



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO 8 OF 2013

B N K.....APPELLANT

VERSUS

E M M.....RESPONDENT

JUDGEMENT

By a Memorandum of Appeal dated 15th May 2013 and filed on 20th May 2013 B. N. K, the Appellant, is seeking to set aside the judgement and decree in Mwingi Senior Resident Magistrate's Court Children Case No 9 of 2012; legal custody of N. V. N, the minor, and costs of this appeal. He has listed seven grounds of appeal, namely:

- i. That the Learned Magistrate erred and misdirected himself in law and facts when he held that the Appellant had abandoned his parental duties when the evidence on record overwhelmingly proved that he had taken care of the child for a period of five years without the Respondent's support.
- ii. That the honourable magistrate erred and misdirected himself in law and facts when he held that the best interest of the child would be served if she was surrendered to the Respondent.
- iii. That the honourable magistrate erred and misdirected himself when he failed to appreciate that the Respondent had not been in touch with the child for five years and it was not therefore able to acquaint herself with the child without interfering with her life in a negative way.
- iv. That the honourable magistrate erred in law and fact when he failed to consider the Children Officer's Report which had recommended that he child should live with the Appellant despite having ordered for the same.
- v. That the honourable magistrate erred and misdirected himself when he failed to consider that surrendering the child to the Respondent would result to a lot of trauma (sic) to the child and interfere with her social life and consequently affect her psychologically.
- vi. That the honourable magistrate erred and misdirected himself when he put the Respondent's wishes in priority to the welfare and interest of the child.
- vii. That the honourable magistrate erred and misdirected himself when he ordered that the child be surrendered to the Respondent without considering the effect the same would have on the child's education and growth.

E. M. M, the Respondent, filed a suit on 30th May 2012 at the Senior Resident Magistrate's Court in Mwingi seeking custody and maintenance of the minor and costs of the suit. The minor was born on 23rd August 2007 and would currently be six years old. It appears from the evidence adduced in the lower court that the parties were in what is commonly referred to as 'come-we-stay' relationship where a man and a woman live together without undergoing any form of marriage. The minor was born of that union.

The evidence of the Respondent is that the Appellant left her with the minor in September 2008; that the

minor got ill and she took her to Gertrude Hospital for treatment incurring a bill of Ksh 5,000; that she called the Appellant and informed him about the bill and also visited him with the minor; that the Appellant snatched the minor from the Respondent claiming that the Respondent was unable to maintain the minor. She denied abandoning the minor and told that lower court that she was in a position to maintain the minor.

On his part the Appellant told the lower court that the Respondent abandoned the minor at the Appellant's gate when the minor was one year and one month; that he took the minor to his parents at Kiome Location where the minor has been living up to the time the matter was in the lower court.

The trial magistrate considered the matter before him and believed that the Respondent had been cruel to the minor by abandoning her at the door of the Appellant. He however considered that the Appellant had remarried and had delegated his parental responsibility over the minor to his parents. He granted custody to the Respondent. It is this decision that the Appellant is contesting in this appeal.

The Appellant has filed submissions and attached authorities. He is maintaining that the Respondent abandoned the minor and was cruel to her; that the lower court failed to consider the report by the Children's Officer; that the minor has been under the care of the Appellant and had grown to know the Appellant's place as her home and that the Respondent has never bonded with the minor.

The Respondent has stated in her submissions that the minor is of tender years and her custody ought to be with the mother; that the report of the Children's Officer is only persuasive and not binding to the court; that there is no contrary report that the minor is suffering or uncomfortable in the current circumstances; that the Appellant had abdicated his parental responsibility to his parents.

