REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(FAMILY DIVISION)

HIGH COURT CIVIL APPEAL NO. 63 OF 2019

ST.....APPELLANT

VERSUS

AW.....….....…RESPONDENT

(Being an Appeal from the orders of the Honourable G.M. Gitonga (Mr.) SRM delivered on 17th May, 2019 in Children's cause no. 309 of 2013 at Nairobi)

JUDGMENT

Background

The Appellant and the Respondent are the biological parents of TNW (hereinafter called 'the child' or 'the minor' now aged about ten (10) years. The child is the subject of this Appeal. The Appellant and Respondent are not married. They were in a relation and cohabited for about 2 years. Out of that cohabitation, the child was conceived. He was born on 3rd December 2010. The relationship between the Appellant and Respondent did not work out and they parted. They entered into a consent that was reduced to a court order in a Ruling dated 21 st November 2013 to the effect that the mother (Appellant) would have the interim actual custody, care and control of the child with visitation rights on alternate weekends by the father (Respondent). The status quo was maintained until 18th August 2018 when the Appellant got married to her current husband who is based in the United Kingdom (UK). Intending to join her husband in the UK the Appellant sought orders to be allowed to relocate with the child to the UK. In determining that application, the Children's Court overturned the prevailing custody arrangements. The Appellant's Application to relocate was denied and the custody order granting the Appellant actual custody, care and control of the child reversed. The Respondent was granted the actual custody, care and control of the child. It is this order that gives rise to this Appeal. The specific orders appealed from are contained in a judgment delivered in ***Nairobi Children's Case No. 309 of 2013*** and read as follows: -

1. That I grant joint legal custody of the child T.N.W to the parties herein.

2. That I grant actual custody, care and control of the said child to the Plaintiff/ Father.

3. That I grant the unlimited but reasonable access to the Defendant/Mother.

4. That the Defendant/Mother shall have access on half of all school holidays which may entail the child visiting the United Kingdom at the defendant's costs. Such visits shall however not be deemed to confer the child with a resident status and the visa shall be so limited.

5. That each party shall bear its own costs.

Memorandum of Appeal

The Appellant is aggrieved by the above decision of the trial court, (Honourable Gitonga G.M), and has preferred this Appeal. In her Memorandum of Appeal dated 17th June, 2019 she has raised six (6) grounds of appeal as follows:

1. That the learned Magistrate erred in law and in fact by wherein he reversed the actual custody care and control of the child herein from the Appellant (Mother) to the Respondent (Father), yet the child has been in the actual custody, care control of the mother for

the last six years, following a consent order recorded in court by the parents in the year 2013.

2. That the learned Magistrate erred in law and in fact when after considering the child, who is of tender years had been well cared for by the Appellant, he relied on the statements of the eight-year-old minor that he would miss his friends if he relocates to the United Kingdom with the Appellant.

3. That the learned Magistrate erred in law and in fact when he failed to consider the fact that the minor had stated that he equally does not mind living with the mother in the United Kingdom.

4. That the learned Magistrate erred in law and in fact when he failed to consider the fact that the minor has been primarily in the custody of the mother since birth and the reversal of the custody orders would be of great upheaval to the minor.

5. That the learned Magistrate erred in law and in fact when he failed to consider that the Respondent expressly stated that the mother figure of the child in the absence of the Appellant would be the nanny, yet the Appellant who has always cared for the child is ready, able, available and willing to raise her son.

6. That the learned Magistrate erred in law and in fact by granting the judgment orders of 17th May, 2019 without having addressed the welfare and the best interest of the minor.

She seeks to have the appeal allowed; to have the orders of 17th May 2019 varied in the best interest of the minor; to be granted custody, care and control of the minor; to be granted leave to relocate with the minor; any other orders that may be beneficial and in the best interest of the minor and costs of the Appeal.

Appellant's submissions

By consent of the parties this Appeal is being canvassed by way of written submissions. Both parties have filed their submissions. Submissions by the Appellant are dated 6th April 2021. She has identified two issues for determination:

1. Whether the Learned Magistrate erred in awarding actual custody, care and control of the minor to the Respondent.

2. Whether the learned Magistrate erred in not allowing the Appellant to relocate with the minor to the United Kingdom.

On the first issue, the Appellant has submitted that it is in the best interest of the child for the Appellant to continue to have actual custody, care and control; that she has been living with the child since he was born and has lived with the child alone for 6 years after signing the consent with the Respondent; that she has been the child's primary care giver and has been involved in all aspects of the child's life and therefore it is imperative that the Appellant be allowed to relocate with him with whom his home and base has been created. She submitted that the Respondent's nature of his work limits the time he gets to spend with the child; that the Respondent admitted in court that he would be away from home on some nights and on entire weekends leaving the child with the nanny and that this was confirmed by the nanny in her evidence. She submitted that she has flexible hours and is in a position to take care of the child without relying on a nanny to do so. That the Respondent testified that he was willing to fully support the Appellant in respect to the child's expenses in the United Kingdom.

The Appellant submitted further that the lower court went against the firmly held principle that in matters of custody of children of tender age, custody should be granted to the mother except in exceptional circumstances and that the Respondent has not proved exceptional circumstances that would sway the court in denying custody to the Appellant. The Appellant cited ***Sospeter Ojaamong v Lynette Amondi Otieno (Civil Appeal No. 176 of 2006)*** where the court stated the exceptional circumstances to include ***the mother's disgraceful conduct, say her immoral behaviour, drunken habit, bad company as some of the factors which would disqualify her from being awarded custody of a child of tender years.*** She also cited ***J. O v. S. A. O [2016] eKLR*** where the Court of Appeal held that:

> ***"There is a plethora of decisions by this Court as well as the High Court that in determining matters of custody of children, especially of tender age, except where exceptional circumstances exist, the custody of such children should be awarded to the mother, because mothers are best suited to exercise care and control of the children."***

On the second issue the Appellant has submitted that the trial court was swayed by the child's answer that he would like to relocate with the mother to the UK but he would miss his friends in Nairobi. It was submitted that Section 4 of the Children Act allows the child to be accorded an opportunity to express his opinion and that the opinion shall be taken into account as may be appropriate taking into account the child's age and degree of maturity. It was submitted that the child is too young to be asked to choose between relocating with his mother to a new place and staying in Kenya to play with his friends. The Appellant cited J. O v. S. A. O. case mentioned above, where the Court of Appeal stated that:

> ***"Section 83 (1) of the Children Act outlines the principles to be applied in making custody orders. They include the ascertainable wishes of the child. But Njagi, J held in B. K versus E. J. H [2012] eKLR, "the test for the best interest of a child is not subjectively dictated by the childish whims of a child. There has to be an element of objectivity….a child's wishes to stay with a particular parent might not be in his best interest. In such a situation, his own preference may not be automatically allowed. The wishes and feelings of a child must therefore be treated with a lot of caution."***

It was submitted that it would be in the present and long-term best interest of the child to relocate with the mother to the United Kingdom where the mother intends to join her husband. That the Appellant is not denying the Respondent access to the child and that the Appellant's husband has expressed his willingness to facilitate the child's travel back to Kenya to be with the Respondent during holidays and back to the

UK. The Appellant cited ***MAA v ABS [2018] eKLR*** where the court stated that:

> ***"The intention of the Respondent to relocate with the child to Oman to be with her husband is genuine and reasonable and this Court should not be a hinderance."***

Respondent's Submissions

The Appeal is contested. The Respondent admits that he works for Capital FM where he plays music on Friday mornings from 6.00am to 10.00am. He submitted that he is also self-employed as a Disk Jockey and works largely from home except the Friday Mornings and weekends from Saturday 10.30pm to Sunday 4.00am. He submitted that he is normally home with the child on other times; that he lives in Kilimani in his own house and that he meets the child school expenses; that he takes keen interest in the child's schooling and extra curriculum activities and that there is a nanny who takes care of the child and stays with the child when the Respondent is out to work and that nothing is certain for the child in the event he relocates to the UK.

The Respondent submitted that the Appellant has misrepresented the facts of this case; that the orders granting her actual custody, care and control of the child were in the interim pending the hearing and determination of the main suit and therefore the trial court did not err in any way since the orders granted after the determination of the suit since the interim orders were made to operated pending the main trial. It is submitted that the orders of 21st November 2013 are not consent orders but were granted after consideration of rival submissions..

In response to the Appellant's assertion that the Respondent did not ask for custody, care and control of the child, the Respondent submitted that he sought joint legal and actual custody, care and control of the child. He submitted that his job is not in any way a bar or prejudicial to his being a present parent with actual custody, care and control. He submitted that it is not controverted that he works from home from Monday to Thursday and goes to the office on Friday mornings and on alternate weekends when he does not have the child. He has submitted that he does not leave the child with anyone else other than the nanny.

On the wishes of the child it was submitted that his feelings and wishes are to be considered account being taken of the age of the child; that the child aged 10 years is considerably mature and capable of offering a well-placed reason for the decisions they may take especially when the reasons are driven by feelings and emotions which are ordinarily the influencers in children. It was submitted that the exceptional circumstances in this case constitute the relocation to another jurisdiction offering different home environment, school and weather, the circumstance of separating child from his younger brother and friends and that although these have nothing to do with the Appellant the court should not limit itself to the previously pronounced exceptional circumstances.

The Respondent further submitted that this court will not be in a position to enforce its orders to compel the husband of the Appellant to cater for the financial responsibility of the minor in the UK (see ***Hadkinson vs Hadkinson 1952 all E.R*** cited in ***Mathew Chepkwony and Ezekiel Chepkwony vs. Paul Kemei Kiprono [2007] eKLR).*** It was submitted that the Appellant has not demonstrated her capability to provide for the child once she relocates. The Respondent cited ***Manjit Singh Amrit v Papinder Kaur Atwal [2009] eKLR*** where it was stated that:

> ***"The ability of the parent to provide and care for A. S. A, is among other factors to be considered in the issue as to who should be given custody. However, it is my understanding that the fact that one or the two parents is in a better financial or material position to give the child a better start in life than the other, does not give the first one a prior claim for custody. It is more the happiness of the child, not the material prospects which this court would be concerned with. Obviously however, a party's financial position cannot be ignored entirely. It follows that if a party is so poor that he/she cannot provide a home for the child or children, this in itself might be sufficient reason to refuse him/her custody, as was state in Re Story (1961) 2 I.R328, 345, 346. And in Re F., (1962) 2 Ch 238, the same principle was restate that "a party who can offer a child good accommodation must, other things being equal, have the edge over one who cannot."***

The Respondent cited Article 53 (1) and (2) of the Constitution of Kenya 2010, Section 6 and 76 (3)of the Children Act and concluded his submission by stating that there is no ground on the Memorandum of Appeal that merits consideration so as to overturn the decision of the lower court and urged this court to uphold the judgment and orders of the lower court while dismissing this Appeal with costs to the Respondent.

Analysis and determination

I will start the analysis and determination of this matter by reminding myself that this court is sitting on a first appeal and as such this court is under a duty to subject the evidence presented before the trial court to scrutiny in order to make its own conclusions bearing in mind always that this court did not have the opportunity to observe the witnesses first hand. In ***Selle & another –vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123,*** the Court had the following to say in respect of the duty of a court sitting on first appeal:

> ***"I accept counsel for the respondent's proposition 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 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.***

I have read the entire record of proceedings from the lower court specifically the evidence by the Appellant and the Respondent on the issue of the custody of the child and the issue raised in this appeal concerning taking the child outside the jurisdiction. I have taken into account

the wishes of the Appellant and those of the Respondent as well as those of the child regarding the relocation to the United Kingdom. I appreciate the fact that the trial court understood the issues of law presented before it in the determination of this matter. I commend the trial court for properly applying the law on the issue of custody of the child and the importance of taking the best interest of the child into consideration. I have also appreciated all the authorities cited by both sides.

It is clear to me that the central issue before the trial court and before this court is the issue of who, between the Appellant and the Respondent should have actual custody, care and control of the child. Following various applications in court, the lower court in its ruling dated 21st November 2013, granted joint legal and actual custody to both parents, among other orders. These orders remained in force until the Appellant brought an application in the lower court seeking leave to be allowed to relocate to the United Kingdom with the child. The matter was heard and the orders appealed from were granted. The effect of those orders is that both parents retained joint legal custody of the child but actual custody, care and control was granted to the Respondent with unlimited but reasonable access to the Appellant. She was also allowed to have access on half of all school holidays. As noted by the lower court this latter order would entail the child visiting the Appellant in the UK. These orders disturbed the status quo obtaining. The Appellant, wishing to join her husband in the UK failed to obtain orders to take the child with her.

It is trite that in all matters touching on the child and in all decisions touching on the child, the best interest of the child is to be given paramountcy. Therefore in determining this appeal this court is alive to the fact that it is under an obligation as provided under Article 53(2) of the Constitution of Kenya 20210 and Section 4(3) of the Children Act to give primacy, while considering any disputed matters involving children, to the best interest of child. A list of what constitutes a child's best interest is yet to be settled. In determining what constitutes the best interest of the child, each case is considered in its own peculiar circumstances. Further it is a settled legal principle that in determining matters of custody of children, especially of tender age, except where exceptional circumstances exist, the custody of such children should be awarded to the mother (see **J.O v. S.A.O [2016] eKLR**).

The only reason, as far as I can determine, that swayed the trial court in denying the Appellant the order she sought to relocate with the child to the UK is because upon interviewing the child, the child indicated that he would like to remain in Kenya because of his friends. The child, aged about 8 years at the time was asked to choose between going to live with his mother the Appellant in the UK and staying in Kenya with his father the Respondent. He told the court that he would like to stay in Kenya. He was asked why he would choose to stay in Kenya, was it because of his dad, to which he answered it was because of his friends.

There is nothing wrong in getting the views of a child in respect to his wishes. The law under Section 83 (1) of the Children Act allow this. But in my view, courts should be cautious and approach this matter with great care. The reason for this is obvious: children, especially children of tender years, may not know how to articulate their wishes properly or may not even know what is the best for them. They may be driven by whims. It is not uncommon for a child to choose to remain in the company of or playing with his/her friends instead of going to school, or joining his/her parents to church or to some other event for instance because to that child playing with friends is what matters to them. The likelihood of this happening is not lost to the courts. In **J.O v S.A.O** (above) the Court stated as follows on this issue:

> ***"Section 83(1) of the Children Act outlines the principles to be applied in making custody orders. They include the ascertainable wishes of the child. But Njagi, J. held in B.K versus E.J.H [2012] eKLR, "the test for the best interest of a child is not subjectively dictated by the childish whims of a child. There has to be an element of objectivity….a child's wish to stay with a particular parent might not be in his best interest. In such a situation his own preference may not be automatically allowed. The wishes and feelings of a child must therefore be treated with a lot of caution."***

The question I wish to subject to scrutiny in this judgment is this: what are the best interests of the child in the matter before me? Both Appellant and the Respondent have legal custody and this order must not be disturbed because for all intents and purposes it is in the best interest of the child who enjoys the right under Article 53 (1) of the Constitution, *inter alia*, to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.

I have weighed two options. The first option is to let the orders of the lower court remain unchallenged. This would have the child stay in Kenya with his father, the Respondent. The Respondent is on record, and this is contained in his pleadings, that he works as a Disc Jockey and works mostly from home except for Fridays mornings and weekends. He testified that on weekends when he is away working the Nanny stays overnight with the child. At two occasions the Appellant was called to step in overnight to take care of the child and another child of the Respondent. The Nanny, Selina Khamate, who testified as the 2nd witness for the Respondent confirmed this. While the Respondent is available for the child, it is not 100% due to the nature of his job. When he is working from home, the child is in school until the evening. On weekends the Respondent is not available fully. He works at night to the wee hours of the morning on Sundays. When he gets home, he must be tired and the attention to is child may not be 100%.

The second option is to allow the mother to relocate with the child. In this scenario the child will be in the care of his biological mother. The mother and her husband are Kenyans. There is no evidence provided that they have Residence status in the UK. They will be in UK due to the demands of the job of the Appellant's husband. Both have relatives in Kenya and it is expected that when the tour of duty is over they are likely to return to Kenya. The Appellant may find a job or she may become a stay at home mum. The husband has testified to the fact that he is willing to support the child to travel to Kenya for visits. The child will enjoy the care and control of his biological mother. He will be brought up in the best way a mother can care for her child. There is nothing on record to show that her husband will not be supportive of her and the child.

I have also noted that both the Appellant and the Respondent have cooperated very well in parenting the child and this was commended by the trial court. It is indeed impressive to see two people who are parents and not married cooperating this well for the benefit of their child and I, too, commend them for that. In view of this I see no reason why the Appellant should stand in the way of her son's right to his father's love, care and protection when it is his turn to be with the child or why she should deny her child this God-given and constitutional right to be with his father.

This court was asked by the Respondent not to limit itself to the previously pronounced exceptional circumstances in declining to grant

actual custody, care and control of the child to the Appellant but instead to find that exceptional circumstances in this case constitute the relocation to another jurisdiction offering different home environment, school and weather, the circumstance of separating child from his younger brother and friends. My considered view on this issue is that it would be stretching this concept of exceptional circumstances too far unless it is shown that the mother seeking to relocate with the child has no interest in taking care of the child but is only using the child for personal gain.

I find the pronouncement of the Court of Appeal relevant to this case when in **C K v T K M [2016] eKLR**, while considering a custody dispute and the issue of taking the child out of the jurisdiction, the Court stated as follows:

> ***"We cannot agree with the appellant that the ruling of the High Court in KWK v. JMW, HCCC. NO. 2173 OF 1999 (OS), lays down any immutable proposition that in a custody dispute, a child cannot be taken out of jurisdiction except in exceptional circumstances. First, the views in that ruling which the appellant urges us to apply were made obiter. Secondly, the application in which they were made was an application by an advocate for leave to cease acting, rather than in the application for custody itself. Thirdly, because the express provision of Article 53 (2) of the Constitution and Section 4 (2) and (3) of the Children's Act which require that in all matters concerning the child, his best interest is of paramount importance, it is conceivable that there may be situations, without being in any way exceptional, where the best interest of the child is served by allowing him to travel out of jurisdiction****." (emphasis added)***

The Court went further in the above case, to state that:

> ***"Nevertheless, M v. P [1980] eKLR, is a good illustration of the Court allowing a child to be taken out of the jurisdiction notwithstanding claims that he would not be brought back into jurisdiction. In that case, the Muslim mother of the child was granted custody of the child until he attained seven years or age, after which the father was to assume custody. Before the child attained seen years, the mother decided to immigrate to the United Kingdom, as she was unable to sustain herself in Kenya. Notwithstanding objections by the father, the court allowed the child to be taken o9ut of jurisdiction because that was in his best interest and upon further finding that no evidence existed to sustain the allegation that the child would not be brought back to jurisdiction upon attaining the age of seven years."***

In the above Appeal (**C K v T K M**), the Court was dealing with a contested custody dispute where the High Court while sitting on appeal allowed the mother of the child to take the child out of jurisdiction when she had custody of him. The Court of Appeal affirmed the decision of the High Court in allowing the child out of jurisdiction. The Court stated that:

> ***"Having carefully considered this appeal, we are satisfied that the first appellate court, in making its orders on custody of the child attached due primacy to the best interest of the child as demanded by Article 53 (2) of the Constitution and Section 4 (2) and (3) of the Children's Act……..."***

I have painstakingly subjected this dispute to deep thought and consideration. The decision I am about to make is guided by my consideration of the guiding principles of the best interests of the child in custody of children disputes. It is my considered view that parental care of a mother who has all the time to dedicate to her child's care and protection cannot be compared to that of a Nanny who may not remain with the family for all the time. I feel that although the father is available for the child during the time he is not working and leaves the child with the Nanny when he is not available cannot be compared to the situation where the mother of the child is always available for the child the only difference being that it is outside the jurisdiction.

After considering the record of appeal, the pleadings in the lower court, the reasoning of the trial court, the submissions of the parties and the authorities cited by both parties, it my conclusion that I am persuaded that allowing the Appellant to relocate to the UK with the child is in the best interest of the child. I allow this appeal and make the following specific orders:

> ***1. That joint legal custody of the child remains with both parents (the Appellant and the Respondent).***
>
> ***2. That actual custody, care and control of the child is granted to the mother (Appellant).***
>
> ***3. That the Respondent is granted unlimited but reasonable access during half of school holidays. Both, the Appellant and the Respondent shall contribute towards travel expenses of the child in respect of this order.***
>
> ***4. That the Appellant is granted leave to relocate to the UK with the child.***
>
> ***5. That the Respondent shall continue to contribute towards the welfare of the child in terms of maintenance and school expenses.***

Orders shall issue accordingly.

Dated, signed and delivered this 24th June 2021.

S. N. MUTUKU

JUDGE