REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 108 OF 2018

MJC.....APPELLANT

VERSUS

LAC.....1ST RESPONDENT/CROSS-APPELLANT

PFC.....2ND RESPONDENT/CROSS-APPELLANT

(Being an appeal and a cross-appeal from the Judgment of the Honourable Resident Magistrate H.M Mbati

delivered on the 17th September, 2018, in Nairobi Children's Case No. 1283 of 2017)

JUDGMENT

1. The appeal and cross-appeal herein arose from the judgment of Hon. H.M Mbati Resident Magistrate delivered on 17th September, 2018 in Nairobi Children's Cause No. 1283 of 2017. The orders sought before the Court were for custody of the minor child known as AFC The Appellant is the biological father of the child, whereas the Respondents/Cross-Appellants are the child's maternal grandparents. In the impugned Judgment, the trial court granted custody of the minor to the Respondents for 3years during which time the Appellant would have access to the minor during all school holidays and daily communication through telephone calls, skype, whatsapp and video calls. The custody was to change after the minor's 10th Birthday with the Court granting custody to the Appellant from September 2021. The Respondents would have access of the minor during the first half of all school holidays.

2. The Appellant being dissatisfied with that decision approached this Court by way of a Memorandum of Appeal dated 15th October, 2018.The appeal is predicated on 10 grounds the gist of which is that the learned Magistrate erred in law and fact in:

i. Granting actual physical custody of the child for 3 years to the Respondents; until the minor attained the age of 10 years despite finding that the Respondents were not guardians of the child.

ii. Failing to recognise the importance of the Appellant's role in the child's tender age and immediate life.

iii. Failing to appreciate that the child had already spent one year with the Respondents and that the same should have been sufficient.

iv. Failing to take into account the conduct of the Respondents in denying the Appellant any meaningful participation in the child's life since the demise of her mother which was indicative of their unwillingness to have the Appellant present in the child's life.

v. Not recognising that the considerations that constitute a determination of the best interest principle in custody disputes between a mother and father are different from those that apply to a dispute between a parent and grandparents and erroneously placed heavy reliance on case law arising from parent's custodial disputes.

vi. Not considering that the 1st Respondent did not testify at the trial so that the Court could not assess her ability to act in the best interest of the child.

vii. Finding that the 1st Respondent was a mother figure to the child while it was manifestly clear by law and fact that she could only be a grandmother.

viii. Not considering that the 2nd Respondent was a step grandfather to the minor and that he would be ranked even farther than the 1st Respondent in the consideration for custody.

ix. That despite relying on a report stating that a father daughter relationship was a secure base for the child, the learned Magistrate limited the Appellant's time with the child to five months in a year.

x. Failing to give the Appellant access to the child during school half terms or any other time that the Appellant would be available to come to Kenya.

3. The Appellant prayed that the trial Magistrate's judgment be partially set-aside and that he be granted immediate physical custody of the child or within a lesser period than the years provided in the Judgement. The Appellant also prayed that access do include the school half terms and reasonable access during the term time for any period that the child lives with the Respondents.

4. On their part, the Respondents filed a memorandum of Cross-Appeal dated 10th May, 2019 against the whole of the said judgment and decree on 9 grounds the gist of which is that the learned trial Magistrate erred in law and fact by:

i. Misdirecting herself and making a decision which was against the weight of evidence.

ii. Failing to appreciate the import of section 103(3)(b) of the Children Act, on the appointment of testamentary guardian when she held that the child's deceased mother's last will dated 8th June, 2017 appointing the cross-Appellants as the minor's guardians had not been probated and they therefore were not guardians.

iii. Failing to appreciate the law and by finding that the Appellant had parental responsibility for the minor as provided by **section 24(2)** of the **Children Act** while at the same time holding that the Appellant could not be ordered to maintain the child because it was not prayed for as the parties were bound by their pleadings while this was not in the best interest of the child.

iv. Failing to appreciate evidence adduced that the Appellant had abdicated his parental responsibilities.

v. Failing to consider the submissions of the Cross-Appellants with regard to the best interest of the child rather than the subjective interest of a parent irrespective of his blood relation.

vi. By elevating the interest of the Appellant and ignoring the best interest of the child by holding that the child should remain in the custody of the Respondents until the age of 10 years and directing the Appellant to give notice to Banda school at the appropriate time for her relocation to the United Kingdom to be under the custody of the Appellant.

vii. Imposing one hour of telephone access/skype/whatsapp video calls every day for one hour after 6pm without any rational basis and/or discernible consideration for the child's age, parties' convenience and the time difference between Kenya where the child lives and the United Kingdom where the Respondent resides.

viii. By failing to appreciate the best interest of the child while arriving at her decision.

