



**IN THE COURT OF APPEAL
AT NAIROBI**

CORAM: GICHERU, KWACH & LAKHA, JJ.A.
CIVIL APPEAL NO. 156 OF 1992

BETWEEN

R A O.....APPELLANT

AND

H O ARESPONDENT

**(Being an appeal from judgment of the High Court of Kenya
at Nairobi (Justice Mango) dated 10th day of June
1992**

in

H.C.C.C. NO. 107 OF 1990)

JUDGMENT OF THE COURT

H O A who is the respondent in this appeal (the husband) and R A O, the appellant (the wife) were married in November 1979 at Homa Bay under the Luo customary law. On 3rd January 1981, they went through a civil ceremony under the Marriage Act (Cap 150). They cohabited at various places and had 3 daughters, namely, G A (born 11th March, 1981), E A (born 6th June, 1983) and L A (born 24th July 1984).

In December 1990 the husband presented a petition for divorce in the superior court alleging cruelty, adultery and desertion. The husband asked for the dissolution of the marriage and for custody of the three children of the marriage. The wife did not enter an appearance and did not contest the husband's petition for divorce. Mango, J. granted the husband a decree nisi and postponed a decision on custody, saying:

"Now remains the more difficult issue of custody. Since about 1987, the petitioner has not effectively stayed with the children of the marriage. Being all females and since the welfare of the children is the paramount consideration, I would not want to make any order in this respect until I have understood the respondent on her views in her capacity incomewise. I would also like at least if nothing else to have a look at these young kids. I will therefore reserve my decision in this respect."

The Judge having expressed the desire to hear the wife and see the children on the issue of custody, the wife duly attended court on 26th May 1992 and brought the children with her. For some curious

reason, Mr Ocharo who appeared for the husband, objected to the wife being heard citing as authority rule 31 of the Matrimonial Causes Rules. The Judge upheld the objection and declined to hear the wife who was thereby driven from the seat of judgment without being heard. The Judge examined the children to discover their wishes and they all told him they wished to stay with their mother. Each of them stated categorically that they did not wish to stay with their father. In spite of the expressed wishes of the children, and notwithstanding the fact that the husband was at the material time living with a woman, to whom he was not married, the Judge nevertheless granted custody to the husband. As to the wishes of the children to stay with their mother he dismissed these as having been prompted by their mother to say so. Obviously, the wife felt aggrieved and she filed this appeal.

There are really only 2 grounds of appeal namely that the Judge erred in granting custody to the husband without hearing the wife and in disregarding completely the wishes of the children.

The law on the point is well settled and it is that in determining the issue of custody the paramount consideration is the welfare of the children. In the present case, the husband was living in an adulterous relationship with another woman and the children themselves had categorically stated to the Judge that they wished to stay with their mother. Those were considerations to which the Judge should have attached much weight instead of taking the easy way out on the purported income of each of the parties.

Secondly, the wife having appeared in obedience to the summons of the court, the Judge was obliged to hear her on the crucial issue of custody of the children notwithstanding the language of the relevant rules and in declining to do so, he fell into grave error which resulted into serious prejudice and injustice to the wife. The Judge committed what is ordinarily called a breach of the rules of natural justice. He condemned the wife without hearing her. That cannot be right.

For all these reasons, we allow this appeal, set aside the Judge's order on custody and costs of the petition and substitute therefor an order granting the custody of all the three children to R A O, the appellant. She will also have the costs of this appeal.

Dated and delivered at Nairobi this 26th day of April 1996.

J.E. GICHERU

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JUDGE OF APPEAL

R.O. KWACH

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

I certify that this is a
true copy of the original.

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DEPUTY REGISTRAR