

3. When this appeal came up for hearing, it being a first appeal, and being guided by the overarching principle that in all matters affecting children, any decision or action that affects children the child's best interest must be of paramount consideration. I first ordered the production of the two children and directed the respondent to visit the children and acquaint himself with the children while noting that it is in the welfare of the children to associate with respondent who is their biological father. The children were brought to Court but they flatly refused to accompany the respondent and even when I interviewed them, they told me they would not accompany the respondent. It would obviously not be in the best interest to forcefully order the children be carried by force and be given to the respondent.

4. The court referred the matter to the District Children's Officer for counseling of the children and for filing of a social report regarding their background. **Ms. Temkou Carol**, the District Children's Officer, Trans Nzoia West filed a report dated 16th December, 2010. I wish to reproduce the report here below:-

'RE: CHILDREN IN NEED OF CARE AND PROTECTION.

CHILDREN:-

B.O – 6 YEARS (CLASS 2, D ACADEMY)
M.M.I – 11 YEARS (CLASS 6, M ACADEMY).

PARENTS:

FATHER:- G.M.B.
MOTHER:- E.A (DECEASED)

CURRENT GUARDIANS:

1. M.T.
2. M.S.

CASE HISTORY:-

The children's mother passed on in 2009 after being sick for quite sometime. During the burial, there was a heated dispute over dowry payments. This led to the delay in burial for over a month. When the dispute could not be resolved amicably the ladies family took the body and buried her. The children started living with their maternal aunt and uncles before their mothers (when she was sick) and continued to live with them up to now. The children seem to be highly influenced by their maternal aunts and are so biased against their father. They have been made to believe that it's their father who caused the death of their mother. They are very hostile towards their father.

The father to the children also behaves hostile to the children. He does not try to get friendly to them. He does not even extend a friendly hand to them, he presents himself to them like an aggrieved party by them. The maternal aunt M and the Uncle M are also very hostile towards the children's father. He too is very hostile towards them. The children are caught between their hostility. Both parties seem to be interested in the property of the late mother to the children and that is exactly what their fight is about. The father to the children is not making it any easier to the children as he has become too hostile.

RECOMMENDATION.

My highness, this are young children who need to be guided towards the right way they need to be taught to respect their father regardless of the two families differences. Heir guardians need to help them to grow up as children with respect, which they have not done. The children have a negative attitude towards their father. The guardians however, have taken care of their physical and educational needs well, but not socially. My highness, the issue of property is what needs to be addressed first, to remove the children from their familiar environment which they are in; to place them with their father who is at this point quite hostile to them will not be in their best interest. They could start by short visits that is if the honorable court deems fit to do so. This is subject to the ruling of the court."

5. This appeal was opposed by the respondent; he filed written submissions and also an affidavit to protest the admission of the report by the Children's officer. According to the respondent, the children have been indoctrinated and completely influenced to hate him and detest him by the appellants and their whole family. Moreover, the children were taken to Tanzania outside the jurisdiction of this court to live with other persons who are not the parties to this case. The respondents urged this court to follow the decision by the children's magistrate who opined in her ruling as follows:-

"It is not denied that the plaintiff is the biological father of the children and that their mother is now deceased. Further that the said children are not living with their uncle M. T and D.S in Tanzania. I gathered for the examination of the said children that their uncles changed their names from I.A. O and B.O.M to M.M and M.B. This act of taking away the children to Tanzania and changing their names is very suspicious. I read bad faith on the part of the respondents and their

brother. This court has a duty to protect the children from trafficking and related issues. The father of the children is alive and says he will take of them. The children say they wish to live with their uncle and that they are comfortable. I gather for the pleadings that they are 11 and 6 years old respectively. When I interviewed them they appeared to have been coached to the extend of even denying the names in the plaint.”

6. I have considered all the issues raised for and against this appeal. The principles to bear in mind when determining a matter involving a child, is always to uphold the best interest of the child. See section 4 (2) & (3) of the Children’s Act No. 8 of 2001 which provides as follows:-

“2. In all actions concerning children, whether undertaken by public or private welfare institution, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

1. *All judicial and administrative institution, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to –*

(a) *Safeguard and promote the rights and welfare of the child.*

(b) *Conserve and promote the welfare of the child.*

(c) *Secure for the child such guidance and correction as is necessary for the welfare of the child and in the public.*

2. *In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that option shall be taken into account as may be appropriate taking into account the child’s age and the degree of maturity.”*

7. The children were brought to this court, and in my own assessment they were in good physical health and they looked confident. The only problem is that they refused to accompany the respondent even for a moment. What disturbed the court is that the respondent is also cold and hostile to the children. He kept throwing tantrums that the children have been influenced by the respondent to hate and detest him. He did not objectively address the issue of how he could endear himself to the children by extending a hand of friendship and love to them. The children may very well have been influenced against the respondent, but on the other hand, I would expect the respondent to make some efforts to reach out and warm up to the children so that he can build confidence in them as their biological father.

8. A social report on this matter was necessary to guide the court in understanding how to make a decision that will impact on the future lives of the two children. It is important also for the respondent to provide information on where the children were going to live, who was going to look after them, what schools the respondent intends to put them and of course how he will build relationship with the children’s maternal relatives who have taken the responsibility of bringing up these children before June, 2009 when their mother died, this relationship is also important for the children. I find the issue of the custody of these children should be handled more carefully with a child social worker, the court and all the parties. The children and also the respondent need counseling so that none is traumatized by an order of custody. As it is now, the court cannot forcefully order the children be taken to the respondent who appears hostile, (although the hostility is directed to the appellants and all the relatives of the children’s mother). On the other hand the hostility has been counter productive because the children have taken it as an affront to them.

9. Accordingly for the purposes of enabling the respondent to take custody of the children, this has to be done gradually. The appellants should disclose to the respondent the schools where the children are in boarding as well any visiting days, school progress reports and fees requirements so that the respondent may be able to visit the children in the school and to provide them with their needs. Fatherhood goes with responsibility. The respondent shall have visitation rights of the children especially during the holidays for a period of 2 weeks every school holiday to begin with, for a period of 12 months. This application an exclusive rights of custody to be heard by another Magistrate after the 12 months trial period of visitation rights. This visitation will be facilitated by the District Children’s officer.

10. Under the children Act the court can make any order for the best interest of the child, in this regard the respondent should bear some parental responsibilities such as paying school fees, buying uniforms and other necessitates for the children. The amount payable should be agreed upon by the parties within 30 days, failure to agree the matter may be referred by any party for determination before the Children’s court. Accordingly, the order by **Hon .T.A. Odera – SRM** is interfered with to that extent. All issues arising on visitation and the issue of custody shall be handled by another Magistrate. This being a family matter, each party shall bear their own costs.

Judgment read and signed on 8th of April, 2011.

M. KOOME.

JUDGE.