IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO. 030/2019**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

MUTALE MUSWEU **APPELLANT**

AND

IAN MUSWEU **RESPONDENT**

CORAM: Chisanga JP, Majula and Ngulube, JJA

On 22nd May, 2019 and 4th December 2019.

For the Appellant: *Mrs. Findlay, D. Findlay & Associates and Ms. Mwape Bwalya, Mwenye Mwitwa Advocates*

For the Respondent: *Ms. I. Nambula, Sharpe and Howard Legal Practitioners*

J U D G M E N T

CHISANGA, JP delivered the Judgment of the Court

Cases Referred to:

1. ***Zanetta Nyendwa vs Kenneth Spooner SCZ judgment (2013) ZR 1 Vol. 2***
2. ***Re C(A) an infant C vs C (1970) 1 All ER 309***
3. ***J vs C (1969) 1 All ER 788***
4. ***D vs M (Minor Custody Appeal) (1982) 3 All ER 897***
5. ***Mponda vs Mponda Appeal No. 199 of 2015 SC***
6. ***The Minister of Home Affairs and Another vs Lee Habasonde (2007) ZR 207***
7. ***Kitwe City Council vs Nguni (2005) ZR 57***
8. ***Sililo vs Mend-a-bath Zambia Limited and Another SCZ 168 of 2014***
9. ***Promart Investment Limited vs African Life Financial Services Zambia Limited and Others (2013) ZR 341 Vol 1***
10. ***C vs C (Minors: Custody) (1988) 2 FLR 291***
11. ***Richard Mweemba vs Mary Munthali Mweemba SCZ Appeal No. 143 of 2010***

12. ***Clissold vs Clissold (1964) 108 Sol Jo 220,***
13. ***Willoughby vs Willoughby (1951) P 184.***
14. ***Re F (a minor) (1995) 3 All ER 641***
15. ***Re Adoption Application No. 41/61, (1962) 3 ALL ER 553, p. 560***
16. ***R v Gygall (1893) 2 QB 232 at p. 248***
17. ***Copeland vs Copeland 904 50 2d 1066 (Miss. 2004)***
18. ***Re B (an infant) (1962) 1 ALL ER at 875***

Other works referred to:

1. **Bromley on Family Law, 3rd Edition at page 327**
2. **Rayden and Jackson on Divorce 5th edition at page 1410**

In this appeal, we will refer to the Appellant as the Petitioner, which is what she was in the Court below. The brief facts of the appeal are that the Petitioner and the Respondent's marriage was dissolved, at the instance of the Petitioner, by a Judgment dated 30th December, 2016. On 28th August, 2017, the Respondent, by summons, applied for a joint custody order of the child of the family. His affidavit evidence revealed that he would like to be granted joint custody of LM, the child of the family as efforts to access the said child in the past had proved futile. He had made arrangements for a live-in maid and his older sister to be readily available to attend to the child whenever she was at his home.

According to the affidavit, he reminded the court that it had made an order, on an application by the appellant for sole custody, that care and control was granted of the petitioner, with reasonable access to him. However, the appellant did not formalize the order. He came to learn of this through a search conducted by his advocates. Although he had seen Luwa Musweu occasionally

during school days at her school, he wished to have joint custody of the infant. He complained that the petitioner had not delivered the child to him as agreed earlier. She had also insisted that there be an adult person to accompany the child when allowing him access.

In seeking joint custody, he informed the court that he had made arrangements for a live-in maid, and his older sister to be available when the child visits him.

The Petitioner objected to the application, citing traumatising behaviour by the Respondent in the past which had led to the child to insist that she shares a bed with the Petitioner. She asserted that the respondent did not show concern for the child's well-being, safety or happiness. He did not relate with her because he suspected that the child was not his. The other reason was that the child's routine would be disturbed if a joint custody order was granted, and further that Luwa Musweu would be separated from her older sister. She stated that the Respondent frequently worked out of town and also worked on Saturdays while she had flexible working hours that allowed her to stay home with the child after picking her up from school thereby providing continuity. She also feared that the child would be constantly exposed to the Respondent's male friends who gather at his residence before motor bike riding or to play video games.

