

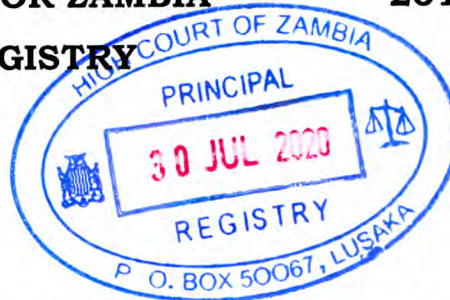
**IN THE HIGH COURT FOR ZAMBIA**

**2018/HP/D207**

**AT THE PRINCIPAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Family Division)*



**BETWEEN:**

**RACHELLE LYN NOACH MILSTEAD**

**PETITIONER**

**AND**

**WARREN STANLEY MILSTEAD**

**RESPONDENT**

**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO,  
IN CHAMBERS, ON THE 30<sup>TH</sup> DAY OF JULY, 2020.**

*For the Petitioner: Mr. M. Chisunka – Nkusuwila Nachalwe Advocates*

*For the Respondent: Ms. J. Mutemi – Theotis Mataka and Sampa Legal  
Practitioners*

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## **RULING**

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**CASES REFERRED TO:**

1. *J vs. C (1970) AC 688;*
2. *Re G (Education: Religious Upbringing), Munby LJ (2012) EWCA Civ 123;*
3. *Mponda vs. Mponda (2018) ZMSC 350;*
4. *Mutale Musweu vs. Ian Musweu - Appeal No. 30 of 2019, ZMCA 236;*
5. *Re Adoption Application No. 41/62 (1962) 3 ALL E.R. 553 @ 560;*
6. *Albright vs. Albright - 437 So. 2d 1003 1005 Mississippi;*
7. *D vs. M (Minor: Custody Appeal) (1982) 3 ALL E.R. 897;*
8. *Allen vs. Allen (1948) 2 ALL ER 4131;*
9. *Re G (2012) EWCA Civ. 1233;*
10. *Stoyke vs. Stoyke - SCZ Appeal No. 67 of 1998;*
11. *Elvis Mtonga vs. Lungowe Lubasi - SCZ Appeal No. 37 of 2003;*
12. *Re A (minor) 2 FLR 394; and*
13. *Rostron vs. Rostron (1982) 3 FLR 270.*

**LEGISLATION AND OTHER WORKS REFERRED TO:**

1. *The Matrimonial Causes Rules, 1973;*
2. *The Matrimonial Causes Act No. 20 of 2007;*
3. *Hayes & Williams Family Law, 6<sup>th</sup> Edition, Oxford University Press, 2018.*
4. *The United Nations Convention on the Rights of the Child;*
5. *The African Charter on the Rights and Welfare of the Child*
6. *The Affiliation and Maintenance of Children Act, Chapter 64 of the Laws of Zambia; and*
7. *Family Law in Zambia: Cases and Materials, Lillian Mushota.*

**1 INTRODUCTION**

1.1 This is a Ruling on the Petitioner's Application for Custody of the child of the family, whom I shall refer to as TM, born on 24<sup>th</sup> March, 2011.

**2 AFFIDAVIT EVIDENCE**

2.1 The application was brought pursuant to **Section 92** of **The Matrimonial Causes Rules**<sup>1</sup> and was supported by an Affidavit deposed to by the Petitioner, RACHELLE LYN NOACH MILSTEAD, filed herein on 4<sup>th</sup> June, 2020, in which she avers, *inter alia*, as follows: -

1. *That upon the marriage being dissolved by this Court, the Petitioner relocated to Zimbabwe with all the children of the family, inclusive of the TM, who is the subject of this application, where TM was enrolled as a student at Mubeena Ebrahim Primary School;*
2. *That a verbal agreement had been reached between the parties which entailed TM remaining in the Petitioner's custody during school terms and travelling to Zambia to be with the Respondent during school holidays;*
3. *That the Petitioner who is a South African national informed the Respondent of her intention to relocate to South Africa owing to an employment opportunity that she came across and towards December, 2019, upon*

*closure of school, the Petitioner and TM travelled to Zambia in order for TM to be with the Respondent as per the verbal agreement in place;*

- 4. That the Petitioner then travelled to South Africa leaving TM for the duration of the holiday and decided to apply for TM's South African citizenship so as to bestow upon him dual citizenship for purposes of fully enjoying the rights of a citizen whilst in her custody and care in South Africa;*
- 5. That unknown to the Petitioner, the Respondent had decided to maintain custody of TM whom he paid school fees for at Shakespeare College in September, 2019 and continued to pay further instalments in October, 2019 and January, 2020;*
- 6. That when the Petitioner travelled to Zambia to pick up TM after the school holiday, the Respondent refused to release him in her custody contrary to their verbal agreement and informed the Petitioner that he had enrolled TM at Shakespeare Collage so as to enable him to continue his education whilst they waited for his citizenship application to be processed;*
- 7. In March, 2020, the Petitioner travelled to Zambia to attend TM's birthday. Upon request by the Respondent to stay at his premises for purposes of being a complete family on TM's birthday, the Petitioner reluctantly agreed to stay at the Respondent's premises and on 25<sup>th</sup> March, 2020, the date that she was due to travel back to South Africa, the airline cancelled all flights, thus the Petitioner continued staying at the Respondent's premises;*
- 8. During her stay at the Respondent's premises, it came to her attention that the Respondent had given TM a mobile phone that contained pornographic material and she witnessed several incidences where the Respondent was*

*violent to TM, the Petitioner and the other children of the family, which left the Petitioner with injuries;*

9. *That as a result the Petitioner fled the Respondent's premises with the children of the family, including TM and the Respondent's sister, in order to protect themselves from further physical harm and has not informed the Respondent of their whereabouts;*
10. *That as result the Petitioner and the children of the family are traumatised and TM has indicated that he does not wish to return to the custody of the Respondent;*
11. *That there is a danger of TM being corrupted by the Respondent's uncouth behaviour if he remains in his custody and it would be in the best interest of TM for the Petitioner to have custody of TM, while the Respondent has reasonable access to TM during school holidays.*

2.2 The Respondent filed herein an Affidavit in Opposition on 5<sup>th</sup> June, 2020, deposed to by the Respondent, WARREN STANLEY MILSTEAD, in which it is averred *inter alia*, as follows: -

1. *That following the dissolution of marriage, the Respondent moved to Zimbabwe with the children of the family and the parties verbally agreed to the Petitioner having TM during school terms, while the Respondent would have TM during school holidays at his cost and he continued to finance his education in Zimbabwe;*
2. *That when the Petitioner informed him of her intention to move to South Africa, it was agreed that TM would live in Zambia with the Respondent as living in South Africa can be dangerous, thus he found a school for TM in Zambia, which the Petitioner found acceptable and he made payments towards school fees;*

3. *That this application for custody has been made by the Petitioner as an afterthought after he filed an application to restrain her from moving TM out of jurisdiction;*
4. *That TM is happy at his new school and as a Zambian, TM should continue to reside in Zambia with the Respondent for purposes of stability and continuity of his education as opposed to staying with the Petitioner who keeps uprooting TM from country to country;*
5. *That it is in the best interest for TM to live with the Respondent as he has more time for him as demonstrated by his ability to personally take him to school and do homework with him;*
6. *That TM is doing well at school and the Respondent believes that if TM remains in his custody, he will have his own bedroom, three dogs that he has raised from when they were puppies, a caregiver to attend to his needs when the Respondent is away from home and grandparents that TM enjoys visiting;*
7. *That he is not abusive as alleged by the Petitioner and the last altercation that the parties had arose from the Petitioner trying to discipline TM and that he had given TM the mobile phone without realising that it had obscene material, which material was deleted upon discovery; and*
8. *That he has no objection to the Petitioner having reasonable access to TM, while he has custody of TM, as he is the better and fit parent to have custody of TM as opposed to the Petitioner who is unemployed and of no fixed abode.*

2.3 The Petitioner responded to the Affidavit in Opposition by filing an Affidavit in Reply, in which she avers *inter alia*, as follows: -

