REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 105 OF 2018

ROO.....APPELLANT

VERSUS

LJA.....RESPONDENT

[Being an appeal arising from the Judgment and decree of the Hon. M. Agutu (RM) delivered in KISUMU CHILDREN'S COURT CASE NO. 30 of 2015 on 11th October, 2018]

JUDGMENT

The Appellant, **ROO**, has challenged the judgment which the learned trial magistrate delivered on 11th October 2018.

1. The Respondent, **LJA**, had sued the Appellant seeking custody of their five children. She had also asked the trial court to order the Appellant to provide maintenance for the said children.

2. In answer to the Plaint, the Appellant lodged a Defence denying all the allegations which had been levelled against him.

3. The Appellant also lodged a Counter-claim, seeking custody of their five children.

4. After a full trial the learned trial magistrate ordered that the parties ought to share parental responsibility for their children.

5. The Court then made the following orders in respect to the Custody and Maintenance of the children;

> ***"1) The Defendant will have custody of the minors on two alternating weekends in a month; i.e. the first and the third weekend in a month, in which he will collect the minors at 6.00p.m on Friday and return them at 6.00p.m on Sundays.***
>
> ***The Plaintiff will have custody of the minors on weekdays and alternating weekends in a month. This is inclusive of school holidays.***
>
> ***2) The Defendant will have unlimited visitation rights over the minors while the minors are in the custody of the***
>
> ***Plaintiff.***
>
> ***Parental responsibility and maintenance of the Children will be shared as follows –***
>
> > ***1) The Defendant is to cater for the school fees of the minors. In addition to that, the Defendant will cater for other miscellaneous needs associated with the children's education i.e. school uniform, books, school transport etc.***
> >
> > ***2) The Defendant to cater for the medical needs of the minors.***
> >
> > ***3) The Plaintiff will cater for the clothing and shelter of the minors.***
> >
> > ***4) The Defendant to contribute Kshs 4,000/= every month payable to the Plaintiff, on or before the 5th of every month, to cater for food of the minors.***
>
> ***Each party will bear his or her costs."***

6. The Appellant felt aggrieved by the judgment, hence this appeal.

7. When canvassing the appeal, the Appellant submitted that the trial court had completely and absolutely failed to evaluate the comprehensive evidence and material which had been placed before it.

8. In his view, the evidence exposes the Appellant as a responsible father, who had taken good care of the children, during the long duration when he had custody of them.

9. In contrast, the Appellant described the Respondent as a reckless mother who left the Appellant and the children as she roamed the world.

10. The Appellant also pointed out that it was wrong to give the Respondent custody, considering that she was usually away in Kericho throughout the week, and only returned to Kisumu over the weekends.

11. It was the Appellant's view that it was meaningful to give him custody as he would practically be with the children, compared to the Respondent who usually left the children with her parents.

12. The Appellant pointed out that he had previously taken good care of the children, as he was always there for them and had actively participated in their educational development. Therefore, the Appellant believed that the best interests of the children would only be served if the court granted him the custody of the said children.

13. And whereas the Appellant conceded that, ordinarily, mothers would be granted custody of children of a tender age, he pointed out the children in this case were not of a tender age.

14. The Appellant requested the court to take into account the fact that during the period of 3 years, when he single-handedly looked after the children, the said children were properly looked after. Therefore, he submitted that there was no basis for disturbing the status quo.

15. He asserted that by granting custody to the Respondent, the trial court had removed the children from a sound, secure and peaceful environment, and had handed them over to a person who had exhibited extreme casualness towards the said children.

16. The Appellant submitted that;

> ***"…. it was a grave mistake for the trial magistrate to have determined the matter simplistically on account of her own interview of the children and completely ignoring clear and glaring evidence placed before her."***

17. He was of the view that the trial court had shut her eyes from the reality that the response by the children, in the cause of the interview may have been influenced by the mother.

18. The Appellant submitted that the interview was not an objective indicator, and that therefore, the trial court ought not to have placed over-reliance upon it, in arriving at the final conclusion.

19. In answer to the appeal, the Respondent submitted that the trial court had correctly applied the principle of the *"best interest of the child"*, as stipulated by **Article 53 (2)** of the **Constitution** and **Section 4 (2)** of the **Children Act.**

20. She pointed out that 2 of the children were of a young age, and said that, as their mother, she had a natural right to have custody of them.

21. The Respondent submitted that it was in the best interest of the children that all 5 of them grow up together, in the same household.

22. Conceding that she worked in Kericho, the Respondent said that she, nonetheless, took good care of the children.

23. According to the Respondent, there were neither exceptional nor special circumstances that could displace the general principle which dictated that mothers be given the custody of their young children.

24. She pointed out that she was not a person with a disgraceful conduct, immoral behavior, drunken habit or bad company.

25. She also added that she did not have mental incapacity which might have rendered her unsuitable for bringing up her children.

26. According to the Respondent, the Appellant was living with *"his 2nd wife and child"*, in Manyatta Estate. She submitted that the court was therefore right to have taken into account the fact that the children of the parties herein were uncomfortable staying with their step-mother.

27. The Respondent submitted that the Appellant should be disentitled from having custody of the children because he had blatantly disobeyed various orders which the court had made.

28. It was emphasized by the Respondent that the Appellant had not been cut-off from his children, as he would continue to have reasonable access to them.

29. I was therefore urged to dismiss the appeal.

30. Being the first appellate court, I am obliged to re-evaluate all the evidence on record, and to draw therefrom my own conclusions. When carrying out the task of re-evaluation of evidence, I remind myself that, unlike the learned trial magistrate, I did not have the benefit of observing the witnesses when they were testifying.

31. At the trial, the Respondent testified in support of her case, whilst the Appellant called 2 witnesses who testified in support of his testimony.

32. It is common ground that the marriage between the Appellant and the Respondent was solemnized in December 2000.

33. Both parties testified that they lived happily until 2007, when issues begun arising between them. Although they tried to have reconciliation, with the help of church elders, apparently they were not successful.

34. In 2011 the Respondent moved out from their matrimonial home, which was in Manyatta Estate, Kisumu. She moved into her parents' house which is located in Milimani, Kisumu.

35. In June 2013 the Respondent moved back to her matrimonial house, so as to stay with the children whilst the Appellant was attending to some work assignment in U.S.A.

36. The Appellant returned to Kenya in September 2013, and the parties lived together until December 2013, when the Respondent moved into her parents' house in Milimani.

37. In January 2014, the children went to the house in Milimani. Whilst the Appellant asserted that it was the Appellant who had engineered the move, it was the Respondent's position that the children just followed her to Milimani.

38. It is common ground that the Appellant went to Milimani to get the children. However, he only went away with 4 children.

39. Later, the remaining child linked up with the Appellant after attending a church service.

40. The Appellant testified that the child joined him willingly; whilst the Respondent accused the Appellant of luring the child away.

41. Each of the parties accused the other of influencing the children in such manner as caused the children to have negative views about the other parent.

42. The Appellant testified that the children perceived their mother to be a person of loose morals, yet when he was questioned about how the children could have come by such information, the Appellant had no idea.

43. On her part, the Respondent accused the Appellant of being abusive to the children, yet she never lodged any complaint with the relevant authorities.

44. Whilst the Appellant considered the Respondent as being irresponsible, he actually persuaded her to come back to the matrimonial home, so that she could look after the children whilst he was away in America, for 3 months.

45. In my assessment, each of the parties distrusts the other and tried to paint them in bad light.

46. But the issue about the custody of the children is not dependent upon how the parties perceive each other. The primary consideration is the best interests of the children.

47. During cross-examination the Respondent described the Appellant in the following terms;

> ***"He had a good relationship with the children. He had no issue with the children. At that point, I would describe the defendant as 1st class***
>
> ***parent. He would do anything and everything for the children, for all the children.***
>
> ***The only issue was our disagreements which would lead to me leaving my matrimonial home."***

48. In my considered opinion, it is unlikely that the character of the Appellant could have thereafter changed so much towards his own children, simply because the Appellant had disagreed with the Respondent.

49. I also note that when the Appellant was being cross-examined he said;

> ***"I realize that the children need the mother and me equally."***

50. If the Appellant was being sincere when making that statement, that would imply that he fully appreciated that neither of the parties ought to be granted absolute custody.

51. After the parties had each closed their respective cases, the learned trial magistrate invoked the provision of **Section 4** of the **Children Act**, and directed that each of the children would have a session with the court.

52. **Section 4 (3)** of the **Children Act** provides as follows;

> ***"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 it 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."***

53. The law-makers made it absolutely clear that the interests of the child must be accorded the first and paramount consideration.

54. It therefore follows that the interests of parents cannot be permitted to supercede the interests of the child.

55. Pursuant to **Section 4 (4)** of the **Children Act;**

> ***"In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and degree of maturity."***

56. I therefore find that when the learned trial magistrate gave to the children an opportunity when they could express their opinion, the court was doing the very thing that the law commanded it to do.

57. The court was obliged to take into account the opinions expressed by the children. Therefore, when the decision made by the trial court was influenced by the opinions expressed by the children, I find that the said decision cannot be deemed as being simplistic.

58. The Appellant appears to have greater financial muscle compared to the Respondent.

59. He also has an employer who provides medical insurance cover for his wife and children.

60. From a material perspective, the Appellant appears to be better suited to provide for the children.

61. However, the welfare of children is not just about material things.

62. I am not suggesting that the Appellant was just providing material things. If anything, he even alluded to the fact that the maternal grandfather of the children had tried to influence the said children through the provision of expensive gifts such as smart phones.

63. I hold the considered view that nobody can ever take away credit from the Appellant for the period he single-handedly looked after the children, when their mother had moved away from her matrimonial home.

64. The law recognizes that the interests of a child must incorporate guidance and correction.

65. Accordingly, when the Appellant was instilling a sense of discipline in the children, he ought to be commended, instead of being vilified.

66. When the Respondent has to be physically away from the children for many hours every week, because she works in Kericho, whilst the children live in Kisumu, I hold the considered view that she does not have the ability to accord maximum care and attention to the children.

67. The children have more time to themselves when they live with the Respondent than when they live with the Appellant.

68. In my assessment of the view expressed by the children, it is most probably the greater sense of *"freedom"* whilst at Milimani Estate which caused them to feel more comfortable there than they did in Manyatta Estate.

69. But such *"freedom"* is not necessarily in the best interests of the children, because they could miss out on appropriate guidance and correction.

70. In the final analysis, I find that the trial court was right to have concluded that, because the Appellant and the Respondent were husband and wife at the time they were blessed with their 5 children, the 2 of them must share parental responsibility.

71. Pursuant to **Section 24 (1)** of the **Children Act**, neither the father nor the mother should have a superior right or claim against the other, in the exercise of their respective parental responsibility.

72. In the light of that legal imperative, I find that the trial court appears to have accorded the Appellant much lesser opportunity to actualize his parental responsibility.

73. In my considered opinion, the best interest of the children would be achieved if I varied **Order No. 1** so that the same shall now provide as follows;

> ***"The Defendant will have custody of the minors on two alternating weekends in a month i.e. the first and the third weekend, in which he will collect the minors at 6.00p.m on Friday and return them at 6.00p.m on Sundays.***
>
> ***The Plaintiff will have custody of the minors on the weekends that are alternate to those when the Defendant will have custody.***
>
> ***During school-going time, the Defendant will have custody of the minors during the weekdays.***
>
> ***During school holidays, the Plaintiff will have custody of the minors during the weekdays."***

74. In addition, I order that when the Appellant has custody, the Respondent will have unlimited visitation rights over the children. And when the Respondent has custody of the children, the Appellant will have unlimited visitation rights over the children.

75. Save for those 2 variations of the Orders made by the trial court, I uphold all the other orders made on 11th October 2018.

76. Finally, as the appeal has succeeded only partially, I order that each party will pay his or her own costs of the appeal.

DATED, SIGNED and DELIVERED at KISUMU This 10th day of September 2020

FRED A. OCHIENG

JUDGE