



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL 19 OF 2019

RM.....APPELLANT

VERSUS

JNM.....RESPONDENT

JUDGMENT

(An Appeal from the Judgement of Hon. L. K. Sindani, Resident Magistrate of 15.4.19 in Tononoka Children's Court Cause No. 267 of 2018)

1. The Appeal herein arises from the judgment of Hon. L. K. Sindani, Resident Magistrate of 15.4.19 in Tononoka Children's Court Cause No. 267 of 2018 (the suit) filed by RM, the Appellant on 7.8.18, against JNM, the Respondent. The parties were married in 1995 and are blessed with 4 children, JM born on 3.7.97, DG, born on 15.7.04, EM, born on 30.4.09 and JB, born on 16.3.13. In the suit, the Appellant sought the following:

- i. a declaration that the parties have equal parental responsibility over the children.
- ii. That legal custody, care and control of the children be vested in her.
- iii. That the Respondent be ordered to pay school fees, medical and educational expenses and contribute monthly maintenance for the children in the sum of Kshs. 25,000/=.
- iv. Costs.

2. The Appellant had alleged that following the parties' separation, the Respondent removed the children from her custody without her consent and took them to his mother in Kisii. Both parties reside in Mombasa. While there, their daughter E had allegedly been defiled twice by the Respondent's cousin. The Appellant, being concerned for the welfare of the children filed the suit in the Children's Court. The Respondent denied the allegations and claimed that the Appellant had neglected and even abandoned the children at one point. His position was that he was already catering for the children's needs.

3. In the impugned judgment, the Hon. Magistrate directed that for purposes of the children's stability, *staus quo* be maintained and that the Appellant was to have unlimited access to the children during school holidays.

4. It is these orders of the Hon. Magistrate that provoked the Appeal herein. The summarized grounds are that the trial Magistrate erred in law and in fact in that she:

- a. Denied the Appellant, the biological mother of the children, custody of the children who are of tender years, in the absence of exceptional circumstances.**
- b. Granted custody of the children to their paternal grandmother in Nyamira County while both their biological parents are alive and reside in Mombasa County.**
- c. Disregarded medical evidence that E had been defiled and was in dire need of medication for post-traumatic stress disorder and therapy and treatment from one Asha Athman Nyakundi.**
- d. Failed to follow the long established principles and binding authorities on custody of children and found the Appellant unworthy of custody of female children of tender years.**

5. The Appellant prayed that the Appeal be allowed and that judgment and orders of the Hon. Magistrate of 15.4.19, be set aside. She also prayed for costs.

6. The Appellant confined her submissions to the last 2 children who are both female. The Appellant submitted that she presented at the trial, post rape care forms demonstrating that E had been defiled by the Respondent's brother, D

7. S who was charged in Criminal Case No. 727 of 2015 at the Shanzu Law Courts. She further asserted that the said DS was acquitted because the Respondent intimidated witnesses and that the Respondent is currently being prosecuted for conspiracy to defeat justice. The Appellant contends that the foregoing is the reason the Respondent took away the children without her consent. It was not because she was an unfit mother. That indeed all witnesses including the Respondent admitted that she was not a wayward person.

8. The Appellant further submitted the trial Magistrate failed to consider the best interests of the female children of tender years and further disregarded the legal principles and binding authorities on the subject. The trial Magistrate further erred in granting custody neither to the mother nor father of the children, but to the paternal grandmother. To the Appellant therefore, the scales of justice tilt in favour of granting the prayers sought in her plaint.

9. The Respondent submitted that the trial Court had the opportunity of observing the Appellant as she testified and found that she was inconsistent in her evidence. This cast doubt on her fitness to have custody of the children. It was further submitted that where there are exceptional circumstances, the law permits the disqualification of a mother from being awarded custody of children. According to the Respondent, exceptional circumstances did exist in the matter warranting the denial of the Appellant of custody of the children. It was further submitted that at one point, the Appellant failed to pick up the children and asked the Respondent to pick them up claiming she was sick. The burden of proving that she was indeed sick was upon her but she failed to discharge the onus. The Respondent however discharged his burden of proving that the Appellant was unfit to be granted custody of the children and that is why the Court disqualified the Appellant. The Respondent contended that the trial Magistrate arrived at a sound, just and fair decision and urged this Court not to interfere with the trial Magistrate's exercise of discretion.

10. I have given due consideration to the record of appeal, the grounds of appeal as well as the submissions by the parties' respective counsel. This being a first appeal, I have subjected the evidence adduced before the trial Magistrate to a fresh analysis and evaluation while giving due allowance for the fact that I neither saw nor heard the witnesses. See Selle and another –vs- Associated Motor Boat Company Ltd.& Others (1968) EA 123.

11. The 2 female children, E and J were born on 30.4.09 and 16.3.13 respectively. At the time of the filing of the suit and of the judgment, the older one was just shy of 10 years old while the younger was about 6 years old. The children are therefore children of tender years within the meaning of Section 2 of the Children Act.

12. Courts have consistently upheld the general rule that custody of children of tender years should be vested in their mother unless there are sufficient reasons or exceptional circumstances to depart from this *prima facie* rule. In the Court of Appeal case of Githunguri v Githunguri [1979] eKLR, Law, JA. opined:

“In the instant case, the learned judge gave the husband the custody of the two little girls because, in his words:

“I do feel that he is in a better position and is generally a more suitable person to look after and to have custody of them.”

He did not say that the mother was an unsuitable person, or that she was unfit to have the care and custody of her little daughters. In my view, there are no ‘exceptional circumstances’ shown in this case to justify depriving the mother of her natural right to have her children with her, so as to exclude the prima facie, or generally accepted rule or principle recognised in the cases to which I have referred in this judgment.”

13. In his testimony in the trial Court, the Respondent stated that the Appellant is neither a prostitute nor a drunkard. He however stated that the Appellant is not a caring mother and does not take education seriously. That when she had custody of the children, she would leave the house at 4am only to return at 8pm, to the detriment of the children. The evidence regarding the children being abandoned by the Appellant and taken to a children's home is hazy. No dates are given and it is not clear when exactly the children were taken there or indeed the children's home to which they were taken. Without further and better details, it is not possible for this Court to make any finding on the same.

14. For a Court to depart from the generally accepted rule, it must be demonstrated that exceptional circumstances do exist to justify depriving a mother of her natural right to have her little girls with her. In the case of J.O. v S.A.O. [2016] eKLR, the Court of Appeal while affirming the same general rule, gave examples of what constitutes exceptional circumstances as follows:

“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 suited 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.”

15. Similarly, in Sospeter Ojaamong vs. Lynette Amondi Otieno Civil Appeal 176 of 2006, the Court of Appeal stated:

“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 behavior, drunken habit, bad company are some of the factors which would disqualify her from being awarded custody of a child of tender age."

16. From the evidence on record, I find that no exceptional circumstances exist to divest the Appellant of custody of her children and by extension deprive the children of the love and care of their mother. In order to secure the welfare of the children however, it is imperative that the Appellant moves out of the house she shares with her cousins and get a place of her own and further maintain reasonable working hours, that will accord her time with the children

17. In her judgment, the trial Magistrate did not grant either parent custody of the children but granted custody to their grandmother. No reasons were given in the judgment for departing from the general rule that custody of the children of tender years should be vested in their mother. She simply directed that *status quo* be maintained.

18. It is to be noted that every child has a right to the parental care of both parents, a right guaranteed by Article 53(1)(e) of the Constitution of Kenya 2010 which as 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;

19. By removing the children from their parents in Mombasa and taking them all the way to Kisii, the Respondent denied them their constitutional right to parental care and protection. The Respondent cannot purport to be exercising parental care and protection over the children by his monthly visits to Kisii. Further, given that both parents of the children are alive, why would the Respondent want to burden his aging mother with bringing up his children? Is it not enough that she has completed her work by bringing up her own children, including the Respondent? Why would he want his mother to do his parental duties for him in her old age, when he is alive and well? Further, why should the Respondent's brother be the one to attend school meetings for the children, as if the children do not have living parents? These questions posed by the Court are questions that could also remain with the children for a long time, if not their entire lives. This cannot be said to be in the best interests of the children. Clearly the trial Magistrate misdirected herself by ordering that *status quo* to be maintained as the order had in effect granted custody of the children to the Respondent's aging mother. Further, the decision entrenched the abhorrent conduct of the Respondent and further negated the constitutional right of the children to parental care and protection by both parents. It is also not lost on this Court that the grandmother of the children never appeared before the trial Magistrate to be examined as to her suitability for vesting actual physical custody of the children upon her, and whether the children's best interests would be better served by being in her custody.

20. While considering the issue of custody of the children herein, the trial Magistrate ought to have attached due primacy to the best interests of the children as demanded by Article 53(2) of the Constitution and Section 4 (2) and (3) of the Children's Act. The trial Magistrate fell into error by granting custody of the children to their grandmother, which compromised the best interests of the children.

21. In the end, having evaluated the evidence and the law, I find that this Appeal has merit. The judgment of the trial Magistrate is hereby set aside and in the best interest of the children, I substitute therefor the following orders:

- i. The Appellant and the Respondent have equal parental responsibility over the children, EM and JB.
- ii. Joint legal custody of the children, EM and JB is granted to both the Appellant and the Respondent.
- iii. The Appellant shall have actual physical custody of the children upon acquiring a house of her own.
- iv. The Respondent shall continue to pay school fees and educational expenses for the children as well as cater for their medical needs.
- v. This being a matter concerning children, each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 5th day of June 2020

M. THANDE

JUDGE

In the presence of: -

..... **for the Appellant**

..... **for the Respondent**

..... **Court Assistant**