Both parties are however agreeable on the principle of law that the paramount consideration is the welfare of the minor. It is on this principle that I want to start basing my finding on. The record is clear that the Appellant was not living with the minor in Nairobi where the record shows he resides. The minor was living with her grandparents, the parents of the Appellant, in their rural home. The minor was therefore not benefitting from parental care either from her father or mother. The evidence on the circumstances under which the minor ended up with her father the Appellant is not clear. This is because it is the Appellant's word against that of the Respondent. The Appellant said the Respondent dumped the minor outside his door and left. The Respondent claims it is the Respondent who snatched the minor from her when she went to ask for money to pay medical bills for the minor. The only other evidence on the matter is that of their respective fathers who were testifying on what had been reported to each by the Appellant and the Respondent as the case may be.

Article 53 (2) of the Constitution states:

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

This is stated again under Section 4 (2) of the Children's Act which states as follows:

“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.”

The principle of the best interest of the child has been used by courts to base their decisions on (see **Civil Appeal No 30 of 1978 G v. G**). To my mind the best interest of the child involves the rights of the child as contained in Part 11 of the Children's Act. These include survival and development of the child, rights and welfare of the child, food, shelter, education including religious education, parental care, guidance and correction, leisure and recreation, non-discrimination, health care, protection from drugs and harmful substances, protections from child labour, from sexual exploitation, from abuse, etc. While this court is aware that it not only the parents who can accord children these rights, it is on both parents, especially in ideal situations, where the greatest responsibility lies. It does not matter whether the parents are married or not. These rights are not dissimilar to the principles considered in an Australian Case of **U v. U (2002-**

2003) CLR 238 at 257 cited with approval in **Manjit Singh Amrit v Papinder Kaur Atwal [2009]eKLR.**

A general principle has always been that custody of young female children should be granted to the mother unless there be shown exceptional circumstances to justify depriving the mother of her natural right to nurture the children. Evidence shows that the minor in this case was not under the care of the Appellant but that of his parents in their rural home. I have not come across any evidence to show that there are circumstances that make the Respondent be denied custody. She has told the court that she is in gainful employment and is capable of taking care of the minor. There is no evidence to the contrary.

I want to distinguish this case with the authorities cited by the Appellant, namely **Mathew Chepkwony & Another v. Paul Kennei Kiprono, Eldoret HCCA No 62 of 2006** and **Manjit case** above. The former case was dealing with stay of execution pending hearing of an appeal and the **Manjit case**, the minor was aged 13 and not a child of tender years.

I have considered all the grounds of appeal and the submissions. On ground one, the Appellant may have been taking care of the minor in terms of material things but the minor was in custody of his parents; on ground two, the lower court used its discretion to give custody to the Respondent. I find that the court based this discretion on sound findings of the law; on ground three, the Respondent may not have been in touch with the minor but I find no proof of exceptional circumstances as to her character that would indicate she has no moral capacity to take care of a female child of tender years; on ground four, the report of the Children's Officer is not binding to the court and the court always retains the final say in deciding cases by applying legal principles; on ground five there is no evidence that the minor is suffering psychologically while in the custody of the Respondent; on ground six I do not agree with the Appellant that the lower court put the Respondent's wishes above the interest of the child. My view is that the lower court had the discretion to decide the case in the manner it did and this court cannot fault the lower court unless it based that finding on wrong principles of law. Finally on ground seven, again there is no evidence that the minor will be affected negatively by living with the Respondent who is her mother.

Parental responsibility is shared between both parents. Both the Appellant and the Respondent have a duty under the law to contribute materially and otherwise to the welfare of the minor. I note that the lower court did not award maintenance of the minor. In my view there is nothing to stop this court from making a further order for the maintenance of this minor. This order would be in furtherance to the best interest of the minor. This court therefore will not disturb the orders of the lower court granting custody of the minor to the Respondent and visitation rights to the Appellant. I will however, and do hereby, order that the Appellant contributes to the welfare of the minor by making monthly payments towards maintenance of the child. The parties shall agree on a reasonable amount taking into account what each party earns and report to court for record of the same. I make orders accordingly.

S.N. MUTUKU

JUDGE

Dated, signed and delivered this 26th September 2013.