IN THE HIGH COURT FOR ZAMBIA **2019/HK/FCD/65**

AT THE KITWE DISTRICT REGISTRY

HOLDEN AT KITWE

(Divorce Jurisdiction)

BETWEEN:

ETHEL MUSUNGU **PETITIONER**

AND

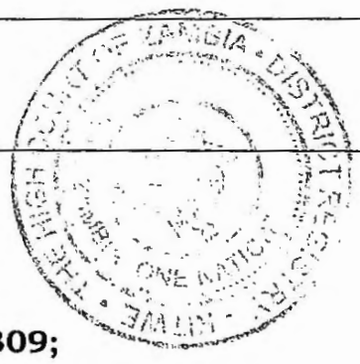
CESAR PORRAS VILCAPOMA **RESPONDENT**

Before the Hon. Mr. Justice E. Pengele in Chambers on 24th July, 2020.

For the Petitioner: **Mr. Bupe Katebe of Messrs. Kitwe Chambers**

For the Respondent: **Mr. M. Kapukutula of Messrs. Legal Aid Board**

R U L I N G



Cases referred to:

1. **Mponda V. Mponda, Appeal No. 199/2015;**
2. **Re C (A) An infant C V. C (1970) 1 ALL ER 309;**
3. **D V. M (A minor: Custody Appeal) (1983) FAM 33 at 41; and**
4. **Anne Susan Dewar V. Peter Alexander Dewar (1971) ZR 38.**

Legislation referred to:

a. **Matrimonial Causes Act No. 20 of 2007;**
b. **High Court Rules, rule 2, Chapter 27 of the Laws of Zambia;**
c. **Affiliation and Maintenance of Children Act, Chapter 64 of the Laws of Zambia;**
d. **Anti- Gender Based Violence Act, 2011; and**
e. **Immigration and Deportation Act No. 18 of 2010.**

Works referred to:

(i) Stephen M. Cretney, "Principles of Family Law" (1984), 4th Edition, Sweet & Maxwell: London

This Ruling follows an application by the Petitioner for an order of interim custody of the girl children of the family. The application has been made pursuant to section 72 of the **Matrimonial Causes Act**[a], Order III, rule 2 of the **High Court Rules**[b], and section 15 of the **Affiliation and Maintenance of Children Act**[c].

The said application was filed on 9th April, 2020. On 17th April, 2020, I refused to grant an *ex-parte* order of interim custody. Instead, I ordered that the application would be heard on 22nd May, 2020.

The application for an order of interim custody is supported by an Affidavit deposed to by the Petitioner. The gist of the Petitioner's depositions in that Affidavit is that the Petitioner and the Respondent have two biological children of the family, namely: Dora Pora, a female aged 8 years; and Alejandra Porras, a female aged 6 years.

The Petitioner has stated that on 11th May, 2019, she obtained a Protection Order against the Respondent in the Subordinate Court at Kitwe on the ground of gender- based violence by the Respondent against her. She added that sometime in December, 2019, the couple assaulted each other. That this prompted the Respondent to

commence proceedings against her for a Protection and Occupation Order which was granted *ex-parte* on 18th December, 2019.

The Petitioner went on to depose that following the aforesaid Protection and Occupation Order, she was removed from the matrimonial home by the Respondent. That the Respondent now lives in the matrimonial home with the two girl children. Further, that she does not have access to the said children due to the Protection and Occupation Order.

The Petitioner went on to state that she verily believes that it would be in the best interest of the children that they live with her as their mother. Further that she has always had custody of, and care for, the said children since they were born.

According to the Petitioner, it is not in the best interest of the children for them to stay with the Respondent in the matrimonial home because of the fact that the children are girls. She maintained that there are exceptional circumstances which make it impracticable for the girl children to be entrusted in the custody of the Respondent or any male person. She stated that the prospects of the children are better in their mother's custody than in their father's custody.

The Petitioner additionally stated that the Respondent should be given reasonable access to the children.

On 20th May, 2020, the Respondent filed an Affidavit in Opposition to the Petitioner's application for an order of custody. The Affidavit is sworn by the Respondent. He deposed that the Petitioner has since relocated to Riverside Area of Kitwe following the grant of the Protection and Occupation Order in his favour on 18th December, 2019, in Cause No. 2019/SK/PO/05. The Respondent further deposed that the Protection and Occupation Order was granted by the Lower Court after the Petitioner assaulted him on 14th December, 2019.

According to the Respondent, it was not him who removed the Petitioner out of the matrimonial home but the Petitioner was removed by the Protection and Occupation Order. Further that the Lower Court guided the Petitioner on visitations of the children and even referred her to the Social Welfare Offices. That the Respondent has on several occasions called the Petitioner to go and get the children and have them visit her but that the Petitioner deliberately refuses to do so much to the dismay of the children. That in addition, the Petitioner rarely calls the children and that whenever she calls, she promises to go and pick them but she does not fulfill those promises.

The Respondent went on to depose that he equally has the best interests of the children at heart and that they have been in his custody and he has always provided for them financially and morally. Further, that there is no report or evidence to the effect that he is not a fit parent to be able to have custody of his own

children. He maintained that he provides well for his children and that he gives them a stable home as contrasted with the Petitioner who, according to him, has no time for the children.

The deponent proceeded to depose that since the Protection Order has not been adjudicated upon by the Lower Court, this application for interim custody is prematurely before this Court. That the proper procedure should have been for the Petitioner to appeal against the decision of the Lower Court.

