merit of ensuring that in every divorce case the interests of the children would be an issue before the court and that issue would be recognized as one which is just as important as the question of divorce….If the interests of the children were thus placed in the forefront, the parents themselves would…be led increasingly to recognize their responsibility towards their children.'

She added that a development in matrimonial disputes that affects children is the move away from the view that an adulterous parent could never be given custody and sometimes even access to the child, and affirmation of the view that an award of custody of a child is not a reward for a virtuous spouse. She gave an example in the case of *S v S* [1962] 1 W.L.R 445 where a mother who was clearly open to criticism in personal character was not deprived of access to her children because she was a good mother.

Sheldon Kirshner (1979: 286-287) examined determination of child custody in America and noted that in most cases parents decide matters of custody for themselves. The parties, through their attorneys, present their agreement as a fait accompli and it is generally accepted. He pointed out a number of possible conflicts between the motives or interests of parents and the best interests of their children to include:

- As the child is frequently viewed, consciously or sub-consciously, as an extension of the individual, a parent may seek custody of the child for narcissistic reasons.
- Custody by one parent, particularly over a child who is the favourite of the other parent, may be sought in order to punish the other parent. The problem may not come to the attention of the attorneys or the court but may be handled as an intra-family matter with threats of recrimination and offers of property settlement as part of the scenario.
- Custody to the mother generally means for her a higher support figure, while custody to the father a lower, if any, support figure. It is not uncommon therefore for fathers to contest custody formally or as an intra-family matter in order to withdraw from the contest in exchange for the mother agreeing to less support. A proposed large settlement or substantial item of property such as a house, may be the factor determining whether custody is contested.
- The father may believe that he is the better custodial parent but that he will not be able to meet his career responsibilities and properly care for his children if he is awarded custody. He may therefore indicate that the mother is the better parent.

P. M Bromley(1987: 294-333) examined the jurisdiction to make orders relating to custody in England. He observed that the term 'custody' has its origins in common law and, as a legal concept, the term can either refer to the power of physical control or the bundle of powers over the child's education, religion, property and general upbringing. With regard to the welfare principle that the child's welfare should be first and paramount consideration, he quoted Lord McDermott in the case of *J v C* [1970] AC 668, 710, [1969] 1 All ER 788, 820-821, HL emphasizing the two words 'first' and 'paramount' he said:

> '[These words] must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of the parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.'

Explaining how courts consider the behaviour of a mother in custody cases, he noted that in the nineteenth century it was the practice of the divorce court not to give care and control to a mother who had committed adultery and it was not until the end of the century that the courts were prepared to concede that this should not automatically deprive her of custody. But it is now established that matrimonial misconduct is relevant

only insofar as it reflects on that person as a parent. Hence the court is not concerned about punishing the adult for his or her conduct but only with doing what is best for the child. He also observed that despite the welfare principle, it is hard to find the courts' definition of what it really means by the term 'welfare'. There are few statements where courts defined the term 'welfare'. In *Re McGrath (Infants)* [1893] 1 Ch 143, 148, Lindley LJ said:

> '…the welfare of the child is not to be measured by money alone nor by 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 wellbeing. Nor can the ties of affection be disregarded.'

> The best modern statement of the meaning of 'welfare' is made in New Zealand's case of *Walker v Walker and Harrison* [1981] NZ Recent Law 257 where Harrison J, said: '"Welfare" is an all-encompassing word. It includes material welfare, both in the sense of an adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place, they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents.'

He also questioned the welfare principle as if it is truly child-centred and quoted an author Maidment who examined child custody and divorce and commented that:

> '…the welfare principle, ostensibly child-centred, has also been and probably always will be a code for decisions based on religious, moral, social and perhaps now social science-based beliefs about child-rearing….these decisions were in the past and are for the present made by adults for adults about adults. When a court makes a custody decision it may attempt to heed the child's needs, but it is essentially making a decision as to which available adult…is to care for the child…'

Bromley also noted the importance of courts calling for advice from a social welfare officer in custody matters and said:

> 'It should be appreciated that a welfare officer is an officer of the court and as such has an independent role, being neither the child's representative nor a witness for either party. Hence, the social welfare officer is expected to visit and interview the various parties, including the child, at their respective homes and if necessary, to extend enquiries to the wider family, school, family doctor and other persons whose observations may be helpful, with a view to providing the court with *factual information* (my own emphasis) on which to make a decision.'

He also commented on the issue of obtaining evidence from children where he said judges may have private interviews with children but much will depend upon the age, ability and temperament of the child and the skill of the judge, and the decision whether or not to see the child is entirely a matter for the judge. As it was stated in *D v D* (1979) 2 FLR 610 by Ormrod LJ that:

> 'If ever a matter was a personal matter for a judge it is the question of seeing or not seeing children. It is highly sensitive decision both for the child and the judge himself and a judge, in my judgment, is fully entitled to make up his own mind…about whether or not to see children. It is a very delicate situation indeed in my experience and it can be extremely embarrassing to a judge when he can see already the likelihood that he will come to a decision which is adverse to the wishes of the child.'

If a judge does decide to see a child in private it is wrong to promise not to divulge confidences vouchsafed to him.

With regard to the application of the welfare principle, Bromley pointed out that there are no rules for determining who should be granted the right to look after the child beyond saying that the child's welfare is the first and paramount consideration. Also as Dunn LJ put it in *Pountney v Morris* [1984] FLR 38, 384:

> 'There is only one rule; that rule is that in a consideration of the future of the child the interests and welfare of the child are the first and paramount consideration. But within that rule, the circumstances of each individual case are so infinitely varied that it is unwise to rely upon any rule of thumb, or any formula, to try to resolve the difficult problem which arises on the facts of each individual case.'

Anne Palmer (1996: 98-112) presented research findings on the application of the best interests criterion in custody decisions relating to divorce in the period of 1985-1995 in South Africa. She noted the duty of courts as upper guardian in disputes concerning custody which was spelled out in *Shawzin v Laufer* 1968 (4) SA 657 (A) where Eloff JA said:

> 'To the court, as upper guardian, the problem of custody is a somewhat singular subject, in which there is substantially one norm to be applied, namely the predominant interests of the child.'

According to her, this means that where necessary the court can intervene in a family situation if it is deemed to be in the children's interests to do so and this is usually done in instances of abuse or gross neglect. She said that society agrees that this kind of intervention is necessary to protect children who are powerless and vulnerable. She observed that the fact that, in the majority of divorces, the custody of the children is decided by agreement between the parties rather than the court, raises doubts as to whether the best interests of the children involved in thousands of divorces granted each year are served. The courts are reluctant to intervene in divorce cases. Where there has been apparent agreement as to the arrangements for the custody of the children of the marriage, the court will seldom do more than ask the party present whether the arrangements are the best that can be made in the circumstances. She added that it is not even required in uncontested divorce matters that both parents be present in the court. It is possible for one spouse to obtain a divorce quite against the other spouse's real wishes. That spouse may reluctantly agree to a divorce only because there is apparently no hope of restoring the marriage relationship and there is little sense in obstinately refusing to consent.

Therefore, an agreement on paper tells one nothing about the bargaining position of the parties when they came to that agreement. Despite the law stating that the court may call for investigation on the arrangements for the children and it is possible for the court to call anyone it wishes to appear before it, this is very seldom, if ever, done. It is not clear why this should be so. But she stated that in part this could be that it has become convention that where the parties seem to be in agreement and there is no obvious reason to query this arrangement, the court deems it better to let the matter rest. She continued that it is well known that in their society people have a strong reluctance to become involved in what are called domestic disputes. She went on to ask questions as to how do the courts determine the best interests of the children? Is the court in a position to make a judgment that is really in the best interests of a particular child based on what is before it; and, if it is, are there judicial guidelines as to what factors to take into account or which will influence the court in reaching its decision?

It was later in the case of *French v French* 1971 (4) SA 298 (W) where guidelines concerning the best interests of the child were outlined. These include the child's sense of security, including the extent to which the parents made such child feel loved and wanted, as the primary consideration. It was followed by suitability of the proposed custodian parent which was to be determined by enquiring into that parent's character, religious and language background and general moral fitness; material considerations; and the wishes of the child, taking into account the age and maturity of the child. She noted that since the concept of the best interests of the child is indeterminate and seen by many to be desirable. Therefore, in this way the ever-changing social values and standards and customs may be reflected in decisions about custody of children. She also observed that applying the concept is always difficult because what is best for a specific child, or children in general, can be determined only if all the options are known, which, of course, is impossible. She added that:

> ‘Not only is the option of the marriage being saved or resuscitated apparently impossible, but the ability to predict the future is beyond the best of us. Knowing which factors to take into account when deciding what is in the child’s best interests is also difficult. Is the child’s security and happiness paramount? Is his or her religious and moral welfare paramount? Is his or her material welfare the most important consideration? How much weight, if any, should be given to the child’s own wishes? These questions cannot be answered determinately because the circumstances of each child and his or her family situation differ from that of another. Generally it is thought that a combination of the factors will best find out what is in the child’s best interests.’

