TM v ZKM (Family Appeal E023 of 2023)
[2023] KEHC 27262 (KLR) (18 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27262 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

FAMILY APPEAL E023 OF 2023

G MUTAI, J

DECEMBER 18, 2023

BETWEEN

TM ..... APPELLANT

AND

ZKM ..... RESPONDENT

JUDGMENT

1. The Hon Viola Yator delivered a judgment in Tononoka Children's Court Cause No. E407 of 2021; TM versus ZKM on 30th November 2022. In the said judgment, the court declared that both parties have equal parental responsibility, gave legal custody to both parties and actual physical custody to the respondent, and supervised access over the weekends during school days and school holidays to the appellant. The court directed the respondent to avail a person other than herself to accompany the child to the appellant should the appellant want access. The court further ordered the appellant to pay school fees and transport, Kes.15,000/- per month, Kes.10,000/- being for food and Kes.5,000/- for entertainment, and the respondent to cater for other school-related expenses, shelter, utility bills, and the house help's salary. Further, both parties were asked to contribute the yearly medical insurance premiums at 50:50 and to share the costs of the clothing needs of the child.

2. Being aggrieved by the said decision, the appellant filed the instant appeal. The appeal raises five grounds which I shall set out below:-

    1. The Learned Magistrate erred in law and fact in issuing orders contrary to the best interests of the child encapsulated in Article 53 of *the Constitution* of Kenya and section 8 of the *Children Act*, No. 29 of 2022, as read with the First Schedule and other relevant provisions of the law, thus consequently arriving at a wrong decision;

    2. The Learned Magistrate erred in law and fact by taking into account irrelevant factors and failing to take into account relevant factors, thereby arriving at an erroneous judgment;

3. The Learned Magistrate erred in law and fact in proceeding to draft and issue a judgment for the plaintiff/appellant to have supervised access without any basis and/or legal justification;

4. The Learned Magistrate erred in law and fact in considering that the plaintiff/appellant had given up on access and or custody of the child; and

5. The Learned Trial Magistrate erred in law and fact by failing to consider the evidence of the appellant.

3. The appellant thus sought to set aside the judgment of the court below delivered on 30th November 2022, physical and actual custody of the child and costs. In the alternative, the appellant prayed for a grant of visitation and access rights to the appellant to interact with the minor and have physical custody during half holidays and alternate weekends without supervision.

4. This being a first appeal, this court must re-evaluate and assess the evidence adduced before the court below and make its own conclusions. It must, however, keep at the back of its mind that the trial court, unlike the appellate court, had the advantage of observing the demeanour of witnesses and hearing their evidence first-hand.

5. This was aptly stated in the cases of *Selle versus Associated Motor Boat Company Ltd*[1968] EA 123, where the Court of Appeal rendered itself as follows: -

> " ...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..."

6. I will, therefore, re-evaluate the evidence and come up with my own conclusions but also bear in mind that I should not interfere with the findings of the trial court unless the same was based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. This is in tandem with decision of the court in *Peters versus Sunday Post Limited* (1958) EA 424,where it was held as follows:-

> " It is a strong thing that for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion."

7. This matter proceeded way of written submissions pursuant to the directions that this Court gave on 31st July 2023. I have considered the Memorandum of Appeal, the Record of Appeal as well as the respective submissions of the parties.

8. The appellant herein moved the Tononoka Children's Court vide plaint dated 27th October 2021 and filed on 29th October 2021, seeking legal custody and unlimited access to a minor known as PT.

9. When the matter came up for hearing before the trial court, the appellant, then the plaintiff, being the first witness, told the court that the defendant wasn't allowing him to spend time with his child despite the fact that all that he was seeking was access during school holidays. He testified that the then

respondent, then the defendant, had changed the child's school four times without his consent, and thus, he was unable to support the child as he was unaware of his residence and school.

10. The respondent, in her evidence, stated that she had never denied the appellant access to his child. She, however, averred that the child was not familiar with the father, and for that reason, it would not be appropriate for him to be with him alone. She testified that the appellant was only contributing 10% of the needs of the child. She urged the court to order the plaintiff to pay school fees, Kes.25,000/- per month towards house rent, Kes.10,000/-per month being house-help's wages, Kes.10,000/- per month for the entertainment of the child, clothing, and food, and Kes.12,000/- per year towards medical insurance. She prayed that the appellant be granted supervised access to the child on the grounds that he is a homosexual. The respondent admitted that the appellant had been sending her Kes.100,000-200,000/- as child support.

11. As already indicated the appeal was canvassed by way of written submissions. The appellant, through his advocates Mwangi Kihira & Company Advocates, filed written submissions dated 18th August 2023.

12. Counsel submitted that the court erred when it addressed itself on the issue of supervised visitation that was not pleaded by the defendant/respondent in her defence and counterclaim. The court regarded the respondent's evidence that the appellant was homosexual without proof and that the same would affect the child emotionally as the said allegations form public records.

13. Counsel further submitted that the court misconstrued the response of the appellant when he stated that he wanted to "give up" to mean that he had given up on the issue of access of the minor. It was submitted that the appellant's response was an emotional reaction to the wrong and malicious accusations by the respondent. Still, the court took them as prayers without exercising due caution. It was urged that the court disregarded the appellant's testimony, where he said he was not asking for too much but only access.

14. Counsel submitted that demonizing the appellant as a bad father is unfair and would end up punishing the child.

15. On whether the best interest of the child was considered, counsel relied on Section 8 of the *Children's Act 2022*, the First Schedule of the *Children's Act 2022*, and submitted that the best interest of the child was not considered. The appellant submitted that the respondent has hindered his interaction with the minor. Further the involvement of the house-help or the respondent in the interaction of the appellant and the minor goes further to hinder free interaction. Limiting their interaction is prejudicial as the child would thereby, in effect, grow up without a father.

16. In conclusion, counsel submitted that the children's cases are not about the parents of a child but the child. The interests of the parents are thus secondary to that of the child. Counsel urged the court to allow the appeal as prayed.

17. The respondent, on the other hand, through her Advocates G. A Okumu & Co. Advocates, filed written submissions dated 24th August 2023.

18. On the 1st and 2nd grounds of appeal, counsel submitted that it is in the best interest of the minor that she be granted custody as she has taken care of the minor since 2016 singlehandedly without any challenges and that the appellant's sexual orientation may expose the minor to bad manners. Counsel relied on Article 53(2) of *the constitution* and Section 83 of the *Children's Act* to support this position.

19. Counsel referred the Court to pages 64-66 of the Record of Appeal and submitted that the appellant did not respond to the allegation that he is homosexual and had on two occasions touched the minor

inappropriately, which clearly confirms that the minor is likely to be exposed to danger in the custody of the appellant hence the need for supervision. Counsel submitted that the child is of tender years whose actual custody should be with the mother.

20. Counsel further submitted that the minor needs parental love and care, happiness, and emotional and psychological growth, which cannot be measured using money or just being a parent, and that he is already getting that from the respondent. That supervised access cannot limit the interaction between the appellant and the minor. Counsel relied on several case laws to support this argument.

21. On ground three counsel submitted that the magistrate arrived at a correct decision. Counsel referred the court to page 65 of the proceedings and submitted that the respondent's evidence of sexual abuse by the appellant to the minor remains unchallenged.

22. On the 4th ground, counsel referred the court to page 66 of the Record of Appeal, where the appellant stated that he wanted to give due to the allegations levelled against him and that his child would look for him someday.

23. On the 5th ground counsel submitted the magistrate considered the evidence of the appellant in arriving at her decision and referred the court to page 73 of the Record of Appeal.

24. In conclusion counsel urged the court to dismiss the appeal and uphold the decision of the trial court.

25. I have considered the appeal and the rival submissions by both counsels. In my view, the five grounds appeal can be condensed into two, namely:-

    a. Whether the best interest of the child was considered;

    b. Whether the appellant should be granted physical and actual custody of the minor and or unsupervised visitation and access rights.

26. The law applicable in determining children matters is *the Constitution* of Kenya and *Children's Act 2022*.

27. Article 53 (2) of *the Constitution* provides that:-

    " A child's best interests are of paramount importance in every matter concerning the child."

28. Section 8(1) of the *Children's Act 2022* provides that:-

    1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—

        a. the best interests of the child shall be the primary consideration; and

        b. the best interests of the child shall include, but shall not be limited to, the considerations set out in the First Schedule.

29. The First Schedule of the *Children's Act 2022* lists down factors that must be taken into account when assessing what amounts to the best interests of a child. These are:-

    1. The age, maturity, stage of development, gender, background, and any other relevant characteristic of the child;

    2. Distinct special needs (if any) arising from chronic ailment or disability;

    3. The relationship of the child with the child's parent(s) and/or guardian(s) and any other persons who may significantly affect the child's welfare;

4. The preference of the child, if old enough to express a meaningful preference;

5. The duration and adequacy of the child's current living arrangements and the desirability of maintaining continuity;

6. The stability of any proposed living arrangements for the child;

7. The motivation of the parties involved and their capacities to give the child love, affection and guidance;

8. The child's adjustment to the child's present home, school and community;

9. The capacity of each parent or guardian to allow and encourage frequent and continuing contact between the child and the other parent and/or guardian(s), including physical access;

10. The capacity of each parent and/or guardian(s) to cooperate or to learn to cooperate in child care;

11. Methods for assisting parental and/or guardian cooperation and resolving disputes and each parent's/guardian's willingness to use those methods;

12. The effect on the child if one parent/guardian has sole authority over the child's upbringing;

13. The existence of domestic abuse between the parents/guardian(s), in the past or currently, and how that abuse affects the emotional stability and physical safety of the child;

14. The existence of any history of child abuse by a parent and/or guardian(s); or anyone else residing in the same dwelling as the child;

15. Where the child is under one year of age, whether the child is being breast-fed;

16. The existence of a parent's or guardian(s) conviction for a sex offense or a sexually violent offense under the *Sexual Offences Act*;

17. Where there is a person residing with a parent or guardian, whether that person—

    a. been convicted of a crime under this Act, the *Sexual Offences Act*, the Penal Code, or any other legislation.

    b. has been adjudicated of a juvenile offence which, if the person had been an adult at the time of the offence, the person would have been convicted of a felony.

18. Any other factor which may have a direct or indirect effect on the physical and psychological well-being of the child.

30. Section 103 of the *Children's Act 2022* provides for Principles to be applied in making custody order.

    1. In determining whether or not a custody order should be made in favour of an applicant, the Court shall have regard to—

        a. the conduct and wishes of the parent or guardian of the child;

        b. the ascertainable wishes of the relatives of the child;

        c. the ascertainable wishes of the child taking into account the child's evolving capacity;

        d. whether the child has suffered any harm or is likely to suffer any harm if the order is not made;

e. the customs of the community to which the child belongs

f. the religious persuasion of the child;

g. whether a care order, supervision order, personal protection order or an exclusion order has been made in relation to the child concerned, and whether those orders remain in force;

h. the circumstances of any sibling of the child concerned, and of any other children of the home, if any;

i. any of the matters specified in section 95(2) where the court considers such matters to be relevant in the making of an order under this section; and

j. the best interest of the child.

2. Where a custody order is made giving custody of a child to one parent, or in the case of joint guardians, to one guardian, the Court may order that the person not awarded custody shall nevertheless have all or any rights and duties in relation to a child, other than the right to actual possession, jointly with the person who is given custody of the child.

3. The rights specified in subsection (2) include the right of access to the child on such terms as the Court may direct.

4. In any case where a decree for judicial separation or a decree for divorce is pronounced, and the Court pronouncing the divorce decree determines that the parent by reason of whose misconduct the decree is made to be unfit to have the legal custody of the child or children of the marriage, the parent so declared to be unfit shall not, upon the death of the other parent, be entitled to legal custody of the child without leave of the Court.

31. The Supreme Court in the case of *MAK v RMAA & 4 others* (Petition 2 (E003) of 2022) [2023] KESC 21 (KLR) (Civ) (2 March 2023) (Judgment) stated,

> " It is evident from the foregoing provisions that the child has a right to parental care and it is in the best interest of the child that he is brought up and cared for by his or her parent. This right can only be denied if it is proved with cogent evidence and valid grounds that a parent is not suitable or is incapable of taking care of the child. Ultimately, therefore, a child needs both of their parents which is their right, especially where a parent's incapacity has not been proven as we have found in this case.
>
> It is a known fact that the society in which children grow up shapes who they are. Having both a mother and father involved in a child's life can provide significant social, psychological, and health benefits. In addition, the stability of having a relationship with both parents can provide security and greater opportunities for children to find their own paths to success. Accordingly, even if circumstances may warrant limited access to a parent, a court should order supervised access. This court has the constitutional obligation to ensure that the child has access to parental care and protection as enshrined in *the Constitution*.
>
> We need to emphasize that it is never in the best interest of a child when the parents are engaged in a protracted court battle. Court battles relating to children are more often than not very selfish in nature and it is easy to overlook the psychological and mental harm done to the child in the process."

32. In this case the trial court gave legal custody to both parties and actual physical custody to the defendant and supervised access over the weekends during school days and school holidays to the plaintiff. The court directed the defendant to avail a person other than herself to accompany the child to the plaintiff should the plaintiff want access. This decision emanated from the allegation that the appellant is a homosexual and had attempted to abuse the child.

33. From the record of the court below, it is clear that the child was born on 30th March 2016. As at the time the impugned decision was made by the learned magistrate the child was six and half years old. The said child was, and still is, a child of a tender age.

34. The law is settled in respect to children of tender age; custody remains with the mother unless there are exceptional circumstances warranting the displacement of the presumption. The Court of Appeal in *J.O. v S.A.O*. [2016] eKLR stated:

> " There is a plethora of decisions by this Court as well as the High Court that in determining matters of custody of children, and especially of tender age, except where exceptional circumstances exist, the custody of such children should be awarded to the mother, because mothers are best suited to exercise care and control of the children. Exceptional circumstances include: the mother being unsettled; where the mother has taken a new husband; where she is living in quarters that are in deplorable state; or where her conduct is disgraceful and/or immoral."

35. In the circumstances, I am not persuaded that the trial court erred in giving the respondent actual physical custody of the child. The appellant is not a Kenyan citizen. His residence when in Kenya is not clear. It is safer, therefore, that custody of the child remains with the mother. In light of that prayers (a) and (b) of the Memorandum of Appeal fail.

36. From the trial court's record, it's evident that no evidence, save for the uncorroborated allegation of the respondent, was tendered to prove that the appellant is a homosexual or to show that the appellant was unfit to have unsupervised access to the child. Homosexuality is a criminal offence in Kenya. The said allegation, therefore, required greater scrutiny than that accorded by the trial court. The conclusion of the trial magistrate, that the appellant could not have unsupervised access, was therefore not based on any cogent, independent evidence. Accordingly, it is my finding that the trial magistrate erred in denying the appellant unsupervised access to the child on the basis of uncorroborated evidence that the appellant is a homosexual.

37. In the circumstances, I allow the appeal partly by granting the appellant visitation and access rights to interact with the minor and have physical custody during half the duration of the school holidays and on alternate weekends during school terms in Nairobi without supervision.

38. Each party to bear their own costs.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 18TH DAY OF DECEMBER 2023 VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of :-

Mr. Kihira for the Appellant;

Ms. Okumu for the Respondent; and

Arthur – Court Assistant