**Nyamweya v Isaac (Civil Appeal 67 (13) of 2020)**
**[2024] KEHC 4471 (KLR) (13 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 4471 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISII**

**CIVIL APPEAL 67 (13) OF 2020**

**JM CHIGITI, J**

**MARCH 13, 2024**

**BETWEEN**

**LORRAINE NYAKERARIO NYAMWEYA ........................................ APPELLANT**

**AND**

**OKARIA ONKANGI ISAAC ............................................................... RESPONDENT**

***(Being an appeal from the Ruling and orders of the Chief Magistrate Court at Kisii Hon. E.A Obina (Principle Magistrate) dated 13th October 2020 in CMC's Child Case No.18 of 2020)***

## JUDGMENT

1. At the trial court the Respondent herein through a plaint and a Notice of Motion dated 11th June, 2020 sought for custody and control of the minor issue from the Appellant to which the court vide a Ruling dated 13th October, 2021 the Notice of Motion was allowed and the trial court granted the Respondent herein custody of the child.
2. Aggrieved by the Ruling/decision of the trial court, the Appellant lodged this instant Appeal by a Memorandum of Appeal dated 2nd March, 2021 seeking for the Ruling dated 13th October 2021 be set aside on the grounds that:
    1. The learned trial magistrate erred in granting the physical custody of a child of tender years to the Respondent.
    2. The learned trial magistrate misdirected himself fundamentally in considering the interest of the Respondent instead of the minor child.
    3. The learned trial magistrate erred in making a decision against the weight of evidence affidavits on record

3. In advancing her case, supporting the Appeal, the Appellant filed her written submissions dated 21st April, 2023. In the main, the Appellant averred that the impugned ruling delivered by the trial court did not consider that the child was a minor of tender age of 6 years, having been born in 2015, in awarding custody to the Respondent who is his father which is against the general rule on custody of children of tender years.

4. The Appellant submitted that the minor is a child of tender age, as per Section 2 of the Children's Act, and as a general rule, mothers are usually given the legal custody of children of tender years unless there are exceptional circumstances not to do so. Also, that to the best interest of the child as envisaged under Article 53(2) of the *Constitution*.

5. The Appellant maintained that the learned trial court magistrate went against the prima facie rule, without sufficient reasons to depart from the prima facie rule where children of tender years are better placed with their mother. Reliance was placed on the cases of *K.M.M v J. I. L* [2016] eKLR, and the Court of Appeal Case of *Sospeter Ojamong v Lynette Amondi Otieno* Civil Appeal 176 of 2006.

6. To the Appellant, by then attending college classes as a student, did not make her incapable of taking care of the minor child having made suitable arrangements for the minor to be taken care of during the day. Therefore, that there were no exceptional circumstances to inform the trial magistrate to depart from the general rule – custody of minors of tender age to be granted to the mother.

7. Further, as per the Appellant, the trial magistrate in error considered the wishes of the Respondent, as oppose to the best interest of the minor child in contravention of Article 53 of the *Constitution*, and Section 4(3) and 76(3) of the *Children's Act*.

8. It is the Appellant's position that the environment she had provided to the minor child was suited for the best interest of the child, notwithstanding the fact that the Respondent was of more financial capability than the Appellant. Relied on the case of *Manjit Singh Amrit v Papinder Kaur Atwal* [2009] eKLR.

9. I find the issue for determination being as to whether the appeal is merited.

**Analysis and Determination**

10. This being a first appeal, the court is obliged to reconsider and re-evaluate the evidence adduced in the trial court and to draw its own conclusions on the same.

11. The duty of a first Appellate Court was succinctly stated by Wendoh J. in *JWN v MN* [2019] eKLR in the following words:

> " It is settled law that the duty of the first appellate court is to re-evaluate the evidence tendered in the subordinate court, both on points of law and facts and come up with its findings and conclusions."

12. Further in the case of *Selle & another v Associated Motor Boat Co. Ltd* [1968] EA the court held as follows: -

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

13. The Application was based on the grounds on the face of it and further supported by the Respondent's affidavit sworn on the 11th June 2022. The Appellant herein vehemently opposed the Application by way of filing Replying Affidavit. Both counsel for the parties were granted leave to file further and/or supplementary Affidavits.

14. The Appellant herein, Respondent at the trial court, presented her case that the Respondent herein, Applicant in the trial court, was a violent man, had remarried, did not support the child, and the child being of tender age was his [child's] best interest to be placed with her [the mother].

15. The Respondent herein, Applicant at the trial court, stated his case that the mother to the child was unavailable as was always in movements leaving the child with strangers, and sometimes with him as the father, and that the mother lacked permanent abode, was a student, and had been found with another man in the matrimonial home. He denied being remarried to another woman. He further stated that he had sent to the mother of the child a total of Kshs 423,090 in a period of one and a half years while she was in school.

16. At the end of the trial, the learned magistrate ordered that the physical custody be granted to the father, while the mother be allowed reasonable liberal visitation rights to the child; the father to cater for all the minor's needs since mother was still a student; and should circumstances change either party be at liberty to apply for review or variation of the orders.

17. In the case of in the High Court of Kenya at Nakuru High Court Children Appeal No E011 of 2021 in the matter of SCKK & JJWK (minors) SMM v Respondent at paragraph 70. I will begin with the Child of Tender Years Doctrine. Historically, under Common Law, the custody of children was given to their fathers as part of their property rights. This was until the introduction of the Tender Years Doctrine, which some historians attribute to the specification of the gender roles during the Industrial Revolution. Over time, the doctrine has continued to evolve with many Courts in various jurisdictions moving away from the doctrine to the more inclusive 'best interest of the child' principle.

    For instance, the Supreme Court of Canada in the earlier case of *Talsky v Talsky*, [1976] 2 S.C.R. 292 applied the doctrine as follows:

    I am of the opinion that that criticism is not deserved. The learned trial judge did not regard the view that children of tender years should be given to the custody of their mother as any rule of law. As Roach J.A. put it, it is as old as human nature, and as learned counsel for the appellant put it in this Court, it is a principle of common sense. It is simply one of the more important factors which must be considered in the granting of custody. In the view of the learned trial judge in the present appeal, it was such a strong factor as to be well nigh conclusive. In the view of the Court of Appeal, it was outweighed by the other matters to which I have referred. Under all the circumstances in the present case and particularly in view of what I have already outlined as the careful plans of the husband for the care and upbringing of the children in his immediate presence, I am of the opinion that the learned trial judge gave too great a weight to that factor.

    Later in *Young v Young*, [1993] 4 S.C.R. 3, the Supreme Court of Canada seemed to alter its earlier position and remarked thus:

    As has been widely observed by those studying the nature and sources of changes in family institutions, popular notions of parenthood and parenting roles have undergone a profound evolution both in Canada and elsewhere in the world in recent years...One of the central tenets of this new vision is that child care both is no longer and should no longer be exclusively or primarily the preserve of women. Society has largely moved away from the assumptions embodied in the tender years doctrine that women are inherently imbued with characteristics which render them better custodial parents

(for a discussion, see D. L. Chambers, "Rethinking the Substantive Rules for Custody Disputes in Divorce" (1984), 83 Mich. L. Rev 477). Moreover, both economic necessity and the movement toward social and economic equality for women have resulted in an increase in the number of women in the paid workforce. Many people have tended to assume that a natural result of this change would be the concurrent sharing of household and childcare responsibilities with spouses, companions and, of course, fathers. In addition, the increased emphasis on the participation of fathers in the raising of children and financial support after divorce gave rise to claims by fathers and fathers' rights groups for legislative changes that would entitle them to the benefit of neutral presumptions in custody decisions.

18. Similarly, in the United States, most of the State Supreme Courts have now done away with the doctrine and replaced it with the best interest of the Child principle. For example, the Supreme Court of Virginia in *Burnside v Burnside* 216 Va. 691, 222 S.E.2d 529 (1976) affirmed its decision in *Portewig v Ryder*, 208 Va. 791, 794, 160 S.E.2d 789, 792 (1968). In both cases the Court opined that the Tender Years Doctrine was a flexible rule, not to be applied without regard to the surrounding circumstances.

19. Similarly, the Supreme Court of Alaska in *Johnson v Johnson*, 564 P.2d 71 (Alaska 1977) objected to the non-selective application of the Tender Years Doctrine. The Court stated thus:

> In Sheridan, we noted our disapproval of the "mechanistic application" of custody rules and reversed the trial court's award of the children to their mother on the ground that: It appears that the basis for resolution of the custody issue was the tender years' doctrine to the exclusion of any other legal criteria or relevant factual considerations. Seemingly ignored in the decisional process was the paramount criterion of the welfare and best interests of the children which should be determinative.
>
> I must caution myself against reliance on foreign jurisprudence and consider the unique Kenyan circumstances of this case. As the Supreme Court warned itself in *Jasbir Singh Rai & 3 others v Estate of Tarlochan Singh Rai & 4 others* (2013) eKLR, that while commonwealth and international jurisprudence continues to be pivotal in the development and growth of our jurisprudence the Court needs to avoid mechanistic approaches to precedent, just because they seem to suit the immediate occasion.
>
> However, it is apparent that while the Tender Years Doctrine, is persuasive in considering custody of children, it can no longer be considered as an inflexible rule of law. This is not to say that the substance of the rule has dissipated completely; it is to say that its inflexibility has been eroded by the evolving standards of decency reflected in Article 53 of the *Constitution*. Differently put, the Tender Years Doctrine must now be explicitly subjected to the Best Interests of the Child Principle in determining custody cases. Differently put, the welfare of the children is the primary factor of consideration when deciding custody cases. The judicial rule that a child of tender years belongs with the mother is merely an application of the principle in appropriate cases. The modern rule begins with the principle that the mother and father of a child both have an equal right towards the custody of the child."

20. I have relooked at and reconsidered the evidence before trial court. I have also paid due regard to the decision by the learned magistrate. It is worth noting, that the ruling/decision is on the Notice of Motion application in a pending suit. The Orders issued, as acknowledged by the learned magistrate are not on permanent basis, but as at the given circumstances then with an option to vary or review the same.

21. In rendering the said ruling/decision, the learned magistrate observed that, "Until the Respondent finishes her education and settles down in a permanent abode friendly to the minor and doing the best

I can in the best interest of the child, I make the following orders since both parents have a right to participate and make inputs in the major decisions concerning the child, educational, religion, health."

22. In the premise, this court finds no error of fact or law in the ruling of the trial court. Consequently, the appeal is dismissed for lack of merit. The suit in the trial Magistrate's court be heard and determined expeditiously factoring the best interest of the child.

It is so ordered.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY of MARCH, 2024.**

**..........................**

**CHIGITI (SC)**

**JUDGE**