In his reply, the Respondent deposed that the Petitioner's allegations were baseless and a fabrication, aimed at portraying him as an unfit, irresponsible

and abusive father. He had made efforts to have a relationship with the child, and has created time and is willing to have his sister live with him to care for the child but the Petitioner has continuously frustrated his efforts.

The court made an interim order on the 29th March, 2018 granting to the Respondent access to child of the family for five hours every Saturday before determination of the respondent's application.

On 30th August, 2018, the Petitioner filed an application to vary the interim order due to an occurrence on the 2nd of April, 2018. The Respondent's car was set on fire by a petrol bomb. She feared that the child would be harmed during the Saturday five-hour visit. The Respondent had done nothing to ensure the safety of the child even though he was aware of threats on his family.

In opposition, the Respondent admitted that his car port had been set ablaze. This did not however mean that he is a negligent parent who would expose his child to danger. His view was that the petitioner was bent on portraying him as irresponsible by making scandalous unfounded allegations so that his application is refused. He explained that it was one Likando Sakubita who set his car port on fire, on a misapprehension of facts. He in fact apologised, as revealed by the message and was tried for the offence.

In reply to the affidavit in opposition, the petitioner asserted that the child was not scratched but bitten by the dog and received medical treatment. Her fear was that a pit bull being a dangerous dog and very unfriendly can pose great danger to the child. Alluding to the petrol bomb incident, she deposed that the

Respondent had not taken any measures to safeguard the child. She added that the child is traumatized by the fact that she has to leave her sister behind every Saturday.

The parties were cross examined on their respective affidavits. When cross examined, the Respondent admitted that they were threatened by the petrol bomb incident. He also admitted that he did not take the child to the hospital as the dog was fully vaccinated, when the child was bitten by the dog. He also said he had not taken any precautions concerning their dog. He conceded that he does travel out of jurisdiction for work, and missed some weekends with the child as a result. He said his maid takes care of the child during visits. He conceded that his hobbies are riding motor bikes and playing video games with his male friends. He said that these friends do not frequently visit his home.

When cross examined, the Petitioner said that her desire is that the Respondent should not access the child until the environment is safe. It was not safe due to the bombing incident, and the dog bite. She admitted being aware that the culprit in the bombing and his family, apologized to the Respondent. She complained that the Respondent requests to reschedule the visits when he has work commitments. She opposed the application for joint custody because the Respondent did not show care for child. When she was bitten by the dog, he merely bandaged the spot instead of seeking medical

attention. She acknowledged that it is in the best interest of the child to have a relationship with her father in her formative years.

After considering the evidence before her, the Court below observed that it was abundantly clear that both parents had been involved in the welfare of the child. She recited the principle that the first and paramount consideration by a court in making a custody order is the welfare of the child; its happiness and well-being, social and educational influences, psychological, and physical well-being. Its physical and material surrounding all goes towards the child's welfare. She expressed the view that the conduct and wishes of the parties were factors to be considered as such conduct is influential to the child's life and welfare. After evaluating the evidence before her, in the context of who is better to promote and safeguard the child's growth, development and welfare, the Court found that the balance leant in favour of the Respondent.

The learned judge opined that children have a right to parents who will ensure, protect and promote their best interest and not selfishly promote their personal interest. The learned judge found that it was proper to make a joint custody order of the child. The Petitioner would have the day to day care and control, while the Respondent would have liberal access over weekends and school holidays. She reasoned that it was important to safeguard the child's need for continuity of the relationship that had been developed with the parents before divorce.

Dissatisfied with the holding of the Court below, the petitioner now appeals on the following grounds:

1. The court below erred in law and in fact in failing to take into account and consideration all the relevant factors, circumstances and evidence on record in the process of evaluation and determination of what was in the best interest of the child by awarding joint custody and liberal access to the Respondent on weekends and school holidays in particular.
2. The Court below failed to evaluate the evidence on record in a balanced manner, instead only considered the flaws of one side and not the other in its assessment of suitability of the parties in the context of who is better placed to promote and safeguard the interest of the child.
3. The Court below erred in law and in fact in disregarding or placing little or no relevance to the real risk, danger or harm the child was likely to suffer by reason of the events on record.
4. The Court erred in law and in fact in stating that the Appellant did not file submissions and wholly disregarded the Appellants submissions when in fact it was the Appellant who filed her submissions within the requisite time frame as ordered by the Court whereas the Respondent did so outside the stipulated time frame, despite this fact the Court below preferred the Respondent's position disregarding the cardinal principles of fairness and equity before the law to all parties.
5. The Court below erred in law and in fact in ordering joint custody to both parties with care and control to the Appellant when it was evident that

there was no reasonable prospect of the parties cooperating and therefore undesirable and unnecessary to make split orders.

6. The Court below erred in law and in fact in ordering joint custody with care and control to the Appellant when in fact the Court contradicted itself by stating that the Respondent was to have the child at his home during school holidays thus denying the Appellant care and control over the child during such school holidays when the Respondent would have the child exclusively.

In the Appellant's heads of arguments, grounds one, two, three, five and six were argued together. It was submitted that in making the joint custody order, with liberal access to the Respondent on weekend and holidays, the Court failed to consider the circumstances and evidence on record in determining what is of primary importance when it comes to the best interest of the child. The Court failed to consider the fact that the Respondent's residence was not suitable for a child of five years. It neglected to interrogate the evidence regarding the availability of the Respondent's elder sister and his during the child's visit. The Court failed to inquire whether these arrangements would be suitable especially taking into account the fact that during holidays, the Respondent is expected to be at his place of work. The Court did not regard the Appellant's evidence that the Respondent's home is usually frequented by male friends.

It is Learned Counsel's further submission that the Court neglected to take into consideration evidence led by both parties but only took into account the Appellant's flaws. When evaluating the Respondent's evidence that the Appellant denied him access to the child, the Court, instead of establishing the reason for the denial, formed its own opinion contrary to the evidence on record.

It was submitted that Courts should consider the interest of the child as paramount in an application for custody. Reference was made to: **Bromley on Family Law, 3rd Edition at page 327** which states:

> ***"Similarly, modern research on psychology has shown that transferring the care and control of a child may have a detrimental if not disastrous, effect by depriving it of security and stability that it has known. Where there is a grave danger of this sort, the court must of course try at all costs to avoid the change"***

Counsel referred to ***Zanetta Nyendwa vs Kenneth Spooner***[1], which reiterates that the welfare of the child is a paramount consideration in custody orders.

Our attention was also drawn *to* ***Re C(A) an infant C vs C***[2] where the court said the following:

> ***"There is no principle in custody cases that a boy of eight years should, other things being equal, be with the father; in all cases the paramount consideration is the welfare of the infant and the Court must look at the whole background of the infant's life and all circumstances of the case...***

Edmund Davies L.J. stated that: ***"the decision must depend on whom the father is, who the mother is, what they are prepared to do, and all the circumstances of the case."***

Learned counsel also referred to other authorities on the applicable principle. We consider it unnecessary to refer to all of them. We will only refer to of ***J vs. C***[3] where the following was stated:

> ***"The second question of construction is as to the scope and meaning of the words... "shall regard the welfare of the infant as the first and paramount consideration." Reading these words in their ordinary significance, and relating them to the various classes of proceedings which the section has already mentioned, it seems to me that they 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 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 on or determines the course to be followed."***

The Appellant also cited the cases of ***D vs M (Minor Custody Appeal)***[4] in which the Court opined the following:

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

It contended that as the Petitioner had been responsible for providing daily care, physical and emotional needs, the Court ought to have considered the continuity of care of the child. That it was not shown that the subsisting arrangement was not in the best interest of the child. It was submitted that

during school holidays, instead of the child being alone at her father's house, she would interact with her sibling. This would provide normalcy to her routine and overall mental health. It was contended that the Respondent, due to his work outside the jurisdiction, is not best suited to provide a settled environment for the child. It was highly unlikely that the Respondent would have the required time. He would most likely relegate his duty of care for the child to a third party, whose capacity to give care to the child is unknown not only to the Petitioner but also to the Court. It was argued that this was evident from the Respondent's inability to commit to his Saturday five hours scheduled visit leaving the child with feelings of disappointment.

