



REPUBLIC OF KENYA
THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO. 40 OF 2016

T L and I L (Minors suing thro' Next Friend

N L..... APPELLANT

-VERSUS-

S L..... RESPONDENT

JUDGMENT

Introduction

1. The appellant in this case **N L** had sued the respondent **S L** for the custody of their minor children **T L** & **I L** aged 5 and 3 years respectively. Her case before the trial court was that **S** who was her husband of 8 years had vested violence on her and chased her from the matrimonial home forcing her to leave the infant children behind. He had married another woman and subsequently denied her (the plaintiff) custody of the children.
2. **S** on the other hand admitted the fact of marriage to the plaintiff. He denied that he was violent and alleged that the **N** had ill-treated the children and abandoned them as she spent time loitering in town. He accused her of being an irresponsible mother and suggested that he was the better parent to have custody of the children who were by then being taken care of by his second wife.
3. In the judgment delivered on 14th March, 2016 the court awarded custody to the father. The court was persuaded that the best interest of the children would be served if the status quo was maintained because the father had the means to shelter and educate the children and provide a stable environment for them. The court further observed that the children were comfortable and getting the care and attention of their father and his current wife.

Grounds of appeal

4. The appellant was aggrieved by the judgment and has brought the present appeal on eight grounds which can be summarized into four to wit:
 - i. That the court failed to adequately consider the evidence.*
 - ii. the court erred in failing to hold that the custody of minors, being of tender years should be awarded to mother unless there were exceptional circumstances the disentiing the appellant from having custody.*

iii. that the court erred in failing to consider that it was in the best interest of the child to award custody to the mother; and

iv. the court erred in failing to consider the violent conduct of the respondent.

5. Article 53 (2) of the constitution provides that “A child’s best interests are of paramount importance in every matter concerning the child.” Section 4 (2) of the Children’s Act categorically provides 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 interests of the child shall be a primary consideration. Section 83 (i) of the Children’s Act sets out the principles to be applied in considering custody. The court is enjoined to 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 who 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 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 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.

6. The best interest principle has been enunciated and expounded in many cases. The common thread is that custody of children of tender years is usually awarded to the mother unless there are exceptional circumstances that warrant a departure from this established principle. In **Midwa Vs. Midiwa 2002 2 EA 453** the Court of Appeal restated the principle in the following terms:-

“It is trite law that, prima facie, other things being equal, children of tender age should be with their mother, and where a court gives the custody of a child of 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, See Re S (an infant) (1958) 1ALL ER 783 at 786 and 787 and Karanu Vs. Karanu (1975 E.A. 18. The learned judge, in our view, did not correctly direct herself on the principle that in cases of custody of the children the paramount consideration is their welfare. Moreover, as the record shows, there were no exceptional circumstances shown to justify depriving the mother of her natural right to have her children with her.”

7. My duty as a first appellate court in this appeal is to evaluate the evidence and reach my own conclusion and in so doing give an allowance that I neither saw nor heard the witnesses. See **Selle Vs. Associated Motor Boat Co. [1968] E.A. 123**. In undertaking this duty, I am conscious that I should not differ with the findings of the trial court unless it is clear that the court made findings of fact on the basis of no evidence or misapprehended the evidence or proceeded on wrong principles of law. [See **Nkuba**

Vs. Nyamiro (1983) KLR 403. See also Kahithi Kimunya Vs. Aden Guyo Haro (2014) eKLR].

8. I have proceeded on this appeal on the basis of the record and the written submissions of the appellant's counsel. Neither the respondent nor his counsel filed submissions as directed by the court. Indeed neither participated in the appeal despite the court adjourning the matter several times to accommodate them.

From my consideration of the record and the submissions, it is clear that the main issue in the present appeal is whether the court observed the correct respondent. The persistent question is whether there were exceptional circumstances to justify denying the biological mother of the right to have the children with her.

9. It is clear from the record that none of the parties called any witnesses to support their case and neither did the court call for independent evidence vide a Children's Officer's report or testimony. The court totally relied on the testimony of the warring parties. The plaintiff had testified that she was chased out of the matrimonial home by the husband who proceeded to stop her from visiting the children. She stated that she had made a report of such violence to the police but that the husband apologized and she did not press the case. She produced a P3 form [Exhibit...] which classified the injuries she had sustained from the beating as harm.

10. The respondent on the other hand testified that the appellant was given to loitering and had on occasion left the children unattended when one of them fell off a bed and sustained neck injuries. He produced a medical treatment report in respect of the younger child whom he alleged had fallen off the bed. He said that he had travelled to the United Kingdom when the child fell off the bed after being abandoned by the mother. He insisted that the appellant did not love the children. Under cross-examination he stated that the appellant cannot take care of the children. He admitted however that he had no proof of her negligence. In his statement, he particularized the acts of alleged cruelty to the children stating that she often beat up the children and abandoned them from time to time when she went to loiter in town.

11. It was submitted on appeal by the appellant that there was no proof that the appellant had neglected the children or was given to loitering. It was also submitted that the appellant had not seen the children because the respondent and his relatives denied her access. As indicated earlier, the respondent did not attend court to challenge the appeal. His counsel on record **M/s Onyoni Opini & Co. Advocates** did not file any submissions despite being served the court's directions to that effect. The appellant was allowed to prosecute the appeal in the absence of the respondent after a record four adjournments occasioned by the respondent's non-attendance and given by the court in consideration of the fact that this matter affected children.

Analysis & determination:

12. The general rule is that custody of young children is awarded to the mother unless there are exceptional circumstances not to do so. **See P.O.O. Vs. L.A.O (2015) eKLR. See also Karanu Vs. Karanu (1975) E.A. 18.** There is no doubt in this case that custody of the children of the marriage aged 5 and 3 respectively was awarded to the father. The issue in this appeal then is whether there were exceptional circumstances to warrant denying the mother custody of the young children.

13. There is no doubt that the couple's marriage was or had broken down by the time the custody case was heard by the trial court. This is evident from the testimony given by the parties. In her statement, the appellant accused the respondent of violence. She stated that the appellant had chased her out of the matrimonial home and married another woman whom he installed in her (appellant's) house. The respondent on the other hand accused her of loitering and neglecting the children. He stated in his testimony that she lived in "shanty places" and was incapable of taking care of the children.

14. While the couple's marital woes were not the subject of the trial, it was a relevant factor to be considered in assessing the credibility of the accusations levied against one another by the parties. The

accusation that the appellant had neglected the children by abandoning them and going to loiter in my view were not proved at all. The respondent produced a medical report in respect of the younger child (IL) which showed that he had been treated for injuries resulting from a fall. He attributed the fall to the neglect of the mother. He presented no evidence to show that the child fell when the mother was away or to show that a child would not fall even in the presence of mother.

15. This court takes judicial notice that childhood accidents do happen to young children as they adventurously move around and play and that the same can happen even in the presence of a loving and responsible mother or any care giver.

16. On the other hand, the appellant produced evidence that the respondent was a violent spouse. She produced a P3 to show that she had once made a report of assault. She left the matrimonial home and was prevented by the husband from visiting the children. While the trial court did not touch on this issue in the judgment, it is in my view a relevant fact that needed consideration. I would make a finding based on the evidence on record that the spousal violence visited upon the appellant contributed to her leaving the matrimonial home and that under those circumstances, it cannot be held against her that she had failed to visit the children. It would be erroneous therefore to adjudge on the basis of the injury to the child (IL) that there were exceptional circumstances to deny the mother custody.

17. The trial court was persuaded based on the evidence provided by the respondent that the children were already living with the father, attending school and being taken care of by the father and his new wife that the best interest of the children would be best served by maintaining the status quo.

18. In upholding the status quo, the court seemed to be saying that the children would be better off in the custody of the parent who can provide a home and education. While these are mandatory duties under **Section 23 of the Children Act**, they cannot be the only considerations in deciding which parent to award custody. In the present case, the appellant did not have a job while the respondent was a military officer earning a decent salary. Indeed from my observation that she thumbprinted her pleadings, it is possible that she was illiterate. To my conscience, she cannot be denied custody of her minor children merely because of a lack of income and inability to afford a decent house. The sharing of parental responsibility envisaged by **Section 23 of the Children Act** would dictate that the party who has the means contributes to the provision of such necessities as the children would require as the less endowed party provides nurture. In the converse, it would be discriminatory and unconscionable to deny a woman custody of her minor children merely because the father of the children can afford a better standard of life for the children. This consideration cannot of itself constitute exceptional circumstances so as to bring the case within the exception created by law.

19. The evidence was presented to the trial court that the children were being taken care of by the respondent's new wife who was said to be a responsible person. No evidence was led to demonstrate that she loved and cared for the children better than their biological mother. In **Githunguri Vs. Githunguri (1979) eKLR**, the court of appeal faced with similar circumstances found that "**the pendulum swings more towards the children remaining with their natural mother**". I would similarly find in favour of the minor children remaining with their natural mother, the appellant.

For the foregoing reasons, I allow the appeal and set aside the trial court's judgment and award custody of the minor children to the appellant. The respondent shall continue to provide the children the same standard of living by providing adequate education, shelter, health care and food. The respondent shall have visitation rights details of which shall be worked out by the parties.

Parties shall be at liberty to apply to the Children's Court in Maralal on account of any consequential issue in respect to maintenance of the children. This being a family matter, each party shall bear their costs of the appeal.

Judgment delivered, dated and signed in open court this 22nd day of February, 2018

R. LAGAT KORIR

JUDGE

In the presence of:

C/A Emojong

M/s Chelagat holding Morintat for appellant

N/A for Respondent