ARO v RBM (Civil Appeal 82 of 2019)
[2023] KEHC 22435 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22435 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 82 OF 2019

FR OLEL, J

SEPTEMBER 21, 2023

BETWEEN

ARO ..... APPELLANT

AND

RBM ..... RESPONDENT

(Being an Appeal from the Ruling of Senior Resident Magistrate J.A Agonda (Ms) dated 7th June 2019 delivered in Mavoko Principal Magistrate court Children's case No 4 of 2019)

JUDGMENT

1. This appeal arise from a Ruling of Hon J.A Agonda (SRM) dated 7th June 2019 and delivered in Mavoko PMCC Children's Case No. 4 of 2019 where she directed that the actual custody of the minor (M.O.R) be granted to the Respondents sister (DM) and the Appellant was granted Right of access on alternative weekends and he was to share custody of the minor during holidays on 50:50 basis with the Respondent. The Court did further order that school fees and other related expenses of the minor would be met by the Respondent. The Appellant was ordered to cater for the minors medical needs by taking out a Medical Insurance Cover for the minor and he was further directed to remit Kshs.10,000/= monthly to the Respondents sister for the minors upkeep and maintenance pending the hearing and determination of this suit. The Respondent was also ordered to surrender the minors birth certificate to the Respondents sister for purposes of registering the minor in school.

2. Being wholly dissatisfied by the Ruling the Appellant did on 18th June 2019 file his Memorandum of Appeal and raised twelve (12) grounds of appeal namely that;

    a. That the Learned Magistrate erred in fact and in law in ignoring the evidence tendered by the Appellant in his Replying Affidavit.

    b. That the Learned Trail Magistrate erred in fact and in law in granting custody of a child to an individual who is not party to the proceedings and/or biological parent of a child.

c. That the Learned Magistrate erred in fact and in law in arriving at finding of fact unsupported by evidence.

d. That the learned Magistrate grossly misdirected herself in finding that the Appellant had moved out of the matrimonial home and went to cohabit with another woman with whom they had two daughters, an incorrect fact that was not pleaded by either party or at all.

e. That the Learned Magistrate erred in law and in fact in ignoring the uncontroverted fact that the Appellant is the biological father of the child.

f. That the Learned Magistrate erred in law and in fact in finding that it ordered a social enquiry suo moto when in fact it is the Appellant that moved the Court to direct as such.

g. That the Learned Magistrate erred in law and in fact in placing unnecessary emphasis on the issue of the maintenance of the child and not custody which prayer had not even been sought by the applicant.

h. That the Learned Magistrate erred in law and in fact and findings that the Appellant had controverted the Respondents contentions in the application.

i. That the Learned Magistrate erred in law and fact in making a finding that it is the Respondent who had been living with the child since the parents separation, while it was undisputed that the Respondent had moved to Dubai without the child.

j. That the Learned Magistrate erred in fact and in law in ignoring the well settled principles of law set out in the authorities Relied on by the Appellant.

k. That the Learned Magistrate erred in fact and in law in making an unwarranted attack at the Appellants counsel thereby exhibiting an unjustifiable bas against the Appellant's case.

l. That the Learned Magistrate erred in law and in fact in arriving at a decision based on innuendo and inconsistent findings not supported either by evidence or the parties own pleadings on record.

3. The Appellant prayed that this appeal be allowed, the Ruling of the trial Magistrate be set aside, and the Appellant be granted custody of the child pending hearing and determination of the substantive suit.

Appellants Submissions

4. The Appellant submitted that he did start cohabiting with the Respondent from around February 2016 at his residence in Kitengela and they were blessed with a son MOR born on 20th June 2016. On or about July 2018 they fell off due to irreconcilable differences and the Respondent remained with actual custody of the child, though they maintained contact through phone calls. Later the Respondent Cut off, communication and he learnt that she had gone to Dubai. He launched a search for his son and discovered that he was staying with the Respondent sister and was in a neglected state of health. He had the respondent's sister summoned to Kitengela children's office, but she ignored and he thus took action by forcefully storming her house and taking custody of the minor, prompting this suit.

5. The Appellant submitted that the trial magistrate erred by ignoring the evidence of the appellant which was contained in his Replying Affidavit filed on 22nd March 2019 and therefore arrived at an unfounded finding that the Appellant herein never controverted the Respondents contention at the lower Court. The trial Court also misdirected itself by finding that the Appellant had remarried and/or was cohabiting with another woman with whom they had two daughters when no party raised such

an issue in their pleadings. Further the pleadings would show that it is the Respondent sister who had two teenage daughters and not the Appellant.

6. Further the appellant faulted the Trial Magistrate as dwelling at length and placing unnecessary emphasis on the issue of maintenance and losing focus on the main issue of in dispute which was custody of the minor. Beyond mere mention by the Respondent on issues touching on maintenance of the minor, there was nothing on record to suggest that the Appellant had failed or was incapable of taking care of the minor. The Appellant had pleaded that he was the CEO of [Particulars Withheld] Limited a transnational money remittance company and was therefore capable of taking care of his child. The social inquiry report had also demonstrated that the Appellant was capable of housing and taking care of the minor.

7. The Appellant further faulted the Ruling on the basis that it was an error for the trial Magistrate to grant actual custody of the minor to an individual who was not a party to the proceedings and/or was not a biological parent of the child. The Court erred in giving custody to the Respondent sister, yet she did not file any document in Court nor were any inquires made to assess and/or inquire into her circumstances. The Appellant submitted that such a recourse was dangerous as no exceptional circumstances were demonstrated to deny either of the children's biological parents' custody.

8. Under Article 53(1) (c) of *the Constitution* of Kenya 2010 and given the special circumstances demonstrated, the appellant submitted that he was entitled to be granted interim custody of the minor in the absence of the mother. Reliance was placed on *CNB v MSN* (2015) eKLR & *MSA v PKA* (2009)eKLR.

Respondents Submissions.

9. The Respondent filed their submission on 18th April 2023 and raised the following issues for determination;

    a. Whether the Learned Magistrate ignored the evidence tendered in arriving at her decision

    b. Whether the Learned Magistrate erred in granting custody of the minor to a person who is not a biological parent.

    c. Whether the Ruling was supported by evidence.

    d. Whether a magistrate can order for a social inquiry report *suo moto*.

    e. Whether the order granted for maintenance was pleaded.

    f. Whether the Magistrate exhibited any form of bias in arriving at the Ruling in question.

    g. Whether this appeal has merit and who bears the costs of this appeal.

10. The Respondent submitted that during subsistence of the cohabitation; the Appellant incessantly physically, verbally and emotionally abused the Respondent and she did annex various SMS massages and hospital treatment documents to prove the same. It was also the Respondents Contention that the appellant prioritized his social life over that of his family which was clearly depicted in the various text messages sent. Due to the aforestated facts the Respondent had no option but to flee from their home with the minor and seek refuge at her sister's residence at Syokimau.

11. Due to financial constraints, in 2018, the Respondent Sought and got a job in Dubai as a waitress to enable her provide for the "minor herein". She enrolled him at a day care center and generally catered for all the minor's recurrent needs, by sending money to her sister who continued to live with the minor and provided a conducive environment in the absence of the Respondent.

12. The Respondent further averred that her sister also had two children and thus the minor was in good hands of family members that love and support him. The appellant rudely disrupted this by forcefully taking custody of the minor thereby greatly disturbing the child and therefore the Court order restoring the child to the minors Aunty was proper and in the best interest of the child.

