



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**CIVIL APPEAL NO. 8 OF 2019**

**EKM .....APPELLANT**

**VERSUS**

**EBO .....RESPONDENT**

*(An appeal from the judgment and decree (Ogombe, SRM) dated 22<sup>nd</sup> February, 2019 in Children's case No. 13 of 2018 at Chief Magistrate's court, Ngong)*

**JUDGMENT**

1. This is an appeal from the judgment and decree, (Ogombe SRM), dated 22<sup>nd</sup> February 2019. In the judgment, the trial court granted custody of the child to the respondent, his biological father.

2. The appellant was aggrieved by that decision and filed a memorandum of appeal dated 7<sup>th</sup> March, 2019 and raised the following grounds, namely:

***1. The learned trial magistrate erred in both law and fact when she failed to appreciate that custody of children of tender years should be granted to the mother unless there are compelling reasons to direct/order otherwise.***

***2. That learned trial magistrate erred in both law and fact when she ordered that actual custody, care and control of the minor who is the subject of the case be granted to the respondent despite having made an unequivocal finding that the appellant was a fit mother.***

***3. The learned trial magistrate erred in both law and fact to appreciate that the appellant who is the minor's biological mother is best suited to take care of the minor in place of the respondent owing to the minor's tender age.***

***4. The learned trial magistrate erred in both law and fact when she ordered that actual custody, care and control of the minor who is the subject of the case be granted to the respondent and not to the appellant on account of the fact that she did not have any source of income and was relying on her mother to defray all costs relating to the minor's general upkeep.***

***5. The learned magistrate erred in both law and fact when she ordered that actual custody, care and control of the minor who is the subject of the case be granted to the respondent on account of the fact he was experiencing difficulties accessing the minor while he lived with the appellant and his grandmother under the same roof.***

**6. The learned magistrate erred in both law and fact when she ordered that actual custody, care and control of the minor who is the subject of the case be granted to the respondent in flagrant disregard of the recommendations contained in children officer's reports that recommended that the same be awarded to the appellant owing to the minor's tender age.**

**7. The learned trial magistrate erred in both law and fact when she failed to equitably apportion parental responsibilities between the appellant and respondent and instead imposing the centime responsibility upon the respondent.**

**8. The learned magistrate failed to appreciate the law and evidence that was tendered hence arriving at the wrong decision.**

3. During the hearing of the appeal, Mr. Mburu holding brief for Nalianya for the appellant, submitted highlighting their written submissions dated 15<sup>th</sup> July, 2019 and filed on 17<sup>th</sup> July, 2019. Counsel submitted that the trial court did not appreciate that custody of children of tender age should be granted to the mother except in case of exceptional circumstances. Counsel relied on Manjit Singh v Papinder Kaur [2009] eKLR, Geoffrey Waruru Kinyua v Susan Wambui Waruru [2010] eKLR and KMM v J.I.L [2016] eKLR for the submission that the principal of law is that custody of children of tender years ought to be given to the mother.

4. Learned counsel argued that the trial court fell into error in granting custody to the respondent yet it found that the appellant was a fit mother. Miss Mburu further argued that the trial court disregarded the recommendations by the Children's Officer that custody be given to the appellant. She faulted the trial court for not taking into account the relevant law and the facts of the case and therefore erred in granting custody to the respondent. She urged this court to allow the appeal, set aside the decision of the trial court and grant custody to the appellant.

5. Mr. Bundi learned counsel for the respondent opposed the appeal through their written submissions dated 11<sup>th</sup> December, 2019 and filed on 13<sup>th</sup> December, 2019 and oral highlights. Counsel supported the decision of the trial court, submitting that the trial court did not error.

6. According to counsel, the appellant is a student who was wholly dependent on her mother. He argued that the appellant does not have a source of income; that she does not have a home or house of her own and that her mother could not grant access to the respondent due to strained relationship between the appellant and the respondent.

7. Counsel referred to paragraph 21 of the record of appeal, arguing that the court did not want to make a maintenance order for the minor against the respondent because he was willing to take care of the minor. He argued that the order granted for custody was not final as the court stated that it could be amended if the status of the appellant changed.

8. According to counsel, the respondent has been with the minor since 7<sup>th</sup> April, 2018 and that there has been no complaint from the appellant over access, visitation or the health of the minor. He also argued that nothing has been placed before this court to show that there is reason to interfere with the decision of the trial court.

9. It is counsel's case that the trial court stated that it could not give responsibility to the appellant's mother when there is a father willing to take care of the child and the appellant was given access. According to counsel, the respondent is not married and interests of the minor have to be taken into account. He argued that the appellant stays in a two bedroomed house with 6 members of the family.

10. Regarding the decisions relied on by the appellant, counsel argued that they are persuasive but not binding. Counsel however told the court that he did not have decisions of his own to rely on.

11. I have considered the appeal submissions and the authorities relied on. I have also perused the trial court's record and the impugned judgment. This being a first appeal the appellate court should not readily

interfere with the discretion of the trial court.

12. In *Nkube v Nyamiro* [1983] KLR 403, the Court of Appeal held that:

***“A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”***

13. In *Josphat Mailu Ndolo (Suing on behalf of the state of Antony Ndolo Mailu) v Director of Public Prosecutions & another* [2020] eKLR, the Court of Appeal observed:

***“Generally, the Court ought not to interfere with the exercise of such discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice”***

14. The respondent, who testified as PW1, told the court that he is a successful businessman who lived in Ngong; that he had a relationship with the appellant out of which they begot the child the subject of this appeal born on 12<sup>th</sup> October 2015. He testified that he always provided for the child who was in the custody of the appellant who was staying with her mother. He however experienced difficulty in accessing the child leading to the institution of the custody proceedings before the trial court. This he stated was after the appellant and her mother turned hostile to him making it difficult for him to access the child.

15. According to the respondent, the appellant went to the extent of reporting to the authorities that he had kidnaped the child which was false. He told the court that he is best placed to provide a suitable home for the child when compared to the appellant who was still a student living with her mother and wholly dependent on her mother for her upkeep and that of the child.

16. The appellant on her part testified as DW1 and told the court that she was a university student staying with her mother, and that the respondent only paid school fees for the minor leaving her and her mother to cater for the rest of the child’s needs.

17. The appellant’s mother testified as DW2 and told the court that she was gainfully employed with a steady income; that she had provided a decent home for the child and took care of the child’s needs and was ready to continue doing so. She stated that although the respondent met the child’s educational and medical needs, the appellant as the mother was the best person to have custody of the child.

18. The trial court considered the evidence as well as two children officers’ reports which concluded that both were capable and loving parents, and stated:

***[15]“As confirmed by the Children’s officers’ reports, they are both capable and loving parents. I decline to choose one parent over the other and hereby award them joint legal custody of the child.”***

19. The court then stated that due to the fact that the appellant and the respondent were not living together, the court had to decide the issue of actual custody. The court then went on to consider factors to take into account such as age of the child which was about 3 years and three months, ascertainable wishes and capability of each parent and the best interest of the child. The trial court appreciated that at such tender age the available authorities were that the mother is best suited to have custody, unless there were exceptional circumstances.

20. The court then stated:

***“[18]...both parties strike me as capable, loving and caring parents to the child. It is their financial capability that differs. While the plaintiff is financially independent and stable, the defendant is still a student and is largely dependent on her mother and even lives with the child***

***in her mother's house. By contrast, the plaintiff has his own home and can independently take care of his child. Up to this point, he has mainly provided for day care fees and related expenses, while the child's grandmother meets the other expenses. He now wants to take up all financial responsibility and relieve the child's grandmother of this responsibility. In a society where there are so many dead beat dads, the plaintiff is commended for his desire to play a key role in the upbringing of the child.***

21. The court concluded that given the respondent's financial position; the fact that he had a home and was still unmarried, it was in the best interest of the child that he be granted actual custody. According to the trial court, the respondent would allow the appellant access unlike the appellant who stayed with her mother which would limit the respondent access.

22. The issue in this appeal relates to custody of a child of tender age. The appellant is the biological mother while the respondent is the biological father. The two have an equal responsibility towards the child. None has a better right than the other in so far as the child is concerned.

23. Article 53 (1) (d) of the Constitution provides that every child has the 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.

24. It is also a constitutional imperative that in matters concerning a child, the interests of the child are paramount. To that extent, Article 53 (2) provides that a child's best interests are of paramount importance in every matter concerning the child. This is emphasized in the children's Act which also recognizes the fact that the welfare of the child is paramount.

25. Section 4(3) of the Act further provides:

***“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 adopting a course of action calculated to—***

***(a) Safeguard and promote the rights and welfare of the child;***

***(b) Conserve and promote the welfare of the child;***

***(c) Secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.”***

26. In that regard, therefore, when considering issues relating to a child, the starting point must be the Constitution and the Children Act. Section 2 of the Act defines a child of tender age as one who is under ten years.

27. The issue in this appeal, as was before the trial court, is who between the appellant and the respondent should have custody of the child. After considering the facts placed before it, the trial court granted custody of the child born on 12<sup>th</sup> October 2015, to the respondent but allowed the appellant access. The decision did not go well with the appellant who preferred the present appeal seeking to reverse the trial court's decision.

28. I have considered the pleading, the decision of the trial court and the reasons thereto. I have also the evidence placed before the trial court. The appellant argued that the trial court went against the firmly held legal principle that in matters of custody of children of tender age, custody should be granted to the mother, except in exceptional circumstances. She has relied on several authorities to buttress this argument.

29. The respondent, on his part, argued that the trial court was right in the decision it made. He also

argued that the appellant being a student; not employed; one without a source of income and a house or home of her own and because she stayed with her family in a two bedroomed house, she should not be granted custody. He contended that did not favour appellant to be granted custody of the child.

30. In matters of custody of a child of tender age, the mother is considered the proper person to be granted custody except where there are exceptional circumstances. In M.A v R.O.O [2013] eKLR while considering the issue of custody of a child of tender age, the court stated:

***“Article 53(2) of the Constitution requires this court to treat the best interest of the child as of paramount importance in every matter concerning the child. Section 4(3) of the Children Act requires all judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any power conferred by this act to treat the interest of the child as of first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to safeguard and promote the rights and welfare of the child, conserve and promote the welfare of the child, and secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.”***

31. The court went on to state:

***“What is the best interest of the child has not been defined by the law. This is as it should be because the best interest of each particular child will depend on the circumstances of each particular case at any one particular time. What is not in dispute, however, is that there are certain minimum requirements that have universally been accepted to constitute the best interest of the child. This includes the right of a child to be provided with shelter, food, clothing and education. The child is entitled to medical care. The child’s welfare should be taken care of under the best possible circumstances. The child is also entitled to parental guidance. This guidance shall where possible, be provided by both parents. The child is further entitled to be given a suitable, conducive and loving environment in which to grow up in. In Kenya, it has been accepted by the courts that the custody of a child of young and tender years (defined in Section 2 of the Children Act to mean a child of the age of ten (10) years and below) ought to be with the mother unless there are compelling reasons for the said custody to be removed from the mother and be given to the father.”***

32. In ZH(Tanzania)(FC) v Secretary of State for the Home Department [2011]UKSC 4, Lord Kerr stated:

***“[48] “It is a universal theme of the various international and domestic instruments to which Lady Hale has referred that, in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interest. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child’s best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result.”***

33. In Mehrunnisga v Parves [1981] KLR 547, the court of Appeal stated:

***“[T]he custody of a child of tender years should always be a mother’s right except where she has through her own misconduct, divested herself of that right.”***

34. Similarly, in Karanu v Karanu [1975] E.A. 188 the Court of Appeal for Eastern Africa observed that;

***“The substantial question in this appeal is whether or not the judge was right in giving custody***

*of the children to the father. At the time the Application was heard, the daughter of the parties was just over 7 years of age and the son was 6 years old. The Judge correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the children but he did not specifically refer to the generally accepted rule that, in the absence of exceptional circumstances, the custody of young children should be given to the mother”*

35. Still on the same issue, the court stated in Githunguri v Githunguri[1981] KLR 598, stated that;

*“[T]he prima facie rule (which is now quite clearly settled) is that other things being equal, children of this tender age should be with their mother, and where a Court gives custody of this tender child to the father, it is incumbent on it to make sure that there are really sufficient reasons to exclude the prima facie rule”*

36. And in Sospeter Ojaamong v Lynette Amondi Otieno (Civil Appeal 176 of 2006) ,the Court held that;

*“The general principle of law is that custody of such children should be awarded to the mother unless special and peculiar circumstances exist to disqualify her from being awarded custody...The mother’s disgraceful conduct, say her immoral behavior, drunken habit, bad company are some of the factors which would disqualify her from being awarded custody of a child of tender age.”*

37. The long line of decisions above speak to one fundamental theme, that unless there are exceptional circumstances, custody of a child of tender age should be given to the mother. What would constitute exceptional circumstances as was observed in the **Ojaamong case** would include matters such as the mother’s disgraceful conduct, her immoral behaviour, drunken habit and bad company, which would disqualify her from being awarded custody of a child of tender age.

38. From the pleadings, depositions and evidence before the trial court, the respondent’s main grounds for seeking custody were that the appellant was a student, did not have income and had no house of her own. He also argued that the appellant stayed with her mother and brothers in a two bedroom house at South B. In his view, this was not conducive environment for the child.

39. Regarding his position, the respondent stated that he is a successful business person with his own home in Ngong which was conducive for the child’s growth. He stated that he had a full time care giver, sisters, brothers and mother who assist in taking care of the child.

40. The appellant admitted that she was a university student; that she stayed with her mother and a care giver in a two bedroom house in South B and that the environment was conducive for the child who was attending school, a walking distance within the estate.

41. Form the impugned decision, the only reason the trial court granted custody of the child to the respondent was because of his financial ability and nothing more. It was the respondent’s duty to demonstrate that there existed exceptional circumstances to deny the appellant custody of the child. There was no evidence that the appellant was of disgraceful conduct; that she had immoral behaviour, drunken habit and bad company to disentitle her from getting custody of the child.

42. The reports from the Children’s Officers were clear that both were good and loving parents. The appellant stated that she lived with her mother who also provided for her child and she was ready to continue supporting the child. The mother testified and confirmed this. The appellant also stated that she had a care giver and that they stayed in a two bed room house with her mother the child and the care giver. Similarly, although the respondent stayed in his own house, he lived with his sisters, brothers, mother and the care giver. The respondent’s situation was not different from that of the appellant who stayed with her mother, the child and the care giver.

43. The fact that the appellant is a student, stays with her mother and does not have financial resources

did not, in my respectful view, amount to exceptional circumstances to deny the appellant the right to custody of a child of barely three years. If the reasoning adopted by the trial court were to prevail, then custody of all children of tender years would be given to men so long as they had financial might including a home and relatives to take care of the child.

44. The constitution and the law are clear that the best interest of the child should dictate the decisions the courts make with regard to matters affecting children. At that age, the child needed the company of the mother and proper upbringing. The respondent is a businessman who would be away at times the same way the appellant would be away attending her studies. Most of the time the child would be with the care giver and the respondent's relatives. That is the same case with the appellant. I am unable to see the difference that would favour the respondent against the appellant to the extent of denying her actual custody.

45. The argument that it would be a burden to the appellant's mother if custody was granted to the appellant was also not an exceptional circumstance that fell in the category expected to disentitle a mother to custody of a child of that age. I also do not agree with the trial court that the respondent would have limited access if the child custody was granted to the appellant, but she would have easy access to the child at the respondent's home since he was not married. Access does not to be at home. It is a matter to be agreed and arranged between the parties.

46. I also note that at the time the child was attending school within the estate and there was no suggestion that the appellant was mistreating the child to disentitle her to the right to custody. The respondent did not establish that there were circumstances that had negatively impacted on the child to constitute a factor that was not in the best interest of the child to grant custody to the appellant.

47. In short, the Respondent did not place before the trial court evidence that would lead that court to remove a young child of tender years from the environment he was living in. As already adverted to, Article 53(1) (e) of the Constitution is clear that both the father and mother shall have equal responsibility to provide care and protection to a child whether they are married to each other or not. That is irrespective of where the child stays or who has legal or actual custody.

48. Having considered the appeal, submissions, the Constitution and the law, as well as relevant decisions, the conclusion I come to is that the trial court fell into error when it removed actual custody from the appellant and handed the child to the respondent. That was not in the best interest of a child of three years.

49. In the premises the appeal is hereby allowed. The judgment of the trial court on actual custody set aside and in place therefor, an order is issued granting actual custody of the child to the appellant.

50. In light of the distance between where the appellant and the respondent reside, the Respondent shall be entitled to have custody of the child during the school holidays. This custody shall be restricted to a period of two (2) weeks. The appellant and the respondent shall agree on a timetable and the place to pick and hand over the child.

51. No orders as to costs.

**Dated, signed and delivered at Kajiado this 23<sup>rd</sup> day of April, 2020.**

**E.C. MWITA**

**JUDGE**