



SOO v LAO (Civil Appeal 175 of 2006) [2009] KECA 416 (KLR) (30 January 2009) (Judgment)

S.O v L.A.M [2009] eKLR

Neutral citation: [2009] KECA 416 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 175 OF 2006
SEO BOSIRE, JWO OTIENO & JA ALUOCH, JJA
JANUARY 30, 2009

BETWEEN

SOO APPELLANT

AND

LAO RESPONDENT

A court dealing with child custody could give directions regarding maintenance and housing even where those orders had not been sought by the parties

The appeal centered on whether a court dealing with the question of custody of a child had power to give directions regarding the child's maintenance and housing even where those orders had not been prayed for. While answering in the affirmative, the court further held that Teso customary law concerning custody of children was invalid for discriminating against women and therefore could not be applied.

Reported by Moses Rotich

Family Law - custody of children - second appeal against order for maintenance of a child - second appeal limited to issues of law - trial court having ordered the appellant father to also provide for the child's accommodation while the custody of the child was granted to the respondent/mother - a court dealing with the question of custody of a child had power to give directions regarding the child's maintenance and housing even where those orders had not been prayed for - custody of children should be granted to the mother unless special circumstances exist -Children Act, section 98

Customary Law - claim that under the customs of the Teso community children belong to the father - whether such a custom would be valid - Convention on the Elimination of all Forms of Discrimination Against Women, articles 3, 4, 16.

Brief facts

The appeal was based on the question of custody of a child arising from a dispute between the parents. The respondent being the mother of the child averred that the appellant who was the father was not providing maintenance and support for both herself and the child. The respondent testified that the appellant assaulted her on several occasions, forced her out of their matrimonial residence but retained the subject child and



cohabited with a girlfriend. She further stated that the appellant did not care much about the welfare of the child and that it was in the interest of the child who had a history of TB to be in the custody of the respondent. The appellant on the other hand made several allegations of improper behavior on the part of the respondent including adultery with his cousin in the presence of the child and that the cousin drunk *chang 'aa* and was a bhang smoker which activities he indulged in, in the presence of the child. He further alleged that the respondent had engaged in witchcraft on the child. The trial court held that the appellant had not shown any exceptional circumstances on the basis upon which the respondent would be denied custody and therefore awarded custody, care and control to the respondent and ordered the appellant to provide maintenance, housing and other expenses of the child. The appellant was aggrieved and preferred an appeal at the High Court which further affirmed the trial court's finding. It is then, that the appellant sought a second appeal at the Court of Appeal on the grounds that the High Court had placed undue weight on matters which were not canvassed in the appeal including the fact that the parties were still husband and wife; that the court failed to address certain issues which the appellant raised in his appeal among them being that the respondent was guilty of various acts of misconduct; that the court failed to address the fact that no probation officers report was produced in evidence to support the respondent's case; that the court erred in law in failing to appreciate that the judgment of the subordinate court granted orders which were not prayed for such as accommodation; that the court did not consider the Teso custom where children belonged to the father and that the trial court erred in referring to Articles 3 and 14 of the African charter on the Right and welfare of Children while it had not been domesticated and that the judgment of the High Court had no *ratio decidendi*.

Issues

- i. Whether a court dealing with child custody issues could give directions regarding maintenance and housing even where those orders had not been sought.
- ii. Whether Teso customary law concerning custody of children could be validly applied to award custody.

Held

1. The issue of custody of children would not have arisen unless the parents of the affected children were either divorced or separated and therefore there was nothing objectionable if that fact was pointed out in a judgment relating to custody of children.
2. The respondent was not given prior notice of the allegations of misconduct made against her so that she would comment or rebut them and further, the allegations were not pleaded either. The court found that the matters were raised as an afterthought.
3. Counsel for both parties had the responsibility of reminding the court that a judgment date could not have been fixed without the probation report and therefore they both failed in their duty to the court.
4. The High Court rightly observed that a court dealing with the question of the custody of a child had power under Section 98 of the Children Act to give directions regarding the child's maintenance and housing.
5. Article 16 (1) (a) of the Convention on the Elimination of All Forms of Discrimination against Women was to the effect that state parties were to take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and ensure equality of men and women. Mothers would be discriminated against if the Teso custom were to be applied.
6. Article 3 and 14 of the African Charter on the Right and Welfare of Children dealt with the welfare of children and whether or not it had been domesticated was a question of fact. The preamble of the Children Act left no doubt that the charter formed the guiding principle behind the legislation.
7. The appellant having raised his complaints in court could not then turn around to question the approach the court adopted. The issue which both the trial and appellate court set to determine was who was best suited to have custody of the subject child bearing in mind the welfare of the child. That issue had been resolved in both courts.

Appeal dismissed



Citations

Cases

Kenya

Martha Olela & another v Jackson Obiera Civil Application No Nai 16 of 1979; [1980] eKLR - (Explained)

Regional Court

1. *Abdulla Bin Wendo & another v Republic* (1953) 20 EACA 166 - (Mentioned)
2. *Peters v Sunday Post* [1958] EA 195 & 424 - (Explained)

Statutes

Kenya

1. Children Act (cap 141) section 98 - (Interpreted)
2. Civil Procedure Act (cap 21) section 72(1)- (Interpreted)
3. Marriage Act (cap 150) - (Interpreted)

Instruments

1. African Charter on the Rights and Welfare of the Child (ACRWC), 1990 articles 3, 14, 16(1)
2. Convention on Elimination of All Forms of Discrimination against Women (CEDAW), 1979 article 16(1)(a)

Advocates

Mr Madara and *Mr Akhaabi* for the appellant

Mr Nyangau for the respondent

JUDGMENT

1. This is a second appeal on the question of custody of a child who was born on December 12, 1998. His name is LO. The dispute over his custody is between SOO, the appellant, and LAO, the respondent who are the natural parents of the child.
2. The litigation between the parties started before the Resident Magistrate's Court, at Nairobi on October 31, 2003, by the filing of a plaint seeking custody and maintenance. The respondent as plaintiff averred in that plaint that she was married by the appellant in a civil marriage which was solemnized under the *Marriage Act* on December 3, 1997. The marriage was consummated; the subject child was subsequently born, but that the appellant was not providing maintenance and support for both herself and the child; was cruel to the respondent and on many occasions was assaulting her in the presence of the subject child. She prayed for maintenance. Filed with the plaint was an affidavit of means. The respondent deposed in that affidavit that the appellant was [profession withheld] with a monthly income of KShs 485,000/= and that her monthly expenditure for the benefit of the child was KShs 65,000/=, excluding housing.
3. In answer to the plaint, the appellant as defendant denied allegations of cruelty and neglect of the child and averred that if anything, he had been in actual care and custody of the child from January, 2003; had financial ability to provide for the child, and had the moral standing to have control and care of the child. Regarding the respondent he averred that she was unemployed and unemployable; was given to uncontrollable tantrums and outbursts and therefore unsuitable to be awarded custody of the child.
4. MA Mlangi, SRM, heard the matter. The respondent testified, and the trial magistrate believed her, that the appellant assaulted her on several occasions, forced her out of their matrimonial residence but



retained the subject child, and thereafter cohabited with a girlfriend. The appellant did not care much about the welfare of the child and it was in the interests of the child who had a history of TB to be in the custody of the respondent.

5. The respondent was cross-examined. However, in that cross-examination, no questions were raised about her character. However, when the appellant testified, he made several allegations of improper behaviour on the part of the respondent. It was his evidence that the respondent often committed adultery with his cousin on their matrimonial bed in the presence of the child, that the said cousin is a bhang smoker and drinks chang'aa and was indulging in such vices in the presence of the subject child; that the respondent had engaged in witchcraft and had used the witchcraft on the child; she had neglected the child who was often dirty and ruggedly dressed with the result that the child had developed negative tendencies including acts of theft. He affirmed that he had the means to provide for the child and the ability and disposition to care for him. He could not however, explain why he had not reported the respondent to the police over alleged witchcraft or her flirtation with a bhang smoker and her chang'aa drinking.
6. Mlenga appreciated that she was dealing with the custody of a child of tender age, cited relevant authorities and summed up the principles to guide the court in such matters that except where exceptional circumstances exist, the custody of such children should be awarded to the mother, because mothers are generally best suited to exercise care and control of such children. She gave examples of such exceptional circumstances, namely, that the mother is unsettled, has taken a new husband, her living quarters are in a desperate state and therefore unsuitable for the habitation of such young children. The trial magistrate then proceeded to consider the respondent's circumstances. She eventually concluded that no exceptional circumstances had been shown, the basis upon which she would be denied custody. Besides, she cited article 16(1) of the [*African Charter on the Rights and Welfare of the child*](#) as also supporting the decision she arrived at that the respondent was best suited to have custody. Her final order was to the effect that legal custody would be given to both parents. The respondent would have the actual custody, care and control of the child, the appellant would provide maintenance at the rate of KShs 10,000/= per month, KShs 20,000/= for housing and in addition he would meet the school fees and medical expenses of the child.
7. The appellant was aggrieved and filed an appeal in the superior court. Rawal, J became seised of the appeal. In her judgment she affirmed the trial court's finding that no exceptional circumstances existed which would deny the respondent the right of custody, held that allegations of adultery against the appellant were not challenged although the appellant alleged adultery, and improper behaviour on the part of the respondent, those allegations were made too late and thus denied the respondent an opportunity to rebut them. All in all, she came to the conclusion that no basis had been laid for disturbing the trial magistrate's decision. In the end, she dismissed the appellant's appeal. The appellant was not satisfied with that decision and therefore brought this appeal.
8. This being a second appeal, only issues of law fall for consideration. Section 72(1) of the [*Civil Procedure Act*](#), cap 21 Laws of Kenya provides as follows:-

"Except where otherwise expressly provided in this Act, or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely:-

- (a) the decision being contrary to law or to some usage having the force of law.
- (b) the decision having failed to determine some material issue of law or usage having the force of law.



(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may, possibly have produced error or defect in the decision of the case upon the merit.”

9. In his memorandum of appeal, the appellant has raised what, *prima facie*, appear to be eleven grounds; the first one being that the learned Judge of the superior court failed to note down all the arguments counsel raised at the hearing of the first appeal. Mr Tengo Madara, counsel on record for the appellant, who also represented the appellant in both the courts below was unable to state in which aspect the first appellate judge failed to record submissions. When pressed by the court on the issue he submitted that he had raised the issue of the propriety of the plaint but there is no note made of the same in the record. It should however be noted that the appellant did not raise the issue in the pleadings. Consequently, it is highly unlikely that the learned judge would have allowed the appellant to raise the issue.
10. The second ground is that the learned Judge placed undue weight on matters which were not canvassed in the appeal, among them the fact that the parties were still husband and wife. During the pendency of the suit a decree of divorce was granted. Rawal, J pointed out this fact in her judgment. No evidence was adduced in this suit on the matter. It is however clear that counsel in their written submissions to the judge mentioned the issue.
11. We wish to point out that the issue of custody of children would not arise unless the parents of the affected children are either divorced or separated. We see nothing objectionable if that fact is pointed out in a judgment relating to custody of children. It is the basis for seeking custody. The appellant’s counsel did not point out the prejudice the mention of that fact caused the appellant. In the circumstances not much turns on that complaint.
12. The third ground raised was that the learned judge failed to address certain issues which the appellant raised in his appeal to the superior court, among them being that the respondent was guilty of various acts of misconduct. She was alleged to be an adulterer; engaged in witchcraft; flirted with a drug peddler and smoker, who was also a changaa imbiber. True, those matters were raised by the appellant in his oral testimony before the trial court. They were raised after the respondent had closed her case and was thus not able to rebut the allegations against her. It is also true that the respondent was not confronted with those allegations when she was cross-examined by the appellant’s counsel. No explanation was offered for failing to cross-examine her on those aspects. Those matters were not pleaded either. So the respondent did not have any prior notice that the matters would be raised so that she would either comment on them or call rebuttal evidence. For that reason, it is our view that those matters were raised as an afterthought. This ground too does not assist the appellant in any way.
13. The fourth ground is that the learned Judge failed to address the fact that no probation officer’s report was produced in evidence to support the respondent’s case, nor did she call witnesses in support of her assertions. We have gone through the records of both the trial and first appellate courts. The respondent did not call any witness in support of her case. That was also true of the appellant. At the close of the defence case an order was made for the mention of the case to ascertain if counsel would have prepared their written final submissions after which a date for judgment would then be fixed. The order further stated as follows:-