13. Article 53 (2) of *the Constitution* of Kenya 2010 and Section 4 (3) of the *children's Act* provide that "A child best interests are of paramoount importance in every matter concerning of the child "and Section 102 (3) of *children's Act* did also provide the Court could grant custody of a child to a parent, a guardian, any person who applies with the consent of a parent or guardian of a child and has actual custody of the child for a period of three (3) years preceding making of the application or on any person who could show cause, having regard to section 101, why an order should be made awarding the person custody. It is these provisions that were considered by the Court and it arrived at a proper finding given the Respondents sister custody and allowing the appellant visitation rights and for him to provide for his part in maintaining the Minor. Reliance was placed. *M.A v R.O.O* (HCC Civil Appeal No. 21 of 2007), *K.M.M v J.IL* (2016) eKLR and *D.K v J.K.N* (2011)eKLR.

14. The Respondent further submitted that the Court did not err in making determination in Relation to maintenance of the Minor as it was born out of the trial courts reliance of evidence placed before Court including Hospital Records, text messages print out, school fee receipts, photographs and payslips. Further under paragraph 5 of the Respondent Application she did ask the Court to grant any further orders that were in the best interest of the minor. Article 53(2) of *the Constitution* of Kenya 2010 and Section 103(2) of the *children's Act* also provided for equal Responsibility in Raising a child and that parental responsibility was not extinguished merely because custody was granted to another person.

15. The Respondent further submitted that the trial Magistrate was not biased in arriving at her decision and gave the appellant right of access on alternative weekends and 50:50 Share of custody during school holidays. The minor had been in custody of the Respondent sister for a period of three (3) years and therefore it was necessary that the current status quo be maintained. The appeal as filed did not have merit and thus ought to be dismissed with costs.

Analysis and determination

16. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See *Santosh Hazari v Purushottam Tiwari (Deceased)* by L.Rs (2001) 3 SCC 179.

17. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko v Varkey Joseph AIR* 1969 Keral 316

18. I have considered the entire record of appeal, the pleadings that were filed, the ruling of the trial magistrate and submissions filed both at the trial court and before this court and condence the issues raised in the grounds of appeal and which arise for determination are;

a. Whether the trial Magistrate erred in law to grant actual custody of the Minor to the Respondents sister, who was not a biological parent to the child.

b. Whether the court erred in placing emphasis on the issue of Maintenance of the Minor, which prayer was not sought by the Respondent.

Whether the trial Magistrate erred in law to grant actual custody of the Minor to the Respondents sister, who was not a biological parent to the child.

19. It is not in dispute that the parties herein are the biological parents of the Minor MOR who was born on 20th June 2016. The parties herein had their marital difference and in July 2018, the Respondent did move out of their shared matrimonial residence and sought refuge at her elder's sister's residence at Syokimau. Due to financial depravity she sought and got a Job at Dubai as a waitress and had been there since November 2018. The Minor remined with her sister and she provided for him. The Appellant did look for his child and in February 2019 took him into his custody which act gave rise to this suit.

20. Article 53(2) of *constitution* of Kenya ,2010 states that ;

> " A child's best interest are of paramount importance in every matter concerning a child"

21. Section 4(3) of the *Children's Act* provides that;

> " A judicial or administrative institution or any person making an interpretation as to conflict of any provision or laws shall have regard to the best interest of a child."

22. Section 102(3) of the *children's Act* states that;

1. A court may, on the application of one or more persons qualified under sub section (3), make an order vesting the legal custody of a child."

3. Any of the following persons maybe 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 actual custody of the child for a period of three years preceding the making of the application, unless the court is satisfied on the evidence that a shorter period is sufficient to justify an order made in determination of the application; or

d. Any person who, while not falling within paragraph's (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."

23. Section 103 (1) of the *children's Act* provides the principles to be considered while making an order for custody and these include the conduct and wishes of the parent or guardian of the child, Whether the child has suffered any harm or is likely to suffer any harm if the order is not made and the best interest of the child.

