



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CHILDREN'S APPEAL NO. E06 OF 2020

AWK.....APPELLANT

VERSUS

JS.....RESPONDENT

JUDGMENT

(Being an appeal from judgement delivered on the 3rd December, 2020

by the Hon. B.B. Limo. (SRM) in the Nakuru Children's Case No. 76 of 2016)

1. The parties in this case were married on 11/12/2010 under the African Christian Marriage and Divorce Act. They settled in Kiserian in Kajiado County. They were blessed with their first child, a son, on 07/08/2011. They named him GLS.
2. The marriage soon ran into headwinds. By 2014, the headwinds had become gale-force, compelling the Appellant to leave the matrimonial home when she was three-months pregnant with their second child. She left with GLS and came to Nakuru County where she lived for a while with her parents. The second child, another boy, was born on 14/05/2015. She named him DKS. His middle name – K, named after the Appellant's father – was one of the issues taken up in the litigation before the Trial Court.
3. By the time, the Appellant relocated to Nakuru, GLS was 3 years old. In January, 2015, the Appellant enrolled him to Baby Class in Nakuru at [Particulars Withheld] Academy in Nakuru.
4. In November, 2015, after more than a year of separation during which the Appellant was living with both children, the Respondent visited Nakuru and requested to take the children to Mombasa for a vacation. DKS was only 6 months old and nursing, so the Appellant says that she allowed the Respondent to take GLS on the understanding that he will be returned in time for the next school year. The request was made during the December holidays.
5. The Respondent never returned GLS to the Appellant. Instead, he went and settled him in Kiserian at the former matrimonial home and started living with him. He enrolled him in school there. The Appellant says she tried everything possible for the minor to be returned to her because she was of tender years and needed to be with the mother. Among other things, she reported to the Children Department; and to the Police. She produced the Summons from the Children's Department and the Police OB No.xxxx. She even sought help from the Kenya National Human Rights Commission. Her efforts were not successful.
6. The Appellant, then, filed a suit at the Nakuru Chief Magistrate's Court – ***Nakuru CM's Children Case No. 76 of 2016*** vide a ***Plaint*** dated 27/06/2016. It seeks both custody and maintenance of both children. In a ***Notice of Motion Application*** filed contemporaneously with the ***Plaint***, the Appellant also prayed for the immediate return of GLS.
7. It appears that the Appellant's Application was never heard. It is important to note that she was acting in person at the time.
8. Meanwhile, the Respondent filed another suit in Nairobi to wit ***Milimani Children's Court Case No. 435 of 2016***

praying for sole custody of the two children. He also filed an application accompanying that suit in which he wanted orders that he be permitted to retain GLS and also for DKS to be placed under his sole custody with visitation rights to the Appellant.

9. The Nairobi suit was eventually consolidated with the Nakuru one and sent to Nakuru for hearing and disposal.

10. Meanwhile, the Respondent filed an Application dated 01/03/2019 seeking custody of both children pending the hearing of the main suit. In particular, the Application sought the removal of DKS, the younger child, from the mother and to be placed in the Respondent's care. At the time, DKS was four years old.

11. That Application by the Respondent proceeded *ex parte* before the Learned Kitur, RM. The Learned Magistrate gave orders on 15/07/2019 that both children be placed in the custody of the Respondent. In enforcement of that order, Children Department Officers and the Police facilitated the removal of DKS from the Appellant and handed him over to the Respondent.

12. The Appellant, now represented by Counsel, moved to Court vide an Application dated 02/08/2019 seeking to set aside the orders of 15/07/2019 on the main ground that the Appellant had not been served with the Application or hearing notice and that the orders were acquired on the basis of fraudulent representation.

13. The Appellant's Application was heard by the Honourable Limo, SRM. On 21/08/2019, he gave orders for the return of DKS to the Appellant. That order was, apparently, not complied with. The Learned Magistrate issued a further order directing the Officer Commanding Central Police Station in Nakuru to enforce the orders. It would seem that the Respondent finally complied with the Court orders and the minor was returned to the Appellant. The Respondent appealed against the decision to order him to return DKS. It does not seem like that there has been any movement on that appeal.

14. Meanwhile, the main suit proceeded to full hearing. Both the Appellant and the Respondent testified on their own behalf. At the conclusion of the case, the Learned Magistrate returned a verdict in which he ordered GLS to remain in the custody of the Respondent while DKS to remain in the custody of the Appellant.

15. The Appellant is dissatisfied with that decision and has appealed to this Court to reverse the same. She wants legal custody of the minors to be granted jointly but for the Appellant to be granted actual custody, care and control of the two minors until they reach 14 years. She also wants orders that, the Respondent be ordered to provide for the children.

16. The Appellant has listed the following as her grounds of Appeal:

1) That the Learned trial Magistrate made an error in law and fact by making orders vesting custody of a child of tender years to the father without evidence impeaching the mother's suitability to have custody.

2) That the Learned Magistrate erred in law and fact by favouring status quo where there was compelling evidence that GLS had been snatched from the Appellant in an unlawful and unprocedural manner.

3) That the Learned Magistrate erred in fact by holding that it will be prejudicial to make orders that have effect of leading to change of schools by the minors without appreciating the fact that the Respondent took the minors from their respective schools in Nakuru and enrolled them to difference schools in Ngong'.

4) That the Learned Magistrate erred in law and fact by attaching unreasonably high probative value to the Respondent's evidence despite glaring contradictions on his various Affidavits, written statements and oral testimony.

5) That the Learned trial Magistrate failed to appreciate the well settled principle of law that in all actions concerning children, whether undertaken by public or private social welfare institutions, Court of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

6) That the Learned trial Magistrate erred in law by failing to apply the rule that gives custody of children of tender years to the mother.

7) That the Learned trial Magistrate erred in law by issuing a Ruling that has the effect of permanently separating siblings

8) *That the Learned trial Magistrate erred in law and fact by failing to call for a social inquiry report into the suitability of the Appellant to have custody of the minors.*

9) *That the Learned trial Magistrate erred in law and in fact by attaching undue importance on financial capability of the Respondent in granting Custody Orders.*

10) *That the Learned trial Magistrate erred in law and in fact by failing to get a Children's Officer's Report to establish ascertainable wishes of GLS before making the adverse orders.*

11) *That the Learned Magistrate erred in law and fact by issuing the Orders that were not prayed for to the detriment of the Appellant and without considering the facts placed before him.*

12) *That the Learned Magistrate failed to appreciate the law vis-à-vis the material placed before him, all of which did not support the Judgment made.*

13) *That the Learned trial Magistrate erred in law and fact in proceeding on wrong principles and thereby arriving on a wrong decision*

14) *That the Learned trial Magistrate erred in law and fact in failing to set out point of determination and giving reasons for Court decision on each point.*

17. The Appeal is resisted by the Respondent. He prays for the dismissal of the Appeal. Although the Respondent's lawyer has submitted at length on the question of the name of DKS, the Learned Magistrate did not address himself on the question; and the Respondent did not cross-appeal on it.

18. I have keenly read through the Trial Court record and the submissions of the Counsel for the two parties. The three related questions presented on this appeal are:

- a. Who should be awarded the actual custody of the children;
- b. How the visitation rights of the parent not awarded custody should be structured; and
- c. What appropriate orders for maintenance of the minors should issue.

19. Both the Appellant and the Respondent agree on the constitutional and statutory provisions that govern the case and the standard of review that this Court should use as a first appellate Court. In short, the prime directive is that the best interests of the children is first and paramount and everything must be done to safeguard, conserve and promote the rights and welfare of the children. Sections 4(2)(3) and 83(1) of the Children Act as well as Article 53(2) of the Constitution all cited by both Counsel in their submissions in aid of their clients' respective cases set out this prime directive and give bright-line contours on their application to real cases.

20. 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.

21. Section 4(2) and 3(b) of the Children's Act echoes the Constitutional imperative:

(2) 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.

(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 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.*

22. Section 83 of the Children Act, on the other hand, lists down the factors to be considered in making a custody award. It reads as follows:

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 not awarded custody shall nevertheless have all or any rights and duties in relation to a child, other than the right of possession, jointly with the person who is given custody of the child.

23. On the other hand, 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

24. This is the standard of review upon which it is incumbent upon the Court to utilize in determining this appeal.

25. The basic facts of the case given at the beginning of this judgment as culled from the Trial Court record were not controverted by the Respondent. However, he gave his own details about what caused trouble in the marriage. In his opinion, the Appellant refused to stay at home and take care of the children or run a business he was willing to start for her and, instead, chose to pursue careers in the hospitality industry which the Respondent thought were not conducive for the bringing up of their children. I have rehashed both parties' version benignly because of my proposed resolution of this appeal.

26. By the time the Trial Magistrate was rendering his judgment, GLS was 9 years and 3 months old while DKS was 5 years and 6 months old. On the key question of actual custody, the Learned Magistrate, in an apparent nod to Biblical Solomon, gave each of the two parents actual custody of one child. He reasoned thus:

From the proceedings on record and testimony of the Plaintiff, the subject minor was attending school when [he] was taken away by [his] father and that the 1st minor is now residing with the defendant from 2015. And that the 2nd born has been staying with her mother from birth and [has] not had enough contact with his father for sometime now.

It is therefore logical and in the best interest of this children that the present status quo be maintained and the modalities be made out for both parents to have access to either of the minors.

The first child is still schooling in Kajiado while the 2nd born's school is in Nakuru. It will be prejudicial to change schools for the minors while each of them [has] been growing in different parts of the country....

27. This is the kernel of the Appellant's grievance with the Learned Magistrate's judgment. In essence, the Learned Magistrate decided to maintain the *status quo* as it existed at the time of rendering judgment. In my view, this decision was either in error or at least pre-mature for four related reasons.

28. *First*, the Learned Magistrate decided to give actual custody of minor children of tender years to the father against the protestations of the mother without performing the requisite analysis impeaching the suitability of the mother to be the primary care giver as required by our decisional law. In Kenya, there is a *prima facie* rule that absent exceptional circumstances, the custody of children of tender years should be awarded to the mother. It is incumbent upon the father or other person seeking custody of children of tender years to demonstrate the exceptional circumstances.

29. Hence, 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.

30. The decision in ***Sospeter Ojaaamong v Lynette Amondi Otieno, Court of Appeal Number 175 of 2006*** described exceptional circumstances in the following words:

The exceptional circumstances would include if the mother is unsettled, has taken a new husband or her living quarters are in a deplorable state.

31. On the other hand, ***Martha Olela & another v Jackson Obiera C.A 16 of 1979*** explained the general principle that custody of young children should be awarded to the mother unless special circumstances and peculiar circumstances exist to disqualify her for being awarded custody. As per the judges, the exceptional circumstances would include "disgraceful conduct, immoral behavior, drunken habit, or bad company."

32. In ***JKN v HWN [2019] eKLR***, I contextualized the exceptional circumstances to bring them in line with the values of our Constitution thus:

As I read our case law now, sexual indiscretion or extra-marital sexual behaviour will only be a factor in a custody award if it rises to the level where it harms the children as for example is assumed to happen when the parent in question has behaved so dishonourably that it affects the children through trauma. If there is no showing of harm, sexual indiscretion alone, without more, is not an inexorable rule excluding a Court from awarding custody to a parent where other favourable factors are present.

33. In the present case, both GLS and DKS are children of tender years. Hence, the Learned Magistrate erred in not performing the analysis required to determine if there were exceptional circumstances to displace the presumption that actual custody of children of tender years should be awarded to the father. This, on its own, is reversible error.

34. *Second*, as a general rule, Courts disfavour split custody awards especially where young children are concerned unless there are exceptional circumstances to warrant them. This is because separating siblings especially when they are of tender years is likely to be traumatic on them. Most siblings develop strong and loving bonds with each other that last a lifetime and Courts have an obligation to, as much as possible, make decisions that facilitate this. There are, also, many practical logistics involved with raising

children that make it more logical to keep children together where there are no exceptional circumstances. It is in the best interests of the children to keep them together.

35. In the present case, while the Learned Trial Magistrate explained that he preferred split custody because each child had been with one parent in the period immediately preceding the litigation, he did not perform an analysis on how that decision would affect the children who are of tender years.

36. *Third*, in performing this analysis, the Learned Trial Magistrate would have benefitted from a Social Inquiry Report by the Children Department. Such a report would have given a good guide not only on the likely impact of the permanent separation of the two siblings but also on whether the custody arrangements the Learned Magistrate ordered were truly in the best interests of the two children. The Learned Trial Magistrate neither requested nor received such a Report. Neither did he interview the subject minors to inform himself of their situation, views or preferences. To this extent, the custody award was, also, premature.

37. *Fourth*, the Learned Trial Magistrate ought to have treated as an important factor the fact that the Respondent obtained actual

“custody” of GLS by subterfuge: he tricked the Appellant that he was taking him for a vacation and would return him in time for school re-opening. He then refused to return him to the mother. At the time, GLS was barely four years old. This is conduct that the Learned Trial Magistrate should have explicitly taken into consideration in awarding custody. It might not be dispositive, but it must be taken into consideration if only to signal to the society that similar conduct by parents – of gaining custody of children against the other parent by subterfuge in the hope that it would enhance their case for actual custody – would be frowned upon by the Courts.

38. After considering these aspects, I have come to the conclusion that the correct outcome of this case is to remand it to the Trial Court so that it can deal with the question of custody in consonance with the guidelines provided above. In particular, the Trial Court must request and receive a Social Inquiry Report on the two minors. It must also consider whether it would be beneficial to interview the children before making its determination. The Court should also consider the effect of the fact that the Respondent came to be with GLS as a result of subterfuge. Finally, the Trial Court should also deal with the question of the name of DKS and make findings thereon. Although it was an issue raised before the Trial Court, the Court did not pronounce itself on the question.

39. The disposition of this appeal, then, is as follows:

a. The Judgment of Honourable B.B. Limo, SRM dated and delivered on 3rd December, 2020 is hereby set aside.

b. The case is remanded back to the Trial Court for re-hearing in accordance with the guidance provided in this judgment.

c. The Chief Magistrate in-charge of the Station to assign the case to any Magistrate in the station with jurisdiction except the Learned Honourable B.B. Limo.

d. The re-trial to be conducted on a priority basis.

e. The *status quo* to be maintained until further orders of the Trial Court.

f. This being a family matter involving children, each party will bear its own costs.

40. **Orders accordingly.**

DATED AND DELIVERED AT NAKURU THIS 23RD DAY OF SEPTEMBER, 2021

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.