



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
FAMILY DIVISION
HCCA CAUSE NO. 114 OF 2018

SWM.....APPELLANT

VERSUS

MNG.....RESPONDENT

(Being an Appeal the from the Judgment of Hon. Z. W. GICHANA (Senior Resident Magistrate)

delivered on 15.10.2018 in Nairobi Children's Court in Case No. 842 of 2017)

JUDGMENT

1. The Appellant filed Nairobi Children's Case No. 842 of 2017 seeking the following Orders;

(i) Full custody, care and control of the minor.

(ii) A Maintenance Order for the monthly financial provision for the child to be shared half way by the Appellant and Respondent.

(iii) Costs of the suit and interest.

(iv) Any other relief the Court may deem fit and just to grant.

2. The Children's Court heard the Case and issued the following Orders;

(i) THAT legal custody of the child be shared between the parties.

(ii) THAT the Respondent takes up actual custody, care and control of the child.

(iii) THAT the Appellant to have access to the child at least on alternate Sunday/Saturday.

(iv) THA the Appellant to provide School fees, School related expenses and provide Ksh.5,000/- per month as part of his contribution to her upkeep.

(v) THAT the parties to agree on the school for the child in case there are changes made.

(vi) THAT the Respondent to provide shelter, medical care and all other needs of the child.

(vii) THAT each party to bear its own costs of the Suit.

3. The Appellant and the Respondent cohabited from 2007 to 2009. The child was born in 2008 and was left with her maternal grandparents when the couple travelled to Nairobi and thereafter the couple separated and the child, a girl child aged 10 years is now in the custody of the Respondent.

4. The Respondent in her defence in the Children's Court sought legal custody and control of the child and also asked the court to dismiss the appellant's suit and order him to pay school fees and other school related expenses for the child.

5. The Children's Court gave the impugned orders which the appellant has appealed against to this Court on the following grounds:

(i) THAT the Learned Magistrate erred in law and in fact by giving actual custody of the child to the Respondent in the absence of a personal interview with the child.

(ii) THAT the Magistrate erred in law and in fact by removing the child from the Appellant and giving actual custody of the child to the Respondent who is now married and settled with her spouse and other children.

(iii) THAT the Learned Magistrate erred in law and in fact by ordering the Appellant to pay Ksh.5,000/- per month without an Affidavit of means by the Appellant and a scrutiny into the Appellant's financial capabilities.

(iv) THAT the Learned Magistrate erred in law and in fact by ignoring the evidence of Appellant's wife and also by finding that the child had stayed without either parents for the better part of the child's life without appreciating that for two years prior to the Judgment the child stayed with the Appellant.

6. The parties filed written submissions in the appeal which I have duly considered. I find that it is not in dispute that the Appellant and the Respondent are the biological parents of the child.

7. The issues for determination in this appeal are as follows:

(i) Whether the Court was right in granting custody of the child to the Respondent without an interview of the child.

(ii) Whether the Court was right in making an order for maintenance of Ksh.5, 000/- without an affidavit of means by the Appellant.

(iii) Whether the Appeal should be dismissed.

(iv) Who pays the Costs of the Appeal?

8. On the issue as to whether the Court should have taken into account the wishes of the child, I find that the Court is duly bound to act in the best interest of the child.

9. The court is obliged to adhere to **Section 4(2)** of the **Children Act 2011**, which provides:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

10. Article 53(2) of The Constitution of Kenya, 2010 provides that:

"A child's best interests are of paramount in every matter concerning the child".

11. I find that there are no exceptional circumstances in this case to warrant the Court to remove the Child who is a girl from the mother.

12. As observed by the court in the **Karanu – vs – Karanu** case, the mother indeed has a “natural right” to have her children with her.

13. In **Re L (infants) [1962] A11 ER 1**, Lord Denning MR said:

“I realize that as a general rule it is better for little girls to be brought up by their mother.”

12. There are also authorities to the like effect to be found nearer home. In **Wambua v Okumu [1970] EA 578**, a Kenya case, Mosdell J had this to say:-

“I do not think it can be controverted that in 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.”

14. I find that an interview with the child is not necessary in the current case. The Respondent is best suited to have actual custody of the child since she is settled with another family.

15. On the issue as to whether the Court was right in ordering the Appellant to pay Maintenance of Ksh.5, 000 without filing of Affidavit of means, I find that Ksh.5, 000 is hardly sufficient in sustaining the child. The Court said Ksh.5, 000 is the Appellant’s contribution and the Respondent has to meet the shortfall. However, the parties have joint parental responsibility and the Respondent should meet maintenance.

16. I therefore allow the Appeal only in respect of the maintenance and I set aside the order requiring the Appellant to pay Ksh.5,000 per month to the Respondent. I direct that the Respondent takes care of the minor in terms of maintenance and the Appellant continues to pay school fees and school related expenses.

17. On the issue as to whether the Appeal should be dismissed, I find that the Appeal succeeds partially with respect to the order for maintenance which is set aside..

18. I accordingly find that the Respondent as the mother is best suited to take care of the child and not the Appellant’s wife. Since the Appellant is paying school fees, the Respondent will take care of the Maintenance aspect.

19. The Appeal is accordingly partially allowed in the following terms:

(i) THAT the Respondent will continue having actual custody of the child.

(ii) THAT both parties will continue sharing legal custody of the child.

(iii) THAT the Appellant will continue having access as ordered by the children’s court on the alternate Sundays/Saturdays.

(iv) THAT since the Appellant is providing school fees and school related expenses, the Respondent will meet the Maintenance needs of the child.

(v) THAT the said sums to be paid directly to the schools attended by the child.

(vi) THAT parties will agree on the Schools for the child in case any changes need to be made.

(vii) THAT the Respondent will continue to provide Shelter, Medical Care and all other needs of the Child.

(viii) THAT each party will meet its own costs of this appeal.

(ix) That in case of change of circumstances such as change of schools where the parties are unable to agree, either party to be at liberty to move the Children's Court for directions.

DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 24TH DAY OF JANUARY, 2020

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.