



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**CIVIL APPEAL NO. 68 OF 2018**

LNM.....APPELLANT

VERSUS

THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

THE NYERI SUB-COUNTY CHILDREN OFFICER.....2<sup>ND</sup> RESPONDENT

**(Being an Appeal from the Judgement and Order of Honourable R. Kefa Senior Principal Magistrate dated 6<sup>th</sup> September 2018 in Children Case No. 4 of 2018 in the Chief Magistrate's Court in Nyeri).**

**JUDGEMENT**

**Brief Facts**

1. The appeal herein has been lodged at the instance of LNM against the judgment and order dated 6<sup>th</sup> September 2018 in Children Case No. 4 of 2018 (OS). The appellant seeks for orders that the court do declare the order placing the minor MM in care and custody of the New Life Children's Home Nyeri and to have the removal of the minor MM from New Life Children's Home and place her back to her grandmother the appellant herein.
2. The appellant in the said application had sought orders that the minor be returned to her and that she be appointed guardian. The trial court found it in the best interests of the child for the minor to remain in New Life Children's Home and gave orders to that effect.
3. Being aggrieved with the decision of the trial court, the appellant has lodged the instant appeal citing 11 grounds of which can be summarised as follows:-
  - a. The Learned Magistrate erred in law and fact by failing to appreciate the evidence of the appellant and her witnesses resulting to a miscarriage of justice.
  - b. The Learned Magistrate erred in law and in fact in finding that the minor was placed in New Life Children's Home irregularly as there was no court order to that effect contrary to Section 63(1)(b) of the Children's Act
4. Parties hereby disposed of the Appeal by written submissions. A summary of the submissions is as follows:-

**Appellant's Submissions**

5. It is the appellant's submission that though she served the Attorney General did not file a defence thereby denying her an opportunity to respond to any pleadings. The court instead requested for the Children's officer's report which the appellant submits is contrary to the laws of natural justice.
6. The appellant further submits that the minor was placed in the children's home irregularly contrary to Section 63 and 120 of the Children's Act as no court order was issued to place the minor in New Life Children's Home.
7. The appellant further submits that she could not be in a position to have the minor's records and birth certificate unless she received them from the minor's mother.
8. The appellant concludes her submissions by stating that it is in the best interests of the minor that she has filed this appeal.

## Respondents' Submissions

9. The respondents submit that pursuant to **Section 4(2) of the Children Act**, the trial court was acting in the best interests of the minor by denying custody to the appellant. From the Children's Officer Report, the appellant's neighbours and administrative bodies were doubtful as to the appellant's statements and therefore the trial magistrate could only act in the best interests of the child as per **Section 4(3) of the Children's Act**. The respondents further submit that the welfare of the child is of paramount importance and the case should not be about the guardian or parents of the minor.

10. The respondents further submit that the appellant failed to prove that the minor was a child of the cousin's daughter. The appellant failed to prove her relation to the child and this was captured by the children's officer which prompted her to write in her report dated 27<sup>th</sup> August 2018 that the minor remain in New Life Children's Home until the biological mother of the minor is found. The appellant failed in her duty to demonstrate that there existed exceptional circumstances to allow her custody of the minor.

11. The respondents further state that though the appellant alleges that the child is her cousin's daughter she did not adduce sufficient evidence to allow her custody of the minor. She did not provide any leads to trace her cousin or the surviving relatives of her cousin for identification of the minor. Further her evidence was contradictory as at some point she stated that she is the one who gave birth to the child and not her cousin. As such she failed to discharge the legal burden of proof as per **Section 107 and 109 of the Evidence Act**.

12. The report done by the children's officer was done in the best interests of the child and if the appellant had given any evidence to prove otherwise, the children's officer would have mentioned the same. The respondents submit that it would not have been proper to deny the minor a home in her relative's house, to develop in a proper home and be given the care she deserves by her loved ones.

13. The respondents contend that in granting custody of a child, one ought to consider **Section 83 of the Children's Act** which provides that in determining custody of a child to the applicant, one ought to consider the best interest of the child. This principle has been enshrined in the cases of **M.A. vs R.O.O (2013) eKLR and ZH (Tanzania) (FC) vs Secretary of State for the Human Department**. Relying the cases, the respondents submit that the appellant's character and intentions towards the minor were suspicious as per the Children's Officers Report and thus it would not have been in the best interests of the child if custody was granted to the appellant.

14. It is the respondents' case that granting custody and guardianship to the appellant is contrary to the best interests and welfare of the child. The respondents rely on **Article 53(2) of the Constitution and Section 4(2) and (3)(b) of the Children's Act** and the case of **Civil Appeal No. 30 of 2016 N.M.M vs J.O.W (2016) eKLR** to support their contention.

15. The respondents further submit that the learned magistrate in making her decision considered the fact that the appellant was not convincing to prove her relation to the minor, she did not adduce any evidence in court to show that she displayed a keen interest in the wellbeing of the child, some family members of the appellant set out her incapability to take care and provide for the minor and lastly the local community and administration had reservations about granting the appellant custody of the minor as they believe that the minor will be exposed to danger. As such, the respondents urge the court to find that the appellant's appeal has no merit and uphold the trial court's judgment in order to ensure the minor's best interests and ascertain that the safety and well being of the minor are not jeopardized.