She also pointed out that the wishes of the children are not given due weight and in some cases their wishes are considered after all other relevant factors have been determined. She quoted Steyn J in French’s case implying that the wishes of the children are the last to be considered when he said:

> ‘Even where the suitability of the proposed custodian parent is settled and the psychological security of the child is ensured, material considerations relating to the child’s well-being will also be considered…. Finally, the wishes of the child will be take into account – with young children as a constituent element in the enquiry where they will attain a sense of security, and with more mature children, a well informed judgment, of what the best interests of the child really demand.’

The age and maturity of the child seem to be determining factors in deciding the weight to be accorded to the wishes of the child. Sometimes physical age is considered to be more important and it was warned that placing undue emphasis on this factor leads to the best interests criterion being subverted. Emphasizing the physical age and children’s emotional preferences in *Greenshields v Wyllie* 1989 (4) SA 898 (W), Flemming J said:

> ‘…because the courts know that children grow up, their perspectives change, that their needs change, a court is not inclined to give much weight to the preferences of children of 12 and 14.’

Palmer (1996) went on to comment that in some areas of family law, 10 year olds are considered old enough and mature enough to express an opinion which could greatly influence the decision, while in custody matters the courts seem generally reluctant to give much weight to the children’s wishes, although, clearly there are exceptions. She went on to ask whether it was due to the fact that the children are usually not represented in court? She added that the court has the power to appoint a legal representative for the children but seldom does so. She also questioned whether, in a case where the children have indicated wishes that are different from those of their parents, these should not be fully investigated.

Bart Rwezaura (1998: 70-75) examined the duty to hear a child in Tanzania and observed that the Law of Marriage Act which requires the court to have regard to the wishes of the child does not contravene article 12 of the Convention on the Rights of the Child which also provide for the right of a child to an opinion. With regard to the wishes of the infant, he pointed out that in practice children views are rarely sought by courts. He added that this has always been the practice although occasionally a court might depart in order to accommodate special cases. The reasons for not seeking for the views of the child by courts are that first, there is a widely shared feeling within the community that parents know what is best for their children and this makes courts reluctant to interfere. He continued that although section 108 (c) of the Law of Marriage Act, Act No. 5 of 1971 requires courts to inquire about the custody arrangements, this is not normally done in cases where the issue is not raised by the parties.

The second factor is that many parties confuse child custody (an English family law concept) with the concept of guardianship under English common law which, in Rwezaura’s view, approximates the local notion of lineage membership and belonging. This made some of the parents hesitate, for example, a former wife might feel reluctant to apply for custody primarily because she believes that such a custody application might suggest or imply that the children do not belong to the former husband’s lineage.

Also in an interview with a social welfare officer, Rwezaura was told that one of the reasons that children's views about custody are not sought is that, if a child is asked to choose the parent whom he or she would like to live with, this will be taken as a rejection of the other parent and the consequences tend to be more serious if the person rejected is the child's father rather than the mother. This is mainly because in patrilineal societies, which are the majority in Tanzania, children born in a valid marriage belong to the mother's husband. He also noted that even the views of children born out of wedlock are not considered relevant because the rules are assumed to be clear. He commented that the rules of customary law governing the allocation of parental rights and duties are not based strictly on the principle of the best interests of the child as envisaged in section 125 of the Law of Marriage Act. The decisions are rather based on the father's right as the natural guardian of his child, provided he takes necessary steps to be legally defined as a parent. Furthermore, he observed that after 1971, courts have increasingly applied section 125 of the Law of Marriage Act to all disputes concerning children, including affiliation proceedings. He added that in either case, Tanzania courts have not got to the point of accepting that the child's views constitute an important part of the custody decision. Thus, no established practice exists of courts seeking the opinion of children under the Law of Marriage Act where it is clearly stated that the child's wishes are to be sought and carefully considered or under the affiliation law where no such provisions are made.

Magdalena Rwebangira and Edith Mneney (1995: 60-65) examined the legal status of women in Tanzania, and noted that the welfare of the child is the guiding principle for courts in allocating custody of infant children in the event of separation or divorce under the Law of Marriage Act. They observed that there is clearly ample room for exercise of discretion in the interpretation and application of section 125 of the Law of Marriage Act and whether the discretion is exercised by the court depends largely on the orientation of the court both ideologically and politically. They noted that, according to studies of court cases in Dar es Salaam in the years 1990-1991, most custody claims were brought by women. Most of custody awards were made in favour of the mother and this was when the petition for divorce did not include other requests for valuable assets like refrigerators, sewing machines, cookers, houses and furniture. Furthermore, most cases were decided *ex parte* and were uncontested. In that same study, of the 21 completed court files examined at Kisutu court for the year 1987, 17 mothers got custody and, out of these, 15 were uncontested. In three out of four contested cases (75 per cent) mothers did not get custody. Hence, they observed that when a custody dispute is not contested, a mother is likely to get it, and when it is contested, a mother is unlikely to get it, despite the fact that the welfare of the child principle is spelled out in the law as paramount. They argued that the criteria adopted by courts in the exercise of this discretion have been three-fold, namely: economic considerations, suitable housing and mother's behaviour and its role in the break-up of the marriage.

With regard to economic consideration, they were of the view that when custody claims are contested, other things being equal, it is the parent's economic ability to provide for the child that is given prime consideration. Where a mother has a formal job, steady income and accommodation, she has a good chance of getting custody of the younger children and even the older ones if the father is proved violent as in *Regina Mchaunde v Simon Mchaunde* DSM District Court No. 43 of 1987. They further contended that many women do not have a steady income as many of them are employed in the informal sector where income levels not only fluctuate but where it is also difficult to prove. Most do not keep books of accounts nor do they receive payment slips which they would tender in court as evidence of their income. Also, most women work in the home and they lose means of subsistence on divorce. Moreover, they argued that courts tend to ignore the element of primary care which mothers provide in the home. If a woman does not have proof of sufficient income, it is assumed that she cannot take care of the children. They were also of the view that often fathers get custody of children and send them to their grandmothers in the rural areas. But when women do this it is viewed gravely by the court as deprivation of parental love and care as it was in *Selestine Kilala and Harma Yusuf v Restiluta* and *Rehema Mmbaga v Abdu Mgassa* (unreported).

On the part of a mother's behaviour and her role in marital breakdown, they noted that this seems to play an important part in deciding the suitability of a mother as a custodial parent. They cited a case of *Rehema Mmbaga v Abdu Mgassa* (Supra) whereby a wife who refused to accompany her husband on transfer was rebuked and denied custody by the court.

However, they observed problems in the law of custody of infants and noted that section 125 (c) of the Law of Marriage Act, which introduces the customs of the community to which parties belong to be taken into consideration, side by side with the considerations on the infant's welfare, can encourage courts to favour men in custody disputes. This is because traditionally women were not in the habit of getting custody of children except in a few communities. They also noted that the tender years doctrine is misused. They argued that the welfare of infant children has been applied restrictively by the courts against women's interests in custody cases. They were of the view that the rebuttable presumption under section 125 (3) seems to have created the impression that it is detrimental for children above seven years old to be in the custody of the mother, even if she is suitable based on established criteria. They also cited the case of *Selestine Kilala and another v Restituta* (Supra) whereby a mother who was a secondary teacher with good housing at the time of hearing was denied custody of her school-going children who were then living with their paternal grandmother away from home. The justification given by the court was that the children were all above seven years old.

Robert Makaramba (1998:21-24) examined children's rights in Tanzania and noted that the Law of Marriage Act, Act No. 5 of 1971 provides supportive care only where parents are capable of doing so and only in the case of those 'children of the marriage', that is children born in wedlock. He argued that one of the aspects which is worth considering when discussing matters relating to children born in wedlock is the question of the effects of separation and divorce on children. He added that in Tanzania parliament has adopted the 'best interests of the child' test as the basis upon which custody and access disputes are to be resolved. He observed that there are some aspects of the way parliament has done this which merit comment. First, the 'best interests of the child' test is the only test whereas the express wording of section 125(2) requires the court to look only on the welfare of the infant in making orders of custody and access. According to him, this means that parental preferences and 'rights' play an insignificant role. Second, the test is broad and parliament has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that predetermined rules, designed to resolve certain types of disputes in advance, may not be useful. It is left to the judge to decide what is in the welfare of the child. He also pointed out that the primary goal of the legal system on divorce must be to minimize the adverse effects on children, which requires a vision of the best interests of the child that is more neutral to the conditions under which access occurs.

