



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
CIVIL APPEAL 561 OF 2007
E W W.....APPELLANT
VERSUS
D N.....RESPONDENT
J U D G M E N T

E W W (hereinafter referred to as the appellant) brought a suit in the Children's Court at Nairobi seeking orders *inter alia*, that legal custody of the two children of the marriage be awarded to her and that the respondent D N be ordered to pay such monthly sums as the court may deem fit for the maintenance of the children. In the suit the appellant claimed that she was married to the respondent in 1997 under Kikuyu Customary Law. She also claimed that there were two issues of their marriage namely O W and J W. The appellant claimed that she was forced out of the matrimonial home after the respondent married another woman and that the respondent retained the custody of O W. The respondent had denied the appellant access and custody of O W hence the suit.

The respondent filed a defence to the appellant's suit admitting having fathered O W but denying having fathered J W. The respondent also denied having married the appellant under the Kikuyu Customary Law or at all. The respondent claimed that the appellant had left O W in the respondent's custody since the child was one year old.

The suit was fixed for hearing for 29th May, 2007 and the respondent was served. The respondent did not however appear for the hearing of the suit and the hearing therefore proceeded *ex parte*. In her evidence, the appellant who was the only witness repeated her claims that she was married to the respondent under Kikuyu Customary Law and prayed for custody of her two children and an order that the respondent provides maintenance.

In his judgment delivered on 11th June, 2007, the trial magistrate found that the appellant had not proved the paternity of the child J W, nor has she explained how the respondent came to be in custody of O W. He further found that there was no evidence that the said O W was not being properly taken care of. He therefore dismissed the appellant's suit.

Being dissatisfied with that judgment, the appellant has filed a memorandum of appeal which was duly amended. The amended memorandum of appeal raises 5 grounds as follows:

- (i) The learned magistrate erred in law and in fact, in holding that the plaintiff did not establish the paternity of Joy Wangui.

- (ii) The learned magistrate erred in law in overly relying on technicalities without due regard to the best interest of the child.
- (iii) That the learned magistrate erred in law in unnecessarily fettering his discretion to call expert witnesses for proper determination of the case without due consideration to the best interest of the child and in total disregard to the principles and the spirit of the Children's Act of Kenya.
- (iv) The learned magistrate erred in law and in fact in finding that the custody of the child O W should remain with the defendant based on the fact that the plaintiff did not allege or prove that the defendant is not properly taking care of her.
- (v) The learned magistrate erred in law in finding that the respondent was not liable to maintain the child J W.

The appeal ought to have been heard in the Family division. However, due to some inadvertence it was registered in the civil appeal's registry and therefore landed before me. I gave the parties the option of going to the Family division but they felt it was expedient to proceed before me to avoid any further delay of the matter.

In support of the appeal, Ms Oganga who appeared for the appellant submitted that the trial magistrate did not take into account the interest of the minor children which ought to have been the paramount consideration as provided under Section 4(2) of the Children's Act. She further submitted that the trial magistrate failed to use his discretion as provided under Section 76(1) of the Children's Act, in calling for expert evidence or giving the minor child an opportunity to express her opinion. Ms Oganga contended that the trial magistrate relied on the defence, totally disregarding the plaint and the reply to the defence. She submitted that the trial magistrate relied on assumptions which were not supported by any evidence.

In support of her submissions, Ms Oganga relied on *Civil Appeal No. 120 of 2005 Habbans Singh Soor vs Fatima Ali Mohamed*, wherein the Court of Appeal expressed the opinion that children of tender age particularly little girls should be with their biological mother. Counsel also referred to *HCCA (Meru) No.72 of 2004 Adan Fungicha vs Hadijah Adan & Another*, where Sitati J. invoking Section 4(2) of the Children's Act held that: *the court had a responsibility to decide all cases under the Children's Act according to substantial justice, without undue regard to technicalities of procedure, remembering always that the welfare of the child is paramount in all cases.*

Mrs. Narangwi who appeared for the respondent opposed the appeal contending that it was misplaced, and unsupported by the facts or the law as pleaded. She maintained that the appeal before the court was an emotional appeal devoid of any facts or law. She submitted that under Sections 107 and 108 of the Evidence Act, Cap 80, which is applicable to the Children's Act, the burden remained upon the appellant who was asserting the facts to prove them. Mrs. Narangwi maintained that the appellant failed to establish the allegation made by her in the plaint, reply to the defence, and the affidavit of means. She further contended that the appellant failed to controvert the defence which was on record. Counsel pointed out that the respondent had denied fathering the child Joy Wangui and therefore it was imperative for the appellant to call evidence to prove that fact.

I have carefully considered the appeal before me. It is clear that in her evidence before the trial magistrate, the appellant did not make any effort to establish substantive facts which were in issue. The appellant called no evidence to prove her alleged marriage to the respondent, nor did she make any effort to establish the disputed paternity of the child J W. It is true that under Section 4(2) of the Children's Act, the best interest of the child should be a primary consideration. However, the basic rules of evidence still apply. Certain basic facts have to be established to enable the court bring Section 4(2) of the Children's Act into play. In this case, the alleged paternity of J W was crucial. Without evidence resolving that issue, the issue of parental responsibility could not arise. The appellant could not abdicate her burden of establishing facts necessary to prove her case and seek refuge under Section 4(2) of the Children's Act.

It was submitted that the trial magistrate failed to apply Section 76 of the Children's Act by failing to ascertain the feelings and wishes of the minor child or calling for expert evidence. That criticism is however, unfounded. The wishes of the minor child would not be of relevance in establishing the child's paternity. As for the calling of the expert evidence there must be a basis for such action. In a situation such as this, where there was no evidence at all linking the child to the respondent, there was no justification for calling expert evidence.

As to the issue of custody of O W, the respondent admitted having fathered the child. By the time the suit came for hearing before the trial magistrate the child had been in the custody of the respondent for over 2 years. There was no evidence adduced before the magistrate to explain what efforts the appellant had made to obtain custody of the child within that period. Moreover, no evidence regarding the age of the child was produced nor was any evidence adduced to show that the child was not being properly taken care of by the respondent. There was therefore no evidence before the trial magistrate to show that it was not in the best interest of the child for her to remain in the custody of the respondent nor was there any justification for the removal of the child from the custody of the respondent.

For all the aforesaid reasons I find no merit in this appeal and do therefore dismiss it with costs.

Dated and delivered this 27th day of November, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Mr. Mwanyumba H/B for the appellant

Advocate for the respondent absent