REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Civil Appli 123 of 1997

ZULEIKHA MOHAMED NAAMAN.....APPELLANT

AND

GHARIB SULEIMAN GHARIB ..... RESPONDENT

(Appeal from a ruling of the High Court of Kenya atMombasa

(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 parentswho are the parties in the appeal are Muslims. Their marriage wasdissolved in accordance with Muslim law. Thereafter, an order wasmade by the Chief Kadhi, Nassor Nahdy, awarding the custody of thetwo children of that marriage to the mother, Zuleikha MohamedNaaman, with "reasonable access to the father". In his ruling henoted, inter alia, that he had awarded custody of the children totheir mother because of their tender age.

The respondent in this appeal, Gharib Suleiman Gharib, thefather of the children (under, the respondent) was aggrieved. Heappealed to the High Court against that decision, the appeal washeard by Mbogholi Msagha, J. with the assistance of two kadhis, asassessors, in accordance with the provisions of section 65(1)(c) ofthe Civil Procedure Act, Cap.21 Laws of Kenya, and thereafter he Pronounced judgment, in effect, affirming the decision of the ChiefKadhi, and the reasons for it, and also gave directions as to thetime the father would have access to the children. There was nofurther appeal against that decision but the respondent later movedthe same court under O.XLIV rule 1 of the Civil Procedure Rules andS.3A of the Civil Procedure Act, for an order that the Court reviewits said decision by depriving the mother of the children, ZuleikhaMohamed Naaman (under, the appellant), custody and grant the sameto him.

The application for review was heard by Waki, J. with theassistance of a set of two Kadhis different from those who sat with

Mbogholi Msagha, J. It should be noted at the outset that MbogholMsagha, J. had, in his judgment earlier on alluded to grantedeither party liberty to move that Court for orders as they deemednecessary. I suppose the application was brought pursuant to thatliberty. Only one ground was put forward for seeking review,namely that the subject children having by then attained the age ofat least seven years, under Muslim law, their religious, health andeducational interests would best be served when the children, both of them boys, were in the custody of their father. He is bestsuited to mould them in character according to the proper muslimtraditions. The affidavit in support of that application was swornby the respondent. Although, in addition to the religious andeducational interests of the children, the respondent alluded toother grounds related thereto; for instance, the different socialbackgrounds 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 Madrasa tul-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 singularimportance to male children in the Muslimfaith. This is one of the considerations thathave to be made in considering the welfare of

The children. It is at this age that thecharacter of male children is molded and theystart to perform the five compulsory dailyprayers 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 Madrassa 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 inlaw in considering the Respondent's rightunder Mohamedan law, and in particularthat aspect of the said Mohamedan lawwhich entitles the father to custody ofmale infants aged over 7 years, inawarding full custody of the saidchildren to the Respondent.Further to ground (2) above and/or in thealternative, the learned Judge andKhadhis erred in law in failing to havedue regard to the welfare of the saidchildren as the paramount considerationin deciding the issue of custody and notthe Respondent's right under Mohamedanlaw.

The learned Judge and Khadhis erred inlaw and in fact in holding that thereligious welfare of the said childrenwould be best addressed if the Respondentwas granted full custody of the saidchildren when no conclusive evidence orat all had been adduced to support such afinding.

The learned Judge and Kadhis erred in lawand in fact in failing to, besides the religious, educational and healthaspects, consider the emotional andpsychological welfare of the saidchildren in deciding the question ofcustody.6. The learned Judge and Kadhis erred in lawin fact in failing to hold that it wouldbe in the best interests of the saidchildren to have the benefit of the loveand care of the Appellant as theirnatural mother as opposed to theRespondent who had re-married andbegotten 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 amisdirection 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 asthe 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 patinent part, as follows:

"where in any proceedings before any court thecustody or upbringing of an infant ... is inquestion, the court in deciding that question,shall regard the welfare of the infant as thefirst and paramount consideration and shallnot take into consideration whether from anyother point of view the claim of the father,or any right at common law possessed by thefather, in respect of the custody...issuperior to that of the mother, or the claimof the mother is superior to that of thefather."

Mr Khatib was of the view that by reason of s.78 of theConstitution 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 childrenin their enjoyment of the rights of worship protected by theConstitution. It safeguards the rights of infants who as yet arenot 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. SughraSultana [19601 E.A 801, that the Guardianship of Infants Act,applies to questions of custody regarding Mohamedan infants as itdoes any other infants. In view of that the submission by Mr.Khatib is untenable.

Having come to the above conclusion, I must now considerwhether Waki J. was right in interfering with the earlier order made by Mbogholi Msagha, J. on custody. It should be recalled thatthe respondent's application was for review. Waki J. would only

have jurisdiction to interfere with that order if the circumstancestouching on the welfare of the subject children had changed totheir detriment. The learned Judge having made a specific findingthat no evidence had been placed before him to show that theeducational and health needs of the children had suffered, he hadno jurisdiction, in my view, to interfere with the order ofcustody. That he did so without any concrete evidence in that regard he gravely misdirected himself by, in effect overturning thedecision of a Judge of equal jurisdiction.

Moreover, the circumstances as presented before the ChiefKhadhi and the superior court clearly showed that this was a casein which physical custody, care and control of the children shouldhave been awarded solely to the appellant in absence of anycircumstances to disqualify her from being awarded custody.

Before I conclude this judgment I wish to comment on oneaspect which, although not directly relevant to the determinationof this appeal, is nonetheless important if only to correct what Iconsider to be a misapprehension on the part of the court below.Both Mbogholi Msagha J and Waki J. seem to think that the Kadhiswho by reason of the provisions of s.65, of the Civil Procedure Acthave to sit with them are

constituted decision makers. The role ofassessors in civil cases is not different from their role incriminal matters. It is advisory and no more. A Judge is notbound to accept and to act on their opinion. In my view, therefore bearing that in mind it was improper for the both Judges, above, tohave expressed their opinions in their respective decisions in acollective manner. The decisions are those of the Judges and thecredit or blame respecting them lies with them.

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

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

S.E.O. BOSIRE

Ag. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR