REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: Hon. D. K. Kemei - J

CIVIL APPEAL NO. 149 OF 2015

KKJ.....APPELLANT

VERSUS

WNK (Suing for and

on behalf of **MKK** aged 13 years and

GMK aged 4 years).....RESPONDENT

(Being an Appeal from the ruling of the Learned Senior Resident Magistrate, Hon. E.K. Too made on 23rd September 2015 at Mavoko Children's Case No. 10A of 2015).

BETWEEN

WNK (suing for and bb

on behalf of MKK aged 13 years and

GMK aged 4 years).....PLAINTIFF

VERSUS

KKJ.....DEFENDANT

JUDGEMENT

1. This Appeal arises from the ruling of **Hon E. K. Too SRM** delivered in **Mavoko Children's Case No. 10A of 2015** in which the Respondent was granted custody of two minors.

2. The Appellant aggrieved by the said decision, has preferred this Appeal. In the suit before the lower court, the Appellant was the Defendant. He had sought an order for custody of the two minors who are issues in his now dissolved marriage with the Respondent who was then the Plaintiff. The two subjects are: **MKK** – a boy born in August 2002 now aged 13 years and **GMK** – a boy born in August 2011 now aged 4 years.

3. The Respondent had filed an application dated 11/9/2015 in which the learned magistrate made the following orders:

a. That the minors in this particular matter be in the custody of the Plaintiff.

b. That the Plaintiff shall provide shelter and food for the minors.

c. That the Defendant shall provide clothing, medical care and education for the minors.

d. That the Plaintiff shall give the father access to the minors at any given time.

e. That the parents do agree on the schools for minors' failure to which the Court will provide direction.

4. In his Memorandum of Appeal filed on the 28th October 2015, the Appellant listed seven grounds of Appeal as follows:

a. The learned magistrate misdirected himself on law and facts when he proceeded to grant the Respondent a prayer which was not in her application.

b. The learned magistrate erred in law and facts when he failed to give the Appellant an opportunity to formally respond to the prayer made in open court.

c. The learned magistrate erred in law and facts when he relied on a children officer's report which the Appellant did not agree with and had not been supplied with a copy nor given opportunity to formally respond to it.

d. The learned magistrate erred in law and facts when he disregarded the wishes of the children to stay with the Appellant and proceeded to grant legal and actual custody to the Respondent.

e. The learned magistrate erred in law and facts when he proceeded to order the transfer of actual custody of the children without interrogating how such an order would affect the education of the children.

f. The learned magistrate erred in law and facts when he held that it was in the best interest of the children to live with the Respondent without giving the Appellant the opportunity to show how he was the one best suited to care of the children.

g. The learned magistrate erred in law and facts when he failed to exercise his discretion judiciously and denied the Appellant stay of execution of his orders pending the Appeal.

5. The Respondent opted not to participate in the appeal as she did not appear for directions despite being served.

6. The appeal was canvassed by way of written submissions. As pointed out in paragraph 5 above, the Respondent did not file submissions. The Appellant's counsel submitted on all the seven grounds of appeal. Under ground 1 and 2, counsel submitted that the court erred in allowing the Respondent to prosecute a prayer which was not in her application. Reliance was placed on the Court of Appeal case in **Stanbic Kenya Limited v. Kenya Revenue Authority (2008) eKLR** where the court declined an invitation to grant a prayer which was not in the application.

7. Under ground 3, counsel submitted that the failure by the Children Officer to visit the home of the Appellant where the children were living at the time was prejudicial to the rights of the children as the environment within which they were living was central to the application being canvassed in court.

8. Under ground 4, counsel submitted that the act of disregarding the wishes of the children was not justified in the circumstances. Reliance was placed on the decision of Justice Mwita, in **EKM V. EBO (2020) eKLR** in which the judge held that there was no material evidence provided to show why the child could be plucked out of the environment he was living in. He further relied on the case of **re ABO (child) (2018) eKLR.**

9. Under ground 5, 6 & 7, counsel submitted that the learned magistrate failed to act in the best interest of the children when he granted orders without interrogating how they would affect the education of the children. Counsel further submitted that this was an act of bias and discrimination against the Appellant. Counsel relied on the case of **JKN v. HWN (2019) eKLR** where **Justice Joel Ngugi** summarized the principles that guide the court in awarding the custody of children as stipulated under **section 83** of the **Children's Act, No. 8 of 2001** and the best interests of the child as provided in Article 53 (2) of the Constitution of Kenya, 2010. The Principles include:

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.

