



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**CIVIL APPEAL (DIVORCE) NO. 41 OF 2014**  
**(FORMERLY KISII HCCA NO. 50 OF 2014)**

**BETWEEN**

**J A N ..... APPELLANT**

**AND**

**D O O ..... RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. E. M. Nyagah, Ag. PM at the Senior Principal's Magistrates Court in Migori in Divorce Cause No. 3 of 2014 dated 1<sup>st</sup> April 2014)***

**JUDGMENT**

1. The parties to this appeal were married under Luo customary law in the year 2000. Their marriage was blessed with two children; J L A and D V A aged 13 and 10 years respectively. It is not in dispute that the marriage was beset by many problems and as a result divorce proceedings were commenced by the respondent. The respondent counterclaimed for divorce and after hearing, the marriage was dissolved on the ground that it was beset by irreconcilable differences. The dissolution of the marriage is not contested in these proceedings
2. The subject of this appeal is custody of the two children. Both parties sought custody and in the judgment the learned Magistrate held that:

*As regards custody of the children, the petitioner has demonstrated that he has been taking care of them as well as they are in his custody. This has also been admitted by the respondent. I see no reason to discourage the current status, the custody of the children will remain with the Petitioner.*

3. It is the order of custody that has precipitated this appeal by the appellant. In her memorandum of appeal she stated that the learned magistrate erred by awarding custody to the respondent without taking into account that the children were female and of tender years and without considering whether there were any special circumstances to warrant the order. She contended that the learned magistrate did not give careful thought to welfare and best interests of the children. She also asserted that the learned magistrate failed to grant the appellant access to the children.
4. The respondent supported the judgment and stated that in terms of **section 2** of the **Children Act, 2001**, the issues being 11 and 14 years old were not children of tender years. He argued that he is capable of taking good care of the children as the appellant had no source of income and that her intention in having the children was to secure her own maintenance and upkeep. He also asserted that the appellant was not a responsible parent.

5. As this is a first appeal, this Court is entitled to review the entire evidence and reach its own independent conclusions bearing in mind that it neither saw nor heard the witnesses testify (see ***Selle v Associated Motor Boat Co.* [1968] EA 123** and ***Kiruga v Kiruga & Another* [1988] KLR 348**).
6. Having reviewed the evidence, I find that the testimony was focused on the state of the marriage which had irretrievably broken down. There is no evidence on either side and no inquiry from the learned magistrate on what constituted the best interests or welfare of the children in relation to the conduct of the parties towards the children and their parental responsibilities. As the children were above the age of tender years, the ascertainable wishes of the children were not determined. In essence, the learned magistrate did not consider the principles set out in **section 83(1)** of the ***Children Act*** before making the custody order. In the event of doubt, the court was entitled to resort to an independent inquiry conducted by the Children's Office.
7. I would add here that merely because the respondent is capable of taking care of the children or is providing for them materially does not disentitle the appellant, as the mother of the children, to custody. The duty of the court is to consider the facts and circumstances and to determine the best interests and welfare of the children.
8. Finally, I think it is important to note that where the court has made custody orders in favour of one party, it ought to make detailed orders of access for the other party where the parties are unable to agree. It is apparent, in this case, that due to the hostility between the parties, the failure to make access orders effectively denied the appellant access to the children.
9. The appellate court has power to vary the orders of the trial court and to make a decision which the trial court would have made. In this instance, I am not satisfied that there is sufficient material upon which I can adjudicate the issue of the best interests and welfare of the children particularly since a year has elapsed since the judgment in the subordinate court was issued.
10. For the reasons I have stated, I now make the following orders;
  - a. The appeal is allowed and the orders granting the respondent custody of the children is set aside.
  - b. The matter concerning the custody of the children shall be reheard by any other magistrate other than Hon. E.M. Nyagah, PM.
  - c. The Court shall rehear the parties and shall be at liberty to make temporary orders for access and maintenance pending final determination.
  - d. In the meantime the *status quo* prevailing shall be maintained pending further orders or directions on **Monday, 20<sup>th</sup> April 2015** when the parties shall appear before the **Chief Magistrate, Migori**.

**DATED and DELIVERED at MIGORI this 17<sup>th</sup> day of April 2015.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Respondent in person.