



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**(CORAM: A.K. NDUNG'U J.)**

**CIVIL APPEAL NO. 120 OF 2019**

**EMO.....APPELLANT**

**VERSUS**

**JMN.....RESPONDENT**

**(Being an appeal from the Judgment and Decree of Hon. E. A. Obina (P.M.) delivered on 8<sup>th</sup> October 2019 arising out of Kisii CM Child Case No. 82 of 2017)**

**JUDGEMENT**

1. The appellant and respondent got married on 7<sup>th</sup> December 2012 and were blessed with a daughter, DVJ("the minor") on 14<sup>th</sup> February, 2015. Unfortunately, the marriage hit the rocks and the appellant left the home sometime in 2015. The suit before the children's court was filed by the respondent. He claimed that appellant had taken the minor to her relatives without his authority and had deliberately denied him access to the child. He urged the court to intervene by granting him actual legal custody or legal access of the minor plus costs of the suit and any other relief the court would deem necessary.

2. In her defence and counterclaim, the appellant blamed the respondent for her departure from the matrimonial home. She claimed that the respondent had chased her and the minor away and stated that she had been staying with the minor since. She accused the respondent of failing to disclose that he had been visiting the minor but without providing for her. She further averred that custody should vest upon her as the minor was still breastfeeding at the time. She sought total custody of the minor with limited access being granted to the respondent on condition that he notifies her of the date and time to access the minor during day time. She also urged the court to compel the respondent to support the minor's needs by contributing a sum of Kshs. 20,000/= each month.

3. At the hearing of the matter, the respondent testified that the appellant had moved out of the matrimonial home in September 2015. According to him, they had no differences until he was served with divorce suit documents. He claimed that he related well with his daughter but had been told by the appellant that her home was out of bounds. He resorted to filing the suit when other means of mediation to get custody failed. He claimed that the minor's mother oscillated between towns and was unavailable for the child. He also claimed that the appellant was a drunkard which affected the minor. He thus sought actual legal custody and unconditional access to the child.

4. The respondent also told the children's court that he was a free-lance journalist and earned an unpredictable income and that the respondent was a sale's personnel at a bank in Kisii. He maintained that he provided food, clothing, medical cover and recreation for the child, although he did not have the exact figures. He also stated that he had not been consulted on whether the minor should attend [Particulars Withheld] School. He was opposed to the minor attending the school because it did not have a playground and he could not raise fees for the school.

5. The respondent adopted her written statement as her evidence and also produced their marriage certificate, the minor's birth certificate and a fee structure for [Particulars Withheld]Academy before the children's court.

6. In cross examination, she stated that she and the appellant had had many differences which led her to moving out. She claimed that the respondent had been incapable of providing, causing them to be evicted every now and then. She added that she was the one that had been paying rent and was still paying her rent at her abode in the city center and did not live in her father's compound as alleged. She admitted that she had not consulted the respondent about the minor attending [Particulars Withheld] Academy but added that there were other children in the school which was recognized by the government.

7. On considering the evidence, I have set out above, the children's court made the following final orders:

*a. Because of the tender age of the minor she shall remain in the custody of the mother.*

b. The father shall have access /the child shall have access to the father over the weekends, Saturday and Sunday between the hours of 9:00 a.m. and 5:00 p.m. parties are at liberty to alter the hours by consent.

c. Both parties to agree on a school to be attended by the minor, with assistance of the children's officer and thereafter equally share the school fees and school related expenses.

d. Food, clothing and shelter shall be shared equally between the parents and I assess a figure of Kshs. 10,000 per month, each to contribute Kshs. 5,000.

e. School holidays shall be shared equally starting with the mother to enable the child bond with both parents.

f. Should the parents not be able to secure a medical cover for the child, they shall equally share the medical expenses as and when they become due.

g. Each party to bear their own costs considering the nature of the claim.

h. Either party is at liberty to move the court for variation of the orders should circumstances change.

8. The appellant has challenged that decision on two grounds. First, she contends that in asking the parties to agree on a school the court shied away from its duty as an impartial umpire given that they could not agree on the school the minor was to attend.

9. She argued that the respondent had wanted the child to be enrolled in a different, affordable school which had a playing field but did not mention which school he preferred. She was of the view that a change of school would cause the minor mental anguish and it was best that the minor be left to continue studying at [Particulars Withheld] Academy which would best serve the minor's educational needs.

