SMO & another v AKM (Civil Appeal E037 of 2022)
[2024] KEHC 17230 (KLR) (7 August 2024) (Judgment)

Neutral citation: [2024] KEHC 17230 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL E037 OF 2022

TM MATHEKA, J

AUGUST 7, 2024

BETWEEN

SMO ..... 1ST APPELLANT

DMN ..... 2ND APPELLANT

AND

AKM ..... RESPONDENT

JUDGMENT

1. Minor F.M was born on 26/02/2017 but unfortunately, her mother, NKM (hereinafter 'N'), died on 17/11/2021. Before her demise, NKM was living with the 1st appellant SMO as husband and wife and according to the pleadings; the couple was living with F.M and a minor brother to F.M.

2. After the death of N, the respondent AKM moved the trial court through an application seeking for physical and legal custody of minor F.M. In the course of the proceedings, it emerged that the paternity of the minor was in issue and the court directed that a DNA test involving the 1st appellant, the respondent and the minor, to determine the issue.

3. The results showed the respondent as the biological father of minor F.M. Consequently, the trial magistrate determined the application and granted legal, physical and actual custody of minor F.M to the respondent.

4. Aggrieved by that ruling, the appellants filed this appeal and a subsequent application, dated 03/11/2022, filed under certificate of urgency.

5. After considering the application, this court (Dulu J) granted visitation rights in the following terms; "In the interim, the applicant will have limited access only to visit the minor on alternative weekends where the minor is living for up to two (2) hours each occasion." Further, the court directed that the application and appeal be canvassed through written submissions.

6. Firstly, I will highlight the application and response as the depositions therein will be relevant in the determination of the appeal.

The Application

7. The prayers sought were;

    a. Spent

    b. That this honorable court be pleased to grant the appellants unlimited/unrestricted access/ visitation rights to the subject minor (F.M alias F.K) with overnight stay over alternate weekends and shared custody during the school holidays pending hearing and determination of this application.

    c. That this honorable court be pleased to grant the appellants unlimited/unrestricted access/ visitation rights to the subject minor (F.M alias F.K) with overnight stay over alternate weekends and shared custody during the school holidays pending hearing and determination of the instant appeal.

    d. That this honorable court be pleased to give directions for the expeditious hearing and determination of the instant appeal.

    e. That this honorable court be further pleased to issue any directions towards advancing the best interests of the subject minor.

    f. That each party to bear their costs for this application.

8. In his supporting affidavit sworn on 04/11/2022, the 1st appellant/applicant deponed that the minor's name is FM alias FK and she was born on 26/02/2017. That the minor's biological mother died on 17/11/2021 and prior to her demise, he had been cohabiting with her as husband and wife since May 2017. The death certificate is exhibited as S-1. That he believed the minor was his biological child and took her as such and the minor knew him as the father. That the minor was under the control, care and custody of him and NKM and he considered NKM to be his lawful wife.

9. He deponed that he has been part and parcel of the minor since her birth and his name was even included in her certificate of birth which he has exhibited as S-2. That it was him who proposed the name 'Kerubo' for the minor as he was intending to name her after his own grandmother. That from the time the minor was born, he undertook his fatherly responsibilities and was attending to all her needs such as food, shelter and school fees. Receipts for school fees and related expenses are exhibited as S-3.

10. He deponed that five days after the demise of N, the respondent who was previously unknown to him summoned him (appellant) to the chief's office at Kawangware in Nairobi while demanding custody over the minor on grounds that he was the biological father. That all along, he never harbored any doubts over the minor's paternity as he reasonably believed her to be his biological child. That he also believed NKM to be his lawful wife and their union was blessed with another child by the name Nathaniel Mogaka Okong'o born on 14/05/2021. The certificate of birth for the said child is exhibited as S-4.

11. He deponed that the respondent filed a case at Kilungu and DNA test was conducted where it was established that the respondent was the minor's biological father. That he was surprised by the turn of events but on account of the prolonged time that he had lived with the minor; he was hoping that the status quo on custody would be maintained since the minor only knew him as the father. He deponed

that the respondent was a total stranger to the minor. That in his estimation, he (appellant) had acquired parental responsibility over the minor on account of cohabiting with NKM and attending to the minor's basic needs as a father.

12. He deponed that his expectation was that the subordinate court would give appropriate directions in the child's best interests but to his utter shock and dismay, the court granted the legal, physical and actual custody of the minor to the respondent without considering that he had also acquired parental responsibilities. Certified copies of the subordinate court's ruling and order are exhibited as S5A & B. That the subordinate court granted the impugned orders with finality at an interlocutory stage.

13. He deponed that from the time of the court's ruling to the time of making this application, he had no access to the minor despite trying to reach the respondent in order to establish the minor's well being. That he is fearful of the minor's welfare and well being as he has established that the respondent has abandoned the minor in Kilungu while he is living in Mombasa. That by dint of acquiring parental responsibility over the minor since her birth, he verily believes that the subordinate court ought to have considered his peculiar circumstances by granting him shared custody and/or access/visitation to the child.

14. He deponed that the minor's younger biological sibling is still living with him and it is also important for the two children to bond. That having lived with both children, he knows for a fact that they have a strong bond and the separation has destabilized them. That to the best of his knowledge, the minor is currently living at Kilungu with the respondent's parents who are very old and it is his firm belief that the minor is not getting proper care and attention.

15. He deponed that he is willing to take up all the parental responsibilities over the minor despite the DNA test results. That he has challenged the subordinate court ruling and he believes that the appeal has overwhelming chances of success. The Memorandum of Appeal is exhibited as S-6.

16. He deponed that if granted access, he is willing to cooperate with the respondent and will not infringe on his rights as the biological father. That according to advice from his Advocate, the best interests of the child always take precedence when making any decision regarding a child. That in this case, he believes that the minor's best interests will be safeguarded by allowing him to be part and parcel of her life. That over the 5 continuous years that he lived with the minor, he never harmed her in any way and therefore she will not be in any danger. That he raised her very well and is willing to continued doing so.

17. Further, he deponed that the minor is over 5 years of age and her views should have been sought prior to granting the impugned order. That it is highly suspect as to why the subordinate court assumed territorial jurisdiction over the matter while none of the parties was resident in Kilungu.

    That he was staying with the minor at Nairobi prior to filing of the suit.

18. The 2nd appellant swore an affidavit on 04/11/2022 and deponed that her deceased daughter was married to the respondent in the year 2016 but was cohabiting with the 1st appellant at the time of death. That N's marriage to the respondent did not last for long because in the year 2017, the respondent accompanied by his relatives attended to her home and expressly indicated that he did not wish to be considered as N's husband any more. That she vividly recalled the respondent unequivocally denouncing the minor in the presence of some relatives who were present at the time. That from that time onwards, she knew that the respondent and NKM were separated and she no longer considered him as her son-in-law.

19. She deponed that for all intents and purposes, there was no marriage between her daughter and respondent for the past 5 years preceding her death. That the respondent did not even attend N's

burial. That it is within her knowledge that the minor was under the custody, care and control of her daughter and the 1st appellant.

20. She deponed that the minor considered the 1st appellant as her father and they had a very strong bond. That she (2nd appellant) was comfortable with the union between the 1st appellant and NKM because NKM was well settled and happy. That she never heard any complaints from NKM about the 1st appellant. That from 2017 when the respondent expressed his desire to leave N, the next time she (2nd appellant) set eyes on him was November 2021 when NKM died.

21. She deponed that the subordinate court did not grant her any rights over the child and from 28th June 2022, she has never had a chance to see her beloved grandchild. That as a grandmother, her joy is to bond with her grandchildren but sadly she has been denied the opportunity on account of the impugned ruling.

22. She deponed that if this court considers her request for access/visitation, she will agree on the modalities with the 1st appellant. That even if the court grants her custody of the child, she will be happy and willing to take care of her.

23. She deponed that the 1st appellant took up parental responsibility over the minor and was a very caring parent to her. That she knows for a fact that he used to cater for her education needs. That she is aware that the respondent is not even currently living with the minor and the information from her sources in Kilungu is that the respondent has abandoned the minor in the care of his aging parents.

24. She deponed that on her part, she is not very old and has the strength to take care of the child with the 1st appellant's help. Further, she deponed that the information from her advocates is that the *Children Act* 2022 allows for the relatives of a deceased parent to apply to the court for appropriate orders where the surviving biological parent is unfit to exercise parental responsibility over a child. That she strongly believes that the respondent is totally unfit to take care of the minor since he never took up any responsibilities during N's lifetime.

The Response

25. The respondent opposed the application through his replying affidavit sworn on 06/02/2023 where he referred to the application as scandalous, frivolous, vexatious, inept and an abuse of the court process. He deponed that as the biological father, he is entitled to the custody of the minor.

26. He deponed that the 1st appellant/applicant has attached a forged certificate of birth in order to mislead this court that the minor is also known as FK. That he reported the forgery and has exhibited a copy of OB as AKM-1.

27. He deponed that the minor's biological mother is now deceased and he is therefore entitled to both legal and physical custody to the exclusion of any other person. Copies of maternal attendance documents, birth notification and birth certificate of the minor are exhibited as AKM 2(a), (b) & (c).

28. That he is the legal husband of NKM having married her under holy matrimony on 23/04/2016 at Redeemed Gospel Church INC-Mtwapa and he never divorced her until her demise on 17/11/2021. Copies of certificates of marriage & death are exhibited as AKM-3 & 4.

29. He deponed that he stayed with NKM up to December 2020 when she moved to Nairobi and she never remarried. That NKM passed on 11 months after moving to Nairobi hence the allegation that the 1st appellant was cohabiting with her since 2017 is false. That he (respondent) used to send money to her occasionally to buy groceries and has exhibited a bundle of MPESA transactions for 2018, 2019 and 2020 as AKM-5.

30. He deponed that the forged certificate of birth from the 1st appellant shows that the minor was born in Kiambu whereas the birth notification dated 02/03/2017 shows that FM was born at Mrima Health Centre in Kilindini Mombasa and a certificate of birth issued on 01/10/2018. The copies are exhibited as AKM 2(a-c).

31. He deponed that he has always taken care of his child since she was born as he was living with NKM as husband and wife until the end of December 2020 when NKM moved to Nairobi with the minor. That he continued supporting them while in Nairobi and he has exhibited a bundle of photographs as AKM-6.

32. He deponed that the 1st appellant's receipts of school fees are a forgery and they don't relate to the minor. That upon getting custody of the minor, he enrolled her to school in Mombasa where he works and resides. Receipt for school fees is exhibited as AKM-7.

33. He deponed that after the demise of N, he took immediate action to take physical custody of the minor and he realized that the appellants had colluded to take the child and made arrangements to burry N. That he filed a case to stop the burial but the 2nd appellant proceeded and buried her at Lang'ata cemetery secretly. Court pleadings are exhibited as AKM-8.

34. He deponed that he is the biological father of the minor and if there is another child as alleged, the same was born in a forbidden union as he was legally married to N. Copies of DNA results and certificate of marriage are exhibited as AKM 9 & 3 respectively.

35. He deponed that he is not a stranger to the minor and that the claim of parental responsibility by the 1st appellant is misleading and a misrepresentation to this court since the 1st appellant has falsified documents to conceal the identity of the minor. That when the minor was availed under a court order, she refused to greet him in the presence of the children officer. That the 1st appellant has no actual or implied right of access to the minor as he tried to conceal her identity and tried to destroy his family by committing adultery and bigamy with N.

36. He denied the allegations of having abandoned the minor at Kilungu and deponed that he is living with her in Mombasa where she is well taken care of. A bundle of photos is exhibited as AKM-10. He deponed that the 2nd appellant does not qualify to automatic parental responsibility as the grandmother since parental responsibilities are shared between the parents.

37. He deponed that the best interests of the minor cannot be attained by granting a stranger access and a girl child cannot be left under the access of an adulterer who has no good morals at all. That the 1st appellant is a stranger and he lied by stating that he lived with the minor for 5 years yet the minor and NKM were in Mombasa where the minor was born.

38. He deponed that Magistrate's courts have jurisdiction within the Republic of Kenya and their matrimonial home was at Kilungu hence the basis of the court's jurisdiction to deal with the matter.

39. In rejoinder, the 1st appellant swore a further affidavit on 14/04/2023 where he deponed that the certificate of birth of the minor (S-2) is a true copy of the original. That while it is true that NKM was married to the respondent in 2016, the union hit a dead end in early 2017 and he started cohabiting with her till her demise. That the respondent is lying by stating that he was living with NKM till December 2020 while in fact he (1st appellant) was the one living with NKM and the minors. A bundle of photos showing N, the minor, her sibling and 1st appellant is exhibited as Sa- Sw.

40. He deponed that the school fees receipts exhibited as S-3 are original copies from the year 2022 when he was actively paying school fees for the minor. That as much as the custody orders by the lower

court were aggrieving, at no point was he involved in illegally trying to take the minor away from the respondent. That prior to the child custody case, the respondent was a total stranger to the minor.

41. He deponed that he acquired parental responsibility of the minor after taking care of her for more than 5 years during which time the respondent was absent in the minor's life. That the respondent was never in contact with the minor's mother prior to her death and that it is in the best interest of the minor that he (1st appellant) be granted actual, physical and legal custody together with the 2nd appellant.

The Appeal

42. The grounds of appeal are that;

    a. The learned magistrate erred in law and fact by awarding custody of the minor (F.M alias F.K) to the respondent who has never assumed parental responsibility over the minor since birth.

    b. The learned magistrate erred in law and fact by granting final orders relating to custody of the minor to the respondent in an interlocutory application thus rendering the main suit nugatory.

    c. The learned magistrate erred in law and fact in failing to make any provision for access of the minor to the appellants and/or giving orders on shared custody in the interim.

    d. The learned magistrate erred in law and fact in failing to take into consideration the appellants' evidence and submissions.

    e. The learned magistrate erred in law and fact through over-reliance on the Children Officer's report without viewing the facts of the case circumspectly and forming an independent decision.

    f. The learned magistrate erred in law and fact through issuing far reaching orders on custody without ascertaining the minor's views/sentiments.

    g. The learned magistrate erred in law and fact by failing to appreciate the concept of acquired parental responsibility.

    h. The learned magistrate erred in law and fact in making outright prejudicial substantive conclusions, applying selective justice and disregarding the evidence tendered by the appellants.

    i. The learned magistrate considered extraneous issues which vitiated her ruling thus arriving at an erroneous finding.

    j. The learned magistrate erred in law by failing to consider the minor's best interests inter alia her stability, the principle against separation of siblings, the duration the 1st appellant had lived with the minor uninterruptedly, the respondent's absence in the minor's life and other critical factors.

The Appellants' Submissions

43. The appellants identified the following as the issues for determination;

    a. Whether the learned Magistrate erred in law and fact by granting final orders relating to custody of the suit minor to the Respondent in an interlocutory application.

    b. Whether the learned trial Magistrate erred in granting the impugned custodial orders without according the Appellants any form of access/visitation rights.

c. Whether the learned trial Magistrate erred in failing to consider the minor's best interests.

d. Whether the Appellants' Motion dated 3rd November, 2022 and the appeal dated 27th July, 2022 should be allowed.

44. As to whether the learned magistrate erred by granting final orders in an interlocutory application, the appellants submitted that none of the parties had led evidence on the witness box and pre-trial directions had not even been given. They contend that on this ground alone the Subordinate court's orders of 28th June 2022 are prima facie irregular and this court should intervene. They relied inter alia on Stephen Kipkebut t/a Riverside Lodge & Rooms –vs- Naftali Ogola (2009) eKLR where the court held :-

'... it has often been stated that an order which results in granting of a major relief in the suit ought not be granted at an interlocutory stage.'

45. They also cited Kenya Deposit Insurance Corporation –vs- Richardson & David Limited & Another [2017] eKLR where the court stated;

> " It is wrong for a judge to grant, at an interlocutory stage of proceedings, final orders, thus disposing of the suit before the parties are heard. The right to be heard is fundamental and only in extremely rare circumstances will a court of law issue orders to the effect of which is to determine the suit with finality or render the suit superfluous."

46. As to whether the learned magistrate erred by not granting any form of access/visitation rights, the appellants submitted that from the pleadings filed in the lower court, it is discernible that they had played a significant role in the minor's upbringing during the lifetime of N. That during the 1st Appellant's cohabitation with N, he took up the role of the minor's father and even took the minor for dedication at his church where a certificate was subsequently issued. They contended that the paternity test notwithstanding, the 1st Appellant acquired parental responsibility over the minor.

47. The appellants submitted that in the motion filed before the trial court, the respondent admitted that due to differences between him and N, he lived in Mombasa while NKM lived in Nairobi. The appellants contended that the admission could only serve to corroborate the 1st Appellant's testimony on the upbringing of the minor.

48. They submitted that the repealed Children's Act, 2001 was the law then applicable and relied on section 94 thereof with regard to the concept of acquired parental responsibility. They submitted that in the instant matter, it is apparent that the 1st Appellant had assumed responsibility over the minor and for that reason, the subordinate court ought to have given due consideration to his input when making an order regarding custody of the minor.

49. As regards the 2nd Appellant's role in the minor's upbringing, the appellants submitted that there is no dispute that she is N's mother, hence the minor's grandmother. That the respondent conceded as much in his pleadings before the Subordinate court and even admitted that it is the 2nd Appellant who notified him of N's death.

50. They submitted that by virtue of the material placed before the lower court, they were deserving of access/visitation orders at the minimum.

51. Referring to page 66 of the record of appeal, they submitted that the learned magistrate was mindful that the Respondent did not have any relationship with the minor but she still went ahead and awarded custody to him. They submitted that the learned magistrate fundamentally erred in granting the final custodial orders without considering the peculiar circumstances of the case. They made reference to

Section 123(3) of the *Children Act*, 2022 which, they submitted, is illustrative and very relevant as it envisages a scenario where a surviving parent had already separated with a deceased parent.

52. They submitted that the subordinate court's hands were not tied to the fact that the Respondent was the biological father to the minor and contended that the trial magistrate was bound to make an enquiry as to the Respondent's suitability in light of his very own admission that he had separated with the minor's mother on account of "differences." That needless to say, the enquiry as to who was suitable to be vested with custody of the minor could only be made after hearing the main suit.

53. As to whether the learned trial Magistrate erred in failing to consider the minor's best interests, they submitted that the best interest rule finds constitutional underpinning under Article 53(2) of *the Constitution* of Kenya. That the said provision is mirrored both in the repealed *Children Act*, 2001 and the current *Children Act*, 2022. That the first schedule of the *Children Act*, 2022 has gone a notch higher to outline what constitutes the child's best interests. Against the backdrop of the said provisions, they contended that the impugned orders of 28th June, 2022 were not made with the child's best interests in mind.

54. Referring to the first schedule of the *Children Act*, 2022, they submitted, firstly, that the trial court failed to take into account the relationship of the child with the child's parent(s) and/or guardian(s) and any other persons who may significantly affect the child's welfare. That despite the glaring evidence that the child had not bonded with the respondent, the subordinate court went ahead to award him custody and worse, the court admitted the minor in a children home to shield her from "trauma" yet they (Appellants) were willing and available to take custody of the child.

55. Secondly, they highlighted 'the preference of the child, if old enough to express a meaningful preference'. In regard to that, they submitted that from the minor's certificate of birth, it is decipherable that she was 5 years of age at the material time hence fully capable of giving her views pertaining to custody. That, the child's best interests were jeopardised when the subordinate court failed to seek her views. They relied on HOO –vs- MGO [2021] eKLR where the Court held that:

> 'As the Court considers the matter and makes its decision that will impact the child herein all circumstances affecting the child must be taken into account. The overriding focus must be a solution that will be in the child's best interests.'

56. Thirdly, they highlighted; 'The duration and adequacy of the child's current living arrangements and the desirability of maintaining continuity' In that regard, they submitted that during the subordinate court proceedings, the Respondent conceded that he had separated with the minor's mother and was living in Mombasa while the minor's mother was living in Nairobi. Consequently, they contended that there was an existing living arrangement which was already working. That the trial court failed to consider the best interests of the child by disturbing the existing living arrangement.

57. Fourthly, they highlighted 'The child's adjustment to the child's present home, school and community'. In that regard, they submitted that the minor's mother had already adjusted to her present home, school and community as she had separated from the respondent. That the learned magistrate awarded custody to the Respondent despite the 1st Appellant's evidence before the subordinate court that he had even enrolled the minor in a school. They submitted that the court was also in error for failing to take this factor into account.

58. As to whether the application and appeal should be allowed, the appellants submitted that the issues in both are interlinked and will be covered by these submissions. That from the foregoing, they have demonstrated that the impugned orders fly in the face of the minor's best interests and have invited this court to allow the Motion and appeal.

59. In conclusion, they referred to MAK –vs- RMAA & 4 others (Petition 2 (E003) of 2022) [2023] KESC 21 (KLR) (Civ) (2 March 2023) (Judgment) where the Supreme Court of Kenya pronounced itself as follows;

> " The children's rights legal regime (*the Constitution*, *Children Act* (repealed), CRC, and the African Charter on the Rights and Welfare of the Child) emphasizes the centrality of the best interest of the child. The best interest of the child is determined by the circumstances of the case as they specifically relate to the child. This comprises the principles that prime the child's right to survival, protection, participation, and development above other considerations and includes the rights contemplated under article 53 (1) of *the Constitution*. As such, the focus must be on the child and what is best for him/her.
>
> We need to emphasize that it is never in the best interest of a child when the parents are engaged in a protracted court battle. Court battles relating to children are more often than not very selfish in nature and it is easy to overlook the psychological and mental harm done to the child in the process. In the instant matter, we note that the appellant has not had direct contact with the minor since Justice Heaton's orders of August 7, 2015. In the circumstances of this case, as already demonstrated, this is in contravention of our legal regime on the rights of the child. However, we are also alive to the fact that the child turned eighteen (18) on February 12, 2022. As such, the child is at liberty to choose whom to live with and whether or not he wants to see the appellant."

60. The appellants referred to a famous quote which says, "anyone can be a father, but it takes a lot to be a daddy." As regard the 2nd Appellant, they quoted Proverbs 17:6 which admonishes that: "Grandchildren are the pride and joy of old age..." They submitted that it is only fair that the minor be allowed to continue enjoying the good relationship she cherished with the 2nd Appellant.

Submissions by the Respondent

61. The respondent identified the following as the issues for determination;

    a. Whether the appellants are entitled to the prayers sought in motion dated 3/11/2023 and the appeal dated 27/7/2022.

    b. Whether the trial magistrate was right to grant the respondent the custody of minor.

    c. Whether or not the best interest of the minor had been taken into consideration by the trial magistrate.

62. With regard to the best interest consideration, he submitted that *the Constitution* of Kenya, the Children's Act, 2022 and the International Instruments on the Rights of the child provide that in every matter concerning a child, the best interests of a child are of paramount consideration. That they are the guiding principle to Courts, tribunals and other bodies when considering a matter concerning a child. He relied on MAA –vs- ABS [2018] eKLR where the Court observed:

> " What is stated in Section 4(3)(b) of the *Children Act* [currently Section 8(2)(b) of the Children's Act 2022] is the Paramountcy principle which is vital in all matters concerning children and must be given prominence. While considering this matter; this court was alert to the welfare of the child herein who is of tender years. The matter is not about the appellant and the Respondent and their interests are secondary to those of the child. The foregoing provisions require this Honorable court to treat the interests of the child as the

first paramount consideration and must do everything to safeguard, conserve and promote the rights and welfare of the child herein."

63. He also cited MA -vs-ROO [2013] eKLR where the court stated as follows:

> "...What is the best interest of the child has not been defined by the law. This is as it should be because the best interest of each particular child will depend on the circumstances of each particular case at any one particular time. What is not in dispute, however, is that there are certain minimum requirements that have universally been accepted to constitute the best interest of the child. This includes the right of a child to be provided with shelter, food, clothing and education. The child is entitled to medical care....."

64. He submitted that the 1st appellant is neither the biological nor adoptive father of the minor and was not nominated as a testamentary guardian by the minor's deceased mother as per Section 27 of The *Children Act*.

65. He submitted that the 1st appellant has not demonstrated that he was providing for any maintenance of the minor as the receipts exhibited do not indicate who was making the payments of the school fees for the alleged FK. He contended that the appellants forged the certificate of birth with intentions of stealing the minor.

66. He submitted that it was the 1st appellant who caused a strain in his marriage and as such, the best interests of the minor cannot be served by a person who was involved in criminal activities with intentions to conceal the identity of the minor for his own illegal motives. He submitted that the minor cannot have been born in two different hospitals at the same time as the evidence on record supports the fact the minor was born in Mombasa. He relied on Schabir Shaik & others –vs- State Case CCT 86/06(2008) ZACC 7 in which the court stated:

> "...One of the reasons for the wide ambit of the definition of "proceeds of crime" is, as the Supreme Court of Appeal noted, that sophisticated criminals will seek to avoid proceeds being confiscated by creating complex systems of "camouflage".....
>
> The Supreme Court of Appeal held that a person who has benefited through the enrichment of a company as a result of a crime in which that person has an interest will have indirectly benefited from that crime."

67. The respondent submitted that the 1st appellant had not assumed parental responsibilities towards the minor and he had not met the conditions stipulated under section 83(c) of the *children Act* i.e The ascertainable wishes of any foster 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; The respondent contended that he was single-handedly taking care of the minor as evidenced by the MPESA transaction which he was sending to his late wife.

68. He submitted that the 1st appellant has no right whatsoever to share the custody of the minor and cannot be granted visitation rights as he is a stranger to her. He submitted that there is no provision in the Children's Act which provides that custody (either exclusive or shared) of a child be granted to grandparents and contended that grandparents have no right to assume parental responsibility over a child when the child's parent is alive and has the means and is willing to take up parental responsibility voluntarily. That the child has a right to parental care and denying the child the right cannot be in her best interests.

69. He submitted that the ideal situation would have been to have both the Father and the grandmother play an active role in the life of the minor to enable her grow up to be confident and a well-adjusted adult. However, he submitted that, joint custody would only be a feasible option where there is the anticipation that the parties would work together for the benefit of the minor. Further, he submitted that there exists a bad relationship between him and the 2nd appellant hence the unanimity of purpose between them is clearly an elusive goal and it would not be in the best interest of the child to make an order of joint custody.

70. He submitted that the right to parental care can only be denied if it is proved with cogent evidence and valid grounds that the parent is not suitable or is incapable of taking care of the child unlike in the present case where the court made the necessary steps and established that he was the best fitted person. He relied on Article 19 of The African Charter on The Rights and Welfare of The Child which stipulates that; 'every child is entitled to parental care and protection and shall wherever possible reside with his or her parents.'

71. As to whether the trial magistrate was right in granting custody of the minor to him, he relied on Kenya Deposit Insurance Corporation –vs- Richardson & David Limited & Anor {2017} eKLR where the court stated that in exceptional circumstances, the court can make orders which determine the matter in its finality. He submitted that the parties were fully engaged by the trial court just and it dealt with the matter just like this court has opted to deal with the application and appeal together.

72. He submitted that the parties in this case were interrogated by the trial court and owing to the unique circumstances; the court was justified in making the orders. That the court considered the best interests of the minor and brought the matter into finality in order to protect the minor from a protracted court process which would have had negative implications. That the court also considered the fact that the minor had just lost her mother and she needed to be re-united with her biological father who was willing to take full responsibility of his daughter. He urged this court to dismiss the application and appeal.

Duty of Court

73. An appeal to this court is by way of re-trial and it is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. (Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123). In this case however, there were no witness testimonies in the trial court.

74. Having considered the application, the response, the grounds of appeal and the rival submissions, the following issues arise for determination;

    a. Who is FM alias FK and Where was she born?

    b. Who had the care and custody of the minor from birth to the time of her mother's demise?

    c. Did the trial magistrate award final orders at an interlocutory stage? if yes, was it erroneous?

    d. Which orders should this court issue?

Analysis

Who is the minor F.M alias F.K and where was she born?

75. It is not in dispute that the minor was born on 26/02/2017 but the place of birth is disputed. The 1st appellant exhibited a certificate of birth showing that she was born in Kiambu Township whereas

the certificate of birth exhibited by the respondent shows that she was born in Mrima Health Centre within the Coast region.

76. It is obvious that there cannot be two birth places in respect of one person hence an automatic indication that one of the certificates is not authentic. In addition to the certificate of birth , the respondent exhibited an ultra sound report for NKM dated 20/01/2017 showing that the procedure was conducted at Sayyida Fatimah Hospital in Mombasa. Another ultra sound report dated 24/02/2017 shows that the procedure was conducted at New Kilifi Wananchi Maternity & Nursing Home. Further, he exhibited a birth notification issued to him on 02/03/2017 and the place of birth is indicated as Mrima Health Centre.

77. The inference from the two ultra sound reports is that NKM was in the coastal region during the period that

immediately preceded the birth of the minor. In fact, the second ultra sound was conducted about three days before the minor's birth. More specifically, the birth notification is issued pursuant to the *Births and Deaths Registration Act* and the proviso to section 11 thereof states that; 'in the case of births in prisons, hospitals, orphanages, barracks or quarantine stations, the duty to give such notice shall lie on the officer in charge of the establishment in which the birth took place.

78. These notification of birth, the ultra sounds etc were not controverted by the appellant. The notification of birth is a primary document issued before the certificate of birth at the point where the child is born. In this case therefore, it is to be taken that the exhibited birth notification was issued by the officer in charge of Mrima Health Centre where the minor was born.

79. As for the 1st appellant, he deponed at paragraph 5 of his further affidavit that he started cohabiting with NKM in May 2017 and at paragraph *6*, he deponed that he had been living with NKM and the minor ever since she was born. I have also looked at his replying affidavit dated 10/02/2022 (herein after 'trial court replying affidavit') and filed in the trial court. At paragraph 2 thereof, he deponed that; "...while it is true that the applicant celebrated marriage with the deceased on 23/04/2016, I wish to state the deceased left the matrimonial home in the first week of their marriage and since then we have been living with the deceased as husband and wife until her demise..."

80. In the said trial court replying affidavit, the 1st appellant narrated that he met NKM in January 2016 when they were teaching in the same school and they began dating. That on 27/04/2016, they travelled to Kisii where he introduced her to his parents and sometimes in May 2016, NKM informed him that she was pregnant. According to the 1st appellant, NKM was living with her parents at that time. That in January 2017 when NKM was almost due for delivery, the 1st appellant started looking for a good hospital where she would deliver but due to complications, she did not travel to Nairobi for delivery. He deponed that NKM went to his place two months after delivery but they were in communication all along.

81. Further, he deponed that after N's relocation to Nairobi, she informed him that the baby's notification card and other birth and hospital documents had been misplaced during the relocation and she needed to obtain others in order to continue with the baby's clinic. Consequently, she obtained a health card from Fremo Medical Centre and continued with the clinics. Further, they applied for a new birth certificate which was issued on 10/09/2018.

82. As to what NKM may have told the appellant, this court would not know as she is not here to confirm the same. The appellant has not produced any evidence to confirm whether or not any report was made to the police for the loss of these documents. There is also nothing from the 2nd appellant to confirm where it is that the child was born while she was living with her parents as deponed to by the

1st appellant. It would have been so much easier to obtain fresh documents from the place where the child was born which was the 2nd appellant's home. The fact that that is concealed gives credence to the respondent's contention that the child was born in Mombasa as he holds the primary documents and there are no stories around them.

83. The place of birth is important as it will assist this court in tracing the location of the minor since she was born.

Who had the care and custody of the minor from birth to the time of her mother's demise?

84. Both the 1st appellant and respondent deponed that they lived with the minor since she was born. The respondent deponed that he lived with NKM up to December 2020 when she moved to Nairobi. On the other hand, the 1st appellant deponed that he started cohabiting with NKM in May 2017 until her demise in November 2021.It is not in dispute that NKM was legally married to the respondent as the exhibited marriage certificate shows that she got married to him on 23/04/2016 at Redeemed Gospel Church- Mtwapa.

85. The respondent's pleadings show that he works and resides in Mombasa while the 1st appellant's pleadings show that he is based in Nairobi. In the process of combing through the record in order to get a clearer picture of what was happening, I came across the Children's Officers Social Enquiry Report dated 16/02/2022 and presented to the trial court. The source of information is indicated to be; the father of the subject, alleged step-father of the subject, maternal grandmother of the subject and chiefs- Kithembe and Kawangware Locations. It is noteworthy that all the parties in this case participated in the report and in my view, parties tend to be more truthful in such informal set-ups compared to formal set-ups like courts. I will reproduce part of the report as follows;

> " They both (NKM & Respondent) met in 2015 and later settled as husband and wife on 23rd April 2016 through a holy matrimony. They were blessed with one child described above. The two however differed shortly after and started living separately, father in Mombasa and mother in Nairobi together with their daughter.
>
> Our social enquiry has established that after separation, the mother started secretly cohabiting with another man in Nairobi namely Samson Moruri Okongo (1st defendant) without the knowledge of her husband. It is alleged that the maternal grandmother (second defendant) to the subject was aware of this new union but did not disclose it to her son-in-law until the demise of the subject's mother. Before her demise, the wife would frequently visit her husband in Mombasa, whom they had somehow reconciled. She had last visited him on 19th December 2020.
>
> On the other hand, the 1st defendant claims that he met with the late wife back in January 2016 at Tender Faith Educational Centre in Nairobi where they were both teachers. They started an intimate relationship while there and had also planned to get married. The relationship of the late wife with the plaintiff and the first defendant ran concurrently without the knowledge by each other until November 2021 when the late passed on."

86. The immunization card from Fremo Medical Centre- Nairobi shows that the minor attended clinic at the facility in the year 2017, 2018 and 2019 and this is an indication that she was living in Nairobi with her mother during that period.

87. In the trial court replying affidavit, the 1st appellant deponed that; "On 23/09/2017, as the parents of FM alias FK, we took the baby for church dedication ceremony whereby she was dedicated." The exhibited certificate of dedication indicates the name of the minor as 'FK Okong'o'. In my view, this

explains the origin of the name 'Kerubo' in the subsequent certificate of birth which was issued on 10/09/2018.

88. Further, the 1st appellant produced a bundle of school fees receipts from Kiserian Adventist Primary School. The student named is FK and all the payments were made between January and June 2022. In the trial court replying affidavit, he exhibited school fees receipt from [Particulars Withheld] Education Centre. They are for FK and the payments were made between January and July 2021.The school fees receipt exhibited by the respondent is dated 26/01/2023.

89. The respondent exhibited MPESA records showing that he sent money to NKM on various dates in 2018, 2019 and 2020. The records may not establish the minor's physical location during that period but they have rebutted the appellants' depositions that NKM ceased all relations with the respondent shortly after her marriage.

90. Further, both the 1st appellant and respondent exhibited bundles of photographs where an adult male, adult female and two minors are captured. The 1st appellant did not deny that the minor female in the photos exhibited by the respondent is the subject herein. The same position applies to the respondent with regard to the photos exhibited by the 1st appellant. I will therefore proceed on the presumption that minor F.M alias F.K is the one in all those photos and that the adult men are the parties herein.

91. In the photos exhibited by the 1st appellant, he has appeared with the minor herein in only one photo and in the rest of the photos, he has appeared with F.M and another smaller child. I note that the minor had started school in the said photos as she can be seen with school uniform. Further, the 1st appellant deponed that his second child with NKM was born in May 2021 and since he identified the said child in the photos, it means that the photos were taken after May 2021. As for the respondent, he has exhibited photos with the minor when she was much younger. In fact, one of the photos (AKM 6) has a date stamp of 11/06/2017.

92. From the foregoing, my view is that the Children's Officers Social Enquiry Report has largely been corroborated. NKM moved to Nairobi shortly after the birth of the minor hence the reason she attended her post-natal clinics in Nairobi. In the trial court replying affidavit, the 1st appellant deponed that he was informed about the pregnancy in May 2016 and they began making plans for the birth of their baby. That notwithstanding, there is a photo exhibited by the respondent where NKM is photographed with the respondent. It has a time stamp of 25/12/2016 and NKM is heavily pregnant. In my view, this is a clear demonstration of her double life.

93. Further, there is a photograph marked AKM-6 with a time stamp of 11/06/2017. It shows N, the respondent and the minor and it is an indication that while cohabiting with the 1st appellant in Nairobi, NKM would travel back to Mombasa with the minor to see the respondent. This is further corroborated by the mpesa transactions which show that she was still in communication with the respondent in 2018, 2019 and 2020.

94. The school fees receipts show that when the minor attained school going age, she started in [Particulars Withheld] Education Centre and then [Particulars Withheld] Primary School. This is an indication that she was living with the 1st appellant and NKM at that particular time. On the flipside, if the minor attained school going age in the custody of the respondent, nothing would have been easier that for him to exhibit the relevant school fees receipts. The only receipt exhibited by the respondent was for January 2023 after being awarded custody by the trial court.

95. From the foregoing, it is evident that NKM was oscillating with the minor between Nairobi and Mombasa. I am inclined to believe the 1st appellant's narrative that he started cohabiting with her in May 2017 and they presented themselves as husband and wife. The respondent would see the minor

occasionally but the longer period of time between May 2017 and November 2021 was spent with the 1st appellant. Actually, it appears that the only consistent time that the respondent spent with the minor was from the time she was born up to around April 2017.

96. Further, I have looked at all the materials on record and my view is that both men genuinely believed to be the minor's father. It is unfortunate that the minor was also a victim of circumstances. Consequently, I am of the view that the 1st appellant may have been genuinely persuaded to obtain the certificate of birth for the child. .

Did the trial magistrate award final orders at an interlocutory stage? if yes, was it erroneous?

97. The prayers sought in the plaint were;

    a. An order be granted to the plaintiff for physical and legal custody of the minor F.M.

    b. Costs of this suit.

98. In the application accompanying the plaint, the orders sought were;

    a. That the plaintiff/applicant be granted physical and legal custody of the minor F.M pending the hearing of the application inter-partes.

    b. That the plaintiff/applicant be granted physical and legal custody of the minor F.M pending the hearing of this matter.

99. On 28th June 2022, the trial magistrate delivered a ruling with respect to the application and issued the following orders;

    a. The plaintiff is hereby granted legal, physical and actual custody of the child namely F.M.

    b. There shall be no orders as to costs this being a family matter.

100. Evidently, the orders granted by the trial magistrate were final as there was nothing left to hear in the main suit. Was it erroneous?

    To answer this the question is whether the orders issued by the trial court were in the best interests of the minor in light of the circumstances of this cases.

101. It is evident that the minor spent the longer period of her formative years in the custody of the 1st appellant and her mother. The record of 16/12/2022 confirms that the minor was living with the 1st appellant and that is why the trial court directed him to avail her at the next court date. Further, the trial court stated that;

> " In the meantime, I find upon paternity being established then the issue of custody shall be addressed. Hence matter remains in abeyance pending determination."

102. The record shows that on 20/06/2022, the trial court mentioned the matter and confirmed that the results of the DNA test were out. Eight days later on 28/06/2022, the trial court issued a ruling and awarded custody to the respondent. Further, the trial magistrate ordered the 1st appellant to produce the minor on 01/07/2022 in order to be handed over to the respondent. When the minor was eventually produced in court, the trial magistrate stated;

> " The child is before court. The court observes that minor is of tender age and might not have a relationship with her biological father. In order to avoid the child facing trauma, I opine

that transition to plaintiff should be gradual hence minor to be placed at Mukaa children home within court's jurisdiction to enable father visit her from there to create a bond."

103. It is important to define certain boundaries that would enable this determination. The first thing is who is a parent? The *Children Act* 2022 states that a "parent" means the mother or father or any person who is conferred parental rights by law;

104. There is the parent who is the biological mother or the biological father. There is the person to whom parental rights are conferred by law. This would be the parent defined by law as an adoptive parent, a foster parent, a guardian.

105. The appellant could describe himself as a "step parent" which in the *children Act* means a parent married to a child's biological mother or father; However, the appellant was not married to the mother of the child, as her marriage to the respondent as subsisting at the time of the cohabitation. In any event he would not have superior rights than the respondent over the child.

106. That takes us to the question of parental responsibility:

S. 31 defines parental responsibility;

(1) In this Act, "parental responsibility" means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.

107. Article 53 of *the Constitution* provides for the rights of the child and the duties of the parents thus: that the child has the right to a name and nationality from birth and these are conferred by the parents. In addition, that the child has the right and the parents, equal rights and duties.

(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;

108. In the circumstances of this case, the 1st appellant and NKM were not both the biological parents of the minor. Evidently the learned trial magistrate was sharply aware of a wrong that needed to be righted instantly the moment it became clear that the 1st appellant was not the parent of the child. In her view it was in the best interests of the child to remove her from that environment so that she could immediately adjust to what was right and lawful.

109. While the respondent not being the biological father had the duty to exercise parental responsibility of the child because the child was in both his and the care and custody of the mother, he had not obtained the legal rights of a parent as is bequeathed by law. And the mother of the child had not appointed him as a guardian.

110. The circumstances of this child are peculiar. Other than living with the mother, who evidently kept in touch with the biological father the respondent did not acquire any rights over the child whose other parent was still alive and who clearly, wanted his child back. We will never know the truth about the relations between the appellant, the respondent and the child's mother, but she saw it fit to have the child interact with her father, while she lived with the 1st appellant.

111. It is true that at the time of the demise of the mother of the child the parents were separated. The trial court could have considered a gradual way of detaching the child from the 1st appellant perhaps, accompanying the process with some counselling, and the views of the child. However, it is not inconceivable that the court may have considered that in the circumstances of this case it was in the best interests of the child to immediately remove her from the respondent and place her in the custody of the biological father.

112. That being the case the 1st appellant has lost any locus standi to determine or suggest how the respondent as the father would raise his child. The respondent as the father of the child is bequeathed with the full statutory duties and responsibilities over his child. He is expected to act within the law and is not immune to the power of the law should he fail in his parental duties.

113. Considering the circumstances of the child and to safeguard the best interests of the child the trial court ought to have opened a Protection and Care file through which the court would monitor the progress of the child and put in the requisite interventions. Through that file the issues related to sibling bonding would be followed up, all as the matter was proceeding. This is supported by s. 8(2) of the Act that a court (as is required of other child justice agencies) 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 rights and welfare of the child; (b) conserve and promote the welfare of the child

114. Additionally, Article 3 of United Nations Convention on the Rights of the Child (UNCRC) prescribes that in all actions concerning the child, the best interests of the child shall be primary consideration. Article 4 of African Charter on Rights and Welfare of the Child (ACRWC) prescribes that the best interests of the child in all actions by a person or authority shall be primary consideration.

115. This brings us to the sibling of the child herein. It was argued that it was not in the best interest of the minor to separate her from her sibling. That is correct but again the peculiar nature of this case is that the children belong to two different fathers and their mother is deceased. How would the court determine that they say with one father this time and they stay with the other father the other time? That is not tenable. The two siblings need to meet and bond but the court must find a fit person in whose acre and custody they can do this. I would say that the person closest to them is their mother's mother. Their maternal grandmother with the necessary supervision could provide the perfect setting where these two siblings could connect with their mother's roots.

Which orders should this court issue?

116. The respondent herein was granted the legal, physical and actual custody of the minor by the trial court. These orders were largely informed by the DNA results which established that the respondent is the biological father of the minor. In the end it is my view that this was not a matter that would have required a full drawn hearing. The law and facts supported the orders and the circumstances of the child. The court had to consider the harm that could have resulted from the delay.

117. In this appeal, the orders sought by the appellants are;

    a. The appeal be allowed.

    b. The ruling/orders of the Principal Magistrate delivered on 28th June 2022 in Kilungu MCCHCC No. E001 of 2022 be set aside.

    c. Custody of the minor (F.M alias F.K) be vested on the Appellants pending hearing and determination of the main suit in Kilungu MCCHCC No. E001 of 2022.

    d. The honorable appeal court be pleased to give any further orders/directions towards advancing the best interests of the minor (F.M alias F.K).

118. Pursuant to the best interest principle and based on the facts of this case it would not be prudent to return this matter to the trial court for hearing and determination.

119. With regard to custody, section 102(3) of the Act provides that;

> " Any of the following persons may be granted custody of a child;
>
> a. A parent
>
> b. A guardian
>
> c. Any person who applies with the consent of a parent or guardian of a child and has had actual custody of the child for a period of three years preceding the making of the application, unless the court is satisfied on evidence that a shorter period is sufficient to justify an order in determination of the application or;
>
> d. Any person who, while not falling within paragraphs *(a)*,
>
> b. or (c), can show cause, having regard to section 101, why an order should be made awarding the person custody of the child."

120. I have already found that the respondent as the parent of this child has the first priority in having the custody of the child. This position is buttressed by section 11 of the Act where it provides that 'every child has the right to parental care and protection' and that; 'except as is otherwise provided under this Act, every child has the right to live with his or her parents.'

121. There is no evidence that the respondent is an unfit fit parent hence no need to interfere with the orders granting him the actual and legal custody of the minor.

122. The 1st appellant would not have any rights over the child. He would not have rights of access and visitation but the two minors ought not to be denied the right to their other sibling.

Disposition

i. The appeal is not merited and is dismissed.

ii. The minor to remain in the custody of the father, the respondent.

iii. The visitation order granted to the appellant is set aside and substituted with a visitation order for the sibling to the minor at the arrangement of the two fathers (1st appellant and the Respondent) to be supervised by the Children Court, Kilungu.

iv. The Children's Officer to open a P&C file on the two children at Kilungu Law Courts. The Officer to work in collaboration with the Children Officers where each child is domiciled to provide the requisite reports.

v. A Children Officer's report be availed on the two children and make recommendations on; the impact of this case on their welfare, their counselling needs, and when ready to so, as per their counsellor, the feasibility of their meeting at the 2nd appellants' home for bonding, under the supervision of the Children Officer for periods to be agreed upon by the respective fathers.

vi. The Children Officer's report to assess the suitability of the 2nd appellant with regard to the directive given above.

vii. The Children Court to comply with Section 95(2)(a) of the Act provides that where a court is considering whether or not to make an order under the Act with respect to the child, it should

have regard to; 'the ascertainable feelings and wishes of the child concerned having regard to the child's age and understanding.' The children Officer to document the same.

viii. This order be served through the Deputy Registrar upon the Children Court Kilungu, and the Children Officer Kilungu, and the County Children Officer, Makueni for compliance.

ix. All the foregoing orders be supervised by the Children's Court Kilungu.

x. Each party to bear its own costs.

xi. Orders accordingly

DATED SIGNED AND DELIVERED VIA CTS THIS 7THDAY OF AUGUST 2024

MUMBUA T MATHEKA JUDGE

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2024-08-07 15:36:37