



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
FAMILY DIVISION
CIVIL APPEAL NO. 112 OF 2018

ENW.....APPELLANT

VERSUS

TBN.....RESPONDENT

JUDGMENT

Introduction

1. The Appellant herein and Respondent started cohabiting as wife and husband sometime the year 2002. Pursuant to irreconcilable differences, the two separated and stayed away from each other to date. At the time of celebrating their marriage, the appellant had a child by the name of VN whom she got from another relationship before she got married to the respondent. Subsequently, the couple was blessed with two biological children namely: (1) VN and TN thus making a total of three children.

2. Following their differences and eventual separation, Julius (*respondent*) instituted a suit against his estranged wife seeking:

1. That status quo of the subject herein who are under the care and control of the appellant/plaintiff at the moment be maintained. Further, a temporary order be issued barring the defendant from further interfering with the subject to safeguard the best interest of the children which is at threat due to the defendant's immediate act of waylaying the same pending the hearing and determination of application.

2. That comprehensive children officer's report be carried out to establish the welfare of the minor children herein and the same be filed pending the hearing and determination of this suit.

3. That the respondent be compelled by the honourable court to issue the minors' birth certificate forthwith, and the same be released to the applicant.

4. Such other orders as this honourable court shall deem fit to grant.

3. Contemporaneously filed with the plaint was a chamber summons of even date seeking similar order as in the plaint. On 20th March 2017, the court considered the chamber summons dated 16th March 2017 and filed on 17th March 2017 and directed as follows:

1. The appellant to serve the defendant/respondent for *interpartes* hearing of the main suit on 3rd May 2017.

2. The respondent to file defence and list of documents and witnesses before hearing date.

3. Meanwhile status quo with regard to the minor's custody to be maintained.

4. A children officer's report to be filed.

4. Consequently, the children officer filed her report dated 10th April 2017 in relation to the three children. The children officer

recommended that the respondent was best suited to have custody, care and control of the children as they were comfortable staying with their father and are more guaranteed of his full support and consistency in their upbringing. The report further stated that the appellant (*respondent*) has no source of income and was incapable of providing for the needs of the children and that she could have free access to the children.

5. On 28th April 2017, the appellant filed her response opposing the suit. She also filed a counter claim in which she prayed for; legal and actual (physical) custody of the three children; the plaintiff is compelled to pay school fees and school related expenses; plaintiff to pay adequate and reasonable monthly upkeep and maintenance for the minors and, costs of the suit.

Hearing before the trial court

6. During the hearing, the plaintiff told the court how he got married to the applicant and that the appellant was a difficult woman who kept deserting their matrimonial home thus abandoning the children all the time and at times taking them out of school thus destabilizing their academic performance.

7. He recited how they disagreed over the frequency of employing and hiring care givers (house help) without following agreed rules of hiring them. He contended that he was comfortable staying with the children whom the appellant had regularly abandoned. He called one witness by the name of AW a security guard at Imara Daima estate where the respondent/plaintiff was staying. The guard confirmed how abusive the appellant was to the respondent and children and that at one point, the appellant requested him to assist in taking the children secretly from the respondent.

8. On the other hand, the defendant (DW3) denied being abusive to the children and the appellant. She also denied allegations of hiring and firing house girls frequently. She also claimed that the respondent (*plaintiff*) was abusive to her and that at one point he assaulted her forcing her to report to the police and get issued with a P3 form. She further denied deserting their matrimonial home but instead claimed that she was forced out.

9. Regarding her financial ability, she told the court that she was an employee of KRA although currently suspended due to work related issues.

10. Upon conclusion of the hearing, the court delivered its judgment on 19th February 2018 making the following orders:

1. I grant joint legal custody of the children VN, VN and TN to the parties herein.

2. I grant actual custody, care and control of the said children to the defendant/mother and restricted but reasonable access to the plaintiff/father in the following terms:

i. the plaintiff/father shall have access to the children on alternate weekends from Saturdays at 10.00 a.m to Sundays at 5.30 p.m.

ii. The plaintiff/father shall also have half of the school holidays with the said children including one Christmas holiday every other year.

iii. the parties may agree on a pick up and drop off points, which shall be convenient public place.

3. The defendant/mother shall take care of the elder minor's school fees and related expenses at her current school.

4. The plaintiff/father shall take care of the younger two minors' school fees and related expenses at their current school or other schools to be agreed upon by the parties.

5. The defendant/mother shall also take care of the minor's housing and clothing needs by virtue of having actual custody of the minors.

6. The parties shall share the minor's food needs assessed at Kshs 30,000 per month. The plaintiff/father shall remit Kshs 15,000/= every 5th day of the month with effect from 5th March 2018.

7. The parties shall also share the cost of the minors' medical care needs, each using their medical cover and contributing on 50% to 50% basis any cash money needed for the same.

8. This being a family matter, each party shall bear own costs.

11. Subsequently, the appellant filed a notice of motion dated 11th May 2018 in which she sought a review of the orders emanating from the judgment delivered on 19th January 2018. Basically, the appellant averred that a sum of Kshs 15,000/= share payable by the respondent (*plaintiff*) as monthly maintenance expenses was inadequate.

12. Equally, by an application dated 11th June 2018 the respondent also sought review of the judgment dated 19th February 2018 seeking actual custody of VN whom he claimed had shown indications of suffering and his educational future being in jeopardy. He sought court's permission to have the said child produced before court to be interviewed in camera by the court to ascertain the suffering he was undergoing

and also get his opinion.

13. After hearing the two applications, the court delivered its ruling on 10th August 2018 allowing the respondent's (*plaintiff*) application dated 11th June 2018 in which the court ordered the minor VN to be interviewed in camera to ascertain the truthfulness of the tribulations he was undergoing. The honourable magistrate deferred the rest of the ruling in respect of the application by the appellant dated 11th May 2018 and whether to allow the respondent custody of Viktor until after the interview of the minor.

14. On 17th August 2018, the court interviewed the boy then aged about 7 years. From the question and answer interview, the boy expressed his desire to stay with the father as he was caring and quite often provided him with goodies like biscuits, bought him a bike, pizza and soda.

15. Based on this interview, the honourable court delivered its final ruling on 24th August 2018 reviewing part of its judgment of 19th January 2018 thereby giving actual custody of VN to the respondent (*father/plaintiff*). Regarding enhanced maintenance, the court maintained Kshs 15,000/= share for each party despite the reduced burden on the appellant by virtue of V having moved from the mother's house to the father's house.

16. Aggrieved by this ruling, the appellant/respondent moved to this court vide a memorandum of appeal dated 23rd October 2018 and filed the same day by the firm of Ndalila and Company Advocates. The appeal is based upon 18 grounds particularized as hereunder:

- 1. That the learned trial magistrate erred in law and in fact in failing to evaluate, access and analyse the evidence on record and coming up with an objective ruling.**
- 2. That the learned trial magistrate erred in law and in fact by finding that the respondent had proved their case on a balance of probability despite lack of concrete evidence in support of that position in the pleadings.**
- 3. That the learned trial magistrate erred in law and in fact by giving custody of one minor to the Respondent despite the overwhelming weight of evidence adduced by the appellant.**
- 4. That the learned trial magistrate erred in law and in fact by opening the plaintiff's case after judgment was delivered on the 19th day of February 2018 was rendered.**
- 5. That the learned trial magistrate erred in law and in fact by not considering the best interest of the minors but instead basing his Ruling on materialist and unnecessary needs which can change depending on the financial status of the respondent.**
- 6. That the learned trial magistrate erred in law and in fact by not considering the proper issues raised by the minor during the child interview conducted between the court and the minor.**
- 7. That the learned trial magistrate erred in law and in fact by failing to consider the Children's Report made by the Children's Officer indicating that the Appellant was fit to live with the minors and can cater for the best interest of the minors.**
- 8. That the learned trial magistrate erred in law and in fact by failing to consider the minors tender age and the importance of the Appellant in their growth together with other necessities.**
- 9. That the learned trial magistrate erred in law and in fact by admitting into evidence documentation without considering the rules of evidence.**
- 10. That the learned trial magistrate erred in law and in fact by disregarding facts adduced by the Appellant on the welfare of the minors especially the medical condition of the minors upon visitation to the respondents.**
- 11. That the learned trial magistrate erred in law and in fact by failing to admit the oral submissions made by the Appellant about the welfare of the minors and instead admitting the respondents submissions based on lies.**
- 12. That the learned trial magistrate erred in law and in fact by awarding Kshs. 15,000/= for maintenance of the minors without considering the current financial and economic status of the country and the basic needs of the minors.**
- 13. That the learned magistrate erred in law and in fact in finding that the defendant is irresponsible and not capable of bringing up the minors and directing the custody of one minor to the Respondent in absence of concrete evidence.**
- 14. That the learned trial magistrate erred in law and in fact by failing to consider the fact that the respondent was maintaining three minors prior to their separation and instead based this Ruling on the Respondents two biological minors leaving out the elder minor VW who is the Appellants daughter.**
- 15. That the learned magistrate erred in fact and in law as his conclusions were perverse or a misapprehension of the evidence on record.**

17. Both parties appeared and argued their case in person. The appellant argued that she was opposed to the ruling of 24th August 2018 giving custody of baby VN to the respondent. She urged that actual custody having been given to her on 19th January 2018 pursuant to the Children Officer's report dated 18th August 2017, the same cannot be reviewed. She contended that, the child was 8 years old therefore fit to stay with the mother and not the father. She further stated that she was not interested with asking additional maintenance expenses from the respondent. She expressed satisfaction with the amount she was getting and her salary.

