



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 53 OF 2017**

**BOO .....APPELLANT**

**VERSUS**

**KA .....RESPONDENT**

**[Being an appeal against the Judgment of the Lower Court Hon. P. L. Shinyada SRM**

**dated 5<sup>th</sup> June 2017 in the Original Kisumu Children's Case No. 19 of 2015]**

**JUDGMENT**

By a Plaint dated 26<sup>th</sup> May 2015 KA, (the Respondent) sought orders against BOO, (the Appellant) for “*legal and actual custody of the minor ROA with access and visitation rights to the Appellant.*” However upon hearing evidence from both sides and calling for and reviewing reports from several sources concerning the child, the Trial Magistrate concluded that the best interest of the child was to place her in the custody of Agape Children’s Ministry until she attained the age of 18 years. Both the Appellant and the Respondent were given visitation rights and the child was given liberty to visit either of the parties and stay with them during the school holidays the only rider being that this was to be with the permission of Agape Children’s Ministry and supervision and only once they were satisfied the child was in a state of mind to so visit and that such visits would not be detrimental to her psychological well being.

Being aggrieved with the judgment and orders of the Trial Magistrate the Appellant brought this appeal. The following is premised on grounds that: \_

- 1. “That the learned Magistrate erred in law and fact by finding that it was in the best interest of the minor that she be under the custody of Agape Children’s Home instead of being in the custody of her father.**
- 2. That the learned Magistrate erred in law and fact by disregarding the evidence of Helen Achieng Rangoro, the counseling manager of Agape Children’s Home, which was that it was in the best interest of the child to be placed in the custody of the father.**
- 3. That the learned magistrate erred in law and fact by disregarding the wishes of the minor, who in the assessment and conclusions of the court was “a girl who was quite composed and would want her wishes to be respected”.**
- 4. The learned Magistrate erred in law by failing to appreciate that the appellant had acquired legal custody of the minor under section 25(2) of the Children’s Act.**
- 5. The learned Magistrate erred in law by failing to appreciate that the minor in question had the right to be cared for by her parents, under section 6(1) of the Children’s Act Cap 141.**
- 6. The learned Magistrate erred in law by failing to appreciate that the minor’s rights to be cared for by her father could only be interfered with only in exceptional circumstances and only when best alternative care can be provided.**
- 7. The judgment was against the weight of the evidence.”**

As the first appellate court I have considered and re-evaluated the evidence and other material placed before the Trial Court. During the hearing it transpired that the child is the Appellant’s step daughter and that her mother died as she was giving birth to another child. The custody of the child was therefore left to the Appellant. It is also evident that instead of staying with the child the appellant vested her custody with one Pamela, a woman with whom he started living upon the death of his wife. In one of the reports it was noted that the child was lagging behind in her education and that she had run into school fees arrears. This court cannot fault the trial magistrate’s findings of fact on that issue as well as on the fact that the person in whose care the Appellant left the child also lamented that she could no longer take care of her. Both Section 4(2) of the Children’s Act and Article 53(2) of the Constitution provide that what should guide the courts in matters such as these is the best interest of the child. In my opinion the constant hopping of the child from one “mum” to another depending on who the Appellant is cohabiting with is clearly not in the interest of the child. Her best interest would be a stable place where she can call home and where her physical, health, mental and education needs are met. I agree with the Trial Magistrate that notwithstanding the fact that the Appellant had acquired parental rights over the child under Section 25(2) of the Children’s Act and despite the child’s own wishes her best interest was to remain in the Agape Children’s Home. The rights of access awarded to the parties and the right given to the child to visit them during school holidays were noble and shall remain in place. However I direct that there be a review of the case within one year upon which the Children’s Officer shall make and present to the court a report on how the child is fairing at the Children’s Home. The appeal is otherwise dismissed with costs to the Respondent.

**Signed, dated and delivered at Kisumu this 19<sup>th</sup> day of April 2018**

**E. N. MAINA**

**JUDGE**