



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, SICHALE & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. E445 OF 2020

BETWEEN

MAK.....APPELLANT

AND

RMAA.....1ST RESPONDENT

THE CABINET SECRETARY,

MINISTRY OF FOREIGN AFFAIRS &

INTERNATIONAL TRADE.....2ND RESPONDENT

THE CABINET SECRETARY, MINISTRY

OF INTERIOR & COORDINATION

OF NATIONAL GOVERNMENT.....3RD RESPONDENT

THE INSPECTOR GENERAL

NATIONAL POLICE SERVICE.....4TH RESPONDENT

THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi, Milimani (Muchelule, J.) dated 27th July, 2020

in

HCCC No. 1 of 2016)

JUDGMENT OF THE COURT

The appellant, **MAK** and the 1st respondent, **RMAA**, were married on 2nd August 2002 under the African Christian Marriage and Divorce Act Cap 151 (Repealed), in Nairobi and in 2004 they were blessed with a son by the name **FKA “the Minor”**. The marriage did not, however, work out and on 9th October 2008 it was dissolved by the High Court in **Divorce cause no. 75 of 2008**. Prior to the dissolution of the marriage, the couple entered a parental responsibility agreement on 15th May 2008 agreeing to both have legal custody of the minor and share other parental responsibilities.

Following dissolution of the marriage, the appellant went to the United Kingdom to do a Master of Laws degree accompanied by the minor. While in the United Kingdom, the appellant was accused of assaulting the minor, leading to the **United Kingdom Family Division High**

Court making the minor a ward of the court on 11th May 2017, with the care and control of the minor being vested in the father.

The appellant was not able to access the minor following the foregoing events prompting her to petition the High Court in **Milimani HCCC No. 1 of 2016** but the court dismissed her petition for want of merit.

Dissatisfied with the judgment, the appellant filed the instant appeal containing 5 grounds, which in summary, are that the learned judge erred in law and in fact by;

- a) Concluding that the parental responsibility agreement was not applicable;
- b) Concluding that the appellant had physically assaulted the minor and that she was on a warrant of arrest in the United Kingdom;
- c) Failing to appreciate that parental rights of a parent are innate and inextinguishable;
- d) Failing to appreciate the full import of the disclosed facts and provisions of the Constitution that had been violated or threatened with violation by the 1st respondent;
- e) Determining the best interest of the child without hearing the child.

During the hearing of the appeal, learned Counsel **Mr. Otieno** appeared for the appellant, while learned Counsel **Ms. Dar** appeared for the 1st respondent. Both parties had filed written submissions which Counsel highlighted orally during the virtual hearing of the appeal necessitated by the Covid-19 pandemic.

Mr. Otieno submitted that concerning the first ground of appeal, the parental responsibility agreement which was a decree of the High Court was binding on both parties. According to him, the judge was wrong in ceding jurisdiction contrary to **section 26(2)** of the **Children Act**, which provides that a parental responsibility agreement can only be overturned by an order of the court. To buttress the contention that the judge erred in ceding jurisdiction to the United Kingdom courts, Counsel relied on the case of ***O.A.G V S.A.J & ANOTHER [2011] eKLR*** and ***REPUBLIC V SENIOR RESIDENT MAGISTRATE MOMBASA EX PARTE H.L. & ANOTHER [2016] eKLR***. On the second ground, Counsel argued that the judge erroneously concluded that the appellant was under a warrant of arrest without evidence, and that in fact there was no warrant of arrest against the appellant.

Asserting that parental rights are innate, counsel argued that the learned judge erred by drawing the conclusion that the appellant was not a fit proper person thereby causing the proceedings before the court to turn on the appellant's character without hearing her. In the result the appellant's right to a fair hearing was infringed. Counsel further contended that the character and conduct of a parent does not extinguish parental rights. On the fourth ground, the appellant argued that the amended petition clearly set out the grounds relied on in the petition, being enforcement of parental rights, children rights, and the right to equal protection and benefit of the law.