The Respondent alleged that it would not be in the best interest of the children to grant custody to the Petitioner because, on a number of occasions, the Petitioner has taken the children to see various men that she has been having affairs with at various hotels and lodges. That if custody is granted to the Petitioner, those incidents would have a negative effect on the moral development of the children.

The Respondent went on to state that the Petitioner is physically and verbally abusive even in the presence of the children. He stated that the Petitioner has on a number of occasions assaulted him.

The Respondent urged me to dismiss the Petitioner's action on the ground that it lacks merit and also that it amounts to forum shopping by the Petitioner in view of the fact that the Protection Order is yet to be determined on its merits.

On 21st May, 2020, the Petitioner filed an Affidavit in Reply which was sworn by the Petitioner herself. The gist of her deposition is that the Respondent has not shown the Court any Court Order that has granted the Petitioner access or visitation time to the children.

The Petitioner stated that she has always had time for the children and that she is the one who has raised up the children and, therefore, better placed to take care of them as their mother.

It is the Petitioner's averment that the application before the Lower Court borders on gender- based violence against the Respondent and not against the children. That the Protection Order sought in the Lower Court is independent of the application for interim custody of the children. That the Protection Order in the Lower Court relates to the Protection of the Respondent and the Occupation Order relates to the question of who should occupy the matrimonial home and not the issue of who should have custody of the children.

The Petitioner stated that being only 8 years old and 6 years old, the two children naturally need to be in the care and protection of their mother.

The Petitioner alleged that it is in fact the Respondent who takes different women to the matrimonial home from the time she was removed from the said home. That the Respondent conducts inappropriate activities even in the presence of the children. She

stated that she was told this by the children on a telephone call and that the children were crying as they narrated the foregoing.

The Petitioner deposed that it is in fact the Respondent who is verbally and physically abusive. The Petitioner alleged that the Respondent makes various sexual advances towards the female members of the matrimonial house including the Petitioner's relatives. She stated that she believes that girl children are prone to being sexually abused by any male person if they are in the custody of that person and that they, therefore, ought to be protected. She insisted that this Court should take into consideration the sex of the children when deciding who should have custody of the children.

On 22nd May, 2020, the Petitioner's application for custody came up before me for hearing. On that day, on request by Counsel for the parties, I ordered that Counsel should file written submissions before I proceed to render my Ruling on the Petitioner's application. I also allowed Counsel for the Respondent to file a further Affidavit to address some of the issues raised in the Petitioner's Affidavit in Reply. Further, Counsel for both parties informed me that they had agreed that the Social Welfare Department be ordered to submit a report on the custody of the children. After perusing the record of this case, I agreed with Counsel's proposal that there be a Social Welfare Report before I proceed to rule on the custody application. I, accordingly, ordered that, pursuant to section 75 (2) of the **Matrimonial Causes Act**[a], there should be a Social Welfare Report

submitted to this Court to help this Court in deciding on the custody application. I ordered that the said Report be submitted by 19th June, 2020.

On 5th June, 2020, the Respondent filed the further Affidavit which he deposed to himself. The crux of his depositions is that Protections Orders under the **Anti- Gender Based violence Act**[d], encompass custody of children of the family affected by acts of gender-based violence.

The Respondent stated that whenever the Petitioner talks to the children, she does so on the Respondent's phone and in the presence of the Respondent. That the children have never made any allegation against the Respondent on any of those phone calls.

The Respondent stated that he resides with the Petitioner's maternal great grandmother and two of the Petitioner's aunties together with a live-in maid who helps him to take care of the children. That under those circumstances, it is highly unlikely that he would be permitted to bring into the home anything that would be to the detriment of his children.

The Respondent disputed the allegations of sexual advances. He went on to say that the counseling at YWCA was done based on an isolated incident after he found the Petitioner with another man with whom she is having an affair.

The Respondent averred that the best interests of the children go beyond their gender and that the fact that the Petitioner is their mother is not a preferential quality.

On 26th June, 2020, the learned Counsel for the Petitioner, Mr. Katebe, filed written submissions. The kernel of Counsel's contentions in those submissions is that the best interest of the child dictates that the children should be placed in the custody of their mother. In Counsel's view, this is because, firstly, the two girl children are very young and will need the continued care and attention of their mother more than that of their father. Counsel submitted that naturally and in most cases, girl children are bathed by their mothers and not by their fathers. Counsel wondered how the father would be bathing the girl children and cleaning their private parts. Counsel further wondered how the father would be in a position to assist the girl children when they experience the commencement of their menstruation for the first time.

Counsel further contended that the girl children need clothing like underwear whose sizes are best known by their mother and not their father.

Counsel maintained that the foregoing are aspects that should be dealt with by the children's mother because she once experienced the same and she is of the same sex as the children.

Counsel averred that the dictates of the best interest of the children demand that girl children are bathed by their mother. That,

therefore, the physiological aspect of the best interest of the child demands that the girl children be in the custody of their mother.

Counsel proceeded to contend that the Respondent has never given the Petitioner an opportunity to see the children from the time he started staying in the matrimonial home with the children on 18th December, 2019. That it is, therefore, not in the best interest of the children to give custody of the children to the Respondent because the Respondent keeps the children to himself to the exclusion of the Petitioner. Counsel claimed that such an arrangement would lead to the children resenting their mother which may not be in the best interest of the children when they grow up into adults. In Counsel's opinion, the emotional support of the children demands that it would be in the best interest of the children for the children to be in the custody of their mother.