16. The respondents submit that the appellant has not satisfied the principles in **Mbogoh vs Shah (1968) EALR 13** and thus the court ought to dismiss the appeal.

## Issues for determination

17. The appellant has cited 11 grounds of appeal which can be compressed into 2 main issues:-

- a. Whether the appellant proved her case on a balance of probabilities before the trial court.
- b. Whether the learned magistrate erred in denying the custody of the minor

## The Law

18. Being a first Appeal, the court relies on a number of principles as set out in **Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123**:

**"....this court must reconsider the evidence, evaluate it 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 respect. 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 into account of particular circumstances or probabilities materially to estimate the evidence."**

19. It was also held in **Mwangi vs Wambugu [1984] KLR 453** that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

20. Dealing with the same point, the Court of Appeal in **Kiruga vs Kiruga & Another [1988] KLR 348**, observed that:-

**"An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the**

**evidence in order to determine whether the conclusion reached upon that evidence should stand.”**

21. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

**Whether the appellant proved her case on a balance of probabilities:**

22. This degree of prove is well enunciated in the case of **Miller vs Minister of Pensions [1947]** cited with approval in **D.T. Dobie Company (K) Limited vs Wanyonyi Wafula Chabukati [2014] eKLR**. The court stated:-

**“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’, thus proof on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”**

23. Further, **Section 107 of the Evidence Act Cap 80** places the burden of proof on the party who wants the court to rely on the existence of any set of facts to make a finding in his favour, to prove those facts.

24. In the instant case, the appellant contends that the trial court did not appreciate the evidence she adduced and thus occasioned a miscarriage of justice.

25. According to the appellant, the minor herein is the child of her cousin who left the minor in the appellant’s custody. The appellant could not prove the whereabouts of her cousin or even the relatives to the said cousin for identification of the minor. Further, her siblings do not even know the said cousin. She failed to produce the birth notification documents pertaining to the minor as she keeps stating different facilities where the child was born. She also gave contradictory evidence as to the origin of the minor to the extent of claiming that she birthed the child and not her cousin. The local community and administration additionally held reservations about granting custody to the appellant.

26. Having laid out the appellant’s case, it is imperative to stress that the case herein involves a minor. In that regard, the law is quite clear that in determining any matters concerning children, the best interests of the child is of paramount consideration. This has been entrenched in the Constitution in **Article 53 (2)** which provides:

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

28. **Section 4(2) and (3)(b) of the Children Act** echo this constitutional imperative as follows:-

**(2) In all actions concerning children whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests 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 adopting a course of action calculated to-**

**a. Safeguard and promote the rights and welfare of the child; and**

**b. Promote the welfare of the child;**

27. This principle was enunciated in the persuasive case of **M.A.A vs A.B.S Civil Appeal No. 32 of 2017** where the court held that the interest of the children is first and paramount and everything must be done to safeguard, conserve and promote the rights and welfare of the children.

28. It therefore follows that the best interests of the children is the first and paramount consideration of the child herein and a court must do everything to safeguard, conserve and promote the rights and welfare of the minor herein.

29. Applying these principles to the facts outlined above, it is evident that the appellant has not proved her case on a balance of probabilities and hence the trial court was correct in holding that the minor remain at New Life Children’s Home. The appellant’s testimony was not consistent, and further the local community and the administration were not too keen on having custody being granted to her. They believed that she was not keen on serving the best interests of the minor. In that regard, I do find that the appellant did not discharge the burden of proof and therefore on this limb, the appeal lacks merit.

**Whether the appellant ought to be granted custody of the minor.**

30. **Section 83(1) of the Children Act** sets out the factors to be considered by the court while determining whether or not a custody order should be made in favour of an applicant.

**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**

31. The above proviso also dictates that the best interests of the child ought to be considered when determining whether or not to grant custody to an applicant. I hold the opinion that it would not be in the best interests of the child to grant the appellant custody of the minor. This position has been supported by the Children's Report filed dated 21<sup>st</sup> April 2021. Further the appellant's demeanour is wanting as she has lied to the origin of the child, she was not in a position to produce the child's birth documents and her relatives do not corroborate her story that the minor is the daughter of her cousin. Further, the local community and the administration is not keen in granting custody to the appellant. These discrepancies do not warrant that it is the best interests of the child that custody ought to be granted to the appellant.

### **Conclusion**

32. The foregoing analysis lead me to the conclusion that the trial magistrate's decision was based on the law regarding the best interests of the child and after carefully evaluating the evidence adduced. The applicant did not demonstrate that she was best suited to be given the custody of the minor.

33. I find no merit in the appeal and I hereby dismiss it with costs.

34. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 24<sup>th</sup> DAY OF JUNE, 2021.**

**F. MUCHEMI**

**JUDGE**

**JUDGEMENT DELIVERED THROUGH VIDEO LINK THIS 24<sup>TH</sup> DAY OF JUNE, 2021**