



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal No. 64 of 2012

T H J.....APPELLANT

VERSUS

S M O.....RESPONDENT

RULING

The appellant **T H J** has filed this appeal against the decision of the Hon. Kadhi **SHEIKH TWALIB B. MOHAMED** delivered on 27th March, 2012. In that decision the Hon. Kadhi awarded custody of the only son of the marriage **A S** aged 7 years to the respondent **S M O** who is the child's father. The appellant being aggrieved by this decision filed a Memorandum of Appeal dated 4th April, 2012 and relied on the following grounds

- “1. The Honourable Kadhi erred in law and in fact by failing to take cognizance of the fact that when considering issues of custody of minors, the welfare of the minor is the underlying principle.**
- 2. The Honourable Kadhi erred in law and in fact by awarding custody to the respondent yet the minor is only about 6 years old and has lived with the mother all along.**
- 3. The Honourable Kadhi erred in law and in fact by failure to consider the material evidence and testimony from the appellant.”**

The background of the case was as follows.

The appellant and the respondent were a couple who got married under Islamic Law on 12th April, 1998. Their union was blessed with four children three daughters and a son as follows

- F born on 15th June, 1999
- M born on 3rd May, 2000
- S born on 23rd January, 2003
- A born on 20th August, 2005

The couple divorced on 3rd April, 2007 and the appellant left the matrimonial home and returned to her parents' home. On 16th April, 2007 the appellant filed a suit in the Kadhi's Court seeking access to the four children on Sundays from 9.00 a.m. to 6.00 p.m. and seeking the return of all the items which she had left in the matrimonial home. On 27th September, 2007 the plaint was amended with leave to include

a prayer for custody and maintenance of the two younger children S and A. The Kadhi court made interim orders awarding custody of the youngest son 'A' to his mother the appellant. The three elder daughters remained in the custody of the respondent, their father. After a full hearing of the suit at which both parties testified the Hon. Kadhi gave his final judgment on 27th March, 2012 in which he granted full custody of all the four (4) children of the marriage to the respondent and directed that the appellant be allowed access. Being aggrieved by this decision the appellant filed this present appeal. By agreement both parties filed written submissions which submissions were duly served on the Hon. Chief Kadhi who is required by law to sit as an assessor in all appeals emanating from the Kadhi Court. On 22nd July, 2014 court heard highlighting of these submissions by counsel. During this session in open court the Hon. Chief Kadhi did sit as an assessor. **MR. MWADZOGO** Advocate argued for the appellant whilst **MR. MAGIYA** acted for the respondent. The Hon. Chief Kadhi did convey to this court his written opinion dated 19th August, 2014 which the court has duly taken into consideration.

From the submissions on record, it would appear that none of the parties is raising any challenge and/or objection to the Kadhi Court making orders with respect of custody of children. In other words there is no objection to the jurisdiction of the Kadhi Court in this matter. This being a first appeal this court is obliged to

“reconsider the evidence on record, evaluate it itself and draw its own conclusions though it should always ber in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in evidence.” [see KPA VS. KUSTON (KENYA) LIMITED 2009 2EA 212]

Article 53(2) of the Constitution of Kenya dictates that a child's best interests are of paramount importance in every matter concerning a child. Similarly, section 4(a) of The Children Act 2001 obliges a court to give priority to the best interests of a child when determining any matter involving children. Islamic Law just like section 4(2) of the Children Act 2001 places emphasis on the best interests of the child and where the custody of a child is in question it should be granted to the one who is in the best position to care for the child. The principles to be applied in determining whether or not custody order ought to be made in favour of a particular applicant are contained in section 83(1) of the Children Act.

The appellant submitted that in coming to his decision the Hon. Kadhi failed to take cognizance of the principle that the welfare of child is of paramount importance. This I find to be an incorrect statement. I have carefully perused the judgment of the Hon. Kadhi and I find that he made several references to the principle of priority to the welfare of the child. It is clear that the Hon. Kadhi clearly placed the welfare of the child as the paramount consideration. I therefore reject this ground of the appeal.

The appellant submitted that the Hon. Kadhi erred in failing to award custody of a minor child to the mother who is the primary caregiver. As a court I am mindful of the general rule that a child of tender years ought to be in the custody of the mother. I have considered the opinion rendered by the Hon. Chief Kadhi who quotes Article 18(a) of Kuwaiti Personal Status Law thus

“Women are the custodian of the children of tender age for boys until they reach puberty and for girls until they get married.”

This position is noted. In my view this position is more true in the case of a baby who is still suckling, a toddler or a child of tender years. The subject child was born in the year 2005. He is now 14 years old. He is well into adolescence. At this stage of a boy's life he needs to have in his life a male role model, a father who will be able to teach and advise him both socially and in respect of religious (Islamic) principles. At the age of 14 years the need to have a child in the custody of the mother is somewhat reduced.

The preferential right to custody of the mother in Islamic Law refers to children of tender age. A child of tender age is defined by the Children Act as a child under the age of 10. The preference for a mother as the custodial parent is not an absolute principle. It will be dependent on what the court considers to be in

the best interests and welfare of the child. I find that the Hon. Kadhi gave sound reasons for his decision to award custody to the respondent. At page 3 line 19 he wrote

“The evidence on record shows that the defendant wrote to the plaintiffs advocate M/S A.A. Mazrui Advocate indicating visitation timings (Dexb4) but the plaintiff didn’t show any interest. There was also an issue of the plaintiff talking ill of the defendant before the children Dexb6. Further when the plaintiff was granted interim custody of their last born, who was in SWAMINARAYAN SCHOOL she removed him to LITTLE FLOWERS without consulting the defendant, who is the father, who had already paid fees in full.....All these plaintiff’s actions are negating the welfare of the children which is paramount as far as Muslim law is concerned. None of the parties have [sic] a right to hurt the other on the welfare of the children.”

It is a matter of concern that the appellant even when granted access did not appear interested in exercising that right. It is also of concern that though she bore four (4) children the appellant only seeks custody of two. It could be argued that being the younger children she felt they were most in need of her care. However the other children are girls and would also be in need of her influence and care as they approach adolescence. The action of the appellant in transferring the boy child to another school without consulting the child’s father and despite his having paid school fees at the former school is malicious and irresponsible. The picture emerging is that the appellant is keen to use this child to fight her personal wars with his father. This cannot be in the best interests of the child.

There is one final aspect of this case which must be taken into account. The children have been separated a fact which does not seem to concern the appellant. Whilst the respondent has expressed a desire to have custody of all four (4) children the appellant only seeks custody of two children. Section 83(1)(i) of the Children Act provides that one of the principles to be applied in determining whom to award custody of a child the court shall have regard to

“(1) the circumstances of any sibling of the child concerned, and of any other children of the home, if any.”

These children are siblings and the best scenario is that they be raised together. They already have to endure the trauma of a broken home. It would be unfair to inflict upon them the added trauma of having to grow up separately. Under one common roof they will be able to share, play and draw comfort and strength from one another. This can only be realized if the children are raised in the same home. I find that the best interests of the child dictate that he be raised together with all his siblings and not apart from them in a different home. Given that the appellant did not pray for custody of her older daughters, this can only be achieved under the custody of the respondent.

For the above reasons I find that no just cause has been shown to disturb the decision of the Hon. Kadhi. I am satisfied that the decision of the Hon. Kadhi does indeed serve the best interests and welfare of the child. I direct further that the appellant be accorded reasonable access to all the four children upon terms to be agreed by the parties. This appeal is hereby dismissed. Since this is a family matter I direct that each party will bear its own costs.

Dated and delivered in Mombasa this 8th day of September, 2014.

M. ODERO

JUDGE