The further submission of Counsel for the Petitioner is that the Petitioner is willing to allow the Respondent to have reasonable access to the children. That it is, therefore, in the best interest of the children that the Petitioner be granted custody of the children.

The additional argument of Counsel for the Petitioner is that the children have always been looked after by their mother from the time they were born. That separating them from their mother would result in destroying a very important bond that should exist between the mother and her daughters. Counsel stated that there would be negative psychological impact on the children if the Petitioner is not granted custody in light of the fact that the

Respondent wants to keep the children to and for himself. To augment the foregoing submissions, Counsel relied on the case of **Mponda V. Mponda**[1].

Counsel for the Petitioner went on to submit that the immigration status of the Respondent is unknown. In Counsel's opinion, it may not be in the best interest of the children to allow them to be in the custody of the Respondent whose immigration status is not known. Counsel for the Petitioner speculated that the Respondent may be deported and the children may be put in a very compromising situation. According to Counsel, the work permit of the Respondent has been revoked. Counsel stated that the temporary permit of the Respondent also expired pursuant to section 27(3) of the **Immigration and Deportation Act**[e].

The other contention of Counsel for the Petitioner is that the children should not be looked after by third parties as if their mother is legally unfit to look after them.

The further contention of Counsel for the Petitioner is that it is only a mother who can properly examine a girl child in case of any sexual or physical abuse. Counsel advanced the opinion that it is quite common these days for girl children to be sexually and physically abused by their fathers, uncles, nephews and grand-parents. That, therefore, the security of the girl children and their best interests demand that custody be given to their mother.

Counsel proceeded to avow that the spiritual development of the children dictates that they be placed in the custody of their mother. That this is because the Petitioner has been looking after the said children from the time they were born. That, therefore, it may not be in the best interest of the children to disturb their spiritual development that has been established by the Petitioner.

It was Counsel's further contention that the Petitioner has been taking care of the educational needs of the children since they were born.

In addition to the foregoing, Counsel for the Petitioner stated that the Petitioner has a stable home and that she is the legal owner of the matrimonial house whereas the Respondent is a foreign national whose immigration status is unknown. That the Petitioner may stay with the children in the said matrimonial home or any habitable place and that the Respondent should be ordered to maintain the children. To buttress the foregoing, Counsel relied on Section 72 (3) of the **Matrimonial Causes Act**[a].

Counsel advanced the view that the practice of the Courts of law has been to give custody of girl children to their mother.

Counsel submitted that the Protection and Occupation Order did not give custody of the children to the Respondent but only restrained the Petitioner from taking the children from the matrimonial home. Further, that in any case, the said Order expired by effluxion of time pursuant to Section 12 (3) of the **Anti-**

Gender Based Violence Act[d]. Further, that the aforesaid order is premised on gender- based violence and the children are not a subject of that gender- based violence.

Counsel for the Petitioner prayed for this Court to grant custody to the Petitioner. Counsel contended that if the Court is inclined to grant joint custody to the parties, the Court should give physical custody to the Petitioner and the Respondent should be granted reasonable access.

On 3rd July, 2020, Counsel for the Respondent filed written submissions. The gist of Counsel's submissions is that the argument by Counsel for the Petitioner, that the children are better placed in the hands of the mother, is flawed. For this Counsel referred me to the case of **Re C (A) An infant C V. C**[2].

Counsel for the Respondent maintained that there is no law that, as a matter of principle, a girl child must always be in the custody of the mother. Counsel submitted that to the contrary it is the best interests of the children that are paramount. In Counsel's view, the interests of the children would not permit the disruption of the bonds that the children have built with their father in the months they have been staying together. Counsel added that moreover, the children are in the company of their father and female members of the Petitioner's family who help to take care of the children. To reinforce their submissions, Counsel for the Respondent relied on the case of **D V. M (A minor: Custody Appeal)**[3].

Counsel for the Respondent claimed that the Respondent is always available for the children and that he finds time to help them with their homework. Counsel alleged that this is unlike the Petitioner who is too busy for her children. That, therefore, it would be in the best interest of the children to continue staying with the Respondent.

It was Counsel's further submission that the Protection and Occupation Order has not expired. That the parties in fact appeared before the Lower Court for hearing relating to the Order on 2nd July, 2020, and that the Ruling has been reserved for 22nd July, 2020.

Counsel for the Respondent contended that the record shows that even when the Petitioner used to stay with the children, she would leave them for long periods of time unattended to. That, therefore, the children are already used to staying with their father and third parties.

The further submission of Counsel for the Respondent is that the immigration status of the Respondent is well known. That the said immigration status cannot be used as a discriminatory ground by the Petitioner. According to Counsel, the Respondent challenged the revocation of his work permit before the High Court and a stay of execution was granted under Cause No. 2020/HK/110. That the matter has serious prospects of success.

Counsel for the Respondent contended that the application by the Petitioner is tainted by the fact that the Petitioner is a violent

person who has caused mischief to the matrimonial harmony leading to the grant of the Protection and Occupation Order. Counsel alleged that the Petitioner has applied for custody as a way of circumventing the judicial process of punishing her for her violent and abusive behaviour that are proscribed by the **Anti-Gender Based Violence Act**[d].

Counsel prayed that the Petitioner's application should be dismissed. That alternatively, the Court should hear from the children.

