Case Number:	Civil Appeal 30 of 1978
Date Delivered:	27 Jul 1979
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Eric John Ewen Law, Cecil Henry Ethelwood Miller, Sir James Wicks
Citation:	Githunguri v Githunguri [1979] eKLR
Advocates:	J Couldrey for Appellant AA Lakha for Respondent
Case Summary:	**Githunguri *v* Githunguri** Court of Appeal at Nairobi July 27, 1979 Wicks CJ, Law & Miller JJA Civil Appeal No 30 of 1978 ***Children*** *- custody of children - guiding principles in awarding custody - welfare of the child and paramount consideration as set out in the Guardianship of Infants Act Cap 144 Section 6 and 7(2).* The parties were married under the Marriage Act Cap 150 and had two infant daughters when they separated. The appellant (mother) applied to the High Court by originating summons under the Guardinaship of Infants Act for custody of the children. The judge rejected her application and awarded custody of the two children to the father. The mother now appeals against this order. **Held :** 1. The order awarding custody to the father is set

aside and substituted with an order giving legal custody of the two infant daughters to their mother.

2. The appellate court will not interfere with a judge's exercise of discretion unless it was based on a wrong principle or was clearly a wrong decision. The trial judge in this case made the wrong decision, since the custody of young female children should be granted to the mother unless there are exceptional circumstances. In this case there are no exceptional circumstances shown to justify depriving the mother of her natural right to have her children.

3. The trial judge correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the children but misdirected himself by not finding that the rule was in favour of the mother.

4. The rule is that the mother should normally have custody of children of tender years and where the court gives it to the father, it is incumbent on it to make sure that there really are sufficient reasons to exclude the *prima facie* rule.

5. (Per Curiam) The purported customary law marriage between the respondent and the other woman was invalid under Section 37 of the Marriage Act.

Appeal allowed.

Cases

1. S *(an infant), Re* [1958] 1 All ER 783

2. L *(infants), Re* [1962] 3 All ER 1

3. *Mbogo v Shah* [1968] EA 93

4. *Wambwa v Okumu* [1970] EA 578

5. *Karanu v Karanu* [1975] EA 18

Statutes

1. Guardianship of Infants Act (Cap 144) Sections 6 & 7(2)

	2. Marriage Act (Cap 150) Section 37 **Advocates** *J Couldrey* for Appellant *AA Lakha* for Respondent
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal Allowed.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Wicks CJ, Law & Miller JJA)

CIVIL APPEAL NO. 30 OF 1978

BETWEEN

GITHUNGURI.....APPELLANT

AND

GITHUNGURI.....RESPONDENT

JUDGMENT

Wicks CJ This is an appeal against the judgment of the High Court (Hancox J) who awarded the respondent the custody of the two infant daughters of the marriage.

The matter came before the High Court by an originating summons filed by the appellant on September 29, 1977. On October 6, 1977, the appellant filed a chamber summons seeking virtually the same relief. Having heard counsel in argument, Simpson J ruled that the chamber summons was incompetent and dismissed it with costs.

Both the appellant and the respondent filed affidavits and the originating summons brought under the Guardianship of Infants Act, Cap 144, was heard and determined by Hancox J. I will refer to the method of procedure later.

Both the appellant and the respondent gave evidence in the court below and were examined on the affidavits. The trial judge found the following facts:

The respondent had formed an association with one Elizabeth Karungari and was living with her intermittently at a house in Caledonian Road. The respondent purported to marry Elizabeth by customary law on February 19, 1977. The matrimonial home had been at Muthaiga and it seems that this was vacated in September 1977. At the time of the hearing the respondent was living in a house at Karen with Elizabeth and the two children. No mention was made of the fate of the Muthaiga house and it would seem that the Karen house was at the material time the matrimonial home.

Both the appellant and the respondent drank but the appellant did get drunk at official parties and embarrassed the respondent in front of his subordinates, she was drunk in front of a priest visiting them from Alaska, and was in the habit of drinking in the company of her sister, Judy, and men. Then on one occasion when the matrimonial home was in Mombasa the appellant became drunk, walked home, and was found sleeping with a knife next to her, as a result the respondent had to remove himself and two children to another room.

The appellant left the matrimonial home in March 1973, when Lilian was only a week old, for one

week. In August 1974, she left the matrimonial home for three weeks, and again for one night on April 2, 1976. On each occasion she left the children behind. The appellant last left the matrimonial home on August 23, 1977, and although in her affidavit she said the respondent told her to go, her evidence was that the respondent objected to her seeing her sister, Judy, and she said in effect ‘well if that is an alternative and I have to choose I am going to live with my sister Judy’. She then left the matrimonial home.

