



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO.36 OF 2012

(Appeal from the judgment of Hon. P. L. Shinyada (SRM) dated and Delivered

on 29th February 2012, in the original Kisii CM CHILDREN'S CASE NO.30 of 2010)

M. M. A.....APPELLANT

VERSUS

V. K. M.....RESPONDENT

JUDGMENT

1. The Appellant **MMA** (*name withheld*) was the Plaintiff at the lower court. According to the pleadings before this court, the Appellant and the Respondent were not married but had a love relationship out of which a child, **HMM** (*name withheld*) was born. The said child was aged 4 months at the time the suit was filed in the lower court on 9th July 2010.

2. It was alleged that prior to the filing of the suit, the Respondent had on 26th June 2010, abandoned the subject **HMM** (*name withheld*) at a hair salon at the Kisumu Junction along Kisii-Migori Road near the appellant's home and disappeared. Subsequently, the Appellant filed a suit before the trial court seeking the following orders:

- a. A declaration that the Defendant is not fit to have custody of the subject.**
- b. Custody of the subject be vested in the Plaintiff.**
- c. An order of injunction restraining the Defendants from snatching away the subject and/or in any manner whatsoever interfering with the Plaintiff's custody of the subject.**
- d. Costs of the suit.**
- e. Further or other relief deemed just.**

3. On 29th July 2010 the Respondent filed a defence to the suit in which she also made a counterclaim and sought the following orders:

- a. Custody of the minor DM (*name withheld*).**
- b. The Plaintiff be compelled to provide for the basics of the minor namely food, shelter and other needs as time dictates subject to review from time to time till the child attains the age of**

18 years.

c. The plaintiff be compelled to surrender the minor forthwith to the defendant and be restrained not to interfere with the child at all unless otherwise as court may direct.

d. Costs of this suit counter claim be provided for.

4. After hearing the parties the learned magistrate made a conclusion and ordered as follows:-

“In summary, I do hereby dismiss the plaintiff’s claim and enter judgment in favour of the defendant in the following terms:

1. Custody of the minor child, DM alias HMM (name withheld) is hereby granted to the defendant herein.

2. The Plaintiff will take care of the child’s educational needs and when need arises (i.e. when the child starts going to school) and also the child’s health care and medical needs.

3. The Defendant will take care of the child’s food, shelter and clothing.

4. The Plaintiff will be at liberty to provide any other needs to the child to ensure that he is comfortable.

5. The Plaintiff will have custody of the child herein every Saturday starting from 9.00 a.m. and he will return the child to the defendant on Sunday by 5.00 p.m.

6. Each party will bear their own costs of the suit.

7. In the event of any difficulty in getting the child from the Plaintiff and/or his family the OCS Kisii Police Station will come in to assist in the execution of the decree/orders herein.”

5. Being dissatisfied with the judgment and decree, the appellant filed the Memorandum of Appeal on 12th March 2012 citing the following grounds of appeal:

1. The learned trial magistrate misdirected herself in arriving at a finding that the Respondent was the person suitable to have custody of the subject child.

2. The learned trial magistrate erred in law in ignoring the overwhelming evidence on record that the Respondent was cruel and hostile to the subject and therefore unsuitable to have the custody of the subject.

3. The learned trial magistrate erred in law in granting custody of the subject herein to the Respondent.

4. The learned trial magistrate misdirected herself in relying heavily on extraneous matters hence arriving at a wrongful decision.

5. The learned trial magistrate failed to take the best interest of the subject into account in arriving at her decision.

6. The decision of the Honourable Magistrate is harsh, expensive and difficult to comply with on the part of the Appellant.

6. This appeal came up for hearing on 10th December 2013 when the court directed that it be canvassed by way of written submissions. The Appellant filed his submissions on 14th May 2014 while the

Respondent had as at, 13th October 2015, when a judgment date was given in this matter, not filed her submissions which submissions have not been filed at the time of reading this judgment.

7. Be that as it may, this being a first appellate court, my duty is to approach and evaluate the whole evidence tendered before the lower court from a fresh perspective and with an open mind. In the case of **Selle & Another –vs- Associated Motor Boat Co. & Another [1988] EA 123**, it was held that the duty of the first appeal court is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that the Appellate court had no opportunity of hearing or seeing the parties as they testified.

8. In addition, the court held as follows:

“A Court of Appeal will not normally interfere with the finding of a fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching this conclusion.”

For the above reasons, and in line with **Section 78 of the Civil Procedure Act**, this court is not bound to adopt the trial court’s finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impressing demeanour of a witness is inconsistent with the evidence generally.

9. From the Appellant’s written submissions filed on 14th May 2014, he argues that the trial court erred in finding the Respondent suitable to have custody of subject child despite overwhelming evidence adduced in court that showed that the Respondent had not only abandoned the child, but had refused to take care of the infant by refusing to breastfeed him and by at one time threatening to harm the child by hitting him on the wall. The Appellant stated that he was better placed to take care of the child as he had been with him since the time was 3 months old to-date. The Appellant contended that the conduct of the Respondent towards the child disqualified her from being granted his custody.

10. The Appellant further faulted the trial court in not addressing its mind to the child’s welfare and instead, choosing to rely on extraneous matters that were neither pleaded nor proved by the Respondent in court.

11. Lastly the Appellant contended that the trial court failed to consider the guiding Laws on children, being the **Children Act No.8 of 2001** and the **Constitution** which emphasize that in all instances, the best interest of the child should prevail.

12. The testimony before the trial court largely focused on the events that led to the child being left in the custody of the Appellant. The Appellant and his witnesses testified as follows:

PW1 M K A, the paternal grandmother of the child testified that on several occasions, she witnessed the Respondent refusing to breast feed the child. She recalled one particular instance when the Respondent called the baby ugly and threw him on the seat. She stated that the Appellant and the Respondent had a rocky relationship and on 26th June 2010, the Respondent left her home with the child saying that she was going to visit her mother only for the baby to be brought back home by a stranger (PW3) at about 2.30 p.m., after which the Respondent disappeared and never came back to her home. PW1 said that she had been taking care of the baby, with the assistance of the Appellant since 26th June 2010.

13. PW2, the **Appellant** herein, testified on his love affair with the Respondent that resulted in the birth of the baby, HMM, he stated that his relationship with the Respondent became sour after the birth of the baby and their disagreements stemmed from the manner in which the Respondent was mistreating the baby by failing to breastfeed him, to wash his clothes and at one time almost hitting the baby on the wall.

Their sour relationship reached a point of no return on 26th June 2010 when he decided to let the Respondent go back to her mother with the baby so that their tempers could cool down. The Respondent

left the Appellant's home at about 10.30 p.m. but later on at about 2.30 p.m. the baby was brought back home by PW3, a total stranger, to whom the Respondent had left the child and disappeared. The Appellant took charge of taking care of the baby, with the help of his sister and mother PW1 and he reported the incident to the clan elders and area chief.

14. PW3 Pauline Rabuth Kerubo, a hair dresser testified that on 26th June 2010, the Respondent left the baby with one of her clients in her salon saying that she was going to pick her luggage only for the Respondent to take longer than was expected and when the baby became restless and started crying, she (PW3) decided to take the baby to the Appellant's home since she knew that is where the Respondent had been staying.

15. The Respondent, in her testimony stated that she was a secondary school teacher at [particulars withheld] Girls High School, but that at the time the baby was born, she had just graduated from Moi University. She stated that after giving birth, she went to live with the Appellant at his home but their stay was not peaceful as the Appellant was engaged in love affairs with other women, was a habitual drunkard and a chain smoker. She claimed that on 26th June 2010, the Appellant snatched the baby away from her and threatened to kill her thereby prompting her to inform her mother to intervene.

16. DW2, M O M the Respondent's mother confirmed having made attempts at intervening in the matter in the company of her lady friend by approaching the Appellant to hand over the baby to her, but the Appellant declined to do so.

Analysis and Determination:

17. In this appeal therefore, having evaluated the evidence of both the Appellant and the Respondent, I note that the main issue requiring this court's determination is who, between the Respondent and the Appellant, is best suited to have the custody of the child taking into account all the circumstances surrounding the case and the evidence on record.

18. Article 53(2) of the Constitution provides that:

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

The above principle reinforces the provisions of **Section 4(2) of the Children Act** (*hereinafter referred to as 'the Act'*) which states as follows:-

“(2) 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.”

19. Section 83 of the **Act** sets out the considerations the court must take into account in making an order of custody as follows:

“83.(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.

20. In addition to the above provisions of the law, the courts have over time adopted and approved the principle that where custody of a child of tender years, is in issue, the mother should have the custody unless special circumstances are established to disqualify the mother from having such custody. (See Githunguri –vs- Githunguri [1981] KLR 598, Mherunnissa –vs- Parvez [1981] KLR 547 and Wambua –vs- Okumu [1970] EA 578 and KUK [1975] EA 18).

21. Under **Section 2** of the **Act**, a child of tender years means a child under the age of 10 years. The subject of this proceeding is said to be aged about 5 years and is therefore a child of tender years.

22. The testimony before the court showed the circumstances under which the Respondent got separated from the subject. While the Appellant states that the Respondent abandoned the child with a stranger at the salon, the Respondent contends that the Appellant snatched the baby away from her and threatened to kill her. I however find the story/version of the Respondent on the circumstances of her separation from her own baby not convincing.

23. The Respondent was at the time the baby was allegedly taken away from her a university graduate, who by all standards, was not only old enough to know and understand her basic rights as a mother, but was also enlightened/empowered academically to know what legal steps she needed to take in order to get her child back, assuming that the baby was forcefully snatched away from her as she alleged.

24. Nowhere in the proceedings has the Respondent demonstrated the tangible steps or efforts she made to get back her child. Instead, it is the Appellant, who on sensing the gravity of the situation at hand, filed this case in the lower court on 9th July 2010 seeking legal custody of the subject. The Respondent has not shown that she sought the assistance of anyone in authority such as the area chief, clan elder, police or children's officer to assist her get her baby back, even after the suit was filed in Court.

25. The lack of action by the Respondent creates an impression in this court's mind that the Appellants claim that the Respondent abandoned the baby and was cruel to him is not without merit. The Respondent has not shown that she had any natural bond affection or attachment to the baby as would be expected of any mother.

26. I must at this point state that this case is very unique. A mother is generally and naturally known to be nurturing and caring to her children especially those of tender years. There are certain duties and functions attached to a young baby such as breast feeding that only a mother can naturally perform and which no one can be allowed to stop a mother from performing.

27. It is therefore not surprising that the authorities cited above favour the automatic granting of custody of children of tender years to their mothers since they are best placed to take care of the children at that stage of their life.

28. From the evidence on record, the Respondent's conduct has not met the expectations of her being a responsible mother. Even if this court was to assume that the Appellant colluded with his mother (**PW1**) to take away her child so as to portray her as an irresponsible parent, I must say that the testimony of PW3, an independent witness, was flawless and compelling. PW3 testified that the Respondent left the baby under the care of one of her clients at the salon, one can only shudder to think what would have happened to the baby if the (PW3's) client decided to take off with him as is common in cases of children being kidnapped.

29. To my mind, I reiterate that the Respondent was a reasonably educated university graduate who could have sought the intervention of law enforcement officers in order to protect her helpless child.

30. Having said that, I still have to make a decision on who between the Appellant and Respondent is best suited to have the custody of the child. R Oxbourgh J, said the following in Res (*an infant*):-

“I only say this; the prima facie rule (which is now quite clearly settled) is that other things being equal, children of 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.”

In this aspect, I find and hold that the Appellant is best placed to have the child's custody as I find that there are sufficient reasons to exclude the prima facie rule as follows:

Firstly, the Appellant has had the custody of the child from the time he was 3 months old to-date. Currently the child is already 5 years or thereabout at the time of delivery of this judgment. I believe that the child is happy and comfortable as the issue of the child's health, or temperament or otherwise was not challenged in the lower court to be wanting. It is my humble and considered view that removing this child from the custody of his father to a totally new environment would be detrimental to his well being and up-bringing as he is already familiar with the Appellant, and his family.

Secondly, I note that the child has already missed the love, care and nurture of his mother during the most crucial time of his life, which is the first 6 months of his life when he ought to have had exclusive feeding of breast milk from his mother and therefore, plucking him away from the care of his father who he is already used to and has bonded with will be double tragedy to the child.

Lastly, the manner in which the Respondent abandoned the subject with a stranger never to return or follow up on her own baby clearly portrayed her, in my view, as not being a responsible mother. The testimony of PW3 was not impeached in this regard.

31. Under **Article 53(1) (e) of the Constitution**, “**every child has the right 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;**”

The above provision imposes on both parents, equal responsibility to provide for the child. This is the essence of legal custody which entitles the parents to share and decide all important decisions regarding the upbringing of the children.

32. As the actual custody remains with the appellant, the Respondent is entitled to have access to the child but since the parents of the child were never married and are estranged the court ought to make clear and certain orders to govern access by the Respondent to the child so as not to create an opportunity for friction between the parties.

33. Since the nature of access requires the court to make an inquiry into the circumstances of the parties and the subject, I will refer the issue back to the Childrens' Court for determination.

34. In view of the reasons stated hereinabove, I allow the appeal to the extent that I hereby set aside the orders of the subordinate court and substitute the same with the following:-

- a. The Appellant and Respondent shall have joint legal custody of the child.**
- b. The Appellant shall have actual custody of the child subject to the Respondent having access to him, on reasonable terms.**
- c. The issue of access shall be determined by the Childrens' Court at Kisii.**
- d. There shall be no orders as to costs.**

Dated, signed and delivered this 30th day of November, 2015 at Kisii.

HON. W. OKWANY

JUDGE

In the presence of:

- Sagwa for Asati for the Appellant
- No appearance for the Respondent
- Njoroge: Court clerk