5. The Respondents/Cross-Appellants prayed that the Appellant's appeal be dismissed, the cross-appeal be allowed and the whole of the judgment and decree of the Children's court be set aside and the cost of the cross-appeal be awarded.

6. The appeal and the cross-appeal were canvassed by way of written submissions which were filed and exchanged between the parties. The Appellant's submissions were filed by M/s Judy Thongori & Co. Advocates while those for the Respondents/Cross-Appellants were so filed by A.F Gross & Advocates.

7. The Appellant submitted that prior to the death of the minor's mother, the minor's parents wished to spend as much time as possible with the child despite the differences in their geographical locations. Further that even after their divorce in 2015, the Appellant continued to pay travel expenses for the minor to come visit him in the United Kingdom. He stated that when the minor's mother died in 2017, he took compassionate leave to come to Kenya to be with his child. The Appellant questioned the court's decision granting custody to the respondents for 3 years, yet they were not legal guardians of the minor since the purported will of probate appointing them had not been confirmed by any court of law under the **Law of Succession Act** and the **Children Act**.

8. Further, the Appellant submitted that there were no compelling reasons to demonstrate that the he could not care and provide for the minor. He also questioned the conduct of the Respondents after the death of Kaya (minor's mother), who became openly hostile to his attempt to have access to the child. He contended that it would be impossible to strengthen his relationship with his daughter as long as the child was in the Respondents' care. He further argued that the 1st Respondent's influence over the child was likely to undermine his authority which could have devastating effects on his relationship with the minor. He submitted that the 1st Respondent did not testify before the trial court which should have made it impossible for the court to determine her suitability to have custody of the child for the three years granted in the judgment.

9. In their submissions, the Respondents asserted that there was no rational basis by the Magistrate to hold that the Respondents were not the minor's guardians merely because the will giving them the powers had not been probated and yet they had charge of and control of the minor since her mother's demise, and had proven to be reliable and consistent care givers. They submitted that from the evidence tendered, the Magistrate erred in failing to make an order for maintenance of the minor while at the same time he made a finding that the Appellant had parental responsibility for the minor. They contended that parental duties and responsibilities in respect of a minor were not merely a title but

related to duties and responsibilities that a parent has in relation to a child, which may be assumed by a relative or even a third party, where a parent has neglected his duties like the Appellant in this case.

10. Relying on the case of **KKPM vs. SWW [2019] eKLR**, the Respondents submitted that the best interest of the child was superior to the rights and issues of parents. They averred that the learned Magistrate failed to give due regard to the child's best interest *vis-à-vis* the question of parental rights. In addition, the Respondents submitted that the imposition of communication between the minor and the Appellant was without any rational or legal basis and was not practical. They recommended that building of the relationship between the minor and the Appellant should be undertaken gradually depending on the mood of the child and not through imposition which did not promote her best interest.

11. From the contending appeal, cross appeal and submissions, the issue for determination by this court is what the best interest of the minor in this cause is.

12. This court is alive to the fact that it did not hear the witnesses testify or observe their demeanor, and therefore should be slow to reverse the trial court's decision. It is however not lost on this court that a first appeal is in a way a retrial. The court must therefore consider the evidence, evaluate it itself and draw its own conclusions. In the case of **Peters vs. Sunday Posts Ltd[1958] E.A. 424** at page 429; the Court of Appeal rendered itself thus:

> ***"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."***

13. This court is obligated under **section 4(3)** of the **Children Act** while considering any disputed matters involving children to give primacy to the best interest of children. This is in consonance with **Article 53(2)** of the **Constitution** which states that:-

> **"A child's best interests are of paramount importance in every matter concerning the child."**

14. The trial court in granting custody and care of the child to the Respondents/Cross-Appellants relied on the parties' pleadings, witness testimonies, documentary evidence, submissions and reports from a Children's Officer, a Social Worker and a Psychologist.

