



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL APPEAL NO.4 OF 2019

BETWEEN

EN..... APPELLANT

AND

BOO..... RESPONDENT

(Being an Appeal from the ruling and order in Busia Chief Magistrate’s Court Children’s Case No.99 of 2016 by Hon. Maureen A. Odhiambo – Resident Magistrate).

JUDGMENT

1. EN, the appellant herein was the defendant in Busia Chief Magistrate’s Court Children’s Case No.99 of 2016. The respondent had sued for orders to be allowed access to their child which he claimed had been denied by the appellant.
2. After hearing both parties the learned trial magistrate granted the orders in her judgment which was delivered on 7th March 2019.
3. The appellant was aggrieved by the ruling and filed this appeal. The appellant was represented by the firm of Ashioya & Company Advocates. The appellant had only one ground of appeal which was :

That the learned trial magistrate erred in and in fact in completely disregarding the child’s psychologist’s report which was tendered in evidence and allowing the plaintiff’s claim contrary to the professional opinion.

4. The respondent was represented by the firm of Ouma Okutta & Associates, Advocates. He opposed the appeal and contended that the order by the learned trial magistrate was based on sound legal basis.
5. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
6. The report by Dr. Caroline Vihenda Ayuya recommended in part:

To safeguard her best interest I recommend that until if in future (this maybe around age 13 and above) and if an identity crisis will ever occur, then the introduction to her biological father will deem fit. At this stage of a 7 year old, this will be detrimental to her development in all aspects (social, emotional cognitive and psychological) since she has already developed attachment and close relationship with his current father and family. Confusion will arise and throw the little girl Methusella into identity confusion. The attachment she has developed with her current father is so crucial to enable develop well.

This report was analyzed by the learned trial magistrate and she declined to be bound by it and gave her reasons for doing so. She was of the opinion that the conclusion was not supported by the input from the respondent. I would agree with the learned trial magistrate. In order for such an evaluation to be balanced, sufficient data was required. Dr. Ayuya’s evaluation needed to subject the child to questions touching on the biological father and assess the impact if any before making a conclusion.

7. The learned trial magistrate cited the Court of appeal in the case of **Kimatu Mbuvi t/a Kimatu Mbuvi & Bros vs. Augustine Munyao**

Kioko [2006] eKLR where it stated:

Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions. We have stated before, and it bears repeating, that such opinions are not binding on the court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified. But a court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.

In my opinion the learned trial magistrate properly rejected the conclusion by the Dr. Ayuya. This professional evidence was also silent as to what effect, the concealing of such facts from the child would have when she becomes eventually exposed to the truth about her status.

8. It was incumbent upon Dr. Ayuya to elicit the child's opinion in accordance with section 4 (4) of the Children Act that provides as follows:

In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity.

Had this been done with the question of the introduction of the respondent to her, of course professionally, then the subsequent report would had some weight.

9. Sections 4 (2) and 4 (3) of Children Act provide as follows:

(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act 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;

(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.

10. I am persuaded to agree with the learned trial magistrate that the appellant was not driven by the interest of the child. In many cases, rarely do men offer to support children they have sired. It has been the female parent going to courts for justice. In the instant case, the appellant has rejected the support for upkeep of the child offered by the respondent and with it the access of the respondent to the child. The access orders in this case had the welfare of the child as the guiding principle.

11. The Constitution of Kenya at Article 53(1) (e) Provides:

(1) Every child has the right—

(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; and

12. The respondent has offered to shoulder his parental responsibility in respect of the child he sired with the appellant. This is in line with the Constitution of Kenya. I am baffled to find the appellant arguing that this was not in good faith.

13. The orders of access that the learned trial magistrate gave, are not permanent orders. These are orders that may be varied on application, if abused. The appellant did not give the orders time nor has she alleged that they have been abused.

14. It is refreshing to read a magistrate's decision that is very articulate on the issues raised by the parties and conclusions thereof that are based on sound legal principles.

15. I therefore find that the appeal lacks merit and the same is dismissed with costs.

DELIVERED and SIGNED at BUSIA this 8th day of April, 2020

KIARIE WAWERU KIARIE

JUDGE