



**REPUBLIC OF KENYA**

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

**[CORAM: A. C. MRIMA, J.]**

**CIVIL APPEAL NO. 133 OF 2018**

**HKN.....APPELLANT**

**-VERSUS-**

**BMO.....RESPONDENT**

***(Being an appeal from the judgment and decree by Hon. E. Muriuki Nyagah, Principal Magistrate in Migori Chief Magistrate's Children Case No. 14 of 2017 delivered on 11/09/2018)***

**JUDGMENT**

**Introduction:**

1. On 12/09/2017 **BMO.**, the Respondent herein, filed *Migori Chief Magistrate's Children Case No. 14 of 2017* (hereinafter referred to as '**the suit**') against **HKN.**, the Appellant herein. The suit was in respect of the custody of the two children of the parties. The children were **JCMM.** born on 26/11/2010 and **JL** born on 03/04/2013. They were a boy and girl respectively. **HKN** was the mother and **BMO** was the father of the children. (I will henceforth refer to the parties herein as '**the Appellant**' and '**the Respondent**' respectively).
2. The suit was vehemently opposed. The Appellant filed a Statement of Defence and a Counter-claim. She sought for the custody and maintenance of the children.
3. The suit was heard and judgment rendered on 11/09/2018. The appeal subject of this judgment was then preferred.

**The suit:**

4. The Appellant and Respondent were the Defendant and the Plaintiff respectively in the suit. The Respondent averred that he cohabitated with the Respondent since 2009 in Nairobi. As a result, they were blessed with the two children.
5. Sometimes in August 2013 the Respondent further averred that he lost his job as a driver with [particulars withheld] Bus Company. He then engaged the Appellant with a view to relocate back home in upcountry. They unfortunately did not agree. That was the beginning of their problems.
6. The relationship between the two sadly deteriorated. The Respondent contended that the Appellant moved out of their home with most of the household items and the children. The Appellant did not disclose her whereabouts. The Respondent remained alone; without a job and with no immediate family.
7. Up to until August 2016 the Respondent remained jobless. He was however lucky to secure employment as a driver with [particulars withheld] Company Limited. He has since then been stationed at the Migori office.
8. The Respondent posited that since securing the said employment he has been fully providing for his family in terms of food, shelter, clothing and school fees.
9. The Respondent further posited that the Appellant was not best suited to have the custody of the children. He drew the Court's attention to instances where he alleged that the Appellant threatened to kill the children, depicted insensitivity and lack of love to the children, largely intended to take the children to the care and custody of her mother and that the Appellant had refused to take part in any family reconciliatory meetings. The Respondent further stated that the Appellant had no means to take care of the children and she intended to use the children to harass and settle scores with him.

10. The Respondent prayed for the custody of the children.

11. To the contrary, the Appellant denied the contents of the Plaint. She contended that infact it was the Respondent who abandoned the family without trace since 2014. That, the Respondent left with all the family possessions and households and married another wife. Since then he refused to cater for their family. The Appellant further contended that she single-handedly took care of the children and that they lived a very happy and fruitful life in Nairobi. The Appellant affirmed that she took care of all the needs of the children.

12. It was the Appellant's position that the Respondent only resurfaced in August 2017 and kidnapped the children. She further stated that her efforts to get back the children through the police and the Children's Office earned her the suit as a Defendant.

13. The Appellant vehemently averred that the Respondent's employment cannot be the only guiding factor in the custody of the children. She urged the Court to take into account the various legal considerations including the period of abandonment.

14. It was the Appellant's further averment that she was a settled business woman. She dealt in jewelry and clothing and can fully support the children. Until the kidnapping, the children were in [particulars withheld]Adventist Academy in Nairobi. She further contended that due to their tender age, the children ought to be under her care and custody.

15. In counter-claiming for the custody of the children the Appellant drew the Court's attention to the manner the Respondent took the custody of the children. It was by unlawful means. The Appellant also contended that she has not known peace since the children were taken from her. She fought through the Police and the Children Offices both on Nairobi and Migori for the return of the children until the Respondent filed the suit.

