



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 52 OF 2008

H Z M.....APPELLANT

-V E R S U S-

B O O..... RESPONDENT

JUDGMENT

INTRODUCTION

1. The Respondent herein had a relationship with the Appellant's daughter, E M L (now deceased), with whom he lived together until her demise in 2006. The Respondent and the deceased lived together from 1999 and had two issues namely M A, a girl born on 7th February 2000 and M O, a boy born on 25th April 2006.
2. The Respondent filed a suit in the Senior Resident Magistrate's Court in Kwale, being **Civil Case No. 11 of 2006** (“**the lower court case**”) seeking orders *inter alia*, for declaration that he has parental responsibility of the two issues of their union with the Appellant's daughter, custody order vesting custody of the two children upon the Respondent and an order requiring the Appellant to release the boy child to the Respondent's care and custody.
3. The lower court case was heard by Hon. Obura, R.M. and a judgment delivered on 5th December 2007 in which the learned Magistrate declared that the Respondent had parental responsibility for both children, ordered that the two children be placed in legal custody of the Respondent and ordered the Appellant to release the boy child, M O to the Appellant's lawful care and custody.
4. The Appellant was aggrieved by the judgment and moved to this court to appeal against the same. The Appellant prays that the judgment be set aside and an order granting custody of the two children to the Respondent be reversed in her favour.
5. On 3rd October 2013, the parties requested and were allowed by this court to have the appeal heard by way of written submissions. Both parties therefore filed their respective written submissions.

The Appellant's Case

6. The Appellant has outlined five (5) grounds of appeal as follows:
 - i. **The Learned Magistrate erred in law and in fact in failing to consider the evidence adduced before the court in its entirety.**

- ii. **The Learned Magistrate erred in law and in fact in dealing with the issue of custody of the Children when she was not gazetted to deal with children matters envisaged under the Children's Act.**
 - iii. **In arriving at her decision to grant custody to the Respondent, the Learned Magistrate completely ignored the Appellant's bond with the Children and the fact that the Respondent as a working father had no time to bond with children of tender years.**
 - iv. **The Learned Magistrate in arriving at her order took into account religious facts which were irrelevant in the circumstances as the welfare of the children should have been of paramount consideration and not any other factor.**
 - v. **In arriving at the decision that the Appellant is not the proper guardian to the children, the Magistrate took into account extraneous and irrelevant factors that are contrary to the principles of granting custody which can be granted to any other guardian other than the biological parent.**
7. The Appellant's case is that the learned trial magistrate lacked jurisdiction to deal with children's matters as she was not gazetted as required by **Section 73 (d) (ii)** of the Children's Act (“**the Act**”). Further, that contrary to **Section 74** of the Act which provides that a children's court shall sit in a different building or room or at different times, from those in which sittings of courts other than Children’s Courts are held, the proceedings of the lower court were held in the same court where matters other than children's matters were being conducted. To support her submissions, the Appellant relied on the case of **J.A.O –Vs- C.G.M & M.M. Nairobi High Court Miscellaneous Application No. 81 of 2013.**
 8. The Appellant faulted the learned trial magistrate for failing to consider the Appellant's bond with the children considering that she had lived with both children and their mother before her demise. Additionally, that the learned magistrate failed to consider the fact that the Respondent was a working father hence had no time to bond with the children who were of tender years then.
 9. The Appellant submitted that one of the minors being a girl, is in need of a motherly figure who can advise and guide her through the facets of life. That the Appellant having stayed with the minor for over two years before she was taken by the Respondent had formed a bond with the minor and is in a better position to take care of the minor.
 10. It is the Appellant's case that the learned magistrate in arriving at her decision, took into account religious factors which were irrelevant as what mattered most was the welfare of the children. That since the Appellant is a Muslim yet she had brought up the children's deceased mother as a Christian, she could still do the same with the children.
 11. The Appellant relied on **section 82 (3)** of the Act to submit that custody of a minor may be granted to any other viable person other than the biological parent. While not disputing that the Respondent has parental responsibility over the children, the Appellant submitted that she is entitled to the actual custody of the children because she had established parental and social links with the children.
 12. The Appellant argued that the Respondent has never bothered to visit the minor M O (now 7 years old) who lives with the Appellant and/or provide for him.

The Respondent's Case

13. The Respondent opposed the appeal. He submitted that the learned Magistrate did not err in law and fact but rather was within the law in her judgment. That the learned magistrate put the interest of the child first as required by **section 4 (2)** of the Act. According to the Respondent, the two children are a brother and sister who should not be separated from each other and their father.

14. The Respondent denied that the learned magistrate lacked jurisdiction due to the fact that she was not gazetted to hear children's matters. The Respondent submitted that the learned magistrate was gazetted on 18th May 2007 vide Gazette Notice Number 4331 Vol. CIX. No. 35 at page 1375. A copy of the said Gazette Notice was annexed to the submissions by the Respondent.

15. The Respondent denied that the learned magistrate ignored the bond

the Appellant had with the children. The Respondent submitted in that regard that M A was already in the Respondent's custody and there was no bond forged between the child and the Appellant. That as regards the second child, M O, the Appellant had only lived with him for 7 months prior to the filing of the suit in the lower court.

16. On the question of whether religious consideration was material, the

Respondent submitted that the religion an individual confesses is very paramount in shaping that person's character. That the law gives parents a responsibility to provide guidance in religious matters pursuant to **section 23 (2) (C) (i)** of the Act. That, further, **section 83 (1)** mandates the court to have regard to the customs of the community to which the child belongs as well as religious persuasions of the child in determining whether or not custody should be made in favour of the applicant.

17. The Respondent submitted that the learned magistrate did not consider extraneous and irrelevant factors but was guided by the principles of granting custody as based on **section 83** of the Act.

ISSUES FOR DETERMINATION

18. In my opinion, having gone through the Notice of Appeal filed herein,

the Record of Appeal, the proceedings in the lower court and the submissions by both parties, the following are the issues that this court should determine:

- i. Whether or not the learned Magistrate lacked requisite jurisdiction to hear and determine the matter because she was not gazetted to hear children's matters.
- ii. Whether the learned Magistrate ignored the Appellant's bond with the children and the fact that the Respondent as a working father had no time to bond with children of tender years.
- iii. Whether the learned Magistrate took account of religious facts which were irrelevant as the welfare of the children should have been of paramount consideration and not any other factor.
- iv. Whether the learned Magistrate took into account extraneous and irrelevant factors that are contrary to principles of granting custody to any other person than the biological parent.

ANALYSIS/ DETERMINATION

Whether the Magistrate lacked jurisdiction

19. The Appellant's case is that the learned magistrate lacked jurisdiction to hear and determine the case as she had not been gazetted as provided for under **section 73 (d) (ii)** of the Act. That the proceedings of the lower court were held in the same court where other civil matters were being conducted contrary to section 74 of the Act. This was an issue of jurisdiction which ought to have been raised at the first instance before the trial Court. It was not and ordinarily ought not to be raised at appeal stage.

20. This argument (of jurisdiction) is not true and has no legal basis

because the learned Magistrate was gazetted by the Hon. J.E. Gicheru, the then Chief Justice, on 18th May 2007 vide **Gazette Notice Number 4331 Vol. CIX. No. 35 at page 1375**. The said Gazette Notice conferred jurisdiction on the learned magistrate to hear cases involving children in

respect of Kwale Law Courts and the whole of Coast Province with effect from 1st May 2007. I have personally verified and confirmed that the magistrate was so gazetted. On the second issue, the court is aware that apart from being gazetted to hear children matters, magistrates have other matters - both civil and criminal - that they deal with on a day to day basis. However, no evidence was laid before the trial court or this Court to show that the lower court case was heard alongside other cases that did not concern children. No cause lists of the hearing days were availed to demonstrate that apart from the subject case, there were other cases before the learned magistrate on the concerned days that did not deal with children's matters. This ground of appeal must and does therefore fail.

Whether the learned magistrate ignored the Appellant's bond with the children

21. The Appellant's case is that she had established a bond with the children because she had lived with both children and their mother before her demise. That the learned magistrate failed to consider the fact that the Respondent was a working father hence had no time to bond with the children who were of tender years then.
22. The proceedings before the lower court show that at the time the suit was filed and heard, the first child, M A was already in the Respondent's custody. The Appellant only lived with M for 2 months before she was taken by the Respondent following her mother's demise in May 2006. I don't think there was any bond forged between this child and the Appellant within those two months. As regards the second child, M O, the Appellant had only lived with him for 7 months prior to the filing of the lower court suit. The baby was about seven months old when the case was filed and about 1 ½ years when the judgment was delivered. Although there may have been a possibility of some bond having been created between M and the Appellant, I do not think that the bond of a seven month old baby or even a 1 ½ year old baby with the Appellant could have been that strong as to override the link the child had or was likely to have with his biological father and sister. To put it differently, there is a possibility that the Appellant may have developed some bond with the child at the time of filing the suit but such a bond could not have been too strong as not to be overcome with the bond that the child was going to forge in a closely knit nuclear family setting with his father and sister. In my view, the Appellant did not show anything so unique between her and the boy that he was not going to get when he started living with his biological father and sister.

