



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CHILDREN CIVIL APPEAL NO.38 OF 2017

(FORMERLY HCCA.103/2014)

(Appeal Originating from Nyahururu CM's Court

Civ.No.61 of 2013by: Hon. V.A. Ochanda – R.M.)

JWN.....PLAINTIFF

- V E R S U S -

MN.....DEFENDANT

J U D G M E N T

JWN, the appellant herein is dissatisfied and aggrieved by the decision of Hon. V.A. Ochanda R.M. who granted orders in favour of the respondent MN.

A background to this appeal is that the appellant and respondent cohabited as husband and wife and were blessed with five children. On 26/11/2013, the respondent filed Nyahururu Children's Court Case No.61/2013 seeking the following orders:

- (1)That the custody of all the children be granted to her;***
- (2)That the appellant be ordered to provide continuous monthly maintenance for the children of Kshs.5,000/=, pay for the education and other related expenses depending on the children's needs at any given time and costs of the suit.***

The appellant filed a defence and counter-claim in which he sought the dismissal of the respondent's case and counter claimed for:

- (a) A declaration that the appellant and respondent have equal and joint parental responsibility over the children and the duty to maintain the children is a joint responsibility to be shared and performed by both the appellant and respondent;***
- (b) An order granting custody of the children to the appellant;***
- (c) An order compelling the respondent to take back and return the children to the matrimonial home at Plot No.XXXXXX Block 1/21.***
- (d) An order compelling the respondent to take back and return the children to the schools that the children were attending in 2013;***
- (e) An order restraining the respondent or anyone else acting on her behalf from moving, withdrawing or taking away the children from the aforementioned schools or in any other manner from interfering with the children's education and peaceful learning at the schools that the children were attending in the year 2013;***
- (f) An order restraining the respondent or anyone else acting on her behalf from moving, withdrawing or taking away the children from the matrimonial home at, Nyandarua County;***
- (g) Any other or further relief that the Hon. Court may deem fit and just to grant for the best interest of the children.***

Both parties were heard and the trial court rendered its judgment and made the orders that have aggrieved the appellant. They are as follows:

- (a) That the plaintiff will have legal and actual custody of the minors while the defendant will have access;*
- (b) That the defendant shall provide shelter should need arise for the minors and contribute Kshs.7,000/= towards food for the minors;*
- (c) That the defendant shall pay for all the education and the educational needs of the minors;*
- (d) That the defendant shall pay for all the health needs of the minors and in addition, the defendant is hereby ordered to include JK on his medical cover with immediate effect;*
- (e) That the defendant shall hand over the monies he is liable to contribute in execution of his parental responsibility to the plaintiff at the end of every month;*
- (f) That the plaintiff shall provide clothing to the minors.*

The appellant raised the following nine (9) grounds in his appeal:

- 1. That the learned trial magistrate erred in law and fact in failing to appreciate, hold and make a declaration that the appellant and respondent have equal and joint parental responsibility over the children named in the said Children Case No.61 of 2013 and the duty to maintain the said children is a joint responsibility to be shared and performed by both the appellant and the respondent equally;*
- 2. That the learned trial magistrate erred in law and fact in ordering the appellant to perform almost all the parental responsibilities over the children in the said Children Case and in assigning the respondent only one parental responsibility over the said children;*
- 3. That the learned trial magistrate erred in law and fact in disregarding the evidence adduced by the appellant and the well established law and legal principles on maintenance of children by both parents, thus arriving at a one-sided judgment;*
- 4. That the learned trial magistrate erred in law and fact in ordering the appellant to contribute Kshs.7,000/= towards food for the said children, over and above providing the children with shelter, education and education needs and paying for the children's health needs, without first establishing whether the appellant means to provide and pay for the children's shelter, education and educational needs and health needs and also contribute a sum of Kshs.7,000/= towards food for the said children;*
- 5. That the learned trial magistrate erred in law and fact in awarding the plaintiff reliefs that were not claimed by the plaintiff in her plaint dated 26th November, 2013;*
- 6. That the learned trial magistrate erred in law and fact in giving a judgment that was against the weight of the evidence;*
- 7. That the trial magistrate erred in law and fact in failing to consider and make any determination on the appellant's counterclaim in her judgment whereas the said counterclaim had been duly filed and was part of the pleadings during the hearing of the said Children Case;*
- 8. That the learned trial magistrate erred in law and fact in failing to allow and grant the reliefs sought by the appellant in his counterclaim whereas the respondent did not file any defence to the said counterclaim;*
- 9. That the learned trial magistrate erred in law and fact in giving a judgment that is clearly oppressive to the appellant.*

The appellant therefore prays that:

- (1) The appeal be allowed;*
- (2) The judgment in Nyahururu Children's Court Case No.XX be set aside;*
- (3) That the respondent's suit in Nyahururu Children's Court Children's Case No.XXX be dismissed and the appellant's counterclaim in the said case be allowed;*
- (4) That the court be pleased to make such orders that the court may deem fit to grant for custody and maintenance of the children.*

Mr. Njogu, learned counsel for the appellant urged that the appeal rests on two key issues namely:

- 1. Whether the trial magistrate erred in granting both the legal custody and actual custody of the children to the respondent; and*

2. Whether the trial magistrate erred in the manner she apportioned parental responsibility over the children between the appellant and respondent whereby the appellant was ordered to provide the children with shelter, education, educational needs, health needs and also contribute Kshs.7,000/= monthly, towards food for the children.

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 – the Stanley Maore v Geoffrey Mwenda Njeri C/A.147/2002.

In the trial court, the respondent testified that she got married to the appellant in 2000. By then, she had one child and got 4 others with the appellant; that they separated on 17/1/2014 when the appellant asked her to leave their home; that she used to farm on the appellant's father's land while the appellant worked away as a Police Officer. PW1 said she now lives on her mother's land with the 4 children where she's farming. She requested that the court order the appellant to meet all the educational needs of the children; that the child, George had his eye injured and required regulars check-ups. PW1 stated that before she filed this case, the appellant was defaulting in paying the school fees and the children used to be sent away from school; that she did casual jobs to meet the children's needs; that she left the appellant's home with the children because they were still young.

The appellant testified as DW1 and called his father G M (DW2) as a witness. DW1 denied that the respondent was paying fees for the children and providing for them. He produced receipts as exhibits 1 – 3 to prove that there was no fee balance from the schools that the children attended; that he lived with his family at his work station.

He built a house in his father's home in 2005 but because of some issues between PW1 and the brothers, the family went back to live in Nairobi till 2011; that PW1 called to inform him that she would go away and not return; that he arrived home on 17/1/2014 and found PW1 had locked her up in the bedroom, that she called for the small child because she wanted to leave and he handed over the child. He denied ever having been summoned by the elders or children's officer.

DW1 further stated that PW1 left the matrimonial home on her own and moved the children without permission and therefore wants the children back; that he will take care of their educational needs and will make arrangements on how they should be cared for but is not ready to give Kshs.7,000/= per month for the children's up-keep.

DW2, the appellant's father recalled that on 17th June, the appellant arrived home at 4.00p.m., went to greet him and next morning DW1 informed him that PW1 had left with some items. He denied knowing of any problems between the respondent and appellant prior to that date; that there were no reports made to the chief. He denied that the children had ever lacked anything.

I have considered the grounds of appeal, the evidence tendered before the trial court and submissions by counsel. It is not in dispute that the appellant and respondent lived as husband and wife upto about 17/1/2014 when they separated. They have not divorced and they have sired four children.

Although the grounds of appeal seem to challenge the whole judgment on the issue of custody yet from the submissions, it is clear that the appellant is challenging the fact that both the legal and actual custody of the children were granted to the respondent. The legal provisions that govern children matters are *inter alia*:

The Constitution requires that in all matters concerning children, the best interest of the child be of paramount importance. Article 53(2) provides:

“2. A child's best interests are of paramount importance in every matter concerning the child.”

Section 4(2) and 3(b) of the Children's Act echo 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

(c).....”

Section 83 of the Children's Act stipulates the principles to be applied in making a custody order. It reads:

“Section 83

(1) 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.”

The appellant is a Police Officer. He testified that he has only 30 days off in a year and that if given custody he would have to make arrangements for somebody to take care of the children when he is away for the 11 months of the year. The respondent is the mother of the children. She is a housewife. The children are aged as follows:

1.FM- born 31/8/1998

2.GN- born 16/8/2001

3.CW- born 23/5/2003

4. LM- born 21/8/2008

5.JK- born 29/5/2014

The children of the marriage are aged between 3 years and 13 years. They are children of tender age and it would be in their best interest that they remain with their mother who has always taken care of them while the appellant was away at work. From the appellant's testimony, his work is such that he cannot live in one place. In her ruling, the court considered the Children Officer's Report which stated that the children were well cared for by the mother, were comfortable and there was no sign of neglect. The appellant did not avail any evidence to prove that the respondent is an unfit mother to care for the children or that there were exceptional circumstances to cause the court to deny her custody and the best interest of the children dictated that the actual custody of the children do remain with their mother, the respondent.

Circumstances to deny the mother custody were considered in the case of – see ***Githunguci v Githunguri (1981) KLR*** and ***Wambura v Okumu (1970) EA 578***.

The Court of Appeal in ***J.O. v S.A.O (2016) e KLR*** 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.”

In the instant case, there were no disclosed exceptional circumstances that would disqualify the respondent from having actual custody of the children and this court would not interfere with the finding of the lower court on that issue.

Whether the legal custody of the children should be shared:

Article 53(2) of the Constitution provides:

“Every child has the right:

(e) 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.

Mr. Njogu, counsel, for the appellant argued that there were no exceptional circumstances to grant both legal and actual custody of the children to the respondent. In the decision in J.K.W. v M.A.A Mgori HCCA.68/2015 J. Majanja held:

“10. The appellant complained that the learned magistrate granted legal custody of the children to the respondent. In J.O. v R.M.M. Nakuru DC No.4/2004(2005) KLR, Musinga J. stated as follows in regard to actual and legal custody:

Actual custody is defined to mean the actual possession of the person of the child as opposed to legal custody which means as respects a child, so much of the parental rights and duties as relates to the person of the child including the place and manner in which time is spent.”

“11. Under Article 53(2)(e)(51(c) of the Constitution, 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.’

This provision imposes on the parents of the children equal responsibility on the father and mother of a child to provide for the child. This is the essence of legal custody which entitles the parents to share and decide all important decisions in the upbringing of the children. In this respect, the learned magistrate erred in granting legal custody to the respondent in the absence of exceptional circumstances.”

In the instant case, the appellant being the father of the children has the right to make some decisions in the lives and upbringing of the children. He cannot be completely shut out of the children’s lives just because custody was given to the respondent. There were no prevailing exceptional circumstances to deny the appellant, the right to legal custody. I am persuaded to find that the trial court erred in granting both legal and actual custody to the respondent alone. I will direct that there be joint legal custody of the children by the appellant and respondent.

The appellant is also dissatisfied with the manner of apportioning of responsibilities, especially in respect to shelter. The appellant argued that it is the respondent who decided to leave the matrimonial home where there was a house, for no apparent reason; that the trial court never enquired into the appellant’s income to ascertain whether he was able to afford all the responsibilities.

In respect to why PW1 left the matrimonial home, her testimony is that it is the appellant who kicked her out. The appellant denied that fact and said that she just left without any provocation. I do not believe the appellant. If indeed there was no problem between the two of them, this court wonders why the appellant did not enquire from PW1 why she was leaving. The appellant simply gave her the child and let her leave with the children without objecting or even seeking intervention from his father or elders. It is clear that all was not well between the respondent and appellant by the time PW1 left her matrimonial home. I am inclined to believe the respondent’s testimony that she was kicked out of the matrimonial home. The appellant’s reaction speaks volumes. The respondent was forced out of her matrimonial home.

The appellant claimed that he had been paying fees for the children and maintaining them and purported to produce receipts for payment of fees for the children. However, it became clear from cross examination that the appellant had only paid the fees after the matter was brought to court. This matter was filed in 2013 and fees was paid in February, 2014 well after PW1 had left the matrimonial home.

I appreciate that the trial court did not enquire into the means of the appellant. All the court knows is that the appellant is a Police Officer with a constant income whereas the respondent is a housewife. The appellant is willing to pay school fees, take care of the health needs of the children but not shelter, clothing and food. Counsel relied on the provisions of Article 53(1) which provides that both the father and mother of a child have an equal responsibility to provide parental care and protection. In support thereof, the counsel relied on the decision in E.M.M. v M.O.O. Naivasha H.C.A.53/2015 where Meoli J. held..... ***“it will not do (for a party) to say that she has an uncertain source of income and therefore the responsibility of maintaining the children should only be borne by the adverse party. The (said) party must establish to the satisfaction of the court that she has also made effort to provide for the upkeep of the children.”***

See also J. Dulu J.M v J.M. (2012) e KLR.

Although it is true that parental responsibility is to be shared, the same can never be equal. The court must take into account the financial capability of the parents. That is why it was held in MK v C. KK HCCA.51/2015 that ***“parental responsibility is shared and not equal based on the financial position of each parent. The mother as the resident parent has a nurturing role to the children and the father to provide maintenance and upkeep of the children.”***

The respondent had testified that the appellant had neglected to pay fees and she had been struggling to do the same. She had even done some casual jobs. I believe that the respondent cannot just sit back and expect the appellant to do everything for the children. She must play a part in the upbringing up her children. It must be appreciated that being the resident parent of the children, she carries an extra burden that cannot be measured in monetary terms; e.g. even though the appellant provides for health care, when a child is sick, she must provide the necessary care and is the one who will spend sleepless nights taking care.

In my view, now that the respondent lives in her parent’s home, she should be the one to provide shelter. There is no evidence that she is paying rent and she should be in a position to apply in the event the circumstances change. It is also my view that the respondent should provide clothing as earlier ordered.

The trial court did not establish how much the appellant earns. The appellant also avoided telling the court how much he earns and why he cannot afford to pay the Kshs.7,000/= that he was ordered to pay. I expect the respondent to do something to earn a living and in my view,

the cost of food should be shared and I order that the sum of Kshs.7,000/= should be reduced. Considering the high inflation and cost of food, the appellant should pay a sum of Kshs.5,000/= for food, while the respondent bears the balance.

In the end, I allow the appeal in part and order as follows:

- (1) The respondent will have actual custody of the children;*
- (2) Both the appellant and respondent have legal custody of the children with the appellant having right of access to the children as will be agreed by the parties;*
- (3) The appellant shall pay for the children's education, educational related expenses, medical care and Kshs.5,000/= for food;*
- (4) That the respondent do provide for shelter, part of the food and the children's clothing;*
- (5) Each party to bear its own costs.*

Dated, Signed and Delivered at NYAHURURU this 29th day of March, 2019.

.....

R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Nyaga for appellant

Mr. Nderitu for respondent

Soi - Court Assistant