1. *That at no point did she agree to TM permanently being in custody of the Respondent and that he only travelled to Lusaka for purposes of being with the Respondent during school holidays;*
2. *That the Respondent paid school fees at Shakespeare College without her approval and that his good performance at the school is due to the foundation he obtained whilst in her custody in Zimbabwe for a period of 1 year;*
3. *That given that she is a citizen of South Africa, she has no intention to permanently leave the country and has not disclosed her current location for safety purposes as the Respondent has issued threats to friends and family in order to coerce them to reveal her current location;*
4. *That her fear of the Respondent is justified by medical reports and the audio recording adduced herein, thus it is not in the interest of TM that he remains in his custody;*
5. *That the caregiver that the Respondent alludes to works only three times in a week and thus TM is usually left with the garden boy;*
6. *That the Respondent sold his truck which was his only source of income and is unemployed, whilst she is employed and has exhibited her bank account statement and proof of fixed abode in South Africa;*
7. *That the Respondent attempted to choke the Petitioner, the children of the family and his sister, which led to them fleeing his residential premises, which shows that he has a violent disposition; and*
8. *That it is in the best interest of TM to continue to reside with the Petitioner who has had primary control and parental responsibility of him since the divorce, as this affords him the stability he requires at his tender age and stage of development.*

### **3 SUBMISSIONS**

- 3.1 On 11<sup>th</sup> June, 2020, the Petitioner filed herein her skeleton arguments, in which the Court's attention was drawn to the case of **J vs. C**<sup>1</sup>, wherein the Court of England outlined the matters the Court ought to consider in granting custody to a party. Additionally, the Court was invited to the case of **Re G (Education: Religious Upbringing)**<sup>2</sup>, where the Court explained the extent of welfare to be considered by the Court in granting custody to a party.
- 3.2 It was further submitted that the position taken in the above cited cases were upheld in a plethora of Zambian cases, including the case of **Mponda vs. Mponda**<sup>3</sup> and more recently the case of **Mutale Musweu vs. Ian Musweu**<sup>4</sup> in which the Court of Appeal stated as follows: -

***"It was accurately restated by Dankwerts, LJ in Re Adoption Application No. 41/61 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...'***

***We endorse this articulation of the duty of a Court considering a custody application."***

- 3.3 Furthermore, it is submitted that the Petitioner is of fixed abode, in gainful employment and is

substantially a responsible parent as is shown in the fact that while the child was in her custody no complaints or harm physically and mentally befell the child. That the child excelled at School whilst in her custody.

- 3.4 In considering the application, the Court was urged to take into account the behaviour of the Respondent, whom it is submitted that he has violently assaulted the Petitioner on more than one occasion and refused to return the child TM to the Respondent. That the Respondent subsequently banished the Petitioner and TM after a violent altercation, which behaviour reveals that he is not suitable to have custody of the child. To this extent, the Court's attention was drawn to the sentiments of the authors of **Hayes & Williams Family Law**<sup>3</sup>, which are as follows: -

*"...the second broad category of case when parental responsibility may be denied is where the father's behaviour demonstrates the inappropriateness of being granted parental responsibility. In some cases, the father may have physically harmed the mother or child. In Re T (A Minor) (Parental Responsibility: Contact) (1993) 2 FLR 450, CA, the mother was violently assaulted by the father when she was six months pregnant, requiring hospital attendance, which brought the relationship to an end. The father assaulted the mother again when he visited her at work and, following a dispute, head butted the mother when she had a 7 month-old child in her arms. In addition, the father refused to return the*



*child after contact sessions, including on one occasion for a period of nine days. The Court of Appeal dismissed the father's appeal against Ewbank J's decision to deny him parental responsibility, expressing the view that it was 'clearly the right decision' in a case of 'cruel and callous behaviour in respect of a young child...'*"

