



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 75 OF 2013

E O.....APPELLANT

VERSUS

G M I

A B I

J I.....RESPONDENTS

(An appeal from the judgment and decree of Hon. R.B.N Maloba (Ag. Principal Magistrate) dated and delivered on the 21st day of June 2013 in the Original KISII CMCC DIVORCE CAUSE NO. 28 OF 2009.)

BETWEEN

G M I.....PLAINTIFF

VERSUS

E O.....DEFENDANT

JUDGMENT

The Pleadings

1. The respondent herein, G M I who was the plaintiff before the lower court, instituted divorce proceedings against the appellant/defendant herein E O vide a plaint dated 19th October 2009. The marriage between the appellant and the respondent was solemnized under Gusii Customary Law in the year 1998 in which 2 (two) heads of cattle were paid to the plaintiff's parents. The couple lived in different towns during the subsistence of their marriage due to the appellant's nature of employment before separating in December 2007. It was the respondent's case that they remained separated with the appellant staying at Nyamache where she teaches and the defendant at Kericho where he is stationed as a prison warder.

2. The marriage was blessed with two issues namely:-

1. B O O aged about 12 years

2. V M O now aged about 7 years.

3. The respondent prayed for dissolution of marriage on grounds of adultery, battery and cruelty. She sought the following prayers before the lower court:

(a) Dissolution of the marriage.

(b) Custody of the two (2) issues of the marriage and an order restraining the appellant from accessing, interfering and or in any way obstructing the smooth custody of the issues of the marriage.

(c) An order for maintenance for the issues of the marriage.

(d) Costs of the proceedings.

4. The defendant on his part contested the above proceeding by way of filing his written statement of defence dated 9th March 2010. The defendant denied the allegations of cruelty, adultery, the fact that he has since taken up another wife that he has not interfered with the plaintiff's life and that of the issues of their marriage. Hence he put the plaintiff to strict proof of the allegations.

5. The appellant, on his part, contested the divorce proceedings through a written statement of defence dated 9th March 2010 in which he denied the allegations of cruelty and adultery. The appellant further contested the respondent's prayer for the custody of the minor children on the basis that the respondent was not fit to be granted the said custody as she (plaintiff) had neglected them by abandoning them at the matrimonial home.

Oral evidence:

6. The plaintiff's testimony was the defendant engaged himself in numerous acts of adultery and would even bring various women into their matrimonial home and to a neighbor's house. The plaintiff added that the defendant eventually married one of his many girlfriends with whom he currently cohabits with at his work station. The plaintiff stated as a consequence of the defendant's amorous behavior, she contracted STD's from which she sought medical treatment. The plaintiff added that the defendant would become violent and assault her every time she complained about his amorous conduct which violence culminated in his chasing her out of the matrimonial home in December 2007 and she has been away from the matrimonial home since then to date.

7. PW2 was B I the plaintiff's mother. She also testified that the plaintiff and defendant got married under customary law, had two children and that she later learnt that plaintiff and defendant had marital squabbles and differences which both their families tried to resolve without any success. She added that PW1 had not remarried and that the couple's 1st born child, B O O, lives with the defendant after he ran away from the plaintiff's custody.

8. PW3 J O, the plaintiff's brother, corroborated PW2's testimony while PW4 Elijah Abuga a Kisii elder explained that the payment of dowry is a pre-requisite for a valid marriage to be valid under Gusii Customary Laws and that when the marriage breaks down or is dissolved, the dowry is refunded. He stated that where the dowry is refunded, the children of the marriage remain with their mother and under those circumstance if the mother she remarries the children of the previous marriage would then be deemed to belong to her new husband. This marked the close of the plaintiff's case.

9. The defendant E O (DW1) conceded that he got married to the plaintiff and that their marriage was blessed with 2 issues. He also confirmed that the plaintiff left their matrimonial home with the two children of the marriage but their first born son had come back to his home and he now lives with him even though at that time he was in boarding school. The defendant's case was that all the efforts to salvage their marriage did not yield any fruits as the plaintiff refused to come back to the matrimonial home.

10. DW2 J N (was the defendant's father. He said that the plaintiff and the defendant got married under

Kisii customary laws but that the said marriage later on broke down and all the attempts to broker a reconciliation were unsuccessful.

11. After considering the evidence tendered by both sides, the trial court in its judgment, held as follows:

- (a) That the marriage between the parties be and is hereby dissolved.**
- (b) Custody of the first born child B O is hereby granted to the defendant with access and visitation rights to the plaintiff in school and during school holidays on prior notice.**
- (c) The plaintiff is granted custody of the second born child V M O with access and visitation rights to the defendant in school and during school holidays on prior notice.**
- (d) Visitation in a matter that both children to be in the care of one parent at a time so as to ensure that they interact and get to know one another as siblings.**
- (e) The defendant to pay Kshs. 3,000 per month for the plaintiff for upkeep of V M O and also cater for her school fees depending on the requirement of her school.**
- (f) The defendant's claim on refund of dowry is dismissed.**
- (g) Each party to bear their own costs given that this is a family issue.**

12. The defendant now appellant, being dissatisfied with the judgment and decree of the trial court has now appealed to this court through a memorandum of appeal dated 4th July 2013 in which he has listed the following grounds of appeal:-

- 1. The learned trial magistrate erred in law in making an order for maintenance of the subject V M O without regard to the provisions of the law.**
- 2. The learned trial magistrate erred in law in failing to consider the defendant's submissions.**
- 3. The learned trial magistrate erred in law in failing to grant custody of both children to the defendant.**
- 4. The learned trial magistrate erred in law in dismissing the defendant's counter-claim.**

13. When the above matter came up before Wakiaga J. on 9th July 2015 he directed that the same be argued by way of written submissions and when the matter came before me on 8th June 2016 both parties had already filed their written submissions.

14. It is now the duty of this court, as a first appeal court, is to analyze and re-assess the evidence on record, as I have done hereinabove, in order to make its own independent findings on the matter.

See Selle –vs- Associates Motor Boat Co. [1968] E. A 123, Jobane –vs- Olenja [1986] KLR 661, 664, Elphantus Mwangi –vs- Duncan Mwangi Wambugu [1982-88] 1 KAR 278 and Mwanasokoni –vs- Kenya Bus Services [1982]1988] 1 KAR 870.

15. After considering the pleadings the proceedings of the trial court, the judgment, the appellants memorandum of appeal and the written submissions by advocates representing each party the issues presented to this court for determination on this appeal are as follows:-

- 1. Maintenance of the girl V M O.**
- 2. Custody of the girl V M O which was given to the plaintiff.**

16. With regard to the first issue, **under the Children's Act Section 24 (1)** maintenance of children is the joint responsibility of both parents and neither the father nor the mother shall have superior right or claim against the other of such parental responsibility. **Under Section 40 of the Children's Act**, such parents have a joint responsibility to maintain the child. In the instant case, I find that both parties have the responsibility to maintain the two issues of their marriage.

17. The trial court in its judgment noted that the appellant (defendant) was a generous and responsible father who had not deprived his children the required support. In determining what each parent should contribute towards the maintenance of their children, the trial court took into consideration each party's respective income. The trial court found that the appellant's gross income as a prison warder was above 25,000 while the plaintiff she was yet to secure permanent employment as a teacher and Kshs. 2,000/= only per month from her work as a teacher employed on temporary basis by the Parents and Teachers Association (PTA) at Mane Primary School

18. Article 53 (1) (e) of the Constitution:

"Every child has a right 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."

19. In C.I.N –vs- J.N.N [2014] eKLR Kimaru, J. observed:

"It will not do for the respondent to say that she has an uncertain source of income and therefore the responsibility of maintaining the children should only be borne by the appellant. The respondent must establish to the satisfaction of the court that she has also made effort to provide for the upkeep of the children. The above constitutional requirement is a game changer for parties seeking the intervention of the Children's court to secure maintenance for the upkeep of the child or children. This is because both the mother and the father of the child have equal responsibility towards the upbringing of the child or children."

20. In appreciating the above aspect, the trial court, in the instant case, directed the defendant maintains the child whose custody she had awarded to the plaintiff in terms of upkeep and school fees. In arriving at that figure of Kshs. 3000/=: the trial court considered that the plaintiff had been awarded Kshs. 5,000/= on interim basis but since the plaintiff only had custody of one child, the amount was reduced to Kshs. 3000/=. In my view, the trial court took into account the parties' respective monthly earnings and the fact that parental responsibility is a joint responsibility to be shared between both parents before arriving at the amount of maintenance to be awarded to the respondent. The trial court also considered the fact that the respondent had the custody of only one child thereby forming a basis for the reduction of the amount of Kshs. 5000/= awarded for interim maintenance to the sum of Kshs. 3000/=. I find that the award made by the trial court for maintenance was modest and just in the circumstances and I will therefore not interfere with the said amount.

21. On the issue of custody, the trial court noted that the boy B O O was no longer a child of tender years and that it was only the girl, V M O who was a child of tender years as she was, at the time of the trial, aged below the age of 10 years.

22. The guiding principles in awarding custody are set out under **Section 83 of the Children's Act**. Under the said section, in determining whether or not a custody order should be made in favour of an 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 who 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 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 supervision order, or a personal protection order or any 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.

23. In Joyce Muthoni Githunguri –vs- Stanley Muguna Githunguri (Supra) at page 25 line 4 from the top the case of BCS (an infant) [1958] 1ALL ER 783 thus:

“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 there really is sufficient reasons to exclude the prima facie rule....”

24. In applying the above principle the trial court awarded custody of the girl V M O to the plaintiff because of her sex and tender age. Furthermore, the trial court held that the defendant’s allegation that the plaintiff was unsuitable was merely based on her income, which reason the trial court found, could not be construed to amount to the exceptional circumstances contemplated under the law.

25. In my view the issue of custody was already extensively considered by the trial court which held, and correctly so, that there was no evidence tendered by the defendant to justify his allegation that the plaintiff was not fit to be given custody of the child V. The trial court applied the tender years principle due to the child’s age and sex.

26. On the issue of the trial court not considering the defendant’s written submission it is now trite law that written submissions are not evidence and hence they only have persuasive value.

27. In the circumstances, I find that the above appeal lacks merit and I dismiss the same in its entirety. The respondent shall have costs of this appeal.

Dated, signed and delivered in open court this 8th day of September, 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

- N/A for Asati for the Appellant

- Nyachiro for Ochoki for the Respondent

- Omwoyo court clerk