**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 32 OF 2017**

**M A A.................................APPELLANT**

**VERSUS**

**A B S..................................RESPONDENT**

**RULING**

***(An Appeal from the Ruling and Orders of Hon. V. J. Yator, Senior Resident Magistrate of 27.9.17 in Tononoka Children's Court Cause No. 316 of 2012)***

1. M A A the Appellant and ABS the Respondent were married in on 4.12.09 under Islamic law. They were blessed with a male child K M A born on 19.9.10. The parties divorced in July 2011. The Respondent on 4.10.15 married T A A A, an Omani National and they have 2 children together. The Appellant got information that the Respondent was making arrangements to relocate from Kenya for good. Being apprehensive that the Respondent would take the child away from him permanently, the Appellant on 6.6.12, filed Tononoka Children's Court Case No. 316 of 2012 seeking an order restraining the Respondent from taking the child out of the jurisdiction of the Court. He also sought the release of the child's passport to him. The matter is highly contentious and several applications have been filed by both parties.

2. The Children's Court in its judgement of 6.10.14 *inter alia* granted the parties joint legal custody of the child. Actual physical custody of the child and his passport was to remain with the Respondent with unlimited access to the Plaintiff during school days and half the school holidays. Neither party was to leave the country with the child without the consent of the other or a Court order. By an application dated 26.5.16 the Appellant sought revocation or variation of the order of 6.10.14 and further sought interim physical custody of the minor and his documents with unlimited access to the Respondent.

3. In a ruling of 27.9.17 Senior Resident Magistrate Hon. V. J. Yator made the following orders:

> a) Actual physical custody is hereby granted to the Defendant (mother) as per the judgement of 6.10.14. However, since the child is in school, the orders to take effect after schools close this term.
>
> b) The Plaintiff and/or his servants and agents are hereby restricted by way of injunction from interfering with the Defendant's actual physical custody care and/or control of the minor K M A and similarly to the Defendant when the child is with the Plaintiff.

c) The Plaintiff and the Defendant shall be at liberty to leave and re-enter the Republic of Kenya. The party travelling to inform the other and the period of travel should not affect the child's schooling and either party's right of custody/access i.e half period of school holidays.

d) Both the Plaintiff and the Defendant to have custody of the child's passport during the period of actual physical custody.

e) The other orders issued on 6.10.14 which have not been reviewed to remain in force.

f) Each party shall bear their own costs and shall be at liberty to apply.

4. The Appellant being aggrieved by the Ruling filed the Appeal herein, the grounds of which are that the learned Magistrate erred in law and fact by:

1. allowing the child (Minor) to be taken out of jurisdiction as the same is not in the best interest of the child as this will destabilize him from the environment that he is accustomed to.

2. issuing an order allowing the Respondent to take the child (Minor) out-of jurisdiction of the Honourable court without issuing order of compliance of return of the child (Minor) as other countries are out of the jurisdiction of the Honourable court thus rendering supervision of the child fruitless in the circumstances.

3. issuing the order of 27th September 2017 without considering the pleadings, affidavits and submissions filed in favour of the Appellant which if duly considered would have caused her to arrive at a different conclusion and/or order.

4. considering and applying wrong principles in reaching her decision thus allowing the Respondent to leave with the minor without putting requisite measures to ensure compliance.

5. granting actual physical custody to the Respondent who lives out of the jurisdiction of the Honourable Court.

6. failing to appreciate the best interest of the child (Minor) in delivering its decision.

5. Parties' counsel made submissions before me. Counsel for the Appellant argued grounds 1, 3, 5 and 6 together. Counsel submitted that the learned Magistrate erred in allowing the child to be taken out of the Country thereby destabilizing him from the environment he is accustomed to. Counsel submitted that the child was staying with his mother in Malindi where he was studying at [particulars withheld]. The child was then taken out of school without the knowledge of the Appellant. Between April and December 2016 when the Appellant went for him, the child was out of school. The Appellant enrolled the child in [particulars withheld] Mombasa where he has fared well. The child is stable with the Appellant and there has been no complaint. The Respondent has remarried and has relocated to Oman. No evidence has been produced to show the arrangements made for the education of the child in Oman. The system of education and the medium of instruction are unknown. No evidence has been produced in the lower Court to show where they will be staying in Oman, whether the Respondent's new husband will accommodate the child, the religious beliefs and practice. Had the learned Magistrate considered this, she would have come to a different conclusion.

6. It was further submitted that it is common knowledge that the Islamic Republic of Oman has extreme religious beliefs. It was contended that under Islamic religion upon divorce, a boy of 2 years and above should go with the father for nurture and mentoring. In a foreign country, the child will be ostracized and asked where his father is and this may ruin his life. Living in a foreign country without his father to mentor him is not in the best interest of the child. The learned Magistrate failed to consider these issues especially where the mother has remarried and lives abroad. If the Respondent goes out of jurisdiction with child it will be difficult for Appellant to see the child. It was therefore submitted that special circumstances do exist in the present cause to warrant the child to be with Appellant.

7. On ground 2, it was submitted that the learned Magistrate while granting custody to the Respondent erred in failing to put in place some measures to supervise compliance with the Court orders and to ensure that child is brought back to jurisdiction. The learned Magistrate also erred in failing to consider that the child was well settled. The Respondent having been in breach of previous Court orders and warrant of arrest having been issued is undeserving of custody. It was submitted for the Appellant that the Respondent has no fixed abode as Malindi is her mother's home while her husband is in Oman and Nairobi is her sister's home. On the other hand the Appellant has a permanent home. The Appellant argued that he has laid good grounds for faulting the impugned decision on leaving jurisdiction, conducive environment and best interest of the child.

8. For the Respondent, it was submitted that the impugned decision of the learned Magistrate was made subsequent to review of earlier judgement of 6.10.14. The child just turned 7 years old in September 2017 having been born on 19.9.10. It is the Respondent's case that from October 2014 to October 2015, the Respondent nurtured the child and was responsible for all his needs. It is her remarriage that triggered the animosity between the parties. Upon remarriage, the Respondent resided in Malindi. She was then transferred to Nairobi and made arrangements to transfer the child from [particulars withheld] Malindi to [particulars withheld] Nairobi and the Appellant was duly notified. However she enrolled the child at Bellevue School due to its proximity to her home in South C. and the teachers were happy with his performance.

9. On the warrant of arrest issued against the Respondent, it was submitted that on 15.6.16 when she was to produce the child before the Children's Court, was unable to attend Court as she was indisposed. She had also engaged a new advocate and by the time the new advocate appeared in Court, a warrant of arrest had been issued against her. The Court then extended the period for her to present herself to 20.6.16. The Respondent's advocate filed Constitutional Petition No. 31 of 2016 seeking to have the warrants lifted which was dismissed. On 16.11.16, the Appellant picked the child from the Respondent's home in the presence of children's officers and was peacefully handed over. The Appellant filed application dated 24.11.16 seeking that the child continues to reside with him. Status quo orders were given and the child remained with Appellant. Efforts to access the child were frustrated by Appellant. It was further submitted that pursuant to the Respondent's application dated 22.2.17 seeking to have the child over the half term holiday, the Court by its order dated 24.2.17 allowed her to have the child between 24.2.17 to 26.2.17. In spite the said order, the Appellant denied her access to the child. The matter was heard on 21.3.17 and was concluded on 26.9.17 when the impugned order was given.

10. The Respondent argued that the decision of the learned Magistrate was well reasoned and that she considered all factors including the submissions. On travel, the Respondent contended that travel is a fact of life and both parents are at liberty to travel with the child. Although the Respondent's husband has a home in Oman it was denied that the Respondent resides in there. Her home is in Malindi and she has relatives in Nairobi. Her travel to Oman was for purposes of accompanying her husband who had gone for medical treatment as he has a cardiac condition. Relying on the paramountcy rule, the Respondent urged the Court to find that the child being of tender years should be with the mother. She submitted that the Appellant has also remarried with 2 other children. Remarriage is a fact of life and is not a ground for denying a mother custody. Remarriage as an exceptional circumstance must be shown to impinge on rights of the child. Relocation should be allowed if it is not inconsistent with welfare of a child. She urged the Court to find that the orders granted to be judicious. On Islamic religion, it was submitted that the learned Magistrate found that both parties were Muslim and would bring up the child in Islamic way and the child would not be prejudiced. Nothing exceptional has been shown that the Respondent is unworthy of the child's custody.

11. I have given due consideration to the submissions by counsel. The issue for determination is whether the learned Magistrate erred in granting actual physical custody of the child to the Respondent who has remarried and may leave the jurisdiction of the Court for Oman where her husband resides. The main concern of the Appellant is that the Respondent being married to an Omani national will relocate to Oman and he may never see the child again. The Respondent however argues that the child is of tender years and should be with her as his mother.

12. Section 83 of Children Act stipulates the principles to be applied in making a custody order as follows:

> ***"83.(1)In determining whether or not a custody order should be made in favour of the applicant, the court shall have regard to—***
>
> ***(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."***

13. The Appellant is apprehensive that the Respondent will take the child out of jurisdiction where the Court will not have control of what happens to the child. He is concerned about the education of the child and his mentoring being a male child. He is also apprehensive that he may never see the child again.

14. In her Ruling, reviewing the earlier orders by allowing either parent to travel with the child the learned Magistrate had this to say:

> ***"I agree that in ,modern living, travelling is a fact of modern living and it will not be in the best interest of the child herein to be denied this right to travel with his parents because the parents cannot agree on anything. I find that no evidence has been tabled to show that the child might be exposed to extremism if he travels to Oman or any other country. Furthermore, the Plaintiff and the Defendant are Muslims and I believe in terms of religion, both of them are ready and willing to raise their child as per the Muslim faith."***

15. Under Section 83(1)(g) of the Act, the Court shall have regard to the religious persuasion of the child while considering whether the learned Magistrate erred on the issue of custody. The Appellant claims that it is common knowledge that the Islamic Republic of Oman has extreme religious beliefs the child will be exposed to extreme religious beliefs when he is taken there by the Respondent. To begin with there is no place known as the Islamic Republic of Oman. Oman is a Sultanate and is known as the Sultanate of Oman. Secondly, Oman has long upheld and promoted religious and cultural tolerance, In an April 2016 article titled Can Oman's Stability Outlive Sultan Qaboos? Giorgio Cafiero and Theodore Karasik of the Middle East Institute state:

> ***"Oman's social traditions suggest, however, that extremist groups may not find fertile***

***ground in the country. Many attribute the Sultanate's norms of nonviolence and dialogue to the Ibadi sect of Islam, which Sultan Qaboos and the majority of Omanis practice. Ibadism, which the Omanis of the interior adopted in the eighth century, is characteristically tolerant. The Ibadis stress the "rule of the just" and condemn violence in pursuit of political objectives."***

I agree with the learned Magistrate that the Appellant has not placed before the Court any material that would persuade the Court to find that the child is at risk of exposure to extreme religious beliefs in the Sultanate of Oman.

16. The Appellant urged the Court to find that the Respondent has remarried, resides out of the country in Oman and will take the child out of the jurisdiction of the Court as exceptional circumstances which warrant her being denied custody of the child. The Respondent on the other hand contends that the child is of tender years and the paramountcy rule of the best interest of the child requires that he be with her, the mother. The child herein is a child of tender years being 7 years old. The Court is required under Section 83(1)(j) to have regard to the best interest of the child while considering the award of custody. Indeed it trite law that, in matters of custody the paramount consideration is the welfare of the infant.

17. Section 2 of the Children Act defines a child of tender years as a child under the age of ten years. It is not disputed that the child having been born on 19.9.10 is a child of tender years. It is trite that children of tender years, absence of exceptional circumstances, ought to be with their mother. In the cases of Githunguri v Githunguri (1981) KLR, Re S (an infant) [1958] 1 All ER, and Wambwa v Okumu (1970) EA 578, various Courts upheld the general rule that custody of children of tender years should be vested in their mother unless there are sufficient reasons or exceptional circumstances to depart from this *prima facie* rule.

18. In Re S (an infant) [1958] 1 All ER 783, at 786 and 787, Roxburgh J said:

> ***"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."***

From the above holding, the Court is obligated to ensure that there are sufficient reasons to go against the *prima facie* rule and award custody of a child of tender age to the father.

19. Closer home, in the Court of Appeal case of Githunguri v Githunguri [1979] eKLR Law, JA. opined:

> ***"In the instant case, the learned judge gave the husband the custody of the two little girls because, in his words:***
>
> ***"I do feel that he is in a better position and is generally a more suitable person to look after and to have custody of them."***
>
> ***He did not say that the mother was an unsuitable person, or that she was unfit to have the care and custody of her little daughters. In my view, there are no 'exceptional circumstances' shown in this case to justify depriving the mother of her natural right to have her children with her, so as to exclude the prima facie, or generally accepted rule or principle recognised in the cases to which I have referred in this judgment. This is not a case of a mother abandoning her children. Although she left the matrimonial home after a quarrel, she came back to fetch her little daughters the following morning, but was prevented from taking them away."***

20. In the present case, the Appellant has not stated that the Respondent is an unsuitable person or that she is unfit to have care and custody of her son. The only issue raised by the Appellant is the apprehension that the child will be taken out of jurisdiction and speculation of what might happen to him there.

21. 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 suited 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."***

22. Although the Court of Appeal listed the taking on a new husband by the mother of children of tender age as an exceptional circumstance, I doubt that the Court intended that remarriage in and of itself is sufficient reason to disqualify a mother from being awarded custody. It must be shown that the remarriage is incompatible with the welfare of the child. No material has been placed before me to show that the remarriage of the Respondent will have an adverse effect on the welfare of the child. Like Law, JA. in the Githunguri case (supra) I am not persuaded that there are exceptional circumstances to justify depriving the Respondent her natural right to have her child with her thereby excluding the prima facie, or generally accepted rule.

23. Further while it is true that the Respondent has remarried, the same is also true of the Appellant. The Court is mindful of the fact that the Constitution of Kenya 2010 protects the Respondent from discrimination on account of her remarriage. Article 27(4)(5) provide:

> ***(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.***
>
> ***(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4)." (underlining mine).***

24. On his part, Miller, JA. in the Githunguri case (supra) had this to say:

> ***"True it is that on the evidence the atmosphere therein has not been the best on occasions but there is not a scrap of evidence to show that despite this and the occasional absence or daytime excursions by the mother either child suffered the slightest injury. I consider that the pendulum swings more towards the children remaining with their natural mother".***

Guided by the above finding I am persuaded that in spite of the remarriage of the Respondent, the pendulum swings more towards the child remaining with his natural mother.

25. On relocation to Oman, in the persuasive English case of Payne v Payne [2001] EWCA Civ 166 the Court stated:

> ***"In summary a review of the decisions of this Court over the course of the last thirty years demonstrates that relocation cases have been consistently decided upon the application of the following two propositions:***
>
> ***(a) The welfare of the child is the paramount consideration; and***
>
> ***(b) Refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children".***

It was submitted for the Appellant that the Respondent has no fixed abode as Malindi is her mother's home while Nairobi is her sister's home. This being the case, it is inevitable that the Respondent will go

to Oman to live with her husband as that is where her home is. This Court being mindful of the welfare of the child as the paramount consideration, is of the view declining to allow the Respondent to travel with the child to Oman would militate against the child's best interest and would impact detrimentally on the welfare of the child. The intention of the Respondent to relocate with the child to Oman to be with her husband is a genuine and reasonable and this Court should not be a hindrance. As was stated Kerr LJ in Tyler v Tyler [1989] 2 FLR 158:

> ***"I also accept that this line of authority shows that where the custodial parent herself, it was the mother in all those cases, has a genuine and reasonable desire to emigrate then the Court should hesitate long before refusing permission to take the children"***

26. Section 83(1)(d) requires the Court to take into account the ascertainable wishes of the child. The Court did have occasion to hear the child and he expressed the wish to stay with his mother. He stated that his father came to the police and took him out of madrassa. The incident led to the other children in the madrassa calling him a thief. His paternal grandmother told him that if he does not go back to his father's home, she would go for him accompanied by the police. He said his father beats him when he does wrong and when he wets his bed while his mother only tells him to stop. His paternal grandmother calls him and his mother abusive names. The child further stated that he does not understand what is taught at [particulars withheld] and when he tells his father, he beats him. He said his mother treats him well. He said that his mother told him they were coming to Mombasa and told him to come and tell the truth.

27. While considering the expressed wishes of the child it is judicious for the Court to consider what is stated in the Treatise *"Family Law"* by P M Bromley, 6th Ed. At page 297: -

> ***"… But it must be remembered that the child may have been coached by one parent and that sometimes the child's own wishes are so contrary to its long-term interests that the court may feel justified in disregarding them altogether"***

> The Court of Appeal stated as much in the J.O. v S.A.O. [2016] eKLR case (supra):

> ***"Section 83 (1) of the Children Act outlines the principles to be applied in making custody orders. They include the ascertainable wishes of the child. But as Njagi, J. held in B. K. versus E.J.H. [2012] eKLR, "the test for the best interest of a child is not subjectively dictated by the selfish whims of a child. There has to be an element of objectivity. … a child's wish to stay with a particular parent might not be in his best interest. In such a situation, his own preference may not be automatically allowed. The wishes and feelings of a child must therefore be treated with a lot of caution."***

28. I have considered the foregoing wishes and feelings expressed by the child albeit with a lot of caution. In the first place, Counsel for the Respondent insisted that the Court hears the child and this after conclusion of submissions by both parties. Further, Counsel contended that it was the child who wished to talk to the Judge. Such boldness from a 7 year old is rare. From what the child told the Court, I drew the conclusion that the idea that he comes and talks to the Judge was most definitely planted in him. The child was however bold and eloquent when he expressed his wishes and appeared clear in his mind that he wished to be with his mother. He was not intimidated by the Court setting or the Judge as a stranger. The Court however cautions itself that the childish whims of the child may not be in his best interest. Any child would prefer the less harsh parent who is permissive. The Court must therefore be objective in considering the expressed wishes of the child and make a decision that will be in his present and long-term best interest.

29. The Appellant submitted that the Respondent having been in breach of previous Court orders and warrant of arrest having been issued is undeserving of custody. On the issue of the compliance with Court orders, the learned Magistrate had this to say:

> ***"It is clear that both the plaintiff and the defendant have been finding reasons not to comply with court orders… It is important to note that the Court after hearing both parties saw it fit to***

***grant custody to the mother of the child. From the judgement, the Court noted that there was nothing exceptional presented by the Plaintiff to warrant the Court grant custody of a child of tender years to his father. Apart from disobedience of court orders, of which the plaintiff and the defendant are both in contempt nothing else has been tabled by the plaintiff to warrant this Court to review the custody order issued on 6.10.14."***

30. This Court notes that both parties were indeed in contempt of the orders of the lower Court. While a warrant of arrest was issued against the Respondent for failing to produce the child in Court on 15.6.16, the Appellant denied the Respondent access to the child as ordered by the Court on 24.2.17. Further given that actual physical custody was granted to the Respondent, by enrolling the child in [particulars withheld] in Mombasa, the Appellant assumed upon himself actual physical custody of the child against the clear order of the Court. Indeed while declining to review the orders of 6.10.14 on the issue of custody the learned Magistrate stated:

***"It is not clear how the Plaintiff came to have actual physical custody of the minor".***

31. The Constitution of Kenya 2010 requires that in all matters concerning children, the best interest of the child shall be of paramount importance. Article 53(2) of provides:

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

Section 4(2) and (3)(b) of the Children Act echo the constitutional imperative:

***"(2). In all actions concerning children whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.***

***(3) All judicial and administrative institutions, and all persons acting in the name of these 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) and promote the welfare of the child;***

***(c) …"***

32. What is stated in Section 4 (3)(b) of the Act is the paramountcy principle which is vital in all matters concerning children and must be given prominence. While considering this matter, this Court was alert to the welfare of the child herein who is of tender years. The matter is not about the Appellant and the Respondent and their interests are secondary to those of the child. The foregoing provisions require this Court to treat the interests of the child as the first and paramount consideration and must do everything to *inter alia* safeguard, conserve and promote the rights and welfare of the child herein. Acting in the best interest of the child, I am of the view that his welfare will best be served if he remains with his mother the Respondent.

33. In the circumstances, having evaluated the material placed before me, I am not persuaded that exceptional circumstances exist that that would render the Respondent unfit to have actual physical custody of the child. I therefore find no reason to interfere with the decision of the learned Magistrate which is hereby upheld. Each party to bear own costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 2nd day of February 2018**

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**M. THANDE**

**<u>JUDGE</u>**

In the presence of: -

**………………………………… for the Appellant**

**……………………..……… for the Respondent**

**……………………..……..…….. Court Assistant**