Learned counsel alluded to the Respondent's hobbies of bike riding and playing video games which expose the child to the Respondent's male friends that frequent his residence. She added that granting joint custody would expose the child to the Respondent's irresponsible behaviour which culminated in a petrol bomb attack as well as his violent temperament. It has also been pointed out that the Respondent's environment is not a safe one for the child owing to the Respondent's pit bull which has on one occasion attacked the child.

It was contended that a holistic consideration of these factors jeopardize the security and wellbeing of a female child during weekends and holidays. She has added that the routine suggested by the Court below is too hectic for a five year-old child. The joint custody order is not in the best interest of the child.

Thus, the order of joint custody granting the Respondent liberal access to the child during weekends and school holiday is irregular. The case of ***Mponda vs Mponda***[6] was drawn to our attention. The Supreme Court stated that:

> ***"In order to arrive at a decision that will promote the best interest of children, there is no requirement under the law which compels the Court to first obtain a comprehensive social welfare report. The Court is entitled to make its decision and conclusion on the evidence adduced before it, if such evidence is sufficient to arrive at a decision that will promote the best interest of the child."***

Counsel for the Petitioner further submitted that the lower Court did not explain how and why the welfare and safety of the child was not a circumstance to be evaluated and accounted in determining the overall best interest of the child of the family

It is the Petitioner's contention that the findings of fact made by the Court – that it is in the best interest of a female five-year-old to be in the unsafe care of the Respondent at his residence – cannot stand to be a correct position of fact.

Under ground four, it was submitted that the trial Court erred in law and in fact when it stated that it did not consider the submissions of the Appellant because the same where filed out of time. Contrary to the assertions by the trial Court, the submissions were filed on 29th October, 2018, within the time frame as ordered by the Court. A perusal reveals that Counsel had industriously crafted their submissions and raised a lot of legal issues on behalf of the Petitioner that needed to be addressed by the Court below.

The Court neglected to consider the submissions in their entirety ran contrary to the advice of the Supreme Court in ***The Minister of Home Affairs and Another vs Lee Habasonde,***[6] that every judgment must reveal a review of the evidence, where applicable, a summary of the arguments and submissions.

In response to the Petitioner's heads of argument, it is argued on behalf of the Respondent the order for joint custody was properly made. Learned counsel did not raise any issues pertaining to the circumstances in which the Respondent's elder sister and maid would look after the child. The Petitioner was misguided in contending that the Court below failed to interrogate circumstances in which these care givers would be present to take care of the child.

In response to the Petitioner's contention that the Court below did not take into account the fact that the Respondent's home is unsafe due to his male guests that frequent the house, the Respondent submitted that there was no evidence adduced by the Appellant to that fact. It was the Respondent's submission that the Court properly evaluated the evidence in a balanced manner which evidence lamentably failed to establish the Petitioner's allegations against the Respondent.

Learned Counsel for the Respondent has submitted under ground three that the Court rightly upheld the globally acknowledged principle of the best interest of the child which in this case is access to both parents thus the award of joint custody. Joint custody was made there was no danger, risk or

hardships established by the Petitioner, warranting the child being denied the much needed relationship with the Respondent, her biological father.

In arguing ground four, Counsel for the Respondent referred us to the cases of ***Kitwe City Council vs Nguni,***[7] ***Sililo vs Mend-a-bath Zambia Limited and Another***[8] and ***Promat Investment Limited vs African Life Financial Services Zambia Limited and Others.***[9] She argued that the settled law regarding submissions is that they are not binding on the Court. The Court's decision cannot be upset on the basis of a purported failure to consider the Appellant's submissions.

In response to ground five wherein the Petitioner has contended that the Court erred in law and in fact when it ordered joint custody with care and control to the Appellant as there is no reasonable prospect of the parties cooperating, Counsel has submitted that the Court fairly awarded joint custody and gave clear direction of how the said order is supposed to work; by allowing the petitioner care and control of the child and the Respondent access on school holidays and weekends. Counsel submits that according to the record, the Petitioner has repeatedly frustrated the Respondent's efforts to co-parent the child of the family.

