

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL NO. 6 OF 2014

BETWEEN

R A O APPELLANT

AND

C O O RESPONDENT

(Being an appeal from the Judgment and Decree in Rongo Principal Magistrates Divorce Case No. 29 of 2012 dated 11th September 2014 by Hon. Z. J. Nyakundi, Ag SPM)

JUDGMENT

1. This appeal arises from a judgment of the Subordinate Court at Rongo where the learned Magistrate made the following orders:
 - a. The marriage between the plaintiff and the defendant be and is hereby dissolved.
 - b. The defendant is granted custody of the children of the marriage.
 - c. There is no order as to costs.
2. The appellant's claim in the subordinate Court was undefended hence the appellant was shocked when the learned Magistrate, after allowing the divorce, awarded custody of the children to the defendant. It is this order that has precipitated this appeal.
3. As this is the first appeal, I am alive to the responsibility of the court. This court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see *Selle v Associated Motor Boat Co. [1968] EA 123*).
4. In my view, the learned Magistrate had no basis for granting custody of the children to the defendant when there was no cross claim by the defendant for custody and when in fact the claim was undefended. This was a grave error which calls for intervention of the appellate court.
5. Furthermore, in proceedings of this nature concerning children, the best interests of the children are of paramount importance as demanded by **Article 53(2)** of the Constitution and **section 4** of the *Children Act*. The learned Magistrate failed to take this into account when he made an order awarding custody of the children to the defendant without investigating the circumstances of the children.
6. The appellant has always been in custody of the three children of the marriage: S A, I W and T Z. There was no evidence to warrant a change in the circumstances of the custody of the children.
7. The appeal is therefore allowed to the extent that the judgment dated 11th September 2014 is varied on terms that the order granting custody of the children to the defendant is set aside and substituted with that granting custody of the children to the plaintiff/appellant herein.
8. There shall be no order as to costs.

DATED and DELIVERED at MIGORI this 24th day of October 2014.

D.S. MAJANJA

JUDGE

Appellant in person