REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY IVISION

CIVIL APPEAL NO. 121 OF 2018

IN THE MATTER OF TSA (MINOR)

AOA………………………………..……………………….. APPELLANT

VERSUS

EDO……………………….…………………………..... RESPONDENT

JUDGMENT

(An appeal from the ruling and orders of Hon R.O. Mbogo Resident Magistrate of Milimani Children's Court Cause No 29 of 2018)

Background

AOA, the Appellant, and TSA's (the minor) mother were married sometime in 2007 under Luo customary Law. They separated in 2008 and had lived apart ever since until the death of the minor's mother in 2017. At the time of her death, the mother had actual custody of the minor. Upon her death, her sister, EDO, the Respondent, took in the minor and lived with her. The Appellant requested that the minor go to Kisumu where he resides with his other family in December 2017 but failed return her to Nairobi after the holidays. He instead secured a school for the minor in Kisumu an began living with her. The Respondent on 10th January 2018 filed Nairobi Children's Case No. 29 of 2018 seeking return of the minor to Nairobi, actual custody of the minor and guardianship of the minor.

The Children's Court in its Judgement of 19.10.2018 made the following orders;

1. The plaintiff shall be appointed as a guardian to act jointly with the father.

2. The plaintiff shall have actual custody, care and control of the minor.

3. The defendant will have access on two fronts;

   a) During school holidays, he shall have half of that holiday access. The access shall be either the first or the last of the holiday as parties may agree.

   b) During school term, he shall have access on Saturdays from 1000 hours and return her on Sundays at 1600 hours. The access shall be on alternate weekends.

4. Since the plaintiff has actual custody of the minor, she will cater for shelter and clothing of the minor.

5. The Defendant shall provide school fees and school related expenses at the current school. The choice of school for secondary shall be mutually agreed and Defendant will continue paying school fees and related expenses till the child turns age of majority.

6. The Plaintiff to continue providing medical through her cover and Defendant to top up in case the cover is exhausted.

7. The Defendant to provide Kshs. 10,000 for food and other utilities and the Plaintiff to meet the shortfall.

8. Each party bears own costs

Memorandum of Appeal

The Appellant, being aggrieved by that judgement, preferred this Appeal. In the Memorandum of Appeal dated 16th November 2018 the Appellant has raised the following grounds of Appeal:

1. The Learned Trial Magistrate failed to appreciate the evidence tendered in court and applicable law in his judgement.

2. The Learned Trial Magistrate erred in law and in fact by failing to find that the Appellant as the biological father of the minor is entitled to the legal and actual care, control and custody of the minor s her only surviving parent.

3. The Learned Trial Magistrate erred in law and in fact by directing that the Appellant provide maintenance for the minor whereas there were no prayers of this nature in the Respondents pleadings.

4. The honourable Magistrate failed to appreciate and consider the provisions of the law which provide that upon the death of the mother, the father shall have parental responsibility of the minor which responsibility he will exercise alone in the event that there is no testamentary guardian appointed by the mother.

5. The honourable Magistrate erred in law and in fact by disregarding the Appellants evidence particularly evidence demonstrating the Appellant having already taken over the actual care and control of the minor upon the death of the mother by having the minor in his residential home and enrolling her in a school within the proximity.

6. The honourable magistrate failed to appreciate and consider the question of culture- the minor having been born into a patrilineal culture that she is entitled and it is in her best interest to practice her culture there being no evidence it is repugnant to any law.

7. The honourable magistrate failed to appreciate and consider religious background of the minor, the minor being a catholic member, it is imperative that she is allowed to exercise her freedom of conscience and her right to religion in an enabling environment pf the appellant who is a catholic member.

8. The honourable magistrate in his judgment failed to take into consideration the apprehension apparent in the circumstances of this case that the Respondent is on the verge of moving to the United States of America with the minor given that the Respondent's family resides in the aforesaid country and that should the minor remain in the Respondents custody, the Appellant may never see her again.