Akilagpa Sawyerr (1977: 124-126) examined judicial manipulation of customary family law in Tanzania, and noted that bride wealth was the prime factor that gave the husband the right to custody of all his children, regardless of whether he and his wife were separated and the woman was known to be cohabiting with another man, hence this was not a problem at all. He stated that the colonial courts were torn in two on the question of bride wealth whereas, on the one hand, this custom is so ingrained in people's minds and tied in with the entire patrilineal system that the courts were loath to tamper with it. On the other hand, they were heavily influenced by the principle that the welfare of the children should be the prime, if not the sole determinant of the parent into whose custody they were to be given. This made the customary right of the legal father to custody enforceable as it was held not repugnant to natural justice or morality in *Maranya Chacha v Muhabe d/o Wambura* (1952) Digest 36 and in *Joseph Makurai Nyaiseti v Chacha Musioni* (1952) Digest 37.

He observed that one of the purposes of custody claims was the assertion of customary rights in respect of the children, particularly the right to bride wealth payments due on the marriage of daughters. The courts separated the question of customary 'proprietary' rights from that of physical custody, with the result that while the legal father was held entitled to collect bride wealth payments when the time came for daughters to be married, his right to physical custody was made to depend upon what would best serve the interests of the children.

Rule 175 of the Law of Persons in 1963 restated the customary law that children born in lawful wedlock belonged to the legal father. Hence, under this rule the legal father has an 'absolute' right to custody of his children. Sawyerr gave an example of the case of *Makafu Nyamrunda v Muga Okanda* [(1968) H.C.D 83] where a man sued for custody of his two children. When his marriage to their mother was dissolved, the latter kept the children and took them to live with her second husband. It was established that while the plaintiff was poor and still single, the defendant had remarried a wealthy man who was looking after the children. The district court awarded custody to the defendant because 'the first thing to be considered (was) the welfare

of the children'. On appeal, the High Court, acknowledging this principle and accepting the evidence of the relative material circumstances of the claimants, reversed the district court decision and awarded custody to the plaintiff on the grounds that, as father, under Rule 175 he had an absolute right to custody of his children. This right of the father has been rejected outright in several cases in favour of the welfare of the children, especially in cases where the courts separated the question of physical custody and entitlement to customary right, especially bride wealth payments. For example, in *Waryoba d/o Katara v Kirimi s/o Wagari* [(1969) H.C.D 6], upon the dissolution of the marriage of Kirimi and Waryoba, the latter sought the custody of their only child. This claim was rejected by both the primary court and the district court on the grounds that, as father, Kirimi was entitled to custody. On appeal Saidi J., in awarding custody to the mother said:

> 'The judgments of both courts below are…right in pronouncing the respondent the father of the child but I think they did not properly take into account the welfare of the child itself. As the facts are I am of the view that the welfare of this child will be more secure if it remains in its mother's custody than in its father's custody… The Respondent is declared the father of the child and will have the right in due course to arrange the marriage of the child and to receive the bride price…'

Sawyerr argued that the principle of the welfare of the child therefore counts more than the customary right of the father to custody.

As far as the above literature is concerned, I therefore want to explore how far the Tanzanian judiciary has gone as regards the opinion of the child in custody matters. It has been said that very little has been done by judiciary in Tanzania concerning the opinion of the child in matters affecting him or her. In this case, children's interests become secondary to the custodian parent's interests. Moreover, as other writers outside Africa, like Bromley, said, it is the interests of the parents which are taken into consideration by courts so I wanted to find out what is happening on the ground as far as the Tanzanian judiciary is concerned. In this case I will examine if the judiciary considers the interests of the child secondary to the custodian parent's interests. As other writers said that the best interests of the child should not only be measured by money, I want to find out how the financial situation of the parent may contribute to the denial of the best interests of the child. Furthermore, I will explore to what extent the behaviour of the mother and her role in marital breakdown influence issues of custody, as Rwebangira and Mneney pointed out that mothers lose custody when their behaviour and role in the marital breakdown are considered by courts. I also wanted to find out if courts still apply customs of the community to which parties belong in issues of custody, as it has already been pointed out by other authors that customs infringe women's right to custody. I therefore, wanted to explore to what extent courts consider customs and how customs influence custody issues.

CHAPTER FOUR

Findings

> 'To the court, as upper guardian, the problem of custody is a somewhat singular subject, in which there is substantially one norm to be applied, namely the predominant interests of the child' (Eloff JA).

My assumptions in this study were:

- In custody matters the judiciary considers the best interests of the child secondary to the custodian parent's interests;
- The judiciary tends to give preference to parents with a better financial situation in custody matters, which may contribute to the denial of the best interests of the child;
- Judicial considerations of customs of the community to which parties belong in terms of how they deal with issues of custody limit the child's best interests;
- Judicial considerations of a woman's behaviour and role in marital breakdown make women often lose custody of child.

Also, my objectives were to investigate: the factors taken into account by courts in deciding custody; how courts apply the law relating to custody, its adequacy and compliance with human rights instruments; problems or gaps in implementing the best interests of the child criterion by the judiciary in custody matters; and to recommend possible solutions to the problems arising in implementing the best interests of the child criterion in matters relating to custody. In this regard, my findings are discussed below.

Thirty (30) cases on child custody for the years 2000–2005 were perused from three different courts namely, Kisutu resident magistrates' court, Ilala district court and Kariakoo primary court. Some cases came as part of divorce proceedings and others came pending hearing of a divorce case. Different factors were considered by the courts in arriving at the decision as shown in the following table:

Table IV

Circumstances	No. of cases	Factors considered	No. of cases
Custody as part of divorce	28	Financial situation	3
Custody pending a divorce case	2	Behaviour	4
Total		Cases settled out of court	6
	30		13

Factors the judicial officers consider in granting custody of the child

The factors that courts considered in some cases in granting custody of the child are discussed below.

Interests of the child secondary to the custodian parent's interests

My research question was to find out whose interests are taken into account by courts in awarding custody and the following were my findings. The Law of Marriage Act under section 108(c) provides for a duty of a court hearing a petition for a decree of separation or divorce to inquire into custody arrangements made or proposed by the parties and states:

> 'It shall be the duty of a court hearing a petition for a decree of separation or divorce – to inquire into arrangements made or proposed as regards maintenance and custody of the infant children, if any, of the marriage and to satisfy itself that such arrangements are in the best interests of the children.'

The judiciary considers the interests of the children secondary to the custodian parent's interests because in some cases, such as those settled out of court, courts did not inquire into the arrangements made or proposed by the parties as regards custody of the infant children. The courts also did not inquire about the suitability of the parents or the custodian parent, as also observed by Rwebangira and Mneney (1995). For example, in *Badriana Mugamba v Arnold Mangesho* Matrimonial Cause No. 43/2001, where according to the records the court gave consent to the settlement deed whereby the parties agreed that custody of the issue of marriage aged 5 years be in the petitioning. However, the court did not inquire further into the arrangements made by the parties for the child to check if they best served the interests of the child. In *Thomson Albert Chota v Doris Joseph Mkude* Matrimonial Cause No. 13/2004, the trial magistrate marked the matter settled as per settlement deed but the deed is not shown in the court record. It is also not in the record whether the magistrate inquired into the arrangements made or proposed by the parties for the children aged 7 and 4 years. The same thing happened in *Rahma Nelson Tiberelwa v Hamisi Rajabu Tofiki* Matrimonial Cause No. 67/2003. Also, in other cases courts did not seek the views of the child as per section 125(2)(b) of the Law of Marriage Act which requires them to have regard to the wishes of the infants. It states:

> 'In deciding in whose custody an infant should be placed, the paramount consideration shall be the welfare of the infant and, subject to this, the court shall have regard to the wishes of the infant, where he or she is of an age to express an independent opinion.'

The law is silent on the age where a child can express an independent opinion. In some cases, seven years old is considered as an age that a child can form an independent opinion. In *Frank Mchani Raymond v Emma Liwenga* Matrimonial Cause No. 58/2000, the parties agreed to settle the matter out of court and asked the court to adopt the settlement deed as a court judgment and to issue a decree of divorce accordingly. On the issue of custody of the only infant, namely, Grace born in May 1998, the parties agreed that:

> 'The respondent shall have custody of the only issue of marriage subject to conditional visitation rights within Tanzania by the petitioner to the issue and the issue to the petitioner on dates, times and venues agreed upon in advance until the issue attains the legal age of seven years whereby the issue can exercise a choice.'