Concerning determination of the best interest of the minor, it was submitted that *to have a child live in cold England without either of his parents during the COVID pandemic* is not the best interest of the child. Further, the role of parents and family in the upbringing of a child are critical. Our attention was drawn to an email where the 1st respondent had recognised the role the appellant played in the upbringing of the child. Mr. Otieno concluded by urging us not to cede jurisdiction to a foreign court.

In response, learned Counsel **Ms. Dar** referred us to the written submissions and emphasized that there are judgements by competent courts in foreign jurisdiction to which the appellant submitted herself voluntarily and which made proper findings. Counsel further argued that the appellant failed to defend herself against the allegation of abusing the minor. She asserted the UK courts acted reasonably and responsibly as a court cannot fail to protect a child since we are all parties to international conventions on protection of children.

Ms. Dar further submitted that the English Courts had found that the minor's place of habitual residence was in the United Kingdom. It was on this basis that it was determined that the parental responsibility agreement made in Kenya was no longer applicable since the minor's legal and factual position had changed. Counsel further referred us to the Cafcass Family Court Report in which, upon the Court's adviser interviewing the minor, it was established that he had been assaulted by the appellant. Counsel submitted that the moment it was proved the appellant assaulted the minor, she lost her right to actual custody of the minor as provided in the parental responsibility agreement. Ms. Dar reiterated that relevant foreign judgments were competent and effective.

In reply, **Mr. Otieno** contended that the appellant never participated in the proceedings in the English courts as she sought an adjournment which was denied. He urged us that the parental responsibility agreement is still binding.

We have carefully considered the record of appeal, the submissions by counsel and the authorities cited. We think that this appeal stands or falls largely on the question whether the parental responsibility agreement between the parties is still applicable, effective and binding.

We note that pursuant to the parental responsibility agreement recorded at the Children's Court in Nairobi on 15th May 2008, the parties agreed to share certain parental responsibilities, including that the mother would have actual custody of the child.

Subsequently, however, the appellant went to the United Kingdom with the minor and while there she was accused of assaulting him. A medical report dated 18th November 2014 was submitted by **Dr. Rob Smith**, a consultant paediatrician at York Teaching Hospital. In it he stated that upon examining the minor, he discovered that he had some scars and bruises. A **Cafcass Family Court report** prepared on 20th December 2016 by the United Kingdom Family Court Adviser in **Case number Y014P00779**, also recorded the following out of the Adviser's interview with the minor;

“F said ‘I still have nightmares about my mum turning up at the hotel.’ I asked him if there had been other times when he had been scared of his mum and he said ‘yes I remember her hitting me with a belt in Kenya, Tanzania and England’.”

We further observe that based on the Cafcass Family Court report, the United Kingdom High Court made the minor award of the court, “until his 18th birthday or until further order to the contrary”. The court further held that the parental responsibility agreement was not reflective of the child’s current legal and factual position. The court directed that the appellant should not have direct contact with the minor. And it is these findings that largely informed the learned Judge’s conclusions that the appellant’s petition was unmeritorious.

With respect we concur with and affirm the learned Judge’s conclusions as being based on the evidence availed and reflective of a proper exercise of discretion. It is noteworthy that fundamental changes have occurred in the lives of the parties and the minor since the recording of the parental responsibility agreement dated 15th August 2008, including the fact that the parties and the minor are no longer resident in Kenya. The assault accusation made against the appellant, and which the United Kingdom High Court found true, is especially critical in this matter and not one to be taken lightly. It is certainly not in the best interest of the minor that he should be left in the care of a mother who causes him physical and mental harm. And any court would be remiss to minimize or appear to normalize such conduct on the part of a parent, wherever it occurs.

Moreover, courts are enjoined to consider the ascertainable wishes of a child when deciding on what is in his or her best interest. In the present case those wishes were expressly stated. In the face of his unequivocal expression of a wish not to be with the mother, such wish must be accorded due respect.

Consequently, in the absence of evidence establishing want of competence or jurisdiction on the part of the foreign court in arriving at its determinations on the matter, we see no fault in the learned Judge’s concurrence and conclusion that the parental responsibility agreement is no longer applicable to the parties.

Ultimately our consideration of this appeal is that it is without merit and must fail. We accordingly dismiss it with costs to be borne by both parties.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JUNE, 2021.

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR