



REPUBLIC OF KENYA



KENYA LAW
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**NA v SDH (Civil Appeal 21 of 2018)
[2019] KEHC 12489 (KLR) (20 September 2019) (Judgment)**

Neutral citation: [2019] KEHC 12489 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 21 OF 2018
M THANDE, J
SEPTEMBER 20, 2019**

BETWEEN

NA APPELLANT

AND

SDH RESPONDENT

*(An Appeal from the Ruling of Hon. V. J. Yator, Senior Resident Magistrate
delivered on 30.4.18 in Tononoka Children's Court Cause No. 54 of 2013)*

JUDGMENT

1. The Appeal herein arose from the ruling (the Ruling) of Senior Resident Magistrate Hon. V. J. Yator, delivered on 30.4.18 in Children's Case No. 54 of 2013 at Tononoka. The record shows that the NA (the Appellant) and SDH (the Respondent) were on 25.6.00 married under Islamic Sharia law and blessed with 4 children. The parties entered into a parental responsibility agreement dated 26.8.13 which was adopted as an order of the Court on 4.11.13. By an order dated 25.1.17, actual custody of the children was vested on the Appellant based on the said parental responsibility agreement.
2. The Ruling of 30.4.18 the subject of the appeal herein was in respect of an application dated 24.1.18 in which the Appellant sought the following orders:
 - i. Production of the minor children
 - ii. An order committing the Respondent to civil jail for disobeying the order made by the Children's Court on 25.1.17.
 - iii. Costs
3. In the Ruling, the trial Magistrate found that the children had ran away from their father, the Appellant in Mombasa to their mother, the Respondent in Nairobi. The Magistrate further found that the Respondent had taken the children to school and had been taking care of them single handedly.



- Committing the Respondent to civil jail would, in the trial Magistrate's view, not be in the best interests of the children.
4. The Appellant being aggrieved by the decision of the trial Magistrate preferred this Appeal dated 15.5.18, the grounds of which are that the learned Magistrate erred in law and by:
 - a. Failing to consider and uphold the best interests of the minor children as the paramount and utmost consideration in the matter.
 - b. Failing to make an order allowing the Appellant access the minor children as their biological father.
 - c. Failing to declare that both the Appellant and the Respondent have joint legal custody of the children.
 5. The Appellant sought the following orders:
 - a. That the Ruling be set aside.
 - b. That actual and legal custody of the children be vested in the Appellant and/or access to the children be granted to the Appellant.
 - c. Costs.
 - d. Any other remedy in the best interests of the children.
 6. Parties filed their respective submissions which I have considered. The impugned Ruling was on an application seeking production of the children and for an order committing the Respondent to civil jail for disobeying the order made by the Children's Court on 25.1.17. It is not clear from the record whether the children were produced in Court. On the second prayer, the Court found that it was not in the best interests of the children to commit the Respondent to civil jail. In the memorandum of appeal, the Appellant faults the trial Magistrate for failing to consider and uphold the best interests of the minor children, failing to allow the Appellant access the children and failing to declare that both the Appellant and the Respondent have joint legal custody of the children. With respect, these issues were not the subject of the application culminating in the impugned ruling and were therefore not before the trial Magistrate for consideration. These are new issues now arising in the appeal. There is no nexus between the grounds of appeal and the application and the ruling thereon.
 7. Before an issue is raised in an appeal, it must first be the subject matter in the trial Court. This was the holding in *Geoffrey M. Asanyo & 3 others v Attorney General* [2018] eKLR, where the Supreme Court had this to say about a matter before it that had not been dealt with in the lower superior courts:

“Firstly, it is trite that a matter coming on appeal to this Court must have first been the subject of litigation before the High Court and risen through the judicial hierarchy on appeal ...”
 8. The issues of granting access to the children to the Appellant and joint legal and actual custody of the children were not the subject of litigation before the lower Court. Accordingly, what was not litigated upon in the trial Court cannot form the basis of an appeal before this Court. By this Appeal, the Appellant seeks to confer upon this appellate Court, original jurisdiction over the issues raised in the memorandum of appeal.



9. In *Thomas Openda v Peter Martin Abn* [1982] eKLR, the respondent therein objected to grounds of appeal which raised points that were neither in the pleadings nor canvassed in the High Court. The Court of Appeal stated:

“From this judgment and the resulting decree the defendant has appealed, in a memorandum of appeal containing 22 grounds, 14 of which are the subject of the objections raised by Mr Nagpal which we are now about to consider and rule on separately. Before doing so, we have refreshed our minds as to the principles applicable to objections of this nature, in the light of cases decided by this court’s predecessor. These are, in chronological order –

1. *Girdhari Lal Vidyarthi v Ram Rakha* [1957] EA 527 in which it was held that a plaintiff who had relied in his pleadings exclusively on a resulting trust in his favour could not on appeal be heard to allege an express trust, especially as the whole conduct of the proceedings below made it clear that only a resulting trust was in issue.”

10. The issue before the trial Court was production of the children and committal to jail of the respondent for disobeying a Court order. What has now been raised in the appeal is access to the children by the Appellant and the vesting of joint custody of the children upon the parties which were not before the trial Court. This goes against the principle set out in the *Girdhari case (supra)*. This is an appellate Court. As such it cannot assume original jurisdiction over the matters raised in the appeal which matters were not litigated upon in the lower Court.

11. For the reasons set out herein, this appeal lacks merit and is hereby dismissed. This being a matter concerning the parties’ children, each party shall bear own costs.

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 20TH DAY OF SEPTEMBER 2019

M. THANDE

JUDGE

In the presence of: -

..... for the Appellant

..... for the Respondent

..... Court Assistant

