REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 99 OF 2018

JM AND GM (*Suing as the maternal aunt and grandfather and on behalf of the minors*

RK AND JK.....APPELLANTS

VERSUS

NKK.....RESPONDENT

(Being an appeal from the decision of the Honourable Resident Magistrate H.M. Mbati (Mrs.) delivered on the 7th September, 2018 in Nairobi Children Court Case No. 783 of 2018)

RULING

1. The respondent NKK and the deceased RMM were married. The marriage was blessed with two sons: RK born on 24th July 2012 and JK born on 7th November 2014. The deceased was murdered on 8th July 2017. The respondent was arrested and charged with the murder at the High Court at Naivasha. The matter is pending resolution. He is on bond.

2. The dispute before the Children Court at Milimani related to the custody of the minor children. The 1st appellant JM is the only sister of the deceased, and the 2nd appellant GMM is her father. They went to the trial court seeking the sole custody, care, and control of the children, and that the respondent be barred from taking away the children from school or interfering with the education of the children by taking them any from their school and custody. The alternative prayer was that, pending the determination of the murder case, they be granted custody, care and control of the children. Their case was that, following the death of the deceased and the arrest and charge of the respondent, both families sat and, on 26th May 2018, agreed that the actual custody and care would be shared between the 1st appellant and the respondent. They were to be with the 21st appellant five days a week, and with the respondent two days a week. The children go to school at [particulars withheld] School in Karen in Nairobi. On 14th June 2018 the respondent took the children for part of the half-term. He refused to release them as agreed. He changed their school to [particulars withheld] Academy. It is because of these and other stated reasons that forced the appellants to move to the children court.

3. The respondent's response was that there was no arrangement to have the appellants keep the children for any time of the week, or at all. He denied to have surrendered the custody of the children to the appellants, or at all. If the appellants have had custody of the children, he pleaded, it was with his temporary consent into which he was blackmailed owing to the criminal case. He contended that he had the constitutional and statutory rights of custody, care and parental responsibility over the children, being the biological father.

4. On 7th September 2018 the children court issued an order granting interim custody of the children to the respondent pending the hearing and determination of the suit. It was ordered that the appellants do have access to the children on alternate weekends with effect from 8th September 2018 from Friday after school to Monday morning when they were to drop them to school. School holidays were to be shared equally, with the appellants having the first half. Half terms were to be alternated with the appellants having 3rd term of 2018. The same was to apply to public holidays. The hearing and determination of the case was to await the outcome of the criminal case at the High Court at Naivasha.

5. Prior to those orders, the court had on 27th August 2018 directed the parties to visit a Psychologist at Gertrude Children Hospital or at Satellite Clinic to interview the children and the parties and to determine the children's ascertainable wishes in respect to custody. The children and the parties were seen by two Psychologists. It was noted that the children were closer to the 1st appellant's family, and that her home could provide a suitable home environment for the children. It was noted that the respondent appeared traumatized, unstable, and required time to grieve.

6. The appellants appealed to this court to challenge the orders of interim custody that the trial court made. The appeal had many grounds, but the substantial complaints were that the orders did not accord with the best interest of the children; that the orders had been given despite the reports by Psychologists that indicated that the respondent was unstable; the court had not considered that the respondent was facing a murder charge in respect of the mother of the children; and the court had ignored the families' agreement on custody.

7. Along with the appeal was filed the present motion that sought the stay of the orders of 7th September 2018 by the trial court, and, pending the hearing and determination of the appeal, the appellant be given the legal and physical custody of the children.

8. The application was opposed by the respondent. On the allegation that the court had ignored the report by the Psychologists, the respondent stated that the reports were simply an opinion which did not bind the court; that he sought to cross-examine the Psychologists but the court declined the request. He denied that there was any agreement where he had surrendered his right to custody.

9. Mr. Makori for the appellant and Mr. Mureithi for the respondent each filed written submissions for the application.

10. The appeal has not been heard. However, I consider that this dispute cannot wait for the appeal. This is because the trial court has stayed the proceedings before it until the murder case, in respect of the mother of the children wherein the respondent is the accused, is heard and determined. It is not known when the criminal case will be heard and determined. Yet, what was before the Children Court was a matter involving the children's custody, care and control which required urgent attention and determination.

11. **Article 53(2)** of the **Constitution** provides that:-

> **"2. A child's best interests are of paramount importance in every matter concerning the child."**

Section 4 (2) and **(3)** of the **Children Act, 2001** commands the court to remember that the best interests of the child are a paramount consideration in any case concerning a child.

Under **Section 76(2)** of the **Act**, it is provided that:-

> **"2. In any proceedings in which an issue on the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child."**

Under Section 83 (1) (b) of the **Act**, the court has to consider the ascertainable wishes of the child when dealing with its custody.

12. It follows that the trial court was clearly wrong to post pone the hearing and determination of the dispute involving the custody, care and control of the children herein until the High Court at Naivasha had determined the criminal case. The order to say the proceedings before the trial court were therefore not in best interests of the children.

13. This is why, to deal with this application and leave the matter pending until the appeal is heard and determined will, in the particular circumstances of this case, hurt the best interests and welfare of the children. These children are entitled to know who will have their custody.

14. I am aware that the Children Court will, after hearing the parties and their witnesses, determine the issue of custody, care and control of the children. What, however, worries me about the interim orders of 7th September 2018 is that, they were issued in the face of the Psychologists reports that showed that those children were more at peace with the 1st appellant's family and home, compared to the respondent who was unstable and was still grieving, and yet the later was given custody. The professional assessment had been ordered by the court. The record does not state that the court considered the assessment, or why it became necessary to ignore it. The respondent complains he sought to interrogate the assessment by cross- examination, but he was not allowed. That is a legitimate complaint.

15. My second concern is that, the trial court did not appear to consider that the fact that the respondent had been arrested and charged in respect to the death of his wife, the mother of the children, was an issued that merited interrogation before deciding whether he was an appropriate person to have custody, interim or otherwise. Of course, this issue was to be considered along with the fact that the respondent was now the only remaining parent, and that, as a parent, he had a constitutional and statutory responsibility over his children.

16. I am alive to the supervisory powers by the High Court under **Article 165(6) and (7)** of the **Constitution**. Given everything that I have said in the foregoing, I will determine both the application and appeal in the following terms:-

a) the interim orders issued by the trial court on 7th September 2018 are hereby set aside;

b) there shall be an interim order of custody of the children to the 1st appellant, with rights of access and visitation as will be determined by the trial court;

c) the parties shall agree on the school to be attended by the children;

d) except for shelter and food, the respondent shall be responsible for the rest of necessities for the children; and

e) <u>another trial court</u> shall, with due speed, hear and determine the dispute between the parties as contained in the plaint and defence, which determination shall supersede the above orders.

17. This was a family dispute. I make no order as to costs.

DATED and DELIVERED at NAIROBI this 23RD day of JULY, 2019.

A.O. MUCHELULE

JUDGE