



CA v KO (Family Appeal E010 of 2023) [2024] KEHC 6076 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6076 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
FAMILY APPEAL E010 OF 2023
DO OGEMBO, J
MAY 23, 2024**

BETWEEN

CA APPELLANT

AND

KO RESPONDENT

(Being an Appeal from the Judgment of the Hon. Erick Malesi, PM in Children Case Number E003 of 2023 at Madiany PM’s Court, delivered on 8/11/2023)

JUDGMENT

1. KO, the Respondent herein filed the Appellant Christin Anyango, in the above case before the Madiany Principal Magistrate’s Court claiming legal custody of two minors, namely Alice Orodo (4 years) and Fanuel Raila (two years). He also prayed for costs of the suit. After hearing the parties, the Honourable trial magistrate in a judgment delivered on 8/11/2023 ordered as follows:

- a. The Plaintiff shall have actual custody of the 2nd children.
- b. The Defendant shall have unlimited access to the children.
- c. The Plaintiff shall carter for all educational needs of the two children.
- d. A progress report to be prepared and filed in court after one month. Mention on 20/12/2023 to receive Children Officer’s Report.

The court did not make any orders as to costs.

2. Aggrieved by the judgment of the court, the Defendant (Applicant herein) filed an appeal against the same before this court. In the memorandum of Appeal filed herein on 22/11/2023 and dated the same date, the Appellant has listed to the following grounds of appeal.

- a. That the learned magistrate erred in law and in fact in arriving at a judgment involving minors in total disregard of the children’s report which is crucial in children’s matters.



- b. That the learned magistrate erred in law and in fact by finding that the Respondent's family could take care of the minors better yet the appellant himself was unemployed and only relied on support of siblings who are abroad.
 - c. That the learned magistrate erred in law and in fact in awarding actual custody to the Respondent yet the said Respondent was not a suitable person to be given actual custody on the basis that he was alcoholic.
 - d. That the learned magistrate misdirected herself by using a one day interaction of the minors loved their father more than the mother hence arriving at a wrong judgment
 - e. That the learned magistrate misdirected himself by failing to appreciate that the minors in question were of tender age and actual custody ought to have been granted to the appellant herein.
 - f. That the learned magistrate erred in law and in fact in making a finding that the Respondent worked at home and could cater for the minors while in real sense the Respondent was unemployed and did not have any source of income hence cannot provide for the minors.
 - g. That the learned magistrate erred in law and fact in making a conclusion that the Appellant could not care for the minors because she did not have work while in essence she already had another business of selling mtumba and furthermore, the Respondent could still support the minors even when they are still in custody of the Appellant.
3. The Appellant prays that this appeal be allowed, the judgment of the trial court be set aside or varied in that the appellant be granted actual custody of the minors. She also prays for costs of this appeal. Respondent opposes this appeal.
 4. By agreement of the parties, this appeal was canvassed by way of written submissions. Both sides duly complied and filed their set of submissions.
 5. This court is seized of this matter as a first appellate court. The jurisdiction of the 1st appellate court is well settled. In the case of *Selle v Associated Motor Boat Co. Ltd & Others* (1968) EA 123, it was held that it is to reassess, re-evaluate and reconsider the evidence before the trial court and to come to its own conclusions bearing in mind that the appellate court has not had the advantage of hearing and observing the witnesses. It is therefore necessary that this court considers the evidence of the parties before the trial court.
 6. From the record of proceedings, both the Plaintiff and the Defendant's evidence was based on their statements filed in court, and on which they were both cross examined.
 7. It was therefore the evidence of the Plaintiff (Respondent herein, that the is the father of the two minors. That the appellant took away the children on 19/8/2023 to an unknown destination, together with their documentation and birth certificates. That he appellant abdicates her parental responsibilities towards the minors and has not contributed at all towards their upkeep despite operating a hotel and it is the Respondent who fully takes care of the children. That he is a man of means able to take care of the children. He added that appellant is hostile to the children and has no motherly love, often using abusive language in their presence or at them. That the appellant has no means at all and it is in the best interest of the children for custody to be given to the Respondent.
 8. The evidence of the appellant was that indeed they are parents of the two minors. That on 20/8/2023, the Respondent ordered her to leave after a series of abuses, making her leave to her parents' home with the children out of fear for their safety. She gave an example of being assaulted by the Respondent's



brother on 7/7/2020. That Respondent gangs up against her with his kin. That she takes care of the children in terms of food, clothing and medical expenses from proceeds of her business. She consented to sharing of parental responsibility.

9. The Appellant denied that Respondent is a man of means as he is unemployed and relies on handouts from his siblings. That whenever Respondent is sent money, he goes on drinking sprees ending up in violence against the Appellant and the children. She knows of no bank account the Respondent has opened for the children or any work he does. That as a holder of Diploma in Food and Beverages, St. Antony Lwak Institute, she runs a food canteen in the premises of District Commissioner Aram, and therefore is of means.
10. Both sides have filed submissions herein. Mr. Ooro for the Appellant submitted that Section 8 of the Children's Act stresses on the best interest to the child on matters of custody. Counsel also referred to Section 103 of the Act. It was submitted that the trial court awarded custody to the father on the basis that he had time to care and nurture the minors and that the mother had left the minors under the custody of their 60 years old grandmother and so was not suitable that custody of the minors, 4 and 2, ought to be with the mother. Counsel relied on the case of *M.A v R.O.O* (2013) eKLR, where the court held in part;

“.....in Kenya, it has been accepted by the courts that the custody of a child of young and tender years (defined in Section 2 of the *Children's Act* to mean a child of age ten (10) years and below ought to be with the mother unless there are compelling reasons for the said custody to be removed from the mother and be given to the father.”
11. Also the case of *Sospeter Ojaamong v Lynette Amondi Otieno*, Civil Appeal No. 176 of 2006.
12. That in this case there are no such exceptional circumstances to warrant custody being given to the father.
13. It was also submitted that in arriving at the decision, the trial court considered irrelevant factors ie that the father has time to care and nurture the children.
14. The Counsel for the Respondent, Mr. Oreda, on the other hand, submitted that Article 53 of the *Constitution* puts the interests of the child as paramount. That the circumstances for consideration are in Section 83 of the *Children Act*. That no parent has superior rights over the child. That Section 76 (3) (f) directs the court to consider financial ability of each parent. That Respondent engages in farming and relies on family business for subsistence.
15. That the court observed how the children interacted with the Respondent who carries on his activities from home and has time to care and nurture the children. That it is only fair and reasonable that custody be vested on the father.
16. I have considered the evidence of the parties and also the submissions made by the two learned counsel for the parties. The issue for determination herein is who between the Appellant and Respondent is better suited to have custody of the two minors, aged two and four respectively. Both the *Constitution* of Kenya and the *Children's Act* gives clear directions on what ought to be considered in matters that relate to children. Article 53 of the *Constitution* of Kenya declares the rights of children in Kenya as including:-
 - i. Right to a name and nationality from birth.
 - ii. Free and compulsory basic education



- iii. Basic nutrition, shelter and health care.
- iv. Protection from abuse, neglect, harmful cultural practices any form of violence, inhuman treatment, and punishment, and hazardous or exploitative labour.
- v. Parental care and protection.
- vi. Not to be detained.....

And at sub-article (2) thereof,

“A child’s best interests are of paramount importance in every matter concerning the child.

17. The *Children’s Act*, also gives a very elaborate declaration on what to consider while dealing with any matter that involves children. At Section 4 (2) of the *Act*, it is provided:

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

The same statute at sub-section (3) goes on to provide;

“All judicial and administrative institutions, 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 right 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 public interest.

18. The common thread that runs through both the constitutional and legislative directions regarding matters that deal with children is that the main consideration is issues of children is the best interests of the child. It is in no way the interest of one or either of the parents or in fact any other person.

