



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG’U, J

CIVIL APPEAL NO. 88 OF 2019

EON.....APPELLANT

VERSUS

NNO.....RESPONDENT

(An appeal from the judgement of Hon. P. Wamucii, RM delivered on the 23rd July, 2019 in Kisii CM’s Court Children Case No. 64 of 2018)

JUDGEMENT

1. This is appeal arises from the judgement of the Senior Resident Magistrate in Children Case No. 64 of 2018 delivered on 23/7/2019.
2. In that suit the respondent vide a plaint dated 25/11/2018 had sued the defendant for;
 - a) Custody, care and control of the minor be bestowed on the plaintiff.
 - b) The defendant bears the costs of this suit.
 - c) Any other relief that this court may deem fit to grant.
3. The trial court took the evidence of the plaintiff and the defendant and in a judgement dated 23/7/2019 made the following orders;
 - i. The actual custody to remain with the defendant.
 - ii. The Children’s Officer Kisii to assist the parties to come up with a structure of access to the minor by the plaintiff.
 - iii. The plaintiff to include the minor in his employer’s medical scheme and hand over the card to the defendant.
 - iv. The plaintiff to pay monthly maintenance of Kshs. 6,000 per month to the defendant for the minor’s upkeep.
 - v. The defendant to take care of all other expenses.
 - vi. Each party is at liberty to apply.
 - vii. Each party to bear their own costs.
4. As a first appellate court my duty is to re-evaluate the evidence and make my own conclusions thereon alive to the fact that I neither saw nor heard the witnesses. (See **Sielle –vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123**).
5. The appellant’s evidence is that he and the respondent were man and wife. They were blessed with 2 children but one died. For unknown reasons the respondent deserted home with the minor herein. The child is now 3 years (as at the time of testimony). The appellant states he has been denied access and it is his wish to be involved in the child’s affairs.
6. On her part, the respondent testified that she has not denied the appellant access. She asserts that the appellant is violent. He has a pregnant wife (by then). The respondent’s fears are that something bad may happen to the child.

7. I have re-evaluated the evidence herein. I note from the outset that the interest of the minor is the paramount consideration in the determination of this dispute. **Article 53(2)** of the **Constitution** provides;

“Article 53(2): A child’s interests are of paramount importance in every matter concerning the child.”

8. The minor in issue is a male approximately 3 years old.

9. The best interest principle has been enunciated and expounded in many decisions of our courts. The commonly running thread is that custody of children of tender years is usually awarded to the mother unless there are exceptional circumstances that warrant departure from that established principle.

10. In **Midiwa –vs- Midiwa [2002]2 EA 453**, the Court of Appeal re stated the principle thus;

*“It is trite law that, prima facie, other things being equal, children of tender age should be with their mother, and where a court gives the custody of a child of tender age to the father, it is incumbent on it to make sure that there really are sufficient reasons to exclude the prima facie rule. (See **Re S (an infant) [1958], ALL ER 783 at 786 and 787** and **Karanu –vs- Karanu [1975] EA 18**). The learned judge in our view did not correctly direct herself on the principle that in cases of custody of the children the paramount consideration is their welfare. Moreover, as the record shows, there were no exceptional circumstances shown to justify depriving the mother of her natural right to have her children with her.”*

11. I have re-evaluated the evidence herein. It is quite clear that the appellant and respondent have unresolved differences between them. The appellant has since remarried and it is the evidence of the respondent that he has (by time of testimony) a pregnant wife.

12. From the evidence, there are no exceptional circumstances shown by the appellant to justify deprivation of the mother of her natural right to have the child. At his tender age, the person best suited to have custody in the best interest of the minor is the mother, the respondent.

13. Am satisfied, therefore, that the trial court correctly directed itself based on the evidence before it on the best interest principle and clearly noted that there were no exceptional circumstances that warranted departure from the principle that the custody of children of tender years is usually awarded to the mother.

14. The trial court at paragraph 3 of the judgement expressed itself thus;

“3: It is trite law that custody of child of tender years must remain with the mother unless it is shown that the mother is unsuitable to be such a custodian. The plaintiff has not shown anything to suggest that the defendant is unsuitable. I therefore find and hold that the actual custody shall remain with the defendant.”

15. The trial court was also alive to the need to give access of minor to the plaintiff, again, in the best interest of the child.

16. Ultimately, I am satisfied that the trial court properly addressed the evidence before it and reaching the correct conclusions. The appeal before court has no merit and is dismissed.

Dated, signed and delivered at Kisii this 19th day of February, 2020.

A. K. NDUNG’U

JUDGE

Appellant in person