



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 64 OF 2013

(Being an appeal against the Judgment and Decree of Ireri B. N., Principal Magistrate dated 29th May 2013 in Vihiga Senior Principal Magistrate's Court Children's Case No. 18 of 2008 – C.A -vs- F.S)

F S APPELLANT

VERSUS

C A RESPONDENT

JUDGMENT

The appellant was the defendant in the subordinate court. The plaintiff (now respondent) brought proceedings in the subordinate court through a plaint seeking custody of the child, payment of a monthly sum to her as reasonable maintenance for the child (L K) as well as costs of the suit.

After hearing the case, judgment was entered by the subordinate court in favour of the respondent against the appellant. The custody of the child was granted to the respondent who was the mother. The appellant was also ordered to pay the respondent Kshs.10,000/= per month towards maintenance of the child. The appellant was also ordered to pay costs of the suit.

Being dissatisfied by the decision of the trial court, the appellant brought this appeal through counsel on the following grounds -

- 1. The learned principal magistrate erred in law in granting custody of the child the subject of the suit in the lower court to the respondent without according the appellant a hearing.**
- 2. The decree granting the custody of the child to the respondent was founded on an error of the law as the learned Principal Magistrate did not afford the child as is mandatory the opportunity to give his views.**
- 3. The learned principal Magistrate erred on the issue of custody in making orders that discarded Maragoli Customary Law to which both parties are subject.**
- 4. The orders of the learned Principal Magistrate for payments of monthly maintenance of Kshs.10,000/= by the appellant was grossly exaggerated, legally erroneous, punitive and arbitrary and in total disregard to the total means of the child and the respondent and the means of parental responsibility.**
- 5. In entirety, the judgment and the decree does not accord with the best interests of the child.**

In the petition of appeal, the appellant has sought that the appeal be allowed, judgment and entire orders be vacated or set aside, that he be granted the custody of the child, that he takes exclusive responsibility for maintenance and welfare of the child, and that costs of the appeal be awarded to him.

The appeal proceeded by way of written submissions. The appellant through his counsel A.B.L. Musiega & Company filed written submissions on 24/3/14. The respondent through her counsel, K. N. Wesutsa & Company filed her submissions on 28/3/14.

The counsel who appeared for the parties, that is, Mr. Mukabwa, h/b for Mr. Musiega for the appellant and Mr. Kundu for the respondent relied on the written submissions filed. I have perused both the proceedings and judgment as well as the submissions on both sides.

As a first appellate court, I am required to re-evaluate the evidence on record afresh and come to my own conclusions. I am not bound to go by the findings of the trial court. See the case of Selle -vs- Associated Boat Co. Ltd. [1968] EA 123.

I have carefully considered the proceedings in the trial court. The appellant made general denials in his written defence. He even denied paternity of the child and asked for a DNA test. However, he did not present himself at the trial.

He was given a number of chances to enable him attend court. He did not. His counsel, at one time, indicated that he wanted to apply to cease acting for him because the appellant had gone to Tanzania and was not giving him instructions. The advocate was however, later on 8/1/2013, to file an application for re-opening of the case after the learned magistrate had closed the case.

That application was dismissed by the learned magistrate in a ruling delivered on 3rd March 2013. In effect therefore, the appellant did not tender any evidence at the trial. There is no indication that he attempted to appeal from that ruling.

What remained on record was the evidence of the respondent alone who testified as PW1. She stated that the appellant was her lover from the year 1994. That he accidentally made her pregnant in 1999. He took care of the child for two months. The appellant's mother shaved the child. The respondent even attended the funeral of that mother, and the child herein was paraded as one of the children of that family.

The respondent testified that she earned a monthly salary of Kshs.20,000/= and paid rent of about Kshs.2,000/= per month. That by July 2012 the child was aged 13 years and was schooling at [particulars withheld] Primary School in Std. 7. She asked for maintenance for the child as well as custody, but did not indicate any figure for that maintenance.

Based on this evidence, the learned magistrate delivered a judgment on 29th May 2013 stating in conclusion as follows -

“I have considered the evidence adduced by the plaintiff as well as the exhibits and pleadings filed herein. I find the evidence of the plaintiff unchallenged. The defendant has not disapproved that he is the biological father to the issue herein as contended by the plaintiff. I am therefore convinced that he is and therefore the plaintiff is entitled to some monthly maintenance, she has stated that the total maintenance for the child is Kshs.20,000/=:, therefore in my view, since plaintiff is working and is earning Kshs.20,000/=:, I view that they share the responsibility equally. In the foregoing, I therefore enter judgment in favour of the plaintiff as prayed for. She is also granted the custody of the child, being the mother and the person better placed and having lived with the minor since birth. I also order that the defendant will pay the plaintiff Kshs.10,000/- towards maintenance of the child every month. Costs of the suit to the plaintiff.”

The appellant has now come to this court on appeal, not denying paternity but infact claiming that he should be given custody of the child, and that he should be fully responsible for the maintenance of the child. At the trial, though he denied paternity, his advocate filed written submissions proposing that the court should grant the custody of the child to him or in the alternative he should pay Kshs.3,000/= per month and have access to the child and also pay the full cost of Secondary School boarding fees for the child.

In effect therefore, the appellant is not denying paternity. He is also not denying his responsibility to maintain the child. He is saying that he wants custody of the child, and he is also saying that the figure of Kshs.10,000/= is too high, and that infact he is willing to take full responsibility for maintenance of the child as long as the child is in his custody.

Both at the trial court and in this court, the appellant has not given facts to support his suitability to have custody of the child. He has not given facts to show his inability to pay the maintenance of the child of kshs.10,000/= per month. I appreciate that under the Children's Act and the Constitution of Kenya 2010 Article 53, the parental responsibility of both the father and mother is on a 50-50 basis, but of course taking into account the ability of each parent, as one parent might have a better ability to provide than another. The primary consideration is always the best interests of the child.

Though the appellant has been scanty on information that might assist the court, I will in the interest of the child vary part of the learned magistrate's decision. On custody, I will order that the mother will have custody of the child, but the appellant will have full access to the child. The magistrate wrongly based the amount for maintenance on the gross salary of the respondent.

On the maintenance, I am of the view that the proposal made by the appellant to bear full cost of boarding in secondary school is more preferable. I will however give the appellant the benefit of the doubt on the amount for maintenance because, if the respondent is earning Kshs.20,000/= and paying rent of Kshs.2,000/= then her disposable income for clothing, food and fare and maintenance of the child will be about Kshs.18,000/=.

It cannot therefore be said that she is using Kshs.10,000/= exclusively for the child. I will reduce the figure for maintenance of the child payable by the appellant to Kshs.8,000/= per month. However, when the child gets to Secondary School, the appellant will pay the full cost of tuition and boarding if it is a boarding school, in addition to the maintenance of Kshs.8,000/= per month. Parties will bear their respective costs of appeal. Appeal allowed to the above extent. It is so ordered.

Dated and delivered at Kakamega this 19th day of June, 2014

George Dulu

J U D G E