



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL APPEAL NO. 165 OF 2019**

**(CORAM: F. GIKONYO J.)**

**EMN.....APPELLANT**

**VERSUS**

**EKG .....RESPONDENT**

**(Appeal from the judgment of E. M. Ayuka SRM in Nkubu PMC**

**Children's Case No. 32 of 2019 delivered on 19.12.2019)**

**JUDGMENT**

**COVID-19 PANDEMIC**

[1] Before I delve into the merits of the appeal, I note that appellant had made a request to court: to be allowed to have the child during the holidays so as to engage him in extra curricula activities. The request was opposed by the respondent who stated that the child was lagging behind in school hence the need for extra coaching. The matter was to be mentioned on 31/3/2020 to determine this request. However, the pandemic of covid-19 which is affecting our country, has completely changed many things including operations of the judiciary, our way of life, learning and all leisure activities by people and students. The pandemic has also come with other demands; strict adherence with hygiene; and the government has inter alia imposed restrictions on movement and social engagements by the people. All learning institutions were also shut until further instruction from the government. In light of the difficult prevailing conditions, the said request is not tenable. The best interest of the child herein in these circumstances is for him to remain where he is. This is in line with the government directives on physical distancing and staying at home to minimize spread of the virus. I will now proceed and determine the appeal.

[2] The appellant was sued by the respondent for custody of their child PDN, any other order that the court may deem fit as well as costs of the suit. The appellant filed a counter claim where he sought for similar orders. On 19/12/2019 the trial court entered judgment in favour of the respondent by granting amongst other orders custody of the minor.

[3] The appellant being aggrieved by the decision in its entirety filed this appeal based on seven (7) grounds which may be summarized into three (3) issues: **that the learned trial Magistrate erred in law and fact in the analysis and evaluation of the evidence; concluding that the appellant did not establish his case; and in the orders he made on joint parental responsibility.**

**Submissions**

[4] This appeal was canvassed by way of written submissions. At the time of writing this judgment, the appellant had not filed his submissions. The respondent submitted that the appeal be dismissed and the orders issued be maintained for better upbringing and care of the child.

[5] As the first appellate court, this court is to evaluate, assess and analyze the extracts on the record and to make its own determination having in mind that it did not have the advantage of hearing witnesses. See: **Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123.**

[6] The plaintiff called two witnesses to establish her case. **PW1 EKG** stated that she and the defendant got married in 2010 and were blessed with a son P D N in 2013- the child is aged six (6) years at the time of giving evidence. The defendant moved into her house and they stayed together. Both of them were in business but in 2013 the defendant was employed by the County Government in Embu. In 2018, they

separated since the defendant was abusive and assaulted her. The defendant traumatized her as she has had many miscarriages. She did not take anything belonging to the defendant for she moved only with her belongings. He took their child and took him to his parents who are elderly and sickly while he stays in town with another woman. Every time she attempts to access the child she is blocked by the defendant. He also instructed the school and his parents not to allow her to see the child. She referred the case to the Children's Office in Embu but they sided with the defendant. She approached Federation of Women Lawyers – Kenya (FIDA) who summoned the defendant but he did not listen leading to the suit.

[7] **PW2 NM** stated that the plaintiff is her niece whom she brought up. She was married to the defendant but later separated.

[8] At the close of the plaintiff's case, the defendant called three witnesses who adopted their statements as evidence. **DW1 EMN** produced his list of documents dated 9/9/2019. He stated that he and the plaintiff began cohabiting in 2013 and were blessed with a P D N who is six (6) years old. Once their son became a school going child he decided to start a business for the plaintiff who was a housewife. In 2016 he took a loan of Kshs. 700,000/-and set up a cyber café and stationary shop at G market which plaintiff was in charge of. On 2/12/2018 the plaintiff left him and their child due to irreconcilable differences. He informed the area chief of his situation and requested that he be there as the plaintiff packed her belongings. He was present at the time of her departure and he locked up the house and brought him the keys. The plaintiff took all her belongings including equipments that he had bought for the business and household goods as well. She left their son under his care on her own will.

[9] The plaintiff resurfaced in April 2019 when he was requested to visit the District Children's Office in Embu. The officer recommended that the child remain in his custody. Later, he was summoned to attend a meeting at FIDA which he complied and made a reply to the complaint. When called upon to attend meetings at FIDA's offices the plaintiff went missing. In June 2019 the plaintiff went to their child's school where she caused havoc trying to take the child away. He reported the incident at Embu Police Station. He has been taking care of the child alone for almost a year before the plaintiff began harassing him and their son and demanding for money. This has caused their child to face emotional trauma as in the past the plaintiff had been aggressive and abusive to him and this led to the child being psychologically and emotionally unstable.

[10] **DW2 Nathaniel Ndwiga**, neighbor and friend, relied on his statement dated 9/9/2019. He stated that he knows the plaintiff as well while she was cohabiting with **DW1**. That due to their conflict on or about the month of December 2018 the plaintiff left her matrimonial home leaving the defendant with the child. There was no violence at the time of her departure since the defendant had been advised to stay away while she collected her belongings. The defendant takes good care of the child and provides for his needs.

[11] **DW3 DNN**, father to the defendant, adopted his statement dated 9/9/2019 into evidence. He stated that the plaintiff and defendant began cohabiting in 2013 but in late 2018 the plaintiff left their matrimonial home as a result of irreconcilable conflicts. She took all her belongings and property that the parties owned together and left. Sometime on or about June 2019 he was called by the head teacher of the child's school informing him that a woman had come to school violently demanding to see the child. They reported the incident at Embu Police Station. That the minor is a well adjusted, lively and outspoken child who is intelligent and well composed.

[12] The issues for determination before the court are: **custody and maintenance of the child.**

[13] The appellant failed to comply with the court directions on the filing of the record of appeal as well as his submissions. Nonetheless, the record of the trial court is before the court and this being a matter concerning a child, I will determine the appeal on its merits.

[14] On custody; the child P D N is a minor aged six (6) years. He is therefore a child of tender years in accordance with **Section 2 of the Children Act** which defines "**child of tender years**" to be a child under the age of ten (10) years. The general rule is that custody of such child is usually given to the mother unless there are special and exceptional circumstances why the mother should not be granted custody. There is no dearth of judicial pronouncements on this rule. For emphasis, I will cite some few.

[15] The Court of Appeal in the case of **Karanu v Karanu [1975] EA 18** held as follows:

*"The substantial question in this appeal is whether or not the judge was right in giving custody of the children to the father. At the time the Application was heard, the daughter of the parties was just over 7 years of age and the son was 6 years old. The Judge correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the children but he did not specifically refer to the generally accepted rule that, in the absence of exceptional circumstances, the custody of young children should be given to the mother."*

[16] Furthermore, in **Githunguri v Githunguri [1979] eKLR** the Court of Appeal for East Africa made reference to the following authority where it was held as follows:-

*"As Roxburgh J said in Re S (an infant) [1958] 1 All ER 783, at 786 and 787:*

*"I only say this; 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."*

Also, **K.M.M v J. I. L [2016] eKLR** :

***"In SOSPETER OJAAMONG vs. LYNETTE AMONDI OTIENO Civil Appeal 176 of 2006***

**The Court of Appeal held;**

***“The general principle of law is that custody of such children should be awarded to the mother unless special and peculiar circumstances exist to disqualify her from being awarded custody. The case of MARTHA OLELA & ANOTHER vs. JACKSON OBIERA Civil Application No. Nairobi 16 of 1979 was cited as one authority for such principle. The mother’s disgraceful conduct, say her immoral behaviour, drunken habit, bad company are some of the factors which would disqualify her from being awarded custody of a child of tender age.”***

I have stated the general rule. Normally, custody of a child of tender years is placed on the mother except in exceptionally circumstances. I will now seek to establish the best interests of the child after taking all factors into account and decide on the custody of this child.

[17] What does the evidence portend? It is not in dispute that the appellant and respondent cohabitated for several years out of which they got a child, P D N who is aged six (6) years old. According to the respondent’s is that the appellant was abusive and assaulted her. He traumatized her to the extent that she suffered many miscarriages. During cross examination she stated that the mistreatment occurred between 2017 and 2018. That she sought treatment at Embu General Hospital as evidenced by **EKG 3** and **EKG4**. I have thoroughly perused the record but unfortunately I cannot be able to trace these documents. Due to the fear of her well being she left and left the minor as the appellant took him away.

[18] The respondent stated that it was the appellant who left their home, took her belongings together with the equipment he had bought for her and left the child as well. When the matter was tabled before the Children’s office in Embu the officer stated that the child remains in his custody. The matter was then tabled before FIDA but the respondent failed to attend meetings. Moreover, the respondent went ahead to cause havoc at the child’s school. In addition, there are occasions in the past where the plaintiff had been aggressive and abusive to their child and this led to the child being psychologically and emotionally unstable.

[19] I do note that there are allegations of abuse and assault made by the respondent. But, the documents produced are not in the court file. Their whereabouts is unknown. That notwithstanding, there are irreconcilable difference between the two individuals. The appellant alleged that the respondent willingly left the child in his custody and left. **DW3** father of the respondent stated during cross-examination that he does not know the circumstances under which they separated and it was the appellant who told him that it was the respondent who left the home. The letter by the Children’s Officer from Embu dated 8/5/2019 stated that child remain in appellant’s custody. She came to that conclusion after hearing both parties. The respondent alleged that the officer was biased. When the matter was tabled before FIDA the appellant alleges that the respondent failed to attend the meetings. However, the appellant did not adduce any evidence as to this.

[20] The appellant produced a letter from the school where the child was prior, Victory Junior Academy, which indicated that an unidentified female came to the school demanding to see the child. That efforts to address her were futile for she was uncooperative, abusive and violent. She held the school at ransom shouting and yelling to any person who tried to quell the situation. The respondent denied this in paragraph 10 of her reply to defence and counter claim. I will handle this piece of evidence with caution because; (1) the letter by the head teacher talks of ‘**an unidentified female**’; it did not identify the female or to be the respondent; (2) the author was not called as a witness to identify the person subject of the letter. **DW1** and **DW3** stated that they reported the matter to Embu Police Station but neither told the court as to whether they saw the respondent at the school. Each stated that they were informed by the head teacher. Such evidence cannot be proof that the identified person is the Respondent.

[21] The appellant stated that he had taken out a loan to start a cyber café and stationery shop which he left under the control of the respondent. He contended that the respondent took all the equipment when she left. In paragraph 17 of her reply to defence and counter claim she stated that she and the appellant in the presence of the Chief itemized the business inventory and agreed what the respondent was to take. **DW1** told the court that the chief was present at the time of the respondent’s departure and he locked up and gave him the keys while giving him a report. Therefore, it is not true that she forcefully took all equipment in the shop.

[22] The appellant also alleged that the respondent was aggressive and abusive to their child which has led him to face emotional trauma. These are grave assertions made by him but the same were unsubstantiated and not supported by evidence. I note however that the letter from the ministry of health dated 26/03/2019 stated that the child has some anxiety disorder. The fact of separation of the two parents of the child and the differences in their relationship cause trauma on a child. Adults to whom a gift of a child is committed by god, should always know the dire consequences their break-up will have on their children. This realization will make spouses focus and place the best interest of the child in a pedestal; employ reason and reasonableness in working out their difference rather than stubbornly insisting on selfish stand-points to prove a point. I have always found the caution ‘*you could be wrong*’ to be the beginning of listening to one another in a relationship. Be that as it may, notably, the child upon being interviewed by the trial court stated that he wishes to live with both his parents.

[23] The appellant failed to demonstrate the respondent was of such disgraceful or violent or offensive conduct that would justify denying her the custody of the child herein. Moreover, the appellant has left the care of the child to his grandparents’ which was confirmed by **DW2** who stated that the child is usually with the grandparents. This kind of placement will not provide a stable home or the much needed physical presence of the father or the child’s physical, spiritual and emotional needs which a parent would provide to the child. Absent father will become a source of great emotional and psychological dissatisfaction on the part of the child.

[24] This analysis, brings me to the conclusion that there is really nothing exceptional which would impel the court to deviate from the general rule. Nothing shows that the Respondent is not fit to live with her child. The best interest of the child demands that this child is committed to the custody of the mother given his age and needs. Consequently, I do not find anything on which to fault the decision by the trial court in awarding the custody of the child to the respondent custody. I dismiss the grounds on custody of the child.

[25] On the second issue; maintenance. **Article 53 (1) (e) of the Constitution** stipulates that:

**“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”**

[26] The trial court stated that the respondent provide shelter, food and clothing. While the appellant pays school fees and any further necessary school requirements, to include him in his medical cover, and pay Kshs. 7,000/- per month being contribution to maintenance. The appellant is of the view that he ought to pay Kshs. 7,000/- as maintenance.

[27] Before the decision of the trial court the appellant was the one in custody of the child. From the pictures he filed in court he exposed the child to activities such as swimming, skating, playing chess and bicycle riding. I concur with the trial magistrate that the appellant exposed the child to good lifestyle which should be maintained. The quality of life of a child should not be compromised because the parents are feuding at each other. The orders by the trial court were fair to the parties yet securing the best interest of the child.

[28] Accordingly, I find the appeal to lack merit and is dismissed with no order as to costs. To avoid confusion and prejudice to the child, I order the trial court file to be remitted back to the trial court for purposes of ensuring the orders made therein are obeyed.

**Dated, signed and delivered at Milimani this 7<sup>th</sup> day of May 2020**

**F. GIKONYO**

**JUDGE**

**Parties acting in person**