Counsel has summed up the Respondent's arguments by relying on the case of ***Nyendwa vs Spooner***[1] that:

> ***"The trial judge properly looked at the whole background of the children's life and the circumstances of the case and came to the conclusion that it is in the***

interest of the children that the custody be granted to the Respondent and that they live in the United Kingdom."

It was submitted that the Court below took into consideration all the circumstances in making the order, so as to protect the best interest of the child. We were urged to uphold the lower Court's holding as it is in the best interest of the child in line with the **United Nations Convention on the Rights of the Child** and **The African Charter on the Rights and Welfare of the Child** for the child to be brought up by both parents notwithstanding the fact that the parents are divorced.

In reply to the Respondent's heads of arguments, Counsel for the Petitioner has pointed us to the Petitioner testimony in cross examination that during the subsistence of the marriage, the Respondent's lifestyle was that of a keen biker and a video gamer. During these activities, he would not be aware of occurrences in the environment. She also testified that such an environment was not suitable for the child. It was submitted that this evidence was not considered by the court below on the premise that there was no evidence led to that fact. This it was argued, was a misdirection as evidence was led on the unsafe conditions at the Respondent's premises.

Counsel for the Petitioner emphasised regarding the suggested caregivers mentioned by the Respondent, that is – the maid and his older sister, that the Court erred in preferring these untried alternatives over and above that which had been in place to date, which have not been proved unsuitable. Learned

counsel added that the Court failed to address the issue that the Respondent sometimes could not make it for the five hours' visitation due to his work commitments. This evidence, it was argued, was vital in determining what is the best interest of the child as the Respondent was not available to personally take care of the child but would rely on third parties.

It is further argued that the Court disregarded sisterhood by splitting the siblings. The case of ***C v. C (Minors: Custody)***[10] was cited, as well as ***Richard Mweemba vs Mary Munthali Mweemba***[11] where the Supreme Court gave custody of two young children to the mother on account of their tender ages and formative stage. The Court stated that their decision was not because the Respondent was wanting but because of the ages of the children.

In reply to the Respondent's arguments under grounds two and three, Counsel for the Appellant has pointed this Court to the affidavit evidence exhibited in the Court below which revealed violent behaviour by the Respondent towards the Petitioner and the risk, danger and hardship the child is likely to suffer under the joint custody order.

Relying on **Rayden and Jackson on Divorce 5th edition at page 1410** and the case of ***Clissold v. Clissold***[12], it was argued under ground five and six that joint custody orders with care and control to one parent are impractical where parents cannot cooperate.

At the hearing, Mrs. Findlay, Counsel for the Petitioner emphasized the arguments in the Petitioner's heads of arguments. that the Court needed to

take into account the sex of the child, continued care, the age of the child, the environment and the fact that the Respondent would be available to personally take care of the child's daily needs.

As regards the petrol bomb, counsel was unable to state whether or not such an incident was likely to repeat itself. She submitted regarding the dog bite that the fact that the hospital treated the child for a month meant that it was a dog bite and not a scratch. It would be prudent to prevent the incident from occurring again. When questioned on the fact that the Petitioner herself has a dog, she submitted that the Petitioner's dog has been in her custody for three years and has never bitten the child. Counsel suggested that preventative measures like giving away the dog should be taken by the Respondent.

Mrs. Findlay admitted that the petitioner also works and it would be necessary to leave the child with a third party. She stated that the order by the Court means that the child will continuously be disrupted from one home to another; there will be no stability in her routine.

Counsel submitted that custody should be given to the mother. When considering access, she urged this Court to be mindful of the fact that the Petitioner must have weekends as well as school holidays with the child.

In addition to the cases referred to us in the heads of arguments, learned counsel referred us to the case of ***Willoughby vs Willoughby.***[13]

Counsel for the Respondent, Ms. Nambule entirely relied on the Respondent's heads of arguments filed into court.

