**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL APPEAL NO. 22 OF 2018**

**SJK *(suing through father and guardian ad litem)* MKY.....APPELLANT**

**VERSUS**

**GJC.....RESPONDENT**

***(Being an Appeal from the Judgment of the Resident Magistrate Honourable E. Kigen in Eldoret Children Case No. 228 of 2017, dated 15th March, 2018)***

**JUDGMENT**

The appellant and the respondent herein are the biological parents to the minor. The appellant had sued the respondent in the lower court seeking for legal custody and access granted to the respondent. The matter proceeded to hearing and the court gave the following orders in the judgment dated 15.3.2018:

> *(a) Legal custody of the minor is granted to the plaintiff and defendant with the defendant having physical care and control of the minor herein.*
>
> *(b) The defendant is granted unlimited visitation rights with prior arrangement with the plaintiff.*
>
> *(c) The plaintiff will reside with the minor for atleast 2 weeks during school holidays.*
>
> *(d) Plaintiff to pay school fees and other educational needs of the minor.*
>
> *(e) The defendant to provide shelter and home clothing*
>
> *(f) Each party to bear its own cost.*

The appellant was aggrieved by the judgment of the court and preferred an appeal raising 6 grounds as follows:

> *1) The learned trial magistrate erred in law and in fact by failing to consider the appellant evidence and submissions*
>
> *2) The learned trial magistrate erred in law and in fact in failing to evaluate the evidence tendered judiciously.*
>
> *3) The learned trial magistrate erred in fact and law in finding that GJC was married to my uncle against the evidence in record.*
>
> *4) The learned trial magistrate erred in law and fact is failing to appreciate that my uncle's children cannot live under one roof with my child.*
>
> *5) The trial magistrate erred in law and in fact in failing to find that under Marakwet culture, tradition, customs and belief it is a taboo and abomination for an uncle to marry an uncle's wife.*
>
> *6) The learned trial magistrate erred in law and fact in failing to appreciate that the child and uncle's children cannot live under one roof as will haunt and torment the child.*

**REASONS WHEREFORE**

> *(a) The judgment and decision of the trial magistrate in Eldoret children's court no. 228/2017 need be varied.*

*(b) That this honorable court do make such orders as may be just expedient.*

(c) *That this appeal be allowed*.

The respondent did not file any response despite service of the appeal.

Submissions were filed in support of appeal. It was his submissions that he intended to seek actual and legal custody of the minor though the pleadings in the trial court asked for legal custody. Though parties are bound by their pleadings and a court cannot grant what was not pleaded. In ***David Sironga Ole Tukai v. Francis arap Muge & 2 Ors*** (2014) eKLR, this court was urged to rely on ***Lenny Maxwell Kivuti v. The IEBC & 3 Ors (2018) eKLR*** where the court held that a court cannot be precluded from studying a material merely because the same was not pleaded, whether the same influence the direction the matter should take thereafter will depend on the nature of the unpleaded material and the extent that it affects the final outcome. In addition to this the children cases are sui generis and a child's best interest is of paramount interest as was held in ***NMM V. JOW*** *(2016) eKLR*. See also ***AOO & 6 Ors v. A.G & Anor [2017] eKLR***. The court was urged to consider Article 53 as read with 159 of the Constitution.

The general rule in custody of minors has always been in favour of the mother. However there are circumstances when there can be an exception. In ***Githunguri v. Githunguri (1978) eKLR*** the court held that when custody is given to the father the court has to ensure there are sufficient reasons to exclude the prima facie rule. The exceptional case includes when the mother has taken in a new husband, or has engaged in immoral behavior.

He further contended that he seeks custody for the best welfare of the child. In ***KWM v. RN [2015] eKLR*** welfare of the child includes emotional and psychological welfare as provided under section 76(3) of the Children's Act.

He as well submitted that the court did not consider section 8, 14 and 83 of the Children's Act when making the custody orders. He had testified that he conforms to the Marakwet culture, and the respondent had gotten married to his uncle which is not acceptable in their culture, the child's health would be tormented thus the court ought to have given him custody of the child. The court failed to take judicial notice of *Section 60(1)(a)* of the *Evidence Act* which provides that the courts shall take Judicial notice of;

***(a) "all written laws, and all laws, rules and principles, written or unwritten, having the force of law, whether in force or having such force as aforesaid before, at or after the commencement of this Act, in any part of Kenya"***

The court did not take judicial notice of Marakwet customs.

*Section 82* of the *Children's Act*, gives the court discretion in deciding whom to give custody. In ***KWM V. RN [2015] eKLR*** the court stated that the appellate court can only interfere with the decision of the trial court upon principles set out in ***Shah v. Mbogo (1968) EA 93,96***. The case was uncontested and the court ought to have given him actual custody of the minor.

This court was also referred to ***B v. M [2008] 1 KLR*** where the court used a report from the children's officer to determine whether the children could be given to either parent.

**ANALYSIS**

The issues that arise for determination is whether the court erred in granting custody to the respondent and appellant with the respondent having physical care and control and the appellant visitation rights.

The appellant had instituted this case in the lower court seeking to have the following orders granted by the court:

*I. A custody order vesting legal custody of the minor to the plaintiff and access granted to the defendant.*

*II. Costs of the suit*

*III. Any other order this honorable court deems fit and just.*

This court has a duty to re-evaluate the evidence on record and arrive at its own independent decision bearing in mind that it did not see the witnesses, and will only interfere with the decision of the lower court if it was based on no evidence or on misapprehension of the evidence or if the court acted on wrong principles in reaching it's findings as was held in ***Mwangi v. Wambugu*** **[1984] KLR 453.**

The respondent never entered appearance even after being served. The appellant sought for legal custody of the minor as his biological father. The minor from the evidence resides with the mother. The appellant gave evidence that he had separated with the respondent who was now married to his uncle and that the minor should be given to him. He is the only person who testified. On issue of customs, he did not present evidence to shed more light on the claimed position to enable the court to arrive at a substantive decision.

The appellant avers that he wanted actual legal custody of the minor and not shared custody as ordered by the court. The appellant cited some electoral cases whose circumstances are quite different from the children's case at hand.

*Article 53* of the *Constitution* is paramount on the welfare of the children. *Article 53(1)(e)* provides as:

***"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 respondent and appellant have the responsibility to care for the child though they have separated. Also *Article 53 (2)* provides that, "*a child best interests are of paramount importance in every matter concerning the child"*

In view of the above the appellant gave evidence that he has been providing for the minor by paying her school fees and he had stayed with her during the December holidays. His evidence was more on the custom belief since he averred that the respondent had gotten married to his uncle and thus stayed in the same homestead with his father, and that the respondent had failed to avail elders to talk on the issue. The appellant however failed to avail an elder to shed more light on the Marakwet customs.

The court did not have the favour of the respondent's evidence and therefore only relied on the appellant's evidence. In ***NMM v. JOW [2016] eKLR*** the court cited various authorities in ***Civil Appeal No. 30 of 1978 at Nairobi: [2008] I KLR G – vs – G at page 497***, the court of appeal held:

***"Basically, these reasons are that the custody of very young female children should be granted to their mother, in the absence of exceptional circumstances which do not in my opinion exist in this case. The learned judge correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the children. He rejected the proposition, advanced before him by the mother's advocate, that there was a 'rule' in favour of the mother. With respect, this was misdirection. When dealing with the paramount consideration of welfare, especially where young female children are concerned, there is a rule that the mother is normally the person who should have custody. As Roxburgh J said in Re S (an infant) [1958] 1 ALL ER 783, at 786 and 787:***

***"I only say this; the 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 the custody of a child of this tender age to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the prima facie rule".***

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."***

There are also local authorities in favour of the said position. 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."***

The best interest of the minor is of paramount consideration and the appellant has not demonstrated whether the child is lacking or is not being well provided for with her needs. In the absence of this, the court shall not interfere with the physical custody, bearing in mind that the minor is a female who is better of brought up by the mother rather than the father.

The court is also guided by the provisions of *Section 83* of the *Children's Act* in determining custody orders which are:

(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.*

If at all the Respondent is married to her uncle as claimed by the appellant and this is against Marakwet Culture, I do not see how that is likely to affect the child's health. If anything it is the parents who are most likely to be tormented by such and of the paramount consideration in this matter is the best interest of the child.

Having weighed the circumstances of the case and the applicable provisions of the law, I do find that the lower court was right in the orders it made. I find no ground for interfering with the same. The appeal therefore lacks merit and it is dismissed with no order as to costs.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED** and **DELIVERED** at **ELDORET** this **27th** day of **March, 2019**

In the absence of:

The appellant

The Respondent

And in the presence Mr. Mwelem – Court assistant