18. In response, the respondent argued that the review application leading to the variation order affecting custody was properly done. He stated that the application was necessitated due to new evidence that was not available at the time the case was heard. He claimed that the boy had threatened to escape if forced to stay with the appellant.

19. He further claimed that it was the child who fled away from the mother by boarding a school bus taking him to his father's residence. He principally supported the court's ruling.

20. After listening the sentiments expressed by both parties, and accusations and counter accusations against each other, the court did summon the appearance of the child for a session in camera. The boy expressed his desire to stay with the father whom he described as good and that he buys him whatever he wants. He told the court that he will be visiting the mother during holidays.

Determination of the Appeal

21. I have considered the grounds of appeal herein, pleadings/record from the lower court and arguments by both parties. This is a first appeal. As an appellate court, this court is duty bound to re-evaluate, re-assess and reanalyse the evidence on the record and then arrive at an independent and conclusive finding bearing in mind that it did not have the advantage of seeing the witnesses and assessing their demeanour.

22. In the case of Abok James Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR the court held that;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”.

23. Similar position was held in the case of Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

See also Peterson Ndung'u, Stephen Gichanga Gituro, N. Ojwang, Peter Kariuki, Joseph M. Kyavi & James Kimani v Kenya Power & Lighting Company Ltd [2018] eKLR.

24. From the title of the Memorandum of appeal, the appellant is aggrieved by the decision of the trial court vide its ruling delivered on 10th August 2018. This ruling is a culmination of two review applications dated 11th May 2018 and 11th June 2018 filed by the appellant and respondent respectively all seeking review of the judgment delivered on 19th January 2018.

25. However, from the grounds stated in the Memorandum of appeal, the appellant seems to have decided not to challenge the entire judgment. It is clear from the record that, since 19th February 2018 when the judgment was delivered, no appeal was lodged or presented challenging the finding of the trial court. It implies therefore, that both parties were satisfied and therefore comfortable with it.

26. For those reasons, the appellant cannot purport to argue grounds of appeal challenging the entire judgment while the appeal is specific that the impugned decision is the ruling of 10th August 2018. For those reasons I will not delve into grounds geared towards challenging the entire judgment.

27. Accordingly, the only grounds that call for consideration are grounds No. 3, 4, 5, 6 and 8. I will therefore collapse them into three issues:

- i. Whether the learned magistrate re-opened the plaintiff's case after delivery of judgment.
- ii. Whether the learned magistrate erred in law by giving custody of the minor (VN) to the respondent taking into account his tender age.
- iii. whether the award of actual custody to the respondent (father) is in the best interest of the child.

Whether the learned magistrate re opened the plaintiff's case after judgment

28. There is no dispute that the court delivered its judgment on 19th February 2019 and awarded custody of the three children to the appellant and then shared out parental responsibility to both parents.

29. However, the appellant filed the application dated 11th May 2018 seeking review of the judgment so as to increase the monthly maintenance expenses from Kshs 15,000/= to Kshs 30,000 against the respondent citing increased cost of living. This application was brought under Order 45 of the Civil Procedure Rules. Equally, the respondent filed his review application dated 11th June 2018 seeking actual custody of their son Viktor who had fled from the mother to his residence citing frustration and desperation of the child.

30. Whereas the appellant is challenging the filing of the review application by the respondent as a form of re-opening the plaintiff's case, she could not justify her review application seeking to have monthly maintenance by the respondent increased.

31. The law governing review applications is Order 45 of the Civil Procedure Rules which provides that;

(1)(i) Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed, and who from the discovery of new or important evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason desires to obtain a revision of the decree or order, may apply for review of judgment to the court which passed the decree or order without unreasonable delay.

32. According to the appellant, there was no sufficient or justifiable cause to have warranted review of custody orders. Before the court reviewed the said orders, the learned magistrate agonized on how to handle the grounds cited for review *inter alia*; calling of the minor for a session in camera to ascertain the truthfulness of the claim that the minor did not want to stay with the mother hence the reason for him running away.

33. I am alive to the fact that children matters are unique and therefore should not be subjected to strict rules of procedure or undue regard to technicalities. Legal Notice No. 77 of 2002 rule 1 of the General rules and regulations of the Children's Act provides that:

“All court matters under parts III, VIII and XIII of the Act shall be conducted in accordance with these rules and regulations but the court shall have power and discretion to decide all matters with due speed and dispatch without undue regard to technicalities or procedure.”

34. In addition, Article 159(h)(d) does empower courts to determine disputes without undue regard to technicalities.

35. From the supporting affidavit of the application dated 11th June 2018, the respondent stated at paragraph 4 some of the grounds that necessitated the review application as: the child's suffering and frustration and that his education was in jeopardy. He gave particulars of such frustration as:

(1) that while in the custody of the defendant, the child had missed school severally.

(2) that on 23rd May 2018 the child missed school due to unpreparedness of the respondent.

(3) that on 4th June 2018 the child headed taking a school bus route to the defendant's residence and instead sneaked to the plaintiff (respondent).

(4) that similar situation as No. 4 happened on 5th June 2018 and when forcefully taken to the bus taking him to the mother cried to tears.

36. When confronted by these allegations which the trial court considered as sufficient ground to interview the boy, it concluded that it was the boy's desire and in his interest to stay with the father whom he was even staying with all along until the date of judgment on 19th February 2018 when he was given to the mother.

37. In his interview, the boy at page 50 of the proceedings stated as follows:

Court: Would you like to be staying with dad most of the days or fewer days.

Child: I would like to stay with dad most of the days.

Court: Why

Child: Because he is good to me. He bought me a bike, juice, pizza and soda.

Court: Dad said that you ran away to Imara Daima bus during home time from school. Is it true?

Child: Yes, it was home time. I was missing my dad.

Court: Dad said that you were another day removed from a bus going to Imara Daima and you started crying.

Child: It is true. It is Mrs Otieno who spotted me and I was taken back to the van going to Viraj village.

Court: Why did you go to the bus for Imara instead of the bus for Viraj village?

Child: I was missing dad.

38. From this assessment, it is apparent that there was reasonable ground to interview the boy and there was nothing wrong with the court interviewing him. Orders regarding or affecting children are subject to review from time to time if it is in the best interest of the child. The appellant admitted in her submissions that at one point the child boarded the bus for his father's residence. Why was the child running away from her?

39. The court had no choice but to intervene by interviewing the child. At age 7 and now 8 years, this is a big child who understands and can differentiate what is good from bad. When I interviewed him in chambers, he appeared quite an intelligent boy. He expressed similar sentiments that he was comfortable staying with the father although he does not mind visiting the mother during weekends and holidays.

40. For the above stated reasons there was good reason to consider the review application after interviewing the child. The interview did not amount to re-opening the case as purported by the appellant as there was sufficient to warrant review of the Judgment. For those reasons it is my finding that the review orders made and in particular interviewing the child does not amount to re-opening the suit.

Whether the court erred in awarding custody to the respondent

41. In determining custody issues and who is entitled to child custody, courts are guided by Section 83 of the Children's Act which provides:

“(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.”**

42. In the case of M.A.A. V AB (2018) eKLR the Court had this to say:

“It is trite that children of tender years, in absence of exceptional circumstances ought to be with their mother.”

Similar position was held in Githunguri v. Githunguri [1981] KLR and Wambua v Okumu (1970) EA 578 where both courts held that as a general rule custody of children of tender years should be vested in their mothers unless there are sufficient reasons or exceptional circumstances to depart from this rule. Also see J. O. v S.A.O. (2016) eKLR.

43. In this case it is the wish of the child to stay with the dad. What exceptional circumstance or sufficient reason that justifies change of custody from the mother to the father: The only ground given is the child's frequent escape from school to his father's residence. What does this mean? This behavior by the child if forced to stay with the mother, will lead to a child being traumatized hence poor performance in school and most probably disappear from home due to trauma or frustration.

44. In my view, the child now aged 8 years although of tender age, is capable of making a choice on which parent to stay with and be comfortable. Parents have an equal responsibility to look after their children (See **Article 53(1)(e) of the constitution**. There is no monopoly in parenting children. There is no proof that the child will suffer or is likely to suffer or his life will be in danger if he stays with the father. Children should not be used as a source of wealth by either parent. Although the appellant stated that she was no longer interested in increased maintenance, her review application was centered on that aspect.

45. In my opinion, times are changing. Children of tender age can still be taken care of by the father just as well as the mother. A father cannot be relegated to giving money for maintenance alone and not custody or a care taker or protector of his child simply because the child is below 10 years.

46. It is apparent from the circumstances of this case that all along since birth until the date of judgment, the boy has been staying with the father including the period when the two were separated; It is in the best interest of the child that the child stays with the father as per his desire and orders of the trial court. I do not find any error or wrong committed by the learned magistrate.

47. Accordingly, it is my finding that the appeal herein has no merit and the same is dismissed with no order as to costs. The orders made by the lower court shall remain in force.

Right of appeal 30 days.

Dated, Delivered and Signed at Nairobi This 28th day of November, 2019.

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J. N. ONYIEGO

JUDGE