



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NUMBER 136 OF 2018

CNG.....APPELLANT

VERSUS

TNK.....RESPONDENT

(Being an Appeal from Judgment of Nairobi Children's Court by Hon. Z.W. Gichana (SPM)

on the 29th day of November, 2018 in Nairobi Children's Case No. 1133 of 2017)

JUDGMENT

1. This is an appeal from Order of the trial Magistrate in Nairobi Children' Case No. 1133/2017 delivered on 29.11.2018 which was coached in the following terms;

- (i) **THAT legal custody of the Children be shared between the parties.**
- (ii) **THAT the Defendant to retain actual custody care and control of the children**
- (iii) **THAT the Defendant shall access the children/child who is a day-scholar on one weekend every month from the 3rd weekend of January 2019. Further for two weeks of the school holidays the Plaintiff shall have the children visit with him for access, or on any other terms as the parties may otherwise agree. The plaintiff shall be at liberty to access the children at school as per school regulations.**
- (iv) **THAT the first holiday access to commence during the April 2019 school holidays.**
- (v) **THAT the Plaintiff to continue providing for the child's school fees, school related expenses at the current school (s) and medical care on a need basis.**
- (vi) **THAT change to the minors' school shall be by mutual consultations.**
- (vii) **THAT the Plaintiff to further provide Kshs.7,000/- per month with effect from 5th December, 2018.**
- (viii) **THAT the defendant to provide for all the other needs of the children.**
- (ix) **THAT each party shall bear own costs.**
- (x) **THAT each party to bear own costs.**

2. A brief history of this case is that the Appellant was the Plaintiff in Nairobi children's Case No. 1133 of 2017 seeking the following orders;

- (i) **Full and legal custody of the minors**
- (ii) **On the alternative reasonable access to the minors**

(iii) Costs and interests of the suit.

(iv) Any other relief the court may deem fit and just to grant.

3. The Respondent who was the defendant filed a defense and counterclaim seeking custody of the minors and apportionment of maintenance.

4. The issues of paternity and shared parental responsibility were not contested.

5. The appellant stated in his evidence he was not married to the Respondent but they were romantically involved and were blessed with two minors, S. G and V. K. who were born on 2.7.2004 and 19.1.2009 (hereafter referred to as the minors)

6. The Respondent on her part said she was staying with the Appellant and she left when the relationship deteriorated as a result of the Appellant's poor morals and cruelty. She was forced to move out with the children. She asked for custody of the children and upkeep.

7. The trial delivered judgment on 29.11.2018 and a decree was issued as stated in No. 1 (above). The Appellant has now appealed against the said orders on the following grounds:

(i) The Learned Magistrate erred in law and in fact while evaluating the evidence and arrived at the wrong decision regarding the custody, access and maintenance of the children.

(ii) The Learned Magistrate erred in law and in fact by disregarding the testimony and evidence tendered by the Appellant and therefore arrived at a decision that was unfair to and contravened his rights as a parent to the children.

(iii) The Learned magistrate took into account irrelevant matters and disregarded relevant matters and therefore, misdirected herself in her decision.

(iv) The Learned Magistrate abdicated her duty under article 53 (2) of the Constitution and arrived at a decision that was not in the best interests of the minors.

8. The Parties were directed to file written submissions in the Appeal. The Appellant's submissions were as follows;

(i) THAT the minors in respect of this appeal are aged 15 and 11 years respectively and both are male and none is considered by law to be a child of tender age to warrant the argument that the mother should have custody except in exceptional circumstances.

(ii) THAT the Appellant had demonstrated in his evidence that he had taken care of the children when they were young when their mother used to be on and off the family and further that he had taken them to a reasonably good school and he craves the opportunity to be able to continue doing so.

(iii) The Appellant also submitted that it was his testimony that the Respondent was not suited for custody of the children as she is dependent on her family for her upkeep.

(iv) The Appellant submitted that the Court without assigning any reasons went ahead to order the appellant to take care of school fees and school related expenses and still over and above to pay Ksh.7,000/- towards maintenance.

(v) The Appellant further submitted that the Court erred in limiting the Appellant's access to the children in doing so, went against the best interest principle enshrined in Article 53 (2) of the constitution of Kenya and broadly under Section 4 of the children Act.

9. The Respondent submitted that as follows:

(i) THAT the duty of the first Appellate Court is to evaluate the evidence before the trial Court and draw its own conclusion being mindful of the fact that it has neither the opportunity of seeing the witnesses or assessing the demeanor of the said witnesses.

(ii) THAT the trial Court took into account several factors before granting the orders including the minors' best interest and further that the best interest of the minors is of paramount importance.

(iii) THAT the trial Court considered all material facts including the conduct of the appellant conduct of sending the Respondent out of the house and the suffering of the children in the hands of the Appellant and also the Respondent's attempts to cater for the basic needs of the children from her meagre earning bore giving Respondent custody.

(iv) THAT the parental responsibility is provided under Article 53 (1) (e) of the constitution and Section 4 (3) of the children act and it is the duty of the parent which translates to the right of the child. The Respondent urged the court to uphold the decision of the trial Court.

10. I have considered the submissions filed by both parties. As it is rightly pointed by the parties in this case, the duty of the first appellant court is to evaluate the evidence adduced and to arrive at its own conclusion while bearing in mind that the trial court had the opportunity to see the witnesses.

11. In **Kiilu & Another vs. Republic [2005]1 KLR 174**, the Court of Appeal stated thus:

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

12. I find the parties gave viva voce evidence which the trial Court considered before giving its Judgment.

13. I find that the trial Court gave legal custody to both parents and access to the appellant.

14. I find that the Appellant submitted that the Respondent has no source of income and is dependent on her family and the Kshs.7,000/- maintenance ordered by the Court is reasonable.

15. The Court took into consideration the fact that the Appellant admitted that he has always provided for the children and he had children and he had the capacity to do so.

16. I accordingly find the orders given by the trial Court reasonable in the circumstances of this case.

17. I dismiss the Appeal for want of merit and I accordingly uphold the decision of the trial Court. The said orders are subject to review by the trial court if there are issues that warrant it to do so.

18. Each party to bear its own costs of this appeal. Orders to issue accordingly.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 4TH DAY OF OCTOBER, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.