



AOA v SFA (Family Appeal E022 of 2021) [2022] KEHC 10746 (KLR) (27 May 2022) (Judgment)

Neutral citation: [2022] KEHC 10746 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E022 OF 2021**

JN ONYIEGO, J

MAY 27, 2022

BETWEEN

AOA APPELLANT

AND

SFA RESPONDENT

JUDGMENT

1. Through a plaint dated 15th September, 2020 filed before Tononoka children’s court case No E011/2020, AO A (hereinafter the appellant) brought a suit against his x- wife SFA (hereinafter the respondent) seeking orders that; actual custody be granted to the plaintiff; both parents to share educational and medical expenses; defendant and her accomplices not to temper or interfere with the minor’s smooth life under the plaintiff’s residence and care; the defendant to contribute towards the baby’s upkeep once she gets a source of income; court to attach a specific warrant of arrest against the defendant in case of breach of the aforesaid directions; and, the defendant to pay costs of the suit.
2. It was the appellant’s claim that his marriage to the respondent was blessed with one child the subject herein who after his parents divorced left for Eldoret with the mother who got married to another man. That due to the minor’s poor health, the respondent was forced to release him to this father for medical attention a role the appellant played with care and love until the minor recovered.
3. He further claimed that the child had integrated and embraced the company of his uncles, aunties and cousins besides bonding with the father (appellant) .
4. It was further alleged that the child has since improved academically and he was not willing to go back to the mother owing to mistreatment from some people in Eldoret. He contended that the welfare and the best interest of the child will be taken care of if he remained in the father’s actual custody. He informed the court to impose a warrant of arrest and two years sentence against the respondent in the event she disobeyed any order issued by the court.



5. During the hearing, the appellant who testified as Pw1, reiterated the content contained in his witness statement and the annexures thereof.
6. He told the court that he picked the child from the respondent's mother out of annoyance that the respondent had gotten married to his best friend a fact he considered to be betrayal. He alleged that the child had expressed his unwillingness to go back to the mother. He told the court that the mother was at liberty to visit the child but not be raised by a step-father his former friend who betrayed him.
7. On cross examination, he confirmed that he was staying with the baby in his brother's house and that when he eventually gets married he will relocate to another place.
8. In response, the respondent filed her defence and counter claim dated 15th March, 2021 seeking to have the suit dismissed and actual custody of the child granted to her with reasonable visitation /access rights to the respondent.
9. She also prayed that the father pays school fees and expenses for school related needs to be agreed with both parents, medical needs and maintenance at Kshs 50,0000 per month. she offered to provide shelter, entertainment, home clothing and supplement on food. She claimed that since dissolution of their marriage in 2018, she relocated together with the minor to Eldoret from Mombasa. That as a child of tender age, she was best suited to have actual custody of the baby. She denied allegations of child mistreatment and that the appellant is using the child as a bait to force reconciliation.
10. During the hearing, the respondent (Dw1) adopted her defence and counter claim and the content contained in her witness statement dated 15th March, 2021. She told the court that she divorced with the appellant the year 2018 due to irreconcilable differences and relocated to her parents in Nairobi and later moved to Eldoret after getting married to the current husband.
11. She claimed that after moving with the child now 7 years to Eldoret she enrolled him at [particulars withheld] school in Eldoret where she solely paid school fees. That during the corona pandemic period, the child was with her parents in Nairobi and upon request to visit the child, the appellant went and picked the minor with her permission and travelled with him to Mombasa after which he clung on him never to let him go back to the mother after the expiry of the 1 month period the child was to stay with the appellant.
12. She denied that her current husband and children from the first family were mistreating the baby.
13. When the court retired to chambers for a session in camera with the child, the child expressed the desire to go back to Eldoret to join the mother and go back to his former school.
14. Upon concluding the hearing, the court delivered its judgment on 21st June, 2021 thus ordering that;
 - a. There be equal parental responsibility between the plaintiff and the defendant towards the subject minor.
 - b. There be joint legal custody of the minor between the parties.
 - c. Actual custody of the minor to vest with the defendant/mother with unlimited access to the plaintiff/father half of the school holidays and whenever he visits the child Eldoret.
 - d. The child to be handed over to the mother immediately schools close on 16th July 2021 for the child to go back to his former school in Eldoret.



- e. The plaintiff to cater for the child’s education fully in the child’s previous school in Eldoret or in a school to be agreed on by parties from time to time near the defendant’s residence directly to the school and to the child
 - f. The defendant to cater for the child’s shelter and food while with the child.
 - g. Medical expenses to be shared equally by the parties as and when the same may arise or to register the child on a medical cover.
 - h. Clothing to be shared equally and in any event not less than twice in a year.
 - i. Parties to provide for the child’s entertainment while with the child
 - j. Either party to be at liberty to apply
 - k. No orders as to costs.
15. Aggrieved by the said judgment, the appellant filed a Memorandum of Appeal dated 27th July, 2021 citing 9 ground of appeal.
- a. The honourable magistrate erred in law and fact by directing that the appellant proceed and hand over the minor to the respondent without appreciating the fact that the appellant took the said minor due to the neglect from the respondent when she abandoned the minor with the grandmother
 - b. The honourable magistrate erred in law and fact in failing to consider the interests of the minor by failing to appreciate that the respondent abdicated her parental duties when she left the minor in the hand of her mother (grand-mother)
 - c. The honourable magistrate erred in law and fact by failing to consider the psychological effect of the said decision on the minor of being moved from his current school where he has developed friends to the new school in Eldoret.
 - d. The honourable magistrate erred in law and fact by failing to consider the psychological effect of the said decision on the minor taking note that the minor’s mother currently resides with her boyfriend taking note that the minor is a boy child and undergoing religious teachings in the madrassa which prohibits such relations.
 - e. The honourable magistrate erred in law and fact in failing to consider religious well-being and / or up-bringing of the child taking note the availability of the Madrasa and mosque in Mombasa as opposed to Eldoret.
 - f. The honourable magistrate erred in law as it violates Article 53 of *the Constitution* of Kenya.
16. When the matter came up for directions, parties agreed to dispose of the appeal by way of Witten submissions.

Appellant’s submissions

17. Through the firm of Marende Necheza and company advocates the appellant filed his submissions on 16th March, 2022 thus adopting his testimony. He submitted that the trial court failed to consider the fact that the respondent had neglected and abandoned the minor with her mother immediately after she left Mombasa following their divorce. That the trial court did not consider the child’s religious beliefs and teachings as he was undergoing madrasa classes in Mombasa and if transferred he will be interrupted.



18. Learned counsel submitted that during the child's private session with the minor, the court did not ask the minor his opinion regarding the step father. That there were no special circumstances to warrant removal of the child from the father to the mother. To support this position the court was referred to the holding in the case of *WWW Vs JMM (suing as the father to KMM)* (2021) e KLR

Respondent's submissions

19. Through the firm of Mukabane and Kagunza advocates dated 7th March, 2022 it was submitted that the best interest of the child would best be served by awarding actual custody to the mother. In that regard, learned counsel referred the court to the case of *MAA vs ABS* Civil appeal No 37/2017. Further reference was made to the case of *JKN vs HWN* civil appeal No 40/2014, *Githuburi vs Githuburi* (1979) and *Midwa vs Midwa* (2002) 2 E.A 453 where the respective courts held that in the absence of any exceptional circumstance, custody of a child of tender age should be awarded to the mother. That a child of tender age requires special attention to which only a mother can attend not a father. That the court properly considered the opinion of the child hence the trial courts orders should not be interfered with.

Determination.

20. I have considered the grounds of appeal herein, memorandum of appeal and oral submissions by counsel. This is a first appeal. This court is therefore duty bound to re-evaluate, re-consider, re-examine and re-asses the evidence tendered before the trial court afresh and arrive at an independent determination or finding without losing sight of the fact that the trial court had the advantage of listening to and assessing the witness' demeanour which advantage this court does not have. See *Jackson Kaio Kivuva vs Pennina Wanjiru Muchene* (2019)e KLR where the court stated that;

“this being a first appeal parties are entitled to and expect a re-hearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reason for such determination. In other words, a first appeal is by way of re-trial and this court, as the first appellate court, has a duty to re-evaluate, re analyse and re -consider the evidence and draw its own conclusion of course bearing in mind that it did not see witnesses testify and therefore give the allowance for that”.

21. Similar position was held in the case of *United India Insurance Company Limited Vs East African underwriters Kenya Ltd* (1985) e KLR.
22. After carefully analysing the grounds and record of appeal and further having considered parties' submissions, I can only discern one issue for determination that is, who has the right to actual custody of the minor. There is no dispute that the parties herein are the biological parents to the subject of these proceedings. It is not disputed that the two are divorced and that after divorce, the respondent left with her child aged 7 years for her parents' place. Thereafter, she got remarried and moved with the baby to Eldoret to joint her new husband.
23. From the appellant's evidence in chief, he could not have opposed the respondent staying with the baby as long as her new husband whom he considers as a traitor did not come into her life. Each parent is seeking to have actual custody of the baby.
24. Under section, 6 (1) of the *Children Act*, a child shall have a right to live with and to be cared for by his parents. In this case, the trial court found that, prima facie, actual custody of a child of tender age should be granted to the mother unless there are exceptional circumstances. At page 4 of her judgment,



the learned magistrate after making reference and rightly so to case law supporting the said principle stated that;

“This court therefore finds no reason at all to depart from the prima facie rule about custody of children of tender age being under the custody of their mothers”.