We have considered the grounds of appeal advanced by the appellant. We will deal with grounds 1, 2 and 3 as they are related. We first wish to remind the parties that a judge considering a custody application exercises a discretionary jurisdiction. Their decision may only be interfered with if although the judge had taken all relevant factors into consideration, their decision was wrong in that they had given insufficient weight, or too much weight to certain of those factors. The appellate court would be reluctant to interfere where the judge had been influenced to a decision or to even a substantial extent by his impressions based on seeing and hearing the witnesses, but it could not be said that in those circumstances it should never do so. See ***Re F (a minor)***[14]**.**

We begin with the principle that applies in custody applications. It was accurately restated by Dankwarts, LJ in ***Re Adoption Application No. 41/61***[15] as follows:

> ***"But I would respectfully point out that there can only be one 'first and paramount consideration', and other considerations must be subordinate. The mere desire of a parent to have his child must be subordinate to the consideration of the welfare of the child, and can be effective only if it coincides with the welfare of the child. Consequently, it cannot be correct to talk of the pre-eminent position of parents, or their exclusive right to the custody of their children, when the future welfare of those children is being considered by the court."***

Elucidating the meaning of '*welfare*' in such matters, Kay, LJ, in ***R v Gygall***[16] had this to say:

".....Again, the term 'welfare' in this connection must be read in its largest possible sense, that is to say, as meaning that every circumstance must be taken into consideration, and the court must do what under the circumstances a wise parent acting for the true interests of the child would or ought to do. It is impossible to give a closer definition of the duty of the court in the exercise of this jurisdiction."

We endorse this articulation of the duty of a court considering a custody application. All circumstances should be considered in arriving at a decision. The court will assess the suitability of the parties to look after the child, the home environment, the relationship of the child with members of its family, stability and continuity of care among other considerations.

The appellant contended that the court neglected to look into the availability of the maid and the older sister to look after the child. In our view, it is not only the availability of these two individuals that should have been looked into. Their suitability to look after the infant was also important. How the maid looks after the child on the times the child has been with the appellant was not explained to the court. It was not indicated whether the routine the child has been raised up to follow by her mother was being adhered to or varied. Only the statement that a live-in maid would be available was made.

Similarly, there was no indication from the appellant's older sister that she would avail herself each time the appellant was away, to look after the child. There was therefore no basis on which the lower court could assess the suitability of the proposed care givers to look after the infant. ***Copeland vs***

Copeland,[17] a decision of the Mississippi Supreme Court illustrates this. This was an appeal from a decision of a lower court, granting the father paramount physical custody of the child of the family, a male child age 18 months.

The appellate court referred to ***Albright vs Albright***, and reiterated as follows:

> ***"The Albright factors used to determine what is in the 'best interest' of the child in regard to custody are:***
>
> > ***Age, health and sex of the child. Determination of the parent that had the continuity of care prior to the separation; which has the best parenting skills and which has the capacity to provide primary child care, the employment of the parent and responsibilities of that employment; physical and mental health and age of the parents, emotional ties of parents and child; moral fitness of parents; the home school and community record of the child.....stability of home environment and other factors relevant to the parent-child relationship."***

The court observed that the lower court, found that the sex of the child favoured the father because both were male. On continuity of care, the lower court specifically found that the continuity of care factor favoured the father, given that he would go and sit with the child when he got home from work, or he would begin preparation of the child's food and get him ready for bed until the mother came home from work. Further, the chancellor (in the court below) noted that during the mother's custodial periods, she would put the child in day care with several other children, while the father would put the infant in the custody of his mother.

The Supreme Court then stated that their review of the record convinced them that there was substantial credible evidence to support the findings and conclusion of the court below.

We are persuaded that the factors listed above would assist a court in assessing who is best suited to have custody of the child, in its best interest.

We would also in this connection echo Donovan LJ's view in **Re B (an infant)**[18]

> ***"In matters where credibility is an issue, of course that consideration [that being seen on hearing the witnesses] is of great weight. I do not think it is of such weight when one is assessing a person's character and ability to look after the child. The encounter is too brief for any reliable conclusion."***

The point we are making is that evidence of ability to look after the infant must be provided. Indications as to how a proposed care giver would look after the child would assist the court in deciding whether the welfare of the child in that regard would be assured. Therefore, the mere word of the respondent that he had a live-in-maid, was insufficient. Our considered view is that more weight than was warranted was attached to the respondent's mere assertion. Our interference is thus warranted.

