REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL 29 OF 2019

NK.....APPELLANT

VERSUS

AL.....RESPONDENT

(An Appeal from the Ruling of Hon. V Yator, Senior Resident Magistrate of 10.7.19

in Tononoka Children's Court Cause No. 93 of 2014)

JUDGMENT

1. The Appeal herein arises from the judgment of Hon. V Yator, Senior Resident Magistrate of 10.7.19 in Tononoka Children's Court Cause No. 93 of 2014 (the suit) filed byAL, the Respondenton 11.3.14, against NK, the Appellant.

2. The background of this matter is that the parties who are Muslims, were married on 26.1.02 in Kampala, Uganda. The Appellant is a citizen of Uganda while the Respondent is Kenyan. They were blessed with 3 children, aged at the time of filing the suit, 11 years, 8 years and 5 years respectively. In his plaint dated 10.3.14 and amended on12.2.19,the Respondent claimed that the Appellant had in February 2014, travelled to Uganda, without cause and consent and abandoned and deserted the family home, thereby causing the children mental anguish. He sought custody of the3 children and an order requiring the Appellant to make a financial contribution to all expenses. In her defenceand counterclaim filed on 28.7.17, amended on 31.7.17 and further amended on 31.7.19, the Appellant denied the allegations by the Respondent and accused him of cruelty. She further claimed that following the parties' divorce, the Respondent cancelled her dependency pass. She now stays in the country on a tourist visa and is unable to work, to earn an income. Sheprayed for custody of the children.She also prayed that the order sought that she contributes 50% of the expenses, be disallowed and that the Respondent be ordered to make periodic financial payment as per the agreement and arrangement currently in place.

3. In the impugned judgment, the Hon. Magistrate ordered that:

a) Both parties have joint legal custody.

b) During school days both parties shall have shared custody but subject to the Defendant acquiring a place of her own in Mombasa as follows:

i) The Plaintiff shall have the children from Monday evening to Friday morning.

ii) The Defendant shall have the children from Friday evening to Monday morning.

iii) The Defendant to pick the children from school on Friday evening and drop them on Monday morning.

c) Should the Defendant decide to relocate to Uganda, she will enjoy unlimited access during school days over the weekends whenever she is in Kenya from Saturday morning to Sunday evening.

d) School holidays shall be shared equally at 50:50.

e) The Plaintiff shall pay school fees and school related expenses for the children.

f) The Plaintiff shall cater for food and all other needs during his period of actual physical custody.

g) The Defendant shall cater for all the needs of the children in terms of food and other needs during her period of actual physical custody.

h) The clothing needs of the children shall be between the parties at 50:50.

i) Each party shall cater for the entertainment needs of the children during their period of custody.

j) The Defendant shall cater for transport for the children should she want to travel with the children to Ugandan (sic) during her period over the school holidays. The father to hand over the travel documents during the time of travel.

k) The medical needs of the children to be catered for by the Plaintiff as and when need arises.

4. It is these orders of the Hon. Magistrate that provoked the Appellant to file the Appeal herein, citing all of 26 grounds.In her submissions, the Appellant summarized the grounds into 3 grounds, *viz*, that the trial Magistrate erred in law and in fact in that she:

a) failed to apply the principles of law relating to custody.

b) failed to apply the principles of law relating to maintenance.

c) arrived at a decision that was unconstitutional and not in the best interest of the children.

5. The Appellant prayed that the Appeal be allowed and that judgment and orders of the Hon. Magistrate of 10.7.19 be set aside and in substitution therefor, an order of this Court be made in such terms as the Court may deem fit in the interests of the children. She also prayed for costs.

6. To begin with, the Respondent in his submissions contended that the Appellant introduced new evidence contained in pages 1051–1067 of the record of appeal and an affidavit filed by the Appellant on 7.10.19. Further, that these documents were introduced without leave of the Court.

7. I have looked at the record. The documents in pages 1051–1067 of the record of appeal include a charge sheet in criminal cases nos. 341/90/2018 and 1760/18 in which the Respondent, has been charged with assault and forgery respectively. There are also statements and other documents related thereto. These documents are neither in the list of documents filed by the Appellant in the trial Court on 31.7.17 nor her further list of documents dated 19.12.17. In fact, the documents are of 2018, a period after the 2 lists of documents were filed.

8. In the case of Wanje v A.K.Saikwa [1984] eKLR the Court of Appeal stated:

"The principles upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning LJ, as he then was, in the case of Ladd v Marshall [1954] 1 WLR 1489 at 1491 and those principles are:

(a) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

(b) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;

(c) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

9. None of the foregoing conditions can be said to obtain in the present case. And in the case of Ernst & Young v Capital Markets Authority & another [2019] eKLR, the Court of appeal while dismissing an application for introduction of additional evidence in the appeal before the Court had this to say:

The documents relate to matters that took place after the judgment was delivered by the High Court. From the record, the High Court judgment was delivered on 7th March, 2017 while the documents proposed to be adduced in evidence date from 18th October, 2017 – 20th May, 2019. Consequently, the proposed additional evidence could never have been placed before the High Court Judge when he was sitting to consider the impugned judgment. Consequently, we should be wary to make determination on matters that were never placed before the High Court Judge in the first place. We agree with counsel for the 1st respondent that if we were to allow this evidence, it would constitute a new case on appeal and the respondent will have no occasion to counter it.

10. The documents objected to by the Respondent were never placed before the trial Court and were not available to the Hon. Magistrate when she sat to consider the impugned judgment. As stated by the Court of Appeal, this Court should be wary to make a determination on matters that were never placed before the trial Court in the first place.

11. Further and even more critical, these documents were included in the record of appeal without the leave of this Court. In Nicholas

KiptooArapKorirSalat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR, the Supreme Court expunged from the record a petition filed out of time without leave of Court and said:

> ***To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filling renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. …Petition No. 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court's Record.***

12. By parity of reasoning, the documents in question having been filed without leave of Court are a nullity and of no legal consequence. Accordingly, the said documents are hereby expunged from the Court record.

13. As regards the Appellant's affidavit filed on 7.10.19, it was in respect of her Application dated 2.8.19. The Application was compromised on 12.2.2020 when parties agreed to proceed with the Appeal. As such the affidavit is not and cannot be part of the Appeal herein. The Respondent's apprehension that the affidavit will be considered by the Court herein, is therefore unfounded.

14. I now turn to the issues for determination as set out by the Appellant, which are not dissimilar to those raised by the Respondent. As I deliberate on this the matter, I remind myself that the primary consideration is the best interests of the children herein. In this regard, I am duly guided by Article 53(2) of the Constitution of Kenya, 2010 which provides:

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

15. I am also guided by Section 4(2) and (3) of the Children Act (the Act) which provides:

> ***(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.***
>
> ***(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration… to the extent that this is consistent with adopting a course of action calculated to—***
>
> > ***(a) safeguard and promote the rights and welfare of the child;***
> >
> > ***(b) conserve and promote the welfare of the child;***
> >
> > ***(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.***

Whether the trial Magistrate applied the principles of law relating to custody

16. The Appellant submitted that her evidence in the trial Court was that she has always had custody of the children from birth to date, nurturing and caring for them. The Respondent on the other hand worked and travelled for long periods of time. The Appellant contended that the trial magistrate failed to take into account the provisions of Sections 83(1), 76(3) and 4(3) and (4) of the Children Act (the Act), which stipulate the factors to be considered when granting custody.

17. The Appellant further submitted that as a housewife, she is continuously capable of being available to offer full time care of the children's emotional and physical development, assisting with school work as well as cooking for them as well as taking food to them. The children expressed their wish that they stay with the Appellant, which the trial Magistrate disregarded. It was further submitted that children of tender years should be with their mother. The trial Magistrate thus erred in finding that the children stay with the Respondent during the school term.