The respondent was not a man of violence and had not beaten the appellant up. He was a tolerant and generous man having paid off a debt owed by his mother-in-law and had shouldered responsibility for the appellant’s two children by a former marriage.

The appellant went to live with her sister, Judy, in a house in Peponi Road which consists of two bedrooms, a sitting room, a dining room, kitchen and bathroom with one servant’s room at the back and which was unsuitable for housing the two infant daughters in addition.

This was the position at the time when the learned judge delivered his judgment. Although the appellant had spoken of divorce, this was only as one of a number of means of obtaining custody of the children. The appellant proceeded by way of both chamber summons and originating summons, a method so uncertain that the chamber summons was dismissed with costs. Had divorce been contemplated, would not the appellant have proceeded by way of the speedy process of a petition of divorce, filing at the same time an application for interim custody of her daughters"

The appellant had left the matrimonial home on no less than three previous occasions, leaving the children behind, and on each occasion returned, she could have returned to the matrimonial home a fourth time and been re-united with the children. There was the mistress Elizabeth. It is not unknown when a wife returns to the matrimonial home by the front door, for the mistress to leave by the back. Some wives tolerate mistresses, some husbands shut their eyes to a wife’s lover.

Since the decision in the court below which was delivered on November 18, 1977, new factors have arisen which completely alter the position. We are told from the Bar that the respondent filed a petition of divorce (Divorce Cause No 10 of 1978) on February 20, 1978, on the grounds of cruelty. The appellant filed a reply and cross petition on the grounds of cruelty and adultery with Elizabeth. At the hearing the respondent did not pursue his petition and it was dismissed. The appellant did not pursue her ground of cruelty and proceeded on the ground of adultery which was unopposed. This was proved and a decree nisi was followed by a decree absolute. We are told that the appellant and respondent have concluded an agreement covering the appellant’s own rights and this includes a house for her occupation.

Two courses are open to us, we can refer the case back to the court below with a direction to reconsider the matter taking into consideration the additional facts, or we can come to a decision on the basis of the additional facts ourselves. In my view we should not adopt a middle course of importing the additional facts into the proceedings in the court below as if they were before the trial judge, for such a procedure could be interpreted as a criticism of the court below on the basis of facts that were never before that court.

The appellant has been deprived of the custody of her infant daughters since August 23, 1977. It is clearly undesirable for us to refer the case back, causing even further deprivation of custody. We should take the latter of the courses I have referred to and take into consideration the additional facts.

The additional facts result in the relationship between the appellant and respondent being altered since the decision in the court below. The cross allegation of cruelty being abandoned, criticism of the

appellant's conduct falls away. Elizabeth is no longer a mistress, she is the woman named living with the respondent. The appellant is a completely innocent party deprived of her children who are now in the custody of the respondent and the woman named. Finally, it can be assumed that the house forming part of the settlement is one suitable for the appellant's station in life and would be suitable to accommodate the children.

We were referred to many authorities, but all of them arise out of divorce proceedings, or concern the custody of children where there has been no marriage, and are not relevant to the appeal as it eventuated.

The appellant is now before us as an innocent party, the mother of two infant daughters who are in the custody of the respondent who is living with the woman named in a petition of divorce which succeeded on that ground. On these additional facts the appeal must succeed.

I would allow the appeal, set aside the order the subject of the appeal, and make an order giving the legal custody of the two infant daughters to their mother, the appellant, with costs of the proceedings under the originating summons in the court below and the costs of this appeal.

I hope that the parties, who are responsible persons of good standing, can agree on the amount of the maintenance for the infants claimed in para 3 of the originating summons, and on the provision of reasonable access to the infants, to which the husband is entitled. In the absence of agreement, I would order that the parties should have liberty to apply to the High Court under the originating summons, or take fresh proceedings under the Matrimonial Causes Act and Rules, as they may be advised. As the other members of the court agree, it is so ordered.

Law JA. There is no need for me to re-state the facts leading to this appeal, which are sufficiently stated in the judgment prepared by Sir James Wicks CJ. The appellant, to whom I shall refer as 'the mother', applied by originating summons under the Guardianship of Infants Act for an order granting her the legal custody of two children of her marriage to the respondent, to whom I shall refer as 'the father'. The learned judge who dealt with the matter (Hancox J) rejected the application and awarded the legal custody of the two children to the father. The children are little girls named Lilian and Clare who at the time of the order, the subject of this appeal, were aged four years and eight months, and one year and ten months, respectively. The mother now appeals to this court.

Mr AA Lakha, who represented the father on this appeal, argued in support of the learned judge's decision. He submitted, quite rightly, that an appellate court will not interfere with a judge's exercise of discretion unless it was based on a wrong principle or was clearly a wrong decision. This court's predecessor so held in *Mbogo v Shah* [1968] EA 93. The learned judge in this case dealt with the matter most thoroughly, and wrote a carefully considered judgment, and it is with reluctance that I have come to the conclusion that his decision was wrong and should not be supported, for reasons which I shall endeavour to set out. Basically, these reasons are that the custody of very young female children should be granted to their mother, in the absence of exceptional circumstances which do not in my opinion exist in this case. The learned judge correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the children. He rejected the proposition, advanced before him by the mother's advocate, that there was a 'rule' in favour of the mother. With respect, this was a misdirection. When dealing with the paramount consideration of welfare, especially where young female children are concerned, there is a rule that the mother is normally the person who should have custody. As Roxburgh J said in *Re* S *(an infant)* [1958] 1 All ER 783, at 786 and 787:

"I only say this; the *prima facie* rule (which is now quite clearly settled) is that, other things being equal,

children of this tender age should be with their mother, and where a court gives the custody of a child of this tender age to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the *prima facie* rule."

In *Re* L *(infants)* [1962] 3 All ER 1, Lord Denning MR said:

"I realise that as a general rule it is better for little girls to be brought up by their mother."

There are also authorities to the like effect to be found nearer home. In *Wambwa v Okumu* [1970] EA 578, a Kenya case, Mosdell J had this to say:

"I do not think it can be controverted that in the absence of exceptional circumstances, the welfare of a female infant aged four years .... demands that the infant be looked after by its mother rather than its putative father.'"

In *Karanu v Karanu* [1975] EA 18, also a Kenya case, the then Court of Appeal approved the dictum of Mosdell J in *Wambwa's* case (supra) and stated as follows:

"At the time the application was heard, the daughter of the parties was just over seven years of age, and the son was six years old. The judge correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the children, but he did not specifically refer to the generally accepted rule that in the absence of exceptional circumstances, the custody of young children be given to the mother."

I would add that both *Re* S *(an infant)* and *Wambwa* were cases dealing with applications for custody made under the Guardianship of Infants Acts of England and Kenya respectively. In the instant case, the learned judge gave the husband the custody of the two little girls because, in his words:

"I do feel that he is in a better position and is generally a more suitable person to look after and to have custody of them."

He did not say that the mother was an unsuitable person, or that she was unfit to have the care and custody of her little daughters. In my view, there are no 'exceptional circumstances' shown in this case to justify depriving the mother of her natural right to have her children with her, so as to exclude the *prima facie*, or generally accepted rule or principle recognised in the cases to which I have referred in this judgment. This is not a case of a mother abandoning her children. Although she left the matrimonial home after a quarrel, she came back to fetch her little daughters the following morning, but was prevented from taking them away.

For these reasons alone I would allow this appeal. I do not find it necessary therefore to deal with other grounds of appeal, beyond saying that some of them have obvious merits. For instance, if the order awarding custody of the husband were allowed to stand, the little girls would effectively be cared for and brought up by the husband's so-called 'wife' Elizabeth Karungari, with whom he lives, having purported to marry her by a customary marriage which would appear to be invalid under Section 37 of the Marriage Act (Cap 150). For all I know Elizabeth is eminently qualified to look after young female children in addition to her own, but the learned judge did not have the benefit of seeing and hearing her, and of forming an opinion as to her character and suitability. Furthermore, the mother has two young sons by a previous marriage living with her, and it would be most undesirable for her family to be split up, the two sons being brought up by her in her home, and their two younger half-sisters being brought up in another home.

I would allow this appeal, and concur in the order proposed by Sir James Wicks CJ.

Miller JA. The judgment and order subject of this appeal were as a result of proceedings in the High Court by way of originating summons seeking relief under the provisions of the Guardianship of Infants Act (Cap 144). Under this Act the power of the court inter alia is defined briefly as following:

“To make such orders as it may think fit regarding the custody of infant children and the right of access to them by either parent in proceedings under the Act.”

The Act also prescribes the principles on which questions relating to the custody up-bringing etc of the children are to be decided, and directs that in deciding such questions the court shall regard the welfare of the children as the first and paramount consideration.

The trial court ordered that the respondent father be custodian of the two female children then aged four years and eight months and one year and ten months respectively and issue of the marriage between the appellant and the respondent. At the time of the application to the High Court the parties to the proceedings were not either judicially separated or divorced; but estranged and occupying separate and different homes; and on the evidence as a whole it would be unrealistic not to conclude that one of the most dominant causes leading up to this case is the marital difficulty of a statute law marriage versus a customary law marriage in our African society.

These are difficult cases to decide; and I for one, do not look forward to the task of making decisions in them; because on the basis of assuming as I confidently do that there is and should be parental love for the children by both the parents, it is almost inevitable that whichever way a court decides, one parent must be dissatisfied if he does not obtain his personal wishes against those of the other parent. As I see it, resort to the courts by married parents in a case such as this, is generally nothing short of a battle between the parents themselves calling upon courts to decide who is victor, and what is more, it is an almost certain result that the courts whether of first instance or on appeal are blamed for deriding in favour of either parent when decision there must be. Courts are conscious of this; and as I have already intimated, I believe that this is expected because of that natural common parental love for the children. Indeed, the legislature appears to have also contemplated the existence and the continuity of parental love and interest despite an order in guardianship already made, by conferring on mother and father alike similar powers to apply to the court ‘in respect of any matter affecting the infant’ (Section 6 of the Act), and also by providing for the making of orders even where mother and father are residing together (Section 7(2) of the Act). Another real difficulty in this particular case is the fact that the trial judge’s reasoning on those facts were wrong, for there are ten grounds of appeal but they amount to no more than one ie that the judge in the lower court was wrong ‘in law’ in that he failed to make the correct decision on the facts adduced before him.

From those facts it is clear that the parties are responsible and well positioned citizens of the country. They were married on November 11, 1972 in accordance with the Marriage Act. From around August 1973 there were several quarrels and disagreements the appellant leaving the matrimonial home for short periods and on one occasion up to three weeks and leaving the children behind. The appellant did not deny this but claimed that it was due to repeated misunderstandings between the respondent and herself. Respondent also did not deny these occurrences but assigned as one of the reasons therefore, the appellant’s persistent association with one of her sisters named Judy, of whom he disapproved. The respondent claimed that Judy was in the habit of taking the appellant out drinking in the company of men whilst the appellant claimed that the respondent’s objection to Judy was because he thought that Judy was spreading gossip to the appellant about his relationship with one Elizabeth Karungari. Whilst the respondent claimed that on August 22, 1977 the appellant of her own accord packed her belongings and

left the matrimonial home, the appellant claimed that she left on August 21, 1977 as a result of a beating at the hands of the respondent and that returning the next day the respondent telephoned her to get packed and leave and that on August 23, 1977 the respondent ensured that she left the home leaving the children behind. Beating or no beating, it is clear from the evidence that the children were then left behind at the instance of the respondent. The respondent claimed that from August 22, 1977 or (hereabouts the children lived with his cousin Njoki and said he:

“Thereafter, having regard to the welfare of the children, I took them to live with me and my wife Elizabeth Karungari. Elizabeth Karungari is a person of integrity fit to look after the children for whom she has great love and takes great care. She has been the secretary of the President His Excellency Mzee Jomo Kenyatta since 1965 and relinquished the post in February 1977 upon the marriage with me.

The plaintiff is not fit to look after the children as she is a person addicted to drinks, is of violent temper, has indeed left the children on several occasions as aforesaid, quite often beats the children and she is never at home. The two children by her former marriage are living with the plaintiff over the weekends they being at boarding school.”

In addition to their respective affidavits the parties gave oral evidence all of allegations and counter-allegations and their attending reasons, each side seeking to justify its conduct; and the learned judge correctly held that ‘it was the duty of the court to deal with things as they are now, not as they were, or as they might have been’. With the added advantage of having seen and heard the parties he also made the following observation on the record which I fully adopt:

“On my observation of the parties before me I do not think the wife was as bad as the husband makes out or that the husband was as bad as the wife made out. The wife appears to have been at least fond of the children. On the other hand I think she was given to exaggeration and I do not believe, having seen the husband, that he was a man of violence or that he beats her up.”

The learned trial judge also found as a fact that the parties drank from time to time. The respondent admitted that he would sometimes become’ lively’ on those occasions. With respect to the appellant’s being away from the home for about three weeks in August 1974 the appellant also appeared to have been quite frank in saying that the respondent and herself were both drunk when they had the fight leading up to her leaving the home to see the respondent’s mother and aunt who had to go to Mombasa to effect a reconciliation and that in the end the respondent called her back to the home saying - ‘it was just a misunderstanding’.

From the evidence at the trial and as I have already intimated, it is perfectly clear and beyond any form of doubt that one of the main causes if not the true cause of the difficulties between the parties has been the respondent’s association with the lady Elizabeth Karungari with whom the respondent now lives as man and wife together with the two infants in respect of whom these proceedings have been undertaken. In his affidavit evidence at the trial the respondent said:

“Elizabeth Karungari is my lawfully married wife having married her on the 19th day of February 1977 under customary law.”

It is common ground now that Elizabeth Karungari is not the lawful wife of the respondent, having regard to Section 37 of the Marriage Act (Cap 150).

The respondent made it clear in his evidence before the trial court that the appellant objected to his having Elizabeth as his second wife.

The break-up of the matrimonial home was around August 1977. The purported customary law marriage to Elizabeth was in February 1977. The respondent admitted that when the appellant left him he placed the two children into the care of Elizabeth Karungari whom the learned judge remarked he had not the benefit of seeing. The learned judge based his decision on a comparison of the parents, parties to the application before him, and delivered a well-reasoned judgment, but I am very much concerned with the results of the order in all the circumstances of this case. I am sincerely concerned with the implications of cases such as these because the legal status of marriage of the citizen is no trite matter in any society.

It is quite obvious through the decided cases that both male and female citizens have from time to time been hard put to deride or reconcile a future where conflict between a statute law marriage and a customary law marriage arises.

In my view, and particularly in a case such as this where it is on record that divorce proceedings in the statutory law marriage are contemplated, it is appropriate to give as much cognisance to the effects of the statutory law marriage as they stand today.

From the evidence in the lower court the respondent has shown himself to be a man of great kindness and for the purposes of this case he had himself made it commendably clear that he loves the institution called ‘home’ even if there be several of them; and he certainly appears to have considered means; but he has also made it abundantly clear that the wife or women in the home must be firmly tied to homely duties and the caring for the children, which despite his parental love and affluence of support and maintenance he cannot himself perform by reason of his demanding official bread-winning duties.

I am looking at this case from two aspects ie (1) the minor one of the legal and procedural steps and results so far, and (2) the allpervading question of the welfare of the two infants. With respect to (1) there is no doubt that as entitled so to do and on a plea of urgency in the matter, it is the appellant who made application by way of originating summons contending and rightly so that the time required for divorce would be against the urgency of her application. We have now been informed from the Bar that the divorce proceedings have ended; and that the appellant was granted a decree absolute on the grounds of the respondent’s alleged adultery with Elizabeth These additional facts were not before the learned judge when he heard the application subject of this appeal.

With respect to (2) it is also clear from the passage of this judgment reproduced above, that the learned trial judge was in difficulty deciding which of the parties was the better conducted parent, at the time of the proceedings before him; he more or less placed them at par in this respect. There then arose consideration of other attributes in the parties.

It is appropriate to mention at this juncture that the ability and intention of the respondent to afford the children the greatest amount of luxuries has not been in question but side by side with this, although it was patent in the proceedings that the effect of the order in his favour was to entrust the actual task of care to Elizabeth the trial court was perhaps swayed by the respondent’s recommendation of this lady. The respondent said:

“Elizabeth Karungari is a person of integrity fit to look after the children for whom she has great love and takes great care. Elizabeth loves my two children Lillian (the elder) very friendly refers to her as ‘Mummy’.”

I am very sorry; and I say this with the greatest of respect and genuine sincere wishes to all three adults, the respondent, the appellant and Elizabeth, but in the interest of the welfare of the two infants is

it beyond the realism of possibility in the unpredictable nature of human affairs that Elizabeth for some reason unjustifiable or otherwise walks out on the respondent next week" Would she then take two children together with her own daughter of about 16 with her" As I said earlier these are not simple cases to decide. Is it not a fact that the High Court's order has placed the two infants into the motherly care of the arch rival of their natural mother" In my humble view it would have been most helpful for the court itself to see and assess the attributes of the lady Elizabeth if possible; and not as it were to partly rely upon the recommendations of the respondent of the lady then in potentially bigamous standing.

All through this judgment I say that my observations are with the utmost respect to all the adults in the case but I like to call a spade a spade especially where the facts demand it. The children have from birth been living in the home of their parents. True it is that on the evidence the atmosphere therein has not been the best on occasions but there is not a scrap of evidence to show that despite this and the occasional absence or daytime excursions by the mother either child suffered the slightest injury. I consider that the pendulum swings more towards the children remaining with their natural mother.

I consider it better that in the interest of the welfare of the infants they be entrusted into the legal custody of the appellant mother. I would accordingly allow this appeal, and I concur in the orders as proposed by Sir James Wicks CJ.

Dated and Delivered at Nairobi this 27th day of July 1979.

S.J.WICKS

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CHIEF JUSTICE

E.J.E.LAW

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JUDGE OF APPEAL

C.H.E.MILLER

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JUDGE OF APPEAL

I certify that this is a true copy of the

original.

DEPUTY REGISTRAR