On 19th June, 2020, the Kitwe District Social Welfare Office submitted a Social Welfare Report. The Report was prepared by Mrs. Betty Siachumpi, a Juvenile Inspector.

On 13th July, 2020, the learned Counsel for the Petitioner, Mr. Katebe filed further submissions which were specifically in respect of the Social Welfare Report. Counsel has submitted that the Social Welfare Report filed in this case is not binding on this Court. That this Court is entitled to make decisions and conclusions on the evidence adduced by the parties. Counsel contended that the evidence and submissions filed in this case are sufficient to assist this Court in arriving at a decision that would promote the best interest of the two children. To reinforce his submissions, Counsel has cited the case of **Mponda V. Mponda**[1].

Counsel has gone on to submit that the Social Welfare Report is not a comprehensive Social Welfare Report. According to Counsel, the

Social Welfare Report has omitted many aspects of the children's best interest despite those aspects having been brought to the attention of the Social Welfare Office in the letter dated 12th June, 2020. Counsel have particularly argued that the Social Welfare Report has not properly dealt with the educational, social, emotional development, security of the children, economic life, spiritual development life and mental health. In Counsel's opinion, the Report is more of a report on the parties hereto against each other as opposed to a report on the best interest of the children.

Counsel for the Petitioner has gone on to allege that the said Report is a biased and subjective report. That this is because the analysis and recommendation of the Report are in favour of the Respondent. In the view advanced by Counsel, the Report has only made an analysis of its investigation in respect of the Petitioner. Counsel has asserted that the Report has not analyzed anything meaningful in respect of the Respondent.

Counsel has contested the veracity of the content of the Report in so far as it states that the Petitioner was at one point confined at Kamfinsa Correctional Facility for theft.

Counsel has gone on to state that the Report has omitted to indicate that the Petitioner has been working and that she is a qualified teacher by profession. That the said information was availed to the Social Welfare Officer who prepared the Report.

In addition to the foregoing, Counsel has stated that the Report is based on hearsay from the purported relatives of the Petitioner and the purported class teacher and coordinator at the children's school, whose names have not been given. Counsel has alleged that the purported relatives and the class teacher and / or coordinator have an interest to serve in this matter by assisting the Respondent to have interim custody of the children.

Counsel has gone on to contend that the fact that female relatives of the Petitioner are staying with the Respondent is a sign of them being dysfunctional and disgruntled family members. That those relatives may pose a great risk to the best interests of the children. Counsel has gone on to cast doubt on the impartiality of the Petitioner's female relatives who have continued to stay with the Respondent.

Counsel has additionally submitted that the Report contains extraneous matters and hearsay captioned as the report from the Police, report from YWCA, report from the relatives, report from a live-in maid, report from school and education records. That the report does not contain any documentary evidence on the academic performance of the children before the Petitioner was removed from the matrimonial home and after she had been removed.

Counsel for the Petitioner has alleged that even the Class teachers and/ or Coordinator of the School have their own financial interest to serve in assisting the Respondent in this matter.

Counsel for the Petitioner has also contested the views of the children as embodied in the Report. In Counsel's opinion, the said views should not be relied upon because the children are of tender age and do not understand the importance of telling the truth and what may be in their best interest. Further that children live in an imaginary world and that the Report should not have considered their views as being their wishes. In Counsel's opinion, the children might have been brainwashed by the Respondent to say anything against the Petitioner since the children are in the Respondent's physical custody. Counsel went further to argue that the purported testimonies from the children have not been obtained after a *voire dire*.

The further submission of Counsel for the Petitioner is that the Report has not stated the truth on the issue of the Respondent's work permit. According to Counsel, it is not true that the Respondent has a work permit. Further, Counsel has stated that it is not true that the matrimonial house is the Respondent's property. Counsel stated that, as the Respondent is a foreigner, the said property is registered in the name of the Petitioner.

Counsel, therefore, alleged that the Social Welfare Report is founded on lies.

Counsel has gone on to cast doubts on the qualifications of the Social Welfare Officer who prepared the Report. Counsel has stated that since the Report does not disclose the said qualifications, it is

not possible to know whether the Social Welfare Officer is a qualified or competent social worker.

Counsel for the Petitioner has urged this Court to treat the Report with great caution and suspicion as it is allegedly founded on hearsay; is subjective and contains unsupported allegations.

I have taken time to carefully consider the submission of Counsel for the Petitioner in relation to the Social Welfare Report.

To start with, I must point out that the order by this Court to have a Social Welfare Report submitted to the Court was instigated by a request made by both Counsel for the Petitioner and Counsel for the Respondent. This Court considered that request and the circumstances of this case before accepting that it would indeed be helpful for this Court to have the benefit of a Social Welfare Report before deciding on the custody of the children. This Court is fully aware of the decision of the Supreme Court in the case of **Mponda V. Mponda**[1], which has been cited by Counsel for the Petitioner. In that case, the Supreme Court stated, *inter alia*, that-

> **"... suffice to state that in order to arrive at a decision that will promote the best interest of the 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 decisions 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 children. Section 75 (2) of the Matrimonial Causes Act[a], makes it clear that the Court has discretion whether or not to call for a Social Welfare Report or any other report, as may be deemed relevant."