10. The other issue the appellant had with the children's court's decision was the court's order that she and the respondent share school holidays equally. She argued that by doing this, the trial court had granted her custody of the minor and in the same breath taken it away from her. She reminded this court of the principle that the custody of a child of tender years should be awarded to the mother. The cases of *Wambwa v Okumu [1970] EA 578*, *Githunguri v Githunguri [1979] eKLR* and *J.O. v S.A.O [2016] Eklr* were cited in support of that principle. She urged that it would be in the best interest of the child for her to have sole legal custody of the minor and give the father limited access during school holidays.

11. For his part, the respondent contended that fathers also had a right to be with their children for the benefit of their health and growth. He stated that the appellant's actions of hiding the child from him had made it necessary to seek court orders. He asserted that he deserved equal treatment and denying him access to the minor was contrary to the law particularly **Article 53 (1) (e) of the Constitution**.

#### **ANALYSIS AND DETERMINATION**

12. As I determine this appeal, I am mindful that the guiding principle in all actions concerning children is that the best interests of the child shall be of paramount importance.

13. The **Children Act at Section 24** provides that where a child's father and mother were married to each other at the time of the child's birth, as in this case, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of parental responsibility. One such responsibility is to provide an education for the child.

14. The appellant and the respondent herein could not agree on whether the minor should continue attending [Particulars Withheld] Academy where she had been enrolled by the appellant. The respondent stated that he had not been consulted on the choice of school for the minor. He was opposed to minor attending the school as it would cause him financial strain. He also stated that the school had no playing ground. On the other hand, the appellant maintained that school was ideal for the child. That it was approved by the government and other children attended the school.

15. Although the respondent claimed that he was jobless and financially incapable of paying school fees at the Academy, he also maintained that he provided food, clothing, medical cover and recreation for the child. He did not specify how much he contributed or what he was willing to give in the future. The appellant similarly failed to disclose her income or the amount she was willing to contribute towards the education of the minor.

16. It is prudent for parties contesting maintenance to file an affidavit of means stating the financial contributions they would be willing to make towards the upkeep of the children. The court in *A M K v S D M HIGH COURT CIVIL APPEAL 45 OF 2017 [2018] eKLR* set out the contents of a comprehensive affidavit of means thus:

*"... ideally the affidavit of means should include income earning capacity and other financial resources by each party/parent; the financial needs, obligations and responsibilities by each party /parent and propose contribution which each party has made or intend to make for the welfare of family/child (ren) including looking after the children through day to day care and support."*

17. Comprehensive affidavits of means assist courts to make an informed decision on the contribution each party is to make towards the upkeep of the minor. The parties in this case did not file affidavits of means or indicate in the evidence what they earned or the financial contributions they were willing to make.

**18.** In a similar situation where the parents could not agree on where the minor was to attend school, the court in *M K v C K K CIVIL APPEAL NO. 51 OF 2015 [2015] eKLR* held:

*“To toss and turn the child from one school to another is to create discomfort, confusion and disorientation in the life of the child while the Appellant and Respondent contest who will win at the end of the day. What is important is for the child to settle down and pursue his [education].”*

**19.** The respondent proposed that the minor should attend a public kindergarten or nursery school where the trainers are keen and not [Particulars Withheld] Academy which was expensive and did not serve the best interests of the minor. He however failed to demonstrate that the standard of education at [Particulars Withheld] Academy was of poor quality and more importantly, failed to suggest an alternative school for the minor for the Children’s Court’s consideration.

**20.** It will not serve the best interest of the minor to keep her from school due to her parents’ inability to agree on the school she should attend. This would destabilize her and adversely affect her education. Until the parties can agree on a mutually convenient school, the minor should continue attending her current school.

**21.** I however see no reason to interfere with the Children’s Court’s order that the parties share school holidays equally. There is no allegation that the child’s wellbeing will be adversely affected by being with her father. He has not been shown to be unfit or incapable of taking care of the child. As already stated, neither the father nor the mother in this case have a superior right over the other in exercise of parental responsibility. I agree that there is need for the minor and her father to cultivate a relationship as this will help in her overall growth.

**22.** The upshot is that this appeal is found to be partially merited. The order of the Children’s Court that both parties to agree on a school to be attended by the minor, with assistance of the children's officer and thereafter equally share the school fees and school related expenses is set aside and substituted with the following order;

a. The minor shall continue to attend [Particulars Withheld] School as the appellant and the respondent negotiate on a school to be attended by the minor, with assistance of the children's officer.

b. The parties shall share the school fees and school related expenses for the minor equally.

**23.** The parties shall bear their own costs of this appeal.

**DATED, SIGNED AND DELIVERED AT KISII THIS 15TH DAY OF APRIL 2021.**

**A. K. NDUNG'U**

**JUDGE**