- 3.5 It has also been submitted that the Petitioner who is ordinarily resident in South Africa, is not averse to the child being in the custody of the Respondent during school holidays nor allowing free communication with the child while he is in her custody as was the *status quo* prior to December, 2019, when the Respondent refused to release the child in her custody.
- 3.6 By his Skeleton Arguments filed herein on 29<sup>th</sup> June, 2020, the Respondent submits *inter alia* that the Court ought to be guided by the best interests of the child TM and not the needs and desires of his parents. The Court was invited to **Section 75** of **The Matrimonial Causes Act**<sup>2</sup> and **Section 3** of **The United Nations Convention of the Rights of the Children**<sup>4</sup>. The Court was further invited to the case of **Re Adoption Application No. 41/62**<sup>5</sup>, in which the best interest of the child principle was espoused.
- 3.7 The Respondent contends that the child being male and having lived with the Respondent since December, 2019, is of paramount importance in considering the custody of the child. That boys need to have their fathers during their formative years. To fortify his

contention, the case of **Mutale Musweu vs. Ian Musweu**<sup>4</sup>, which cited with approval the case of **Albright vs. Albright**<sup>6</sup>, wherein the following factors were used to determine what is in the best interest of the child in regard to custody: -

**"Age, health and sex of the child. Determination of the parent that had the continuity of care prior to the separation and which has the best parenting skills and which has the capacity to provide child care, the employment of the parent and responsibility of employment, physical and mental parent and child, moral fitness of parents, the home school and community regard of the child..."**

- 3.8 It is also contended that the child *in casu*, being male and aged 9 years, needs specific guidance and instruction from his father who is the Respondent. That it would be disruptive to remove him from the Respondent whom he has been living with since December, 2019 and having established ties at his current school. It is further contended that the removal of the child from the Respondent's custody would not be in the best interest of the child. The Court was invited to the case of **D vs. M (Minor: Custody Appeal)**<sup>7</sup>, wherein the House of Lords had this to say regarding the considerations to be placed by a Court hearing a Custody application: -

**"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 disruptions of established bonds is to be avoided whenever it is possible to do so."**

*(Counsel's emphasis)*

#### **4 THE LAW**

4.1 The application was brought pursuant to **Rule 92** of **The Matrimonial Causes Rules**<sup>1</sup>, whose relevant part is couched as follows: -

***"(1) Subject to paragraph (2), an application for an order relating to the custody or education of a child, or for an order committing him to the care of a local authority under section 43 of the Act of 1973 or providing for his supervision under section 44 of that Act, shall be made to a Judge."***

4.2 The starting point and primary consideration on any custody matter before the Court is enshrined in **Section 75 (1) (a) and (b)** of **The Matrimonial Causes Act**<sup>2</sup>, which provides as follows: -

***"In proceedings in which application has been made with respect to the custody, guardianship, welfare, advancement or education of children of marriage-***

***(a) the Court shall regard the interest of the children as the paramount consideration; and***

***(b) subject to paragraph (a) the Court may make such order in respect of those matters as it thinks proper."***

4.3 **Section 71 (6)** of **The Matrimonial Causes Act**<sup>2</sup> defines "Welfare" in relation to a child as including the

custody, the education of the child and financial provision for the child.

- 4.4 This Court is empowered by **Section 72** of **The Matrimonial Causes Act**<sup>2</sup> to make any such order as it deems fit. **Section 72 (1) (a)** of the said Act provides as follows: -

*"The Court may make such order as it thinks fit for the custody and education of any child of the family who is under the age of twenty-five -*

*(a) in any proceedings for divorce, nullity of marriage or judicial separation, before or on granting a decree or at any time thereafter, whether, in the case of a decree of divorce or nullity of marriage, before or after the decree is made absolute; ..."*

## **5 ANALYSIS AND FINDINGS**

- 5.1 I have considered the Application together with the Affidavit evidence on record. Although the Petitioner did not obtain leave to file the Affidavit in Reply, I have exercised my discretion to consider it. I have also considered the skeleton arguments prepared by the parties, which have made my task considerably more straightforward and I am grateful to both Counsel for the authorities cited. I may not be able to discuss all the authorities in detail, but I am alive to the principles espoused therein.

- 5.2 The issue for determination before this Court is who should be awarded Custody of the child TM. In an application to the Court for custody, by either parent,

the first and paramount consideration is the welfare of the children. The conduct and wishes of the parents are also factors to be considered. However, the dominant matter for the consideration of the Court is the welfare of the child, both moral and physical being paramount. I refer to the Case of **Allen vs. Allen**<sup>8</sup>, where it was held that the test to be applied is the welfare of the children.

5.3 In considering the custody of a child, mindful that its welfare is of paramount importance, a Court must consider the child's happiness and well-being, their social and educational influences, their psychological and physical well being, their physical and material surroundings, all of which go towards their true welfare. These must be considered along with the conduct of the parents, as they are influential in the life of the child and its welfare. However, the welfare of the child is the chief consideration and is not equal of any other consideration. All these other considerations are subordinate.

5.4 The principle of the interest of children was also adopted in the case of **Stoyke vs. Stoyke**<sup>9</sup>, where the Supreme Court held that the question for the Judge to ask is not what the essential justice of the case requires, but what the best interests of the child require.

5.5 In the case of **Elvis Mtonga vs. Lungowe Lubasi**<sup>10</sup>, the Supreme Court of Zambia acknowledged that the

welfare of the child is of paramount consideration. In the case of **J vs. C**<sup>1</sup>, cited by the Petitioner, Lord MacDermott explained that paramountcy of the child's welfare means: -

*"...more than the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. The words denote a process whereby, when all 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. It is the paramount consideration because it rules upon or determines the course to be followed."*

5.6 The paramountcy principle is universally applied. I refer to **The United Nations Convention on the Rights of the Child**<sup>4</sup>, cited by the Respondent, where it is stated that: -

*"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."*

5.7 The best interest of the child principle is also included in **Article 4 of The African Charter on the Rights and Welfare of the Child**<sup>5</sup> which provides that: -

*"In all actions concerning the child, the best interest of the child shall be the primary consideration."*

5.8 I am guided by the above authorities and authorities cited by the parties. Having heard both parties and the child TM, it is abundantly clear to me that both

parties have been involved in their child's life. The evidence on record points to the fact that when this Court granted a *decree nisi* on 1<sup>st</sup> November, 2018, the Petitioner relocated to Zimbabwe and took with her the child TM. This was after the parties verbally agreed that TM would remain in the custody of the Petitioner during school terms and travel to Zambia to be with the Respondent during school holidays. When the Petitioner decided to relocate to South Africa towards the end of 2019, the parties agreed that TM would remain in the custody of the Respondent, until the Petitioner arranged for TM to be bestowed with dual citizenship for purposes of fully enjoying the rights of a citizen whilst in the Petitioner's custody and care in South Africa. Accordingly, the Respondent has resided with the child TM since December, 2019, until May, 2020, when the Petitioner took him following a violent altercation with the Respondent.

- 5.9 It is also clear from the Respondent's Affidavit evidence that the Respondent has fears that if the Petitioner is granted custody of TM, she may not allow him access and that the child will be affected by his older siblings' morals and conduct, which the Respondent states has deteriorated whilst in the custody of the Petitioner. Further, the Respondent has fears that the child will not be safe as living in South Africa can be dangerous. The Respondent has not presented before this Court any cogent evidence that show that the Petitioner will

deny him access once the Petitioner is granted custody. His fear have no basis. Decisions of the Court, regarding custody, must not be based on unproven suspicions. This Court can only determine the matter of custody based on the facts presented before it, for the determinant lies in what will serve the best interests of the children.

5.10 In assessing the suitability of the parties to look after the child TM, I have taken into consideration the home environment, the relationship of the child with members of its family, stability and continuity of care as per evidence on record and the statement from the child. I have had occasion to examine the exhibits attached to the Affidavit in Support of the application for custody, which I found to be very disturbing. Having also heard the child TM, I am inclined to believe the evidence on record that the Respondent has physically harmed the Petitioner and children of the family. It is not disputed that the parties had a verbal agreement whereby the Petitioner was to have custody, care and control of TM during school terms, while the Respondent would have TM during school holidays, which agreement was breached by the Respondent when he decided not to hand over TM to the Petitioner. The Petitioner had to flee the Respondent's home with TM when the Respondent became violent. Various incidences of the Respondent's violence committed against the Petitioner and the older children of the



family were narrated by the child TM, who witnessed them. The Respondent's behaviour shows that he is less co-operative than the Petitioner, which is likely to lead to the ousting of the Petitioner if he had custody. Further, his behaviour demonstrates the inappropriateness of being granted parental responsibility.

5.11 From what was submitted before this Court and having heard the child TM, it is apparent that when the relative suitability of the parties is weighed, in the context of who is better to promote and safeguard the child's growth, development and welfare, it tilts the balance in favour of the Petitioner. A child has a right to a parent who will look after its best interests and makes the child feel safe. A parent who will ensure, protect and promote the child's best interests. A parent who will oversee all aspects of its day to day life and long-term well-being, as well as major decisions with respect to education, health and well-being.

5.12 I have drawn my attention to **Section 15 (2)** of ***The Affiliation and Maintenance of Children Act***<sup>6</sup>, which states that when the Court is called to make an order for custody, it is the welfare of the children that matters most and not whether the mother or father's claim in respect of the custody is superior to the other. It was submitted by the Respondent that being the father of TM who is male, the Respondent was better placed to raise TM. In my considered view, the fact

that the Respondent is the child's father is not sufficient cause for him to be granted primary custody of the child. The position that I take was also espoused in the British case of **Re G**<sup>9</sup>, where it was stated as follows: -

***"...men and women, husbands and wives, fathers and mothers have come before the family courts, as they come today, on an exactly equal footing. The voice of the father carries no more weight because he is the father, nor does the mother's because she is the mother. The weight to be attached to their views, if opposed, is to be determined on the basis of the merits or otherwise of the views being expressed, not on the basis of the gender of the person propounding them." (Court's emphasis)***

5.13 The Court in the above-mentioned case, further went on to elaborate on what actually matters in custody hearings in the family Courts as follows: -

***"The judge must consider the child's welfare now, throughout the remainder of the child's minority and into and through adulthood. The judge will bear in mind the observation of Sir Thomas Bingham MR in Re O (Contact: Imposition of Conditions) (1995) 2 FLR 124, 129, that:***

***The Court should take a medium-term and long-term view of the child's development and not accord excessive weight to what appears likely to be short-term or transient problems."***  
(Court's emphasis)

5.14 It is on record that the Petitioner has had custody, care and control of TM who is at a tender age of 9

years, while the Respondent has only had access during holidays ever since the parties divorced. I am guided by the book ***Family Law in Zambia: Cases and Materials***<sup>7</sup> at **page 377**, where the learned author opines as follows: -

***"The duty of the Court is to concern itself with the child's welfare whether the father's claim is superior to the mother or vice-versa. Courts also consider the age of the children, sex and their health. Courts do not ignore the reality that where children are very young, the mother is often better placed to bring them up." (Counsel's emphasis)***

5.15 I am satisfied that the Petitioner who has had the continuity of care prior to the child being kept by the Respondent from December, 2019, provided the necessary care and guidance to TM, which can be seen from how grounded, smart and polite the child is. TM is still at formative stage and requires continuity of care, which will give him a sense of security and non disruption of established bonds with his mother and siblings. This can only be attained if TM remains in his mother's custody.

5.16 If TM remains with the Respondent, the evidence on record reveals that he would mostly be looked after by hired help when the Respondent is away from home or grandparents whom TM allegedly spent every weekend with whilst he lived with his father, whereas the mother would look after TM herself. I have considered the averments on the availability of these individuals

that the Respondent mentioned. According to the Respondent, these hired help clean the house, cook and attend to the child. However, no evidence was adduced to explain how the child relates with them and whether the routine the child has been raised up to follow by his mother was being adhered to or varied. Further, there was no indication from the child's grandparents that they would avail themselves each time the Respondent was away, to look after the child. This would have been helpful in assessing their suitability to look after the child. Reference is made to the case of **Musweu vs. Musweu**<sup>4</sup> cited by both parties. Since the child TM has been cared for by the Petitioner on a daily basis, clearly he has formed and nurtured a bond with the Petitioner and his siblings whom TM spoke fondly of, which if broken, could have negative impact on him. I am guided by the case of **Ulrich Stoyke vs. Cleothallona Emily Stock**<sup>10</sup>, where the Supreme Court stated as follows: -

*"...the general principle regarding custody of children is that, the paramount consideration is the welfare of the child. It has been said that, the welfare of the child is not measured by money only nor by physical comfort only, the moral and religious welfare of the child must be considered as well as his physical wellbeing, nor can the ties of affection be disregarded." (Court's emphasis)*