15. The gravamen of the appeal and the cross appeal is that the Children's court erred by vesting rights of custody in the Respondents for 3 years and thereafter in the Appellant. Both parties argued that the trial Court failed to take into account the best interests of the minor.

16. On the one hand the Appellant argued that the Court failed to consider his rights as the only surviving parent, when he sought to have custody of the minor granted to him immediately. On the other hand, the Cross-Appellants argued that 3 years was too short a time for the child to build a relationship with the Appellant, which should be gradual and it was unnecessary to uproot the child from her environment in Kenya where she was stable and comfortable. They also argued that the Appellant had abdicated his parental responsibility and should not be given custody after the lapse of 3 years.

17. I am satisfied that the key grounds in the memorandum of appeal and the cross-appeal are arguable. It is common ground that the Appellant is the only surviving biological parent of the minor. The lower court had to make a delicate balance between his rights and those of the minor's maternal grandparents. The court considered **Article 53(2)** of the **Constitution** and **section 83** of the **Children Act**. In its opinion, the best interests of the child demanded that custody be granted to the grandparents for a period of 3 years, during which time the Appellant was to build and cultivate a bond with the minor before taking up custody in September, 2021.

18. I note that the maternal grandparents have lived with the minor in Kenya as the primary care givers after her mother who was their daughter passed on in 2017. The 1st Respondent remains an important figure in the life the minor who is an only child. I am also alive to the fact that the Appellant who is her biological father resides in the United Kingdom.

19. This Court has considered the evidence on record, the rival submissions by counsels, the materials in support of the arguments on either side and the relevant legal provisions to the matter. The child in question is one of tender years being aged under 10 years and naturally ought to be with the mother. The child's mother is deceased. The Respondents, parents of the child's mother took the child in to their custody after her mother died. The Appellant and the Respondents have had an acrimonious relationship over custody and visitation of the child.

20. The Appellant and the child's mother lived together with the child as a family until 2014 when they separated. In 2015, the mother relocated to Kenya, where she moved in with her parents, the Respondents herein. Geographical differences made it difficult for the Appellant to have regular and continued access to the child. However, the Appellant and the deceased mitigated this by ensuring that there was regular communication and visits by the minor to her father during school holidays. At this point custody was joint between the deceased and the Appellant with deceased being the primary care giver. In 2016, the deceased fell ill and passed on in 2017, whereupon the Respondents took up actual custody of the minor.

21. It is the Appellant's case that he sought increased access to the child after his divorce with the deceased and that he travelled to Kenya on several occasions to see the child during deceased's illness. He asserted that he had taken several steps to be in the life of the child and that he provided maintenance for the Child until the demise of her mother when he came to Kenya and requested to take the child to Britain. It was his wish to have full custody of child, and cater for all her needs in Britain where he had secured a part time position at [particulars withheld] School so that he could take care of his daughter.

22. On the other hand, the Respondents accused the Appellant of failing to show interest in parental responsibility over his daughter and as a result they had been providing food, medical, shelter and school fees for the child at Banda School. The Respondents also opined that the Appellant did not have a solid relationship with the child, having only lived with the deceased as a family from 2011 to 2014 when they separated. They argued that uprooting the minor from the environment and social setting she was accustomed to would disorient, prejudice her psychological and emotional wellbeing and disrupt her education. They asserted that they possess sufficient means to guarantee the child a good life, better education and a sense of belonging.

23. **Section 83** of the **Children Act** lists the Principles to be taken into account in making a custody order as follows:

a) The conduct and wishes of the parent or guardian of the child;

b) The ascertainable wishes of the relatives of the child;

c) 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;

d) The ascertainable wishes of the child;

e) Whether the child has suffered any harm or is likely to suffer any harm if the order is not made;

d) The customs of the community to which the child belongs;

e) The religious persuasion of the child;

f) Whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;

g) The circumstances of any sibling of the child concerned, and of any other children of the home, if any;

24. The question that arises is whether there were sufficient reasons to prompt the learned Magistrate to grant custody to the Respondents for three years. The child falls within the definition of a child of tender years. The trial court gave the special circumstances under which custody was awarded to the Respondents and not to the father as giving the Appellant time to deepen his relationship with the child so that she could naturally want to spend more time with him and hopefully want to move in with him.

25. In her testimony, the child stated that she preferred to live with her grandparents at the moment and to occasionally see her father during school holidays. The court in reaching a determination should consider the feelings and wishes of a child but must take into account the age of the child and the degree of maturity as stipulated in **section 4(4)** of the **Children Act** as follows:

"(4) 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."

26. At the time of her examination the child was aged 6 years. She is now 9 years old and therefore her degree of maturity ought to have been an important consideration by the trial Court. It was the minor's testimony that she visited England to visit her cousins because she missed them. She further stated that she did not want to have sleepovers at her father's house because she wanted to sleep in her own bed. She said she had a special blanket which she sleeps in to avoid bad dreams. Such reasoning from the child indicates that she is not mature enough to sway the Court's opinion on custody and the child's best interest absent of any exceptional circumstances.

27. In her judgment, the learned trial magistrate was persuaded by the reports of two medical experts Gaynor Kelly-Teare, a mental health professional and Grootenhuis a counselling Psychologist. It was Gaynor Kelly-Teare's opinion that the minor had made secure attachments to Africa and the Respondents. Further, that she had began to develop coping skills and was adapting to the loss of her mother. She recommended that this base should not be tampered with for the next couple of years to prevent interference with the process of emotionally digesting the trauma. She further recommended that any major changes should be undertaken slowly with the child being fully involved.

28. Kieke Grootenhuis, a clinical Psychologist who had seen the minor for 18 sessions recommended that she should be provided with a secure base which should include her close care givers being her maternal grandparents, her father, her nanny, teachers and classmates. She recommended that this should not be tampered with for the next couple of years to prevent interference with the process of emotionally digesting the trauma. The secure base would give the minor a secure footing to deepen her relationship with her father whom she had seen infrequently for the last two years. She also noted that her relationship with him was less solid than the relationship she had with the Respondents.

29. On the weight a court of law should attach on expert opinion the court in the case of **Stephen Kinini Wang'ondu v The Ark Limited [2016] eKLR** held that:

"Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided;

it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.

While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this.

Firstly, expert evidence does not "trump all other evidence". It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.

Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing. A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones."

30. In evaluating the evidence of Gaynor Kelly-Teara, there are several issues worth noting. First, that she is a friend of the deceased's family having known them for a period of 7 years. Second, she did not interview or speak with the Appellant or the child herself, although she stated that her views were advised by her professional knowledge and experience. Third, she lacked vital information on the child such as the child's nationality or whether the child had visited the United Kingdom but it was the opinion that the child had a very close relationship with the Respondents. She also stated that she relied on information she got from Diane (a relative). She referred to her report as a volunteer opinion.

31. It is my considered view that the evidence of Gaynor Kelly-Teara was as a result of partisan instructions from the Respondents. It was a report she arrived at without having had an opportunity to interview the Appellant, the Respondent or the child who are the three key parties in this matter. She relied on hearsay evidence received from a third party who is not a party to the proceedings. I therefore find that her report is prejudicial and her opinion cannot be considered to be entirely expert opinion. To that end I find that the learned trial magistrate erred in placing reliance on the report.

32. The Respondents/Cross-Appellants also raised a ground that the learned trial magistrate erred in law by failing to appreciate the import of **section 103(3)(b)** of the **Children Act**, on the appointment of testamentary guardian. The learned magistrate in her decision declaring that the Respondents were not recognised as the legal guardians stated that it was only after the Respondents had obtained a grant of probate that the Court could recognise them as guardians and require the Appellant to Act jointly with them as stipulated by **section 103(2)** of the **Children Act** if he did not object to such joint guardianship. The learned trial magistrate observed rightfully however, that the overriding principle in children's cases is the best interest of the child.