It is significant that the appellant insisted that the child be accompanied by her maid, when visiting the respondent. This insistence underscores the appellant's apprehension for the safety of the infant while at the respondent's home. The demeanor of the appellant should therefore have been considered together with her insistence that the child be accompanied. This insistence

shows that her apprehension was real. The respondent asserted that he acceded to her demands, though unreasonable. The evidence reveals that he was an avid video gamer and biker. Though he denied having male friends at home to play video games, this was unlikely to be accurate. How then did his wife know that video gaming was his hobby if she had not seen him playing video games? Though he denied having a lot of male friends over, he did not tell the court where he played video games other than at home. The appellant's insistence that the child be accompanied to the respondent's home tends to show that she needed someone reliable to look after her during visits.

However, instead of going back to court to request imposition of this condition during visitation, she took matters in her own hands, and prevented the respondent from accessing the child when he was to do so pursuant to the Order. This is why the learned judge took the view that she was uncooperative. We condemn the appellant's approach in the strongest of terms. Parties should not take matters in their own hands but should approach the courts for assistance where warranted.

The evidence on record revealed that the child was treated for a dog bite at a hospital. This lent credence to the appellant's assertion that the child was bitten and not merely scratched. The respondent merely bandaged the area, and did not inform the appellant that the child had been bitten. He produced vaccination certificates in court. The child would have been spared the unnecessary injections she received had he communicated. The learned judge

was of the view that the dog was harmless, as a picture showed the child playing with the dog.

In our view, regardless of breed, the propensity of the dog should be considered when it comes to the safety of the child. This particular dog having bitten the child, the court should have considered whether precautions should be taken, so as to prevent a re-occurrence of the incident.

Coming to the petrol bomb, the learned judge properly discounted the incident as a one off incident unlikely to re-occur.

Having said the above, we agree that it is in the best interest of a child to have contact with its father, where there is nothing militating against him coming into contact with the child. This would enable her to bond with him. However we do not think that making the child live one part of the week with the mother and the other with the father is appropriate. It is disruptive and likely to disorient a child. We would in this connection refer to **Nutshells of Family Law by Tony Wragg, Seventh Edition London Sweet & Maxwell 2007, Page 75,** where he states the following:

> ***"....courts have long been influenced by the idea that a child's development is assisted by maintaining a relationship with both parents, if possible. However, this has usually been achieved by the courts ordering that a child should live with one parent and have frequent and regular contact with the other. Only exceptionally have courts ordered the child to live with one for part of the time and the other for the rest. Also generally, it has not been considered beneficial to grant an order the effect of which would have been to split siblings. The likely effect on him of any change in his circumstances, stability in the life of a child is considered beneficial. Thus, generally, a court has leant against an order the***

effect of which would have been to change well-established and beneficial arrangements, for example a change of home; a change of carer."

The order of the court below was to move the child from one home to the other in the same week. Instability is the result of such an order. The evidence does not reveal any exceptional circumstances why the child should be moved about every week. This exceptional order does not appear justified by the evidence. It appears that the trial judge did not consider the effect of such an order on continuity of care.

That said, it must be remembered that the basis on which it was ordered that the child lives with its father for the stated period is unsustainable, as the proposed care giver's ability to do so was not assessed. The material on which to do so was not availed to the court. No Order was made concerning the dog that bit the child, when the court should have done so, to ensure the safety of the child.

Coming to ground four, we find this ground of appeal inconsequential. The trial court did not see the submissions although they were on record. This however cannot be the basis to overturn a decision of the court.

On the foregoing, we allow the appeal, and set aside the order made by the trial judge. The child will live with its mother. It will spend one Saturday in a month with the father but in the company of the appellant's maid. The respondent will have to put adequate measures in place to prevent the dog from biting the

infant again. The respondent is at liberty to apply for variation of the custody order before another high court judge. Each party will bear own costs.

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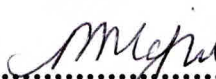
F. M. CHISANGA
JUDGE PRESIDENT



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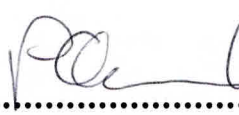
B. M. MAJULA
COURT OF APPEAL JUDGE



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P. C. M. NGULUBE
COURT OF APPEAL JUDGTE