REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 103 OF 2019

IN THE MATTER OF RA & BM (MINORS)

EM..... APPELLANT

-VERSUS-

CM.....RESPONDENT

JUDGMENT

1. The duty of the first appellate court is to reconsider and re-evaluate all the evidence tendered in the trial court and to come up with its own findings and conclusions **(Peters –v- Sunday Post [1958] EA 424).**

2. The dispute between the appellant E.M. and the respondent C.M. concerns their two minor children. Under **Article 53(2)** of the Constitution and **section 4(2)** and **(3)** of the **Children Act (Cap 141),** the court is obliged to bear in mind that the best interests of these minors shall be the primary consideration in dealing with the dispute.

3. On 23rd August 2019 the learned Resident Magistrate of the Children Court at Milimani rendered a judgment in which he awarded joint legal custody of the minors to the parties; actual custody, care and control of the minors to the respondent; access to the minors by the appellant of one half of the school holidays and during school term on alternate weekends; the appellant to cater for shelter and clothing of the minors; the appellant to take out a medical cover for them or to pay for their medical needs on need basis; the appellant to pay school fees and other related expenses, but the choice of school to be agreed on; both parties to meet the cost of food and utilities, with the appellant contributing Kshs.20,000/= monthly.

4. The appellant was aggrieved by the judgment and decree of the trial court and on 23rd September 2019 filed this appeal whose grounds were as follows:

> **"1) The Honourable Learned Magistrate erred in law and in fact by failing to find that the mother had deserted the minors and parental responsibility based on her conduct leaving them for a period of one (1) year.**
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> **2) The Honourable Learned Magistrate erred in law and in fact by failing to acknowledge the minors have lived comfortably with the father who has single handedly cared for the minors financially and socially in terms of provision of the basic needs such as schooling, shelter, food, healthcare, clothing, amenities, love, affection and warmth and without contact or assistance of the mother to the extent the minors could not recognise her.**
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> **3) The Honourable Learned Magistrate erred in law and in fact by failing to acknowledge that there were exceptional circumstances to depart from the *prima facie* Rule on custody, care and maintenance of children of tender years.**
>
> **4) The Honourable Learned Magistrate erred in law and in fact by failing to consider that the best interest of the minors would be served by not disturbing them from where they currently are, that is in the custody of their father.**
>
> **5) The Honourable Learned Magistrate erred in law and in fact by failing to consider that the mother who has been unemployed for six (6) years now is unfit to take care of the minors as she is dependent on her sister and parents who are now serving retirement from formal employment.**

6) The Honourable Learned Magistrate erred in law and in fact in granting such unrealistic orders and directions that would disrupt the smooth schooling of the minors this being a third term of the year and in allowing the mother who is unemployed to have actual custody, care and control of the minors with total disregard to the affidavit of means by the appellant."

He asked that the judgment and the decree of the trial court be set aside, reviewed and/or varied.

5. Mr. Rono for the appellant and Ms. Wangechi for the respondent agreed to have the appeal determined on the basis of their written submissions.

6. What was not in dispute was that the appellant and the respondent got married in December 2012 and lived together until August 2017 when the respondent went back to her parents with the two children who were born between 2012 and 2015. The marriage was not an easy one. The parties testified before the trial court. The respondent blamed her mother-in-law whom she said did not like her because she was of a different tribe. The appellant, on his part, complained that the respondent's parents kept interfering with the marriage.

7. The appellant testified that after the respondent went back to her parents he would access the children. He did not find the children to be in good state. The older child had missed 3rd term of the school. He took the child to school and hired a house help. Between February and October 2018 the respondent could not be reached. He had custody of the children during the time. When she returned the children could not even recognise her.

8. The respondent's case was she always wanted the appellant to stop leaving with his parents and find a separate accommodation for the family. At one point the appellant took the children, asking to stay with them for two weeks but refused to release them after that.

9. It was common ground that at the time of the case at the Children Court the children were living with the appellant. The respondent admitted that they were going to school and were well catered for. When the appellant was asked, he stated that the respondent was a good mother when they got married. Lastly, the respondent was earning Kshs.15,000/= monthly and living rent free in her parents' home while the appellant was earning between Kshs.200,000/= and Kshs.300,000/= per month.

10. The trial court considered the evidence and the law and came to the conclusions subject of this appeal.

11. There is no dispute that the best environment for the children would have been where their father and mother lived together with them, under one roof. However, the obtaining situation is that the parents have separated. The Children Court was called up to determine the circumstances of the children and their parents and determine what was in the best interests of the former, in terms of shelter, food, education and guidance, medical care and so on.

12. The trial court was alive to the fact that the appellant and the respondent had an equal responsibility over the children. Under **section 24(1)** of the **Act**, neither of them had a superior right or claim against the other in the exercise of such parental responsibility.

13. The trial court considered that the children were of tender years, and made reference to decided cases in which the general principle of law was that the custody of such children should be awarded to the mother unless there were special and peculiar circumstances existing to disqualify her from being accorded custody **(Sospeter Ojamoong –v- Linnet Amondi Otieno, Civil Appeal No. 176 of 2006).** The appellant acknowledged this principle, and cited the decision in the High Court at Kisumu in **A.A. –v- V.O. [2011] eKLR.** He went to state that, the fact that the respondent had deserted the children for one year amounted to disgraceful behaviour of an exceptional nature that should have denied her custody. The trial court noted that the respondent had not willingly left the children, but that it was the appellant who had taken away the children from her.

14. The appellant's case was that he had the means to comfortably take care of the children when compared to the respondent, and therefore the trial court ought to have given him the custody of the children. The respondent's counsel submitted, in response, that although the ability of the appellant was a factor to be considered in granting custody, that alone could not give him a prior claim **(H.G.G –v- Y.P. [2017]eKLR)**. What was of paramount consideration was what was in the best interests of the child. I add that, for these tender children their emotional and psychological growth and happiness were of considerable significance.

15. The appellant had a problem with the fact that whereas the respondent was lodging with her elderly and retired parents, he had a better place from where the children were going to school. One must remember that circumstances beyond the children's wishes have led to the present scenario. The parents cannot live together. The court was being called upon to estimate which environment would serve the children's best interests.

16. I have considered the evidence before the trial court, the grounds of appeal and the written submissions. I have come to the conclusion that the trial court did not err in its decision.
I am not able to find that the trial court failed to appreciate the weight or bearing of the evidence before it, or that it had plainly gone wrong on the facts and the law. The consequence is that I find the appeal to be without merit and dismiss it with costs.

DATED AND DELIVERED AT NAIROBI THIS 11TH NOVEMBER 2021.

A.O. MUCHELULE

JUDGE