



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA
Civil Appeal 123 of 1997

ZULEIKHA MOHAMED NAAMAN.....APPELLANT

AND

GHARIB SULEIMAN GHARIB RESPONDENT

(Appeal from a ruling of the High Court of Kenya at Mombasa (Mr. Justice Waki)

dated 19th December, 1996,

in

Civil Appeal No.103 of 1993)

JUDGMENT OF BOSIRE. Aq. J.A.

This appeal relates to custody of two children. The parents who are the parties in the appeal are Muslims. Their marriage was dissolved in accordance with Muslim law. Thereafter, an order was made by the Chief Kadhi, Nassor Nahdy, awarding the custody of the two children of that marriage to the mother, Zuleikha Mohamed Naaman, with "reasonable access to the father". In his ruling he noted, inter alia, that he had awarded custody of the children to their mother because of their tender age.

The respondent in this appeal, Gharib Suleiman Gharib, the father of the children (under, the respondent) was aggrieved. He appealed to the High Court against that decision, the appeal was heard by Mboghli Msagha, J. with the assistance of two kadhis, as assessors, in accordance with the provisions of section 65(1)(c) of the Civil Procedure Act, Cap.21 Laws of Kenya, and thereafter he pronounced judgment, in effect, affirming the decision of the Chief Kadhi, and the reasons for it, and also gave directions as to the time the father would have access to the children. There was no further appeal against that decision but the respondent later moved the same court under O.XLIV rule 1 of the Civil Procedure Rules and S.3A of the Civil Procedure Act, for an order that the Court review its said decision by depriving the mother of the children, Zuleikha Mohamed Naaman (under, the appellant), custody and grant the same to him.

The application for review was heard by Waki, J. with the assistance of a set of two Kadhis different from those who sat with Mboghli Msagha, J. It should be noted at the outset that Mboghli Msagha, J. had, in his judgment earlier on alluded to granting either party liberty to move that Court for orders as they deemed necessary. I suppose the application was brought pursuant to that liberty. Only one ground was put forward for seeking review, namely that the subject children having by then attained the age of at least seven years, under Muslim law, their religious, health and educational interests would best be served when the children, both of them boys, were in the custody of their father. He is best suited to mould them in character according to the proper Muslim traditions. The affidavit in support of that application was

sworn by the respondent. Although, in addition to the religious and educational interests of the children, the respondent alluded to other grounds related thereto; for instance, the different social backgrounds of himself and the appellant, the fact that the appellant has not remarried and is therefore, for that reason alone, unsuited to have custody and the fact that she was not friendly to his relatives; the submissions in support of and in opposition of the application mainly centred on their religious welfare. No evidence was placed before the Court to show that apart from the fact that the children were much older circumstances had changed from what they were as at the date the order sought to be reviewed was made.

The subject children were aged 4 ½ and 3 ½ years respectively as at the 28th October, 1992, when the appellant filed suit for maintenance before the kadhi court. So on the 16th March, 1995, when Mbogholi Msagha, J. made the order which was sought to be reviewed they had attained the age of about 6 and 5 years respectively. They were then pupils at Pwani academy, and Madrasatul-Irshad, Mombasa. The learned Judge made a specific finding that the children were then of tender age, that there was no evidence which showed that the appellant as the mother of those children was in any way disqualified from having custody of them, and that their welfare which he rightly held was the first and paramount consideration, demanded that she be awarded custody of the children.

Waki, J. after hearing submissions, at great length from counsel then appearing for the parties prepared a reasoned ruling and, in pertinent part, stated as follows:

"The attainment of the age of 7 is of singular importance to male children in the Muslim faith. This is one of the considerations that have to be made in considering the welfare of

The children. It is at this age that the character of male children is molded and they start to perform the five compulsory daily prayers in the Muslim faith."

Later the learned Judge remarked, agreeing with the assessors, that the arrangement which was then in place in which there was shared custody of the children was undesirable as the children were attending a particular Madrasa when staying with their mother and a different one when staying with the father and there was a likelihood of them being confused. No evidence was however placed before the court to show that the arrangement had in any way adversely affected the children. That notwithstanding the learned Judge was of the view that the interests of the children would best be served if they were placed in one good Madrasa for purposes of continuity. Having reached that conclusion, he proceeded to make the order which is the subject matter of this appeal, notwithstanding that there was no evidence before the court that the children's educational and health needs had suffered. The welfare of the children would best be served by "full custody of the two male children" being granted to the father. The appellant

was aggrieved hence this appeal.

There are six grounds of appeal, namely:

1. The learned Judge and Khadhis erred in law and in fact by confining themselves only to the religious aspect of the said children's welfare in arriving at the decision to award full custody thereof to the Respondent.

