



REPUBLIC OF KENYA



KENYA LAW
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**DSG v SPG (Civil Appeal E018 of 2021)
[2022] KEHC 14494 (KLR) (Family) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14494 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY
CIVIL APPEAL E018 OF 2021**

AO MUCHELULE, J

OCTOBER 27, 2022

BETWEEN

DSG APPELLANT

AND

SPG RESPONDENT

(Being an appeal against the Judgment of the Children's Court Nairobi (Hon M Otindo (PM) Delivered on 26th January 2021 in Children Case No 1017 of 2018)

JUDGMENT

1. In *Selle v Associated Motor Boat Co Ltd [1968] EA 123* it was held that:-

“.....this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High 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 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 aspect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan (1955) 22 EACA 210.*)”

2. On January 26, 2021 the learned principal magistrate (Hon MA Otindo) of the Children Court at Nairobi delivered a judgment in which she granted physical custody of two children of the marriage to



- the father (the respondent SPG) with visitation rights to the mother (the appellant DSG). The children were 11 and 4 years and 9 months, respectively. They are JFG and DFG, both sons.
3. The couple got married on November 22, 2008. The appellant brought into the relationship her own child (a son) called SLW. The couple separated in December 2019 and divorce proceedings were ongoing when the respondent on August 28, 2018 filed a plaint in the children court seeking to be granted the custody of their two sons to the exclusion of the appellant, claiming that the conduct and actions of the appellant were inimical to the best interests of the boys in that she had breached their rights to parental care, education and had psychologically abused and neglected them. The appellant filed a defence and counterclaim. She sought the dismissal of the suit and asked that her counterclaim be allowed. Her case was that the respondent was a person of uncontrolled and ungoverned temper which made her and the children live in fear of their safety; had totally refused to contribute to the payment of the mortgage to their house; had beaten her and mentally abused her in front of children; had shown open hostility to her son and telling the other children that this was not their brother, and thereby forcing her to take away the child from their home to live elsewhere; and so on. She asked she be given custody of the children, and that that was in their best interest. Lastly, that it was not in the best interest of the children to be separated.
 4. The trial court heard the parties orally. The respondent called three witnesses (LMC, ENO, and JN), each of whom had at one time or another been their housemaid. The appellant testified and called one witness PK who was Deputy OCS of Muthangari Police Station. At the time of the hearing the parties were living separately. The respondent was living with the two children. The appellant had been left in the matrimonial home.
 5. The substance of the respondent's case through him and the witnesses was that he has always provided for all the needs of the children without the appellant's support; the children fear the appellant who mistreats them; the appellant brought different men in the house in the seeing of the children and asked that the children call each of them father; the children do not want to stay with the appellant, and only want her to visit; and the respondent has since taken the children for cancelling because, among other things, the younger child says his mother turns into a ghost at night. His case was that the appellant was an absent mother who wanted to treat her own son preferentially.
 6. The appellant wanted to have actual custody of the two children, to be allowed to live together and bond with her son. She denied the evidence of the respondent and her witnesses, saying the witnesses had been coached. Her case was that the respondent was a violent man to her and to the children.
 7. A police occurrence report was produced by the appellant's witness to show that one of the maids (ENO) had on May 11, 2020 complained to Muthangari Police Station that the respondent had been talking to her to persuade her to testify for him in the case. ENO testified to say that she had never made such complaint to the police. Inspector PK of the police station is the one who produced the occurrence book report, but he was not the officer to whom the report had been made. He was not the one who had made the entry.
 8. The trial court considered all this evidence. It accepted the version of the respondent and his witnesses and discounted the version of the appellant and her witnesses. The trial court saw these witnesses as they testified. The court had the feel of the case. I have not found anything on the record to show that the finding of the court was misplaced, or against the weight of the evidence.
 9. The children officer's report recommended that the children do stay with the mother. The court interviewed the children. They indicated that they wanted to stay with the father, with the mother only visiting. The court, after considering all the above, decided that the children should stay with the father, with the mother only visiting.



10. In the memorandum of appeal the appellant complained as follows:-

- i. That the learned magistrate erred in law and fact by failing to grant the appellant actual and physical custody of the children subject of the proceedings despite the fact that the evidence, the law and the best and paramount interest favoured the appellant having custody of the children;
- ii. That the learned magistrate erred in law and fact by denying the appellant the first priority to have custody of a child of tender years without any justification whatsoever and in contravention of well settled judicial principles;
- iii. That the learned magistrate erred in law and fact by impugning the suitability of the appellant to have custody of the children on the basis of false and fabricated testimony by the respondent and the respondent's witnesses;
- iv. That the learned magistrate erred in law and fact by disregarding and/or failing to consider, analyse and give due weight to the testimony of the appellant and the appellant's witness thereby arriving at an erroneous finding;
- v. That the learned magistrate erred in law and facts for failing to hold that the respondent's witness ENO was untruthful and unreliable based on the compelling testimony by the appellant and appellant's 2nd witness;
- vi. That the learned magistrate erred in law and fact for failing to uphold the principles placing the best and paramount interests of the children above all else;
- vii. That the learned magistrate erred in law and fact by requiring the appellant prove her case to a higher threshold than that of a balance of probabilities applicable in civil proceedings;
- viii. That the learned magistrate erred in law and fact by failing to give due consideration of the violent circumstances under which the appellant was living with the respondent leading to a judicial separation and the impact of the same to the children;
- ix. That the learned magistrate erred in law and fact by putting into consideration the respondent's conduct of denying access and visitation rights during the pendency of the suit and consistently lying to the court about it;
- x. That the learned magistrate erred in law and fact by failing to consider and determine all issues placed before the court for determination; and
- xi. That the learned magistrate erred in law and fact by failing to allow the suit as prayed for in the counterclaim dated November 6, 2018 against the weight of the evidence adduced by the appellant and the applicable law."

11. The written submissions by the appellant's counsel went to great length to urge the court to find that the trial court was wrong not to find that the appellant was a better parent to be given the actual custody of the children, given their age. Several decisions were referred to in support of the appellant's case that the best interests of the children could only be served by her being given their actual custody, with the respondent having visitation rights. It was her case that there were no exceptional circumstances that could take away the children from her.

12. Section 4(2) and (3) of the *Children Act*, 2001 and article 53(2) of the *Constitution* are clear that the children's best interests were of paramount consideration when the trial court sought to determine who between the applicant and the respondent should have their actual custody.



13. Under section 83(1) of the *Children Act* the trial court was required to consider the conduct and the wishes of the appellant and the respondent in determining whether or not it should give either of them the children's custody. Then, it was required to consider the ascertainable wishes of the children. Lastly, it was to consider whether the children had suffered any harm or were likely to suffer any harm if actual custody was given to either the appellant or the respondent.
14. I have anxiously considered the evidence adduced before the trial court, the complaints in the memorandum of appeal and the written submissions. I have considered them against the judgment by the trial court. It was evident in the judgment that the trial court was alive to the best interest principle, was alive to the general principle that where the court is dealing with the question of actual custody of children, especially children of tender age, except where there are exceptional circumstances, the custody of such children should be given to the mother (*JO v SAO [2016] eKLR*; *Githunguri v Githunguri [1979] eKLR*; etc).
15. Further, the trial court considered the issue when it is that, despite the age of the children, it may be in their best interest to give them to the father. The question of exceptional circumstances. It referred to *Sospeter Ojamong v Lynette Amondi Otieno, Court of Appeal No 175 of 2006* and *Martin Olewa & another v Jackson Obiera, Court of Appeal No 16 of 1979* and observed that the exceptional circumstances that would disqualify the mother would include her disgraceful conduct, criminal behaviour, drunken habit or bad company. The court found that the appellant had objectionable conduct that disentitled her to the children. It included being absent, being negligent, being unable to supervise the children's school work, not providing for their basic needs and engaging in extramarital affairs. The evidence was that the appellant brought men to the home in the seeing of the children. No wonder the children, when interviewed by the court, were categorical that they did not want to live with their mother (the appellant).
16. This court accepts the findings of the trial court. It accepts that the conduct by the appellant was exceptional and this is what denied her the opportunity to have actual custody of the children. The trial court considered all the evidence given to it and subject it to the usual standard of proof.
17. In conclusion, I find no merit in the appeal and dismiss it with costs.

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 27TH DAY OF OCTOBER 2022

A O MUCHELULE

JUDGE

