



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 25 OF 2018

BON.....APPELLANT

VERSUS

AAO.....RESPONDENT

(Being an Appeal an Appeal against the Orders by Hon. R. O. Mbogo (RM) in Children's Case No. 46 of 2018 on 22nd February, 2019)

JUDGMENT

1. The Appellant filed this appeal against the Judgment delivered on 22.2.2019 in the following terms:

(i) THAT parties shall jointly share legal custody of the minor.

(ii) The Defendant shall have actual custody, care and control of the minor.

(iii) The Plaintiff will have access to the child in the following terms:

(a) During School holidays, he shall have half of that holiday access. The access shall be either the first or last half of the holiday as parties may agree.

(b) During School term, he shall have access on Saturdays from 0900 hours and return him on Sunday at 1600 hours. The access shall be on alternate weekends.

(iv) THAT since the Defendant has actual custody of the minor. She will cater for their shelter and clothing.

(v) THAT the Plaintiff shall provide school fees and related expenses. The child shall be enrolled at [Particulars Withheld] School. Choice of Secondary and college must be mutually agreed by both parties. The fees will be paid till the child earn their first degree or diploma.

(vi) THAT Plaintiff shall provide medical cover for the child.

(vii) THAT no orders on return of Defendant's personal property as the Courts lacks jurisdiction.

(viii) THAT both parties shall meet the cost of food and other utilities. The Plaintiff shall contribute Kshs.20, 000 per month while the Defendant shall meet the shortfall.

(ix) THAT each party shall bear own costs.

(x) THAT each party is at liberty to apply.

(xi) THAT the costs of the Application be provided for.

2. The Appellant who was the Plaintiff in the Children's Case No. 46 of 2018 had moved to Court to seek legal and actual custody of the minor the subject of this case (hereafter referred to as the child)

3. The Appellant wanted the child to be released to him so that he could go back to his previous school.

4. The Appellant also wanted an injunction against the Respondent from taking away the child and maintenance in such terms as may be awarded by the court and costs of the suit.
5. The Respondent in her defence and Counterclaim dated 20.7.2018 also asked for custody of the child, release of the child's birth certificate, orders restraining the Appellant from attacking her character, maintenance and also her personal belongings and a dismissal of the Appellant's case.
6. The Court heard the evidence and gave the Respondent actual custody care and control of the child.
7. The Appellant was given access during alternate weekends and shared parental responsibility.
8. The Appellant was also ordered to pay maintenance of Ksh.20,000/- medical cover and school fee for the child while the Respondent was to provide shelter, clothing and share costs of food and other utilities with the Appellant.
9. The Appellant was dissatisfied with the said orders and he filed this appeal on the following grounds:
 - (i) **The learned trial Magistrate erred in law and fact in failing to take into consideration salient relevant considerations concerning and touching on the welfare of the minor before reaching his decision key among them the Respondent's drunken and promiscuous behavior, abandoning the minor at night while reveling all-night-long and misappropriation of rent and the minor's school fees vis-vis the minor's welfare and best interests.**
 - (ii) **The learned trial Magistrate erred in law and fact in issuing order granting the Respondent actual custody without considering her drunken and promiscuous delinquencies and that she evaded the Children's Officer reaching her in her dwelling place for the purpose of carrying out social inquiry as ordered by the Court, by way of relocating from her known living place, and abandoning her known phone number and falling into the realm of a person who cannot be found.**
 - (iii) **The learned trial Magistrate erred in law and fact in overburdening the Appellant with disproportionate parental responsibility in complete disregard of constitutional, statutory and judicial principles.**
 - (iv) **The learned trial Magistrate failed to take into account the Respondent's act of eloping from the matrimonial home she shared with the Appellant to an unknown place, only to resurface later and callously waylay the minor from the Appellant's house and re-elope with him to yet another unknown place without considering his schooling.**
10. The Parties were directed to file Written Submissions in the Appeal. The Appellant filed written submissions dated 5.9.2019.
11. The Appellant submitted that the Respondent lacks a fixed abode and due to her drunkenness, abandonment of the minor, promiscuity, withdrawal of the child from school, misappropriation of the minor's school fees and that she should not be given custody of the child.
12. The Appellant submitted that he does not know where the Respondent stays. He also submitted that she is always drunk and further that she eloped from the matrimonial home and enrolled the child at a school called '[..] PREPARATORY' removing him from [Particulars Withheld] PRIMARY where he had enrolled the child.
13. Further that due to the Respondent's promiscuity, the Respondent's house help had testified how the Respondent brought different men to her house and she is not fit to be given custody of the child.
14. The appellant further submitted that the Respondent had financial impropriety and she cannot manage finances and further that she had refused to allow him access to the minor.
15. The Appellant also submitted that the parental responsibility was disproportional and further that he lost his job and his means had changed for the worst and he should not be made to shoulder the entire parental responsibility. He attached his affidavit of means as evidence of the same.
16. The Appellant asked the Court to allow the Appeal and grant him custody of the child and also to dismiss the cross-appeal and set aside the orders issued on 22.2.2019.
17. The Respondent opposed the appeal and filed a cross- appeal seeking adjustment of the maintenance to Ksh.100, 000/- per month.
18. The Respondent submitted that the child who is a minor of tender years has always lived with her and trial Court was hesitant to disrupt the custody.
19. The respondent submitted that the Appellants pleadings were not in order as he produced new evidence at appeal stage. Further that he did not seek leave to file the Affidavits of means.
20. The Respondent further submitted that there is no evidence that the Appellant lost his job and further that Appellant has never complied with the orders issued on 22.2.2019 and does not deserve the orders he is seeking.
21. The Respondent also submitted that no special circumstances have been shown to warrant custody of a child of tender years being given to the father and further that allegations by the Appellant of immorality and drunkenness are mere hearsay.

22. The Respondent asked the court to dismiss the appeal and allow the cross-appeal which is seeking to enhance the maintenance to Ksh.100, 000/- per month from Ksh.20,000 per month.

23. I have considered the submissions filed in this appeal and I find that the paternity of the minor is not in dispute. The first duty of the Appellate court is to re-evaluate the evidence adduced at the trial and to arrive at its own conclusion.

24. In **Kiilu & Another vs. Republic [2005] 1 KLR 174**, the Court of Appeal stated thus;

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

25. I find that the trial court ordered the Appellant to pay maintenance of Kshs. 20,000/- on 22.2.2019 and there has been no compliance.

26. The issues for determination are as follows:

(i) Whether the custody of the minor should be given to the Appellant.

(ii) Whether the Maintenance should be enhanced.

(iii) Whether the Appeal should be dismissed.

27. On the issue as to whether custody of the minor should be given to the Appellant, the Law provides that custody of a minor of tender years should be with the mother unless there are exceptional circumstances to warrant the minor to be given to the father.

28. In the current case, the appellant did not demonstrate existence of exceptional circumstances.

29. In **Karanu v Karanu [1975] EA 18**, the then Court of Appeal stated as follows:

"...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 be given to the mother."...This is not a case of a mother abandoning her children. Although she left the matrimonial home after a quarrel, she came back to fetch her little daughters the following morning, but was prevented from taking them away".

30. In **Jusab – vs – Gamrai & Another [2009] 1 EA at page 164**, the court (Rawal J) held:

*"Having considered all the cases cited before me by both parties, including Re: **L (minors) [1974] WLR 250**, Re: **R (minor) 1981 1 FLR 416**, I shall quote the following passage from the last-referred case to show how I have and shall deal with this case:-*

"but the weight to be given to either of them must be measured in terms of the interest of the child not in terms of penalizing the 'kidnapper' or of comity, or any other obstruction 'kidnapping' like other kinds of unilateral action in relation to children, is to be strongly discouraged, but the disagreement must take the form of a swift, realistic and unsentimental assessment of the best interests of the child leading, in proper cases, to the prompt return of the child to his or her own country, but not the sacrifice of the child's welfare to some other principle of law."

31. In this case I find that the Appellant said the Respondent did not have a fixed abode and yet he said she is always drunk and brings home different men. Where does she entertain the men?

32. I find that the Appellant is out to disparage the reputation of the Respondent and to make her appear unfit to take care of the minor.

33. There is no evidence she is unfit to look after the minor.

34. On the issue of the maintenance, the Appellant said the order is disproportionate and asked the court to vacate the order of maintenance of Ksh.20, 000/- per month.

35. The Respondent filed a cross appeal and sought enhancement of the figure to Ksh.100, 000/-.

36. I find that the Appellant is attempting to adduce evidence at appeal stage by saying he lost his job and by filing his affidavit of means.

37. The appellant should have moved to the trial Court to seek review if there was change of circumstances.

38. I also find that the cross appeal has no merit as it has not been established that the Ksh.20, 000/- is not sufficient.

39. The Court said the parental responsibility is shared and the Respondent should therefore meet any shortfall.

40. I find that the amount of Ksh.20, 000/- ordered by the magistrate is reasonable.

41. I accordingly find that the cross-appeal lacks in merit and I dismiss it. I also dismiss the appeal herein and direct that the Respondent adheres to the orders of the magistrate's court issued on 22.2.2019.

42. I further direct that each party bears its own costs of this appeal.

DELIVERED,DATED AND SIGNED IN OPEN COURT THIS 29TH DAY OF NOVEMBER, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA,NAIROBI.