The learned Judge and Khadhis erred in law in considering the Respondent's right under Mohamedan law, and in particular that aspect of the said Mohamedan law which entitles the father to custody of male infants aged over 7 years, in awarding full custody of the said children to the Respondent. Further to ground (2) above and/or in the alternative, the learned Judge and Khadhis erred in law in failing to have due regard to the welfare of the said children as the paramount consideration in deciding the issue of custody and not the Respondent's right under Mohamedan law.

The learned Judge and Khadhis erred in law and in fact in holding that the religious welfare of the said

children would be best addressed if the Respondent was granted full custody of the said children when no conclusive evidence or at all had been adduced to support such a finding.

The learned Judge and Kadhis erred in law and in fact in failing to, besides the religious, educational and health aspects, consider the emotional and psychological welfare of the said children in deciding the question of custody.⁶ The learned Judge and Kadhis erred in law in fact in failing to hold that it would be in the best interests of the said children to have the benefit of the love and care of the Appellant as their natural mother as opposed to the Respondent who had re-married and begotten a child by his current wife. Mr. Lumatete Muchai, advocate, who appeared for the appellant, submitted, inter alia, that evidence having not been adduced to show that the children would have been prevented from performing religious rites, the learned Judge of the superior court was not right in depriving the appellant of custody. Furthermore, regard being had to the provisions of sections 7 and 17 of the Guardianship of Infants Act, Cap. 144, Laws of Kenya it was a misdirection on the part of the learned Judge to more or less wholly base his decision on religious considerations. On the other hand, Mr. Khatib for the respondent, submitted that although circumstances had not changed since the making of the order which was sought to be reviewed, Muslim law entitled the respondent as the father of the children, to have custody after they had attained 7 years as he was better suited under Muslim law to mould their character appropriately.

Section 17 of the Guardianship of Infants Act provides, in pertinent part, as follows:

"where in any proceedings before any court the custody or upbringing of an infant ... is in question, the court in deciding that question, shall regard the welfare of the infant as the first and paramount consideration and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of the custody... is superior to that of the mother, or the claim of the mother is superior to that of the father."

Mr Khatib was of the view that by reason of s.78 of the Constitution of Kenya, which guarantees the freedom of conscience, section 17, above, is subject to it. With due respect to him, section 17 does not in any way inhibit or bar parents of children in their enjoyment of the rights of worship protected by the Constitution. It safeguards the rights of infants who as yet are not capable, on their own to fight for and safeguard their own rights. The precursor of this court, the Court of Appeal for East Africa, clearly held, in the case of Abdul R. Razmi v. Sughra Sultana [1960] E.A 801, that the Guardianship of Infants Act, applies to questions of custody regarding Mohamedan infants as it does any other infants. In view of that the submission by Mr. Khatib is untenable.

Having come to the above conclusion, I must now consider whether Waki J. was right in interfering with the earlier order made by Mbogholi Msagha, J. on custody. It should be recalled that the respondent's application was for review. Waki J. would only have jurisdiction to interfere with that order if the circumstances touching on the welfare of the subject children had changed to their detriment. The learned Judge having made a specific finding that no evidence had been placed before him to show that the educational and health needs of the children had suffered, he had no jurisdiction, in my view, to interfere with the order of custody. That he did so without any concrete evidence in that regard he gravely misdirected himself by, in effect overturning the decision of a Judge of equal jurisdiction.

Moreover, the circumstances as presented before the Chief Kadhi and the superior court clearly showed that this was a case in which physical custody, care and control of the children should have been awarded solely to the appellant in absence of any circumstances to disqualify her from being awarded custody.

Before I conclude this judgment I wish to comment on one aspect which, although not directly relevant to the determination of this appeal, is nonetheless important if only to correct what I consider to be a misapprehension on the part of the court below. Both Mbogholi Msagha J and Waki J. seem to think that the Kadhis who by reason of the provisions of s.65, of the Civil Procedure Act have to sit with them are constituted decision makers. The role of assessors in civil cases is not different from their role in criminal matters. It is advisory and no more. A Judge is not bound to accept and to act on their opinion. In my

view, therefore bearing that in mind it was improper for the both Judges, above, to have expressed their opinions in their respective decisions in a collective manner. The decisions are those of the Judges and the credit or blame respecting them lies with them.

In the circumstances and for the reasons I have endeavoured to give, I would allow this appeal, set aside the order made by Waki J. on 19th December, 1996 and substitute in its place an order awarding the custody of the two children, Suleiman Gharib and Mohamed Gharib, to the appellant with reasonable access to the father in any one week-end each month when he may take away the children. I would award the costs of the appeal, and of the proceedings before the superior court to the appellant.

Dated and delivered at Mombasa this 25th day of July, 1997.

S.B.O. BOSIRE

Ag. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR