



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT SIAYA**

**CIVIL APPEAL NO. 28 OF 2019**

**BAO.....APPELLANT**

**VERSUS**

**TAO.....RESPONDENT**

***(Appeal from the judgment, decree and order in Ukwala SRM Children's Case No 4 of 2019 delivered on 2/7/2019 by Hon. C.I. Agutu, SRM)***

**JUDGEMENT**

**Introduction**

1. The appeal herein is against the judgement, decree and order passed by the Senior Resident Magistrate at Ukwala by the Hon. C.I. Agutu on the 2<sup>nd</sup> day July 2019.
2. The respondent herein TAO sued the appellant, BAO her husband seeking legal and actual custody of the two minors, fruits of the union, maintenance in terms of medical cover and school fees for the minors as well as costs of the suit. The trial court in its judgement granted the respondent custody of the minors whereas it granted the appellant visitation rights and access to the minors through any technological means agreed by the parties herein.
3. Aggrieved by the trial court's decision, the appellant filed his memorandum of appeal dated 26<sup>th</sup> July 2019 which set out the following grounds of appeal;
  - a) *That the learned trial magistrate erred in law and fact by failing to appreciate the principle of equal parental responsibility and/or rights before arriving at her judgment.*
  - b) *That the learned trial magistrate erred in law and in fact by failing to analyze and evaluate the evidence adduced by the Appellant in a judicial manner before arriving at her judgment.*
  - c) *That the learned trial magistrate erred in law and in fact by showing open bias in her interpretation of the law and fact in arriving at her judgment*
  - d) *That the learned trial magistrate erred in law and fact by allowing the Respondent to adduce Video and/or electronic evidence directly from her phone without prior notice to the Appellant thereby violating his constitutional right to fair hearing.*
  - e) *That the learned trial magistrate erred in law and fact by failing to appreciate the impact of the Constitution of Kenya 2010 and the Children's Act on parental responsibility and the best interest principle of a child*
  - f) *That the learned trial magistrate erred in law and fact by making a judgment only stemming from the Respondent's unsupported allegations and not at any point considering the appellant's evidence and pleadings*
  - g) *That the learned trial magistrate erred in law and fact by failing to appreciate the totality of evidence produced in support of the appellant's defence and counterclaim while summing up her findings in her judgment and thereby relied on extrinsic factors in arriving at her judgment*
  - h) *That the learned trial magistrate erred in law and fact by mixing issues in her judgment thereby ending up failing to address the real issues in controversy in the matter before her and particularly the factors to consider before granting custody of the minors to one parent in exclusion of the other*

i) *That the learned trial magistrate erred in law and fact by failing to evaluate the evidence tendered judiciously before arriving at her judgment*

j) *That the learned trial magistrate erred in law and fact by failing to pronounce herself on the Appellant's application for a report of a children's officer to aid in arriving at a decision*

4. In rejoinder, quite unusually for appeals, unlike in applications or petitions, the respondent filed grounds of opposition dated 26<sup>th</sup> August 2019 as follows;

a) *That the learned trial Magistrate appropriately applied the provisions of the Children's Act, 2001 and the Constitution of Kenya 2010 regarding the welfare and best interest of the child principle by granting custody to their mother the Respondent herein since they are children of tender ages.*

b) *That the learned trial Magistrate aptly analysed the evidence adduced by both the Appellant and the Respondent and judiciously considered the said evidence while arriving at her judgment especially since the Appellant failed to demonstrate any compelling reasons and/or exceptional circumstances for denying their mother, the Respondent herein actual custody of the children of tender years, therefore claims of bias by the Appellant are unfounded.*

c) *That this Appeal has been brought in bad faith and is only intended to waste this Honourable courts time and frustrate attainment of the minors Welfare and to deny them their Best Interest.*

5. The parties agreed to canvass the appeal through written submissions.

### **Appellant's Submissions**

6. It was submitted by the appellant that it was in the best interest of the minors that the appellant be granted shared custody with the respondent so as to allow the minors have a holistic growth and development where both parents have a say in the decisions that affect the minors.

7. It was submitted that there was no tangible evidence placed before court by the respondent to prove the allegations that the appellant was involved with another lady and that conversely the respondent had moved the minors to their grandmother's place thus cutting off his access to them.

8. The appellant further impugned the trial court's judgement on the ground that there was no reason given by the trial court as to why the appellant should not be granted shared custody. He further submitted that although custody of children of tender years is usually granted to mothers, the rule did not take away the appellant's right to shared custody.

9. Reliance was placed on the case of **NMM v JOW [2016] eKLR** where the court provided exceptional circumstances where custody would not vest in the mother including where the mother was unsettled, had taken a new husband or her living quarters were in a deplorable state. It was submitted that the respondent was unstable as she had left the minors with their grandmother and moved to stay elsewhere and thus there was need for him to be granted shared custody.

10. The appellant further relied on the case of **JKN v HWN [2019] eKLR** where the court opined that section 83 of the Children's Act did not dictate that custody must be granted to one person only and proceeded to grant shared custody to both the appellant and the respondent.

### **Respondent's Submissions**

11. The respondent submitted that the learned trial Magistrate aptly analyzed the evidence adduced by both the Appellant and the Respondent and judiciously considered the said evidence while arriving at her judgment especially since the Appellant did not demonstrate any, neither did the learned Magistrate find existence of any exceptional circumstances to warrant the departure from the general rule when she awarded actual physical custody of the children to the Respondent.

12. The respondent further submitted that the children herein are of tender ages and are therefore better placed in the Respondent's custody as she is ready and willing to have them in her custody and take good care of them in their best interest

13. Regarding access and visitation rights, the respondent submitted that it was a trite principle of law that children are entitled to both parents' attention, love and care but in the event that the child had suffered any harm or is likely to suffer any harm if the order of access is made, the courts have a duty to so protect the child. It was submitted that in the instant case, the Respondent testified that the youngest child of the parties was not completely out of their bedroom and would repeat what transpired between the Appellant and his mistress and further that one of the children insisted on sleeping in the nude like Aunty Dorcas who was a regular on the father's bed, a fact that was substantiated by the Appellant admitting that Dorcas was an intimate friend.

14. It was further submitted that that the Appellant had not demonstrated that the learned trial Magistrate exercised her discretion in an injudicious manner so as to warrant this Court to interfere with the said decision.

### **Analysis & Determination**

15. This is a first appeal. The duty of a first appellate Court was stated in **JWN v MN [2019] eKLR** in the following words:

***“It is settled law that the duty of the first appellate court is to re-evaluate the evidence tendered in the subordinate court, both on points of law and facts and come up with its findings and conclusions.”***

16. This is the standard of review upon which it is incumbent upon the Court to utilize in determining this appeal.

17. Revisiting the evidence adduced by the parties before the trial court, the respondent testified that she was the appellant’s wife and that they had been blessed with two issues. She alleged infidelity on the part of the appellant and further stated that the appellant failed to exercise care and discretion in his infidelity and instead exposed the minors to his sexual vulgarity and grossness.

18. The respondent testified that she was familiar with the appellant’s alleged mistress who was once her student. The respondent further submitted that the minors repeated what transpired between their Dad and his mistress and further, that one of the issues even insisted on going to sleep naked like the dad’s mistress, aunt Dorcas.

19. On his part, the appellant testified that he would provide for his children’s medical expenses as well as the school fees. He testified that he loved his children and should be granted shared custody. The appellant admitted that Dorcas was an intimate friend but that the relationship had since ended.

20. I have considered all the above evidence, the grounds of appeal and the rival submissions as filed by the parties’ Counsel. The commencement point is the Constitution and statutory provisions which are clear that in making any decisions concerning children, the paramount consideration must, always, be the best interests of the child.

21. The Constitution of Kenya, 2010 in Article 53(2) provides that:

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

22. Section 4(2) and 3(b) of the Children’s Act echoes Article 53 of the Constitutional and provides:

***“(2) In all actions concerning children, whether undertaken by Public or Private Welfare Institution, Courts of Law, Administrative Authorities or Legislative bodies, the best interest of the child shall be the primary consideration.***

***(3) All Judicial and Administrative Institutions and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with the adopting a course of action calculated to –***

***a. Safeguarding and promoting the rights and welfare of the child;***

***b. and promote the welfare of the child.”***

23. The second prime principle taken into consideration in deciding custody questions is honed out of case law: the principle is that there is a prima facie rule that in the absence of exceptional circumstances, the custody of children of tender years should be awarded to the mother.

