



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(FAMILY DIVISION)

HCEA NO. E 028 OF 2021

FFA.....APPELLANT

VERSUS

NYA.....RESPONDENT

(Being an appeal from the Judgment of the Kadhi

(Hon. Principal Kadhi, AJ. I. Hussein (Mr.) in Kadhi's Court at

Nairobi in Divorce Cause No. 92 of 2020 delivered on the 18th day of February, 2021)

JUDGMENT

Memorandum o Appeal

This Appeal arises from a judgment delivered in *Kadhi's Court Divorce Cause No. 92 of 2020*. The Appellant is aggrieved by the decision of the Honourable Principal Kadhi *AJ .I. Hussein*, and has preferred this Appeal. The Kadhi dissolved the marriage between the Appellant and the Respondent and granted custody, care and control of their three children, all minors, to the Respondent. He also ordered the Appellant to cater for the school fees and other school related expenses, shelter and medical expenses in respect of the children and to provide Kshs 50,000 per mother to cater for the maintenance of the children.

In his Memorandum of Appeal dated 15th March, 2021, the Appellant has raised seven (7) grounds of appeal which are as follows:

- i. That the learned Kadhi erred in law and in fact in finding and holding that the Petitioner is entitled to custody, care and control of the minors.
- ii. That the learned Kadhi erred in law and in fact in finding and holding that only the Petitioner was entitled to custody care and control of the minors without considering and placing sufficient weight on the testimony, exhibits and submissions of the Respondent and without analyzing the entire evidence on record thereby arriving at an erroneous decision.
- iii. That the learned Kadhi erred in law and in fact in finding and holding that only the Petitioner has been with the children since their birth contrary to the evidence and testimony of both parties.
- iv. That the learned Kadhi erred in law and in fact by failing to grant legal and actual custody to the Appellant (Respondent) without

any justifiable and legal reasons.

v. That the learned Kadhi erred in law and in fact in finding and holding that the Respondent shall cater for the children school fees and other school related expenses.

vi. That the learned Kadhi erred in law and in fact in finding and holding that the Respondent shall provide Kenyan Shillings Fifty Thousand (Kshs. 50,000/-) towards the maintenance of the children without considering the evidence on Respondent's current financial and employment status.

vii. That the learned Kadhi erred in law and in fact in failing to consider the testimony and evidence of both the Petitioner and the Respondent.

Submissions

In compliance with the directions of this court, this Appeal was canvassed through written submissions. On 24th June 2021, Counsel for both parties informed the court that they had filed their respective submissions. I have had the chance to read the submissions. The Appellant has raised three issues for determination by this court:

i. Whether the honorable Kadhi erred in law and fact by granting custody of the minors to the Petitioner/Respondent alone.

ii. Whether the honorable Kadhi erred in law and fact by awarding an amount of Kshs. 50,000/- for maintenance of the children by the Appellant.

On the first issue he submitted that the decision of the Kadhi in awarding custody of the three minors to the Respondent was not in accordance with the law under Article 53 (2) of the Constitution and Section 4 (2) of the Children Act. He submitted that the Kadhi had no reason to deny him custody of the children and failed to take into account the evidence tendered by both parties. He submitted that the Appellant was not found at fault in the divorce proceedings and therefore there was no reason to deny him custody of the children. He submitted that the lower court did not take into account the provision of Section 83 (1) of the Children Act in granting custody orders and there failed to take into account the best interest of the three minors.

On the second issue, the Appellant submitted that the lower court failed to take into account the financial situation of both parties. He cited **CM v DN [2020] eKLR** where the court held that:

“While considering the order for financial provision for maintenance of children, the trial court was obligated to take into account the income or earning capacity, property and financial resources of the parties both then and in the foreseeable future. The trial court was also to consider the parties’ financial needs, obligations or responsibilities. As regards children, the court was required to bear in mind their financial needs and circumstances.”

He submitted that he pays Kshs 300,000 towards school expenses and a monthly maintenance sum of Kshs 40,000 and therefore a payment of maintenance sum of Kshs 50,000 is on the higher side. He urges that this court reviews this order and reduce it to a reasonable amount.

On the last issue, he has submitted that he should be awarded costs of this Appeal.

The Respondent in her submissions argued that the honorable Kadhi was right and had full authority and competency when he ordered sole custody to be given to her. She argued that the Kadhi court had jurisdiction to deal with the issues of custody and relied on the following cases in support of this **Eggers -v- Eggers 82 S.D 675 (S.D 1967)** and **Abdirahman Mohamed and another -v- Adan Yusuf (2013) eKLR**. She also argued that the best interest of the child should be considered when determining the issue of custody. She relied on Article 53(1) and (2) of the Constitution, Section 4(3) and sections 82,83,84,85 of the Children Act 2001. It was her argument that the general principle regarding custody of the minor children is that unless there exist peculiar and special circumstances the mother has priority. She also stated that under Islamic law, the same principle of custody of children of tender age to mothers applies. She submitted that she has been fit and able guardian and has shown nothing but love and compassion for the

children while providing for all their basic needs. She also argued that she should maintain sole custody of the children because the Appellant remarried in 2018 and thus is already maintaining another family. That since the marriage irretrievably broke down the Appellant has failed to make meaningful efforts to cater for the children's basic needs and hardly makes an effort to see the children and spend quality time with them.

She submitted that the Appellant has relocated from the country and is currently residing in Abu Dhabi in the United Arab Emirates and therefore lacks a permanent abode in the country. That her first born is in High School and the second born will be joining High School soon and therefore need consistency in their life. That the Appellant has been neglectful to the needs of the family and has failed to comply with the courts orders pursuant to Divorce Cause No. 92 of 2020 for him to pay rent of Kshs. 75,000/- pending determination of the suit therein. She also submits that she is agreeable to allowing the Appellant visiting rights while maintaining sole custody as it is not her intention to disallow the children from maintaining their relationship with their father.

On the second issue the Respondent submitted that the Islamic law vests the responsibility of the child maintenance fully on their fathers based on the children's needs and the father's financial ability. She stated that the Children's Act sets out parental responsibility of each parent of a child. She quoted sections 23 and 24 of the said Act. She argued that she has solely been undertaking a majority of the duties and responsibilities including food, shelter, clothing and medical care and sometimes pays the school fees.

Analysis and Determination

This being the first appeal, this court is obligated to consider all the evidence tendered in the lower court and arrive at an independent conclusion. This duty was set out by the **Court of Appeal** in the case of **Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2EA 212 wherein it was held** inter *alia*, **that: -**

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”.

I have read the evidence tendered in the Kadhi's court and has analyzed the same. In determining this appeal, I have taken into account Article 53 (2) of the Constitution and Section 4(3) of the Children Act that obligate this court to give primacy to the best interest of children in all matters dealing with the child. It is also the duty of a court in determining issues of custody of children to ensure that the provisions of Section 83(1) of the Children Act is taken into account. This Section provides that:

(1) In determining whether or not a custody order should be made in favour of the applicant, the court shall have regard to—

(a) the conduct and wishes of the parent or guardian of the child;

(b) the ascertainable wishes of the relatives of the child;

(c) the ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;

(d) the ascertainable wishes of the child;

(e) whether the child has suffered any harm or is likely to suffer any harm if the order is not made;

(f) the customs of the community to which the child belongs;

(g) the religious persuasion of the child;

(h) whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;

(i) the circumstances of any sibling of the child concerned, and of any other children of the home, if any;

(j) the best interest of the child

I am aware that courts have found that the Kadhi Court lacks jurisdiction to determine matters custody and maintenance of children. There are several decisions on this issue including **AAI V HAD (2018) KLR** and **JAOO vs HAS (2015) eKLR**. I note, however, that on the issue of the custody and maintenance, the Appellant did not plead issue of want of jurisdiction by the Kadhi's court nor tender evidence in respect thereof.

In considering whether to interfere with the decision of the lower court, it is trite law that an appellate Court should be slow in interfering with the exercise of the discretion of the Court below. An appellate Court may only tinker with a decision of the lower court, if it is satisfied that the discretion of that court was not exercised judiciously. In **Mbogo & Another versus Shah [1968] E.A. 93**, it was held at page 96 that:

An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice.

I have taken into account the issues raised in this Appeal and as I have stated above, it is trite that the best interest of the child is of paramount importance in all matters concerning the child. I have also noted that there is the issue of whether the Kadhi has jurisdiction to handle issues of custody of children. Since this issue has not been raised in this appeal, I will decide this matter based on what is the best interest of the three minors.

Every child has right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not (Article 53 (1) (e)). My careful consideration of the proceedings before the Kadhi show that I have no reason to interfere with the discretion of the Kadhi in all the orders he made save for some of the orders which did not take into account the best interest of the three minors for them to fully benefit from the provisions of the law. I find no evidence that the Respondent is not fit to have actual custody, care and control of the minors. But it is important to also recognize the rights of the children to parental responsibility of both parents. They should not be denied the love of their father. This appeal therefore succeeds in part as shown below:

1. Orders number 1, 2, 4, 6 and 7 issued by the Kadhi in his judgement dated 18th of February 2021 shall remain as ordered and are hereby upheld.
2. Prayer No. 3 is overturned by this court on Appeal and reworded as follows: that actual custody, care and control of the children shall remain with the mother, the Respondent.
3. Legal custody is awarded to both parents, the Appellant and the Respondent. To that end the Appellant shall have visitation rights on arranged days with consent of the Respondent. Such consent shall not be denied unreasonably. The Appellant is at liberty to apply to court in the event this consent is denied.
4. Prayer No. 5 is reviewed downwards to the effect that the Appellant shall provide Kshs 40,000 per month towards maintenance of the children.

Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF DECEMBER 2021.

S. N. MUTUKU

JUDGE



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