



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 91 OF 2015**

KNCS.....1<sup>ST</sup> APPELLANT

JKS.....2<sup>ND</sup> APPELLANT

**VERSUS**

NG .....1<sup>ST</sup> RESPONDENT

AS.....2<sup>ND</sup> RESPONDENT

**VERSUS**

**OFFICE OF THE DIRECTOR OF**

**PUBLIC PROSECUTION.....1<sup>ST</sup> INTERESTED PARTY**

**OFFICE OF THE CHILDREN DEPARTMENT.....2<sup>ND</sup> INTERESTED PARTY**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup> INTERESTED PARTY**

**(Being an appeal from the Ruling of Children’s Court at Nairobi MILIMANI (HON. A. NYOIKE & HON. D. K. KUTO (BOTH SRM) issued on 8<sup>TH</sup> & 14<sup>TH</sup> JULY 2015 respectively in Nairobi Children’s Case No. 885/2015)**

**JUDGMENT**

1. The two Appellants herein KNCS and JKS (hereafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> Appellants) filed this Appeal against the Orders of the Children’s Court issued on the 8.7.2015 and extended on the 14.7.2015.
2. The Orders dated 8.7.2015 were issued ex parte in respect of the minor (hereafter referred to as the child) the subject of the case who is the biological child of the Appellants.
3. The Respondents filed **Nairobi Children’s Case No. 885/2015** and sought the said orders which were granted in respect of the minor who required to be rescued from the Appellant’s residence over allegations of torture.
4. The orders which were issued on 8.7.2015 and extended on the 14.7.2015 were as follows:
  - (i) **THAT the matter be and is hereby certified urgent**
  - (ii) **THAT the Children’s Officer Westlands do immediately rescue the minor from the current care givers and/or parents and the minor be taken to hospital for treatment.**
  - (iii) **THAT the OCS Parklands Police Station do provide security for the rescue mission in conjunction with Officers from the Children’s Office from Parklands Children’s Department.**
  - (iv) **THAT the Department of Children’s Services Westlands do urgently conduct and file a social inquiry report into the**

minor's plight.

(v) **THAT the Director of Immigration do bar the defendants from leaving the country either themselves or with the minor herein.**

(vi) **THAT interpartes Mention on 13.7.2015.**

5. The Appellants who were aggrieved by the said orders filed this Appeal on the following grounds:

(i) **THAT the Learned Trial Magistrates did not have Jurisdiction to grant the orders as the same exclusively reserved for the High Court under section 22 of the children's Act hence the orders granted are null and void.**

(ii) **THAT the Learned Magistrates erred in law in failing to appreciate that the jurisdiction of the Children's Court is clearly spelt out in section 73 of the children's act and the same excludes the orders issued.**

(iii) **THAT the Learned Magistrates erred in law and fact and indeed over-reached themselves in bestowing the custody of the minor to complete strangers.**

(iv) **THAT the Learned Magistrates erred in law and fact in depriving the Appellants their biological child without hearing them.**

(v) **THAT the Learned Magistrates violated Clear Provisions of the Children's Act regarding custody of the Minors or Minors in need of Protection including Section 82, 83, 113 and 114 of the Children's Act.**

(vi) **THAT the Learned Magistrates erred in law and fact by making draconian orders without objective evaluation of all the evidence from both sides.**

(vii) **THAT the Learned Magistrates erred in law and facts and evidence and misinterpreted the law on the subject matter.**

6. The parties were directed to file written submissions in the Appeal. The Respondents and Interested parties who had been enjoined in the Appeal filed submissions but the Appellants did not file any submissions and they failed to appear in Court on 31.5.2019 for compliance and for a Judgment date.

7. I have considered the submissions filed herein by the Respondents and interested parties. This Court delivered a ruling on 29.4.2019 which dismissed the Appellant's Application dated 24.1.2019 seeking access to the minor .

8. The orders the Appellants are appealing against were issued for the purpose of rescuing the minor who was in need of care and protection in accordance with Section 119(j) and (q) of the Children Act.