9. The entire judgment by the honourable magistrate was for anything but the best interest of the minor.

10. The learned magistrate erred in awarding cost to the Respondent.

The appeal was opposed by the Respondent.

Submissions

Directions were given that this appeal be canvassed through written submissions. Parties have filed their submissions. The Appellant's submissions are dated 18th June 2021. He submitted that the discretionary power conferred on the court to determine guardianship should be on a case to case basis and in the best interest of the child and that the same was not done in the trial court as it based its decision on the assumption that the minor resides with the Respondent even though the same was as a result of an agreement between the parties.

He submitted that the above arrangement was due to the fact that the Appellant resided in Kisumu and the minor schooled in Nairobi thus they saw it prudent to not interrupt her studies for the year. He also contended that the Respondent's decision to pay the minors fees was unsolicited as he had not expressed any inability to pay the same and nevertheless had enrolled the minor in another school in Kisumu.

With regard to custody, he submitted that Section 82 Children's Act empowers the court to grant custody of a child and provides an order of priority of applicants, giving parents first priority. He further submitted that Section 83 outlines principles for consideration which the trial court did not consider but only focused on the minor being a female aged 10 thus wrongfully awarding the Respondent actual custody. He contended that the trial court did not consider whether the Respondent had a stable home or whether she would relocate to the USA ostensibly denying him access to his daughter. He noted that in as much as the court can deny custody to an existing parent, he should not be punished without factual or legal excuse. He cited **Re LMK (Minor) 2019 eKLR** where the court denied a surviving parent custody only because he had been inexplicably absent from the minors life for a continuous period of 10 years. He differentiated the decision in that case to the present case and contended that the court erred in considering only the one (1) year the Respondent had custody over the minor which in any case was arrived at by consent of the parties.

He further submitted that the magistrate did not take into consideration the provisions of Section 83(1). He cited ***Family Law by P.M Bromley, 6th edition at page 297*** where it is stated that:

> ***"..but it must be remembered that the child may have been coached by one parent and that sometimes a child's own wishes are so contrary to its long term interests and that the court may feel justified in disregarding them altogether…"***

He also cited ***J.O Vs S.A.O (2016) eKLR*** where the court held 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 as 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 selfish 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."***

On the issue of maintenance he submitted that parties are bound by their pleadings and that a court should only rule on the basis of prayers sought in the pleadings. He contended that the trial court erred by making an order for maintenance even though the same had not been prayed for. He relied on the case of ***PPO vs LWLO (2005) eKLR*** where the court refused to grant maintenance orders on grounds that the same was not pleaded and also the case of ***Samuel Kanyua Nganga vs Milka Wairimu Gakuya (2006) eKLR*** where court held that;

> ***(a) There was no evidence that the respondent asked for maintenance***
>
> ***(b) There was no evidence of how much was asked for maintenance***
>
> ***(c) That the Respondent was obliged to prove the demand for payment of maintenance by evidence.***
>
> ***(d) The maintenance was not sought for in evidence and could not be awarded.***

The Respondent's submissions are dated 22nd June 2020. The Respondent raised the following issues for determination:

> ***(a) Whether the learned trial magistrate was correct by making a determination that the Respondent is entitled to the legal and actual care, control and custody of the minor as opposed to the Appellant who is the biological father and the only surviving parent of the minor.***
>
> ***(b) Whether the learned magistrate was correct by directing that the Appellant provides for maintenance for the minor whereas there were no prayers of this nature in the Respondents pleadings.***
>
> ***(c) Whether the learned magistrate was correct in appointing the Respondent guardian of the minor.***

On the first issue she submitted that the minor stated in an interview with the court that she lives with the Respondent and a nanny and she considers the Respondent her second mum. Also that the Appellant took her to [Particulars Withheld] Academy in Kisumu but she would love to go back to [Particulars Withheld] School and that the Respondent provides her with everything she needs. She relied on Section 81(3) and 4(2) Children's Act and Article 53 Constitution of Kenya. She also relied on ***HCCA No. 13 of 2007 Ramadhan Ali Athman vs Peter Mwingo Chirima (2020) eKLR***, where the court held that:

> ***" The Appellant and the mother of the children herein were married. However, the mother of the children is now deceased and the Appellant, being the sole surviving parent has come to this Court seeking actual physical custody of the children, which was granted to the grandmother of the children in the trial Court. Section 27 of the Act provides for the transmission of parental responsibility upon the demise of one parent. Upon the demise of the deceased, the Appellant was required by law, to exercise parental responsibility of the children herein. Parental responsibility is defined in Section 23 of the Act as follows:***
>
> > ***(1) In this Act, "parental responsibility" means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.***
>
> ***The duties referred to above include inter alia the duty of a parent to maintain the child and in particular to provide him with food, shelter, clothing, medical care, education and guidance. Parental responsibility is intended to secure the best interests of the child."***

It was her contention that the trial court basing on evidence found that the Appellant had abdicated his parental responsibility prior to and after death of the minor's mother thus awarding actual and legal custody to her.

On the 2nd issue, she submitted that the minor's mother confided in her that the Appellant never contributed towards the minor's basic needs and that even after the death of the minor's mother, the Appellant made no contribution towards the minor's basic needs. She also submitted that the Appellant still has parental responsibility over the minor being the sole surviving parent and thus should provide maintenance. She relied on the case of ***Ramahan Ali Athman*** (cited above). She contended that mere allegation of contribution was not sufficient and that the Appellant should have provided evidence of the contributions made and that the court acted in the best interest of the minor in requiring the Appellant to provide maintenance.

On the 3rd issue, she submitted that she had custody of the minor after her mother's death and provided her basic needs and that the minor recognized her as a second mum and is comfortable residing with her. She relied on Section 102 Children's Act and submitted that the court was right in appointing her a guardian jointly with the Appellant.

Analysis and Determination

This being the first appeal, I have a duty to analyze and consider the evidence tendered in the trial court and arrive at my own conclusion. I have therefore given due consideration to the pleadings, evidence and submission and I agree with the Appellant and the Respondent in the identified issues for determination. Though captured differently by each party, the identified issues revolve around:

1. Whether the learned magistrate erred in law and fact in granting the Respondent sole actual custody, care and control of the minor.

2. Whether the learned magistrate erred in appointing the Respondent a guardian jointly with the Appellant.

3. Whether the learned magistrate erred in law and fact in ordering the Appellant to provide maintenance for the minor when there was no prayer for maintenance.

These issues are intertwined. I will discuss and determine them together before making my conclusions.

In making my determination in this appeal, I am guided by Article 53 (2) of the Constitution and Section 4(3) of the Children Act that ***"a child's best interests are of paramount importance in every matter concerning the child."*** Likewise, the Convention on the Rights of the Child and the African Charter on the Rights of the Child lay emphasis on the centrality of the best interest of the child in decision making on matters affecting the child. The ***best interest*** of the child is not defined. This leaves the decision making institution to determine what is the best interest of the child basing on the circumstances of the case as they specifically relate to the child. The focus must be on the child and what is best for that child. Consideration of what is the best interest of the child will be guided by the basic rights of the child as provided under the Constitution, Children Act and International Instrument ratified under Article 2 (5) of the Constitution that provides that ***"The general rules of international law shall form part of the law of Kenya."***

I have noted that the Respondent understood the orders of the trial court as granting her ***legal custody and actual care, control and custody of the minor.*** At least that is what one of the framed issues reads. My reading of the orders of the trial court show that the legal custody is not one of the orders issued. To clarify the issue of custody of a child I turn to Section 81 of the Children Act. Under this Section the following is defined:

> ***81. Meaning of custody, care and control***
>
> ***(1) In this Part unless the context otherwise requires—***
>
>> ***(a) "custody" with respect to a child, means so much of the parental rights and duties as relate to the possession of the child;***
>>
>> ***(b) "care and control" means actual possession of a child, whether or not that possession is shared with one or more persons;***
>>
>> ***(c) "legal custody" means so much of the parental rights and duties in relation to possession of a child as are conferred upon a person by a custody order;***
>>
>> ***(d) "actual custody" means the actual possession of a child, whether or not that possession is shared with one or more persons.***

It is clear to me that what the trial court granted to the Respondent is actual custody, care and control of the minor, among other orders. Legal custody is not one of the those orders granted by the trial court. Under Section 82 (3) of the Children Act, the order of priority of persons who qualify for custodial orders is given. A parent of the child ranks first in that order of priority followed by a guardian. To my understanding the guardian under reference is one appointed in accordance with Section 27 of the Children Act as shown below.

I have considered the circumstances under which the trial court made the determination on the issues before it. The evidence produced before the lower court shows that there was animosity between the Appellant and his late wife. As evidence shows they could not see eye to eye. This sour relationship made it impossible for the Appellant to relate to his daughter. It had to take the efforts of the Respondent and another sister of hers to sneak the child to see the Appellant. This is admitted by the Respondent. It is therefore clear to me that the Respondent knew the kind of relationship her late sister had with her husband, the Appellant. The Appellant claims that he did not want to go to court over the child for fear of traumatizing the child.

Evidence of lack of support of the child by the Appellant is not confirmed. It is the Respondent's word against that of the Appellant. The Respondent claims that she was told by her late sister that the Appellant was not supporting the child. Given that the Respondent used to assist the Appellant to access the child, surely she must know about the kind of relationship the Appellant and her late sister had. There is no evidence on record that the Respondent or her late sister ever sought assistance from the court to have the Appellant compelled to provide for the child, if he had failed to provide for her. The fact that the Respondent used to assist him to access his daughter meant that he was interested in the welfare of his daughter but for the animosity that existed between him and his late wife.

The rights of a child contained in Article 53 (1) (e) of the Constitution include ***right 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***. On that right to parental care, ***Section 6 of the Children Act provides that:***

> ***(1) A child shall have a right to live with and to be cared for by his parents.***

(2) Subject to subsection (1), where the court or the Director determines in accordance with the law that it is in the best interests of the child to separate him from his parent, the best alternative care available shall be provided for the child.

To my mind, the parents of a child owe a duty of care to their children and where it is not possible to provide that duty of care, then interventions are made for the alternative care giver. That alternative must be determined with the best interest of the child in mind. In my considered view, there must be concrete evidence provided to the court to persuade the court to deny a parent, whose duty to care for the child is provided for by the law, the duty to care for their child. Coupled with the child's parental care is the parental responsibility.

Section 27 of the Children Act provides as follows on parental responsibility:

27. Transmission of parental responsibility

(1) Where the mother and father of a child were married to each other at the time of the birth of the child or have subsequently married each other—

(a) on the death of the mother the father shall exercise parental responsibility for the child either alone or together with any testamentary guardian appointed by the mother;

(b) on the death of the father, the mother if living shall exercise parental responsibility for the child either alone or together with any testamentary guardian appointed by the father;

(c) where both the mother and the father of the child are deceased, parental responsibility shall be exercised by—

(i) any testamentary guardian appointed by either of the parents; or

(ii) a guardian appointed by the court; or

(iii) the person in whose power a residence order was made prior to the death of the child's father and mother, and which order is still in force; or

(iv) a fit person appointed by the court; or

(v) in the absence of the persons specified in paragraphs (i), (ii), (iii) and (iv), a relative of the child.

After careful reading of the proceedings of the lower court, I have noted that there was no testamentary guardian appointed by the mother of the child herein. The father of the child is alive. Therefore Section 27 (1) (c) (ii) is not applicable. Both parents of the child are not dead. The father is alive. The trial court based his decision on appointing the Respondent guardian of the child on the following reasoning:

"From the evidence on record, the mother of the child passed away in March 2017 through a road accident. The Plaintiff is a maternal aunt of the child and has been having custody since then. She has been paying her school fees and related expenses and has been taking care of the child's needs. The Defendant even admitted in court that the Plaintiff has taken good care of the child. I see no reason as to why the Plaintiff cannot be appointed a guardian of the child. I will allow this prayer and direct that the Plaintiff be appointed as guardian to act jointly with the father."

It goes without saying that the trial magistrate based his determination, in granting guardianship to the Respondent, on the fact that the child has been living with the Respondent since her mother's death and not that the Appellant is not capable of parental responsibility. I have not seen any evidence to suggest that the Appellant is not capable of taking care of his daughter. I have noted the interview by the court of the minor. Ascertainable wishes of a child are some of the principles to be taken into account in granting custody orders. But care must be taken in so doing. For instance in this case, the child expressed herself that she likes living with the Respondent and loves going to school in Nairobi. She claimed not to like her father's home in Kisumu because she lived with her siblings. This child has lived alone as the only child with the Respondent. It would take getting used to living with other people in her life. A report by the Children Officer would have informed the trial court of the environment under which the child lives in when she goes to visit her gather. As stated in ***in B. K. versus E.J.H. [2012] eKLR, "the test for the best interest of a child is not subjectively dictated by the selfish whims of a child."*** There has to be some element of objectivity in determining what is the best interest of the child. As I have stated above in this judgment, there is no evidence that the Appellant was taken to court to compel him to take parental responsibility of the child.

Section 83 (1) of Children Act is clear on the principles the court ought to consider in determining the issue of custody. These principles are:

(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."

To my mind these principles cannot be considered in isolation. The court must be satisfied with as many principles as would satisfy the court to enable it determine the matter in a way that protects the rights of the child and that takes into account the best interest of the child. Did the trial magistrate comply with this requirement? The question that arises is whether there were sufficient reasons to prompt the learned Magistrate to grant custody to the Respondents. The child at the time fell within the definition of a child of tender years.

I have read the reasoning of the trial magistrate in granting actual custody care and control of the child to the Respondent. He took into account evidence of both parties, especially where the Respondent testified that she had had custody of the minor upon the death of the minor's mother while the Appellant testified that they agreed that the Respondent should have custody for the year 2017 after which the Appellant would have custody but went on to reason as follows:

> ***"I have considered the evidence on record, the parties' submissions and the law applicable and I am of the considered view that the Plaintiff should be granted actual custody, care and control of the minor. The minor is a girl child who has been in custody of the Plaintiff for over a year and I haven't seen any reason why I should disturb that custody. The Plaintiff demonstrated that she had bonded well with the child and she had taken over as a mother figure to the child. It is not lost to the court that the child is now 10 years old and she is in her pre-teen a position in life where she would have needed her mother to mould and guide her……….. However, I note that the child also needs to bond with her father so that she can forge a strong relationship with him. To this end I will direct that he be granted unrestricted but reasonable access to the child."***

It is clear to me that the same factors that guided the trial magistrate to grant the Respondent the guardianship order are similar to the ones he has based the granting of the custody orders. There is no consideration as to whether the Appellant ought to get these orders. He was denied actual custody, care and control without good reasons, in my view. The law places the Appellant, being one of the parents of the child, priority over anyone else unless good reason be given that he is not capable of exercising parental care and responsibility as the law requires of him. I did not seen any evidence to that effect. The Respondent as I pointed out assisted the Appellant to access the child when the mother was alive and when the relationship between the parents of the minor was sour. She knows the circumstances pertaining at the time better than anyone else. Should the Appellant be denied legal custody, actual custody, care and control of his daughter without good reasons? I think to do this would be to go against the very law that protects the child. It would be breaching the law that promises her parental care and protection and would be going against the very tenets of the best interest of the child.

I agree with the trial magistrate that there is strong endorsement of the Respondent's capabilities to take care of the child. However it is critical to consider the law in determining this matter. The child has a right to parental care and protection and it is in the best interest of the child that she is brought up and cared for by his or her parent. This right can only be denied if it is proved with cogent evidence and valid grounds that the parent is not suitable or is incapable of taking care of the child, which evidence I have pointed out that it is lacking in this case.

Section 76 (1) of the Children Act provides:

> ***"Subject to Section 4 where a court is considering whether or not to make one or more orders under this Act with respect to a child it shall not make the order or any other orders unless it considers that doing so would be more beneficial to the welfare of the child than making no order at all"***

I have pointed out in this judgment that my reading of the pleadings and proceedings in the lower court did not indicate any situation painting the Appellant as an unfit or unable parent. It is a fact that the Appellant was separated from the minors mother and did not have much interaction/ access to the child at the time but that being said, it was not entirely through his own volition as both parties agreed it was the late mothers decision and besides their relationship was not one of the best under the circumstances.

On the issue of maintenance, it is true that this is not one of the prayers sought by the Respondent in her Plaint. However I note that the Respondent had prayed for "Any other and/or further relief that this Honourable Court may deem just to grant. The problem with the judgment of the lower court is that the trial magistrate did not explain himself what informed his decision to award maintenance where none was sought. The trial magistrate is on record stating that both parties did not file affidavits of means. They could not have done this without directions from the court. Directions of the court on affidavit of means were not given because there was no reason to do so given that there was no prayer for maintenance. The trial magistrate proceeded on this matter as though he was dealing with both parents of the minor. The Respondent is not the mother of the child and that title cannot be granted her by law. All she can be is a holder of a custodial order or guardianship order granted to her by the court.

Parental responsibility is defined in Section 23 of the Act as follows:

> ***(1) In this Act, "parental responsibility" means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.***

Maintenance is an aspect of parental care and is the responsibility of both parents of a child. While I fault the trial magistrate for disregarding the fact that no prayer for maintenance was sought, I am alive to the fact that the trial court had discretion to grant orders that are befitting in the best interest of the child.

I have given this matter much thought. I have considered the provisions of the law on issues of the child and basing my decision on the best interests of the child, it is my considered opinion that the trial magistrate erred in law in failing to consider the legal provisions dealing with the best interests of the child. He failed to appreciate the circumstances under which the parents of the minor lived before the mother died and left the child with her sister. The trial magistrate approached this matter as if he was dealing with both parents of the minor. Even if that were the case, he is under an obligation to consider all factors of this case before making a decision as to which of the two parent's custody orders ought to be given. He did not call for a Report from the Children Officer on the other family of the Appellant to inform himself of the environment the child lives in when she goes visiting the Appellant,

Having considered the provisions of the law in relation to the orders granted by the trial court it is my considered view that the trial magistrate failed to appreciate the provisions of Article 53 (1) (e) of the Constitution that provides that the ***right to parental care and protection, includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not***. Further he failed to appreciate Section 6 of the Children Act provides that:

> ***(1) A child shall have a right to live with and to be cared for by his parents.***
>
> ***(2) Subject to subsection (1), where the court or the Director determines in accordance with the law that it is in the best interests of the child to separate him from his parent, the best alternative care available shall be provided for the child.***

In the absence of the mother therefore this duty falls on the father unless good reason be given why he is not able to take care of the child. There are no reasons given, other than that the child lived with the Respondent after her mother died, to deny the Appellant the right to exercise his parental duty.

I think I have said enough to demonstrate that this Appeal succeeds. I am alive to the fact that the child has bonded with the Respondent and has settled well in School in Nairobi. However this is not to mean that she is not able to settle down with her father and other siblings and settle in another school in Kisumu. For the above reasons I hereby allow this appeal, overturn the orders granted by the lower court and instead make the following orders:

1. That legal custody of the child is awarded to the father, the Appellant.

2. That actual custody, care and control of the child is awarded to the father, the Appellant.

3. That the child shall not be disturbed in terms of changing schools until end of the current school year to enable integration of the child in the new school in the next school year.

4. Each party to bear own costs.

Orders shall issue accordingly.

Dated, signed and delivered this 27th September 2021.

S. N. Mutuku

Judge