



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO 84 OF 2016

KIKM & ASDM APPELLANTS

(Suing through their mother and guardian ad litem FCK)

VERSUS

DMN..... RESPONDENT

RULING

1. By an application dated 21st May 2020 and a supporting affidavit thereto, **DMN** (the applicant) seeks that:

- a) **FCK** be punished for being in contempt of the orders issued on 6th March 2018
- b) The said **FCK** be denied the right of audience until she purges the contempt
- c) Costs of the application be provided

2. It is premised on grounds that by a ruling made on 26th February 2019, and issued on 6th March 2019, custody of the couple's children was awarded to the applicant. However, the respondent in total disregard, removed custody of the children from the respondent, and she has not returned them to-date. It is stated that the appellant was aware of the court orders, but has used every means to wrestle custody of the children from the respondent, thereby undermining the authority of this court.

3. It is not in dispute that the parties are the parents of the two (2) minors who were placed in the respondent's custody after hearing of the case in the subordinate, whilst the appellant was allowed to have the children for a period of two (2) weeks during school holidays. It is alleged that after the children's court delivered its judgment the appellant went into hiding with the children whom she did not want to release to the respondent's custody as directed by the subordinate court. That it was only after about two (2) years that the children and the appellant were traced in Nairobi and the mother was arrested pursuant to a warrant issued by the subordinate court. She was brought to Eldoret and placed in police custody and subsequently produced in court. The subordinate court released the appellant on bail pending further directions.

4. However, the appellant made an application before this court seeking reversal of the order placing custody of the children with the respondent, and while the matter was being dealt with the subordinate court placed the children in **SOS children's home**. The respondent insists that this was done at the instigation of the appellant, despite protests from and he who points out that the placing of the children in **SOS children home** is the genesis of the current complaint over the first minor being molested. He refers to the first medical report which he says indicates the person who molested the child, the place and time when she was molested, emphasizing that it was somebody who was staying with the children at the **SOS children home**. He is thus perplexed that the appellant is now using the same to agitate or justify her having custody of the children.

5. It is also pointed out that, from the proceedings both in the subordinate court and the appeal, appellant's *modus operandi* is not to have the children released to the respondent in compliance with the court order. That she has actually kept the children away from her abode to avoid their being tracked by the police and the respondent, and she is therefore not providing the maternal love and care she pretends to be giving to the children.

6. That, to obviate the mischief, the appellant should be ordered to avail the children in court before the determination of the application, and that the court may if necessary, even interview the children in the absence of the parents to ascertain the truthfulness of the alleged assault. The appellant's conduct is described as being harmful to the welfare of the children and that it is calculated at engendering anarchy.

7. In response, the appellant maintains that the order alleged to have been disobeyed was in fact complied with; as the Respondent took custody of the children on the 10th of March 2019 and has had them all along until she obtained valid court orders of custody via a court

order issued on the 25th of February 2020. That in any case, the order of court was for joint custody which the Respondent has never allowed her to enjoy.

8. As regards having gone away with the children after judgement, the appellant explains that she was in serious fear of her safety given the Respondent's history of violence she had suffered several episodes of severe physical and psychological abuse in his hands throughout the course of their marriage (often meted in the presence of the children). She reported such incidences of domestic violence via OB Numbers 32/26/08/2015 and 39/28/09/2015 where the Respondent assaulted her. That in one incident the Respondent assaulted the family's housekeeper as she was trying to protect the children and the matter was reported to the police via **OB No. 41/26/2/16** and a charge of 'Assault causing Actual Bodily Harm' brought against the Respondent via **ELDORET CMCR No. 1202 of 2016**

9. It is her contention that due to this history of abuse, and the fact that their children were of tender years; she was apprehensive that the children may not be guaranteed safe, healthy environment when with their father. She describes the allegations that she insisted on the children being taken to SOS Children's Village as utterly ridiculous, saying that was a decision reached by the court in exercise of its discretion.

BASIS FOR THE CONTEMPT AND THE MEDICAL REPORT RELIED ON BY THE APPELLANT

10. It is the respondent's case that on 10th March 2020 the appellant proceeded to the children's school and took the children into her custody. It is pointed out that this happened after the orders she had obtained from the subordinate court placing the children in her custody without disclosing that this court had made orders to the contrary in this matter had been discharged. When the trial magistrate learned that she had been duped into issuing the orders she discharged her orders and directed that the file used to obtain the orders in utter abuse of the court process be placed in this file. It was on the same day that the appellant rushed from court and took the children to her custody and they have not been seen by the respondent to date. The respondent maintains that they are not in her custody as efforts by the police to trace them have failed to yield fruit.

11. It is also argued that in furtherance of the appellant's malicious intention, since the hospital had declined to make another medical report other than the P3 form that she sought, and obtained a court order to have the director of **Moi Teaching and Referral hospital** directed to make a further medical report and file the same in court. The respondent submits that the intention was to create a mistaken impression that there are several reports on the matter when in essence the incident is only one. And that the medical reports basically are the same.

12. In response to the molestation alleged to have occurred at SOS Children's Village, the appellant's response is that regardless of what occurred there, it is a confirmed fact from the Medical Report that one minor was defiled by her father having examined the child on the 25th of October 2019, **Dr. Taban** gave her remarks as follows:

*"The examination findings are consistent with anal penetration both previous and possibly ongoing. **Keeping in mind that the Respondent was in custody of the children from March 2019, it is without doubt that the 1 minor was defiled while in his custody**". The stay of the 1st minor at SOS therefore does not in any way negate the sexual assault meted upon her by her own father at their home.*

13. The appellant points out that the Medical Report is very clear as to how the first minor's body was examined and evidence of anal penetration found, and under "Remarks" for the examination done on the 25th of October 2019 at 1500hrs, Dr. Taban stated clearly that **"The examination findings are consistent with anal penetration both previous and possibly ongoing... after the examination done on the 28th of February 2020 at 1735hrs...there is evidence of anal penetration."**

14. As regards **P3 FORM DATED 28/10/2019**, the respondent points out that the same states that the hymen was intact and everything else was normal except for the anal penetration which was occasioned by assault while the child was at **SOS Children** home in January - February 2019. It is contended that this was the time the minor was in a children home pursuant to the subordinate court order and the respondent cannot be blamed for it, as the minor was not in the respondent's custody nor did he have access to her or the other child.

15. In reference to the **UNDATED MEDICAL REPORT BY DR TABAN L TOKOSANG**, the respondent argues that this is the same doctor who prepared the P3 form on 28/10/2019 and that she clearly captures the events leading to the complaint in the history of the case, to the effect that the event occurred at **SOS Children** home in February 2019, and there is no other alleged incident captured in the report, which was made pursuant to the court order.

16. In her submissions the appellant states that contrary to the allegation by the Respondent who has again twisted facts claiming that: **"the hymen was intact and everything else was normal except anal penetration which was occasioned by assault while she was at SOS Children's Home in January- February 2019."** and that he was not in custody of the child at the time. This court is referred to **Section C, No. 2(a)** where the Doctor observes, inter-alia, that there were **"healed hymenal tear at 11 o'clock, healing tear at 12 o'clock."** And it is pointed out that at the time of examination, the Respondent had been in custody of the children for around 8 months since March 2019. The appellant's contention is that presence of a healing tear shows that the minor was defiled while in the Respondent's custody, and Dr. Taban stated in her remarks in the Medical Report that: **"The examination findings are consistent with anal penetration both previous and possibly ongoing."**

17. In reference to the **COUNSELLING REPORTS** which were the follow up psychological counselling sessions, the respondent submits that the main issue is on bathing the minor by the father (respondent), arguing that contrary to the assertions by the appellant and her advocate, there is no sexual assault and or molestation by the respondent captured in all the reports

18. The court is urged to find that CONTEMPT has been established as it is demonstrated that the appellant was aware of the existence of the order and has acted contrary to the order which in any event the order was issued in the appellant's presence and she has made several attempts to have the order reviewed. That the order was clear on how the custody of the children was to be shared, with the respondent was

to have custody when schools are in session and the appellant would have children for two (2) weeks only during school holidays. That this means that the appellant could only have custody of the children for two (2) weeks in April, August and December, yet the children were removed from the respondent's custody when schools were in session. The appellant has been having custody of the children since 10/3/2020 to date a fact she does not deny. She also does not deny being aware of the existence of the order.

19. The appellant draws this court's attention to pages 3 and 4 of the Psychological Report where the Psychological Counsellor indicated that on the 2nd of March 2020 at 0900hrs, the 1st minor (K) told her, inter-alia, that: **"the dad insists on bathing her, including washing her genitalia."** She shared in Kiswahili that **"Akiniosha huku nyuma, mkono yake ni ngumu inaniumiza"** and also shared that **"when she complains to her father that she feels pain he apologizes but carries on bathing her."**

20. The appellant urges this court to consider the remarks given by the Doctor and Counsellor, and find that there can be no doubt that the Respondent's behaviour towards his child has been inappropriate and harmful. That he has had forced sexual intercourse with his own daughter; a fact this Honourable Court cannot ignore.

21. It is on account of this narrative that the appellant welcomes the Respondent's suggestion that the children be interviewed by this Court in the absence of their parents, as in any case the **Children's Act** provides that a child's views should be taken into consideration when deciding any matter concerning that child, including custody.

ANALYSIS AND DETERMINATION

22. I notice that what the parties in this matter have tried to do is to argue the appeal, a lot of the details regarding contents of medical reports, reports at the police station, a criminal matter pending in court are ingredients ripe for an appeal or an application for review or even stay. Surely some reports coming in AFTER the order had been made, and which the appellant seeks to rely on to excuse her conduct, would in my view be put to better use in an application for stay or review. The matter before this court concerns an alleged disobedience of orders issued on 6th March 2019 which was to the effect that:

The children currently held at SOS Children's home be released into the custody of the respondent and the appellant shall have two (2) weeks visiting rights during the school holidays, which right shall be exercised under the supervision of the Children's officer because of her past conduct, pending hearing and determination of the appeal.

23. What the appellant asserts is her justification for her actions in contravention of the court order arguing that the contempt proceedings brought forth against her are unfounded as the order dated 6th March 2019 was complied with and the Respondent took custody of the children on the 10 of March 2019. That she took subsequent custody of the children under the authority of a valid court order issued on the 25th of February 2020; which order was issued to protect the welfare of the children.

24. It is her contention that the Respondent has in essence failed to establish contempt and he comes to court with unclean hands as despite there being joint custody orders in both the parents' favour, the Respondent has never allowed her to have custody or access of the children at any time during their stay with him. That it is the respondent therefore who has been in contempt of court orders as well.

IS THE JUSTIFICATION ADVANCED TENABLE IN LAW?

25. The appellant's conduct is described as defiance of the court order and she has been encouraged to continue with her course by her advocate who ought to know better and advise her of the need to purge the contempt. That the applicant has therefore established a case for the appellant to be punished for being in contempt of the court. The applicant relies on the decisions **Republic -vs- Principal secretary Ministry of Defence - Exparte George Kariuki Waithaka (2019) eKLR** where it was held at page 8 & 9 that:

"I accordingly find that the respondent was aware of the orders by the court and has not shown any steps taken to satisfy the decretal sum he is culpable of disobeying the same and for contempt of court ... As regards culpability, the act or omission constituting disobedience of an order may be intentional, reckless, careless or quite accidental and totally unavoidable. An intentional act may be done with or without an intention to disobey the order, and with or without an intention to defy the court. The element of contumacy, which requires flagrant defiance of, the authority of the court, is no longer necessary to establish breach of a court order. It is now established that the mental element for liability for contempt arising out of disobedience is simply that the disobeying party either intended to disobey, or made no reasonable attempt to comply with the order. See in this respect the English house of Lords decision in Heaton's Transport (St Helens) Ltd v Transport and General Workers Union (1973) Ac 15

"It is also the position and it has been held in several judicial decisions that if personal awareness of the court orders by the alleged contemnors is demonstrated, they will be found culpable of contempt even though they had not been personally served with the orders and penal notices".

CONCLUSION

26. I have no doubt from the facts presented before this court that the appellant is in contempt of the orders issued by the court – she tries to breathe hot and breathe cold, and even turn the heat against the respondent, saying he is the one who has made it difficult for the orders to be realized, claiming that the Respondent is before this Court with unclean hands; as he has not been respecting the joint custody orders granted by court. She laments that whenever he had the children, he never allowed her to stay with them for some time or even visit them.

27. She then tries to justify her actions, drawing out the protective mother syndrome, that she must protect her brood at all costs, despite knowing that her actions are in utter contempt of the court orders which are indeed unambiguous. She then goes into a reconciliatory, mode saying she is remorseful about her previous actions and promises to always take good care of the children and raise them in a healthy

environment where they will not experience any more trauma. That the children's grandparents (Appellant's parents) are ready and willing to provide the extra help and parental guidance required to ensure the minors' holistic self-development. The appellant exhorts this court to consider the good intentions of the Appellant in protecting the welfare of the children as their mother; and dismiss the instant application of contempt in her favour and let her raise the minors herein in peace

28. This court is urged to be guided by case cited of **Republic vs. Principal Secretary Ministry of Defence (2019) eKLR** where the court exercised its discretion by suspending contempt; after taking keen consideration of the actions and intentions of the opposing party alleged to be in contempt.

Article 53 of the Constitution of Kenya provides:

(1) Every child has the right—

(a) ...;

(b);

(c) to basic nutrition, shelter and health care;

(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;

(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;

Of course this court's primary duty is to protect the best interests of the minors herein, and the dilemma it is caught up in is if the appellant purges the contempt of court in the face of the allegations raised will it compromise the welfare of the children? Are the claims that the safety cannot be guaranteed if they are left with their father, who is alleged to violate them instead of loving, guiding and protecting them founded?

29. Will the court be gambling with the lives of these minors who have been turned into pawns in a fight between their parents? The Social Inquiry Report dated 8th July 2020 filed by the Children's Department whereupon both children expressed their desire to stay with their mother. The first minor expressed herself to the effect inter-alia that "she hates staying with her father with the reason that the father bathes her and scrubs her hard in the private parts and also hates it when her father locks them inside the house."

30. It has been drawn to my attention that the **Office of the Director of Public Prosecutions (ODPP)** has recommended defilement charges against the Respondent for the sexual assault against the 1st minor.

Also cited is the decision in Esther Kakonyo v Julian Wambui Gakuru (2018) eKLR

"We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not ... The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the constitution. The dignity, and authority of the court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy".

31. I am alive to the fears and concerns expressed by the appellant, yet she had legal counsel, with so many other options at her disposal which include but not limited to seeking stay of the orders, seeking review or revision, and of course appealing against the orders. She cannot consciously go against the orders then whine about the apprehension she harbours. Wouldn't it have been more prudent to come back to this court and ask for review even under certificate of urgency?

32. I will paraphrase the sentiments of the court in **Esther Kakonyo v Julian Wambui Gakuru (supra)** that courts must never provide succour and cover to an individual who exhibits scant respect for rules and timelines, then waxes emotional lyrics. Obviously the appellant is unhappy with the orders and has challenged them but before those orders are reversed (if at all) this court cannot blink away and aid in the bending or circumventing the orders, while it may seem to aid one side, it unfairly harms the other party who strives to abide by the rules.

33. I find that the appellant is out-rightly disrespectful to the court, and is determined to have her own way, using the children to blackmail anyone who does not dance to her tune. She has the temerity to now offer options on who she thinks is best suited to take care of her children (namely her parents), and all I can say is that it is so sad and cruel for parents to use their children as missiles in their emotional combat.

34. I find no justification in her conduct when she had the options I have already alluded to, and I find that the appellant was and is aware of the court orders issued on 6th March, and has acted in wilful disobedience. She is fined a sum of KShs 50,000/- and in default she will serve 2 (two) months imprisonment. She will have no right of audience until she purges the contempt. Mention 12th October 2020.

Delivered and dated this 7th day of October 2020 at Eldoret

H. A. OMONDI

JUDGE

Mr. Momanyi for respondent

Miss Ruto for appellant