



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CIVIL APPEAL NO 42 OF 2020

KOO.....APPELLANT

-VERSUS-

EAO.....RESPONDENT

(Being an Appeal from the Judgment and order of Hon C.N.C. Oruo (SRM) delivered at Maseno in Children’s Case No 2 of 2020 on 14th July 2020)

JUDGMENT

INTRODUCTION

1. In her decision of 9th July 2020 in Maseno Children’s Case No 2 of 2020, the Learned Magistrate, Hon C.N.C Oruo, Senior Resident Magistrate, granted custody of two (2) minors JA and RB aged nine (9) and five (5) years respectively (hereinafter referred to as “the minors”) to the Respondent herein and further granted the Appellant herein controlled access and/or visitation rights to the said two (2) minors in a manner that was to be agreed upon by both parties.
2. Being aggrieved by the said Judgement, the Appellant filed his Memorandum of Appeal dated 24th July 2020 on 27th July 2020. He relied on six (6) grounds of Appeal.
3. Both parties filed their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

4. This being a first appeal, it is the duty of this court to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **[1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

6. Having considered the Grounds of Appeal and the respective Written Submissions by parties herein, it was the considered view of this court that issues that had been placed before it for determination were as follows:-
 - a. **Whether or not after evaluating the evidence that was placed before her, the Learned Trial Magistrate arrived at an erroneous conclusion.**
 - b. **Whether or not the Learned Trial Magistrate relied on a Defence that was filed without leave of the court.**
7. The court therefore found it prudent to address the aforesaid issues under the following distinct and separate heads.

I. DEFENCE

8. Ground of Appeal No (b) was dealt with under this head.

9. The Respondent submitted that the Appellant objected to her Defence that was filed after interlocutory judgement but that they subsequently recorded a consent setting aside the *ex parte* judgement, which consent was adopted as an order of court and matter was set down for hearing.

10. The court perused the proceedings on Page 5 of the Record of Appeal and noted that it was untrue that the Trial Magistrate relied on a Defence that had been filed out of time. On 30th June 2020, she noted that both parties were ready to proceed with the hearing and set aside the interlocutory judgment that had been entered against the Respondent herein on 16th June 2020 by consent of the parties.

11. The Appellant did not demonstrate that he sought to have the said consent set aside and/or vacated before the trial commenced on that day but in fact took to the stand and adduced his evidence. He could not now be seen to complain about a defence which he agreed by consent to be on record and be relied upon by the Learned Trial Magistrate.

12. In the premises foregoing, Ground of Appeal No (b) was not merited and the same be and is hereby dismissed.

II. CUSTODY OF THE CHILDREN

13. Grounds of Appeal Nos (a), (c), (d), (e) and (f) were dealt with under this head as they were all related.

14. The Appellant submitted that he and the Respondent herein had cohabited as husband and wife out of which union they were blessed with the minors herein. He stated that the marriage was peaceful but it began experiencing problems due to the Respondent's infidelity which led to their separation.

15. He pointed out that the Respondent left the minors with him but came back after some time, took the said minors and disappeared with them to an unknown destination. It was his submission that which the Learned Trial Magistrate did not consider and find that there existed exceptional circumstances to grant him actual custody of the minors.

16. He further argued that the order that he has unlimited access or visitation rights to the minors in a manner agreed by both parties, was unclear and ambiguous. He relied on the following cases. He relied on the cases of Githunguri vs Githunguri [1979]eKLR, Noordin vs Karim [1990] e KLR; EKK vs KM [2012]e KLR in support of his case.

17. On the other hand, the Respondent averred that a fight that was solely occasioned by the Appellant made her move out of the said marriage with the said minors whereafter he married another wife who had children. It was her contention that she had been in full custody of the minors since 2017 to date and was apprehensive that moving them to him would destabilise them.

18. She was emphatic that she was a person of means as she worked as a secretary and was best placed to have the custody of the minors. She added that she had enrolled them at schools near her working station.

19. She contended that the Learned Trial Magistrate carefully considered the case and arrived at a conclusion that was at the best interest of the minors. In this regard, she placed reliance on the case of J.O vs S.A.O [2016]eKLR.

20. First, our Constitution and Statutory Laws are clear in making any decisions concerning children, the paramount consideration must, always be the best interest of the child.

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

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

22. Section 4(2) and 3(b) of the Children’s Act, 2001 echoes the Constitutional imperative:

(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 to be taken into consideration in deciding custody questions is honed out of case law: it is that there is a *prima facie* rule that unless there are exceptional circumstances, custody of children of tender years should be awarded to the mother.

24. In the case of Githunguri vs Githunguri (Supra), the Court of Appeal rendered itself as follows:-

“...the custody of very young female children should be granted to their mother, in the absence of exceptional circumstances which, do not in my opinion exist in this case. The learned Judge correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the children...When dealing with the paramount consideration of welfare especially where young female children are concerned there is a rule that the mother is normally the person that should have custody.”

25. As this is now the settled law regarding custody of children, this court did not deem it necessary to belabor the point. It is therefore incumbent on a father of children of tender years to demonstrate that there are sufficient reasons to exclude this *prima facie* rule.