The court entered judgment as per the settlement deed. The decision of the court in this case illustrates that the court satisfied itself that the arrangements made by the parties were in the best interests of the child. It also illustrates that the interests of the child are secondary to the custodian parent's interests whereas, in this case until the child reaches seven years of age, she can exercise her right of a choice as to where she prefers to stay. Hence it can be argued that when a child attains the age of seven years he or she is considered as capable of forming an independent opinion. The implication here is that the views of the child below seven years will not be sought by the court. The interests of the child therefore become secondary to the custodian parent's interests.

It can also be argued that the rebuttable presumption that a child below the tender age of seven years is better off with the mother, which is provided under section 125 (3) of the Law of Marriage Act, means the court considers the interests of the child secondary to the custodian parent's interests. This assumes that it is good for the child to be with his or her mother and the fitness of the parent is not in question. The provision states:

> 'There shall be a presumption that it is for the good of an infant below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of an infant by changes of custody.'

Moreover, in *Sauna Mwenge v Gervas Mwenge* Matrimonial Cause No. 7/1996 the trial magistrate granted custody of the children aged 15 and 12 years to the father simply because they were above seven years of age. In her judgment she said:

> '…It is a fundamental principle of law in case of custody of children that what is of paramount importance is the welfare of the children. Since the children in this case are above the age of seven years, I direct that they should stay with the respondent, and their mother who is the petitioner can and should as a matter of right have access to these children when convenient, for example when they are on holidays.'

The case therefore illustrates that the trial magistrate considered the interests of the children secondary to the custodian parent's interests who also wanted custody of the children. It seems that the trial magistrate took into consideration only the fact that the children were above seven years so custody was given to the father. She was reluctant to take into consideration other factors, for example, by seeking the views of the children, who were over seven years, as to where they would prefer to stay. This also contravenes article 12 of the Convention on the Rights of the Child (CRC) and article 4 (2) of the African Charter on the Rights and Welfare of the Child (ACRWC), which Tanzania has ratified, which require courts to assure a child who is capable of forming his or her own views, the right to express those views freely in all matters affecting the him or her. Also, his or her views are to be given weight according to the age and maturity of the child. Article 12 of the Convention on the Rights of the Child states:

> 'States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.'

Also, article 4 (2) of the African Charter on the Rights and Welfare of the Child states:

> 'In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.'

These cases also illustrate that the child is not considered as a separate person with individual rights as Bosman-Swanepoel (1998) also pointed out:

> 'A child should be regarded as a separate person with individual rights who, inter alia, has the right to express his or her opinions as to which he or she considers the most appropriate placement for him or her at the time of divorce.'

It also seems that the trial magistrate applied the rebuttable presumption as an automatic right of a father to stay with the children. Also, in *Robert Swere v Teddy Zacharia* Matrimonial Cause No. 50/2003, the parties inter alia, agreed in their deed of settlement that the three children of the marriage aged 15, 13 and 8 years

remain with their father but be free to visit either parent and the father was to pay their school fees. The court therefore ordered the matter settled. This case also illustrates that the court, by adopting the arrangements made by the parties on custody issues, makes the interests of the child secondary to the custodian parent's interests because it is not clear if the children wanted to stay with their father. This was also the case in *Camille Karamaga v Devota Kamaraga* Matrimonial Cause No. 57/2001 where it was not clear if the two children of the marriage, aged 9 and 7 years, wanted to stay with their mother. Perhaps it is a cultural practice that adults make decisions for the young ones, as Rwezaura (1998: 57) also observed, the community's belief is that a child cannot be left to make decisions concerning his or her own life. Or it is also because it is a divorce case and therefore courts are reluctant to intervene, as Palmer (1996: 103) put it:

> 'Where there has been apparent agreement as to the arrangements for the custody of the children of the marriage, the court seldom will do more than ask the party present whether the arrangements are the best that can be made in the circumstances…An agreement on paper, therefore, tells one nothing about the bargaining position of the parties when they came to that agreement. Furthermore, while it is possible for the court to call for an investigation in terms of section 6 of the Divorce Act as to the arrangements for the children and it is possible for the court to call anyone it wishes to appear before it, this is very seldom, if ever done.'

Therefore, it is important for the courts to investigate the arrangements made by the parties if they best serve the interests of the children. The courts in this case may call for the advice of a welfare officer, as provided for under section 136 (1) of the Law of Marriage Act, to investigate the background of the parties, their home environments and the way they live with their children. The law states:

> 'When considering any question relating to the custody or maintenance of any infant, the court shall, whenever it is practicable, take the advice of some person, whether or not a public officer, who is trained or experienced in child welfare but shall not be bound to follow such advice.'

From eleven magistrates I interviewed, ten of them admitted to me that they never called for the advice of social welfare officers. It is only one female magistrate who told me that she normally calls for the advice of a social welfare officer in custody cases. She added:

> 'I normally call for advice of a social welfare officer to give me a report about the home environments of the parties and the life of the child at home. If the court wants to satisfy itself, it may call for advice from the social welfare officer.'

The voice of this female magistrate illustrates that the advice of a social welfare officer is important if the court wants to satisfy itself that they are making the right decision. Even among the 30 cases I perused there is no case where the opinion of a social welfare officer was sought by courts. Also, the three social welfare officers I interviewed had similar views – that judicial officers seldom call for their advice in custody cases. When I asked one of the social welfare officers about their role in custody cases, he replied:

> 'The role of a social welfare officer where the court needs his or her advice is to pay home visits and investigate the lives of the parents with their children. The officer can also ask the children with whom they want to live between their parents. The social welfare officer also produces a report before the court on the mentioned issues. It is therefore upon the court whether to follow or not to follow the advice of the officer because the officer also recommends the court as to who should be granted custody of the child.'

Another female social welfare officer went even further to say that the judicial officers do not see the importance of calling for the advice of a social welfare officer in custody cases, maybe because the law does not make it mandatory for the courts to call for the advice of the social welfare officer while she believed that their advice adds a value in helping the court to reach a fair decision, as she said:

> ‘Custody of the child is a family issue whereby social welfare officers must be involved. Since the law itself says that the court may follow or not follow the opinion of the social welfare officer, magistrates have looked at it as if it is not important to call for the advice of the social welfare officer. Courts do not call for our advice but we are actually very important people in helping them to reach a fair decision because matrimonial cases start in our office before they go to court, therefore it is us who know well the background of the parties.’

In the light of the comment that the social welfare officer made, there was a female magistrate who also admitted that the court has never realized the importance of calling for the advice of a social welfare officer in custody matters. Another female magistrate told me that social welfare officers are very important in custody matters when I asked her if it is easy for courts to determine the best interests of the child. She observed:

> ‘According to my experience it is not easy for the courts to determine the best interests of the child. There should be social workers who may investigate the home surroundings of the parties, and so on, like it is done in criminal cases. Depending on the evidence of the parties only is not good because they might pretend in court. This helps the magistrate to determine what is best for the child.’

The judiciary can also consider the interests of the child secondary to the custodian parent’s interests because of the number of cases that judicial officers have to handle. For example, a female magistrate said:

> ‘There is no problem with settling the matter out of court. Courts are happy to see that because there are so many cases they handle, therefore it reduces the burden. What the court does is to look at the memorandum of the settlement and if the parties have signed it.’

Furthermore, from the court records, there were two cases where children appeared in court as witnesses for their parents. In one case, the trial magistrate after hearing the case and the evidence adduced by the parties and their witnesses, then gave the first two children freedom to choose to stay with either parent. This was the case of *Grace Chisala v Robert Chiapo* Matrimonial Cause No. 16/2002 where the parties had three issues of the marriage aged 12, 7 and 3 years. One of the defence witnesses was a son of the parties (the first born) who told the court that he knew his mother left the matrimonial home because she claimed that his father had no money. The trial magistrate in her judgment said:

> ‘… the first two children are free to stay with either parent, that is mother and father…Also the child who is under the majority age is ordered to stay with the petitioner.’

