



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 31 of 2004

S O APPELLANT

VERSUS

L AO RESPONDENT

JUDGMENT

The parties before me are now a divorced couple. The Appellant, being aggrieved and dissatisfied with the Judgment of Senior Principal Magistrate (late) Mrs. Mlanga of the Children Court, is before me in appeal. I shall where appropriate refer the appellant as the father and the Respondent as the mother.

The main grounds of the appeal were financial incapacity and other misconduct on the part of the mother including that of adultery. It was contended further that those acts of misconduct were not challenged by her.

This appeal being the first appeal, this court has powers and obligation to look into the matters of fact and law keeping always in mind that the learned Magistrate had an advantage of seeing the demeanors of the witnesses. Thus unless the findings of the subordinate court was unfounded on facts and/or unreasonable and unsustainable in law, this court would not interfere with her decision.

There are some facts which are not disputable i.e. (a) the Respondent is the biological mother of the child and (b) the child was born on 12th December, 1998.

With these facts I can confidently restate the law as to custody of minor children which is well established in our jurisprudence. In short the trite law is that the custody of a minor child should be given to the mother unless there are exceptional circumstances which point out that the mother is hopelessly incapable to look after the welfare of the child. The court also has to take welfare of the child as a prime consideration in the matters of custody of minor children.

Before I evaluate the circumstances of the case under appeal, it may be appropriate to look into the decree of the court, which I quote:

“REPUBLIC OF KENYA

IN THE SENIOR RESIDENT MAGISTRATE’S COURT AT NAIROBI

CHILDRENS CASE NO.363 OF 2003

IN THE MATTER OF THE CHILDREN ACT 2001 AND

IN THE MATTER OF L O (MINOR)

L A APPLICANT/PLAINTIFF

VERSUS

S O RESPONDENT/DEFENDANT

Decree

Claim for:-

- a) *Custody*
- b) *Maintenance*
- c) *Costs*
- d) *Any other relief.*

This suit coming on the 19th September, 2003 for final disposal before the Children's Court No.1 Nairobi in the presence of the Counsel for the Plaintiff and of the Counsel for the Defendant.

It is ordered and decreed that:-

1. *The Plaintiff be and is hereby granted actual custody and control of the minor Lawrence Ojaamong' and the Defendant be allowed reasonable access to the child.*
2. *Joint Legal custody be and is hereby granted to the Plaintiff and the Defendant.*
3. *The Defendant to give the Plaintiff KShs.10,000/- as money towards maintenance of the Child and KShs.20,000/- for the monthly house rent.*
4. *The Defendant to cater for the school fees and other needs as and when they arise.*
5. *The costs of this suit be to the Plaintiff.*

Given under my hand and the seal of this court, this day of 2004.

SENIOR RESIDENT MAGISTRATE

NAIROBI CHILDREN'S COURT

The subordinate court from the perusal of the decree thus has granted joint legal custody to the parents with actual (*sic*) custody and control to the mother and reasonable access of the child to the father. Of course, she has also given order of maintenance as well as the payment of rent against the father. This decree is then challenged by the father.

From the evidence on record from the mother, I do note that she was the one who was looking after the child who was infected with T.B. She candidly agreed that she was not working but was capable of earning. She also pointed out that the father was a Member of Parliament and he was the one who forced her out of their home at Lucky Summer and that he was living with a girl friend at Westlands. She also

gave evidence as regards physical violence meted to her by the father.

In any event, I do note, with serious note that the father neither questioned her allegation of his own adultery nor did he confront her with her own acts of adultery and witchcraft which were the main features in his own evidence in response. This fact definitely shows that she was not given an opportunity to deny those allegations. In any event, I do find that those allegations were not proved by the father even on balance of probability. I may add that he also agreed that he has not complained against the acts of witchcraft to the police.

I have also carefully perused the evidence led before the subordinate court and find that no exceptional circumstances as to the moral degradation or incapacity are shown or proved against the mother and I cannot and do not interfere with the order as to the custody and control of the child given in her favour. The fact that she was not in gainful employment cannot be taken against her to show that she is hopelessly incapable of looking after the child.

The authorities cited by the Learned Counsel for the father do help the case of the mother, on the contrary.

Lastly, I shall consider the order as to maintenance. It was contended that by giving orders as to payment of rent the court has directly given the order in favour of the mother which cannot be given under the Children Act. I must confess I was unable to fully understand the said submissions. The custody and control have been granted to the mother and thus she has to stay with the child. Furthermore Section 98 of the Children Act does provide that the court may give directions regarding child's maintenance including housing amongst other provisions. (*emphasis mine*).

I am thus unable to find any error on the part of the Learned Senior Principal Magistrate's decision either in law or in facts.

The appeal is dismissed with costs to the Respondent.

Dated and signed at Nairobi this 12th day of May, 2006.

K.H. RAWAL

JUDGE

12.5.2006