



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**HIGH COURT CIVIL APPEAL NO. 45 OF 2018**

**DMM.....PLAINTIFF**

**VERSUS**

**PMN....1<sup>ST</sup> DEFENDANT**

**FKK....2<sup>ND</sup> DEFENDANT**

(Being an Appeal from the Judgment and Decree of the Honourable Y. M. BARASA Resident Magistrate Sitting vide Kerugoya Chief's Magistrate's Children Case No. 35 of 2017).

**JUDGMENT**

This appeal arises out of the Judgment and decree in the **Chief Magistrate's children Case Number. 35 of 2017**. The Judgment in the matter was delivered on 31<sup>st</sup> January, 2018.

In Trial Magistrate had granted custody of the child to the Respondent who were the defendants' and ordered the Appellant to cater for the minor by paying for her Education and related expenses, clothing and medical care.

The Appellant was dissatisfied with the Judgment and filed this appeal which is based on the following grounds;

i. That the Learned Magistrate erred in law and fact by holding that the Respondents had proved their case for granting of legal and actual custody of the child SWM while no sufficient evidence was tendered to support such a finding.

ii. The Learned Magistrate erred in law and facts by denying the Appellant the legal and actual custody of his own biological child against the weight of evidence and in non consideration of the legal principles and laws government custody to minors as per the Children's Act.

iii. The Learned Magistrate erred in law and fact by not fully considering the Appellant's evidence in support of his case and written submissions filed therein hence made a wrong finding.

iv. The Learned Magistrate erred in Law and fact by not properly addressing his mind to the relevant laws on custody of a minor and hence caused injustice to the Appellant by denying him his right over own child.

v. The Learned Magistrate erred in law and fact by not finding that the Respondents are old in age and without proper supportive structures for the child and hence failed to consider the best interest and or welfare of the child while addressing issue of the legal and actual custody of the minor.

vi. That Learned Magistrate erred in law and fact by not finding that no evidence was tendered in court to prove that the Appellant was not fit or capable to assure full custody of own child and hence made a wrong finding.

vii. The Learned Magistrate erred in law and fact by not finding that the child's best interests and welfare were well served if her custody is bestowed upon the Appellant as opposed to the Respondents.

The appellant prays that the Judgment and decree of the Lower Court delivered on 31<sup>st</sup> January, 2018 be set aside and /or reviewed and Judgment be entered in the appellant's favour as prayed in his plaint filed in the Lower Court.

The Brief background of this appeal is that the appellant had instituted this suit vide a plaint dated 14<sup>th</sup> October, 2017 in which he was seeking orders that the actual and legal custody of the minor be vested in him.

The appellant and the deceased mother of the minor had lived as husband and wife since the year 2009 until she met her untimely death in the year 2017.

During the period of cohabitation the appellant and the deceased mother of the minor they were blessed with the minor S.W. M born on 17<sup>th</sup> October, 2014 the subject matter of these proceedings.

The mother of minor fell sick in the year 2017 and succumbed to the illness. During the time of the mother's illness the 2<sup>nd</sup> Respondent who is the mother of the deceased offered to help to take care of the minor to enable the appellant to look after her sick wife.

The appellant then made efforts to get the minor back, that the Respondents' refused to release the minor to him and he decided to file this suit.

The Respondents on their part claimed that the appellant was an absentee father due to his busy schedule at work. The appellant did not want to be involved in the burial plans nor in the welfare of the minor and he is also a drunkard. They gave this as their reason for taking the minor with them. The appellant vehemently denied these allegations during cross-examination and stated that it was actually the respondents' who denied him access to the minor and even prevented him from burying his wife.

The appellant claims that the minor was forcefully, unlawfully and illegally taken away from him and yet he is the father of the minor and has capacity to take care of her, it is then he filed this appeal against the Judgment of the Trial Magistrate.

The Court gave directions that the appeal be canvassed by way of written submissions.

#### **For the Appellant;**

He addressed all the grounds in his submissions in a nutshell and submits that on the issue of custody it is the appellant's submission that no sufficient evidence was adduced in court to convince the court that the appellant was not fit to stay with the minor. The court based its Judgment on the ground that the appellant did not intend to live with the minor and that he wanted to take her to his parents, adding that his schedule of work is very busy.

He submits that, it is not in the best Interest of Justice to deny the minor only surviving parent to have a say on the custody and upbringing of the minor and be reduced to a mere provider with visitation rights only.

That the appellant should have the right to decide on how the minor should be brought up as he is after her wellbeing and best interest.

He further submits that the Trial Magistrate in his judgment took note that the school environment where the minor attends is not conducive taking note of the location of the same, and noted that the minor who was at that time was still sharing a bed with the Respondents, and appreciated that the Children's officer's opinion that the situation could rob the minor of her innocence. This should have been considered when arriving at the Judgment in the best interest of the minor.

The Trial Magistrate erred by taking note of all this intricate and serious issues and stating that the issue can be solved by doing some adjustments.

They submit that the presumption that the respondents would make the necessary adjustments was just a gamble and yet the same are very important and sensitive matters which are not adequately addressed by the trial court.

That the Trial Magistrate failed to properly address the issues by granting the custody of the minor to the respondents and indicated that taking away the minor from her current home would affect her despite acknowledging that the appellant was married to minor's mother.

That the grounds were not sufficient to deny the appellant the right to determine, where and how the minor would be raised. The court failed to consider that the child was forcefully taken away from the appellant since the respondent was only supposed to have stayed with her

during the subsistence of her late mother's illness.

That the appellant demonstrated that he is capable of taking good care of the minor as he has been able to open an account in her name which has savings in it and he has also included her in his NHIF cover.

That the finding of the trial magistrate was Contrary to Provisions of Article 53 ( 2) of The Constitution which provide that;

**“a child's best interest are of paramount importance in every matter concerning a child.” And Section 4 (2) of the Children's Act which goes to provide that;**

**“in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies the best interest of a child shall be a primary consideration.”**

He submits that it is not in the best interest of a child to deny her the right to be under the care of her only surviving parent who is able to provide for her with all the basic requirements she needs and at the same time accord her the fatherly love that she so much deserves.

That the appellant's right as biological father should not be ignored as it is of paramount importance and the best interest of her child.

He relies on Article 19 of The African Charter on The Rights and Welfare of The Child which stipulates that;

**“every child is entitled to parental care and protection and shall wherever possible reside with his or her parents.”**

**For The Respondents;**

It is submitted that the single most factor that drove the appellant to file suit was his only single witness his mother who from the onset they submit has no greater right to or over the minor herein. That the Respondents who are equally the minors maternal grandparents.

They submit that they rely on their Statement of defence and witness statements both dated 16<sup>th</sup> November, 2017 as true and honest accounts of facts obtaining to their having custody of the minor, and which were uncontroverted during the Lower courts hearing.

They submit that the salient features which arose during the hearing include;

- The biological mother of the minor by the time of Institution of the lower court suit was deceased having succumbed to her illness in September, 2017.
- Since the demise of the minor's biological mother the minor has been living the respondents who are her maternal grandparents and who have been providing for all her basic needs.
- The minor is a girl child of tender years ( 3 years) by the time of institution of the suit.
- The appellant admitted to having a busy work schedule and would not be necessarily available around the clock to be with the minor.

They submit that the respondents' did not forcefully and lawfully and/or illegally take the minor away from the appellant as alluded by the appellant, but rather as a matter of necessity and in the best interest of the minor and with regard to the Ground of Memorandum of Appeal the Respondents are asking the question:

- Did the trial court in its Judgment make a proper finding in the best interest of the child.

They submit that the Trial Court properly addressed itself to this question of paramount importance in every matter that concerns the minor herein, this was more so given the account of the minor's tender age and gender among other considerations.

They submit that this were good grounds to persuade the trial court to grant actual custody of the minor to the respondents and the court gave unlimited access to the minor by the appellant.

He relied on the case of; C. K. & Another -vs- A. W. F ( 2016) eklr and they urge the Court not to interfere with the Judgment of the Lower Court.

I have considered the Appeal, the Submissions and the evidence which was adduced before the Trial Magistrate. This is a 1<sup>st</sup> appeal, in

**SELLE & ANOTHER -VERSUS- ASSOCIATED MOTOR BOAT COMPANY AND ANOTHER (1988) E.A. 123** where it was held that the duty of the 1<sup>st</sup> appellate court is to evaluate and examine the evidence, adduced in the trial court, in order to reach a finding taking into account the fact that the appellate court had no opportunity of hearing, or seeing the parties as they testified. That in line with the **Section 78.**

It is not in dispute that appellant is the biological father of the minor and the only living parent as her mother is deceased.

The only issue which arises for determination is:

- Custody of the minor.

The appellant is the biological father of the minor and the only living parent.

- The law, that is **the Constitution the Children Act and the International Instruments on the Rights of the child like Convention on the Rights of the Child and African Charter on the rights and welfare of the Child** speak in one voice concerning the determination of matters involving a child. That voice is loud and clear and it is that in every matter concerning a child, the best interests, of a child are of paramount consideration. This acts as the guiding principle to Courts, tribunals and other bodies when considering a matter concerning a child.

**Article 53(2) of the Constitution provides.**

**“A Child’s best interests are of paramount importance in every matter concerning the child.”**

**The Children Act** has buttressed the Constitutional provision. At **Section 4(1)** it 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.”**

- Convention on the Rights of the child and the African Charter on the Rights of the child have emphasized the Centrality of the best interest of the child. There is no definition of the best interest of the child. The best interest of the child is determined 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 him. Consideration will be guided by the basic rights of the child which are provided under the Constitution, Children Act and International Instrument which have been ratified under;

**Article – 2 (5) of the Constitution:**

**“The general rules of international law shall form part of the law of Kenya.”**

Under **Article 53 (1) (e) of the Constitution provides**

**“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.”**

- The emphasis is that it is the father and mother who has the responsibility to give their child parental care and protection. This is a responsibility which the courts has a duty to enforce by compelling the parent to provide for the child where he or she has neglected that duty.

Under the **Children Act** safeguards for the rights and welfare of the child are stated at Part 11 of the Act.

- These rights are, survival and best interest of the child, non – discrimination, rights to parental care, right to education, right to religious education, right to health care and other protections for the welfare of the child.

**Section 6 (1) of the Act provides that:**

**“A child has a right to live with and to be cared for by his (or her) parents”**

**Article 7 of the 1989 Conventions** on the rights of the child states that a child shall have a right to live with and be cared for by his or her parents.

This is also echoed at **Article 19 of the African Charter on Rights and Welfare of the Child** which states that -

**“Every child is entitled to parental care and protection and shall whenever possible reside with his or her parents”**

- Parental responsibility attaches to the right of the child as it is the parent who has the responsibility to ensure that the needs of the child are catered for. The law provides that it is the parent of a child who has parental responsibility, The child has a right to parental care and it is in the best interest of the child that he is brought up and cared for by his or her parent. This right can only be denied if is proved with cogent evidence and valid grounds that the parent is not suitable or is incapable of taking care of the child. **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”**

- The trial magistrate appreciated the guiding principle in determining custody. He however fell into error by failing to consider the Constitutional provision and the provisions of the Children Act which categorically provide that it is the biological parents who have parental responsibility.

- The responsibility is not determined by the fact of the marriage. The determining factor is whether the person is the mother or the father of the child. This is well captured under **Article 53 (1) e of the Constitution which states –**

**“whether married to each other or not.”**

Grandparents have no right to assume parental responsibility over a child when his parent is alive and have the means and is willing to take up parental responsibility voluntarily. The child has a right to parental care and denying the child the right cannot be in his best interests. The Act provides that even where the father and mother were not married, the father shall acquire parental responsibility.

**Section 25 of the Act provides:**

**1. Where a child's father and mother were not married at the time of his birth-**

**a. the court may, on application of the father, order that he shall have parental responsibility for the child; or**

**b. the father and mother may by agreement ( a parental responsibility agreement”) provide for the father to have parental responsibility for the child.**

**2. Where a child's father and mother were not married to each other at the time of his birth but have subsequent to such birth cohabited for a period or periods which amount to not less than twelve months, or where the father has acknowledged paternity of the child or has maintained the child, he shall have acquired parental responsibility for the child, notwithstanding that a parental responsibility agreement has not been made by the mother and father of the child.**

- The law is leaning mostly towards a child being raised by a parent. The best interest of the child are determined depending on the circumstances of the case. Children are unique human beings who are known to adopt to their surroundings very fast. It would not take long for the minor to adopt to the new environment with the father who is his fresh and blood.

The appellant gave evidence in court and stated that she had lived with the mother of the minor as husband and wife from the time she was born until the time the mother died.

The appellant testified that he has a stable job and lives in Government quarters In Kerugoya town and he told the court that the time he lived with the child she never lacked anything. He further testified that the environment of his in-laws is not the right one and he said that he has no problem assuming all the responsibilities of the child.

The appellant called his mother ( Pw2) who testified that she is willing to take care of the child when the appellant is away on duty due to his busy schedule. The child is known to her as they used to interact when she lived with the appellant and her late mother.

The Trial Magistrate called for a Children's officer's report which states that the school is not conducive, the minor shares a bed with the grandparents, a fact which is not in the best interest of the child as she may be exposed to issues of the adult and rob her off her innocence.

It also states that the child does not have enough clothes, and the Children officer recommended that the best interest of the child is an overriding factor in this matter.

This report paints a negative picture on the environment the child is living in. It tends to suggest that the Respondents are struggling to meet the needs of the child, as at the time of the report they had not even bought for her a bed.

The circumstances of this case lean on, giving the custody of the child to the appellant who is the father, had lived with the child and she never lacked anything, and he is willing to continue to take care of the minor.

The respondents are living with the child without any lawful order and this is not in the best interest of the child.

- The law requires that a person holding the child in the manner the respondents are holding the minor to be appointed guardians of that child.

**See Section 102 to 104 of the Children Act.**

- I find that the appellant being the undisputed father of the minor is the right person to have legal and actual custody of the minor. It is not only morally wrong but also unlawful to deny the father of the child who is alive and readily willing to take care of the child. He is not only suitable but has demonstrated that he has a stable job and income which will ensure that the minor enjoys a good life where his basic rights are provided and most of all parental love which he can only get from the appellant. The earlier she enjoys this parental love the better. There is absolutely no good reason why she should be denied parental love and care until she attains the age of eleven (11) years.

- The Act has emphasized that the first stop shop when considering custody is the parent. **Section 82 (3) (a)** provides that

**“custody of the child may be granted to the following persons –**

**a. a parent”**

There is no provision in the Act which provides that custody of the child be granted to grandparents. The trial magistrate fell into error by granting the respondents custody despite the fact that they had unreasonably and unlawfully denied the child parental love and care.

- The trial magistrate erred by arriving at a finding which was not supported by evidence tendered before him and in particular by failing to consider the best interest of the child, in view of the Children officer’s report.

The trial magistrate erred by ignoring the fact that the minor had a living parent who had parental responsibility as provided by the law.

I find that the best interest of the minor and the requirements under the law is that the custody of the child be granted to the father who is the appellant in these proceedings.

- I hold that the Appeal succeeds;

**I order that;**

i. The Judgment of the trial magistrate is set aside

ii. Judgment is entered for the appellant as prayed in the plaint dated 14<sup>th</sup> October, 2017 with no orders as to costs.

**Dated at Kerugoya this 29<sup>th</sup> day of May 2020**

**L.W. GITARI**

**JUDGE**