33. However, **section 103 (3)(b)** of the **Children Act** does not exist, but from the arguments, I believe the Respondents were making reference to **section 104(3)(b)** of the **Children Act** which provides for testamentary guardianship under will. **Section 104** of the **Act** reads as follows:

(1) Either parent of a child may, by will or deed, appoint any person to be the guardian of the child after that parent's death.

(2) A guardian of a child may by will or deed appoint another individual to take his place as the guardian of the child in the event of his death.

(3) Any appointment made under subsection (1) or (2) shall not have effect unless—

(a) in the case of an appointment by deed, the deed is dated and is signed by the person making the appointment and in the presence of two witnesses;

(b) in the case of an appointment made by a written will, it is made, executed and attested in accordance with the provisions of section 11 of the Law of Succession Act (Cap. 160), or an appointment made in the course of an oral will if it is made in accordance with section 9 of that Act.

(4) A guardian so appointed shall act jointly with the surviving parent of the child as long as that parent remains alive, unless the parent objects to his so acting.

34. Further, **Article 53** is clear with regard to where parental responsibility lies. There can be no basis for imposing parental responsibility on a person except in limited circumstances provided under the Children's Act, where guardians are appointed and take up parental responsibility for the child. In the present case, the Respondents have no legal obligation to assume parental responsibility for the child while

the child has a surviving parent who is legally bound and is ready and willing to take on parental responsibility. They may have a moral authority since the child's mother (their daughter) is deceased. The learned trial magistrate was therefore right in her determination that the Respondents were not guardians of the child within the strict meaning of the law.

35. The learned trial magistrate in granting custody to the Respondents stated that it was in the best interest of the minor to remain in the Respondent's custody until she attained the age of ten years. She observed that custody of children of tender years was ordinarily granted to the mother unless there were exceptional circumstances. She proceeded to find that the 1st Respondent had taken the role of a mother figure and that the minor was very attached to her. On this part I agree with the Appellants' argument that the learned trial magistrate failed to appreciate his role as the surviving parent to the minor and that the 1st Respondent was a grandmother to the minor and not the mother.

36. From the evidence the minor is an only child aged 9 years. Children of tender years require a place where they will receive parental care something which cannot be measured monetarily or by tangible things. The Respondents claimed that they were in a better position to provide for the child. However, the ability to provide a better life to a child in material sense does not give one priority over another. The child's psychological growth and happiness are not based on material provision alone. Nonetheless, financial provision is equally an important consideration in a child's upbringing. The Appellant stated that he had secured a part time position at [particulars withheld] School to enable him take care of his daughter. In his testimony he also indicated that he had a house which is located near his parent's and his sister's house who had two children. It has therefore not been demonstrated that he has no ability to financially support, maintain, and provide for the child and it is my considered view that the extended family nearby would also help with the child's psychological growth and happiness.

37. From the evidence of the witnesses and the expert reports, I note that the relationship between the Appellants and the Respondents is very toxic. Dr Kieke Grootenhuis recommended that they should establish a conflict free, trusting and neutral co-parenting set up in the best interest of the child and I am in total agreement that this is what would be in the best interest of the child. However, until this is done, the child is at risk of being psychologically affected by the conflict between her father and her grandparents in which she would appear to be being called upon to choose one side over the other. No child should ever have to bear such a burden.

38. The Appellant being the surviving parent, has parental responsibility for the child absent of any legal guardian to act jointly with him. I find that it is in the best interest of the child in this cause to be placed in the custody of the surviving parent, her father. No exceptional circumstances have been demonstrated to justify why the Appellant should not have full custody of his child.

39. In the premise, the Appeal therefore succeeds and the Respondents' cross Appeal is hereby dismissed. The Respondents to have access to the child on such terms and conditions as will be agreed upon by the parties.

In the circumstances of this case, there will be no order as to costs.

DATED SIGNED AND DELIVERED VIA EMAIL AT NAIROBI THIS 8TH DAY OF APRIL, 2020.

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L. A. ACHODE

HIGH COURT JUDGE