



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL NO. 68 OF 2015

BETWEEN

J K W APPELLANT

AND

M A A RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J. Mitey, RM in Senior Resident Magistrates Court at Rongo in Children's Case No. 21 of 2014 dated 23rd January 2014)

JUDGMENT

1. The appellant and respondent are the parents of H B W (6 years) and K B W (4 years). At the trial both the parties testified. They had some disagreements whereupon the respondent decided to leave the matrimonial home with the children. The appellant filed the suit seeking custody and maintenance of the children. It is common ground that they are now separated and the live issue for consideration before the subordinate court was the custody, maintenance and access to the children.
2. After hearing the parties, the learned magistrate drew the following conclusions and made the following orders in the judgment;

Hence each of the parties must contribute equally to provide food shelter, clothing, education and all their requirements even as custody is given to one of them.

Owing to the needs of each of the issues, the best interest is allow the two issues being of tender age to stick and grow together as siblings, during their early childhood, developmental stages under the case of their mother the defendant herein, but with the right of access to their father, the plaintiff upon proper arrangement of the parties.

I therefore proceed to grant legal custody of the two issues H.B and K.B.W to the defendant. As for the issue of maintenance, both parents have an equal responsibility to provide as stated above.

3. Being dissatisfied with the judgment and decree, the appellant filed the memorandum of appeal on 5th February 2015. Mr Oguttu-Mboya, who appeared for the appellant, argued the appeal on the basis of three broad grounds. First, he contended that the trial court erred in granting exclusive custody of the children to the respondent which amounts to divesting the appellant of parental rights and responsibilities. He submitted that this was contrary to **Article 53** of the Constitution

which provides that parents have equal rights and responsibilities hence the appellant was discriminated against.

4. The second point of argument is the learned magistrate did not deal with the issue of access and the order of access issued was ambivalent and equivocal. Counsel submitted that it was clear that the parties were estranged and the court ought to have set out in clear term the orders of access rather than leaving the issue to the parties.
5. Lastly, counsel contended that the court ought to have considered the cultural context of the children in making the order of custody. He argued that children live in a patrilineal culture. He submitted that the court ought to have given effect to Luo customary law in making the orders of custody.
6. The respondent, who was not represented, supported the decision of the magistrate and informed the court that she was not opposed to the appellant's support.
7. **Article 53(2)** of the Constitution provides that, "*A child's best interests are of paramount importance in every matter concerning the child.*" This principle underpins and reinforces the provisions of **section 4(2)** of the **Children Act** (hereinafter "**the Act**") which reiterates the same principle. **Section 83** of the **Act** sets out the considerations the court is to take into account in making an order of custody;

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 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 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.*
8. In addition, the general principle that has been approved by our courts is that where custody of a child of tender years is in issue, is that the mother should have the custody unless special circumstances are established to disqualify the mother from having of such in child (see **Githunguri v Githunguri [1981] KLR 598**, **Mehrunnissa v Parvez [1981] KLR 547** and **Wambua v Okumu [1970] EA 578** and **K v K [1975] E.A. 18**). Under **section 2** of the **Act**, "*child of tender years*" means a child under the age of 10 years. The children subject to these proceedings are children of tender years.
 9. The testimony before the subordinate court largely focused on the events that led to the separation between the appellant and respondent. The consequence of the separation was that the respondent left the matrimonial home with the parents. The appellant has not shown or demonstrated that there are exceptional circumstances that would entitle the appellant, as the father of the children, to have custody of the children. Culture is one of the many factors that the court ought to take into consideration in awarding custody under **section 83(1)(f)** of the **Act** but it is not necessarily a decisive factor to deprive the respondent of custody of the children. The appellant has not

demonstrated how the grant of custody to the respondent would deprive the children of their culture.

10. The appellant complained that the learned magistrate granted legal custody of the children to the respondent. In *JO v RMN NKU DC No. 4 of 2004 [2005]eKLR*, Musinga J. stated as follows in regard to actual and legal custody;

Actual custody is defined to mean the actual possession of the person of the child as opposed to legal custody which means as respects a child, so much of the parental rights and duties as relate to the person of the child including the place and manner in which his time is spent.

11. Under **Article 53(2)(e)** of the Constitution, every child have the 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.” This provision imposes on the parents of the children equal responsibility on the father and mother of a child to provide for the child. This is the essence of legal custody which entitles the parents to share and decide all important decisions upbringing of the children. In this respect the learned magistrate erred in grant legal custody to the respondent in the absence of exceptional circumstances.

12. As actual custody remains with the respondent, the appellant is entitled to have access to the children. On the issue of access, I agree with the appellant that where the parents are estranged the court ought to make clear and certain orders to govern access to the children. The order that the appellant would have access to the children, “upon proper arrangements being made” was not helpful as the parties were not on talking terms and such an order would increase the opportunity for further friction between the parties.

13. Since the nature of access requires the court to make an inquiry into the circumstances of the parties and the children, I will refer the issue back to the Children’s Court for determination.

14. In light of the reasons I have set out, I allow the appeal to the extent that I hereby set aside the orders of the subordinate court and substitute the same with the following;

- a. The appellant and respondent shall have joint legal custody of the children.
- b. The respondent shall have actual custody of the children subject to the appellant having access to them on reasonable terms.
- c. The issue of access shall be determined by the Children’s Court at Rongo.
- d. There shall be no order as to costs.

DATED and DELIVERED at MIGORI this 20th day of July 2015.

D.S. MAJANJA

JUDGE

Mr Oguttu-Mboya instructed by Oguttu-Mboya & Company Advocates for the appellant.

Respondent in person.