24. 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 suitable 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.”***

25. The question is, what amounts to exceptional circumstances? The Court of Appeal in ***Sospeter Ojaamong v Lynette Amondi Otieno, CA No. 175 of 2006*** had this to say about exception circumstances:

***“The exceptional circumstances would include if the mother is unsettled, has taken a new husband or her living quarters are in a deplorable state.”***

26. In ***Martha Olela & another v Jackson Obiera C.A 16 of 1979*** the court explained the general principle that custody of young children should be awarded to the mother unless special circumstances and peculiar circumstances exist to disqualify her for being awarded custody. The court stated that exceptional circumstances would include “disgraceful conduct, immoral behaviour, drunken habit, or bad company.”

27. In the instance case, the appellant had custody of the minors prior to the trial court’s judgement to the exclusion of the respondent who had been working away from home. By virtue of section 2 of the Children Act, children of tender years are those ten years and below. The minors in the instant case are aged 8 and 7 years respectively. Although the appellant says that he loves his children and that he should be granted joint custody, he has nonetheless not given any peculiar or exceptional circumstances or specific issue that he has with or on the part of the respondent which would inform or persuade this court to vary the trial court’s decision which is impugned herein.

28. The Learned Trial Magistrate in arriving at the final decision came to the conclusion that custody should be awarded to the Respondent.

The Appellant believes that this was a misdirection; that he marshalled sufficient evidence to displace the prima facie rule that custody should be awarded to the mother.

29. However, having considered the evidence tendered by the appellant in the trial court, I find no evidence to support the appellant's contention in this appeal that he adduced sufficient evidence to surmount the prima facie rule that the custody of young children should be awarded to the mother. Differently put, I do not find any evidence that the best interests of the children in the circumstances of this case militate against the award of the custody of the children to the Respondent, as claimed by the appellant.

30. I am guided by the provisions of **section 83 of the Children Act** which outlines the factors to be considered in making a custody award. The section 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.***

***Where a custody order is made giving custody of a child to one party to a marriage, or in the case of joint guardians to one guardian, or in the case of a child born out of wedlock to one of the parents, 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 of possession, jointly with the person who is given custody of the child.”***

31. In the present case, the Appellant insists that he deserves shared custody.

32. In the case of **JKN v HWN (supra)** the court stated:

***“As I read our case law now, sexual indiscretion or extra-marital sexual behaviour will only be a factor in a custody award if it rises to the level where it harms the children as for example is assumed to happen when the parent in question has behaved so dishonourably that it affects the children through trauma. If there is no showing of harm, sexual indiscretion alone, without more, is not an inexorable rule excluding a Court from awarding custody to a parent where other favourable factors are present.”***

33. In the instant case, the respondent gave un rebutted testimony that the minors were witnesses to the appellant's sexual indiscretions with his intimate friend Dorcas and that they went ahead and imitated the same. In my humble view, this is likely to cause trauma to the minors and therefore it is not in the best interest of the children of tender years as the minors herein to be left in the company of the appellant when their mother is separated from him.

34. The appellant further asserted that the trial court failed to order that a children's officer report be considered which prejudiced his case. In my humble view, the wishes of the children especially when of tender age like the minors in the instant case who are both under the age of ten years are not dispositive of who should be awarded custody.

35. The upshot of the above is that I find no fault in the judgement rendered by the trial magistrate. I uphold it and find and hold that this appeal is devoid of any merit. The same is hereby dismissed.

36. Regarding the issue of costs, I am in agreement with the appellant that as this is a family matter, both parties ought to bear their own costs. I therefore order that each party shall bear their own costs of this appeal.

Orders accordingly.

**Dated, Signed and Delivered at Siaya this 25<sup>th</sup> Day of January, 2021**

**R.E. ABURILI**

**JUDGE**