



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL CASE NO. 46 OF 2016

Arising from the ruling in Isiolo Children's Case No. 7 of 2016 by J. M. Irura SRM delivered on 4th October 2016.

H G G.....APPLICANT/APPELLANT

Versus

Y P.....RESPONDENT

JUDGMENT

Custody of children of tender age

[1] This appeal relates to an appeal from a ruling in Isiolo Children's Case No. 7 of 2016 delivered by J. M. Irura SRM on 4th October 2016. In the ruling, the trial Magistrate did not grant the orders sought, to wit; the custody, control and care of the minors and a cumulative maintenance amount of Kshs. 200, 000/-. The Applicant being dissatisfied by the ruling filed appeal dated 10th November 2016 and put forth the following grounds:

- 1. That the learned trial Magistrate erred in law and fact by granting the Respondent custody of the children of extremely tender ages of 9 years, 8 years, 6 years and 2 years despite the presence of overwhelming expert evidence from the children officers report that the Appellant was best suited to have custody.**
- 2. That the learned trial Magistrate erred in fact and law by awarding custody of minors of tender ages to the respondent in contravention to the provisions of the Children's Act and the Children's Act in tenor and other known principles applicable in such cases.**
- 3. The learned trial Magistrate erred in fact and law by awarding custody to an ageing Respondent who is about 70 years and in essence placing the minors under the custody of a step-mother a fact well exhibited in the pleadings and the respective children reports.**
- 4. The learned trial Magistrate was extremely biased and applied selective justice by only relying on parts of the pleadings and contents in the children reports that were in favour of the Respondent in her ruling.**
- 5. The learned trial Magistrate expressed blatant bias by relying on extraneous and spurious issues in granting custody of children of a tender age to the Respondent.**
- 6. The learned trial Magistrate erred in fact and law by failing to make a finding that the**

Appellant was entitled to a monthly maintenance for the children from the Respondent.

The Appellant prays that the appeal be allowed and the following reliefs granted:

- a) Custody of the children is granted to the Appellant.**
- b) A monthly periodical payment is made to the Appellant towards the maintenance of the children.**
- c) The court to issue any other orders it deems just and equitable in her circumstances.**
- d) Costs of the suit.**

Appellant's submissions

[2] In the Appellant's submissions dated and filed on 2nd March 2016, she condenses the six grounds of appeal into the following two questions;

- 1. Who should get the custody of the minors?**
- 2. Whether periodical monthly payments should be made to the Appellant towards the maintenance of the children?**

The Appellant made two strong arguments. First; that the trial Magistrate did not take into cognizance the tender ages of the children and their gender in awarding custody to the Respondent who is their father. Second; that the trial magistrate ignored the children reports filed by two independent children officers from Isiolo and Meru. The Appellant analyzed the two reports. She stated that the report filed by one BENJAMIN KINYUA dated 11.07.2016 recommended that the children be awarded to the Appellant who is the mother and cited the following reasons for his opinion:

- a) The tender ages of the children
- b) The fact that the children were living with a step-mother (the Respondent's wife)
- c) The un-availability of the Respondent to offer quality care to the children owing to his busy schedule.

The other by SARAH JILLO, the children's officer from Isiolo filed in court and dated 12.7.2016 shared the same sentiments. According to the Appellant, the child aged two years was breastfeeding by the time the Respondent restrained the Appellant from having custody of the minors. She urged further that the children had been with her- the mother- since birth until sometime last year when the Appellant went to take the other daughter to secondary school in Mombasa the Respondent prevented her from further accessing and having custody of the children. To her, there was no evidence of compelling reasons whatsoever to have the custody of the children taken away from her and granted to the Respondent.

[3] On maintenance the Appellant submitted that the Respondent is a man of immense means with massive wealth ranging from businesses, motor vehicles and other investments. She enumerated the said properties and annexed the Respondent's bank statements- a fact that the Respondent did not deny. She therefore justified a monthly maintenance of Kshs. 200,000/- as extremely fair in the circumstances and prays that the court should award it.

Respondent's submissions

[4] The Respondent in his submissions was of a different opinion. He states that the Appellant is not better placed to have custody, care and control of the minors for the following reasons:-

- (a) She is a perennial deserter; she left behind a breast feeding baby who was at the age of one and a half years to an unknown place for two days and this made him to file a report with the police. On the second occasion she took her child to school in Mombasa and never returned for a long duration.
- (b) She does not have a proper mental health for the Appellant has a mental disorder- a fact she has not denied. Again, the Respondent claims that she had made attempts to commit suicide and in one instance she drank methylated spirit.
- (c) The living standards and environment at the Appellant's dwelling place is unknown and or uncomfortable and not suitable for the welfare of the children.
- (d) She has other four children to cater for.

Based on the foregoing, the Respondent submits that he is better placed to have custody; care and comfort of the minors for the children have proper education; a superb environment at their dwelling place for they have ample space and separate rooms and they are in good health. Therefore, they should not be taken away from the environment they are used to.

[5] He further submitted that according to the Children's welfare officers reports it was seen that the Appellant has constant income especially from the rental houses and further income from her businesses among others buying and selling cows and goats. Since she has constant income every month the Respondent believes that she doesn't require any maintenance. The Respondent states that the appeal is misplaced and does not put the minors' interests at heart. The court can only grant the Appellant supervised access as she cannot be trusted with the children.

DETERMINATION

Medical report expunged

[6] Before I delve into my decision, I should record that, on 18th day of September 2017, Mr. Kitheka, Counsel for the Respondent asked the court to expunge from the record the medical report marked as annexure YP13 to the Replying Affidavit sworn by the Respondent on 14th June 2016. He also asked the court to expunge all other submissions which he had made based on the said report. The Report as well as the submissions were marked as expunged from the record and I shall not refer to them at all in this decision.

General rule on custody of children of tender age

[7] Having said that, I discern that the issue in controversy is custody and maintenance of the children herein. The four children are of the ages of 9 years, 8 years, 6 years and 2 years. According to section 2 of the Children's Act, these are children of tender age. As a general rule, mothers are usually given the legal custody of children of tender years unless there are exceptional circumstances not to do so. Here, I am content to cite the decision by M. W Muigai J in **K.M.M v J. I. L [2016] eKLR** that;

“...a child of tender years' best interests and welfare are where legal custody is awarded to the mother barring extenuating circumstances that would prevent the mother from providing protection and care of the child. Case law lends credence to the proposition that in cases of a child of tender years less than 10 years as defined under Section 2(1) of the Children Act 2001, custody is granted to the mother.”

As the question of gender of the children has been canvassed, I am also guided by the Court of Appeal in **Githunguri v Githunguri [1979] eKLR** that:-

“...the custody of very young female children should be granted to their mother, in the absence of exceptional circumstances which do not in my opinion exist in this case. The

learned judge correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the children. He rejected the proposition, advanced before him by the mother's advocate, that there was a 'rule' in favour of the mother. With respect, this was a misdirection. When dealing with the paramount consideration of welfare, especially where young female children are concerned, there is a rule that the mother is normally the person who should have custody. As Roxburgh J said in *Re S (an infant)* [1958] 1 All ER 783, at 786 and 787:

"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."

[8] Borrowing from the judicial authorities, the focus is to attain the best interest of the child in accordance with the principle of the Constitution in Article 53 (2) that:

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

The above phrase is therefore not a mere cliché or worn-out notion that do not call up any legal delight; it is a real facet in the administration of justice in matters involving children. Therefore, for a court of law to depart from the general rule on custody of children of tender years, there must be exceptional circumstances which warrant the mother to be denied custody of children of tender age. Such factors should be ones which affect the welfare and best interests of the child and may include but not limited to; the mother's mental instability or insanity; *disgraceful conduct, say her immoral behavior, drunken habit, abandoning the children; cruelty to children; and the company she keeps etc.* See *K.M.M v J. I. L* [2016] eKLR (supra) that:

"In *SOSPETER OJAAMONG vs. LYNETTE AMONDI OTIENO Civil Appeal 176 of 2006*

The Court of Appeal held;

"The general principle of law is that custody of such children should be awarded to the mother unless special and peculiar circumstances exist to disqualify her from being awarded custody. The case of MARTHA OLELA & ANOTHER vs. JACKSON OBIERA Civil Application No. Nairobi 16 of 1979 was cited as one authority for such principle. The mother's disgraceful conduct, say her immoral behavior, drunken habit, bad company are some of the factors which would disqualify her from being awarded custody of a child of tender age."

[9] Applying the foregoing test, are there exceptional circumstances which justify departure from the general rule? The Respondent in his submissions argued that the Appellant is not better placed to have custody, care and control of the minors for the following reasons:-

(a) She is a perennial deserter; she left behind a breast feeding baby who was at the age of one and a half years to an unknown place for two days and this made him to file a report with the police. On the second occasion she took her child to school in Mombasa and never returned for a long duration.

(b) The living standards and environment at the Appellant's dwelling place is unknown and or uncomfortable and not suitable for the welfare of the children.

(c) She has other four children to cater for.

[10] I will weigh these allegations and the facts of this case upon the constitutional principle in article 53 of the Constitution. I should also be guided by section 4(3) and 76(3) of the Children's Act, which I shall reproduce below:

Section 4(3) provides:

4(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

- (a) safeguard and promote the rights and welfare of the child;**
- (b) conserve and promote the welfare of the child;**
- (c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.”**

Section 76(3) of The Children’s Act which states:

76(3) Where the court is considering whether or not to make an order with regard to a child, it shall have particular regard to the following matters—

- (a) The ascertainable feelings and wishes of the child concerned with reference to the child’s age and understanding;**
- (b) the child’s physical, emotional and educational needs and in particular, where the child has a disability, the ability of any person or institution to provide any special care or medical attention that maybe required for the child;**
- (c) the likely effect on the child of any change in circumstances;**
- (d) the child’s age, sex, religious persuasion and cultural background;**
- (e) any harm the child may have suffered, or is at risk of suffering;**
- (f) the ability of the parent, or any other person in relation to whom the court considers the question to be relevant, to provide for and care for the child;**
- (g) the customs and practices of the community to which the child belongs;**
- (h) the child’s exposure to, or use of drugs or other psychotropic substances and, in particular, whether the child is addicted to the same, and the ability of any person or institution to provide any special care or medical attention that may be required for the child;**
- (i) the range of powers available to the court under this Act.**

[11] The trial court awarded custody of the children herein- albeit being children of tender age- to the father solely on these considerations:-

- (a) That the children preferred living with the father,
- (b) The living conditions at the father’s place are better,
- (c) That the father operates from home and
- (d) That the Appellant may hide the children from the Respondent.

The children may have stated that they prefer to live with their father but to occasionally get to see their mother. The feelings and wishes of a child are to be considered but the court must take into account the

age of the child age and the degree of maturity of the child as stipulated in section 4 (4) of the Children's Act that:

“(4) In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity.”

These children were aged 9, 8, 6 and 2 years and therefore the degree of maturity ought to have been an important consideration by the trial court. The trial court did not consider this factor. There were allegations that the children may have been coached to say so by the Respondent and the trial court ought to have delved into the issue much deeper in order to determine the best interest of the children. One wonders how a child aged 2 years would possess such maturity and understanding as to express an informed opinion on such matter. In my view unless the mother is a monster and a wretched person, children of tender age would love to be and should be with their mothers. This brings me to the other point that the Appellant was a perennial deserter. I have perused the record and the reports by the children's officers and there is no evidence that she was a wayward person despite the allegations by the Respondent that she abandoned a breast-feeding baby for two days and that at one time she had hid the children from the Respondent. From the record and the averments by the parties, this couple was not in its cordial posture at the time and it is not strange that not-common things happen human beings in such situation. It is therefore wrong to conclude that if given the children the Appellant would abandon them or not hide them from the Respondent. Notably, the Appellant has four other children she is taking care of.

[12] Children of tender age require a place where they will receive parental care from a parent- something which cannot be measured monetarily or by tangible things. From the record however, it seems that the children are have better living facilities at their father's house. They have separate rooms, individual beds, a designated study area and playing area. They also have a cook, driver and cleaner who cater to their needs. The Respondent referred to the case of Manjit Singh Amrit V Papinder Kaur Atwal [2009] eKLR where Judge D. A. Onyancha stated

“And in Re F., (1969) 2 Ch 238, the same principle was restated that “a parent who can offer a child good accommodation must, other things being equal, have the edge over one who cannot.””

But the learned Judge also stated that:

“The ability of the parent to provide and care for A.S.A., is among other factors to be considered in the issue as to who should be given custody. However, it is my understanding that the fact that one of the two parents is in a better financial or material position to give the child a better start in life than the other, does not give the first one a prior claim for custody. It is more the happiness of the child, not the material prospects which this court would be concerned with. Obviously however, a party's financial position cannot be ignored entirely. It follows that if a party is so poor that he/she cannot provide a home for the child or children, this in itself might be sufficient reason to refuse him/her custody, as was stated in Re Story (1961) 2 I.R 328, 345-346. And in Re F., (1969) 2 Ch 238, the same principle was restated that “a parent who can offer a child good accommodation must, other things being equal, have the edge over one who cannot.””

What I understand the good Judge (now retired) to be saying is that the ability of the father to provide a better life to a child in material sense does not give such parent priority over the mother or unrivalled chance to get custody of children of tender age. To me, a child's happiness, emotional and psychological growth are not based on material provision. Nonetheless, material or financial provision is equally important consideration in a child's upbringing. But in this case, the Appellant and Respondent are said to be well off except that the Respondent is richer. Both are able to meet the basic needs of the children. The Appellant has reasonable accommodation; she has a bungalow- which she has rented out- and has four other semi-permanent rooms with one already rented out. She occupies two separate single rooms which are not connected. It is erroneous therefore to accord preponderant proportion of weight on the fact that

the Respondent has better house as the trial magistrate did.

[13] The other factor to consider is that the Respondent operates from home for his office is adjacent to the house. However, according to BENJAMIN KINYUA's report the Respondent is preoccupied fully by his nature of business and may lack adequate time for the children. Parents should be able to avail quality time to and spend it with their children and there is no substitute for that. The Respondent attempted to provide a substitute in the following submissions;

"...the social inquiry reports also show very well that their step mother takes care of all their needs and the children have never suffered in any way health wise."

The social reports indicated that the step-mother oversees the welfare of the children and that the Respondent is nearly 70 years. From the record, the Appellant has other four children she is taking care of. There is no evidence that she does not carry out her parental care in a responsible manner. This is an important consideration which the trial magistrate ignored and instead used it to dismiss her claim of a sum of Kshs. 200,000 on maintenance of the children on the fear that the money may be used on the other four children. That was total misdirection and was not based on any evidence. In the circumstances, in spite of the fact that the step- mother is taking good care of the children, she is not the right person to provide parental care to children of tender age including one who is 2 years of age where the mother is living, well and capable of discharging her parental responsibility. The mother is. I so find.

[14] By way of conclusion, the trial magistrate did not accord appropriate proportion of weight to the reports filed by two independent children officers from Isiolo and Meru. The report filed by one BENJAMIN KINYUA dated 11.07.2016 recommended that the children be awarded to the Appellant who is the mother and cited the following reasons for his opinion:

- a) The tender ages of the children
- b) The fact what the children were living with a step-mother (the Respondent's wife)
- c) The un-availability of the Respondent to offer quality care to the children owing to his busy schedule.

The other by SARAH JILLO, the children's officer from Isiolo filed in court and dated 12.7.2016 shared the same sentiments. It is not in doubt that the child aged two years was breastfeeding at the time and in accordance with child health care recommendations the child should be breast-feeding even now. It should be noted that the children were in the custody of the Appellant since birth until sometime last year when the Appellant went to take the other daughter to secondary school in Mombasa and the Respondent prevented her from further accessing and having custody of the children. For those reasons I find that there are no exceptional circumstances which would impel the court to deviate from the general rule that custody of a child of tender years should in the first instance be given to the mother. I am aware that these children are used to a certain kind of lifestyle that should be maintained in order not to interfere with their emotional needs. This will, however, be catered for through provision of reasonable maintenance by the Respondent too as both parents bear parental responsibility towards their children. Whereas the Appellant did not provide specific details to support her claim of Kshs. 200,000, she however submitted that Kshs. 150, 000 would go to education. This may be on the higher side bearing in mind that these are young children below the age of 10 and are in early school. Other than school fees, there are other needs for these children to wit food, clothing, holiday and entertainment just to mention a few; these matters I will consider in my decision on maintenance. First, in the best interest of the children herein, I accordingly award custody of these children to the Appellant. The Respondent will, however, have unlimited access to the said children but on such times and places that will not interfere with the school life of the children. The Respondent may also take them for holiday or to his house on such times and occasions as may be agreed between the parties or as the court shall order in case of disagreement. As an important condition, the appropriate children officer shall within 3 days, visit and inspect the homestead of the Appellant for purposes of establishing how the children shall be living in the Appellant's homestead and file a report thereto within 10 days of today. The Appellant shall provide details of how the children shall be living in

her homestead. Upon the filing of the report herein, the court shall assign the time and manner the children shall move to their mother's house. At the moment the children shall remain with the father until such time the report shall have been filed and the court has ordered the time and manner of moving of the children. The children should remain in their current school. On maintenance, in order to sustain the lifestyle the children are used to, I order that the Respondent shall pay a monthly sum of Kshs. 120,000 to the Appellant as part of his maintenance of the children. In the upshot, the decision of the trial magistrate in Isiolo Children's Case No. 7 of 2016 delivered by J. M. Irura SRM on 4th October 2016 is set aside. Each party shall bear own costs of the appeal. It is so ordered.

Dated, signed and delivered in open court at Meru this 19th day of September 2017

F. GIKONYO

JUDGE

In the presence of:

Mr. Mutegi advocate for Mr. Muriuki advocate for appellant

Mr. Mutegi advocate for Mr. Kitheka advocate for respondent

Appellant and Respondent present.

F. GIKONYO

JUDGE