REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO 18 OF 2019

CN.....APPELLANT

VERSUS

DMK.....RESPONDENT

(An appeal from the judgment and order of the Honourable E. Agade Senior Resident Magistrate in the Senior Principal Magistrate's Court at Kangundo Children Case No. 5 of 2017 dated the 17th January, 2019)

BETWEEN

DMK..... PLAINTIFF

VERSUS

CN.....DEFENDANT

JUDGEMENT

1. The parties to this appeal are husband and wife. The suit in the lower court was filed by the Respondent herein, the Appellant's husband, who claimed that out of their union, there were two issues aged 6 and 4 years respectively both of whom were attending Kangundo Junior Academy, the eldest being in pre unit. However, between 17th and 18th July, 2017, the Appellant herein, without informing him, left home with the two children and proceeded to Nairobi as a result of which the said children were unable to sit for their second term examinations. According to the Respondent he had a four-bedroom permanent bungalow house with electric power and tap water with two bathrooms and toilet, heated showers and independent solar lighting. The said house sat on an acre land on which there were two green houses and an open field for gardening where he was undertaking horticultural farming for onions and tomatoes. Later the two children were taken to Voi to stay with the Appellant's guardian who was not a blood relative. At that time the Respondent stated he was working in Isiolo and the information was relayed to him by one of the teachers at the said school. Upon his return a meeting was called on 24th July, 2017 by the Children's Office where it was agreed that the Appellant would take back the children from Voi to their home for which the Respondent gave the Appellant Kshs 5,000.00. Though the children were taken from Voi, they were instead taken to Eastleigh in Nairobi where as a result of the scare tactics employed by the Appellant, the children became scared and the Respondent had to leave.

2. According to the Respondent, the said children were housed in a crowded house where they were restrained and were dull and uncomfortable. Following an order from the court the children were returned back to the school and sat for their end year exams but did not perform well. According to the Respondent, the Appellant was abusive to him when he visited the children. It was her case that the Appellant further denied him access to the Kangundo home as a result of which he was forced to relocate to Utawala unfurnished house. According to him, he was the only breadwinner to the family as the Appellant was not working but was managing the family business farm.

3. It was his case that he was taking care of the family from his salary and advances from his employer and his Sacco. Apart from his immediate family, he was also taking care other children outside the marriage as well as his father and maternal grandfather. It was his case that without any work he could not understand how the Appellant would provide for the children. It was the Respondent's case that he intended to relocate from Isiolo to Nairobi.

4. In his plaint the Respondent sought for an order restraining the Appellant from taking the children and the custody of the children with

access to the Appellant.

5. In her evidence the Appellant stated that before they started staying together she used to get money from her sponsor. She however had Kshs 300,000.00 at the time they started staying together out of which Kshs 150,000.00 was spent in purchasing land and the balance they used in constructing their matrimonial home at Utawala. According to her, the Respondent was having an affair with a neighbour. On 4th September, 2017, she enrolled the children I school and bough their uniform. While she admitted that she does not work, she insisted on having their custody since she was always with them. According to her, she was intending to stay with the children at Utawala since the house at Utawala is the same as the one in Kangundo though the Utawala one has no water. It was her evidence that in the event that she moves to Utawala she would provide for the children's clothing, electricity bill and pay for the housegirl since she was in the process of looking for work being a diploma holder. It was her evidence that the Respondent was never around. While she was ready to cater for the children's transport, clothing and medical it was her proposal that the Respondent should cater for their food and school fees. She stated that **GZ**, to whom she took the children was the one who took care of her after she lost her parents and she grew up at St Barnados.

6. She however admitted that while the children were in Voi, she did not make arrangements for their schooling but went to Nairobi to look for work to cater for their basic needs. She admitted that she did not know how long it would take for her to get a job. It was however her intention to take the children from Voi on the opening of the schools. It was her evidence that the Respondent should be ordered to surrender the keys to the Utawala house since he was violent to her and to the children. Since there was no formal marriage between them, she did not see any reason to file for divorce. Though she admitted that she was yet to get a job, it was her evidence that she had already made some connections and was doing business earning Kshs 24,000.00 per month. She stated that since her neighbour sells water, she would also make arrangements for the water but stated that she would need a housegirl to take care of the children. She admitted that she locked the bedroom where the Respondent's clothes were though she had no problem with the Respondent being granted access to her Utawala house though she was not willing to stay in Kangundo.

7. The Appellant disclosed that on 17th July, 2017 when she took the children to Voi there was one week remaining for the schools to close.

8. DW1, **GZ**, admitted that in July, 2017, the Appellant took the children to her in Voi. She however stated that the arrangement was a temporary one until the parties solved their issues.

9. In a report filed by the Children's Officer it was found that though the Utawala House was a three-bedroom house built on a 40 by 80 metres plot and the Kangundo one was a four bedroom one built on almost one-acre piece of land, both were conducive to raise children. Upon a visit to the Kangundo home, the officer found that the children were happy and apparently healthy and were free with the father though they expressed the wish to stay with the mother in Utawala home. It was noted that the Appellant was burdened by paying fees for his other children while the Appellant had gotten a job in Nairobi but was yet to settle financially. It was reported that though both parties loved their children, while arguing they often got personal and forgot about the best interests of the minors. It was recommended that the custody be given to the Appellant with right of access to the Respondent. Apart from that the trial court had occasion to listen to an audio recording in which the Appellant was heard insulting the househelp and instruction the minor to insult the househelp.

10. In her judgement, the learned trial magistrate relied on Article 53(2) of the Constitution and sections 4(2), 81(1)(a) and 82(3)(a) of the Children Act. The learned trial magistrate appreciated the principle that a child of tender age in respect of custody, care and control should be given to the mother in the absence of exceptional reasons since the mother is generally best disposed to provide better quality care to such children than the father. She however was aware of the exceptions to the rule as set out in Civil Appeal No. 36 of 2012 and in **JO vs. SAO [2016] eKLR**. In this case the learned trial magistrate noted several unbecoming actions on the part of the Appellant which she highlighted including the fact that during the pendency of the case, the Appellant was given custody of the children but she abandoned them going instead to stay alone in Utawala, removing the children from school during the term, hurling insults in the hearing of the minors action which the court found as amounting to immorality, removing the children from the court's jurisdiction in defiance of a court order, being temperamental and rude. According to the court the conduct of the Appellant bordered on criminality and was irrational as a parent. The court therefore found that there existed compelling reasons for the court to bend the prima facie rule and deny the Appellant, a mother, custody of the minors in the nest interest of the Minors. Accordingly, the court granted the custody of the children to the Respondent till the age of 18 with right of access to the minors. The Appellant was further restrained from withdrawing the children from the jurisdiction of the curt and the plaintiff was directed to fully maintain the children.

Determination

11. I have considered the submissions of the parties in this appeal. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

12. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

13. However, in **Peters vs. Sunday Post Limited [1958] EA 424**, it was held that:

"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

14. It was therefore held by the Court of Appeal in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** that:

"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

15. In this appeal, it is clear that the determination of this appeal revolves around the question of who between the Appellant and the Respondent ought to have custody of the minors from their union. **Musinga, J** (as he then was) in **J.O. vs. R.M.M. Nakuru DC No.4/2004 [2005] KLR**, described "actual and legal custody" as follows:

"Actual custody is defined to mean the actual possession of the person of the child as opposed to legal custody which means as respects a child, so much of the parental rights and duties as relates to the person of the child including the place and manner in which time is spent."

16. There is no dispute that the two stayed as a couple and in fact had what they both termed as a matrimonial home. It is therefore clear that despite lack for compliance with formalities of a formal marriage the two for all intents and purposes considered themselves as a married couple. In this case it is not in doubt that the Respondent was at all material times working in Isiolo while the family was staying in Kangundo. The Respondent was not in any formal employment but was managing the family farm. The family was relatively comfortable in so far as the physical facilities were concerned and the children were undertaking their education apparently without any serious hitches. However sometimes in July, 2017 the Appellant without the Respondent's knowledge and during the school terms decided to leave their house in Kangundo with the children whom she took to her Guardian in Voi where she left them and went to Nairobi to look for a job. By the time of the hearing of the case, she was still not in any gainful employment though she was doing some small business.

17. In these kind of matters, the law is very clear on the considerations that the court ought to take into place in arriving at its determination. The Constitution of Kenya, 2010 in Article 53(2) provides as follows:

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

18. Section 4(2) and 3(b) of the ***Children Act*** states as follows:

(2) In all actions concerning children, whether undertaken by Public or Private Welfare Institution, Courts of Law, Administrative Authorities or Legislative bodies, the best interest of the child shall be the 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 the adopting a course of action calculated to –

***a.* Safeguarding and promoting the rights and welfare of the child;**

b. and promote the welfare of the child.

