



VNG (Suing as a Mother and Next Friend of the Minor) v FKM (Civil Appeal 122 of 2021) [2023] KEHC 20963 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20963 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 122 OF 2021
A MSHILA, J
JULY 28, 2023
IN THE MATTER OF KN (A MINOR)**

BETWEEN

VNG (SUING AS A MOTHER AND NEXT FRIEND OF THE MINOR) APPELLANT

AND

FKM RESPONDENT

(Being an Appeal from the Judgment of V.A.Kachuocho (SRM) delivered on 28th June, 2021 in Thika Children's Case No. 21 of 2020)

JUDGMENT

Background

1. The Plaintiff avers that she was married to the Defendant in September 2011 through the Registrar of Marriages. On 30/03/2014, they were blessed with one issue namely KN 111. That in 2015 they moved in to their matrimonial home in Thika until 5/11/2016 when the Defendant battered the Plaintiff causing her to move out as she feared for her life.
2. The Plaintiff contends that in March, 2017, the Defendant took the minor away from the Plaintiff's parents' home without her knowledge. The issue was reported to the Chief and the parties herein resolved that the minor would be enrolled in Leerand School where the Defendant would pay fees and would be free to take the child on Saturday and return him on Sunday evening while the Plaintiff would take care of food and shelter as well as be with the minor during school days.
3. Further, she averred that all was well until the year 2018 when the Defendant started going against the agreement arrived at the Chief's Office. On 13/03/2020 when the schools were closed due to Covid 19 pandemic the Defendant took the minor away depriving the Plaintiff a chance to see the child.



4. In the circumstances, the Plaintiff sought for judgment against the Defendant for orders;-
 - a. That custody, care and control of the minor herein be granted to her.
 - b. That the Defendant do have reasonable but controlled access to the minor which will not distract the minor from the pursuit of his education and development.
 - c. That the Defendant continues to pay school fees and other school related expenses for the minor while the Plaintiff takes care of food, shelter and clothing for the minor.
 - d. That the Defendant does provide medical care for the minor.
5. The Defendant filed his Defence and Counter Claim. He denied the contents in the Plaint. He further reiterated the particulars of the parental responsibility agreement entered by the parties on 15/03/2017 which he urged the court to adopt.
6. The matter was heard and determined in the absence of the Defendant even though he had been properly served with a Hearing Notice. The trial magistrate made the following orders as to custody;-
 - i. Both parties to share custody of the minors equally.
 - ii. The Plaintiff to have physical custody of the minor during the school days, and half of the school holidays unless mutually agreed otherwise.
 - iii. The Defendant to have custody of the minor during each alternative weekends of the school days, and half of the school holidays unless mutually agreed otherwise.
 - iv. Both parties to alternate custody during major holidays to wit Easter, Christmas and New Year unless mutually agreed otherwise.
7. In regard to maintenance, the trial magistrate found that both parties to equally contribute to the welfare of the minor as follows;-
 - i. Shelter- each party to bear when in physical custody of the minors
 - ii. Food- Plaintiff to bear
 - iii. Clothing- both parties to provide for the minor every three (3) months
 - iv. Education and its related expenses - Defendant
 - v. Medical care - both Plaintiff and Defendant
8. The Appellant is aggrieved by the judgment of the trial magistrate and has preferred the present Appeal. In her Memorandum of Appeal, she has listed nine (9) Grounds of Appeal as follows:-
 - a. The Learned Trial Magistrate erred in law and in fact when she gave orders in favour of the Respondent despite the fact that he had deliberately declined to participate in the proceedings telling the Court that he did not have “any case “ in any Court at all.
 - b. The Learned Trial Magistrate erred in law and in fact in granting joint custody of the minor to both parties after correctly finding that the custody of the minor to both parties after correctly finding that the custody of the child of tender years should be given to the mother unless there are special circumstances.



- c. The Learned Trial Magistrate erred in law and in fact when she gave orders of joint custody despite knowing very well that the parties were not living together and that such joint custody would put the child in a state of confusion and uncertainty.
 - d. The Learned Trial Magistrate erred in law and in fact in failing to grant the orders sought by the Appellant despite her, having proved her case overwhelmingly and despite there being no evidence at all tendered by the Respondent in rebuttal.
 - e. The Learned Trial Magistrate displayed open bias against the Appellant by seemingly arguing the case for the Respondent who had openly told the Court that he did not wish to tender evidence or otherwise participate in the proceedings.
 - f. The Learned Trial Magistrate erred in Law and in fact when she took as evidence averments contained in a pleading while the Defendant had declined to testify in support of his case.
 - g. The Learned Magistrate erred in law and in fact when she gave orders which could not be effectively carried out considering the hostility displayed by the Respondent against the Appellant.
 - h. The Learned Trial Magistrate misdirected herself in failing to act in the best interest of the child.
 - i. The Learned Trial Magistrate erred in not awarding costs to the Appellant.
9. The parties were directed to canvass the Appeal by way of written submissions.

Appellant's Submissions.