“and a parties (sic) order mention on the said date for social officer report”

14. We take it that the court wanted a report from either a social worker or a probation officer. There is no indication on record whether such report was filed. The appellant now complains that the trial court erred in drafting its judgment without that report, and the superior court in turn ignored this aspect,



and thus erred as well. It is by implication being suggested that the decision of the superior court should be vacated for that reason.

15. We do not know whether any report was compiled as had been directed by the trial court. The said report, assuming it was prepared as directed, could be favourable to either the appellant or the respondent. Counsel for the parties had the responsibility of reminding the court that a judgment date could not be fixed without that report. Both of them failed in their duty to the court. Counsel for the appellant should not be heard to complain about a matter in which he himself was partly to blame. Besides, it cannot be said that only the appellant suffered prejudice. The parties gave evidence which the trial court considered before delivering its judgment. The superior court likewise considered the same evidence, analysed it and came to its own conclusion as it was obligated to do - (*Peters v Sunday Post* EA 195 & 424). It is also trite law that a fact may be proved by the testimony of a single witness. (*Abdulla Bin Wendo & another vs R* [1953] 20 EACA 166 at P 168). Issues of custody do not as a matter of law require testimony of more than one witness to establish a fact. So if the trial court which had the benefit of seeing and hearing parties testify believed one party's story and rejected the story of the other party, the court ought not and should not be faulted merely on the ground that supporting evidence to that testimony should have been called. This ground also fails.
16. The fifth ground is that the learned judge erred in law in failing to appreciate that the judgment of the subordinate court granted orders which were not prayed for. The plaintiff did not make a claim for accommodation. Yet the trial court made an order decreeing that the appellant pays a sum of KShs 20,000/= towards house rent. The appellant complained about this award in his first appeal but that court held that it was unable to discern any error in the trial court's judgment. We affirm. The court rightly observed that a court dealing with the question of the custody of a child had power under section 98 of the *Children Act* to give directions regarding the child's maintenance and housing. That section provides as follows:-

“A court shall have power to make an order and to give directions regarding any aspect of the maintenance of a child, including but not limited to, matters relating to the provision of education, medical care, housing and clothing for the child; and in this behalf may make an order for financial provisions for the child.”
17. It is our considered view that an order awarding actual custody to an unemployed mother of the child who has no means of getting reasonable accommodation for the child, will not be in the best interests of that child unless provision is made for accommodation, more so if the father of the child, as the appellant herein, is able to provide such accommodation for him. The respondent freely admitted that she was unemployed, had no reasonable accommodation in which the child would live and that she could not provide for the child. On the other hand the appellant, likewise freely admitted, that he had the resources sufficient to make provision for the benefit of his son. In the circumstances, it will be selfish to say that an order directing him to provide accommodation, not for the mother of the child, but for the benefit of the child is wrong. It is of course true, that by a side wind the mother will benefit from the provision of housing. That is because the court came to the conclusion that the interests of the child demanded that he lives with his mother. The order for payment of rent flows from the order awarding the respondent the care and control of the child.
18. The remaining grounds may be handled together. Mr Madara handled them together, quite properly so, in our view considering that they all in one way or another deal with the way the learned Judge of the superior court handled the evidence. We earlier stated that the duty of the superior court as the first appellate court in this matter was to consider all the evidence which was presented to the trial court, evaluate it itself, analyse it and come to its own conclusion bearing in mind that unlike



the trial court it did not have the advantage of seeing and hearing the witnesses testify as to be able to assess their credibility. As we stated earlier only the appellant and respondent testified. The court believed the respondent. The superior court too believed her as to her suitability to be awarded custody of the subject child. Both courts correctly warned themselves that the paramount and overriding consideration was the welfare of the child. Both courts reminded themselves that they were dealing with a child of tender age. The general principle of law is that custody of such children should be awarded to the mother unless special and peculiar circumstances exist to disqualify her from being awarded custody. The case of *Martha Olela & another v Jackson Obiera* Civil Application No Nai 16 of 1979, in which a ruling was delivered on January 16, 1980 was cited as one of the authorities for such principle. The mother's disgraceful conduct, say her immoral behaviour, drunken habit, bad company are some of the factors which would disqualify her from being awarded custody of a child of tender age. We observe that the appellant raised some of these against the respondent, but as we stated earlier the aspersions cast on the respondent's character were raised as an afterthought and must have been raised with authorities as the aforesaid in mind. Otherwise why were those allegations not put to the respondent when she was in the witness box for her comment?

19. In the course of his submissions before the superior court, Mr Madara raised issues of the right of the father under the Teso custom concerning children. He remarked, among other things, that the Teso are a patrilineal society, a factor which in his view should have been borne in mind. He also criticized the trial magistrate for referring to articles 16(1)(a) of the [Convention on the Elimination of All Forms of Discrimination against Women](#); and articles 3, and 14 of the [African Charter on the Right and Welfare of Children](#) arguing that article 16, above had nothing to do with the welfare of Children, and also that articles 3 and 14, above, have not been domesticated.
20. Article 16, above, should be read in context. Mr Madara, and Mr Akhaabi before him, submitted on behalf of the appellant that among the Teso, children belong to the father. Viewed from that stand point article 16 becomes relevant. Mothers would be discriminated against if such a custom were to be applied. Articles 3 and 14 above, deal with the welfare of children. Whether or not they have been domesticated is a question of fact. The preamble to the [Children Act](#) leaves no doubt that the [African Charter on the Rights and Welfare of Children](#) forms the guiding principle behind the legislation. The provisions of the Act re-echo the provisions of the Charter and we have no doubt whatsoever that the principles enunciated therein are in effect rehashed in the [Children Act](#).
21. The last issue we would wish to deal with is the complaint by Mr Madara that the judgment of the superior court has no *ratio decidendi*. The superior court was handling an appeal. A petition of appeal erroneously titled "memorandum of appeal" was filed setting out the appellant's ground for complaint against the magistrate's decision. The learned Judge of the superior court in her judgment set to answer those complaints. The appellant having raised those complaints cannot be right in turning around to question the approach the learned Judge adopted. The all important issue which both the trial and first appellate courts set to determine was, who between the appellant and respondent was best suited to have custody of the subject child bearing in mind the welfare of the child. That is what custody is all about. In our view both courts below answered that issue and we find no basis for the complaint raised.
22. In the foregoing circumstances we cannot but agree with Mr Nyangau for the respondent that there is no basis for interfering with the superior court's decision. Accordingly we dismiss the appellant's appeal. Ordinarily in a legal dispute between husband and wife a court would not award costs. However, as we stated earlier, the parties are no longer husband and wife. The appellant brought this appeal and thus dragged the respondent here. She is unemployed and got counsel to represent her. Besides, costs are in the discretion of the court. In the circumstances, we order that the appellant shall bear the respondent's costs for this appeal. Those are the orders of the court.



DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY, 2009.

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

J. ALUOCH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

