



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL NO. 52 OF 2015

BETWEEN

M A A APPELLANT

AND

M S A..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. P. Mayova, Ag. SRM at the Chief Magistrates Court in Homa Bay in Children's Case No. 1 of 2012 dated 5th August 2014)

JUDGMENT

1. In the subordinate court, the appellant filed a suit seeking legal and actual custody and maintenance of the two children; ANS (born 2002) and A N S (born 2005). After hearing the suit the learned magistrate awarded custody of the children to the respondent thus precipitating this appeal.
2. The thrust of the appeal from the memorandum of appeal filed by the appellant and the written submissions in support is that the learned magistrate erred in law and in fact in clearly departing from the principle that the custody of children of tender years should normally be awarded to the mother unless there are exceptional circumstances. The respondent on his part contends that the decision of the subordinate court was made in the best interests of the children.
3. As this is a first appeal, this Court is entitled to review the entire evidence and reach its own independent conclusions bearing in mind that it neither saw nor heard the witnesses testify (see *Selle v Associated Motor Boat Co. [1968] EA 123* and *Kiruga v Kiruga & Another [1988] KLR 348*). The evidence before the subordinate court was as follows.
4. The appellant testified that she was a teacher and was married to the appellant as a second wife. She separated from the respondent year 2011 as a result of religious differences. She admitted that due to her religious conviction she believed that she should not be a second wife. She testified that the appellant took away the children in August 2011 stating that he was taking them for a funeral. He never returned the children causing her to file suit in the subordinate court. She testified that from that time she had not seen the children.
5. The respondent testified that he was working as a Town Clerk and that he had married the appellant as his second wife under Luo Customary law and that they separated out of religious differences. He further testified that he was staying with the children and that his first wife, who had 10 children, was able to take care of the children when he was away. He also stated that he was able to maintain the children. DW 2, the manager of the academy where the children were

going to school, testified that the children were withdrawn by the appellant from school in October 2010 while the school was in session causing them to miss lessons and examinations. The Childrens' Officer (DW 3) produced a report dated 29th November 2012 in which he supported the status quo, that is, the custody of the children by the father.

6. After the parties closed their respective cases, the learned magistrate felt it was necessary to interview the children. The learned magistrate interviewed the children and although no notes were taken of the interview, he recorded his impressions of the children in the judgment as follows;

The children were jovial, looked healthy and after spending two hours with the children, I was satisfied that the children were comfortable with their father where they are. I confirmed that they were in school and proper arrangements had been made for their schooling. They do not wish to be moved from where they are.

7. The learned magistrate held that in ordinary circumstances, the custody of young children should be given to the mother but in the circumstances, it was in the best interests of the children to maintain the status quo. He held that the appellant had the right to participate in the children's upkeep and that she had unlimited access to the children. He concluded that, *"She will always liaise with the defendant whenever she wants to see the children. The defendant is ordered not to deny the plaintiff access to the children unreasonably."*
8. The guiding principle in this case is to be found at **Article 53(2)** of the Constitution which states that, *"A child's best interests are of paramount importance in every matter concerning the child."* This principle is reinforced by the **Children Act (No. 8 of 2001)** and in particular **section 4** thereof, which provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law or any other institutions, the paramount consideration shall be the best interests of the child. What amounts to the best interests of the child has not been defined by the law as best interests of a child will depend on the particular circumstances of each child.
9. In applying the best interest of the child principle the courts in Kenya have accepted that custody of children of tender years ought to be with the mother, unless there are compelling reasons for the child to be removed from the mother and given to the father (see generally **Karanu v Karanu [1975]EA 18** and **Githinguri v Githunguri [1981]KLR 598**). The definition of a child of tender years is provided under **section 2** of the **Children Act** as follows, *"a child of tender years" means a child under the age of ten years."*
10. According to the respondent, the appellant was an unsuitable mother as she had joined a cult and was indoctrinating the children. I find that these allegations were unsupported by any evidence. The appellant, like any other Kenyan, is entitled to worship in any Church and there is no evidence that the appellant's religious practice was harmful to the children. From record there is no evidence that the appellant was incapable of taking care of the children as a mother.
11. I also reject the argument that since the respondent is polygamous, his custody of the children is inimical to their best interests. Polygamy is legally recognized and common institution and in any case the appellant married the respondent as a second wife. When parties separate, each of them is entitled to enter into new relationships and the only issue is whether the children are harmed. In this case, there is no evidence that the children are harmed by the respondents other relationship.
12. In dealing with this matter, I too must take into account the best interests of the children having regard that I have not had the opportunity to hear the parties and the children as to the present status of the children. The children have been in the custody of the respondent since 2012 and in light of the interview conducted by the learned magistrate, I would be reluctant to reverse the order of custody immediately. The views of the children are a factor in considering the issue of custody though not a decisive factor. To reverse the order of custody immediately would disorient

the children and unsettle them. What I am concerned about is that the appellant's access to the children was not settled in a manner that would have been in the best interests of the children as the parents were clearly estranged. Where the parents are estranged or unable to agree, that court should always make specific orders defining terms of access.

13. As the Children are no longer children of tender years and had expressed the desire to live with their father, I refer the matter back to the Magistrates court to determine the terms of access for the respondent including access to the children on weekends and school holidays. The appellant is at liberty to renew the application for custody thereafter.

14. There shall be no order as to costs.

DATED and DELIVERED at HOMA BAY this 5th day of November 2015.

D.S. MAJANJA

JUDGE

Mr Nyauke instructed by Nyauke and Company Advocates for the appellant.

Mr Kisera instructed by Omonde Kisera and Company Advocates for the respondent.