24. As stated in *M.A. v R.O.O* HCC Civil Appeal No 21 of 2009 & *D.K v J.K.N* (2011) both cited in *K.M.M v J.I.L* (2016) eKLR it is agreed that the general rule is that, where the custody of a child of tender years as defined by section 2 of the *children's Act* is in issue, the mother of the child should have

custody unless special circumstances are established to disqualify the mother from having the custody of such a child.

25. Both parents hold contrary views as to who should have custody of the minor and since the primary matter is yet to be heard on merit, evidence adduced and a determination made as to which party is in the best position to be given custody of the minor, this court will refrain from making any conclusive finding on the facts pleaded. Be that as it may the appellant did plead in his replying affidavit at paragraph 9 that it was not unusual for him to arrive late even on weekends as his job entails handling assignments via teleconference with foreign partners. He did not state what alternative arrangement he had put in place to have the child taken care of in his absence and even the social inquiry report did not give much information as to the measures put in place to take care of the minor who was about three (3) years old as at then.

26. The respondent moved out of her matrimonial home in July 2018 and went to reside with her sister DM in Syokimau. She stated that the said sister had two children, the last born being a teenager at high school. Her brother also lived in the same compound hence it was a safe place for her and the child. Prior to permanently moving out the respondent also pleaded that whenever they had their differences with the appellant, she would always seek shelter at the said sister's residence in Syokimau.

27. It was therefore evident that the child was in an environment where his physical, emotional and educational needs could be taken care off. When making the ruling being challenged it is these factors that the trial magistrate took into consideration and found that in the circumstances of this case the best interest of the child was not to destabilize the environment where he was being raised and there were no exceptional circumstance's shown to warrant disturbance of the said set up. The said decision cannot be faulted.

28. The appellant further faulted the court for placing the custody of the minor on a third party who was not a parent and who was not a party to the proceedings. Section 102(3) of the *children's Act* allows the court to vest custody of the minor on a "Guardian". As stated in *K.M.M v J.I.L* (2016) eKLR

> " The issue of the respondent having the child taken care of by sisters, parents and the applicant at different stages of the child's life is not sufficient evidence of neglect and destabilizing the child. Instead..... the respondent was struggling to secure and retain her new job through mandatory training and she had the child taken care of by family members she trusted and counted on including the applicant. This job is key to her providing best interest of the child, food, shelter, clothing education and conducive environment for his growth and development."

29. Under African cultural set up it is commonly said that " It takes a village to raise a child". The respondent too has to provide and take care of her child. She found an opportunity to work as a waitress in Jumeirah Hotel in Dubai and thus cannot be faulted for leaving the child with her sister. What is of utmost importance and consideration by the court is that the child is in a safe, healthy environment which is secure and helps him flourish and develop. The appellant too did show he is capable of taking care of the child, but failed to provide evidence of the support system he had in place which was more conducive for the child as compared to where he was staying.

Whether the court erred in placing emphasis on the issue of Maintenance of the Minor, which prayer was not sought by the Respondent.

30. This issue is a moot point as the Respondent did plead at paragraph 10 of her plaint and under paragraph 5 of her application what was needed to maintain the child and in both the supporting

affidavit and replying affidavit the issue of maintenance of the minor was addressed at length. Section 103(2) of the *children's Act* also provides that parental duty over a child are not extinguished merely because custody has been granted to one of the parties. The court was thus right in making the orders of maintenance which was in the best interest of the child.

Disposition

31. This appeal therefore has no merit and the same is dismissed

32. Each party too shall bear their own costs of this appeal given that the parties herein are the parents of the minor and each has the best interest of the child at heart, though the positions conflict.

33. This matter concerns the welfare of a child and unfortunately this appeal was not heard until assigned to this court in April 2023. I do direct that the primary suit be mentioned at the earliest possible opportunity before the chief Magistrate -Mavoko to enable her assign the children's court to expeditiously hear and determine the suit within Ninety (90) days.

34. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 21ST DAY OF SEPTEMBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 21st day of September, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant