



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL APPEAL NO. 251 OF 1975**

**P K M .....APPELLANT**

**VERSUS**

**A G R.....RESPONDENT**

*(Appeal from the Resident Magistrate's Court at Mombasa)*

**JUDGMENT**

February 3, 1976, **Sheridan J** delivered the following Judgment.

On 26th February, 1975 Mr Akulongo, the Provincial Children's Officer, applied to the Juvenile Court for an order under section 25 of the Children & Young Persons Act (Cap 141) that **E M M** and **E E N**, two young girls aged 6 1/2 and 5, whose parents are **A G R** (PW 1) and **P K M** (DW 1) (hereinafter referred to as "the father" and "the mother") be given unto the custody of their father as being in need of protection or discipline contrary to section 22 (c) of the Act.

The only evidence in support of the application was that the girls were living with their maternal grandparents whereas their parents lived in Mombasa. It is not in dispute that their mother removed them there. There was no evidence that they were in need of care, roaming the streets or destitute which are some of the circumstances envisaged by section 22 (c) of the Act.

Although the father and mother had been living together there was no satisfactory evidence that they had contracted a marriage by civil law or by customary law, which need to be supported by a dowry, as the magistrate seems to have appreciated. If that was so the putative father had no right to custody of the children.

In his judgment dated April 12, the magistrate correctly noted that the main consideration was the welfare of the children and that the proper person to have custody of them, as girls, was the mother. He then made the following orders:

"Order:

No 1: The two children to remain with their mother here in Mombasa and their father shall be given access to see them or even taken them for a few days.

No 2: The father to contribute something for the maintenance of these two children.

No 3: The children shall not be taken away from Mombasa by the mother if the mother leaves for a few days, without permission from their father Alexander Gona.

Failure to comply with that order then this order will be varied.”

On April 15, the father reported to the magistrate that the mother had run away with the children and asked for the enforcement of the order of April 12. The magistrate issued a summons for her to attend court on April 18. On April 17, the day before the summons was returnable and in the absence of any evidence that the summons had been served on her, and in her absence, the magistrate ordered a warrant for her arrest to issue but not to be executed if she released the children. The order did not specify whether the children were to be released to Mr Akulongo or to the father. I have been informed from the bar that they are now with the father. These subsequent proceedings were most irregular. They condemned the mother without giving her an opportunity of being heard.

A further ground of appeal is that the juvenile court had no jurisdiction to make the orders under section 25 of the Children & Young Persons Act save in cases where the children are in need of protection or discipline under section 22 of the Act, which is not the case here. If the father wished to obtain custody of the children who were not otherwise shown to be with a parent who was incapable of exercising proper care over them – placing them with the maternal grandparents does not by itself establish the mother’s incapacity to do this – he should have applied to the High Court under the Guardianship of Infants Act (cap 144) but here he would probably be met with the objection that under section 2 of the definition of “father” does not include the father or putative father of an illegitimate child.

The proceedings were misconceived. I allow the appeal and set them aside. The result is that the mother will have custody of the children.

**Dated and delivered at Mombasa this 3rd day of February, 1976.**

**D.J SHERIDAN**

**JUDGE**



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