10. The Appellant submits that her evidence remained uncontroverted in the trial court as the Defendant refused to participate in the court's proceedings. In any event the Defendant was said to have shown that he was no longer interested in the affairs of the minor as such the trial court should have given full legal and physical custody to the Appellant. The minor was said to be of tender years as such custody should have been given to the Appellant. Reliance was placed on among others the case of *HGG vs YP* (2017) eKLR. The Appellant submitted that given the Respondent's extreme anger issues, alcoholism and the fact that he had other women, the trial court should have granted him limited and controlled access to the child but not custody. The trial court was faulted for referring to the Respondent's pleadings while he failed to testify in court. Reliance was placed on among other cases the case of *Victoria Miseda Vs Bental Services Limited* (2020) eKLR. In conclusion the Appellant submitted that the trial court erred in granting orders in favour of the Respondent when the Respondent ceased to have interest on the welfare of the child as evidenced by his lack of interest in the proceedings both in the trial court and in the court herein. This court was therefore, urged to reverse the order granting both legal and physical custody to the Respondent and grant the Appellant custody, care and control of the child.

Trial Court's Evidence

11. VN (PW1) adopted her witness statement. She stated that the Defendant could not be reached as he changed his contacts as such he is not available to pick the child. She urged the trial court to grant her physical and legal custody of the minor. She contended that she had no issues with the Defendant being granted access to the child. She informed the trial court that she could take care of the minor while the Defendant should pay school fees.
12. Josphat Wanyaga (PW2) the area Assistant Chief adopted his witness statement. He testified that PW1 visited his offices claiming that her child had been taken away from her by the defendant.



13. EWM (PW3) adopted her witness statement as well.

Issues For Determination

14. Having read and considered the trial court record and the submissions filed herein this court has framed the following issue for determination:-

- a) Whether the court erred in granting joint custody of the minor to both parties.

Analysis

Whether the court erred in granting joint custody of the minor to both parties.

15. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another Vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

16. Section 82 of the *Children’s Act* provides that;-

“ 82. Custody

- (1) A court may, on the application of one or more persons qualified under subsection (3) of this section, make an order vesting the custody of a child in the applicant or, as the case may be, in one or more of the applicants.
- (2) An order under subsection (1) may be referred to as a custody order, and the person to whom custody of the child is awarded is referred to as the custodian of the child.
- (3) Custody of a child may be granted to the following persons—
 - (a) a parent;
 - (b) a guardian;
 - (c) any person who applies with the consent of a parent or guardian of a child and has had actual custody of the child for three months preceding the making of the application;
 - (d) any person who, while not falling within paragraph (a), (b) or (c), can show cause, having regard to Section 83, why an order should be made awarding that person custody of the child.



17. Similarly, Article 53(2) of the Constitution of Kenya states that;-

“A child’s best interests are of paramount importance in every matter concerning the child.

18. The Appellant is the mother to the minor herein. She sought for sole custody, care and control of the minor as the Respondent had stopped complying with the temporary agreement reached by both parties at the chief’s office. The Respondent refused to participate in both proceedings at the trial court and the instant court. By the time the matter was being heard at the lower court, the Respondent had already abandoned the said proceedings as well as his duties towards the minor as stipulated in the temporary agreement.

19. The court must take into consideration the best interest of the minor. In the instant case, the mother has custody of the child as the Respondent abandoned his parental responsibilities. The lower court however, granted joint custody to the child despite the evidence on record in respect of the hostility between the parties.

20. The joint custody ordered in this instance, is found to be unreasonable as there were no reasons advanced why the Appellant ought not to have been granted sole custody. In any event the Appellant was already taking care of the minor by herself without the assistance of the Respondent. The joint custody granted to the parties was difficult to implement order given the hostile relationship between the parties.

21. Refer to the case of *JKW v MAA* [2015] eKLR where the court held that;-

“In addition, the general principle that has been approved by our courts is that where custody of a child of tender years is in issue, is that the mother should have the custody unless special circumstances are established to disqualify the mother from having custody of such a child.

22. A child of tender years is defined under Section 2 of the Children’s Act as;

“a child of tender years” means a child under the age of ten years;”

23. At the time the trial court was delivering its judgment, the minor herein was aged six (6) years that means the minor fell within the definition of a child of tender years. Indeed, the trial court failed to take the principles concerning custody of the child with regard to children of tender years. The trial court in its judgment failed to give the special circumstances under which custody was awarded jointly and not solely to the mother who at the time was taking sole care of the child as the Respondent had already abdicated his parental responsibility.

24. In the circumstances, this court is satisfied the court erred in granting joint custody of the minor to both parties; and is satisfied that this- court is entitled to interfere with the trial courts findings on custody;

25. This ground of appeal is found to have merit and it is hereby allowed;

Findings And Determination

26. For the forgoing reasons this court makes the following findings and determinations;

- i. This court finds the appeal to have merit and it is hereby allowed;
- ii. The judgment of the trial court on the shared custody of the minor delivered on 28th June, 2021 is hereby set aside and substituted with a judgment granting sole legal and physical custody to the Appellant as the mother of the child.



- iii. The orders regarding maintenance of the child granted by the trial court are hereby upheld and only varied as regards shelter which the Appellant shall be solely responsible;
- iv. The Appellant to bear the costs of this appeal
Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 28TH JULY, 2023

A. MSHILA

JUDGE

In the presence of:-

Mourice Court Assistant

Njuguna for appellant

N/A for respondent (non-participatory)