While I agree with the contention by Counsel for the Petitioner that the Social Welfare Report is not binding on me, I hold the strong view that I am entitled to take into account any aspects of the Report which I consider to be useful in the determination of the Petitioner's application. In the present case, I saw it appropriate, on the facts of this case, to call for a Social Welfare Report. Section 75 (2) of the **Matrimonial Causes Act**[a] gives this Court discretion to decide on whether or not to receive a Social Welfare Report in evidence on such matters as may be relevant to the proceedings.

I do not, therefore, agree with Counsel for the Petitioner's apparent invitation for me to disregard the Report. I do not think that the Report can be considered to be entirely irrelevant just because Counsel for the Petitioner thinks that it does not comprehensively cover the aspects that were communicated to the Social Welfare Department in Counsel's letter of 26th June, 2020. In any case, my order which called for the Social Welfare Report did not state those specific aspects as the issues that should be addressed by the Report.

I, therefore, hold the firm view that I reserve the discretion to take into account any aspects of the Report that I feel is relevant to the determination of the custody application. I do not agree with Counsel for the Petitioner that just because Counsel holds the view that the Report could have omitted to address what was mentioned in Counsel's letter, then the Report should thereby be considered to be unreliable or less than comprehensive. I also do not agree with Counsel for the Petitioner that just because the Report has made recommendations in favour of the Respondent, it should be adjudged to be biased and subjective.

In addition to the foregoing, I have not seen any factual basis for the allegations by Counsel for the Petitioner that the class teachers for the children and the School Coordinator for the children's school have an interest of their own to serve in this matter in assisting the Respondent to have interim custody of the children. The allegation is not supported by any facts whatsoever. In my view, Counsel's assertion that the class teachers and the School Coordinator have a financial interest to serve in assisting the Respondent is a serious allegation which cannot be taken to be true without any factual substratum.

With regard to the submission by Counsel for the Petitioner that the testimonies of the children to the Social Welfare Officer should have been obtained after a *voire dire*, I have failed to find any authority to buttress that submission. I hold the view that, in an application for custody, the Court has discretion to decide on whether or not to

talk to the child before deciding on who should have custody of the child. The Court will make the decision to speak to the child having regard to the age of the child. The Court will also decide, having regard to the circumstances of the case, on how the Court would speak to the child. It is within the discretion of the Court to decide on whether to call the child to testify in the presence of both parents, whether to speak to the child in confidence or in the privacy of the Chambers, whether to get the child's views through a Social Welfare Report or indeed whether to get the child's views in any other manner that the Court considers appropriate in the circumstances of the particular case.

I do not, therefore, accept the contention by Counsel for the Petitioner that the views of young children, in an application for custody, can only be taken into account if they have been obtained after a *voire dire.* In so holding, I have taken time to peruse some authorities on the subject. A reading of the case of **Anne Susan Dewar V. Peter Alexander Dewar**[4], establishes that there is nothing in that case to show that the Court received the views of the children after a *voire dire* had been conducted. This is clear from the following extract from the Judgment in that case:

> **"On the question of custody, the interests of the children are, of course, paramount. I have had the benefit of a report by Mrs. Mataka, a Juveniles Inspector, and I have spoken with the children individually in Chambers. John Bruce was clearly**

attached to his father; he was also obviously fond of his mother. As to his sister, he complained that she broke his toys, but this was more the condescending, indulgent comment of a big brother than anything else; he seemed fond of his sister and enjoyed seeing her at School. Alison obviously missed her brother and looked forward to seeing him at School. My own observation thus entirely confirms Mrs. Mataka's recommendation that the children be kept together...."

My holding that the Judge, or indeed the Social Welfare Officer, does not need to conduct a *voire dire* before receiving the views of young children in custody application, also finds support in the words of Stephen M. Cretney the author of **"Principles of Family Law" (1984), 4th Edition, Sweet & Maxwell: London**[i], at page 334, where the learned author has said the following:

"A Judge exercising the wardship or divorce jurisdiction may interview the child in private. In practice, however, it is usually best for the views of children to be put before Court by way of a welfare officer's report. It seems that in practice once a child reaches the age of seven he will be consulted by the welfare officer, and children aged five and six are asked for their views in some cases."

On the basis of the foregoing, I do not see anything wrong with the Juveniles Officer in this case asking the children for their views. Dora Porras was born on 10th August, 2011. She was, therefore, over the age of 8 years when she was consulted by the Juveniles Officer. Alejandra Porras was born on 4th June, 2013. She was, thus, about 7 years old when she was consulted by the Juveniles Officer.

All in all, I hold that I am entitled to look at the Social Welfare Report and decide on what aspects I can take into account in adjudicating on the application for custody. The Social Welfare Report is not binding on me. It is intended to assist me in arriving at the best interests of the children.

I have carefully considered the Petitioner's application for custody, the opposition by the Respondent and the Written Submissions of Counsel. I have also taken into account relevant aspects of the Social Welfare Report.

In an application for custody of a child, it is trite that the interest of the child is the paramount consideration. Section 75 (1) (a) of the **Matrimonial Causes Act**[a], provides that-

> **"75 (1) 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 ...."

S. M. Cretney, the learned author of the book entitled **"Principles of Family Law," 4th Edition (1984), London: Sweet & Maxwell,** at pages 323 to 324, has emphasized the primary position of the welfare of the child in an application for custody. He has said the following:

> **"The welfare principle' has been described as the golden thread which runs through the whole of this Court's jurisdiction'. The child's welfare is considered first, last and all the time'. Hence as has already been noted, the welfare principle overrides the doing of justice as between the child's parents' or as between his parents and an outsider."**

It is clear from the foregoing that in an application for custody of a child, the Court is not called upon to do justice to the parties but to make a decision that will promote the welfare of the child. The welfare of the child overrides any call to achieve justice between the contending spouses. The need to take the welfare of a child as the paramount consideration does not imply that the Court cannot take into account other relevant factors. The Court may examine other relevant factors in its effort to arrive at the best interest of the child.

The broad question that I have to adjudicate on in this application is "whether or not I should grant custody of the two girl children to

the Petitioner, pending the hearing and determination of the Petition for dissolution of marriage". The Petitioner has put forward very spirited contentions in support of her claim to have the children in her custody. The Respondent, on the other hand, has insisted that the children's best interests would be better served if they continue to be in his custody.

Section 72 (1) (a) of the **Matrimonial Causes Act**[a], which I have already referred to, empowers this Court to make an Order of custody of a child under the age of twenty- five pending the determination of a petition for dissolution of a marriage. That provision enjoins the Court to give paramount consideration to the interests of the child. In deciding on which of the two contending parents should be granted custody of the two children, I will, therefore, take into account the interests of the children as the paramount consideration.

I have noted from the record that the relationship between the Petitioner and the Respondent has been very confrontational and far from being harmonious. This is clear from the documents on the record which show some instances of violence by the parties against each other. Those instances of violence have culminated into some orders by the Lower Court. I will not, at this point, however, delve into any determination of which of the parties has been the aggressor in those instances of violence.

The Petitioner deposed in her Affidavit in Support of her application for custody that it would not be in the best interest of the girl

children for them to stay with their father in the matrimonial home because of their sex. In her Affidavit in Reply, the Petitioner has maintained that the girl children naturally need to be in the care and protection of their mother.

In his submissions, Counsel for the Petitioner has advanced a number of contentions on which he has based his argument that the girl children should be put in the custody of their mother.

Counsel for the Petitioner has raised issues relating to who would be bathing the girl children if they are put in the custody of their father; how their father would handle the children menstruation periods once the children start having their menstruation; and how the father would deal with the issue of buying underwear for the girl children.

In my view, the issues raised by Counsel for the Petitioner in effect, if upheld, would imply that a father can never be granted the custody of a girl child of the age of the children in this case. I am of the opinion that if the intention of Parliament was to invariably preserve custody of young girl children for their mothers, Parliament would have expressly stated so. It is incontestable that Parliament must have known that young girl children would need to be bathed, would at one point start having their menstruation periods and would need to have their underwear purchased. A reading of the **Matrimonial Causes Act**[a] and decided case on custody establishes that there is no principle of law or rule that young girl children should *ipso facto* be put in the custody of their

mothers as opposed to their fathers. Conversely, what the law requires the Court to do is to consider the best interest of the children. The best interest of the children cannot be confined to the sex of the children. The sex of the child is just but one of the many factors that the Court may take into account in deciding on the best interest of the child. I do not therefore, agree with the submission that just because the children are young girls they should naturally be put in the custody of their mother, the Petitioner. In so deciding, I have taken a leaf from the decision of Edmund Davies, LJ, in the case of **Re C (A) (An infant) C V. C**[2], where his Lordship said the following:

> **" If W V. W and C V. C is to be regarded as authority for the proposition that there is a principle that a boy of eight should, all other things being equal, always be left in the custody of his father, then that is a view with which, with profound respect, I cannot agree. The decision must depend on who the father is, who the mother is, what they are prepared to do, and all the circumstances of the case. There is no such principle', in my judgment; the age and sex of the child are but part of the considerations to be borne in mind."**

It is clear from the case of **Re C (A) (An Infant) C. V. C**[2], that the sex of a child is but just one of the factors that the Court may take into consideration in an application for custody. The Court must

have regard to all other relevant facts of the case. Stephen M. Cretney, in his book entitled "**Principles of Family Law" (1984), 4th Edition, Sweet & Maxwell: London**[i], has said on page 333 that-

> **"Statements will be found in the reports that as a general rule, it is better that very young children should be in the care of the mother, and that older boys should be in the care of their father, and girls with their mother. But these are not principles or rules: they are simply judicial statements of general experience, whose application depend on the facts of every case."**

I do not agree with Counsel for the Petitioner that granting custody to the Respondent would imply that the Respondent would have to personally bath the girl children and clean their private parts. It does also not entail that the Respondent would personally have to attend to the girl children when they are having their menstruation periods nor that he would have to attend to them as they try their underwear on.

In fact, it is beyond dispute that the Respondent resides with the Petitioner's great grandmother, two of the Petitioner's aunties and a live-in maid. The Social Welfare Report establishes that the visit by the Juvenile Officer to the Respondent's home revealed that the Respondent and the children are currently residing with the

Petitioner's great grandmother; one of the Petitioner's cousins; and a live-in maid.

I am, therefore, of the view that in the event that custody of the children was granted to the Respondent, there are female adults at the Respondent's home who would be in a position to attend to any feminine needs of the children which the father may not be properly suited to attend to.

Counsel for the Petitioner has gone on to raise issues relating to difficulties that the Petitioner has been facing in having access to the children from the time the Lower Court made a Protection and Occupation Order on 18th December, 2019. The Petitioner's Advocate has contended that conversely, the Petitioner is willing to allow the Respondent reasonable access to the children. I have carefully taken into account the foregoing. I have noted that the Respondent has disputed the allegation that he has been denying the Petitioner access to the children. In my view, the allegation that the Respondent has been denying the Petitioner access to the children cannot be the determining factor on whether the Respondent should be divested of custody of the children. The question of access to the children is an aspect that I will decide on in this application. It is only when the party that I will grant custody fails to abide by the order I will make on access that this Court may think of reconsidering the question of who should have custody of the children.

Counsel for the Petitioner has gone on to submit that the children have always been looked after by the Petitioner from the time they were born. That, therefore, separating the children from their mother would result in destroying the bond that has been created between the mother and the children. I have carefully studied the facts of this case. From the record of this case, it is clear that prior to the parties starting to stay apart, the children were staying with both parties. It is clear that the parties must have stayed together as a couple, with their children, from the time their two children were born until 18th December, 2019, when the Respondent was granted the Protection and Occupation Order by the Subordinate Court.

From the foregoing, I do not think it is tenable for the Petitioner to ground her claim to custody on the basis that she has been looking after the children since they were born. The facts of this case show that the children had been staying with not only the Petitioner but also the Respondent from the time the children were born to the time the Petitioner was ordered by the Subordinate Court to leave the matrimonial home on 18th December, 2019. It follows that if there was any bond created between the Petitioner and the children, it can plausibly be contended that a similar bond could have been created between the Respondent and the children. In any case, after 18th December, 2019, the children have continued to live with the Respondent. There has, therefore, been no break in the chain of the Respondent's care and custody of the children to-date. I, therefore, do not agree with the submission of Counsel for the Petitioner that

the Petitioner could be more entitled to have custody on the ground that she has been looking after the children since they were born. The Respondent has equally been looking after the children since they were born.

Counsel to the Petitioner proceeded to submit that the Respondent should not be given custody of his children because his immigration status is unknown. Counsel has additionally submitted that the Petitioner has a stable home while the Respondent is a foreign national whose immigration status is unknown. I have taken time to peruse the documents so far placed by the parties on record. I have not seen anything that shows that the fact that the Respondent is a foreigner could have a detrimental effect on the best interests of the children. It goes without saying that the Respondent was still a foreign national when the two children were born and he continued to be a foreign national throughout the years he lived with the Petitioner and the two children. I do not, therefore, think that the fact that the Respondent is a foreign national can be taken to be detrimental to the best interests of the children. The fact that the Respondent is a foreign national does not change the reality that he is the father of the two children in question. I do not agree with the apparent intimation by Counsel for the Petitioner that the foreign status of the Respondent should have any effect on the Respondent's suitability to have custody of the children.

Counsel for the Petitioner has taken the point further that the Respondent's immigration status is unknown. I have carefully read through the Petitioner's Affidavit in Support as well as her Affidavit in Reply. I have not seen any portion where she deposed to the current immigration status of the Respondent. All I have seen, on perusal of the documents exhibited to the Affidavit in Support, is a document marked "EM3" which is headed "Revocation of Permit". That document is dated 13th November, 2019. It notifies the Respondent that his permit has been revoked on grounds stated therein. I have also seen exhibit "EM4" which seems to me to be a copy of the duplicate receipt issued to the Respondent in respect of a temporary permit. The said receipt is dated 30th December, 2019.

From the foregoing, I have not seen the factual basis for the submission of Counsel for the Petitioner that the Respondent's immigration status is unknown. Even assuming that the Respondent's immigration status is unknown, a perusal of the documents before me does not disclose anything that would show that the Respondent's immigration status would make him unsuitable to have the custody of his children. A scrutiny of the document marked "EM3" shows that the ground for the revocation of the Respondent's permit was stated, in part, as follows:

> **"Whereby you have contravened a provision of this Act by continuing to hold an employment permit issued under this Act after termination of your contract of employment."**

The document marked "EM3" does not show that the Respondent was involved in any conduct which would not be in line with the best interests of the children. In any case, the exhibit "EM4" shows that on 30th December, 2019, the Respondent was issued with a temporary permit.

A review of submissions filed on behalf of the Respondent shows that Counsel for the Respondent responded to the issue of the Respondent's immigration status. Counsel for the Respondent submitted that the Respondent challenged the revocation of his work permit before the Kitwe High Court and that a stay of execution of the said revocation was granted by the High Court under Cause Number 2020/HK/110.

In view of the foregoing, I hold that I cannot hold that it would not be in the best interest for the children to stay with the Respondent simply on the ground of his immigration status. I do not see anything about the Respondent's immigration status which I would hold to be inimical to the best interests of the children.

Counsel for the Petitioner has taken the arguments further by contending that the security of the children would require that they are put in the custody of their mother. According to Counsel, it is only their mother who would properly examine the children in case of any sexual or physical abuse. Further, Counsel has advanced the view that it is quite common these days for girl children to be

sexually and physically abused by their fathers, uncles, nephews and grand- parents.

This Court readily takes cognizance of the fact that indeed there are cases of defilement of girl children committed by the children's fathers, uncles, nephews and grandparents. This Court cannot, however, agree with the suggestion by Counsel for the Petitioner that girl children are only prone to being defiled when they are in the custody of someone other than their biological mother. I do not think anyone can contest the fact that there are also cases of defilement of girl children who stay with their biological mothers. I do not, therefore, agree that the children in the present case would only become insecure if put in the custody of their father and not when put in the custody of their mother. In any case, I consider the contention of Counsel for the Petitioner, relating to the risks of the children being defiled, as being quite speculative. There is no evidence that the Respondent stay with any of the children's uncles, nephews or grand- parents. Incontestably, the children currently stay with their father. But there is no evidence to suggest that the Respondent has shown any propensity or behaviour from which this Court can infer that he might defile his own girl children.