19. It is therefore clear that in all matters concerning a child, whether or not the child is a party, the first and paramount consideration is the interest of the child. What then are the factors that determine the best interest of a child? As a guide, section 83 of the ***Children Act*** states:

> **In determining whether or not a custody order should be made in favour of the applicant, the court shall have regard to –**
>
> **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;**
>
> **f. the customs of the community to which the child belongs;**
>
> **g. The religious persuasion of the child;**
>
> **h. 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;**
>
> **i. the circumstances of any sibling of the child concerned, and of any other children of the home, if any;**
>
> **j. The best interest of the child.**
>
> **Where a custody order is made giving custody of a child to one party to a marriage, or in the case of joint guardians to one guardian, or in the case of a child born out of wedlock to one of the parents, the court may order that the person not awarded custody shall nevertheless have all or any rights and duties in relation to a child, other than the right of possession, jointly with the person who is given custody of the child.**

20. I have my own reservations concerning the itemisation of the best interest of the child as one of the factors in that section. That factor is not just one of the factors but is the paramount one. In my view the other factors only come into play where the court is investigating what constitute the best interest of the child. There is therefore a distinction between the interests of a child and what the desires or wishes of the child. Whereas the desires and wishes of the child may be a factor to be taken into account in determining his best interest, it does not necessarily follow that a child's wishes are of paramount consideration. It may well be that a child's wishes may not be in his best interest. The law does not say that the court should go by the child's wishes but by his interest. This is my understanding of the holding by **Joel Ngugi, J** in **JKN vs. HWN [2019] eKLR** where he held that:

> **"It is true that the wishes of the children especially when of tender age are not dispositive of who should be awarded custody. However, under section 83 of the Children's Act as well as international best practices, it is a reasonable and equitable norm to take the wishes of the children where clearly expressed into account in making a custody determination."**

21. If the court is able to determine where the best interest of the child lies, it is my view that that is the end of the matter and the court ought not to override that determination by looking at other fringe issues such as the age of the child. The age of the child is a factor to be considered where his age is a determinant of his interest. It has therefore been appreciated that all factors being equal a tender child's interest is better catered for by his custody being placed with the mother. In other words, the age of the child is prima facie evidence of his best interest. There are however exceptions to this rule. Jurisprudence both locally and in other jurisdictions is awash with holdings to that effect.

22. Roxburgh J. in **Re S (an infant) [1958] 1 All ER 783, at 786** and **787,** a decision cited with approval by the Court of Appeal in **Githunguri vs. Githunguri [1979] eKLR** held that**:**

> **"…the prima facie rule (which is now quite clearly settled) is that, other things being equal, children of this tender age should be with their mother, and where a court gives the custody of a child of this 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."**

23. The position was echoed by the Court of Appeal in **J.O. vs. S.A.O (2016) eKLR** in the following terms:

> **"There is a plethora of decisions by this court as well as the High Court that in determining matters of custody of children and especially of tender age, except where exceptional circumstances exist, the custody of such children should be awarded to the mother because mothers are best suitable to exercise care and control of the children. Exceptional circumstances include: the mother being unsettled; where the mother has taken a new husband; where she is living in quarters that are in deplorable state; or where her conduct is disgraceful and/or immoral."**

24. This rule is particularly emphasised when the child in question is a female child**. Mosdell, J** in **Wambwa vs. Okumu [1970] EA 578**, **Mosdell, J** in that regard expressed himself as follows:

> **"I do not think it can be controverted that in the absence of exceptional circumstances, the welfare of a female infant aged four years...demands that the infant be looked after by its mother rather than its putative father."**

25. These were the sentiments of the Court of Appeal in **Githunguri Case** (supra) in which it held as follows:

> **"…the custody of very young female children should be granted to their mother, in the absence of exceptional circumstances which do not in my opinion exist in this case. The learned judge correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the children. He rejected the proposition, advanced before him by the mother's advocate, that there was a 'rule' in favour of the mother. With respect, this was a misdirection. When dealing with the paramount consideration of welfare, especially where young female children are concerned, there is a rule that the mother is normally the person who should have custody."**

26. The Judges of Appeal also cited **Lord Denning MR** in **Re L (infants) [1962] 3 All ER 1**:

> **"I realise that as a general rule it is better for little girls to be brought up by their mother."**

27. The issue that the court must therefore ask and determined is whether "everything is equal". If so then the rule applies. If not, then the determination must tilt towards the interest of the child notwithstanding his age or gender. Some of the factors which have been classified as amounting to exceptional circumstances were identified by the Court of Appeal in **Sospeter Ojaaamong vs. Lynette Amondi Otieno, Court of Appeal Number 175 of 2006** where it held that:

> **"The exceptional circumstances would include if the mother is unsettled, has taken a new husband or her living quarters are in a deplorable state."**

28. In **Martha Olela & Another vs. Jackson Obiera C.A 16 of 1979** the Court of Appeal further held that exceptional circumstances would include "disgraceful conduct, immoral behaviour, drunken habit, or bad company."

29. In effect, the age of a child is not the determinant factor when it comes to custody. I therefore agree with **Joel Ngugi, J** in **JKN vs. HWN [2019] eKLR** when he states that:

> **"…it is important to point out a serious misdirection regarding the Lower Court's reasoning in awarding custody to the Respondent. In my view, the Lower Court's reasoning was steeped in a dangerous fallacy born of stereotypes. The Learned Trial Magistrate reasons that it is not possible for a man to be the primary care giver because "*he shall from time to time be required to attend to his bread winning duties and will soon leave the duties to the house girls…..[therefore]….If I am to call a spade a spade, it is difficult for a man to take the role of care giving*." The Learned Magistrate then proceeds to reason that "*it would be much safer for the Respondent to take custody of the children than they be in the care of house helps…*" The two biggest problems with the reasoning in this portion of the judgment is that it assumes that: i. There is a clear and natural bifurcation between "care giving" and "bread winning" and that men do the latter while women do the former; and ii. Mothers should be given custody because they are not involved in "bread winning" (especially if they are living with a man) and that, therefore, they take care of the children themselves rather than rely on paid help. This strand of reasoning is dangerous because it somewhat implies that women who rely on paid help to supplement their care-giving work as they pursue their careers or business opportunities are somewhat giving less optimal form of care-giving than women who have chosen to be stay-at-home mothers. This is a strand of judicial reasoning that could easily send a message that "good" mothers stay home with their children while "good" fathers go out and "win bread" for the family. With tremendous respect, I find this reasoning to be dangerously problematic. It does no favours to women to espouse these kinds of stereotypes. Moreover, relying on the stereotypes to reach a verdict on an individual and specific case is unfair to the parties concerned."**

30. The Learned Trial Magistrate cannot be faulted for not applying the said rule line, hook and sinker as the Appellant would have liked her to do. Were there any exceptional reasons in this case? The Learned Trial Magistrate considered the conduct of the Appellant in removing the children from the school midstream the term without caring about their right to education enshrined in the Constitution, her action of "dumping" them with her guardian while she went in search of a job, her action of abandoning them even after she was given a temporary custody, her demeanour in court and her disobedience of the orders of the Court. In my view, these were all relevant factors to be taken into account. Therefore, even without taking into account the further evidence adduced by way of affidavit after the hearing the Learned Trial Magistrate had sufficient material before her upon which she could arrive at the decision she made. I have on my part reviewed the said material and I have no reason to fault her on her conclusion regarding the issue whether the Appellant had shown that she had the best interest of the children at heart.

31. As regards the report of the Children's Officer particularly as regards the wishes of the children, as I have held hereinabove, those wishes are not the determinant factor but the interests of the children and they can be disregarded where the best interests of the children dictate otherwise and where there is no serious hindrance to giving custody to the other party. In this case there is no such hindrance as the same report revealed that the children were happy in their environment and were free with the Respondent.

32. Regarding the further evidence, it is clear that the Appellant was afforded an opportunity to controvert the same but failed to do so. In my view, in matters revolving around children, as long as the rules of natural justice are adhered to a procedure that is geared towards the determination of what is in the best interest of the child ought not to be treated as being fatal to an otherwise just decision.

33. I must however state that in matters affecting children the doctrine of *res judicata* does not apply. As noted by **Muigai, J** in **A N M vs. P M N [2016] eKLR:**

> **"*Res judicata* is not applicable to children matters as it is not expressly provided for in Children's Act 2001. Practically, it behoves, parents, family community and society to support the child in growth and development up to the stage the child or young adult has ability to fend for himself/herself. Therefore, naturally there will be upcoming issues with regard to the child to safeguard the child's interest."**

34. It therefore follows that if circumstances change, any of the parties is at liberty to move the trial court for the variation of its orders.

35. Having considered the issues raised in this appeal, it is my view and I hereby find no merit in this appeal but there will be no order as to costs considering the nature of this case, being a children's matter pitting parents against each other.

36. Orders accordingly.

37. This Judgement has been delivered online with concurrence of both advocates for the parties due to the prevailing restrictions occasioned by COVID 19 pandemic.

Read, signed and delivered online at Machakos this 20th day of May, 2020

G V ODUNGA

JUDGE

CA Geoffrey