25. There is no contestation that by the time the impugned judgment was delivered, the child was 6 years old. It is also on record that when the court held a private session with the child, he was categorical that he wanted to join his mother in Eldoret.
26. It is also clear from the pleadings of both parties and oral evidence that, after their divorce, the respondent joined her parents in Nairobi and thereafter moved to Eldoret to join her new husband. It was also admitted that the respondent was to stay with the baby during corona period for one month and thereafter release him to go back to the mother. However, that was not to be as the appellant clung to the child for reasons that he did not want his son to stay with a step father (his former friend) who betrayed him by marrying his wife and that the boy had started madrassa classes and did not require interruption.
27. When considering the issue of actual custody of a child, the court has to consider the principles laid down under section 83 of the [Children Act](#) which provides;
In determining whether or not a custody order should be made in favour of the 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 any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;
 - (d) the ascertainable wishes of the child;
 - (e) whether the child has suffered any harm or is likely to suffer any harm if the order is not made;
 - (f) the customs of the community to which the child belongs;
 - (g) the religious persuasion of the child;
 - (h) whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;
 - (i) the circumstances of any sibling of the child concerned, and of any other children of the home, if any;
 - (j) the best interest of the child.
28. As stated earlier, the child’s wish is to stay with the mother. The other factor to be considered is the age of the child. There are numerous decisions/case law or judicial precedents which provide that; as a matter of general principle, actual custody of a child of tender age should be given to the mother unless there are exceptional circumstances to warrant exclusion. See [Githunguri vs Githunguri](#) (supra), [JO vs SAO](#) (2016) e KLR and [Sopster Ojaamong vs Lynette Amondi Otieno](#) civil appeal No 176/2006 where the respective courts applied the aforesaid principle.



29. In the instant case, the appellant has given three major reasons to justify disqualification of the mother from assuming actual custody of the child. Firstly, the step father was his friend hence betrayal to him and his son. As much as I do agree that for a friend to have married his former wife would be an act of betrayal, there is no law barring a friend from marrying a friend's former wife. I do not think the appellant's bitterness and differences with his former friend will affect the child. There was no proof tendered to show that the minor had suffered prejudice from the step-father. In any event, the mother should have complained or the child should have raised it before the trial court during their private session. I do not find this to be an exceptional circumstance to disregard the aforesaid general principle.
30. The appellant admitted that he does not have a home or a house of his own and that he was staying with a brother. He stated that he will move to his house when he gets married. It is worth noting that, when he gets married, the child will also be subjected to a step mother hence the issue of having a step-father should not arise as long as the child is not prejudiced or is not likely to suffer in the hands of a step parent.
31. The second issue was that of the child having started madrassa classes hence his transfer will disrupt his studies. However, the appellant is forgetting that before he took the child for temporary visitation, the child was already in school in Eldoret hence his wilful refusal to release the child amounted to interruption of his education. As to the issue of Mombasa having Madrassa classes, it is not correct as Eldoret is equally a big town with many Muslims who must be having their children also in madrassa classes.
32. Considering the claim that the child was being mistreated, it did not come from the child but the appellant who stays a thousand kilometres away from Eldoret to Mombasa. I do agree with the trial court that the allegation is unsubstantiated.
33. Having held as above, it is my finding that in the best interest of the child pursuant to Article 53 (2) of *the Constitution* and Section 4 (2) and (3) of the *Children Act*, and considering that the child is of tender age, actual custody should be with the mother. I do agree with the trial court that there are no exceptional circumstances to warrant exclusion or denial of actual custody of the minor from the respondent. A mother has a natural unique body and biological chemistry to a child of tender age which guarantees a child's emotional and psychological development besides physical attention like cleaning soiled clothes, special attention and closeness when sick hence the preference for a mother to be given priority over minors of tender age for actual custody.
34. I do not find any prejudice the appellant will suffer as he was granted unlimited access including ½ holidays. In fact, for all practical purposes, the appellant does not have even a care taker as he is accommodated at a brother's house implying that the child will be left at the mercy of relatives whenever the father was away looking for their daily bread. In the best interests of the child, the respondent should assume actual custody. I do therefore uphold the finding of the trial court in entirety.
35. In a nut shell, I am satisfied that there are no good reasons given to justify the applicant's prayers. Accordingly, the appeal is hereby dismissed. This being a family related dispute, I will not make any order as to costs. Each party to bear own costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 27TH DAY OF MAY 2022

J. N. ONYIEGO

JUDGE