16. Further to the custody of the children the Appellant counter-claimed for the return of the children to their former school in Nairobi, an injunction and the children's maintenance.

17. The suit was heard. Each of the parties testified without calling any witness. The court then decreed the custody of the children to the Respondent with unlimited access to the Appellant on reasonable terms. That was on 11/09/2018.

#### **The Appeal:**

18. The Appellant was aggrieved by the judgment. She lodged an appeal. The Appellant proposed the following 8 grounds in the Memorandum of Appeal dated 11/10/2018 and evenly filed: -

**1. The learned trial magistrate erred in law and fact by granting the Respondent custody of the children of extremely tender years of seven and five years despite the presence of overwhelming evidence that the Appellant was best suited to have custody.**

**2. The learned trial magistrate erred in law and fact by awarding custody of the minors of tender years to the Respondent in contravention to the provisions of the Children's Act and other known principles applicable in such cases.**

**3. The learned trial magistrate erred in law, fact and principle by awarding custody of the minors to the Respondent in total disregard to the down principles on custody of children of tender years and the landmark authorities adduced before the trial court in support of custody of children of tender years being granted to the mother.**

**4. The learned trial magistrate erred in law and fact by awarding custody of the minors of tender years to the Respondent who due to his busy schedule at work has little and/or time to cater to the minors emotional; physical and mental needs and in essence placing the minors under the custody of a step-mother (the Respondent's new wife) a fact well exhibited in the pleadings**

**5. The learned trial magistrate misdirected himself in principle and misapplied the law by awarding custody of the minors to the respondent on the basis that the Appellant had an unregistered business and such was not a tax paying citizen and also lacked a permanent place to operate.**

**6. The learned trial magistrate was extremely biased and applied selective justice by only relying on parts of the pleadings and documents evidence produced with regard to the Respondent's monthly income in awarding custody in favour of the Respondent in his judgment.**

**7. The learned trial magistrate impliedly acknowledged the fact that the Appellant had a source of income that she used to support her children at the time the Respondent disserted his matrimonial home yet still misdirected himself by relying on extraneous issues such as registration of business in awarding custody to the Respondent.**

**8. The learned trial magistrate erred in law and fact by failing to make a finding that the Appellant was entitled to maintenance for the minors upkeep from the Respondent**

19. The Appellant prayed for the following orders: -

**(a) Custody of the minors herein is granted to the Appellant**

**(b) A monthly periodical payment is made to the Appellant towards the maintenance and upkeep of the minors herein.**

**(c) The Court to issue any other orders it deems just and equitable in the circumstance**

**(d) Costs of the appeal and the court below**

20. Directions were taken, and the appeal was disposed of by way of written submissions where both parties duly complied. The parties heavily submitted on their rival positions and referred to several decisions.

**Analysis and Determination:**

21. As the first appellate Court, this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348**).

22. I have certainly perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties.

23. I must remind myself that this is an appeal in a matter involving children. The **Constitution of Kenya, 2010** in **Article 53** provides for Children as follows: -

**(1) Every child has the right**

**(a) to a name and nationality from birth**

**(b) to free and compulsory basic education**

**(c) to basic nutrition, shelter and health care**

**(d) to be protected from abuse, neglect, harmful cultural; practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour**

**(e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and**

**(f) not to be detained, except as a measure of last resort, and when detained, to be held-**

**i) for the shortest appropriate period of time and**

**ii) separate from adults and in conditions that take account of the child's sex and age.**

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

24. Subordinate to the **Constitution** are Acts of Parliament and international conventions on matters relating to children. The most profound Act of Parliament is the **Children's Act** No. 8 of 2001 (hereinafter referred to as '**the Act**').

25. The purpose of **the Act** is provided for in the preamble as follows: -

**An Act of Parliament to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institutions; to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes.**

26. On the best interests of the child, **Section 4(2) and (3)** of **the Act** provides as follows: -

**(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 interest of the child shall be a primary consideration.**

**(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising 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

27. **Section 4(2)** of the Act is further reiterated in *Article 3* of the *United Nations Convention on the Rights of the Child (UNCRR)*. Kenya is a signatory to this Convention.

