



USA v IAO (Children’s Case E007 of 2023) [2024] KEHC 5400 (KLR) (3 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5400 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CHILDREN’S CASE E007 OF 2023
JN ONYIEGO, J
MAY 3, 2024
IN THE MATTER OF RI AND R (MINORS)**

BETWEEN

USA APPELLANT

AND

IAO RESPONDENT

(Being an appeal against the judgment of Hon. R. Aganyo P.M. delivered on 15.03.2023 in Children’s Case No. 044 of 2022 in PM’s Court at Wajir)

JUDGMENT

1. By a plaint dated 15.11.2022, the appellant herein moved Wajir Children’s Court seeking; physical custody of their two children the subjects of these proceedings; payment of Kes 40,000 as monthly maintenance and costs of the suit.
2. It was her case that she and the respondent are husband and wife although separated and that their marriage has been blessed with two children (twins) one of whom is attending special education as she is handicapped thus requiring special care. It was averred that in the year 2019, through a parental responsibility agreement signed by both parties, she handed over custody of the two children to the defendant/respondent owing to her poor mental health which has since improved. She claimed that during the children’s stay with their father ‘R’ underwent circumcision thus violating her rights.
3. In response, the defendant entered appearance on 21.11.2022 and further filed a defence to wit that he had not neglected his parental duties. He urged that since the appellant had relinquished her motherhood duties to him, there was no good reason fronted by her to warrant the children being placed under her custody again. He argued that the children’s physical comfort, proper upbringing, moral and religious welfare ought to be considered before the plaintiff is granted physical custody of the minors.



4. He blamed the plaintiff for what he called mischief as it had taken her three years before making attempts to reclaim the physical custody of the children. He thus urged the court that in as much as he was not opposed to sharing of legal custody with the plaintiff, the best interest of the minors lay with him being granted the actual custody.
5. The defendant also filed a counter claim wherein he corroborated the plaintiff's claim that previously, they were married but had since separated. That in the year 2019, the plaintiff's ill health and lack of permanent place of abode rendered her unable to take care of the minors. It was claimed that through the Wajir East-Sub County office, a mediation was held whereby the minors were handed over to him. Further, it was averred that the claim by the plaintiff that she had fully recovered was far from the truth. That if the plaintiff were to be exposed to strenuous and emotive devotion of bringing up the minors herein, her health condition was more likely to worsen.
6. It was his case that he had since enrolled RI to a school while R was receiving special treatment and as such, she had experienced progressive improvement. He stated that at no particular point in time had the plaintiff been denied access to the said minors and that given custody of the said children, he would still ensure that the plaintiff has access to the minors herein. He thus prayed that the suit be dismissed and he be granted custody of the minors in question.
7. The trial court heard both parties and via a judgment delivered on 15.03.2023, the trial magistrate held as follows:
 - i. The defendant be granted legal custody of both children for him to continue taking care of them and that he be supported with proper supervision and monitoring by the Children's Office.
 - ii. The plaintiff being the mother of the children, is granted access and visitation rights of the said children as named in the matter at their place of residence at reasonable times on condition that the said access does not interfere with their well being (with support and proper supervision and monitoring by the Children's Office, if need be) with a warning to the defendant and his family members to desist from committing any criminal act to stop or interfere with the plaintiff's rights of the said granted access, which may otherwise be interpreted as contempt of this court's orders.
 - iii. I do not grant any orders with regard to maintenance in the circumstances of the case, as I find that it is not necessary to do so.
 - iv. The parties are at liberty to attend counselling sessions if need be at the Children's psychosocial support services to facilitate family reconciliation and mediation to enhance better and peaceful co-existence between the family members herein, promoting safeguards and welfare of the minors in the best interest of the children.
 - v. Each party to bear its own costs.
8. Aggrieved by the said judgment, the appellant proffered a memorandum of appeal dated 35.05.2023 citing 12 grounds of appeal summarized as hereunder;
 - i. The learned magistrate erred in law and fact by awarding physical custody of the minors herein to the respondent.
 - ii. The learned magistrate erred in law and fact by failing to take cognizance of the fact that one twin had been compelled to undergo female genital mutilation and the other twin faced the risk of being made to undergo the cut.



- iii. The learned magistrate erred in law and fact by failing to take cognizance of the elements of the parental agreement previously entered by the parties.
 - iv. The learned magistrate erred in law and fact by failing to consider the best interest of the minor by failing to grant the appellant unlimited time with the minors herein despite the fact that she is their biological mother.
9. She sought for orders that:
- i. The appeal be allowed.
 - ii. This Honourable Court grants her the physical custody of the children as they are of tender years and therefore require special care which the appellant is better placed to provide.
 - iii. This Honourable Court do compel the respondent to provide monthly maintenance for children of Kes. 40,000/-.
 - iv. Costs of the appeal.
10. The court directed that the appeal be canvassed by way of written submissions which the appellant through the firm of Nyipolo & Associates Advocates in their submissions dated 16.10.2023 submitted that, the trial court erred by departing from the prima facie rule that custody of young female children of tender years ought to be granted to the biological mother. Counsel placed reliance on the case of *Gitbunguri v Gitbunguri* [1979] eKLR wherein it was settled that
- ...the custody of young female children should be granted to their mother, in the absence of exceptional circumstances...
11. It was urged that in total disregard of the prima facie rule, the trial court granted custody of the minors herein to the respondent even after it was submitted in court that one of the minors herein had already been made to undergo female genital mutilation. That the court disregarded the issue despite the same being brought to its attention.
12. It was submitted that financial inability of apparent is not a ground to deny such party actual custody of a minor. In that regard, reliance was placed in the case of *HGG v YP* [2017] eKLR where the court stated that
- ...the ability of the father to provide a better life to a child in material sense does not give such parent priority over the mother or unrivalled chance to get custody of children of tender age.
13. It was further contended that the court proceeded on a wrong principle that it had considered the views of a minor yet the children had stated that they preferred to live with their father but to occasionally get to see their mother. That though the feelings and wishes of a child are to be considered, the court must take into account the age of the child and the degree of maturity of the child....
14. That the court erred in disregarding the parental responsibility agreement that existed between the parties. Counsel argued that the said agreement as listed in the first document of the respondent's list of documents, para 15 both acknowledged that the appellant temporarily granted custody of the minors to the respondent owing to the appellant's failing health. This court was referred to the Supreme Court of Kenya decision in the case of *MAK v RMAA & 4 Others* (Petition 2 (E003 of 2022) [2023] KESC 21 (KLR) (2nd March 2023) (Judgment) where the court observed that where there is a parental responsibility agreement a court ought to uphold the same. The appellant thus urged that in reference



- to the above authority, the trial court was in error for failing to interrogate the PRA status and its validity.
15. It was argued that the trial court fell in error by giving access orders that were unreasonably restrictive without factual basis. That there was no evidence tabled before the court to show or prove unsustainability of the appellant not to be granted custody of the minors. It was argued that in the case of *K.M.N. v Children's Court, Tononoka & Another* [2015] eKLR the High Court frowned upon unnecessary restrictions placed by the trial court that hindered access to the child in issue and further termed the same as an impediment to the stable development of a child. This court was therefore urged to find in favour of the appellant.
 16. The respondent through the firm of D.K. Wanyoike & Advocates submitted while relying on their submissions dated 06.11.2023 urging this court to consider the facts on record for the reason that this court did not have an opportunity to access the witnesses unlike the trial court. That the learned trial magistrate was categorical that the appellant did not tender evidence to show that she was capable of taking care of the minors. The court could not determine whether the appellant lived in Nairobi or Wajir and so, it was not easy to determine whether she was in a position to safeguard the interests of the minors herein.
 17. It was further submitted that the respondent had proved to the court that he had been living with the minors for three years prior to the filing of the suit and that he was single handedly capable of providing the minors with their needs. This court was urged that the court was right to find that there existed exceptional circumstances and the same formed the basis of the impugned judgment. Reliance was placed on the case of *I.O. v S.A.O* [2016] eKLR where the court emphasized that matters to do with custody of children and especially of tender years, except where there are exceptional issues, custody should be awarded to the mother.
 18. That there was no evidence provided by the appellant to disprove the fact that the respondent had humanly possible provided for the minors in circumstances that the appellant could not. Reliance was placed in the case of *Githunguri v Githunguri* (*supra*) that in as much as custody of children of tender years ought to be granted to the mother of the minors, where the court gives the custody of a child of this tender age to the father, it is incumbent on it to make sure that there are really sufficient reasons to exclude the prima facie rule.
 19. It was further urged that while considering the best interests of the minors, the same was in favour of the respondent as reliance was drawn from the case of *M.A. v R.O.O* [2013] eKLR where it was held that

