



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO.30 OF 2010**

**BETWEEN**

**JO O ..... APPELLANT**

**AND**

**M K O..... RESPONDENT**

*(Being an appeal from the judgment of L.M. Nafula, SRM in Ogembo*

*SRMCC No.10 of 2009 delivered on the 18<sup>th</sup> February, 2010)*

**JUDGMENT**

1. By a plaint dated 12<sup>th</sup> May 2009 the Appellant sued the Respondent for the custody of two minor children A.O.O. then aged 10 and V.R.O. - 4 years on the basis that in the year 2008 the Respondent decided to go away from her matrimonial home without any justification.
2. By a statement of defence dated 8<sup>th</sup> June 2009 the Respondent denied the particulars contained in the plaint and further stated that the minors were suffering without their mother whose love and affection they seriously lacked.
3. Based upon the said pleading the matter proceeded for hearing wherein the trial court L.M. Nafula then SRM, dismissed the claim and awarded custody to the Respondent and pronounced herself as follows:-

**“The Law as per Children's Act usually favours mothers with the custody of such minor children unless it is proven otherwise that such mothers have become incapable of exercising parental responsibility over their children as the case may be, evidence was adduced by the plaintiff and his witness who shockingly to this court is the defendant's mother that the defendant is not a fit mother to exercise her duties to the minor children. I have however had to treat the witness evidence with some due consideration more particularly when she stated that she was giving evidence because she had been paid dowry, she then could not be a credible witness but one who is one-sided by virtue of the said dowry.”**

4. Being aggrieved by the said judgment the appellant filed this appeal and raised the following grounds:-
  1. **THAT** the Learned Trial Magistrate erred in law and fact by dismissing the Appellant's claim in the lower court.
  2. **THAT** the Learned Trial Magistrate erred in law and fact by awarding the respondent custody of the minor subjects without adducing any evidence of fitness in court.

3. **THAT** the Learned Trial Magistrate erred in law and fact by condemning the appellant to pay Kshs.7,000/= per month for maintenance and up keep without any evidence before the court.
4. **THAT** the Learned Trial Magistrate erred in law and fact by not appreciating the social background of the Respondent.
5. **THAT** the Learned Trial Magistrate did not take into heart the best interests of the minor subjects herein.
6. **THAT** the Learned Trial Magistrate erred in law and fact by not appreciating the evidence tendered in court and the pleadings filed.

## SUBMISSIONS

1. On behalf of the Appellant it was submitted that the children falls under the bracket of children of tender age. It was submitted that the principles to be applied in determining whether or not custody order ought to be made in favour of a particular party are contained in **Section 83 (1) of the Children's Act**.
2. It was submitted that the court failed to take cognizance of the principle that the welfare of a child is of paramount importance and therefore the trial court did not take that into account. It was further submitted that the trial court condemned the appellant to pay Kshs.7000/= per month for the maintenance and upkeep without any evidence before the court. It was submitted that the amount was excessive, exorbitant and oppressive.
3. It was submitted that under **Section 24 (1) of the Children Act No.8 of 2001** both parents have equal parental responsibility to a child born within marriage and therefore compelling the appellant to shoulder for the children's upkeep and maintenance on his own without the help of the respondent was unjust and unfair.
4. On behalf of the respondent, it was submitted that there was evidence that the appellant got married to a second wife and therefore the appellant will not be in a position to take care of the minor children. It was submitted that the court was right in awarding Kshs.7000/= in maintenance which the appellant had never paid.
5. It was submitted further that minors are children of tender ages and as per **Section 2 of the Children Act** the respondent is better placed to take care of their interest.
6. When the appeal came up for hearing Miss Mugute appeared for Mr. Nyambati while Miss Mutiwa appeared for Mr. Sagwe. Miss Mugute submitted that one minor was with the appellant while one was with the respondent and that the respondent had no fixed abode. Miss Mutiwa submitted that there was no evidence tendered to support the contention that the respondent did not have a fixed abode neither was there any evidence that the appellant had a second wife.
7. There are only two issues which have been identified for determination:
  - a. *Whether the trial court was right in awarding custody to the respondent.*
  - b. *Whether Kshs.7000/= was excessive.*

1. The law as regards custody of children of tender ages has been stated as follows:-

i. **Karangu -vs- Karanja(1975) EA 18**

**--the substantial question in this Appeal is whether or not the judge was right in giving custody of the children to the father. At the time the application was heard, the daughter of the parties was just over seven (7) years and son was six (6) years old. The judge correctly directed himself that in cases of this nature the paramount consideration was the welfare of the children but he did not specifically refer to the generally acceptable rule that in the absence of exceptional circumstances the custody of young children should be given to the mother."**

i. **In GVG Civil Appeal NO.30 of 1978** where the trial judge had granted the custody of children of tender years to the father LAW JA had this to say:-

**"It is with reluctance that I come to the conclusion that his decision was wrong and**

**should not be supported for reasons which I shall endeavour to set out. Basically these reasons are that the custody of very 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 position advanced before him by the mothers advocate that there was a rule in favour of the mother, with respect this was a misdirection. When dealing with the paramount consideration of the welfare, especially where young female children are concerned, there is a rule that the mother is normally the person who should have custody as Roxburgh J said in Res (an infant):**

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

2. It therefore follows that unless there are exceptional circumstances custody of children of tender ages should be given to the mother. The issue therefore is whether the appellant placed before the trial court the exceptional circumstances to enable the court depart from the prima facie rule?
3. The evidence tendered by the appellant was that he had the custody of the children and that he paid fee for them at Father Kaiser Academy (sic) Lolgorian. That the respondent deserted their matrimonial home in July 2008 and went to Lolgorian town whereat some other men had rented for her a house during which period the said men assaulted their son. He reported the matter to the Gucha Children office which ordered that he remains with the custody of the children.
4. It was further his evidence that the respondent threatened to poison the children and was arrested but was subsequently released and took away the children from the appellant. **PW2 W M O** who is the respondent's mother testified that she left her matrimonial home, got married to a Maasai man with the children but later returned them to the witness and under cross examination she stated that the appellant was taking good care of the children than the respondent. She further stated that the matrimonial disputes were deliberated upon by the elders who did not find any issue with the appellant.
5. In her defence the respondent stated that they had cohabited together but had to leave because the appellant was mistreating one of the minors who was not his biological child. She stated that the minor needed motherly love.
6. From the evidence tendered I find that the appellant did not prove exceptional circumstances which would have made the trial court go against the prima facie rule. The allegations made by the appellant and his witness are generally problems in any marriage and that was evidence tendered that the respondent has a rental house in Lolgorian and taking the ages of the children herein the court cannot be faulted in awarding custody to the respondent.
7. Whereas the appellant did not produce an affidavit of means and taking into account that there was evidence before the trial court that the same was a businessman against the respondent's evidence under cross examination that she was a business lady and a farmer capable of fending for the children Kshs.7000/= awarded to the respondent amounts to Kshs.3500/= per a child per month which translates to about 117/= per day per a child would not be considered excessive in the circumstances.
8. I therefore find no merit in the appeal herein which I hereby dismiss with no order as to cost.

**Signed and dated on this 11<sup>th</sup> day of March, 2015.**

**J. WAKIAGA**

**JUDGE.**

In the presence of:

Mr. Kaburi for Nyambati for Appellant

N/A for Respondent