19. Section 83 of the *Children Act*, further gives direction on principles to be applied in making custody orders the same states:-

“In determining whether or not a custody order should be made in favour of the applicant, the court shall have regard to:-

- a. The conduct and wishes of the parent or guardian of the child.
- b. The ascertainable wishes of the relatives of the child.
- c. The ascertainable wishes of any forstar parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application.
- d. The ascertainable wishes of the child.



- e. Whether the child has suffered any harm or is likely to suffer any harm if the order is not made.
 - f. The customs of the community to which the child belongs.
 - g. The religious persuasion of the child.
 - h. ..
 - i. ..
 - j. The best interest of the child.
20. In this particular case, the 2 competing interests are those of the father (Respondent) and the mother of the child (Appellant) who are separated and no longer live together.
21. The circumstances of the Respondent are that he stays in his family home. He is not in any formal employment or business. In his evidence, he works from home, and is able to take care of the two minors. That as their father, he is better placed to nurture the minors.
22. The evidence of the appellant, on the other hand, that she now stays at her parents' home. That she has income from a hotel business that she runs and is able to give care to the two minors. She refutes the evidence of the Respondent that the Respondent lives on the good will of his siblings.
23. It is therefore, for this court to determine who between the appellant and the Respondent would be better placed to have custody of the two minors in view of the express provision of the law (as seen above), that the paramount consideration that the court must make is what could be in the best interest of the children.
24. This court was referred to a number of relevant court decisions that would give this court guidance on this issue. In the case of *M.A. v R.O.O* (2013) eKLR, cited by the Appellant, the court held in part;
- “.....In Kenya, it has been accepted by the courts that the custody of a child of young and tender years (defined in Section 2 of the Children’s Act to mean a child of the age of 10 years and below) ought to be with the mother unless there are compelling reasons for the said custody to be removed from the mother and be given to the father.”
25. And in the case of *Sospeter Ojaamong v Lynnette Amondi Otieno*, Civil Appeal No. 176 OF 2006, the court held:
- “The general principle of law is that custody of such children should be awarded to the mother unless special and peculiar circumstances exist to disqualify her from being awarded custody...The mother’s disgraceful conduct, say her immoral behaviour, drunkenness habit, bad company are some of the factors which would disqualify her being awarded custody of a child of tender age.”
26. From the legal provisions and the trends set by the courts, custody of a child of tender years would vest on the mother unless there are such exceptional reasons that would justify such custody being vested on the father and not the mother. There is no doubt herein, that the two children subject of this case as minors of tender years. They are aged two and four years respectively.
27. Whereas, the Respondent claims the right of custody over the two minors, the Respondent has not shown any special or exceptional reason why such custody would not be bestowed on the mother of the two children, who is ready, willing and able but to himself. The Respondent claim is based on his



belief or intention to nurture the children. To me, this ground that the Respondent is putting forward his interest herein ahead of the best interest of the children. His plea and intention to nurture the children is also not based on any legal principle or consideration. The same therefore cannot override the general principle that custody of a child (children) of tender years be vested on the mother in the best interest of the child.

28. It is in view of this consideration that I am persuaded by the submissions of learned counsel for the Appellant, that the trial magistrate in making the judgment aggrieved of and issued on 8/11/2023 was persuaded by and considered irrelevant factors. Had the trial court considered the relevant law, it obviously would have arrived at a different finding and awarded custody of the two minors to their mother, the Appellant.
29. It is for this reason that I find merit in this appeal of the Appellant dated 22/11/2023. I allow the same, set aside the orders of the trial court of 8/11/2023. I order that the Appellant be granted the actual custody of the two minors herein.
30. In view of the nature of the claim herein, regarding custody of the children of the two parties, I order that each party to this appeal shall bear own costs of this appeal. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 23RD DAY OF MAY, 2024

D. O. OGEMBO

JUDGE

23/5/2024

Court

Read out in Open Court in presence of Mr. Ooro for Appellant and Mr. Oreda for Respondent.

D. O. OGEMBO

JUDGE

23/5/2024

