

In the name of Allah, The Beneficent, The Merciful

The National Supreme Court

Department of Personal Status law

Cassation Decision/172/2016

Issued by the Bench of the Supreme Court of the Third Cycle of the Personal Status Department, on 17/03/2016 under the Chairmanship of Mr. Al-Tayeb Abdul Ghafoor Abdul Wahab and the membership of the Honorable Judges of the Supreme Court Mrs. Sitanna Abdul Jaleel Mohammed, and Mrs. Fadia Abdulgadir.

The appeal papers number 141/S/2015 are filed with the Appeal Court of Northern State – Dongula along with the claim documents number 250/Ghaf/2015 with the Court of Dongula filed under number 8/cassation/2016.

Appellant: Abu Baker Mahdi Fathi

Respondent: Ablaa Gissm Al-Saeed

The Facts

The Appeal Court of the Northern State issued ruling number AS SH/141/2015 on which it ruled against the judgement of the Trial Court, that it turn, ruled against the respondent's right to custody of her daughter and ruled to the dismissal of the claim.

On 21/12/2015, Mr. Abdul Rahman Mahmoud Hassan filed an appeal against the said judgment on behalf of the appellant Mr. Abu Baker Mahdi Fathi. The appellant was notified of the contested judgement on 17/12/2015. Therefore, and according to articles 159-190 of the 1983 Civil Procedures Code and its subsequent amendments in 2009, the appeal is accepted in form on which the court based its arguments on the fact that the Appeal Court has erred on its judgment on the case in question, where it mentioned that negligence is presumptive and that care and caution should be applied for the right of the minor since the minor is only two years of age. The appeal petition added that the Appeal Court failed to take into account the nature of the work of the respondent at the hairdresser and that such work is harmful for the minor because her mother takes her to such places and for all that, the appellant requested to revoke the decision of the Appeal Court in favor of the judgment passed on by the Trial Court which ruled to drop the respondent's right to custody.

The Reasoning

The Appeal Court of the Northern State, the Muslims' Personal Status Department issued a valid judgment in accordance with the laws and based on correct interpretation of the facts presented by the appellant regarding dropping the respondent's right to custody, where the Appeal Court took under consideration the reasons to drop the mother's right to custody of the minor and concluded through its appealed judgment that to revoke the judgment of the Court of the First Instance to drop the right of custody of the respondent and the inclusion of the minor to her appellant Father. Custody, according to the definition of jurists/scholars is defined as rearing if the minor and to see to its affairs and wellbeing at a certain age by whoever owns the right from his incest to raise him, whereas article 109 of the Personal Status Act of 1991 stated that custodianship is the upbringing, education and care of the minor, in a way that does not contradict or conflicts with the right of the guardian and the interests of the minor. The appellant failed to prove any form of negligence to be deemed sufficient grounds leading to such a degree of dropping the custody of the minor and that the assessment issues of the degree of damage and negligence are discretionary of the Trial Court

and requires care and foresight in investigation and determination since it involves the right of the minor, and he, the minor has the right of protection because guardianship is a responsibility that takes into account the consideration of three parties, the rights of the minor, the rights of guardianship and the rights of the parent. Should these three rights be reconciled then that should be the course to follow, but should they conflict then the right of the minor shall prevail since the purpose of guardianship is to benefit the minor in the first place, as is dictated and proven by the rulings of the National Supreme Court the Cassation Department and where there is no defect or failure in the course of the investigation leading to the elevation of the minor or causes him harm, which is in violation of the law then there is no room for the intervention of the Court of Cassation, which is a court specialized in overseeing the integrity and validity of the application of the law and not a court to decide on disputes among the parties, therefore it should be in favor of the respondent and the later, i.e. the respondent according to the consensus of the jurists/scholars has priority in raising the minor so long as the conditions of the law have been met, since the appeal petition are based on the aforementioned, in this regard is still under deliberation and repeating the facts at this stage of litigation does not lead to any merits, so long as the judgement of the concerned Court is valid which we have been pointed to earlier, therefore, and for these reasons we agree on the validity of appealed judgment and reject the appeal, and Allah it is whose help is to be sought in this matter, and to the decision of the honorable members of the bench.

(Signature)

Dr. Sitanna Abdul Jaleel Mohammed
Supreme Court's Judge
21/02/2016

Since it is determined in the rulings of this court that the essence of people is good, and whoever claims otherwise, bares alone the burden to proof without being compelled to go under oath in this instance, where the appellant failure to present prove of his claim.

And that negligence leading to dropping the right of guardianship is what leads to the loss of the minor. The court should not base its judgment on any reason that could not be drawn from the events that the evidence has proved. For all that, and since it is proven through the study of the documents that the two parties agree that the girl, the subject of the lawsuit is still in the age that requires guardianship of a female and that she, did not exceed the age of three years of age, and that the appellant failed to prove his claim of the respondent's negligence to a degree leading to dropping her custody of her aforementioned daughter.

Since the court's finding and deliberation of the presented evidence by the appellant in this regard were palatable, the intervention of the Appeal Court to weigh the evidence is justifiable and it ruled to revoke the judgement of the Trial Court and issued a new sentence that rejects the lawsuit in accordance with the law and that this ruling should be supported.

And whereas the appeal is unfounded, no doubts remain as to its invalidity and rejection.

Therefore, I agree with what the honorable judge Dr. Sitanna Abdul Jaleel Mohammed has established and concluded, and our judgment is to reject the appeal in question.

(Signature)

Al-Tayeb Abdul Ghafoor Abdul Wahab
Supreme Court's Judge
10/03/2016

(Signature)

Fadia Abdulgadir
Supreme Court's Judge

13/03/2016

Final Order:

"The appeal is dismissed summerly"

(Signature)

**Al-Tayeb Abdul Ghafoor Abdul Wahab
Supreme Court's Judge
10/03/2016**

*Amal