.... the child is entitled to medical care. That the child's welfare should be taken care of under the best possible circumstances.
 20. Counsel contended that the children officer's report support custody of the children to the father and the opinion of the children wishing to stay with their father should be respected. It was argued that the appellant's insistence on the custody of the minors is mainly camouflaged by her own hidden interests in receiving monthly maintenance from the respondent.
 21. In the same breadth, it was submitted that the PRA was just like any other contract agreement which could be vacated. Reliance to support the same was placed on the case *NSA & Another v Cabinet Secretary for Ministry of Interior and Coordination of National Government & Another*, HC Petition No. 17 of 2014 [2019] eKLR. That in the case herein, no application had been placed before this court to vitiate the said PRA and therefore, the same was still in place. In the end, this court was urged to dismiss the appeal herein.



22. This being the first appellate court, it is thus bound to reconsider, re-evaluate and re-assess the evidence tendered before the trial court and arrive at an independent determination and or conclusion without losing sight of the fact that the trial court had the advantage of seeing and listening to the witnesses to be able to assess their demeanour. See *Selle and another v Associated Motor Boat Co. Ltd and others* [1968] EA 123 and *Peters v Sunday post limited* [1958] EA 424.
23. I have considered the record of appeal, grounds of appeal and the submissions by both parties. Issues for determination are; whether there was justification in awarding custody of the children who were of tender age to their father; whether the court did disregard parental responsibility agreement and whether the actual custody award of the children to the father was in the best interests of the children.
24. It is trite that in every decision undertaken concerning a child, the best interest of a child should be taken into account. This position is clearly captured in the [Convention on the Rights of the Child](#) and the [African Charter on the Rights of the Child](#). The same has also been captured under the [constitution](#) 2010 in article 53(2) as follows: a child's best interests are of paramount importance in every matter concerning the child.
25. From the onset, it follows that what matters to this court is the best interest of the minors and the same was well pronounced in the case of [MAA v ABS](#) [2018] eKLR, where it was held as follows:-

“... While considering this matter, this Court is alert to the welfare of the children herein who are of tender years. The matter is not about the applicant/appellant and the respondent; and their interests are secondary to those of the child. The foregoing provisions require this Court to treat the interests of the child as the first and paramount consideration and must do everything to inter alia safeguard, conserve and promote the rights and welfare of the child herein. Acting in the best interest of the children in question.”

26. There is no that parental responsibility is an equal joint responsibility of the parents to a child and no parent shall be treated specially as having a superior right over the child than the other. See Section 32(1) of the [Children Act P.K.M v A.N.M](#) [2020] eKLR where Aroni J stated that;

“in my view therefore one need not go further to look at what parents need to do for a child and to what extent. In this instance the parties have joint responsibility towards their son and no one is superior to the other...”

27. As to what constitutes parental responsibility, Section 31 of the [Children's Act](#) defines parental responsibility to mean all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child.

28. The main ground of appeal in this case is that the learned magistrate ignored the appellant's evidence and bestowed custody of the minors on the respondent who has since remarried while failing to consider the biological mother of the minors who is still alive. That the trial magistrate ignored the prima facie rule without giving due consideration to the evidence before it.

29. While considering grounds 1,3 and 4 of the appeal herein, it is not disputed that the minors subject of these proceedings are biological children to the parties. I have further perused the PRA dated 06.12.2019 and the contents of the same reads as follows:

“Re: Parental Responsibility Agreement Between USA ID NO.xxxxx v IAO ID No. xxxxx.

Parents to: RIA – 6yrs



RIA – 6yrs

Following a discussion between the above persons relating to the welfare of their children before the Children’s Officer, they agreed that:

- i. The mother temporarily hand over the custody of her children to their father.
- ii. The mother maintains close contact with her children through visits and other necessary means in line with the best interests principle.
- iii. This agreement is subject to review in accordance to the needs of the children.
- iv. The above agreement is made without any coercion.”

30. The parties thereafter signed the agreement in the presence of two witnesses namely KSA and MAH.
31. My consideration of the evidence adduced before the trial court shows that the mother voluntarily surrendered to the father her right to actual custody of the children.
32. The appellant did not deny that she temporarily relinquished her rights in regards to the custody of the minors to the respondent subject to review in accordance to the needs of the minors. It is not lost to the court that the appellant in her plaint further averred that she granted the respondent temporary custody of the minors due to her ill health but was now stable to handle motherhood responsibilities.
33. The respondent in his statement and counter claim urged that the appellant was not in a better form of health and mind to handle the children herein. That especially R, who required special medical attention and a rigorous medical follow up treatment would be disadvantaged to stay with the appellant.
34. The issue of the appellant’s physical and mental health having been raised by the respondent, the appellant in her pleadings conceded that indeed she had faced some health challenges and that she was now alright. It is my view that it behoved the appellant to disprove it. The appellant bore the evidential burden to show that her general health would not impede her ability to care for the children if placed under her custody and that she is now stable.
35. The respondent also submitted that the appellant did not have a place of fixed abode, an allegation that was not responded to by the appellant. It was also noted in the PRA that none of the parties was coerced to sign the same. It is most unusual for a mother having custody of her children to surrender such custody unless she was encumbered with a serious situation. In any event there is room for review from time to time if circumstances change hence the door is not closed.
36. Although the jurisprudence of custody cases is that custody of young children should be granted to the mother as a general rule as it was stated in the *Githunguri case* above quoted, it needs to be borne in mind that custody will not be granted where such a mother has no known place of fixed abode and that her mental health status has not been ascertained to be stable.
37. In as much as counsel for the appellant argued that the welfare of children is not measured by the party who is more able to provide money or physical comfort for the children, an argument I am in agreement with, it is also important to consider whether the child is likely to suffer emotionally when subjected to deplorable living conditions. In the circumstances of this case, the appellant relinquished voluntarily her parental responsibility to the respondent on account of her poor mental health. She claimed that she has since recovered but there was no proof.



38. Further, from the evidence on record, it revealed that the appellant was on the move between Nairobi and Wajir implying that she has no fixed place of a board. For those reasons, I am in agreement with the trial court that there exists exceptional circumstances to depart from the general rule.
39. In the circumstances of this case, there is a special case here which is well attended by the father. The stable child who was interviewed by the court expressed her opinion that they were comfortable living with their father. She even stated that they are happy with their step mother. It is not automatic that a mother should take actual custody of a child of tender age simply because she is a mother. There are other parameters to be considered above all, whether the best interests of the child would be met.
40. In the instant case, gender is not the issue but the best interest of the children who will suffer if disturbed from the environment they have since gotten used to. I do not see any injustice to be suffered by the appellant by being allowed access to the children as per the trial court's directions. From the prayers sought in the appeal, it would appear that the appellant is interested in accessing monthly maintenance using the children as the scape goat. This court can not fall into that trap. A father is as good as a mother when it comes to parental responsibility or award of custody orders unless there exists good reasons not to so award.
41. On ground 2, it was stated that one minor had been made to undergo the female genital mutilation while the other was yet to undergo; of importance to note is that no evidence was tabled before the court to support the same. It is trite that he who alleges must prove and that remains the settled law. [Section 107 of the [Evidence Act](#)].
42. In a nutshell, I do not find any merit in this appeal hence dismissed it with no order as to costs. However, I noticed that the appellant was not granted legal custody of the minors which cannot be taken away. Accordingly, I do order that order number one of the trial courts' orders be amended to read;

“ That legal custody of the two children be and is hereby awarded to the parents jointly while actual or physical custody is awarded to the father”.

The rest of the orders shall remain the same with emphasis that the appellant shall have unlimited access.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF MAY 2024

J. N. ONYIEGO

JUDGE