26. Unless a father can demonstrate that a mother's behaviour is not in the interests of the child, then custody must remain with the mother. A mother who begins to cohabit with another man after separation from her partner is in no worse place than a father who after such separation goes to cohabit with another woman. They are on equal footing. In any event, unless it can be demonstrated that the infidelity by any parent is harmful to the children, that would not be a good ground to divest either parent custody if the circumstances demand that he be vested that custody.

27. No Reports by Children Officer were filed in court to prove the testimony of the Appellant and or disapprove the evidence adduced by the Respondent. The fact that the Respondent left the matrimonial home and had been cohabiting as husband and wife with another man and has gone on to fraudulently process new birth certificates for the minors was therefore neither here nor there.

28. As there was no dispute that the children were minors and in primary school, the Learned Trial Magistrate could not be faulted for having awarded custody of the children to the Respondent herein by virtue of the fact that the first child was not only of tender years but she was also female.

29. Where there is more than one child, the best of interests of the children would be for them to live with one parent and not be separated. Indeed, such separation causes much trauma to children who are involuntarily dragged into disputes and differences between their warring parents. Separating children is tantamount to making the children choosing one parent over the other and must be frowned upon unless there are any exceptional circumstances that would warrant such separation such as when a mother should be divested of custody of her children but she has a child that she is breastfeeding at the time of separation.

30. As there were no exceptional circumstances to separate the two (2) children, the Learned Trial Magistrate also applied the correct principles in awarding the Respondent custody of the second child who was a boy and of tender years.

31. It was not lost to this court that the Respondent was living with the children at the time of trial and she had in fact been taking care of them since 2017 a fact that was well considered by the Learned Trial Magistrate. The Appellant did not also rebut her evidence in that regard. Vesting custody of the children to the Appellant herein would definitely have disrupted the children's lives and was thus not be in their best interests as contemplated by the Constitution and Statute.

32. In the premises foregoing, Grounds of Appeal Nos (a), (c), (d), (e) and (f) were not merited and the same be and are hereby dismissed.

III. ACCESS TO THE CHILDREN

33. Ground of Appeal No (e) was dealt with under this head.

34. Whereas the Respondent testified that she did not mind if the court granted the Appellant visitation rights as the biological father of the minors, this court agreed with the Appellant that the order that he had unlimited access to the minors as agreed by both parties from time to time was uncertain, amorphous and ambiguous and was prone to misinterpretation and abuse.

35. It must be appreciated that matters involving children are very emotive and that biological parents approach courts because they themselves are completely unable to agree on their differences and/or disputes. Leaving them to their devices to agree on what they had initially not been able to agree upon is most dangerous and has the potential of bringing harm to the children.

36. The Learned Trial Magistrate had given the Appellant controlled access/visitation rights. She did not indicate that a third party would control the same. It was also not clear who would control the access, the custody and/or visitation, that is, if it was by the Appellant or the Respondent. Indeed, as was correctly stated by the Appellant, the order was ambiguous and was subject to different interpretations that had the potential of causing great harm to the relationship between the Appellant and the Respondent herein including their children.

37. It is not uncommon to hear of parents killing children and/or the parent having custody of the children. It is of course best that parties agreed on custody and access but when they are unable to do so, courts must intervene so as to safeguard the best interests of the children.

38. When hearing appeals, Section 78 of the Civil Procedure Act Cap 21 (Laws of Kenya) provides that the court can exercise the following powers:-

Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

a. to determine a case finally;

- b. to remand a case;**
- c. to frame issues and refer them for trial;**
- d. to take additional evidence or to require the evidence to be taken;**
- e. to order a new trial.**

39. So as to bring finality to this matter, this court deemed it prudent to pronounce itself on the issue of access as shown in the disposition herein.

40. In the premises foregoing, there was merit in Ground of Appeal No (e) and the same be and is hereby upheld.

DISPOSITION

41. For the foregoing reasons, the upshot of this court's decision is that the Appellant's Appeal was partially successful. The effect of this is that the order by the Learned Trial Magistrate that the Appellant shall have controlled access/visitation rights to the two (2) minors to be agreed upon by the parties be and is hereby set aside and/or vacated and is hereby replaced with the following order:-

- a. THAT the Appellant shall have access of the two (2) children on every alternate weekend from 8.00 am- 8.00 pm commencing 3rd April 2021.**
- b. THAT for the avoidance of doubt, the Appellant shall collect the children from the Respondent's house on Saturdays at 8.00 am and return them to her house on Sundays at 8.00pm on the weekends stipulated in Paragraph 41(a) hereinabove.**
- c. THAT the parties are at liberty to agree on any other modalities of custody and access of children between them with the consent of the court in Children's Case No 2 of 2020 KOO vs EAO.**

42. As this is a family matter that is highly contentious which could further polarize parties if costs are to be pursued but most importantly, because the Appellant was partly successful in his Appeal herein, each party will bear its own costs.

43. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF MARCH 2021

J. KAMAU

JUDGE