



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**CIVIL APPEAL NO. 63 OF 2015**

**BETWEEN**

**P O O ..... APPELLANT**

**AND**

**L A O ..... RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. B. R. Kipyegon, RM at the Senior Resident Magistrates Court in Ndhiwa in Divorce Cause No. 1 of 2015 dated 5<sup>th</sup> August 2015)***

**JUDGMENT**

1. The parties to this appeal were married under Luo customary law in the year 2004. Although both parties had children from previous relationships, their marriage was blessed with one daughter; BSO (“the child”) aged 9 years. It is not in dispute that the marriage was beset by many problems and as a result divorce proceedings were commenced by the respondent. After hearing the case, the learned magistrate made the following orders;
  - i. *The Luo customary marriage herein is dissolved.*
  - ii. *The child in issue BSO will remain in actual custody of the mother.*
  - iii. *Each parent will continue to play parental responsibilities to the child as usual.*
  - iv. *Any parent remains at liberty to apply for maintenance, withdrawal or placement of actual custody and control of the child as against each other on the basis of evidence of arising breach of the welfare of the child.*
  - v. *Each parent shall bear his or her costs of the suit.*
2. It is the judgment that precipitated this appeal by the appellant. In the memorandum of appeal dated 24<sup>th</sup> August 2015, the appellant raised various issues concerning the manner in which the learned magistrate dealt with the evidence. At any rate when the parties appeared before me for the hearing of the appeal, they agreed that the marriage had irretrievably broken down and neither party was contesting that part of the judgment. Their respective submissions were in respect of the orders relating to the custody of the child. After reviewing the proceedings I am satisfied that the marriage between them had collapsed and I agree with the conclusions of the learned magistrate that, “[W]hatever existed as a marriage in the circumstances has since been reduced to a shell by lasting irreconcilable differences between the parties.” The dissolution of the marriage is therefore not contested in these proceedings.
3. On the issue of custody, the learned magistrate held that though both parties had irreconcilable differences, each of them had strived to uphold the welfare of the child. He noted that since the

parties separated, the child had lived with the respondent though she was now in boarding school. In his view the status quo was better preserved by the respondent having actual custody. In addition the learned magistrate dealt with the counter accusations between the parties regarding polygamy and adultery and found that none of the parties demonstrated that their behavior towards each other curtailed the welfare of the child.

4. In the memorandum of appeal, the appellant contests custody on grounds which may be summarized as follows; that the court erred by failing to examine the child to inquire about her preferred custody, that the court erred by ruling against the weight of evidence, that both the appellant and the respondent could both play parental role and that the court erred by failing to give clear direction on the custody of the child.
5. The appellant submitted that, in making the final orders, the learned magistrate clearly sided with the respondent and denied him custody yet the child had no problem with him. He accused the respondent of having serial marriages which would endanger the moral welfare of the child and confuse her about her identity. He contended that the child is suffering psychologically as a result of the position she has been placed in and it would be in the best interests of the child to be in his custody.
6. On her part, the respondent recounted that for the time she lived with the appellant there were many problems and that he is the one who abandoned her with the child. She admitted that they both share maintenance although he continues to default on his obligations from time to time. She accuses the appellant of not being morally upright and as such, he is not a suitable parent.
7. 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***). As I stated earlier, the testimony between the parties concerned the nature and state of the relationship and in view of the fact that it is the custody of the child in issue, I do not see the utility in rehashing it.
8. In the course of the proceedings, the parties engaged in negotiations regarding the issue of custody and maintenance and on 19<sup>th</sup> February 2014 they filed a consent signed by both of them setting out the following matters;

*[2] That custody of the minor BSO (8 years), presently in Class III ... shall continue studying in the same school for the rest of Term 1 2014.*

*[3] The father agrees to pay full fees and buy school uniform as per the fees structure provided by the school.*

*[4] The father shall also buy clothing for the minor.*

*[5] The mother shall cater for food and accommodation for the [child].*

*[6] At the beginning of Term II 2014, the [child] shall be relocated to [School] in Homa Bay and the father shall pay full school fess, buy books, school uniform and any other requirement as per the fees structure provided by the school.*

*[7] Medical expenses in respect of the [child] shall be shared between the mother and the father.*

*[8] The father shall have visitation rights over the [child] during school holidays. During holidays, the father shall also have the right to collect the [child] to visit him for at least one week, or as agreed, and return her to the mother after such visitation.*

*The parties further agree and pray as follows;*

- i. *That the court be pleased to accept and enter this consent as its final order in matters addressed by the consent.*
  - ii. *That this court be pleased to make no order as to costs of this suit.*
9. After the consent was filed, the matter proceeded for hearing as if the child's had been resolved. In fact, the parties appear to have complied with the consent in that the child was transferred to the boarding school as agreed. It is in the context of the consent that I affirm the learned magistrate's order directing the parties to apply for variation of orders in the event there is a change in circumstances. It is at that stage that the court will review the evidence presented and decide what is in the best interests of the child.
10. I would add that the recriminations between the parties regarding their conduct which have now merged into the divorce will not be of assistance. Both parties equal responsibility to bring up their child in an environment devoid of such accusations and indeed their consent captures such a spirit. As the parties are now divorced, the reality is that either party will be leading a separate life which entitles them to have new partners but this fact alone cannot deny either of them their parental rights or absolve them of their parental responsibilities.
11. The guiding principle in this case, which the learned magistrate appreciated and applied, 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 interest of the child. What amounts to the best interest of the child has not been defined by the law as best interest of a child will depend on the particular circumstances of each child.
12. 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 ***Githinguri v Githunguri [1981]KLR 598, Karanu v Karanu [1975]EA 18***). A child of tender years is defined under **section 2** of the **Children Act** as follows, "*a child of tender years*" means a child under the age of ten years." BSO falls within the bracket of a child of tender years.
13. In applying the principle the learned magistrate held that the best interests of the child would be upheld by maintaining the status quo. The appellate court has power to vary the orders of the trial court and to make a decision which the trial court would have made. In this instance I am of the view that if there is a change in circumstances regarding the welfare of the child, the subordinate court is best placed to deal with the matter having regard to the evidence presented to it.
14. I decline to intervene in the judgment and decree and I affirm it. The appeal is dismissed. There shall be no order as to costs.

**DATED and DELIVERED at HOMA BAY this 2<sup>nd</sup> day of November 2015.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Respondent in person.