Whether the learned magistrate took account of irrelevant religious factors

23. The Appellant's case is that the religious factors considered by the learned Magistrate were irrelevant in the circumstances of this case as the welfare of the child was the most important factor to consider. **Section 83 (1)** of the Act provides that in determining whether or not a custody order should be made in favour of the applicant, the court shall have regard to the wishes of the parent or guardian of the child [Section 83 (1) (a)]; the customs of the community to which the child belongs [Section 83 (1) (f)]; and the religious persuasion of the child [Section 83 (1) (g)].
24. It is not in dispute that the Appellant is a Muslim living in a predominantly Muslim setting while the Respondent is a Christian. It is also not in dispute that the children's deceased mother was a Christian. The Respondent submitted that it was the wish of the parents to bring up the children in a Christian setting and way. The Appellant, on the other hand, stated that she was able to bring up the children in a Christian way as she would give them to her brother, J M, a Christian, who would take them to church. In my view, the Respondent, being a Christian himself, is in a better position to inculcate best Christian teachings and practices upon the children than the Appellant who will have to enlist the services of third parties to induct the children into Christianity. Religion is a way of life and is best exemplified in day to day living in a home setting and not just by occasional visits to the church. I do not think that by handing over the children to her brother to take them to church and return them to a predominantly Muslim setting and neighbourhood the Appellant will achieve the parents' wishes of bringing up the children in a Christian way. **Section 23 (2) (c) (i)** of the Act gives the parent of a child the right to give parental guidance in religious, moral, social,

cultural and other values. Religious factors are, therefore, based on the Act and the same cannot be deemed irrelevant as argued by the Appellant.

Whether the learned magistrate took into account extraneous and irrelevant factors

25. The Appellant's case is that section 82 (3) of the Act allows any other person who is not the biological parent of the child to be granted custody of that child. That section provides as follows:

“83. (3) Custody of a child may be granted to the following persons —

(a) a parent;

(b) a guardian;

(c) any person who applies with the consent of a parent or guardian of a child and has had actual custody of the child for three month preceding the making of the application;

d. any person who, while not falling within paragraph (a), (b) or (c), can show cause, having regard to section 83, why an order should be made awarding that person custody of the child.”

26. Section 82 (3) (c) of the Act allows custody order to be made to any applicant other than the parent or guardian of the child but on condition that the consent of the parent or guardian is granted and the applicant has had actual custody of the child for three months preceding the making of the application. If these conditions are not met, the applicant should not be granted custody. It is not in dispute that the Respondent is the biological father of the children. The Appellant admitted that the Respondent has parental responsibility over the children. The Respondent did not give his consent that custody order be made in favour of the Appellant.

27. The Appellant only lived with M for two months before the Respondent took her away. The Appellant had not lived with M for three months prior to her application that she be granted custody of the children. She therefore did not meet the legal threshold for the granting of custody order over M. The Respondent could however be given custody over Ma with whom she had lived for about seven months prior to her prayer for custody order. The question is, could the court grant custody of the children to two separate custodians, that is, custody of M to the Respondent and custody of M to the Appellant? In my view, it was in the best interest of the children that they live and grow up together. Since the Respondent did not meet the legal requirement for custody order over M, it was right that the learned magistrate, among other considerations, ordered that M to join M in living with their biological father. This would enhance the upbringing of the children in a closely knit nuclear family setting. These are very sound factors that the learned magistrate put into consideration and the same are not extraneous or irrelevant.

28. Other circumstances of this case justified the granting of custody order of the children in favour of the Respondent. The Appellant, at the time the suit was filed, was aged about 54 years. The youngest child, M was seven months. By the time M would obtain the majority age of 18, the Appellant would be 72 years. In my view, the age factor also supported the granting of custody order in favour of the Respondent who was better placed to take care of the children to maturity.

29. The Respondent's case at the lower court was that he is employed and capable of providing for the children. He testified that he earns a salary of Kshs. 30,000.00 per month. The Appellant's case was that she owns rental houses and could provide for the children. When asked whether she had the title documents to the rental houses, she said that she did not as the same were with her husband. She then stated that she could live with the children even on the streets. In my view, the Appellant did not demonstrate her ability to provide for the children. In any event, she admitted that the Respondent had been sending her money for some of M's needs, an indication that she

could not provide for the children without external support.

CONCLUSION

30. In my view, the Appellant has failed, in her grounds of appeal, to

show that the learned Magistrate erred in law and in fact in delivering her judgment of 5th December 2007. The appeal is therefore dismissed with costs and the judgment of the lower court upheld. The Appellant is hereby ordered to hand over the minor, M O, to the Respondent forthwith. If Appellant fails to voluntarily hand over the minor M O to the Respondent an order is hereby issued for the Children's Department in or near Kisauni to obtain at the costs of the Appellant the minor M O and shall hand him over to the Respondent.

DATED and DELIVERED at MOMBASA this 20TH day of MARCH, 2014.

MARY KASANGO

JUDGE