18. For the Respondent, it was submitted that peculiar circumstances existed that rendered the Appellant unsuitable to have custody of the children. According to the Respondent, the Appellant's morality is wanting and she is thus unable to bring up the children especially their daughter, in a morally correct way. The Respondent cited pages 1253 and 1256 of the record where he claims that the Appellant confirmed that the whole town was saying she had an affair with the children's swimming coach and that she comes home at midnight. Pages 611-615 contain the Appellant's inhumane acts against the children. The Respondent further argued that there can be no clear division between care giving and bread winning. According to the Respondent therefore, the trial Magistrate applied the law as required.

19. The Children Act stipulates the principles that are to be applied in making a custody order. Section 83 provides:

> ***(1) 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.

20. On the conduct of the Appellant, the Respondent contended that she is of immoral character. The basis of his contention is that the Appellant confirmed that everyone was saying that she was having an affair with the swimming coach and that she comes home at midnight. The Court notes that the Appellant did state that the whole town was saying that she was having an affair with the children's swimming coach. The Appellant also stated thatshe came home close to midnight on 17.3.17. My view is that the Appellant's statement regarding the swimming coach was a report on what was being said out there. Without any evidence that she was in an affair with the coach, it surely cannot be said to be a confirmation that the Appellant was indeed having an affair with the swimming coach. On her returning home after midnight, the Appellant explained that she had attended W's birthday party and that the Respondent and the children were aware of the fact. The Respondent locked her out upon her return. There is no evidence to suggest that the Appellant returned home after midnight on any other occasion or habitually. I therefore have difficulty in finding that this is a blot on the moral character of the Appellant.

21. I have also looked at Pages 611-615 which contain pictures of the 2 older children with tape on their mouths and of the youngest children with his hands and legs tied with a cloth. In his evidence, the Respondent stated that the Appellant would do this to the children, take photographs and send the same to him while he was away. He stated that the children complained to him and their grandmother. In her testimony, the Appellant stated that she does not know who took the pictures. Although she concedes that tying a 2 year old child is a terrible thing to do, she does not deny that she was in fact the one who taped the children's mouths and tied the youngest one with a cloth. It is not indicated why this was done to the children and whether it was a form of punishment. Ihave carefully looked at what the children stated before the trial Court to see if any reference was made to the matter. I note however, that none of them said that the Appellant was cruel to them.

22. In the case of SospeterOjaamong vs. Lynette AmondiOtieno 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."***

23. The Court of Appeal in the foregoing decision cited disgraceful conduct, immoral behavior, drunkenness, bad company as some of the factors that would disqualify a mother from being awarded custody. Are the incidences cited by the Respondent sufficient to disqualify the Appellant from being awarded custody of the children? When I consider the same, I am unable to draw the conclusion that they render the Appellant unfit to be granted custody. Notably the trial Magistrate stated, in her judgment, that she was of the considered view that both parties were fit to be granted custody.

24. Further, the mother on account of her being a housewife spends more time with the children. The evidence shows that she gave daily care to the children even during hospitalization, assisted with homework and attended school events. She also cooked for the children and even took their meals to them while in school and generally nurtured them. This no doubt freed the Respondent to work full time in order to provide for the family. My considered view therefore, is that given these circumstances, and in the best interests of the children, the Appellant is better placed to have actual physical custody, care and control of the children. I am also guided in this regard by the holding in the case of J.O. v S.A.O. [2016] eKLR, in which the Court of Appeal stated:

> ***"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."***

25. From the wording above, the Court of Appeal was of the view that custody of children should generally be awarded to the mother, more so of young children. The rider is where exceptional circumstances render the mother unfit to have custody. In the present case, after evaluating the evidence, I find that neither the Appellant nor the Respondent is an unfit parent for purposes of custody.

26. As regards the discernible wishes of the children, the trial Magistrate stated:

> ***"The children were interviewed by the court and all of them were of the view that if their parents could iron out their differences***

and get back together they would be very happy. The two older children however stated that should there be no choice they wished to stay with their mother. All the children however admitted that both their parents were wonderful and they have never lacked anything."

27. The evidence shows that the parties herein were in a very difficult marriage before it was terminated in the Kadhi's Court. The people who worked for them also got caught up in the conflict in the home. Tragically also, the children bore the brunt of the toxic relationship between their parents. The children love both parents, but have been forced by circumstances to make a choice between them. When interviewed by the trial Court, the eldest child H, aged 15, stated that his parents fight like children. He further stated that he would like to stay with his mother but he wished that his parents could get back together. The second child, I aged 12, stated that their parents fight in their presence. She loves both parents and would like to stay with both but if she must choose, then she would rather stay with her mother. She also stated that if she has an issue she prefers to share the same with her mother. The youngest child, A, aged 10, stated that he would like to stay with both parents.

28. The ascertainable wishes of children as well as their best interests, are some of the factors to be considered while determining to whom a custody order should be made. In this regard, I agree with Ngugi, J. who in the case of JKN v HWN [2019] eKLR, stated:

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.

29. In the present case, 2 of the children clearly expressed their wish to stay with their mother. As such, I find that the trial Magistrate fell into error by disregarding not just the ascertainable, butthe clearly expressed wishes of the children. Ultimately, 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 postulated in Article 53(2) of the Constitution and Section 4 (2) and (3) of the Children's Act.

Whether the trial Magistrate applied the principles of law relating to maintenance.

30. It is the Appellant's case that the trial Magistrate failed to apply the principles of law relating to maintenance. She submitted that the trial Magistrate erred by ordering the Appellant to cater for all the needs of the children while in her custody, considering she has no source of income. The Appellant contends that once the Appellant gets her citizenship, she will be able to resume providing for her children through earnings from her baking. She submitted that the Respondent, who is capable catering for the needs of the children should continueto do so regardless of who has custody of the children.

31. For the Respondent, it was submitted that in spite of parental responsibility being equal, the trial Magistrate placed a greater responsibility on him, with the Appellant being directed to cater for the needs of the children only during the time in her custody. The Respondent argued that the Appellant confirmed that she earnsKshs. 30,000/= from baking. Rather than complaining, she ought to have applied for a work permit to enable her be gainfully engaged. The Respondent further contended that contrary to the impression created by the Appellant, there was no maintenance agreement between the parties.

32. In her judgment, the trial Magistrate directed the Respondent to cater for school fees, school related expenses and medical needs for the children. She further directed each party to cater for the children's food, entertainment and all other needs during their period of actual physical custody and both parties were to take care of the clothing needs of the children on a 50:50 basis.

33. It is this arrangement on maintenance that the Appellant finds fault with. She claims that the trial magistrate erred in reviewing the maintenance agreement in force. This Court has reviewed the record and notes that no evidence of a maintenance agreement was adduced in the trial Court. Indeed, the Appellant did state, at page 1252 of the record, ***"I have no agreement."***

34. The Article 53(1)(e) of the Constitution of Kenya, 2010 guarantees to every child, parental care and protection as follows:

53. (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.

35. Section 23(1) of the Act defines parental responsibility as all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child. Sub-section (2) provides that the duties referred to in Sub-section (1) include inter alia:

(a) the duty to maintain the child and in particular to provide him with—

(i) adequate diet;

(ii) shelter;

(iii) clothing;

(iv) medical care including immunisation; and

(v) education and guidance;

36. Parental care and protection is an equally shared responsibility of both parents. Shared responsibility presupposes ability.From the evidence, the Respondent has undertaken the above duties as the sole bread winner. The Appellant has discharged her responsibility by cooking for the children, taking food to them in school, checking their homework, attending school meetings and events and generally giving guidance to the children.

37. Maintenance is an aspect of parental care and is the responsibility of both parents of a child. Section 94(1) of the Act stipulates the considerations by which the Court shall be guided, when making an order for financial provision for the maintenance of a child. These considerations include *inter alia*:

> ***(a) The income or earning capacity, property and other financial resources which the parties or any other person in whose favour the court proposes to make an order, have or are likely to have in the foreseeable future;***
>
> ***(b) the financial needs, obligations, or responsibilities which each party has or is likely to have in the foreseeable future;***
>
> ***(c) the financial needs of the child and the child's current circumstances…***

38. On the income or earning capacity of the parties, the evidence on record shows that the Appellant is an unemployed housewife. She did engage in baking pastries for sale which however was discontinued under circumstances that are not clear to the Court, as each party blames the other. The Respondent on the other hand works as a consultant with [Particulars Withheld] Kenya. The Respondent is the sole bread winner of the family and has been taking care of all the family needs including food, clothing, school fees, school related expenses, medical expenses and other home related expenses. The children are young, dependent and still in school and therefore still requireprovision for all these needs.

39. Without the Appellant being in any gainful employment, the trial Magistrate erred in directing her to cater for the needs of the children during her time with them. This clearly militates against the best interests of the children. This was the tenor of the holding in the case of S.O v L.A.M [2009] eKLR, where the Court of Appeal stated:

> ***It is our considered view that an order awarding actual custody to an unemployed mother of the child who has no means of getting reasonable accommodation for the child, will not be in the best interests of that child unless provision is made for accommodation, more so if the father of the child, as the appellant herein, is able to provide such accommodation for him. The respondent freely admitted that she was unemployed, had no reasonable accommodation in which the child would live and that she could not provide for the child. On the other hand the appellant, likewise freely admitted, that he had the resources sufficient to make provision for the benefit of his son.***

40. The marriage between the parties is over. They both must reorganize and adjust their lives to the new reality. In order for the Appellant to contribute towards the needs of the children, it is necessary that she be granted time to start the business of baking and selling pastries. Only then can an order be made for her to contribute to maintenance of the children.

Whether the decision of the trial Magistrate was unconstitutional and not in the best interest of the children

41. The Appellant submitted that the judgment violated the provisions of Article 27 of the Constitution. It was contended that the trial Magistrate in her decision, discriminated against the Appellant by virtue of her sex, her role as a mother, financial status and the medical status of the children. The Respondent counters this by arguing that the Appellant failed to pin point any provisions of that Article that were violated by the trial Magistrate. Article 27 of the Constitution guarantees to all persons,equality and freedom from discrimination. It is trite law that a party claiming that a constitutional provision has been infringed must state with precision must state with precision how the provision has been infringed. In the South African case of S. vs. Zuma & Others (1995)2 SA 642(CC)[A3], it was held:

> ***A party alleging violation of a constitutional right or freedom must demonstrate that the exercise of a fundamental right has been impaired, infringed or limited.***

42. In the present case, I am not persuaded that the Appellant has clearly articulated how the trial Magistrate's judgment violated her rights as guaranteed by Article 27 of the Constitution. I am therefore unable to find that the said Article 7 of the Constitution was violated. This finding does not however negate my finding that the trial Magistrate's orders relating to custody and maintenance of the children were in contravention of Article 53(2) of the Constitution. It has been demonstrated herein that the said orders jeopardized the best interests of the children.

43. Should the Court then allow the Appeal herein? It is trite law that an appellate Court should be slow in interfering with the exercise of the discretion of the Court below. An appellate Court may only tinker with a decision, if it is satisfied that the discretion of that Court was exercised injudiciously. In Mbogo& Another versus Shah [1968] E.A. 93**,** it was held at page 96 that:

> ***An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice.***

44. In the present case, having evaluated the evidence and the law, this Court finds that there exist sufficient grounds to interfere with the

decision of the trial Magistrate. The judgment of the trial Magistrate of 10.7.19 is hereby set aside and in the best interest of the children herein, I substitute therefor the following orders:

i) Joint legal custody of the childrenis granted to both the Appellant and the Respondent.

ii) The Appellant shall have actual physical custody of the children while the Respondent shall have unlimited access every alternate weekend during the school term and half the school holidays.

iii) The Appellant shall not take the children out of the jurisdiction of the Court without the consent of the Respondent or leave of this Court.

iv) The Respondent shall continue to pay school fees and educational expenses for the children as well as cater for their medical needs.

v) The Respondent shall continue to cater for food, clothing, entertainment and other needs of the children. With effect from 1.7.2021 however, the Appellant shall take care of these needs during her period of actual physical custody of the children.

vi) This being a matter concerning children, each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 10th day of July, 2020

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M. THANDE

JUDGE

In the presence of: -

…… for the Appellant

…… for the Respondent

…….…… Court Assistant