From this case it can be said that the court considered the interests of the children as first and paramount consideration by giving them the freedom to choose to stay with either parent. Also, in *Dorothea Emilian v Evarist Mtotela* Matrimonial Cause No. 12/2001 where the parties had three issues of marriage aged 18, 14 and 10 years and the petitioner asked for custody of all the children. The first born child, who was at that time a standard seven leaver, testified against his father as a witness for the petitioner (his mother) and stated that since 1998 there was a dispute between his father and mother. The cause of the dispute was because his father had got another woman at Kipunguni Ukonga and moved there completely, and came to see them once in a blue moon. He also took domestic stuff such as the television, its rewinder and cassettes. He added that:

> ‘To date our father does not give us anything. It is our mother who takes care of us. Other people are also helping us.’

The respondent in his defence told the court to consider the welfare of the children as paramount. He said:

> ‘The rest of the property is ours but this court should also consider the future of our children because they are still in school. I therefore pray to your honourable court to consider our children first rather than us.’

The trial magistrate held that:

> 'I have allocated a number of household effects to the petitioner and children because the defendant has already moved from the matrimonial house. The shamba and house will remain with the petitioner and children as long as she remains unmarried. Once married they will remain the property of the children.'

The court in this case considered the interests of the child as paramount and the father of the children also recommended that. But it can also be argued that when children are called before the court, although in this case he was at the age of majority, they can give the court a clearer picture of what is happening in their homes. This helps courts to consider the interests of the children over the custodian parents' interests by, among other things, seeking the views of the children and giving them freedom to choose where they want to stay. There was also another case of *Damas Mfoi v Hilda Machange* Civil Appeal No. 151/2001 where the court refused to adopt the settlement deed because one party was not aware of it. The petitioner or father in this case filed a settlement deed which stated that the parties had reached a compromise on change of custody of the child and that, in view of the change, it was in the best interests of the child to be in the hands of Damas and that is where the child was as from 9 July 2004. Parties therefore, requested an order as to their compromise. It was ruled that the court could not allow the arrangement sought therein without having the respondent served, since she was not aware of the presence of the application. The case illustrates that the trial magistrate did not want to consider the interests of the party asking for custody of the child in the absence of another party. Also, whether both parties agreed on the settlement deed was questionable.

There is also a problem with the age that a child can be regarded by judicial officers as capable of expressing an independent opinion. When I asked the magistrates as to what age, according to their experience, they think a child can express an independent opinion, they had different views. This might also be why they are reluctant to seek the views of the children because each one has his or her own perceptions about the age that a child can express his or her wishes. Their views about what age a child can express an independent opinion are shown in the following table.

Table V

Age	No. of magistrates agreed	No. of magistrates who doesn't know
6-8	6	1
9-12	1	
13-14	1	
15-17	2	
Total	10	1

Financial situation of the parent

As regards the financial situation of the parent, my research question was to see to what extent judicial officers take the financial situation of the parent into account in awarding custody and my findings were as follows.

Articles 3 and 12 of the Convention on the Rights of the Child, articles 4 (1) and 7 of the African Charter on the Rights and Welfare of the Child and section 125 (1) of the Law of Marriage Act state that the interests of the child shall be a paramount consideration in all matters concerning a child and that he or she should be given the right to form an independent opinion where he or she is capable of doing so. Article 3 of the Convention on the Rights of the Child states:

> 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

Also, article 4 (1) of the African Charter on the Rights and Welfare of the Child states:

> 'In all actions concerning the child undertaken by any person or authority the best interests of the child shall be a primary consideration.'

Moreover, article 7 of the charter states:

> 'Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws.'

Furthermore, section 125 (2) of the Law of Marriage Act states:

> 'In deciding in whose custody an infant should be placed the paramount consideration shall be the welfare of the infant…'

In some cases courts considered only the financial capacity of the parent without seeking the views of the children as to where they preferred to stay, even where they could be considered as capable of forming an independent opinion. The parent's suitability to have custody of the child is also not questioned beside his or her financial situation, for example, is he or she a responsible parent towards the children? Does the parent really takes care of the children? Courts also considered the age of the child so as to give the parent with a better financial situation custody of the child. In *Salama Ally v Hamidu Omary* Matrimonial Cause No. 11/2003, the petitioner asked for divorce and custody of the three issues of the marriage, aged 12, 7 and 2 years. The court held that:

> 'The court in deciding in whose custody an infant should be placed, shall have regard to the welfare of the child as paramount consideration and that the court is also required to have regard to the wishes of the parents of the infant. In this case the court is of the view that since the first two children are attending school and they are above the age of seven years, they should stay with the respondent. The respondent is working and thus capable financially as compared to the petitioner. The third child should stay with the petitioner since he is of a tender age, he needs much attention of the mother…The child will decide with whom to live with after attaining the age of seven years.'

The decision of the trial magistrate in this case illustrates that a seven year old child is considered capable of expressing an independent opinion but the magistrate did not bother to seek the views of the first two children who were over seven years, simply because the respondent or father was more financially capable, compared to the petitioner – the mother. Preference was given to the respondent only because of his financial status. The court was reluctant to find out if the first two children preferred to stay with the respondent/father so as to reach a decision that the best interests of the child would be best served in the custody of the respondent. The same happened in *Hellen Sarmanis v Saverio Cecchett* Matrimonial Cause No. 54/2003 where the petitioner (the mother) filed a petition for divorce on grounds of cruelty and asked for custody of the only issue of the marriage, aged 9 years, who was at that moment studying in South Africa. The respondent (the father) told the court that the petitioner did not deserve custody of the child because she had been abusing him with dirty language. He also pointed out that he was the one who used to provide necessities, including school fees, and

that the petitioner at that moment had no money to maintain the child. The trial magistrate, turning to the only issue of marriage, said:

> 'In this issue each of the parties wanted the custody of the child of the marriage, but according to the court records it is not the dispute that the said child is aged more than 7 years and the respondent insisted that as he is the one who provides everything, including payment of school fees, food and shelter, he pleaded before the court to grant him custody. From the submission this court is of the view that the welfare of the child is very vital to be considered by the court. In this respect, therefore, this court orders the only issue of the marriage to be under custody of the respondent on the directive that the petitioner shall be allowed to stay with her during holiday time.'

Also in *Grace Jackson v Slivenus Onyando* Matrimonial Cause No. 43/2000 the trial magistrate said:

> 'Both parties would wish to get custody. Currently, the respondent has custody of Paschal, now aged 11 years, while the petitioner stays with Juliana (15) and Jackson (6 years). Since it has not been suggested and/or established that the respondent cannot manage the issues, I find no reason to deny him custody of Juliana and not for Jackson who is still below seven years of age. It is therefore ordered that he be given custody of Juliana. Since the petitioner is a businesswoman as she claimed, the respondent is ordered to pay shs 40,000/= per month towards the upkeep of Jackson.'

It would also appear in this case that the court took into consideration the financial situation of the father in awarding custody of the child when the magistrate said that it had not been suggested that the respondent cannot manage the issues. As a female magistrate also said:

> 'Most of the magistrates look at the financial situation of the parent. If the parent has a better financial situation, the court grants him or her custody despite his or her behaviour. For example, you may find that a father has a better financial situation but has extra-marital affairs and a mother is in a weak financial situation but she can take good care of the children. In this case the courts often grant custody to the father because of his better financial situation.'

Also the tender age presumption seems to be applied by courts as an automatic right of either parent depending upon the age of the child, as Rwezaura (1998: 73) also observed. The tender age presumption is applied to the extent that children's views are not sought by courts. Also, the love, care and relationship between the child and the parent which are vital for the welfare of the child are not considered by courts as it was also pointed out in New Zealand's case of *Walker v Walker and Harrison* (Supra) where Harrison J, said:

> '…However, while material considerations have their place, they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents.'

Therefore, the interests of the child might not be best served by looking at the financial situation and the tender age presumption only. The above instruments, the convention, the charter and the Law of Marriage Act are also contravened. Moreover, the cases illustrate that when the financial situation of the parent is considered by the courts, the likely party to lose custody of the child is the mother because most women are financially incapable compared to their male counterparts.