5.17 The issue of a bond between a mother and child was also endorsed in the case of **Elvis Mtonga vs.**

**Lungowe Lubasi**<sup>11</sup>, where the Supreme Court accepted the argument from the case of **Re A (minor)**<sup>12</sup>, which is as follows: -

***"...the unbroken relationship of the mother and child is one which it would be very difficult to displace unless the mother was unsuitable to care for the child."***

5.18 The Respondent averred that the Petitioner consumes drugs such as marijuana and codeine, but provided no cogent evidence to this effect. I do not attach much weight to this because had this been the case, the Respondent would not have allowed the Petitioner to have care, custody and control when the parties divorced, as per their verbal agreement which is not in dispute. On the other hand, the record is replete with evidence that demonstrates how violent the Respondent is, which was confirmed by the child TM. Further, the child stated that what he loves most about his father is playing video games with him and their favourite game is "Call of Duty", which is rated 18 years and above. Clearly, this is a bad choice for TM who is aged 9 years old. The reason why various games have such ratings attached to them is because they often cover subject material that a child of tender age may simply be incapable of internalising. It was also not disputed by the Respondent that he gave TM a phone that contained pornographic material. He stated that he was not aware of this and upon being informed of this, he deleted the contents. This

oversight on the part of the Respondent is what would lead to the child being corrupted. A responsible parent ensures that gadgets are inspected before being handed to child of a tender age.

5.19 On the basis of the foregoing authorities, considering the verbal agreement that previously worked for the parties and on the fact that there has been no cogent evidence that suggests that the Petitioner is unsuitable to be granted the day to day care, control and responsibility of the child, I am inclined to refuse to break the ties of affection and/or the relationship built between the Petitioner and TM. I am fortified by the case of **Rostron vs. Rostron**<sup>13</sup>, where it is stated that the benefit to be derived from disrupting children's lives is not equal to the risk of the emotional devastation to the said children.

5.20 In my considered view, this is a proper case in which, day to day care and control of the child TM should be vested in the mother. It is important to safeguard the child's need for continuity of relationships, thus the father must be granted liberal access in order to maintain a relationship with the child TM. This will be in the best interest of the child, as the relationship developed with both parents prior to divorce will be continued and fostered and considering the child's expression for the need to spend the school holidays with his father. Of course, in future, depending on

how the situation goes, when circumstances may be different, the Order is always open to revision.

5.21 It is further my considered view, that the best place for the child TM in this matter, is with his mother, the Petitioner, where he has been living all along. The Respondent did not state that the child TM is not happy in the present living environment. In fact, the child TM who stated that he loves his parents equally, wishes to continue living with his mother, the Petitioner, during school terms and spending school holidays with his father, the Respondent. Thus, it is my view that the child TM deserves to be with the Petitioner and his siblings in the Petitioner's home during school terms. Clearly, it is in the interest of the child to remain in the custody of the Petitioner.

## **6 CONCLUSION**

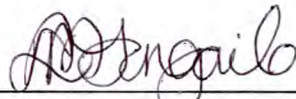
6.1 In view of the foregoing reasons, having taken into account what is in the best interest of the child, I am satisfied that the child's best interests will be served by placing him in the day to day care and control of the Petitioner. Accordingly, custody is granted to the Petitioner. The Petitioner is to have day to day care and control, while the Respondent is to have liberal access to the child TM, especially during school holidays.

6.2 The Respondent averred that he solely provides for the upkeep of the Petitioner and the children of the family. Accordingly, it is further Ordered that the Respondent

shall continue to pay for the education of the child and shall make adequate financial provisions for the child, even when he is with his mother (the Petitioner) who has custody of him. In the event that the Respondent fails or neglects to do so, the Petitioner shall be at liberty to apply before the Registrar for the necessary Orders.

- 6.3 The Order for financial provision and education of the child has been necessitated for the security of the child, as and when he is under the day to day care and control of the Petitioner. For the avoidance of doubt, the Respondent may have the child TM at his place of residence during school holidays.
- 6.4 In the circumstances of this case, I make no order as to costs.
- 6.5 Leave to Appeal is granted.

**Delivered on the 30<sup>th</sup> day of July, 2020.**



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**P. K. YANGAILO  
HIGH COURT JUDGE**