Counsel for the Petitioner has proceeded to aver that the spiritual development of the children dictates that they be placed in the custody of their mother. I have not, however, seen anything on the record which would convince me that the Petitioner is more spiritually sound than the Respondent. In fact there is absolutely

no evidence relating to the parties spiritual standing. I cannot, therefore, accept that the children's spiritual prospects would be better if they are in the custody of the Petitioner than if they continued to be in the custody of the Respondent.

The other contention of Counsel for the Petitioner is that the Petitioner has been taking care of the educational needs of the children from the time they were born. I have already held elsewhere in this Ruling that the record of this case shows that the Respondent and the Petitioner were both staying with the children from the time the children were born to 18th December, 2019, when the Petitioner was ordered to leave the matrimonial home pursuant to the Protection and Occupation Order made by the Subordinate Court. I cannot, thus, hold that it is the Petitioner who has been taking care of the educational needs of the children to the exclusion of the Respondent.

On the evidence that is so far before me, I am more inclined to order that the children must continue to be in the custody of the Respondent pending the hearing and determination of the Petition for dissolution of marriage or until further order of this Court. I have not found anything that would detrimentally affect the best interests of the children if they are left to continue being in the custody of the Respondent. The evidence so far placed before me shows that the Respondent has provided a relatively stable home environment for the children. The children have been staying with the Respondent since about 18th December, 2019, when the

Petitioner was restrained by the Protection and Occupation Order of the Lower Court from staying in the matrimonial home. This implies that the Respondent had been living with the children for about 5 months, by the time I heard this application on 22nd May, 2020. I have not seen anything that could have happened in that period which I can hold to be detrimental to the interests of the children.

I have taken time to examine the document brought to my attention by the Department of Social Welfare on the children's school attendance. That document reveals that the children's respective attendance of classes at School, cannot raise any concern to this Court. Further the Social Welfare Report shows that the class teachers for the children indicated that they had not noticed any strange behaviours on the part of the two children. The class teachers stated that the children are active in class and do not miss classes except when they are not feeling well. The class teachers also indicated that, whenever either of the children is unwell, the Respondent notifies the school. The class teacher for Dora added that Dora's home work handbook is usually signed by the Respondent.

I hold the opinion that the evidence and documents before me do not show that the Respondent is an irresponsible father towards his two children. The documents and evidence so far placed before me show that the Respondent has been a responsible father to his children in the 5 months he has stayed with them without the Petitioner.

In fact, it is clear from the record that, although the Respondent may not have been working in any formal employment following the revocation of his work permit, there is no evidence to show that he has been neglecting to meet his financial obligations towards the needs of the children. The Social Welfare Report reveals that all the School fees for the two children have been settled by the Respondent. In the Ruling dated 13th February, 2020, on maintenance pending suit, the Honourable Registrar held that it was clear from the evidence before him that the Respondent had been meeting the two children's school needs. In her Affidavit in Support of Summons for maintenance pending suit filed on 8th October, 2019, the Petitioner deposed in paragraph 7 to the effect that she was a first year student at the Copperbelt University and that she totally depended on the Respondent for financial support including for her school fees. In his Ruling, the learned Registrar ordered the Respondent to be paying the Petitioner monthly maintenance of K1, 000.00. A quick perusal of the record shows that the Respondent has been paying that K1,000.00 into Court towards the maintenance of the Petitioner.

In my view, the foregoing shows that the Respondent must be a relatively responsible person towards the welfare of his children.

The Social Welfare Report also shows that the two children of the family expressed a preference to continue staying with the Respondent. The Report additionally discloses that there is a possibility that the Petitioner might have been influencing the

children to be creating lies against the Respondent. The Report states, in the relevant portion relating to Alejandra, as follows:

> **"She further mentioned that the last time the mother took them, she told her to be lying about her father so that the mother could be recording. She was told to say that the dad comes home drunk and sleeps out, only returns in the morning. Alejandra said she told us this because she hates lying. This was confirmed because a few days before, the mother sent a recording to the Officer which had the conversation which the child revealed."**

In view of the foregoing and having in mind all relevant circumstances in this case, I am of the firm view that it would be in the best interest of the children for them to continue to be in the custody of the Respondent pending the hearing and determination of the Petition for dissolution of marriage or until a further order of this Court.

I, accordingly, find no merit in the Petitioner's application for custody of the two girl children. I dismiss the said application. I grant custody of the two girl children to the Respondent pending the hearing and determination of the Petition. The Petitioner shall have reasonable access to the children on weekends, public holidays and during school holidays. On weekends and public holidays, the children must be taken back to the Respondent by 14: 30 hours on the day before the next school day.

In accordance with section 72 of the **Matrimonial Causes Act**[a], my orders on custody may be reviewed if there is a material change in the circumstances which might have an impact on the best interests of the children.

I make no order for costs for this application.

The Petition for dissolution of marriage shall be heard on 17th November, 2020 at 09:00 hours.

Delivered at Kitwe this 24th day of July, 2020.

E. PENGELE
HIGH COURT JUDGE