The mother's behaviour

My research question was to see how a woman's behaviour and her role in marital breakdown influence issues of custody, and the following were my findings. In most of the cases I perused, women lost custody of the child when courts considered their behaviour n deserting the matrimonial home and their role in marital breakdown as in this case their behaviour was seen as the cause for the marital breakdown. Hence, judicial officers gave custody of the child to the father where he proved that his wife deserted the matrimonial home and left the child

or children with him. In *Audax Kameja v Mary Kameja* Matrimonial Cause no. 23/2004 where the respondent (the mother) deserted the matrimonial home and her whereabouts were not known to the petitioner (the father) who had looked after, maintained and educated their daughter, then aged 8 years old, since she was four. He asked for, inter alia, divorce and custody of the child. The court therefore granted his request accordingly. The trial magistrate in this case took into consideration the welfare of the child who had since the age of four years, been deserted by her mother. It was therefore, in the best interests of the child that custody be with the petitioner or father. The same applied in *Iqbal Siddiq Alimhamed v Biliqis Abdul Sattar Mieth* Matrimonial Cause No. 36/2003 whereas the petitioner/father asked for, among other things, custody of the four issues of the marriage aged 17, 15, 14 and 12 years, on grounds of desertion by his wife. He claimed that his wife had deserted the matrimonial home seven years before and her whereabouts were not known to him. In his petition for divorce, the petitioner averred that the respondent's action of deserting the matrimonial home had left him with many difficulties as he had to look after the children and ensure their welfare. He added that the behaviour of the respondent in deserting the matrimonial home caused him and his children to suffer mentally. The court therefore entered judgment for the petitioner as per plea. Also in *Flora Lumisha v Dionese Lwanga* Matrimonial Cause No. 20/2002 where the petitioner who had deserted the matrimonial home and abandoned her three issues of marriage aged 8, 6 and 2 years, pleaded for custody of the last two children because they were under seven years of age, pending hearing and determination of the petition for divorce. The court held that:

> 'On the issue of the children of the marriage this court directs that the same remain in the hands of the respondent/defendant and the applicant is allowed to visit them.'

What the court considered was the welfare of the children. Moreover, in *Beatrice Mugula v Hamza Mugula* Civil Appeal No. 85/2000 where a mother deserted the matrimonial home and abandoned the children, the father went abroad and left the children with the house servant. The petitioner/applicant applied to court for the custody of the issues of marriage aged 6 and 3 years pending hearing of divorce case. The primary court magistrate, in considering the rights of the child, said that children's rights had been violated as per the international rights of the children which are: the right to live with both parents in safeguarding the interests of the child, the right to have communication when the parents are not separated and the right to good health and education. She stated further that:

> 'The court considers section 125(2) of the Law of Marriage Act which provides for the factors to be considered in deciding custody of the child. There is a rebuttable presumption which applies when the marriage of the parties is broken down that a child below the age of seven years is preferred to be in the custody of his/her mother. In this case, the marriage between the parties is still alive and not irreparably broken down to the extent of deciding custody of the children. Therefore, when the court called for the opinion of the children with regard to where they want to stay, they were not brought before the court whereas the applicant has the right to feel sad because she has no belief in those who are living with her children. Since the court has been informed that the respondent will return to Tanzania next month, it is better to wait and see whether the respondent will continue the marriage or want to dissolve it so that the court gives its order on permanent custody of the children. The court therefore grants the applicant access to the children without any disturbance from any person until her husband is back.'

On appeal, at Ilala district court, the trial magistrate in her ruling said:

> 'As the counsel for the appellant is not specific for reasons which her client left her matrimonial home which result for the plea of collecting her clothes and visiting her children, this court cannot entertain such a plea. It is said by the counsel that the appellant left her matrimonial home in July 2000 and she had not visited her children who are aged six and three years, and on her statement she is not specific as she fails to make a full disclosure of relevant facts….'

Although the applicant later on withdrew the case, her behaviour and failure to explain why she had deserted the matrimonial home, made her lose her case before she withdrew it. The case also illustrates that the views of

the children can sometimes be sought but the people who are asked to bring the children to court may not obey the court's order, as in this case it is not clear why the children were not brought before the court.

The above four cases therefore, illustrate that the mothers' behaviour in deserting the matrimonial home and abandoning the children while articles 18 (1) of the Convention on the Rights of the Child, article 20 of the African Charter on the Rights and Welfare of the Child and article 23 of the International Covenant on Civil and Political Rights require both parents to have responsibility for upbringing and development of their children, often cause women to lose custody of the child. Article 18 (1) of the Convention on the Rights of the Child states:

> 'States parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.'

Also, article 20 of the African Charter on the Rights and Welfare of the Child states:

> 'Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development of the child…'

Article 23 of the International Covenant on Civil and Political Rights states:

> 'States parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and its dissolution.'

It is because the court takes into consideration the best interests of the children as it is so required under article 3 of convention, article 4 of the African Charter and section 125 of the Law of Marriage Act that the welfare of the child shall be a paramount consideration.

Turning to the customs of the community to which parties belong as provided for under section 125 (2)(c) of the Law of Marriage Act, which states:

> 'In deciding in whose custody an infant should be placed the paramount consideration shall be the welfare of the infant and, subject to this, the court shall have regard to the customs of the community to which parties belong.'

I found out that courts do not take into consideration the customs of the parties in issues of custody as I had thought. I found no case where customs of the community to which parties belong were applied as was done in the past as Sawyerr (1977) pointed out, reported in the literature review chapter. And when I asked the magistrates if they ever apply customs in issues of custody, all eleven magistrates had the same view that they never applied customs of the parties in issues of custody. They also gave me similar reasons, for example, that customs are outdated since nowadays people from different tribes marry each other so which custom would the court take into consideration? They further said that customs deny women's right to have custody of the child since most of our Tanzanian communities are patriarchal whereby a child belongs to a father hence, custody would obviously go to the father if customs are considered by the court.

Some of the cases were withdrawn by the parties but it is not known if they decided to restore their marriages or whether there was something else. Others were dismissed by courts for lack of prosecution.

CHAPTER FIVE

Voices of women and men on child custody and children's preferences

This chapter reveals the voices of fathers and mothers on child custody because they are among the people who are affected by decisions of judicial officers as a result of a custody dispute. Therefore, I wanted to get their views on the factors that judicial officers take into account when deciding custody matters. Most of the voices of my respondents on child custody came from women and men who had matrimonial disputes with their partners hence filed a case in court for divorce and custody of the child as among other pleas. Some voices came from men and women whose matrimonial disputes ended at the social welfare office. I only got one female respondent whose custody dispute arose as part of an affiliation case. The chapter also reveals the preferences of children as far as custody disputes are concerned. It intends to show what children like most when they are asked to choose between their parents. Since they are the ones who are directly affected by decisions of the courts in custody disputes, it is significant to consider their preferences.

Women and men's voices on child custody

Factors that judiciary can take into account when granting custody of the <u>child:</u>

(a) Behaviour of the parent

As I was interviewing my respondents, that is ten mothers and four fathers who had disputes on custody issues, about which factors the court/judiciary should consider when granting custody, they all had similar views. Behaviour or character of the parent appeared to be the first issue that these parents wanted to be considered by the court before other factors are taken into account. For example, Mr. Y, a contractor from Salasala said:

> 'Since my wife is promiscuous, she does not deserve custody of the child because she leaves the child alone and makes the child miss the love of his mother as she sleeps around with other men.'

Also Mrs P, a housewife stated:

> 'Fathers like my husband cannot take care of children because the children are afraid of him as he is cruel. He can't take care of them and treat them the way I do. When the children see him, they stand a bit far from him; they call him and ask for money for school or other things. But when their uncle comes in, they run after him and hug him and tell him their problems.'

These voices illustrate that the most significant thing that parents take into account when it comes to issues of custody of the child is the behaviour of the parent. My observation is that behaviour is considered vital by the parents because of their responsibility for bringing up their children. Since they both want their children to grow up in good hands, with good behaviour, well taken care of and loved, their behaviour becomes important for the welfare of their children. Hence, it can be argued from the respondents' voices that the behaviour of the parent is a vital issue in custody when judicial officers implement the principle of the best interests of the child.

(b) Financial situation of the parent

They also mentioned the financial situation of the parent as another factor that courts can consider in awarding custody of the child. Mrs C, an air hostess with two children, said:

> 'Financial situation of the parent should be considered because my salary allows me to maintain my children. I can also pay for their school fees if their father fails to do so.'

Also Mr Y, a contractor from Salasala, added:

> 'I want custody of my child because I am financially capable to take care of him. I can educate him and so on.'

Others suggested that in considering the financial situation of the parent, courts should not forget to consider the behaviour of the parent too because, according to them, if the parent is financially capable but has bad character he or she does not deserve custody of the child. Miss M, a small business woman from Kibaha, who filed an affiliation case to Ilala district court, was of the following view:

> 'If custody of the child is granted to the father it will be to the detriment of our child because of his behaviour of forcing the child to undertake female genital mutilation. The child used to tell me that her brothers went to the hospital for a cut (circumcision) but she does not know where her father will take her for the same. Although he is financially capable, he does not deserve custody of the child.'

Furthermore, Mrs M, from Kunduchi, an employee in the private sector added:

> 'Financial situation of a parent should be considered by courts and his or her behaviour too because you may find that a parent is financially capable but does not take good care of the children, for example, my former husband wanted his daughter to get married while she was still in school.'

Some added that courts should also grant custody to the parent who is financially incapable but he or she can take care of the children. This was suggested by the mothers where many of them are financially incapable compared to their male counterparts but they would still want to have custody of their children. As Mrs P, a housewife with four children, put it:

> 'Although I have no means of earning an income, I would like to stay with my children. I will look for any means of getting money for shelter, food and clothing for my children.'

Also, Mrs A, a small business woman with three children aged 12, 10 and 7 added:

> 'Courts should also grant custody even to the parent who has no better financial situation but can take good care of the children. I am saying this because I know that my husband cannot take good care of his children. My husband is self employed, he sells vouchers for cell phones. But he leaves 500/= to 1000/= Tshs every day at home for food, he does not buy uniforms and school bags for his children. He does not provide anything. So I will not be satisfied if custody of my children goes to the father. It is better if I have custody of my children even if I am not in a better financial situation.'

Therefore, these voices suggested that for the welfare of the children, judicial officers should not only consider the financial situation of the parent when awarding custody but also, in line with it, they should consider other factors such as the behaviour of the parent and the capability of the parent to take good care of the children.

Moreover, there were two mothers who suggested that financial situation of the parent should not be considered by court when deciding custody of the child. Mrs M. said:

> 'The financial situation of the parent should not be considered because the court may grant custody to a parent who has a better financial situation and cause problems or may grant to the one with no better financial situation and cause problems too. For example, the parent may in the same case be the one who does not love the children.'

Also, Mrs. A was of the view that:

> 'The financial situation of the parent should not be considered, the court should grant custody even to the parent who has no better financial situation but he or she can take good care of the children.'

(c) Wishes of the parents

All the parents I interviewed, both mothers and fathers, had similar views that the wishes of the parents should be considered by courts when deciding custody of the child. Some even wanted it to the extent of rejecting the wishes of their children as something that courts should also take into consideration. Mr S, a driver from Kunduchi said:

> 'Children shouldn't be called to express their wishes. This should be left to the parents only to decide for them.'

My observation is that some parents think that they know what is best for their children and that children cannot decide or speak for themselves, as Rwezaura (1998: 71) also observed. It can also be argued that since magistrates come from the same community, they adopt the said shared feeling that children cannot decide for themselves even in custody disputes. However, this violates the right of the child to form an opinion as guaranteed under article 12 of the Convention on the Rights of the Child and articles 4 (2) and 7 of the African Charter on the Rights and Welfare of the Child and also stated under section 125 (2) (b) of the Tanzania Law of Marriage Act.

Apart from the above factors, women as mothers had other factors that they deemed important for the courts to take into account when deciding custody of the child. These factors are shown in the following table:

Table VI

Factors	No. of mothers agreed	Reasons	No. of fathers rejected the factors deemed important by mothers	Reasons
Role of a mother as a care taker	11	-Mother knows how to take care of the child. -The child rearing role is vested to the mother.		
Young children need mothers	8	-Breastfeeding -Mother knows how to take care of the children. -Fathers are always busy with other work	3	-Promiscuity -Fathers too know how to take care of the children.
A stepmother can't take care of the child who is not hers	9	-Stepmothers have a tendency of mistreating children who are not theirs.		

Court's handling of custody cases

From 14 parents I interviewed, one claimed that the court's handling of her custody case was not fair to her when I asked her the extent to which equality impacts on custody cases. Mrs R, whose husband petitioned for divorce and custody of the children of the marriage, claimed that she was denied her rights to be heard, to bring witnesses and to engage a lawyer. She was told by the primary court magistrate to wait until the case finished so that if she was aggrieved by her decision, she would appeal and she could engage a lawyer if she wanted. Mrs. R said:

> 'The trial magistrate was not fair as she denied me the right to be heard, she did not tell me to bring witnesses or to bring exhibits. The day when our case came for mention, the trial magistrate proceeded with the hearing and closed it too telling us to come for a judgment. Before that she asked me if I have any evidence I didn't answer as I was under pressure and I didn't know the law. So, I told the magistrate that I wanted to engage a lawyer, she told me to wait for a judgment, and if I was aggrieved by her decision I will appeal. The trial magistrate was in favour of my former husband as she listened to him only.'

This voice therefore, illustrates perceptions that some cases are not handled fairly by judicial officers. The right to a fair hearing which is guaranteed under article 13(6)(a) of the Constitution of the United Republic of

Tanzania (URT Constitution) is contravened. It states:

> 'To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely: when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned.'

The right to engage a lawyer as guaranteed under article 8(e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol) is also infringed. The article states:

> 'Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States parties shall take appropriate measures to ensure that women are represented equally in the judiciary and law enforcement organs.'

The right to equality before the law is also violated if only one party is given the right to be heard during the court's proceedings as a result article 7 of Universal Declaration of Human Rights, article 15(1) of CEDAW, article 8 of the Women's Protocol, article 3(1),(2) of the African Charter on Human and Peoples' Rights, article 26 of the International Covenant on Civil and Political Rights and 13(1) of the Tanzanian constitution are violated. For example, article 15(1) of CEDAW states:

> 'States parties shall accord to women equality with men before the law.'

Article 3(1),(2) of the African Charter on Human and Peoples' Rights states:

> 'Every individual shall be equal before the law.'

> 'Every individual shall be entitled to equal protection of the law.'

Also article 13(1) of the Tanzanian constitution states:

> 'All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law.'

Gender equality rights guaranteed under article 8(d) of the Women's Protocol are also violated as it seems that only men were given the right to be heard and women were deprived of the same. The article states:

> 'States parties shall take appropriate measures to ensure that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights.'

Also article 9 (2) of the Convention on the Rights of the Child, which requires all interested parties on custody disputes to be given an opportunity to participate in the proceedings and make their views known, is violated, as it states:

> 'In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.'

Women and men's own definition of the 'best interests of the child'

When I asked ten parents about their understanding of the term 'best interests of the child' in child custody disputes, some had similar views but others had different views, depending on the circumstances of their cases. Below is a table showing different categories mentioned by mothers and fathers on their understanding of the term 'best interests of the child'.

Table VII

Category	No. of parents defined it
Education	4
The right of a child to stay with a mother	2
Food, shelter and clothing	1
The right to inherit from the father	1
The right of a child to visit his/ her mother	1
Total	10

The category on the above table illustrates what judicial officers also consider to be the best interests of the child as shown in the mentioned cases. The category includes education, the right of a child to stay with a mother, the right of the child to visit his or her mother, and food, shelter and clothing.

Children's preferences

I interviewed five children to ask them where they would prefer to stay and most of them had similar views whereby they prefer to stay with a parent who spends a lot of time with a child, a parent who is not cruel and aggressive and a parent who does not use threatening words to the children. They also prefer to stay where there is love, care, friends to make and play with and where they can get material things such as school bags, school uniforms and school money. Some of their preferences were a result of the life experiences they had shared with their parents, as some of them witnessed their parents fighting, using abusive language and showing disrespect to the other parent and the children too. For example, a 12 year old girl whose her parents had a fight said:

> 'If my father would have not been to Tanga, there could have not been fighting between my parents. My father went to Tanga on September 2004 and came back in the same year with another woman whom he left at my aunt's place after my mother, I and my young sister refused to let her in. He came back home at around 1:00 pm on that day and wanted to chase away my mother but she told him that she cannot leave her children. I and my sister also told him that we do not want our mother to move from the house. He proceeded to threaten my mother in front of us telling her that he will kill her but we told him that he will not kill our mother. I don't want my dad to stay in our house because his relatives can harm my mother as my aunt told me and my sister when we went to visit her, that if she were a driver, she could have killed our mother.'

Also, another 9 year old girl child stated:

> ‘I prefer to stay with my mother because my father refused to pay school fees and he was not leaving money at home for food when I was staying with him. It was our neighbour who used to give us food.’

The voices of the children illustrate that some children suffer as a result of their parents’ behaviour and conflicts. Therefore, when they have to choose between their parents, the parent who was misbehaving is unlikely to be chosen by the children. Therefore, children learn from their parents’ behaviour, it affects them and even in custody cases their choice will depend on the way the parents have been treating them.

Since I didn’t manage to observe a case where a child’s views were sought, I interviewed magistrates as regards their experience about children’s preferences from the children they happened to interrogate. They reported similar preferences as those mentioned above. For example, a six year old boy child whose parents were separated, and who preferred to stay with his father told the magistrate:

> ‘My mum doesn’t give me money and buy me a school bag. I don’t play while I am at my mother’s place but when I go to my father’s place I play, he gives me money and buys me the school bag.’

The trial magistrate gave the father custody of the child not only because the child preferred so but also because she observed that the behaviour of the mother was not good as she was promiscuous and she did not have time for her son. As a result it was the child’s grandfather and grandmother from the paternal side who spent time with him.

CHAPTER SIX

Conclusion

There are several factors that the judiciary takes into account when implementing the best interests of the child criterion in matters relating to custody. These include the financial situation of the parent, the character or behaviour of the parent and the wishes of the parents or of the custodian parent.

In trying to consider the above factors the judiciary seems to have left out other issues beside those factors which are also significant for the welfare of the child. These issues include: the wishes of the child, as provided for under article 12 of Convention on the Rights of the Child, article 4 of African Charter on the Rights and Welfare of the Child and section 125(2) (b) of Law of Marriage Act; suitability of the parent to have custody of the child; and inquiries into the arrangements made or proposed by the parties as to whether they are in the best interests of the child, as provided for under section 108(c) of the Law of Marriage Act.

Judicial officers gave preference to the parents with a better financial situation without even questioning the suitability of the parent to have custody of the child and seeking views of the children as to where they preferred to stay, that is either with the mother or the father. Fathers were most likely to get custody of the child because of their better financial situation and besides this, judicial officers applied the tender age presumption which is provided for under section 125(3) as an automatic right of the father to have custody of a child who is over seven years of age.

Judicial officers took into consideration the behaviour of the mother in deserting the matrimonial home in deciding custody of the child, whereby mothers lost custody at the end of the day.

The judiciary considered the interests of the child secondary to the custodian parent's interests as they did not inquire into the arrangements made or proposed by the parties for the children when they decided to settle the matter out of court. They did not question the suitability of the parent to have custody of the child or seek the views of the child as to where he or she preferred to stay – that is either with the mother or father, as is his or her human right.

Judicial officers no longer apply customs of the community to which parties belong as they are outdated and they infringe on women's human right to have custody of their child, as in most societies a child belongs to a father. Hence, my assumption as regards customs did not stand.

Some of the provisions of the laws and human rights instruments relating to custody of the child were not fully implemented by judicial officers in deciding custody of the child due to the lack of consideration of other issues mentioned above when considering the financial capacity, character and the wishes of the parent. These are article 3 of Convention on the Rights of the Child, article 4 of the African Charter on the Rights and Welfare of the Child and section 125(2) of the Law of Marriage Act which state that the best interests of the child shall be a paramount consideration in all matters affecting custody. Also, article 12 of Convention on the Rights of the Child, articles 4 and 7 of the African Charter on the Rights and Welfare of the Child and section 125(2) (b) of the Law of Marriage Act require courts to have regard to the wishes of the child who is capable of forming his or her own views.

The tender age presumption which is provided for under section 125(3) of the Law of Marriage Act has been applied by judicial officers as an automatic right of either parent depending upon the age of the child without even questioning the suitability of the parent to have custody of the child or seeking the views of the child as to where he or she prefers to stay. In this case therefore, mothers got custody of the children below seven years of age and fathers got custody of the children above seven years of age, especially when the financial situation of the parent was taken into consideration by judicial officers. Hence, judicial officers consider the interests of the child secondary to the custodian parent's interests and in this case they limit the best interests of the child.

There is a problem as regards the age where a child can be regarded as capable of expressing an independent opinion. In this case therefore, judicial officers each have their own perception as regards the right age. This can also adversely affect the right of the child to an opinion as there is no expressed age in the Law of Marriage Act where a child can be regarded as capable of expressing an independent opinion. As a result the views of the child are not sought by judicial officers and his or her interests are therefore considered secondary to the custodian parent's interests.

Involvement of social welfare officers (where necessary) in custody matters as required by section 136 of the Law of Marriage Act is significant if a court wants to satisfy itself in its decision. Non-involvement of the social welfare officers can sometimes make the work harder for judicial officers when determining the best interests of the child, since the social welfare officer's role is to provide them with the background of the parties, their home environments and their lives with their children.

CHAPTER SEVEN

Recommendations

As far as the findings and the conclusion are concerned, I recommend the following for effective implementation of the principle of the best interests of the child by judicial officers.

1 Judicial officers should have regard to other factors

Judicial officers should realize that the best interests of the child are not served by only measuring the financial situation and wishes of the parents. They need to also consider other factors, such as suitability of the parent to have custody of the child and the child's wishes as well as inquiring into the arrangements made or proposed by the parties for the child when they decide to settle the matter out of the court.

They should also realize that they are the upper guardians in issues of custody of which there is one norm they need to apply and that is the predominant best interests of the child as it was pointed out in *Shawzin v Laufer* (Supra) where Eloff JA said:

> 'To the court, as upper guardian, the problem of custody is a somewhat singular subject, in which there is substantially one norm to be applied, namely the predominant interests of the child.'

Moreover, they should be sensitized that when taking into account all other relevant matters such as the financial situation of the parent, their behaviour and wishes, the best interests of the child shall be of the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed, as was observed by Lord McDermott in *J v C* (Supra).

2 Awareness raising on the application of the tender age presumption

There should be awareness raising among magistrates that the tender age presumption which is provided for under section 125(3) of the Law of Marriage Act does not give automatic right to either parent to have custody of the child depending on the age of the child. They should therefore be made aware of its application in custody matters and that it is a rebuttable presumption whereas it may or may not be applied depending on the circumstances of the case. In this case they should be aware that the suitability of the parent to have custody of the child should be questioned and the views of the child should also be sought for the interests of the child to be served. Awareness raising can be done through seminars and workshops by other judicial officers who are conversant with the application of the said provision.

3 Seeking the views of the child

Magistrates should seek the views of the child in custody disputes, as required by article 12 of the Convention on the Rights of the Child, article 4 of the African Charter on the Rights and Welfare of the Child and section 125(2) (b) of the Law of Marriage Act . They should realize that children also have the right to form an independent opinion as their human right, and that their wishes have to be given some weight. They should also remember that custody matters affect children directly, hence,their views need to be respected where they are logical for their best interests and that it should not only be adults who make decisions for the children.

4 Learn from other countries

Judicial officers from Tanzania should learn from courts and judicial officers of other countries on how they apply the principle of the best interests of the child in custody matters. This is to enable them to have a wider scope in the application of the best interests of the child principle and to be able to put it in practice when they handle custody cases. This could be done by organizing seminars or training with other countries and sending a number of judicial officers to particular countries, for example, three officers per year. When they come back the judiciary should make sure that these officers disseminate information to their fellow officers on what they have learnt from other countries through seminars and workshops. The officers can also ask for examples of custody cases from other countries which the judiciary should make copies of for use during seminars and workshops for their own benefit when handling custody cases. There are also a lot of publications from other countries on custody issues. Judicial officers should also be sensitized to refer to these books and learn more about the application of the best interests of the child criterion.

5 Sensitization of judicial officers on the importance of social welfare officers

Section 136 of the Law of Marriage Act requires courts to call for the advice of a social welfare officer in custody matters. The judiciary should therefore conduct seminars and workshops which would be carried out by judicial officers themselves. Since most of custody disputes come as part of a divorce case, whereas matrimonial disputes must pass through the social welfare office before reaching the court, judicial officers should call for advice from the social welfare officer whenever it is practicable. They should also learn that social welfare officers can provide them with background information about the parties in a custody dispute and the circumstances of the children's lives too, on which they can make a decision. As Bromley, explaining their importance, emphasized:

> 'It should be appreciated that a welfare officer is an officer of the court and as such has an independent role being neither child's representative nor a witness for either party.'
>
> …when welfare officers are appointed by courts they are expected to investigate the circumstances of the child or children concerned and the important figures in their lives with a view to providing the court with *factual information* on which to make a decision.'

6 Awareness raising on common responsibilities of the parents

The Ministry of Community Development, Gender and Children, in collaboration with human rights non-governmental organizations, particularly those dealing with the rights of women and children like TAWLA, LHRC and TGNP (Tanzania Gender Networking Programme), should raise awareness among women on family education as required under article 5(b) of CEDAW which Tanzania has ratified. The article states:

> 'States parties shall take appropriate measures to ensure that family education includes a proper understanding of…the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.'

In this case the ministry should ensure that parents, especially women, recognize the principle that both parents have common responsibilities for the upbringing and development of the child, as also required under article 18 (1) of the Convention on the Rights of the Child. Women should also be made aware that the behaviour of deserting the matrimonial home and abandoning the children has an adverse impact on the children who need a mother's love and care.

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