



**BJN v GWN (Civil Appeal 46 of 2003)  
[2005] KEHC 2722 (KLR) (Family) (8 April 2005) (Judgment)**

*Ben Joel Ndegwa v Grace Wambui Ndegwa [2005] eKLR*

Neutral citation: [2005] KEHC 2722 (KLR)

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

**FAMILY**

**CIVIL APPEAL 46 OF 2003**

**MK KOOME, J**

**APRIL 8, 2005**

**BETWEEN**

**BJN ..... APPELLANT**

**AND**

**GWN ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal from the judgment and order of the children's Court at Kiambu dated 5th November 2003 in Kiambu PMCC No. 10 of 2002.
2. The appellant, Joel Ndegwa the father of the two minor children has listed a total of 35 grounds of appeal. During the hearing of this appeal some of the grounds that are repeated severally were combined into about six grounds of appeal as follows:
  - a) That the learned magistrate erred in law and fact in dismissing the appellant's counterclaim for custody of the children despite the express provisions of Section 4 of the *Children Act* 2001.
  - b) The Magistrate erred in law and fact in awarding Kshs.12,000/= for maintenance of the children which was against the evidence tendered by the appellant.
  - c) The learned magistrate erred in law and fact by failing to determine the mode of access to the children by the appellant and referring back to the parties in contravention to the provision of Section 83(2) of the *Children Act*.
  - d) The learned magistrate erred by failing to call the children in court and determine their welfare after accessing the welfare of the children and therefore failed to take into accounts the health need of one of the children



- e) The magistrate erred by relying on uncorroborated evidence presented by the respondent to the effect that the appellant was relating with another woman and that rendered him unsuitable to be granted the custody of children.
  - f) The learned magistrate ignored the evidence of the appellant and failed to take into consideration the evidence that the appellant was paying Kshs.4,300/= per month in running insurance policies for his children.
3. The genesis of this dispute which has snowballed into a highly contested custody and maintenance matter, begun in April 2000 when the appellant who was the sole bread winner of this family of the respondent and two minor children aged about 12 years and 9 years respectively walked out of his family without notice and leaving them in utter despair. The parties were residing in a rented house at Zimmerman Estate in Nairobi whereby the appellant used to pay rent and provide for the family. The respondent was not gainfully employed.
  4. This desertion by the appellant prompted the respondent to file a complaint with the Children's Officer, but due to the fact that the appellant refused to co-operate, and the respondent had no means or source of income to maintain and educate the children, she filed the matter before the Children's Court.
  5. At some point in time, the respondent moved to her parents home in Kiambu as she was unable to pay house rent for what was the matrimonial home at Zimmaman Estate. The court on its own motion transferred the matter to Kiambu and the learned Senior Resident Magistrate delivered a judgment on 5th November 2003 after having heard all the parties by way of oral evidence. The following orders which the appellant is appealing against were made:
    1. "Judgment was entered in favour of the plaintiff against the respondent in the following terms
      - a) School fees for the two children at Kshs.6,500 per month
      - b) General maintenance of the two children at Kshs.12,000 per month
    2. That the defendant shall have access to the children on terms to be agreed upon between the plaintiff and the defendant and in any event of such an agreement not being reached parties are free to come back to court for further orders on the issue of access to the children by the defendant
    3. For the avoidance of doubt Kshs.6,500/= per month in respect of school fees is not to be paid during the school holiday months.
    4. That the sum of Kshs. 12,000/= per month for general maintenance does not include the children medical expenses which are to be made by the defendant separately through his employers medical policy.
    5. In view of the nature of this case each party will bear his/her own costs of this case."
  6. These are the orders being appealed against. The appeal was opposed by the respondent, counsel for the respondent raised the following issues;
  7. Firstly, if the appellant wished to have the children appear in court, he was at liberty to apply for their attendance. The fact that he did not apply for their physical appearance he is now estopped by his conduct from raising the issue.



8. Secondly, the appellant was supposed to return to court for further orders regarding the issue of access to the children, which he has failed to do and preferred to pursue this appeal.
9. Concerning the issue of custody, counsel argued that the court made very careful evaluation of all the material presented to court and observed the generally accepted principle in matters of custody, that is, the custody of children of tender age is generally given to a mother unless there are special circumstances as envisaged under Section 83 of the *Children Act* 2001.
10. I have gone through the proceedings as well as the judgment the subject of this appeal, am satisfied that the learned magistrate arrived at the correct judgment in granting the respondent the custody of the minor children.
11. The conduct and wishes of the appellant were both carefully considered and although the magistrate considered that the appellant was already in a relationship with another woman, that was not the only determining factor that was put in consideration. For instance the respondent at one time tried to take the children to the appellant's rural home after they separated but the appellant promptly returned the children to the respondent's home whereby he left them with a stranger in the absence of the respondent.
12. Secondly the learned magistrate also considered that the appellant had abandoned the children who had been separated from him for about 3 years and finally took into account the appellants failure to provide for their school fees and general upkeep during the time when he abandoned the children.
13. In accessing the welfare of the children, the court has the discretion of calling the children or the Social Worker to provide information that may help the court. However, this may not be necessary if the material presented to the court is enough to enable the court make an assessment and on evaluation of who is best suited to promote the welfare of the children.
14. In view of the above assessment I am satisfied that the decision to award custody to the respondent was properly arrived at. I am satisfied that the learned magistrate properly evaluated the suitability of both parties before granting the respondent the custody.
15. How about the payment of Kshs.6,500/= for school fees per month and Kshs.12,000/= per month for the general welfare.
16. Page 9 of the judgment clearly shows that the magistrate evaluated the material that was placed before her. There was a schedule of school fees structure, while the parties lived together, the first child was in a private school the respondent gave reasons why she preferred the children to remain in a private school as opposed to the free primary education and despite the fact that the respondent was seeking for a larger sum for school fees the court awarded her Kshs.6,500/= per month for the two children for school fees. The court also reasoned out and considered the items the respondent would require for the general maintenance of the children before arriving at the sum of Kshs.12,000 being maintenance.
17. Accordingly I am not satisfied that the sums ordered for school fees and general upkeep were improperly accessed and arrived at and I find no justification in interfering with the order.
18. On the issue of access, perhaps it is best negotiated by the parties, but considering the acrimonious stance taken by the opposing sides, it is not possible for them to enter into any meaningful negotiations.
19. However the appellant was at liberty to go back to court for further orders which he never did.



20. It is important that children should be accorded an opportunity to associate with both parents for their own well being. In this regard I am inclined to accept this ground of appeal on access and grant the following orders:

- 1) That the appellant shall have access to the two minor children on every alternative week and from Friday after school and to return them on Sunday on or before 4 p.m. with effect from 21st April 2005 until further orders.
- 2) The appellant shall also have the children for two weeks on every school holidays.

The other grounds of appeal are hereby dismissed.

Each party shall bear their own costs.

It is so ordered.

**JUDGMENT READ AND SIGNED ON 8TH DAY OF APRIL 2005.**

**MARTHA KOOME**

**JUDGE**