28. **Section 76(1)** of the Act further guides Courts in making orders relating to children. It states as follows: -

**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.**

29. Running from the **Constitution** through the Act and the UNCRR, the guiding principle in any matter relating to a child is 'acting in the best interest of the child.'

30. But what is the meaning of 'the best interest of a child?' The **Constitution** and the laws are silent. Courts have however stepped unto bridge the void. In **MA vs. ROO (2013) eKLR**, the Court stated as follows: -

*.....What is the best interest of the child has not been defined by the law. This is as it should be because the best interest of each particular child will depend on the circumstances of each particular case at any one particular time. What is not in dispute, however, is that there are certain minimum requirements that have universally been accepted to constitute the best interest of the child. This includes the right of a child to be provided with shelter, food, clothing and education. The child is entitled to medical care. The child's welfare should be taken care of under the best possible circumstances. The child is also entitled to parental guidance. This guidance shall where possible, be provided by both parents. The child is further entitled to be given a suitable, conducive and loving environment in which to grow up in. '...This Court agrees with the Respondent that his right as the biological father of the child should not in the circumstances be ignored. However, such right shall be subject to what constitutes the best interest of the child. As an adult, the right of the respondent as the father of the child cannot be considered to be of paramount importance to that of the best interest of the child...'*

31. In **KMM vs. JIL (2016) eKLR** the Court had the following to say: -

*..... At the international level, the legal instruments on rights of the child, the International Convention on Rights of the Child (UNCRC) and the African Charter on Rights and Welfare of the Child (ACRWC) focus on child's best interests, welfare and considerations as paramount. Secondly, both parents of the child shall contact, access and interact with the child irrespective of whether parents are married or not or if they reside in different states for purposes of the child's upbringing and development. The member states are obligated to facilitate an expeditious process for the parent to contact access and interact with the child..'*

32. Returning to the matter at hand, the main issue in contention is the custody of the two children. **Section 82** of the Act gives the first priority of custody of a child to a parent or parents. **Section 83(1)** of the Act guides several considerations to a Court in custody matters. They include: -

(a) *The conduct and wishes of the parent or guardian of the child;*

(b) *The ascertainable wishes of the relatives of the child;*

(c) *The ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;*

(d) *The ascertainable wishes of the child;*

(e) *Whether the child has suffered any harm or is likely to suffer any harm if the order is not made;*

(f) *The customs of the community to which the child belongs;*

(g) *The religious persuasion of the child;*

(h) *Whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;*

(i) *The circumstances of any sibling of the child concerned, and of any other children of the home, if any;*

(j) *The best interest of the child.*

33. Courts have dealt with the subject of custody of children for long. Further to the foregone considerations Courts have come up with judicial guidelines in respect to custody of children of tender ages. **Section 2** of the Act defines a child of tender years to mean 'a child under the age of ten years.'

34. **Ngugi, J.** in **JKN v HWN (2019) eKLR** traced the judicial ancestry on the custody of children of tender years long before the passage of the Act and the promulgation of the Constitution. For ease of reference I will reproduce verbatim paragraphs 28 to 34 as under: -

*28. This is a rule of esteemed judicial ancestry and pedigree tracing its history in Kenya to long before the passage of the Children Act and the promulgation of the Constitution of Kenya, 2010. For example, in Wambwa v Okumu [1970] EA 578, Mosdell J had this to say:*

*I do not think it can be controverted that in the absence of exceptional circumstances, the welfare of a female infant aged four years.....demands that the infant be looked after by its mother rather than its putative father.*

29. Similarly, the Judges of Appeal in *Githunguri v Githunguri* [1979] eKLR stated as follows:

*...the custody of every young female children should be granted to their mother, in the absence of exceptional circumstances which do not in my opinion exist in this case. The learned judge correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the children. He rejected the proposition, advanced before him by the mother's advocate, that there was a 'rule' in favour of the mother. With respect, this was a misdirection. When dealing with the paramount consideration of welfare, especially where young female children are concerned, there is a rule that the mother is normally the person who should have custody.*

30. The Judges of Appeal in the *Githunguri Case* approvingly quoted Roxburgh J, in *Re R (an infant)* [1958] 1All ER 783, at 786 and 787:

*I only say this; the prima facie rule (which is now quite clearly settled) is that, other things being equal, children of this tender age should be with their mother, and where a court gives the custody of a child of this tender age to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the prima facie rule.*

31. The Judges of Appeal also cited Lord Denning MR in *Re I (infants)* [1962]3 All ER 1:

*I realize that as a general rule it is better for little girls to be brought up by their mother .*

32. Finally, more recently the Court of Appeal in *J. O. v S.A. O.* (2016) eKLR stated:

*There is a plethora of decisions by this court as well as the High Court that in determining matters of custody of children and especially of tender age, except where exceptional circumstances exist, the custody of such children should be awarded to the mother because mothers are best suitable to exercise care and control of the children. Exceptional circumstances include: the mother being unsettled; where the mother has taken a new husband; where she is living in quarters that are in deplorable state; or where her conduct is disgraceful and/or immoral.*

33. And what amounts to exceptional circumstances? The decision in *Sospeter Ojaamong v Lynette Amondi Otieno*, Court of Appeal Number 175 of 2006 had this to about exception circumstances:

*The exceptional circumstances would include if the mother is unsettled, has taken a new husband or her living quarters are in a deplorable state.*

*34. On the other hand, Martha Olela & another v Jackson Obiera C. A. 16 of 1979 explained the general principle that custody of young children should be awarded to the mother unless special circumstances and peculiar circumstances exist to disqualify her for being awarded custody. As per the judges, the exceptional circumstances would include "disgraceful conduct, immoral behavior, drunken habit, or bad company."*

35. In this matter the children are now 9 years old and 6 years old respectively. They are both children of tender years. From the above judicial precedents custody of such children ought to be given to the mother save on exceptional circumstances.

36. It has been held that exceptional circumstances include instances where the mother is unsettled, where the mother has taken a new husband, where the mother is living in quarters that are in deplorable state, where the mother's conduct is disgraceful and/or immoral, where the mother is of a drunken habit or where she keeps bad company.

37. The exceptional circumstances are all issues of fact. That means evidence must be tendered in proof. The burden was on the Respondent.

38. In his evidence the Respondent stated that as the relationship with the Appellant deteriorated the Appellant left their home with the children. He reported the matter at Uthiru Police Station. The Respondent did not produce any evidence to that end; not even an OB Number. He then stated that 2 months after the Appellant left she returned asking for money from him. He then realized that the children were not in good health. The Respondent while admitting that as at that time he also did not have any money, he did not expound on how the children were not in good health.

39. The Respondent further alleged that the Appellant is intent on taking the children to her mother. Again, the Respondent did not adduce evidence to that end. He also failed to adduce evidence that the Appellant was out to kill the children and that the Appellant has no love to the children.

40. On the other hand, the Appellant testified that she was a settled business woman dealing in jewelry and clothing. She also stated that she had all along been able to take care of the children in the absence of the Respondent. There is evidence that the children had been enrolled in Tommie Fulp Adventist Academy in Kabete. That was a private school. The Appellant further stated that she ensured that the children attended Church on every Saturday as Seventh Day Adventists.

41. Cases are decided on the basis of evidence and the law. In this case the Respondent ought to have tendered evidence in proof of any or a set of the exceptional circumstances. He failed to do so. His testimony was largely speculative. He further relied on his job in creating an impression that he is able to fully provide for the children.

42. To me, what the Respondent fears most is maintaining the Appellant under the guise of maintaining the children. That is a general concern for men in his situation. It is a genuine concern. Courts must therefore be able to be realistic and reasonable in such cases.

43. I wholly agree with the Respondent that money is quite essential in bringing up children. However, I must add that money cannot be the sole determinant on custody matters. There are so many things which money cannot achieve. Such things may instead require the presence of a person. For instance, when a girl is growing up there are many things which she naturally learns by keeping company with the mother than when with the father. In such a case the money aspect may not aid much.

