



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO.41 OF 2018

IN THE MATTER OF ABO (CHILD)

BETWEEN

NOO.....APPELLANT

AND

HAO.....RESPONDENT

(Appeal against judgment and decree in Winam Children's Case No. 29A of 2016 delivered by Hon. J.Mitey (RM) on 29th May, 2018)

JUDGMENT

1. HAO (*hereinafter referred to as respondent*) sued NOO (*hereinafter referred to as appellant*) in the lower court claiming orders **THAT:**
 - a) *Legal and actual custody of the child be awarded to the plaintiff/respondent*
 - b) *Plaintiff provides maintenance for the child*
 - c) *Costs of the suit and interest thereon at court rates*
2. The defendant/appellant denied the claim and in his counterclaim prayed for orders **THAT:-**
 - a) *Legal and actual custody of the child of the marriage be granted to the defendant/appellant*
 - b) *Plaintiff be condemned to pay costs of the defence*
 - c) *Such other or further relief or order as the court may deem fair, just and expedient to grant*
3. In a judgment delivered on 29th May, 2018, the learned trial Magistrate **found that the plaintiff/respondent had proved her claim and granted the following orders:-**
 - a) *That legal custody of the minor ABO now aged 6 years old is given to both parents save that the actual custody is hereby granted to the plaintiff*
 - b) *Parties shall share responsibilities equally in terms of Article 53 (1) (e) of the Constitution*
 - c) *Defendant will provide school fees and other related requirements (transport, books, activities etc)*
 - d) *Plaintiff will provide accommodation and food*
 - e) *The minor has a right of access to the defendant and to spend time with each party on half-half basis during the school holidays*

f) Each party to meet its own costs

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 17.7.18 filed the Memorandum of Appeal dated 11.6.16 in which he raised 7 grounds that:-

1) The Learned Magistrate erred in law and in fact in granting the respondent herein the actual custody of the minor disregarding the glaring evidence adduced by the Appellant which proved exceptional circumstances militating against the granting of such order to the respondent

2) The Learned Magistrate erred in law and in fact by not considering that the minor has been in actual custody of the Appellant since 2015, has bonded with him and is peacefully settled in school, hence disturbing the status quo would not be in the best interest of the child development both emotionally and academically

3) The Learned Magistrate erred in law and in fact in not appreciating the evidence adduced by the Appellant and his witnesses touching on the immorality and drunkard habit of the Respondent

4) The Learned Magistrate erred in law and in fact by failing to appreciate that the minor did not show any signs of distress or mistreatment/ neglect when he was presented in court by the Appellant

5) The Learned Magistrate erred in law and in fact in not appreciating the strength of the two reports from the children's offices in Kisauni and Kisumu which commended that the Appellant was most suited to have actual custody of the minor

6) The Learned Magistrate erred in law and in misapplying her judicial discretion by sharply deviating from her ruling of 24.6.16 without giving any justifiable reasons

7) The Learned Magistrate erred in law and in relying on the evidence of the Respondent which was merely packed with lies and falsehoods

SUBMISSIONS BY THE PARTIES

5. When the appeal came up for mention on 20.9.18, the parties' advocates agreed to dispose it off by way of written submissions which they dutifully filed.

THE EVIDENCE

6. The respondent told court that she lived with the minor in Migori from when he was born in 2012 until 14.6.15 when the appellant took away the child to Mombasa where he has been staying since then. She also told court that the appellant has since remarried to another woman who takes care of the minor. She told court that she was able and willing to take care of the minor but urged court to order the appellant to pay the minor's fees since he had enrolled the minor to an international school which she could not afford.

7. The appellant conceded that the minor lived with the respondent until 14.6.15 when he took him away after he found the respondent who had taken into drinking alcohol living with another man and not taking good care of the minor. He stated that he had been providing for the needs of the minor. His witnesses DW3, DW4 and DW5 told court that they had severally seen the respondent in company of men drinking alcohol.

SUBMISSIONS BY THE PARTIES

Appellant's submissions

8. The appellant holds the view that he demonstrated by his evidence that he acted in the best interest of the child when he took him away from the respondent and that his evidence had not been controverted. It was submitted for the Appellant that the child had been in his custody since 2015 and that taking him away would not be his best interest. It was additionally submitted for the appellate was best suited to have actual custody of the minor as recommended by the children's officer in Kisauni and Kisumu

9. The Appellant placed reliance on law and the following authorities:-

i. Section 83 of the Children's Act

ii. MMA v VKM [2017] eKLR

Respondent's submissions

10. The respondent holds the view that the appellant should not be awarded actual custody of the minor purely on the basis her immorality and her failure to give appropriate care to the minor and the fact that the minor is already enrolled in a school in Mombasa. It was submitted for the respondent that she is in gainful employment and that it had not been proved that she was incapacitated from taking care of the minor.

11. The Respondent placed reliance on law and the following authorities:-

- i. Article 53(2) of the Constitution**
- ii. Section 2 of the Children's Act**
- iii. Section 4 of the Children's Act**
- iv. RNN v DKK [2017] eKLR**
- v. NMM v JOW [2016] eKLR**
- vi. Bhutt v. Bhutt Mombasa HCCC NO. 8 of 2014 (O.S.)**
- vii. POO v LAO [2015] eKLR**
- viii. KA v KB [2008] I KLR**
- ix. DK v JKN [2011] eKLR**

ANALYSIS AND DETERMINATION

12. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. See **Sumaria & Another vs Allied Industrial Ltd (2007)2KLR** and **Selle & Another vs Associated Motor Boat Co. Ltd. & Others 1968) EA, 123.**

Applicable Law

13. The Law governing the interests of children is to be found both in the Constitution and the Children's Act among other laws. Article 53 of the Constitution provides that:-

(1) Every child has the right—

(e) 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; and

(2) A child's best interests are of paramount importance in every matter concerning the child.

14. "A child of tender years" is described under section 2 of the Children's Act as "a child under the age of 10 years. The child in this case is about 6 years and is therefore a child of tender years. Section 4(3) of the same Act requires all judicial and administrative institutions, and all persons acting in the name of these institutions to treat the interests of the child as the first and paramount consideration in every matter concerning the child.

15. Section 83 of the Children's Act provides for principles to be applied in making custody order in the following terms:-

(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

16. I have considered case law governing custody of children of tender years. In the case DK v JKN (supra), the court cited with approval the decision of the Court of Appeal in Midwa vs. Midwa [2002] 2EA 453 at page 455 where the court had this to say:

“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.

17. The court in DK v JKN (supra), further relied on the decision in Re S (an infant) [1958] 1 All ER 783, at 786 and 787 where Roxburgh J stated:-

“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.”

18. This principle has been restated in numerous decisions among them RNN v DKK (supra); NMM v JOW (supra); Bhutt v. Bhutt (supra); POO v LAO (supra) and KA v KB (supra) cited by the respondent.

19. In the case of AA v VO [2011] eKLR the court finding no exceptional circumstances to deny the mother custody of a female minor granted joint custody to both parents with care and control of the said minor being granted to the mother.

20. The trite law that custody of minor children should be granted to the mother is however not absolute. In the case of MEHRUNNISSA VERSUS PARVEZ (1981) KLR 547, the Court of Appeal held that:-

“Custody of a child of tender years should always be a mothers’ right except where she has through her own misconduct divested herself of such right”.

21. Case law on exceptional circumstances were restated in the case of SO VERSUS LAM NAI. CA NO. 175 OF 2006 to be conduct which is disgraceful such as immoral behavior, drunkenness habit and bad company while in the case of SOSPETER OJAAMONG VERSUS LINET AMONDI OTIENO NAIROBI HCCC NO. 31 OF 2004 the learned judge stated that such conduct is one showing that the mother is hopeless and is incapable of looking after the said child.

22. The evidence before the trial court that the appellant had taken to drinking and returning home late while she lived with the minor was not controverted. From the foregoing, I am satisfied that the trial court failed to rightfully consider that it was not in the best interest of the child to grant custody of the minor to the respondent for the reason that she had by her conduct disintegrated herself from exercising her natural right of nurturing the child.

23. The two Children Officer’s reports presented before the trial court commended that the appellant was best suited to take custody of the minor. There is evidence that the minor was presented before the court. There is no evidence that the minor was not being properly taken care of by the Appellant. In ordering that the child be removed from Mombasa where he has lived with the Appellant for over 3 years and goes to school, to Migori where the respondent’s stays cannot in my considered view be in the best interests of the child. The trial court appears to have been swayed by the respondent’s evidence that the Appellant was hot tempered, which evidence was not demonstrated when the Appellant testified in court. In any case, there is no evidence that Appellant had not treated the minor with care to warrant interference with the status quo.

DISPOSITION

24. From the foregoing analysis, the appeal succeeds. The order of the trial court is set aside and in the spirit of Article 53 (1) (e) of the Constitution, is substituted with the following orders:

- a) ***Both the Appellant and the Respondent herein will have joint custody of the minor ABO***
- b) ***The Appellant will have the actual custody, care and control of the said minor***
- c) ***The Respondent will have unlimited access to the minor as much as it is practically possible with prior notice to the Appellant***
- d) ***Upkeep and general maintenance of the minor shall be shared by both parties as shall be agreed between them***
- e) ***The Appellant will stay with the child for half of the school holidays either at the beginning or at the end of the holiday as shall be agreed between the parties***
- f) ***Since this is a family matter, each party shall bear own costs.***
- g) ***There will be liberty to apply by either party.***

DATED AND DELIVERED IN KISUMU THIS 20th DAY OF December 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For the Appellant - N/A

For the Respondent - Mr Muia/Mr Odumbe