



REPUBLIC OF KENYA



Njenga v Njoroge (Civil Appeal 55 of 2021) [2024] KEHC 7234 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7234 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 55 OF 2021
SM GITHINJI, J
JUNE 13, 2024**

BETWEEN

JOSEPH KANG'ETHE NJENGA APPELLANT

AND

MIRIAM NJERI NJOROGE RESPONDENT

*(An Appeal from the Judgment in CM Child Case No.4 of 2017 Before Hon.
(Dr) Julie Oseko – Chief Magistrate delivered at Malindi on 19th May, 2021)*

JUDGMENT

1. This appeal arises from a judgment delivered in Malindi Children Cause No 4 of 2017 by Hon. Dr. Julie Oseko (CM)(rtd) on 19/5/2022. Aggrieved by the said decision, the Appellant filed a Memorandum of Appeal dated 14/6/2021 seeking that the impugned judgment be set aside with costs. The grounds upon which the appeal is premised and tailored are as follows: -
 1. The learned trial magistrate erred in fact and in law by condemning the defendant unheard.
 2. The learned trial magistrate misdirected herself by entering substantive judgment without notice to the defendant.
 3. The learned trial magistrate misdirected herself by failing to grant the defendant leave to appeal on his notices of motion.
 4. The learned trial magistrate erred in fact and in law by failing to appreciate that the parties have equal benefits and protection from the law.
 5. The learned trial magistrate erred in fact and in law by skewedly applying only one overriding factor in decisions concerning children.



6. The learned trial magistrate erred in fact and in law by failing to appreciate that the defendant has remained proactive and diligently participates in all the spheres of children's growth and development even in their formative years.
 7. The learned trial magistrate erred in fact and in law by failing to appreciate that the plaintiff has for 8 years never participated in the children's upbringing having totally abdicated her parental responsibilities since 2013.
 8. The learned trial magistrate erred in fact and in law by failing to make a finding that no evidence was adduced in court warranting the removal of the children from the defendant's custody.
 9. The learned trial magistrate erred in fact and in law by failing to make a finding that advocates for the plaintiff were not properly on the records of the court.
 10. The learned trial magistrate erred in fact and in law by declaring the defendant persona non grata in his children's lives except for his monetary contributions and provisions of material comforts.
 11. The learned trial magistrate misdirected herself in her consideration of the plaintiff's allegations as proven material facts.
 12. The learned trial magistrate erred in fact and in law by being openly biased against the Defendant throughout the proceedings.
2. In the suit before the lower court, the Appellant was the Defendant and the Respondent the Plaintiff. The Respondent in the plaint dated 23/1/2017 sought an order for full custody of the three subjects who are issues in her now dissolved marriage with the Appellant. The three subjects are: Destiny Wendo – a girl born on 31/05/2008, Innocent Thayu- a boy born on 19/8/2011 and Joash Baraka – a boy born on 7/04/2013. The Respondent's grievance is that the Appellant forcefully took the issues from her in the year 2015 and kept their whereabouts secret until sometime later when she learnt that the Appellant had left the issues in the care of an alleged girlfriend.
 3. The Appellant filed a defence and counterclaim dated 27/3/2017 wherein he accused the Respondent of habitual desertion of her matrimonial home and abandonment of her spousal and parental responsibilities. He sought orders inter alia sole custody, care and control of the issues; an order that the Respondent contributes towards the maintenance of the children; that the Respondent be estopped from harassing the Appellant; and punitive damages.
 4. The hearing proceeded without the participation of the Appellant despite being served with the hearing notices.
 5. The Respondent testified as PW1. She adopted her written statement dated 6/11/2017 as part of her evidence in chief. She told the court that as at the time of her testimony, the children were with the Appellant. She narrated that she first left her matrimonial home in the year 2014 when they had a disagreement over some rape allegations. That she was prompted to file a children's case and by August 2014 she had obtained interim custody orders. Despite those orders, the Appellant refused to give the children to her. She told the court that as at that time, the children were living in Nakuru. The Respondent told the court that on the eve of the hearing of that case, the Appellant pleaded with her to withdraw the court case, which she eventually did and the Appellant willingly left the children with her. She continued that the children stayed with her until April when the Appellant requested to have the children for the holidays. It was during that period that the Appellant started harassing her



- to change the youngest child's name. This culminated into another disagreement and the Appellant forced her to leave without the children.
6. The Respondent added that thereafter, the Appellant denied her access to the children and would sometimes hide them at his girlfriend's house in Mombasa. She told the court that the Appellant even changed the children's school when he realized that she had a visitation program.
 7. Parties filed written submissions which the trial magistrate considered in her judgment. The orders that were issued in the impugned lower court's judgment read:
 - a. That the sole custody, care and control of the minors be granted upon the Plaintiff.
 - b. That the defendant pays maintenance of Kshs. 50,000 monthly.
 - c. That the Defendant cater for medical costs, accommodation, education and food.
 - d. An order to restrain the defendant from taking possession of the kids.
 - e. An exclusion order restricting the defendant from accessing the dwelling place of the Plaintiff with minors.
 - f. Costs of this suit in favour of the Plaintiff.
 8. Aggrieved by the above decision, the Appellant preferred this appeal of which the court directed be heard by way of written submissions.

The Appellant's Submissions

9. In his submissions dated 10/7/2023, the Appellant condensed the grounds of appeal into three and submitted on each as follows:

Firstly, that the trial magistrate erred in fact and in law by condemning him unheard. The Appellant submitted that he was never served with the hearing notices or even the Respondent's submissions. To him, that was malicious and intentional to blindside the court and pervert justice. He relied on the case of *Ali Ngumbao Baya & 2 others v Director of Public Prosecution* [2016] eKLR.

Secondly, that the learned trial magistrate misdirected herself through misinterpretations and or misapplications of the law. The Appellant argued that the trial court erred in failing to call or involve the government social services department or the children, and relied on the Respondent's sole evidence to arrive at a decision that to him was not informed.
10. He added that the trial magistrate went against statutory provisions which prohibit the disruption of the children's lifestyle, by removing them from the place they had called home for a period of more than 3 years. To him, this failure was against the expectations derived from the mandate of the judiciary to serve substantive justice as guided by Articles 48 (3), 53 (1) (d), (e), 159 (2) (d) and sections 76 (3) (a), (c) and 83 (c) of the *Children's Act*.
11. Lastly, that the trial magistrate erred in fact and in law by being openly biased against the defendant throughout the proceedings. To the Appellant, the adjudication of the matter before the trial court was craftily skewed to tilt the scales of justice against him. He narrated that the dismissal of his application on 23/3/2017 for want of prosecution was unfair and unwarranted, yet the trial court would always end up reinstating the Respondent's case. To him, the trial court was manifestly biased against him.



Some of the instances he claimed bias was delivering judgment without notice to him and misstating facts in her judgment even when the record showed that the Respondent had abandoned the children with the Appellant; and that his defence and counterclaim was uncontroverted.

12. The Appellant added that judgment was entered yet there were pending applications before the trial court. The applications he claimed were dated 27/3/2017, 30/5/2017, 16/8/2022 and 8/2/2023. The Appellant urged the court to set aside the impugned judgment, reinstate the defendant's case for hearing at another court within Mombasa where he is domiciled with the children, together with their other siblings. In the alternative, the Appellant urged the court to determine the suit in terms of his counterclaim.

The Respondent's Submissions

13. The Respondent submitted that the Appellant on numerous occasions since 2014 when the first children's case was filed, evaded court, and there was no way he could be heard in such circumstances. To her, the grounds raised are not sufficient grounds of appeal and that the appeal should be dismissed. She added that the Appellant has failed to demonstrate that the trial court was biased and that the condensed grounds of appeal are for dismissal.
14. It is settled that a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, bearing in mind that it did not see the witnesses. (See *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR). Therefore, having considered the evidence before the trial court, the memorandum of appeal, and submissions presented by the parties herein, I find that the issues for determination are: -
 - i. Whether the Appellant was condemned unheard.
 - ii. Whether the learned trial magistrate misdirected herself through misinterpretations and or misapplications of the law.
 - iii. Whether the trial magistrate was biased against the Appellant throughout the proceedings at the lower court.

Analysis and Determination

15. The Appellant's argument is that he was condemned unheard as he was never served with the hearing notices or the written submissions of the Respondent. A cursory perusal of the proceedings before the subordinate court reveals that the Appellant is not truthful. I say so because the numerous times the matter was fixed for hearing, the court ensured that the Appellant was served and indeed some of the hearing dates were taken in court in the presence of the Appellant. Particularly, on 14/8/2018, 4/9/2018 and 9/10/2018 the Appellant was present when the hearing was adjourned. The matter was again fixed for hearing on 20/11/2018 when the Respondent's advocate informed the court that the Appellant was unwell and unable to attend court. The court adjourned the hearing to 29/1/2019. There is no record of proceedings on that date. The hearing was thereafter scheduled for 22/9/2020 in the absence of the Appellant with orders to issue notice. Seemingly, the Appellant was not served and the hearing was again adjourned to 29/9/2020 when the court also observed that the Appellant was not personally served and directed personal service. The court adjourned the hearing to 14/10/2020. On that material date, the court observed that the Appellant was duly served and proceeded to hear the Respondent's case.
16. There is indeed a copy of affidavit of service sworn by Samson Kimbeja on 13/10/2020. That affidavit shows that the Appellant was personally served with the hearing notice at his workplace and he



acknowledged receipt thereof by signing on the copy of the hearing notice. It is evident to me that the Appellant was duly served. He deliberately failed to attend court when the matter was scheduled for hearing and cannot be heard to cry foul at this stage. For this reason, I decline to find that the Appellant was condemned unheard.

17. In the same breath and considering the chronology of events aforementioned, I do not find any evidence of bias against the Appellant. The trial court, in my view, accorded the Appellant lenience on several occasions but he chose to sleep on his rights.
18. On whether the learned trial magistrate misdirected herself through misinterpretations and or misapplications of the law, it was the Appellant's argument that the trial court erred in failing to call or involve the government social services department or the children's office, and relied on the Respondent's sole evidence to arrive at a decision that to him was not informed. The Appellant did not however identify the provisions that mandate a trial court to call witnesses from the social services department before making a decision in such cases. If he thought the reports were vital, he should have applied for them.
19. The Appellant's allegation that the trial magistrate misdirected herself in entrusting the children to the Respondent against the evidence that the Respondent was a stranger and inexperienced, does not in my view hold any water having failed to substantiate his allegations before the trial court. This is because the Appellant did not present any evidence to controvert the Respondent's and the trial court was in order to arrive at a finding based on the strength and analysis of the evidence on record.
20. The Appellant argued that the trial court went against the spirit of courts' purpose to deliver substantive justice under Articles 48 (3), 53 (1) (d), (e), 159 (2) (d) and sections 76 (3) (a), (c) and 83 (c) of the *Children's Act*.
21. Pertinent to note that Article 48(3) of the *Constitution* and section 76 (3) (a), (c) and 83 (c) *Children's Act* are non-existent provisions. Article 159 (2) (d) provides that justice shall be administered without undue regard to procedural technicalities. The Appellant did not demonstrate how the trial court failed to administer justice in line with the said Article 159 (2) (d). Further, Article 53 makes provision for the rights of children. Sub-article 1 (d) and (e) provide that every child shall have the right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour; and (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.
22. While this provision relates to the issues herein, the Appellant did not demonstrate how the children's rights were violated by the impugned decision of the trial court. That the children had lived with him for three years is not in my view sufficient reason to stop a court from issuing orders that they be moved to the other parent where the circumstances are to their best interest. In this case, the Appellant failed to present any evidence in support of his case and the trial court found in favour of the Respondent. This ground of appeal must equally fail.
23. In the foregoing, I find that the appeal is unmerited. It is hereby dismissed with no orders to costs.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 13TH DAY OF JUNE, 2024.

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S.M. GITHINJI

JUDGE



In the Absence of; -

PARA 1.

Joseph Kang'ethe Njenga/Appellant

PARA 2.

Miriam Njeri Njoroge/Respondent

Parties be notified.

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S.M. GITHINJI

JUDGE

13/6/2024

