



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO 22 OF 2017

BC.....APPELLANT

VS

CK.....RESPONDENT

(Being an appeal from the judgment and decree in Molo Resident Magistrate's Court Children's Case No. 20 of 2015 (Hon. R. Amwayi RM) dated 19th July 2017)

JUDGMENT

1. This appeal arises out of a custody dispute between the appellant, BC, and her estranged spouse, CK, over the custody of their two minor daughters, HC and DC. From the birth certificates on record, HC was born on 22nd February 2007 while DC was born on 4th August 2011. The children were therefore 10 and 6 respectively at the time of the trial in 2017, and are now 12 and going on 8 respectively.
2. In his plaint before the trial court, the respondent had sought from the Children Court in Molo, where he resides, an order for legal and actual custody of the two children, a permanent injunction restraining the defendant, the mother of the children, from interfering and taking away the children, costs of the suit and any other relief that the court may deem fit to grant.
3. In her defence and counterclaim, the appellant sought sole custody of the children and contribution by the plaintiff/respondent towards the maintenance of the children, as well as costs of the suit.
4. In the judgment dated 19th July 2017, Hon. R. Amwayi (RM) found that it was in the best interests of the children that they should not be separated from each other. She also found that even though the children were of tender years, there were exceptional circumstances to warrant granting custody of the children to the respondent, the father of the children. She directed, however, that the appellant shall have unlimited access to the children on weekends and holidays, and dismissed the appellant's counter claim.
5. As the first appellate court, I am under a duty to re-evaluate the evidence before the trial court and reach my own conclusion. I must, however, bear in mind that I have neither seen nor heard the witnesses testify, which the trial court had the advantage of doing -see **Selle – vs – Associated Motor Boat Co. Ltd (1968) EA 123**.
6. The appellant and the respondent both testified before the trial court. Neither of them called any witnesses. The respondent's evidence was that he and the appellant were husband and wife, married in 2005. At the time of the hearing, they were not staying together. Their union had resulted in the two children the subject of the dispute. In 2013, the appellant had gone to Eldoret to study community health, a course that the respondent had facilitated. At the time, H was 6 years old and D 3.
7. The respondent testified that at the end of her course, the appellant returned to her matrimonial home for one day, then informed the respondent that she was going to visit her parents in Kericho. She never returned to her matrimonial home from that date. That was in December 2014.
8. It was his testimony that the appellant then went and took the younger child, D, from his parent's home in Bomet without his consent. She had retained custody of D, while he had retained custody of H. The appellant had refused to return to her matrimonial home and had never attempted to see H, though he had never intimidated her and had begged her to return home. She was living with another man in Kuresoi and had refused to return home, and he had not been able to access the child. He had made attempts to get access to the child and had written letters to the Children's officer which he produced as exhibits. He had later, in September 2015, taken H to boarding school. He was meeting the medical expenses of D who had an eye problem in 2014. He wanted to have custody of both children as the appellant had left and was cohabiting with another man.
9. It was his testimony further that he was living with another woman with whom he had been co-habiting since May 2015, and they had one child. His first child with the appellant, H, was comfortable with the new wife and their child. He wanted the court to grant him custody of both children so that they would not be separated, and their mother was living with another man. Though she was already married, he had no

intention of filing for separation or divorce from the appellant.

10. The appellant's testimony was that she was a nurse at [Particulars Withheld] School, where she also resided. She confirmed that she was married to the respondent from 2005 till 2013, and they had the two children. That they got married while she was in college and had had difficulties as the respondent was not working and they depended on her parents. When she went back to school, the respondent started threatening to kill her and she left and went back to her parents. She had been summoned by a children's officer as she had left the children with the respondent, and an attempt to resolve their marital dispute had failed. She wanted to have custody of the children as she had a salary and could take care of them. She stated that she would take them to boarding school. She denied that she was married, stating that she had employed the man that the plaintiff alleged was her husband in her agro vet shop.

11. In her decision, the trial court relied on **DKV vs JKN (2011) eKLR** for the proposition that the custody of a child of tender years should be given to the mother unless there were special circumstances to justify denying custody to the mother. She further noted that the Children Act defined a child of tender years as one who was below 10 years. She observed that the appellant left the children after she came back from college and she did not tell the court why she did not take the children with her to her maternal home. While she had stated that the respondent had threatened her, she did not produce an Occurrence Book (OB) entry to confirm that she reported the threats to police. The trial court therefore found that the appellant had abandoned the children by leaving them behind when she went to her parent's home. She had never bothered to visit the elder child for the period that the respondent had had custody of her. The trial court also noted that the respondent had the elder child in day school while the appellant intended to place the children in boarding school. She was of the view that the children should not be separated from each other, and there were special circumstances to grant custody to the father. The trial court, however, granted the appellant unlimited access to the children during school holidays, and directed that the parties share parental responsibility for the children.

12. The Counsel for the parties filed written submissions which they asked the court to rely on in rendering its decision.

13. The appellant reiterates in her submissions her evidence before the trial court. She states that she is an employee of [Particulars Withheld] school and has means to take care of the children. She further argues that it is good for the children to be with her, their biological mother, than with a step-mother, the wife of the respondent. She further submits that the trial court erred in stating that the respondent had placed the child in day school while she was in boarding school.

The appellant relied on the decision in **Githunguri vs Githunguri [1981] KLR** and **Karanu vs Karanu [1975] EA 18** to urge the court to grant her custody of the two children who are female children of tender years.

14. In his submissions, the respondent submits that while the appellant was in college, which he paid for, he took good care of the children. He reiterated his evidence that the appellant had abandoned the matrimonial home and the children, then had taken the younger child from his mother's home in Bomet. He had been in custody of the older child, while the appellant had custody of the younger child. He had attempted to visit the younger child but the appellant has never visited the elder child. He submits that while there are challenges in life and in relationships, his and the appellant's being no exception, he had shown exceptional responsibility as a father in taking care of the children while they were young and has not stopped doing the best he can to provide for them. He contrasts this with the conduct of the appellant whom he submits has never made any attempt to visit the elder child. He urged the court to find that the trial court had considered the weight of evidence and had made a decision in the best interests of the children.

15. The respondent further submits that the trial court was right in granting custody of the children to him. He submits that the evidence on record shows that he is a caring father and that the appellant has never been persistent enough to know what is going on with the children. While she had claimed that he had threatened her, she had not made any report to the relevant authorities over the said threats. He notes that the appellant has been granted unlimited access to the children but has never gone to visit the elder child. He maintains that the children are fond of him and he is fond of his children, and it is therefore in their best interests that they remain in his custody.

16. The respondent noted that the Children Officers in Kericho had indicated that the child, D, was staying with her grandmother, the appellant's mother, while the appellant had been given a house at her workplace. That she spent time at the school during the work week, but spent the weekends at her parents' with the child. In his view, since the appellant is not always with the minor, and the minor spends most of her time with her grandmother, he was a better parent to have custody. He observed that according to the report by Bett C Cosmas, the Kuresoi Sub-County Children Officer, the child H had expressed confidence to continue staying with her father and willingness to visit her mother once in a while.

17. I have considered the appeal before me and the submissions filed on behalf of the parties by their respective Counsel. I have also considered the judgment of the trial court and the reasoning behind her decision to grant full custody of the children to the respondents, even though the two children are children of tender years.

18. In considering a matter involving children, the applicable constitutional principle set out in Article 53 (2) is that the best interests of the child should be the primary consideration. This provision is also echoed in section 83 (1) (d) of the Children Act which provides that in determining whether or not a custody order should be made in favour of a party, the court shall have regard to the ascertainable wishes of the child and the best interest of the child. The parties have also referred me to several decisions which I have also considered.

19. In **Noordin v Karim [1990] eKLR**, the High Court (Githinji J, as he then was) held, upon a consideration of the facts before him, that the case presented one of the exceptional cases where the mother should be denied custody of the children. From the facts, he found that the mother of the two children, both boys, had remarried. The resources of the new husband, who had five children from a previous relationship living with him, as well as his mother and sister, were unknown. While observing that in cases involving very young female children, there is a rule in favour of the mother in the absence of exceptional circumstances, his view was that in the case before him, the best interests of the children required that their custody should be given to the father.

20. The position of the court reflects the jurisprudence that has developed in our jurisdiction for a number of years- see **Githunguri v**

Githunguri, (1981) KLR 598 and Karanu v Karanu (1975) E.A. 18. In this latter case, the court held as follows:

“The substantial question in this case was whether or not the Judge was right in giving custody of the children to the father. At the time the application was made the daughter of the parties was just over seven years of age, and the son was six 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 with the mother.”

21. In this case, from the evidence before the trial court which I have set out and considered, the children, both girls, have been separated from each other at a tender age since 2014. The older child has been in the custody of the father, while the mother has had custody of the younger child. The effect of the order of the trial court would be to separate the younger child from her mother and grandparents, whom it appears have been her primary care givers for the last five years, and placing her in the custody of her father and his second wife, whom he indicates he has been living with since 2015. The appellant denies that she is married, and avers that the person whom the respondent alleges she is married to is someone whom she has employed in her agro-vet business.

22. One of the factors that the trial court took into consideration in making her decision to grant custody of both children to the respondent is that the appellant had stated that she would take the children to boarding school. The trial court observed that the father had the older child in day school, and therefore he was better placed to have custody of the children.

23. However, the evidence before the court was actually to the contrary: the respondent stated that he had placed H, the child in his custody, in a boarding school, [Particulars Withheld] Academy, and produced a letter dated 1st September 2015 (p exhibit 4) to confirm this. This implies that she only stays at home during the school holidays. It would imply, therefore, that if the respondent had custody of the two children, he, too would place them both in boarding school, as the appellant had stated that she would do.

24. Ideally, the best interests of children requires that they are brought up in a two parent, loving and peaceful environment. Unfortunately, we do not live in an ideal world. For a diverse number of reasons, parents separate, or divorce, and the children are caught in the middle. The parties to this matter, in their evidence before the trial court, not surprisingly, gave evidence in which they blamed each other for the break-up of their relationship. Whatever the reasons for the break-up, however, the children have found themselves caught in the middle. The duty of the court is to make an order that is in the best interests of the children.

25. In the course of hearing this appeal, I took the view that it would be in the interests of the children for the court to obtain an independent perspective on the current conditions of the children. I directed that the Children Officers, Kericho and Molo, where the appellant and the respondent respectively reside, investigate and prepare reports on the children. The Kuresoi Sub-county Children officer observes that the elder child is happy to continue staying with the respondent and to visit her mother sometimes. The children’s grandmother, who resides in Bomet and appears to be staying with the child, says she is happy to support the respondent in bringing up the children. The Sub-county Children Officer, Kericho East, Belgut, Soin/ Sigowet also paints the living arrangements between the appellant and the second child, D, in a positive light. He even has a photograph of an apparently happy and healthy child attached to his report. The reports indicate that both parents have the will and the resources to contribute to the upbringing and maintenance of the children. The elder child is already in boarding school, while the appellant intends, if granted custody, to place the younger child in boarding school also.

26. In my view, the trial court erred in reaching the decision it did on the basis that the respondent would keep the children at home, while the appellant would send them to boarding school. The best situation, in my view, is one in which the children are together, and still get an opportunity to know and interact with both of their parents. This will not be achieved by an order granting the respondent full custody of both children.

27. In the best interests of the children, I will hereby interfere with the decision of the trial court and vary it as follows. I grant joint custody of the two children to the appellant and the respondent. The appellant and respondent shall place both children in the same boarding school, and shall jointly meet the cost of their education and general upkeep. The parties shall each have access to both the children for half of each school holiday.

28. In view of the nature of this matter, I direct that the parties shall bear their own costs of the appeal.

Dated and Signed at Nairobi this 21st day of June 2019

MUMBI NGUGI

JUDGE

Dated Delivered and Signed at Kericho this 11th day of July, 2019

GEORGE DULU

JUDGE