10. The Appellant finally submitted that he has shown that the trial court erred in the ruling made on **23rd September, 2015** and therefore prays that the ruling and all subsequent orders be set aside an/or reversed, the custody of the children be restored to the Appellant and the court do award the Appellant costs of this Appeal.

11. This is a first appeal. The duty of a first appellate court was succinctly stated by **Wendoh J** 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."***

12. It is noted that the matter had not reached a full trial as the appeal herein relates to orders made at interlocutory stage of the proceedings and hence the issue of the demeanour of witnesses does not arise.

13. The appellant has taken great exception at the action by the trial court to issue orders of custody of the minors even though such a prayer had not been sought by the respondent in the application. It is my view that this being a court of equity, it is bound to look at intentions of the parties before it and not the form. The omission to have a prayer for custody of the minors pending the hearing of the application is an omission curable by invoking the provisions of **Article 159 (2) (d)** of the **Constitution of Kenya** as well as the provisions of **s**ections **1A** and **1B** of the **Civil Procedure Act** which mandates the courts, while enforcing rules of procedure, not to lose sight of the bigger picture which is to render substantive justice. (See **Nicholas Kiptoo Arap Korir Salat –vs- Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR**). The intentions can be inferred from the grounds in support of the application and the supporting affidavit.

I am in agreement with the learned magistrate's holding that procedural technicalities should not override the best interest of the minors.

14. Proceeding to the merits of the appeal, the main issue for determination is whether the Appellant has made a case for the grant of the said orders as per the various grounds of appeal.

15. In my view, there are two major considerations a court must have in mind in deciding the custody question. The two are as follows:

i. First, our constitution and statutory law are clear in making any decisions concerning children and that the paramount consideration must, always, be the best interests of the child.

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

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

Section **4(2)** and **3(b)** of the **Children's Act** echoes the Constitutional imperative as follows:

> *(a) 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.*
>
> *(b) 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.*

ii. The second prime principle taken into consideration in deciding custody questions is honed out of case law: it 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.

This is a rule of esteemed judicial ancestry and pedigree tracing its history in Kenya to long before the passage of the Children Act and the promulgation of the Constitution of Kenya, 2010. For example, in **Wambwa v Okumu [1970] EA 578**, **Mosdell J** had this to say:

> ***"I do not think it can be controverted that in the absence of exceptional circumstances, the welfare of a female infant aged four years ... demands that the infant be looked after by its mother rather than its putative father."***

Finally, more recently, 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."***

16. And what amounts to exceptional circumstances? The decision in **Sospeter Ojaaamong v Lynette Amondi Otieno, Court of Appeal Number 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."***

17. The learned trial magistrate applied these two prime principles governing the award of custody cases and 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. He complains that in the present case, the wishes of the children to stay with the Appellant was overlooked by the trial court.

18. On my part, I wish to begin my analysis by pointing out two things. First, one of the minors is not considered a child of "tender years". By virtue of section 2 of the Children Act, children of tender years are those between ten years and below. **MKK** and **GMK** are aged thirteen and four years respectively.

19. Second, in the period subsequent to the ruling by the lower court, at the instance of the court, a report by Children Officer was filed in the case. It is incumbent upon the court to take the report into consideration.

The Report is dated 22nd September, 2015 pursuant to a court direction dated 16th September, 2015. The report states as follows:

> **a. The Plaintiff/Respondent was interviewed on 18th September, 2015.**
>
> **b. A home visit was conducted at the Plaintiff's house in 2 bed room rented house in Kitengela on 21st September, 2015 and the house is well furnished and currently living alone as the children are with the Appellant/Defendant.**
>
> **c. The Plaintiff/Respondent was married by the Appellant/Defendant in 1999 and were blessed with two children. The marriage had issues and led to their separation in September 2014. The issues were identified as unfaithfulness; violence financial discord and threats by the Defendant to kill himself and the children.**
>
> **d. According to the Respondent/ Plaintiff the Appellant/ Defendant took custody of the young child on 30th July, 2015 claiming the Respondent/Plaintiff was living in an environment that was not conducive for the child. The Appellant/ Defendant has been with the two children since then and has been denied access.**
>
> **e. Deterioration of the education performance of the older child as highlighted by the Respondent/Plaintiff.**
>
> **f. Admission of violence and unfaithfulness by the Appellant/Defendant during his marriage with the Respondent/Plaintiff but through the Pastor and relatives they reconciled.**
>
> **g. The older son communicating his wishes to live with the Appellant/Defendant.**
>
> **h. The young brother relating very well with both parents.**
>
> **i. The Officer recommended the Respondent/Plaintiff to be granted actual custody of the children as they are still at a tender age and the Appellant/defendant accesses the children over the weekends; half the school holiday; the older child be taken back to his preferred school (Machakos academy) and that both parents take joint parental responsibility of the children as guided by the Court.**

20. As the issue of is a key factor in custody disputes, violence will only be a factor in a custody award if it rises to the level where it harms the children as for example it is assumed to happen when the parent in question has behaved so dishonourably that it affects the children through trauma.

21. In the present case, violence was established on a balance of probabilities (which is the correct standard to use) as there was showing of actual harm to the children.

22. On the question of whether the Respondent abandoned the children when they were young, the evidence on record does not show that she abandoned the children. It is true that the wishes of the children especially when of tender age are not dispositive of who should be awarded custody. However, under **section 83** of **the Children's Act** as well as international best practices, it is a reasonable and equitable norm to take the wishes of the children, if they were clearly expressed, into account in making a custody determination.

23. So, was it established in this case that the children wished to be with their father rather than their mother? On balance, I would say yes. I say so for two main reasons: First, when the children were questioned by the court, they seemed to unmistakably say so. Second, the report of the Children Officer dated **22nd September, 2015** was categorical that the children preferred to live with their father, the Appellant.

24. The upshot of this is that the custody orders in this case cannot stand as given. The best interests of the child dictate the same. In my view, the conclusions above do not point to the need or superiority of either parents getting sole actual or legal custody of the children. The court is in loco parentis to the children and as such it must strike a balance and ensure that the issue of custody must run hand in hand with the issue of shared responsibility by both parents towards the children.

25. In my view **Section 83** of the **Children Act** does not dictate that custody, whether actual or legal, must be given to only one parent or person. The section envisages that custody can be shared or joint. I believe that the complexity of the situation in the present case warrants the unusual response of granting a shared custody order: Both the Appellant and Respondent must equally share both the actual and legal custody of both children as well as welfare of the said children.

26. In the result, it is my finding that the appellant's appeal has merit. The same is allowed. The orders of the trial court dated 23/9/2015 and 27/10/2015 are set aside and substituted with the following directions :

a. That there shall be joint legal custody of the minors as both parents have a right to participate and make inputs in the major decisions concerning the children including but not limited to the educational; religious; and medical decisions.

b. That the physical custody of the children will be shared as equally as is practicable given the educational decisions made by both parents.

c. That while in the custody or care of one party, the other shall have reasonably liberal visitation rights to the children.

d. That the Appellant and Respondent are ordered to appear before the Machakos County Children's Officer or her designate to work out, through mediation, the details of the Joint Custody Agreement. The Joint Custody Agreement should cover the full gamut of potential areas of conflict including but not limited to when each party shall have primary custody (joint custody schedule); when and how the exchanges will happen; who will have primary custody during holidays, vacations and school breaks; child care arrangements; education and extra-curricular activities; religious issues; and health care issues.

e. That both the Appellant and Respondent are directed to mediate the Joint Custody Agreement in good faith; and further that the failure by either to do so will result in adverse orders being made against the intransigent party.

f. That both parties will be at liberty to apply for further orders to better effectuate the joint custody ordered herein.

g. That both parties shall jointly share the provision of clothing, medical care and education of the minors.

h. Each party to bear their own costs.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF JULY, 2021.

D. K. KEMEI

JUDGE