44. In this case the Respondent ought to have availed evidence in satisfying that this is a case falling within the exceptions to the general rule on custody of children of tender years.

45. The upshot is that the custody of the children must be granted to the Appellant who is the mother.

46. I will now deal with the maintenance of the children. The Appellant prayed for a monthly or periodical payment towards the upkeep and maintenance of the children. The trial court granted custody of the children to the Respondent who was to fully maintain them. The Appellant as only granted visitation rights.

47. The Appellant testified of her ability to take care of the children even without any support from the Respondent. Likewise, the Respondent never complained when the trial court ordered him to fully maintain the children. None of the parties adduced evidence of their financial positions. The Appellant however admitted that the Respondent used to financially support the family after he secured his current job and before he unlawfully took custody of the children.

48. The Appellant is self-employed. The Respondent is in a formal employment with Kenya Power and Lighting Company. This Court takes judicial notice that as an employee the Respondent must be under a medical cover offered by the employer. Since the Respondent does not deny paternity of the children then unless the contrary is proved the children are automatically covered under the Respondent employer's medical cover. That takes care of the health concerns.

49. The Appellant is settled in Nairobi. She did not testify that she pays rent. She did not even state that if granted custody then part of the maintenance ought to be rental payments. Infact the Appellant's Counsel during highlighting of the submissions re-emphasized that the Appellant does not require any support from the Respondent in raising the children. The fairest order on the issue is that the Appellant shall take care of the accommodation of the children.

50. On the education of the children, I order that both parents shall equally bear the cost of educating the children. That will include school fees, transport costs, if any, boarding fees, if applicable, school trips among all matters related to the education of the children.

51. On the upkeep of the children, the parties shall bear equal burden. The parties shall agree on this aspect. If no agreement is reached between the two, the parties shall institute mediation through the Children's Officer and come up with an appropriate agreement which shall be filed in Court.

### **Conclusion:**

52. As I come to the end of this judgement it is my hope that the parties shall relax their hardline stands and recommit their joint efforts for the benefit of their innocent children. The children are innocent because there is no pointer in this matter that the children were the cause of their parents' disagreement.

53. Finally, the following orders do hereby issue: -

**(a) The appeal is hereby allowed and the order granting custody of the children to the Respondent herein is hereby set-aside;**

**(b) The custody of the children herein, JCOMM and JL is hereby granted to the Appellant herein, HKN The Respondent shall forthwith release the children to the Appellant.**

**(c) The Respondent shall have reasonable access to the children. The parties shall agree on reasonable terms thereto and if no agreement is reached the nearest Children's Officer to where the children will be residing shall mediate the dispute and file an agreement in Court.**

**(d) The Appellant shall forthwith make arrangements and secure vacancies for the children in a school so as not to interrupt the children's studies when the schools re-open in January 2020.**

(e) The Respondent herein shall bear the medical care of the children whereas the Appellant herein shall take care of the children's accommodation.

(f) The Appellant and the Respondent shall equally bear the cost of the education and upkeep of the children. On education, the Respondent shall pay one-half of all the costs. However, the Respondent shall fully shoulder the costs of admission of the children into the school. On the upkeep, the parties shall reasonably agree on the same. In the unlikely event of failure to agree the matter shall be mediated upon by the nearest Children's Officer to where the children will be residing and who shall file an agreement in Court.

(g) Any agreement filed in Court on the basis of this judgment shall be enforceable as an Order of this Court.

(h) In view of how the Respondent took custody of the children, I find that the Respondent ought to have instituted legal means of attaining custody. His conduct therefore rendered the parties to incur uncalled for expenses. The Respondent shall bear the costs of the suit and this appeal.

(i) Parties be at liberty to apply.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 11<sup>th</sup> day of November 2019**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open court and in the presence of: -**

**Mr. Abisai** Counsel instructed by the firm of Messrs. Abisai & Company Advocates for the Appellant.

**Mr. Odhiambo Kanyangi** Counsel instructed by the firm of Messrs. Odhiambo Kanyangi & Company Advocates for the Respondent.

**Evelyne Nyauke** – Court Assistant