9. The said orders were therefore not issued pursuant to Section 22 of the Children Act but they were seeking rescue of the minor from her biological parents who were subsequently charged in court with causing the minor grievous harm.

10. The Appellants were thereafter arraigned in court and charged in Criminal Case No. 1458 of 2015 with the offence of causing grievous harm to the minor.

11. The Appellants were acquitted under **Section 210** of the **CPC** and the 1<sup>st</sup> Interested Party (ODPP) filed an appeal against the said acquittal which is still pending determination.

12. I find that in the circumstances, the trial court acted within the provisions of Section **125(5)** of the **Children Act**.

13. I find that the trial Court acted in the best interest of the child as required by **Article 53 (2)** of the **Constitution of Kenya, 2010** which provides that:

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

This constitutional provision anchors the principle of the best interest of the child in our constitutional dispensation and does not require further exposition.

14. **Section 83(1) of The Children Act (Cap 141)** sets out the factors to be considered by the court while determining whether or not a custody order should be made in favor of the applicants.

15. Under **sub-section 83(1) (j)**, the court is required ultimately to have regard to the "best interests of the child" as fundamentally obligated under the afore-analyzed **Article 53(2) of The Constitution of Kenya**.

16. **Sections 4 (2) and 76 of the Children's Act** provides:

***“4. (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.***

**76. (1) Subject to section 4 where a court is considering whether or not to make one or more orders under this Act with respect to a child it shall not make the order or any other orders unless it considers that doing so would be more beneficial to the welfare of the child than making no order at all.”**

17. The Act then in **subsection (3)** of the said **section 4** aforesaid, mandates thus: -

***“All judicial and administrative 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”***

14. **Article 3** of the UN Convention on the Rights of the Child states that;

***1. 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.***

***2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.***

***3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.***

18. I find the Appellants did not come to Court to prosecute this Appeal. The trial Magistrates had the jurisdiction to grant the orders which were for the best interest of the child who required to be rescued.

19. In Australian case of **U vs U (2002-2003) CLR 238** at page 257, the court after deliberations, stated that in determining what is in the child’s best interests, the court must take into account the following principles: -

- a) Any wishes expressed by the child and any factors that the court thinks are relevant to the weight it should give to the child’s wishes while all the time keeping in mind the child’s age, maturity and/or level of understanding***
- b) The nature of the relationship of the child with each of the child’s parents and with other persons.***
- c) The likely effect of any changes in the child’s circumstances, including the likely effects on the child of any separation from the parents or either of them or any siblings of the child or any other person with whom the child has been and is living.***
- d) The practical difficulty and entailed possible expenses of the child to have contact with a parent and whether that difficulty or expense will substantially affect the child’s right to maintain personal relationships and direct contact with both parents on a regular basis.***
- e) The capacity of each parent to provide for the needs of the child including provision for emotional and intellectual needs.***
- f) The child’s maturity, sex, and background .... And any other characteristics of the child that the court considers relevant***
- g) The need to protect the child from physical or psychological harm caused or to be possibly caused by being subjected or exposed to abuse, ill-treatment, violence or other behaviour that is directed towards the child....***
- h) The attitude to the child, and to the responsibilities of parenthood, demonstrated by each parent of the child.***
- i) Any family violence involving the child or a member of the child’s family***
- j) Any family violence order that applies to the child or a member of the child’s family***
- k) Whether it will be preferable to have an order that would be least likely to lead to the institution of further proceedings in relation to the child***

***l) Any other factor or circumstance that the court thinks is relevant.***

20. I commend the Respondents for their bravery and for rescuing the life of the minor at a great price to their personal security and at a great financial cost to themselves.

21. The Appeal herein lacks in merit and the same is accordingly dismissed.

22. The Respondents will continue taking care of the Minor until further orders of the children's Court which is mandated under Section 125(4) to review, vary or revoke any order made in respect of a child in need of care and protection from time to time on its own motion or on application of any person.

23. This Court further orders that each party to bear its own costs of the appeal.

**DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 12<sup>TH</sup>**

**DAY OF JULY, 2019**

**ASENATH ONGERI**

**JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.**