**THERESA TEMITAYO WILLIAMS**

**v.**

**RASHEED AHMED WILLIAMS**

IN THE SUPREME COURT OF NIGERIA

ON FRIDAY, 3RD DAY OF APRIL, 1987

SC. 117/1985

**LEX (1987) - SC. 117/1985**

OTHER CITATIONS

2PLR/1988/77 (SC)

# (1987) NWLR (Pt. 54) 66

**BEFORE THEIR LORDSHIPS:**

ANDREWS OTUTU OBASEKI, J.S.C. (Presided and Read the Lead Judgment)  
  
AUGUSTINE NNAMANI .J.S.C.   
  
ADOLPHUS GODWIN KARIBI-WHYTE, J.S.C.  
  
SAIDU KAWU, J.S.C.  
  
CHUKWUDIFU AKUNNE OPUTA, J.S.C.

**ORIGINATING COURT(S)**

LAGOS STATE HIGH COURT (Oladipo Williams, J., Presiding)

COURT OF APPEAL, LAGOS JUDICIAL DIVISION

**REPRESENTATION**

H. A. LARDNER, S.A.N. (with him Mr. S. A. ABAYOMI) - for the Appellant

Mr. KEHINDE SOFOLA, S.A.N. (with him Mr. A.O. ANIAGOLU) - for the Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

FAMILY LAW - Custody of children of a dissolved marriage - Applicable principles to consider in award of custody - When joint custody can be ordered - Effect of education of young children in foreign boarding schools

FAMILY LAW - CUSTODY OF CHILDREN:- Children of divorced parents – Application for transfer of custody from one parent to another – Nature of evidence required to impeach the incumbent – Evidence of potential for better life opportunities and welfare with the applicant – Whether relevant and sufficient

FAMILY LAW - CUSTODY OF CHILDREN:- Children of divorced parents -Working divorcee mother – Evidence of absence of personal care for the child due to work demands – Whether can be displaced by evidence of adequate arrangement with third parties to provide alternative care

FAMILY LAW - CUSTODY OF CHILDREN:- Children of divorced parents – Paramountcy of the welfare of the child – What constitutes - Refusal of parent in whom legal custody lies to allow a child enjoy the best care and attention of both parents on offer – Whether ground for reviewing custody order

FAMILY LAW - CUSTODY OF CHILDREN:- Equality of claims of both parents – Attitude of courts thereto – Sex, age, number of children of the marriage involved – Relevancy - Duty of court in considering same in the making of custody orders

FAMILY LAW - CUSTODY OF CHILDREN:- Opportunity of sound education as well as physical and mental welfare – Lack of evidence of plan regarding same – Whether fatal to a claim of a parent for custody – Duty of court thereto

FAMILY LAW - CUSTODY OF CHILDREN:- Rule that an order of custody is not a penal order on either parent and should not be construed as such – Legal implications of

FAMILY LAW - CUSTODY OF CHILDREN:- An order for joint custody with care and control to one parent and access/responsibility for education to another – Legal basis of the power of court thereto - When will be the appropriate order – Relevant considerations

FAMILY LAW - CUSTODY OF CHILDREN:- Adultery on the part of a mother – Whether ground to deny her custody of a young female child – Sympathy of court for the innocent father – Proper treatment of

FAMILY LAW - CUSTODY OF CHILDREN:- Duty of court to hear evidence – Oral evidence of parties – When necessary for the judicious and judicial exercise of discretion by the court in the making of custody orders – Absence of – Legal effect

FAMILY LAW - CUSTODY OF CHILDREN:- Application for transfer of custody away from incumbent – Distinction between evidence that the child was unhappy or was likely to be unhappy and positive evidence that the child was happy – What the court considers relevant in making such orders

FAMILY LAW - CUSTODY OF CHILDREN:- Cases where both parents are eminently qualified, able and anxious to give affection and proper guidance to their child – Duty of court thereto – When joint custody proper order to make - Coercive order – When court will refrain therefom

FAMILY LAW - CUSTODY OF CHILDREN:- "interests of those children" as used in Section 71(1) of Act No. 18 of 1970 - What it contemplates

EDUCATION AND LAW:- Custody of child during matrimonial causes – Considerations in granting same – Whether desire of a parent to send a child abroad for educational training is a material consideration – How treated

EDUCATION AND LAW:- Education of child – Importance of – Plan to educate a child of tender years outside the proper environment – What constitutes – Attitude of court thereto – Legal implications for custody proceedings

HEALTHCARE AND LAW:- Health profile of a child - Sickler with acute asthmatic condition requiring regimented care – Implications for an application for custody of child

CHILDREN AND WOMEN LAW: Care of young children - Custody of children of a dissolved marriage - Education of children in foreign boarding schools away from their parents – Implications for justice administration and wellbeing of the child

**PRACTICE AND PROCEDURE ISSUES**

ACTION:- Principle that a Plaintiff can only succeed on the strength of his own case and not on the weakness of the case of the opponent – Custody cases – Whether a party will be granted custody based on the failure of the other party to show adequate proposal for the welfare of the child

COURT – JUDICIAL DISCRETION:- Trial Court’s exercise of – How properly made by a trial court - Attitude of appellate court to invitation to interfere therewith – When interference appropriate

COURT – JUDICIAL DISCRETION:- Exercise of discretion founded on irrelevant considerations or on matters not before the Court – Duty of appellate court thereto – When retrial will be appropriate order to make

JUDGMENT AND ORDER:- Order of retrial – When proper – Duty of appellate court thereon - Proceedings regarding the custody of a child – Attitude of court to the making of an order of retrial thereto

JUDGMENT AND ORDER:- Order of retrial – Power of Court and Supreme Court to order same – Legal basis

INTERPRETATION OF STATUTES: Section 71(1) of Act No. 18 of 1970 – What it contemplates

WORD AND PHRASES:- “Paramount consideration” – Meaning of – Whether court has duty to consider other considerations other than the predominant factor

WORD AND PHRASES:- "Interests of those children" as used in Section 71(1) of Act No. 18 of 1970 – Meaning of

NOTABLE PRONOUNCEMENT:

“The divorce mentality (as shown in this case as well as in every other case where the custody of children of the marriage becomes a burning issue) reveals an intrinsic contradiction. As long as the marriage subsists no issue as to custody will arise. Both parents are ex debito justitia entitled to the love, affection and company of their children. That is their natural and moral right. These parents break up their marriages and start a fight to finish battle for that which was theirs as of right - the custody of children of the marriage. If all the time, energy, money, and effort put in fighting custody cases are expended in saving the marriage, Nigeria will surely be better for that.

The other issue one might comment upon is the desirability of brothers and sisters - children of the same marriage growing up together and understanding one another and being an inspiration and help each to the other. At least this is the African concept of family relationship. The break of this marriage has been an assault on this concept. The two boys have not met their sister Kafilat since 1975. One only hopes that the injury the breakup of this marriage had done to the children's relationship of brothers and sister can be repaired by the order made in this appeal.

From 1975 the girl Kafilat had been in the custody of the mother. That was good. I do not for one moment subscribe to the view that a boarding school in England is a fitting substitute for a mother's care and attention. There are periods in a girl's life when she is undergoing the slow advance to maturity when she needs her mother to discuss and answer her many questions about herself, her development both physiological and psychological. This again is no longer a life issue as the Appellant has at last succumbed to the temptation of sending her daughter to school in England may be to prove that she too can do it. Yes, but who suffers? - the children of course.” – [OPUTA JSC’s concurring judgment]

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The short point in this appeal relates to the proper order to make in respect of the custody of one of the children of the marriage between the parties to this appeal that has been dissolved by a decree nisi made by the court of trial. The decree nisi has since been made absolute. The name of the child in question is Kalifat Abimbola Williams. There were three children of the family, namely, Rasheed Ayodele Williams (male); Hakeem Akintola Williams, (male) and Kafilat Abimbola Williams (female). There was no contest about the custody of Rasheed Ayodele Williams and Hakeem Akintola Williams both of whom have been in the care and custody of the respondent since the parties separated on October 1, 1975. The contest is only in respect of the custody of Kafilat Abimbola Williams who has been in the care and custody of the appellant since the parties separated on 1975 October 1.

Oladipo Williams, J. who heard and determined the petition granted custody of the child to the appellant. This was after hearing evidence from the respondent. The appellant did not testify in support of her application for custody and did not appear at the hearing of the petition.

DECISION(S) APPEALED AGAINST

The Court of Appeal to which the respondent took the matter on appeal, by a majority of two to one, reversed the decision of Oladipo Williams, J. and granted custody to the respondent.

ISSUE(S) FOR DETERMINATION ON APPEAL

*The Supreme Court resolved the appeal based on the issues formulated by the Appellant viz:*

“(1) "Did the learned trial judge correctly direct himself as to the law applicable to the matter?

(2) Did he correctly identify all the facts and circumstances he had to take into account in reaching a decision?

(3) Can it be affirmatively asserted that he gave improper weight to or ignored any of the relevant facts and circumstances?

(4) Can it be affirmatively asserted that his decision is otherwise wrong?

(5) If the answer to questions 1 and 2 are in the affirmative and to questions 3 and 4 are in the negative, was the majority decision of the Court of Appeal correct in law in re-opening the learned trial judge's decision in the exercise of his discretion and reversing his decision on the grounds upon which he did?“

DECISION OF [CURRENT] COURT

1. Where there is no evidence before the Court to disqualify either parent from being awarded the custody of the child of the marriage under consideration, the Court shall make an order for joint custody while ensuring that with order as to care and control and responsibility for education be given to the party best placed to give effect to same. It will meet the justice of the case and take care of the welfare of the child.

2. Appeal therefore allowed. Decision of the Court of Appeal set aside and in its stead, substitute the following orders:

The appellant and the respondent shall have joint custody of their daughter, Kafilat Abimbola Williams, the appellant exercising care and control of the child while the respondent takes charge of the education of the child. There will be no order as to costs.

**MAIN JUDGEMENT**

**OBASEKI, J.S.C. (Presided and Delivering the lead Judgment)**:

The short point in this appeal relates to the proper order to make in respect of the custody of one of the children of the marriage between the parties to this appeal that has been dissolved by a decree nisi made by the court of trial. The decree nisi has since been made absolute. The name of the child in question is Kalifat Abimbola Williams. There were three children of the family, namely, Rasheed Ayodele Williams (male); Hakeem Akintola Williams, (male) and Kafilat Abimbola Williams (female). There was no contest about the custody of Rasheed Ayodele Williams and Hakeem Akintola Williams both of whom have been in the care and custody of the respondent since the parties separated on October 1, 1975. The contest is only in respect of the custody of Kafilat Abimbola Williams who has been in the care and custody of the appellant since the parties separated on 1975 October 1.

Oladipo Williams, J. who heard and determined the petition granted custody of the child to the appellant. This was after hearing evidence from the respondent. The appellant did not testify in support of her application for custody and did not appear at the hearing of the petition. The Court of Appeal to which the respondent took the matter on appeal, by a majority of two to one, reversed the decision of Oladipo Williams, J. and granted custody to the respondent.

The appellant being dissatisfied has brought the issue of question of custody to this Court for determination.  A brief resume of the facts is desirable for the purpose of this judgment. The parties were married at Woodgreen Marriage Registry, London on 30/3/63. After the marriage, the parties cohabited at diverse places both in London and Lagos including 16B Airport Road, Ikeja. Following the breakdown of the marriage, the parties have been living apart since 1st October, 1975, a period of over 6 years preceding the presentation of the petition. This period of separation started on 1st October, 1975 when the respondent appellant left the matrimonial home. The separation created problems for the respondent and according to his testimony "since she left and there were no boarding schools in Lagos, I decided to educate the children in England. Consequently, the first two boys were taken to Abbey Junior School in Kent in England where they were till 1980 before they left for King's Junior School (for the elder) and for the younger, King's Junior School, Cantabury, Kent in England ... The two boys have always been with me for the greater part of the time. The other part they spent abroad ... I have a lady friend, a friend of the family who comes in to look after them while they are here."

The appellant left with the only daughter of the family, Kafilat Abimbola Williams. Since she left, the respondent has not set his eyes on her. All the efforts made by the respondent yield no results. The letter, Exhibit 6 he wrote was returned with a covering note endorsed on it by the appellant. The appellant has turned down all approaches by the respondent to have a say in the upbringing and education of Kafilat Abimbola Williams. The treatment she gave to his letters Exhibits 6 and 7 typifies her attitude .She refused even to let him pay Kafilat's fees. Opposing the appellant's request for custody in his testimony, he said:

"I could pray the court not to grant her request for custody of Abimbola. She has no time for her. She leaves for her work at 7.00 a.m. She leaves her in the care of maid who will take her where they want to go and take taxi to school. In the afternoon, she is still in court. She has an arrangement with Mrs. Finnih and Mrs. Egbeyemi , her friends who collect her and help her until she goes to collect her in the evening.

In the last two years she has been travelling in and out of the country leaving the girl in the care of friends. All these convince me that she has no time for her.

I will like the court to grant me a divorce because our marriage has broken down completely and to grant me custody of the girl for a better quality of education and hope thereafter. I want also the custody of the two boys."

As I said earlier, the appellant did not testify at the hearing. Indeed, she did not put in any appearance at the hearing. She was a Chief Magistrate at the time of the hearing of the petition. She is now a judicial officer having been elevated to the High Court Bench.

The evidence on record does not lead to an easy resolution of the question for determination, i.e. whether the interest and welfare of Kafilat Abimbola Williams will be better served by her remaining in the custody of the appellant or transferring to the custody of the respondent. The evidence does not show that the appellant has no time for Kafilat. Rather, it shows that adequate arrangement is made for her while appellant is at work.

The desire of the respondent to make available to her the same educational opportunities as the two brothers are enjoying in England, laudable as it is, cannot be a ground for denying the respondent custody of Kafilat. The rebuff the respondent has suffered from the hands of the appellant in his effort to contribute his quota to the welfare of Kafilat is however a ground for granting split or joint custody. A child is entitled to enjoy the best care and attention the parents can offer. Provided that a parent is in a position and willing to provide them, the child should not be denied them by the actions of either parent.

However, the three grounds of appeal filed in this matter to the Supreme Court raise five questions for determination. These five questions formulated in the brief filed by the appellant and restated by appellant's learned counsel in oral arguments read:

(1) "Did the learned trial judge correctly direct himself as to the law applicable to the matter?

(2) Did he correctly identify all the facts and circumstances he had to take into account in reaching a decision?

(3) Can it be affirmatively asserted that he gave improper weight to or ignored any of the relevant facts and circumstances?

(4) Can it be affirmatively asserted that his decision is otherwise wrong?

(5) If the answer to questions 1 and 2 are in the affirmative and to questions 3 and 4 are in the negative, was the majority decision of the Court of Appeal correct in law in re-opening the learned trial judge's decision in the exercise of his discretion and reversing his decision on the grounds upon which he did?

Taking the first question first, it is common ground between the parties that the learned trial judge and the Court of Appeal properly directed themselves as to the law applicable to the issue of custody of children of a marriage that is dissolved. Section 71 of the Matrimonial Causes Act 1970 contains the guidelines the courts are to follow in proceedings in respect of custody of children of the marriage and I note with satisfaction that both the High Court and the Court of Appeal made ample reference to it. The section reads:

"(1) In proceedings with respects to the custody, guardianship, welfare, advancement or education of children of a marriage, the court shall regard the interests of those children as the paramount consideration; and subject thereto, the court may make such order in respect of those matters as it thinks proper.

(2) The court may adjourn any proceedings within sub-section (i) above until a report has been obtained from a welfare officer or such matters relevant to the proceedings as the court considers  desirable and any such report may thereafter be received in evidence;

(3) In proceedings with respect to the custody of children of a marriage, the court may, if it is satisfied that it is desirable to do so, make an order placing the children, or such of them as it thinks fit, in the custody of a person other than a party to the marriage.

(4) Where the court makes an order placing a child of a marriage in the custody of a party to the marriage, or of a person other than a party to the marriage, it may include in the order such provision as it thinks proper for access to the child by the other party to the marriage or by the parties or a party to the marriage as the case may be."

Thus, running through the whole section is the paramount and dominant position the welfare of the child occupies in the variety of matters to be considered before making the order. If placing the child in the custody of either parents will not promote the welfare of the child, the court is not obliged to make such an order. Thus, when the learned trial judge in setting out the principle of law by which he would be guided said:

"It is well settled that in deciding matters such as this the claim of the petitioner should not be regarded as superior to that of the respondent, neither must the claim of the respondent be regarded as superior to that of the petitioner. It is the welfare of the child or children that must be regarded as the first and paramount consideration. It is also reasonable to say that the best arrangement for the welfare of any child is that he or she should be with his or her parents."

he was not in error.

All the justices of the Court of Appeal in their judgments approved the above statement as a true statement of law. However, Nnaemeka-Agu, JCA. in his lead judgment in the court below, went further to elaborate on the ingredients of custody when he said:

"I take the view that custody of a child essentially concerns not only control of the child but also carries with it the necessary implication of the preservation and care of the child's person, physically, mentally and morally. In other words, responsibility for the child in regard to his/her needs - food, instruction, clothing and the like (see Wedd v. Wedd (1948) SASR. 104, per Moyo, J. at p. 106). Although s.71 of the Matrimonial Causes Decree 1970 treats custody, guardianship, welfare, advancement or education of the child, as if they were separate subjects, it is sometimes difficult to consider any of them in isolation when considering the welfare of a child. They dovetail into each other."

It seems to me that order for custody must have in view the opportunity of sound education as well as physical and mental welfare. A parent who will deny these to his or her child is not worthy of an order for custody from the court.

An order of custody is not a penal order on either parent and should not be construed as such. It imposes a responsibility not to be lightly taken.

In the instant appeal, the evidence clearly established that Kafilat Abimbola Williams had been in the custody of the appellant since birth and that the appellant has borne single-handedly the cost of the education of the child at her own election so far.

The evidence established that the appellant holds a responsible post in the public service of Lagos State which made it impossible for her to give her best personal attention to the child during the hours of work. She however according to the evidence made suitable arrangements for the child's care and attention during the period. The respondent has only complained of the appellant's failure to give the child her personal attention. His proposal is to send the child to a boarding school abroad in Europe. Education or the opportunity for education is in the best interest of a child if it is in a proper environment. For a child of tender years, education outside the proper environment, i.e. country of origin is bound to give a distorted view of life and cannot, in the final analysis, be in the best interest of the child.

It appears to be the fashion among certain classes of people to regard provision of educational opportunities for children of tender years outside this country as the ultimate. Their judgment has not yet been called into question and until then, time will tell whether what has been done is in the best interest of the child.

In stating the principles on which custody is to be decided, the learned  editors of Rayden on Divorce Vol. 1 12th Edition at page 967 made references to the provisions of Guardianship of Minors Act 1971 and Guardianship Act 1973 both being English Statutes. The guiding principles enunciated in those Acts though not binding on this court, contain the kernel of the declarations in section 71 of our Matrimonial Causes Act 1970 and I will adopt them as the necessary intendment of our law. They are:

(1) Where in any proceedings before any court the custody or upbringing of a minor is in question, the court in deciding the question shall regard the welfare of the minor as the first and paramount consideration and shall not take into consideration whether from any other point of view the claim of the father in respect of such custody is superior to that of the mother or the claim of the mother is superior to that of the father.

(2) In regard to the custody or upbringing of a minor, a mother shall have the same rights and authority as the law allows to a father and the rights and authority of mother and father shall be equal and exercisable by either without the other.

(3) Nor is there necessarily any rule that mother has a paramount claim as against other relations, at any rate where the father is alive and support the application of those relations. In re A, an infant (1959) C.L.Y. 950 (1959) Times March 25th C.A.

(4) The welfare of the infant although the first and paramount consideration is not the sole consideration and the conduct of the parties is a matter to be taken into account. Re  L (infants) (1962) 3 All ER. 1

(5) The adultery of a party is not necessarily reason for depriving that party of custody unless the circumstances of the adultery make it desirable.

(6) All the circumstances must be considered. Re A (an infant) supra.

(7) The fact and advantages of brotherhood and sisterhood must also be considered when there is more than one child of the family and " it is proposed to give custody of one child to one person and another to a different person. *Wakeham v. Wakeham* (1954) 1

(8) There is settled rule that a child of tender years should remain in the custody of the mother Re B. (an infant) (1962) 2 All ER 872; W v. W and C (1968) 3 All ER 408 but obviously the care and supervision that a mother who is not out at work can give to little children is an important factor. *In Re O.* (infants) (1971) Ch 748 A (1971) 2 All ER 744 CA at 746, 752.

(9) In dealing with the questions of custody or access the court will have regard to the particular circumstances of each case always bearing in mind that the benefit and interest of the child is the paramount consideration and not the punishment of a spouse for misconduct. *B. v. B*. (1924) p. 176. B

(10) The wishes of an unimpeachable parent stand first. Re Thain, Thain v. Taylor (1926) Ch 676 approved in *Mckee v. Mckee* (1951) AC 352, 366; (1951) 1 All ER. 942, 949 PC.

There is nothing before the court to disqualify any of the parties from entitlement to an order for the custody of Kafilat Abimbola. It appears from the facts on record that she is now schooling in England. It must be that the appellant decided to make available to her the same opportunity for sophisticated western education as the respondent has made available to her two brothers. Be that as it may, the issue of custody is before this Court and still has to be determined.

There is no doubt that it had not been easy for the Court of Appeal to find any fault with the appellant in whose custody the child had been since  the separation. This is evident from the judgment of Nnaemeka-Agu, JCA. (with whom Pepple, JCA.) concurred, when he said:

"The absence of the respondent in this case made it impossible to judge either her character which could be decisive in such matters or to know that she has been exercising good care and attention on the girl in question. See H v. H & C (1961) 1 All ER. 262. p In the instant appeal, the appellant alone gave evidence; the respondent was absent due to no known reason."

With respect to the learned justice of the Court of Appeal, I would say that the absence of any evidence of her character made it impossible to judge her character. I would also go further to say that the absence of any evidence impugning her conduct in the exercise of care, control and supervision of the child made it impossible to damnify and condemn the appellant. The evidence led does not, in the least, amount to an indictment. On one view, it amounts to a commendation and a mother's concern for the welfare of her child.

The other adverse comment made by the learned Justice of the Court of Appeal is that since the evidence on the issue of custody was not sufficient, the appellant (then respondent before the Court of Appeal) did not ask the Court of Appeal for a new trial. In the words of the learned Justice:

"Although sometimes when evidence given by the parties on the issue of custody is insufficient, a new trial may be ordered (see W v. W (1971) 117 Sol. Ja 367 CA) in the instant case, the respondent had opportunity to testify but chose to rely on only the cross-examination of her solicitor which I have shown is inadequate, and she has not asked us for a new trial. I shall order none."

Having complained of the insufficiency of the evidence, the learned Justice of the Court of Appeal proceeded to hold:

"On the only evidence before the court, there can be no doubt that the appellant made out a good case for custody of his daughter."

This view of the evidence is totally different from the view held by the learned trial Judge. In his judgment, Oladipo, Williams, J. said:

"... It is reasonable to say that the best arrangement for the welfare of any child is that he or she should be with his or her parents. ... There is no evidence that the girl who now lives with the respondent is unhappy or is suffering unduly because she has not as yet been given the benefit of the sophisticated education which her brothers are now receiving abroad. The two sons could be more comfortable in their present environment in the United Kingdom and during their brief visits to this country but great comfort is not the criterion for measuring the welfare of a child. It has been held that if a parent could provide a home and the necessities of life to a child, he or she should not be deprived of custody unless guilty of misconduct. See *In re O'Hara* (1900) 2 I.R. 232. It is the evidence of the petitioner that the respondent is a Chief Magistrate in the Lagos State Judiciary and one should be able to say with some degree of certainty that the respondent should be able to afford to give her daughter the necessities of life. It should be mentioned that the petitioner did say in his evidence that the respondent usually left her daughter after school in the care of her friends while she is at work. Without any other evidence, this is no evidence that the girl is unhappy or likely to be unhappy... The desire of the petitioner that the girl be allowed to enjoy the more comfortable and sophisticated environment of her brothers is quite understandable but if one were to accede to that wish, one would be running the risk involved in breaking the tie which must have existed between the respondent and her daughter. See Laxton v. Laxton and Eaglan (1966) 2 All ER 977. I am of the considered opinion that it would be in the best interest of the children that the two sons should remain under the care and control of the petitioner and that the girl should remain with the respondent."

The position therefore is that there is no evidence before the Court to disqualify either parent from being awarded the custody of Kafilat Abimbola their daughter. The fact that she had been in the custody of the appellant since 1975 tilted the scale substantially in favour of the appellant. The absence of any evidence of plans and proposal for her future education is definitely against her while the evidence given by the respondent of his plans and proposal for her education is in his favour.

In the circumstances, an order for joint custody with care and control to the appellant and responsibility for education to the respondent will be most appropriate. It will meet the justice of the case and take care of the welfare of the child.

I refer to the case of *Allen v. Allen* (1948) 2 All ER. 413 - a decision of the English Court of Appeal. The facts are short and the headnote reads in part:

"...............................................................................................................................

After a decree of divorce had been granted to a husband on the ground of his wife's adultery, an order was made granting to the husband the custody, care and control of the daughter of the marriage aged 8 years who, until then had been in the care and under  the control of the mother. Since the decree absolute, the mother had married the co-respondent. The judge, in deciding to make the order regarded the moral welfare of the child as of paramount importance and took the view that the wife, having once committed adultery, was likely to do so again, and that as the husband was re-married to a wife against whose moral character no charge  could be made, he was more fit to have the care of the child, there was little to choose between the accommodation offered by the parties, but it was undisputed that the child was happy with her mother and making good progress at school and there was medical evidence to the effect that the child's health would suffer if she were separated from her mother.

On appeal by the wife against the order, Held, the judge had not applied the proper test, the welfare of the child both moral and physical, being the paramount consideration and therefore the appeal must be allowed."

In his judgment, Wrottesly, L.J. said at page 414:

"The welfare of the child, both moral and physical was the paramount consideration. It was impossible to say because a woman had once committed adultery, she was not a fit person vis-a-vis one who had not to look after a child. There was no suggestion that the mother was promiscuous or a bad mother or a bad housekeeper, or anything which made it undesirable for her to look after the child. All the evidence in the case is strongly in favour of leaving the child with her."

Evershed L.J., (as he then was) also commented in concurrence as follows:

"This court is always loath to interfere with the discretion of a learned judge but I agree that here we are compelled to do so. The learned judge seems to have read the word "moral" into S.1 of the Guardianship of Infants Act 1925 before "welfare". Further, he has inferred that a woman who has committed adultery will always repeat it. Both suppositions are wrong. It would not be right to snatch this female child of eight from her mother and force her to make a new start with her father and step mother. The court has sympathy with the father who has been gravely wronged and if he wants access to the child, not only on odd days, but for a substantial period during the holidays, he is entitled to have it."

In the case of Re W (an infant) (1963) 2 All ER. 706 at 711, Pennycuick, J. commented and I agree with him:

"I see force in the comment of the learned stipendiary that it is in the interest of the infant that the father should have a practical and effective interests in its education. I think however that this point is met to a great extent by the following considerations, namely:

(1) the fact that the mother had the custody would not prevent the father from making plans for the infant's education;

(2) any order relating to an infant is in its nature subject to reviews and where the custody of the infant is given to one parent, it is always open to the other parent to make a further application to the court;

(3) it is also open to either parent to apply to the Chancery Division by way of wardship proceedings, and that is probably the right course in a case of any complexity;

(4) if one parent has legal custody and the other care and control, and they are unable to agree, a further application by one or other to the court is probably inevitable in any case."

In this case, Pennycuiuk, J. held that he has no jurisdiction to award legal custody to one parent and care and control to another. But on appeal to the Court of Appeal, the decision was reversed. See R. W. (J. C.) (an infant) (1963) 3 All ER. In that case, Ormerod, L.J. at p. 462 said:

"It is true to say that the notion has developed considerably since 1886 for orders for divided custody to be made but I can see no reason why they cannot be made under the jurisdiction conferred by section 5 of the Act of 1886 without any unnecessary straining of the language of that section."

Upjohn, L.J. at p. 465 said on the same issue:

"It seems to me in those circumstances, quite impossible to construe this section as giving this very emasculated jurisdiction. The section plainly gives power to deal with custody not indivisibly but divisibly, that is to say in this sense, that the court can deal with each and every aspect of the constituent elements of custody. It can give care and control to one parent with access to the other and can vest the remaining constitutents of custody in the other as the stipendiary magistrates did in this case. Take for example, which does not arise here but which I have no doubt does frequently arise, parents may be of different religious beliefs and I can see nothing whatever to prevent care and control and charge of religious upbringing being committed to one parent and all the other constituents of custody vested in the other. This is a question of discretion in each case."

And Davies, L.J. said at p. 467:

"So if 'custody' as the learned judge thought means custody whole and undivided it seems to me that there is no power to make orders for access, such as have been made for over one hundred years by the divorce courts, there being no jurisdiction to make them. This is quite impossible conclusion."

I will therefore allow the appeal, set aside the decision of the Court of Appeal and in its stead, substitute the following orders:

The appellant and the respondent shall have joint custody of their daughter, Kafilat Abimbola Williams, the appellant exercising care and control of the child while the respondent takes charge of the education of the child. There will be no order as to costs.

**NNAMANI, J.S.C.:**

I had a preview of the judgment just delivered by my learned brother, OBASEKI, J.S.C**.** and I agree with him that the justice of this case lies in an order which would protect the interests of the child,

This is in many ways a most unfortunate case for it involves the avoidable tussle between two parents for the care and custody of their young daughter. The facts of this case and its journey from the High Court to this Court have been admirably set down in the judgment of my learned brother. I need not repeat them. The straight issue appears to be that while the learned trial Judge, Oladipo Williams, after hearing the evidence of the respondent granted custody of the girl to the mother, the Court of Appeal held in effect that there was no evidence on the basis of which the Judge could have made his findings or arrived at his conclusions. Much of the argument of learned counsel in their briefs of argument and before this Court centred around this issue. Oladipo Williams in his judgment had found as follows:

"There is no evidence that the girl who now lives with the respondent is unhappy or is suffering unduly because she has not as yet been given the benefit of the sophisticated education which her brothers are now receiving abroad .

.........

It is the evidence of the petitioner that the respondent is a Chief Magistrate in the Lagos State Judiciary and one should be able to say with some degree of certainty that the respondent should be able to afford to give her daughter a home and the necessities of life. It should be mentioned that the petitioner did say in his evidence that the respondent usually left her daughter after school in the care of her friends while she was at work. Without any other evidence there is no evidence that the girl is unhappy or is likely to be unhappy. The girl's situation, as I see it, cannot be very much different from the situations of other girls in our society today. The desire of the petitioner that the girl be allowed to enjoy the more comfortable and sophisticated environment of her brothers is quite understandable but if one were to accede to that wish, one would be running the risk involved in breaking the tie which must have existed between the respondent and her daughter."

Delivering the majority judgment of the Court of Appeal, Nnaemeka-Agu, J.C.A. was clearly not satisfied with these conclusions of the learned trial Judge. In his view, the learned trial Judge having found that the facts testified to by the appellant therein were established, ought to have come to certain conclusions. The learned Justice continued -

"He should have come to the conclusion that the nature of the respondent's duty and her constant travels do not give her enough time to take personal care of the girl in question and that she is left most of the time in the care of a maid and the friends of the respondent. There is indeed no evidence of the amount of care and attention those friends of the girl's mother give her. And there can be no gainsaying the fact that for a girl of ten years of age adequate parental care is an absolute necessity. The appellant's evidence above has put forward his intention to give his daughter as good an education as her brothers and has seriously damaged the respondent's claims to her custody. There is absolutely no evidence from the respondent to show what care or attention or type of education the girl is receiving now, so there is nothing to  compare with the proposals of the appellant".

In considering this delicate and sad case, it is perhaps safer to start with the generally accepted position that in deciding these matters such as custody, the interest of the child is paramount.

There can be no quarrel with, and indeed there was no quarrel, the statement of the law on this by the learned trial Judge.

"It is well settled that in deciding matters such as this the claim of the petitioner should not be regarded as superior to that of the respondent neither must the claim of the respondent be regarded as superior to that of the petitioner. It is the welfare of the child or children that must be regarded as the first and paramount consideration. It is also reasonable to say that the best arrangement for the welfare of any child is that he or she should be with his or her parents."

This objective is fully reflected in Section 71(1) of the Matrimonial Causes Act 1970 which provides that -

"In proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage the Court shall regard the interests of those children as the paramount consideration; and subject thereto, the court may make such order in respect of those matters as it thinks proper."

In according the child's interest paramountcy, there are a number of well settled considerations. For instance, there is no settled rule that a child of tender years should remain in the custody of the mother (See Re B (an infant) (1962) 1 All E.R. 872) although obviously the care and supervision that a mother who is not out at work can give to little children is an important factor. In *W v. Wand C* (1968) 3 All E.R. 408 the Court of Appeal in England held that it was right for the Court to be guided by the general principle that a boy of eight was on the whole, other things being equal better off with his father. It has also been settled that the fact and advantage of brotherhood and sisterhood must be considered when there is more than one child of the family and it is proposed to give custody of one child to one person and of another to a different person. *Wakeman v. Wakeman* (1954) 1 All E.R. 434 C. A. 435. It seems also accepted that the interest of the child can only be determined by the Court after hearing the relevant facts, relationships, claims and wishes of parents, risks, choices, other circumstances and weighing them. (See Rayden on Divorce 13th Edition Vol. 1 pp. 1035 and flq.). It  would seem to me to follow that material from both parents must be forthcoming for a proper consideration of all these issues mentioned above. Evidence of both parents is in my view imperative. Indeed such is the importance of the evidence of both parents that by Divorce Rule 92(4)(a) (which admittedly is not part of the law of this country) neither the applicant nor the respondent is entitled to be heard in support of or as the case may be, in opposition to any application for custody, care and control or access unless he or she is available at the hearing to give oral evidence or the Judge directs otherwise. In *H v. Hand C* (1969) 1 All E.R. 262 it was stressed that issues such as the custody and care and control of a child cannot be determined by the Court without hearing the oral evidence of the parties and their witnesses since the character and appearance of the respective parents is very often a decisive matter.

How then do these principles affect this case in which the appellant herein did not testify before the trial Court and the only evidence available was that of the Respondent? In his testimony before the learned trial Judge, the respondent said -

"I could pray the Court not to grant her request for custody of Abimbola. She has no time for her. She leaves for her work at 7 a.m. she leaves her in the care of maid, who will take her access (sic) the maids where they want to go and take taxi to school. In the afternoon, she is still in Court. She has arrangements with Mrs. Finnih and Mrs. Egbeyemi, her friends who collect her and help her until she goes to collect her in the evening. In the last two years she has been travelling in and out of the country leaving, the girl in the care of friends"

There was no evidence from the respondent to counteract the adverse portions of this testimony or even to explain and expatiate on those areas that are not necessarily against her. Yet it was on this evidence that the learned trial Judge made the inferences and deductions that eventually led to his order of custody in favour of the appellant.

Learned Senior Advocate, Mr. Lardner strenuously argued that there was enough even in that testimony to justify that order, and that there was no justification for the Court of Appeal to disturb the exercise of discretion by the trial Judge. These submissions follow the questions which he had identified as due for determination. These included the questions -

"Can it be affirmatively asserted that he gave improper weight to or ignored any of the relevant facts and circumstances?" and "was the majority decision of the Court of Appeal correct in law in re-opening the learned trial judge's decision in the exercise of his discretion and reversing his decision on the grounds upon which they did?"

It has been well settled by several authorities that if judicial discretion has been exercised not in bad faith, frivolously, or vexatiously but judiciously and judicially a higher tribunal should not disturb it because it would have exercised that discretion differently. See *University of Lagos and Anor. v. M. I. Aigoro* (1985) 1 N.W.L.R. (Pt. 1) 143; *Olaniyan v. University of Lagos* (1985) 2 N.W.L.R. (Pt. 9) 599. But it is also part of the law that the exercise of discretion must not be based on irrelevant considerations. Perhaps more apposite here, is the requirement that it must be based on sufficient materials. Were there sufficient materials before Oladipo Williams, J.? The answer is in my respectful view in the negative. No one who examines the testimony of the respondent before the trial Judge can come away with the impression that the appellant was not a caring mother. She made such arrangements as a caring working mother would make in the circumstances. Nor can anyone who examines this issue dispassionately conclude that the little girl would have received more care, if, as the respondent herein proposed, she was merely sent overseas to be visited occasionally by the respondent. Indeed I cannot agree more with Obaseki, J.S.C. that for a child of. tender years, education abroad may give a distorted view of life apart from robbing the child of knowledge of his own country of origin in which he will ultimately live and work. The question however is that evidence of the respondent alone was not enough for the Court to examine all the choices in an attempt to find what is in the child's best interest. As the appellant did not give evidence what is the relationship between her and the child in those hours they spend together after work and school? What is the child's reaction to her friends, indeed to the arrangements made for her comfort while the appellant was at work? Although it can be reasonably assumed that a Chief Magistrate, as the appellant was at the time, can provide the necessities of life for her daughter, But ought the court to assume too the circumstances of her home, her temperament etc. ? What were her proposals for the child's education and upbringing as against the respondent's assertion that - "I want Abimbola to join her brothers in the United Kingdom, read up to "A" levels and go to a University of her choice and come home for holidays"?

In my view the issue was not, as the learned trial Judge, seemed to have decided that there was no evidence that the child was unhappy or was likely to be unhappy. There ought to be positive evidence that the child was happy. 1 do not therefore think that there was sufficient material before the learned trial Judge on which to base his exercise of discretion. I am fortified in this view by the facts disclosed in a counter-affidavit sworn to on 10th January, 1985 by the appellant in support of an application for leave to appeal to the Supreme Court. Although paragraph 10 thereof was subsequently countered by the respondent, I averred that –

"the said female child is a sickler with acute asthmatic condition and has been receiving treatment in England at my expense and because of her disability she is now attending St. Anne's Infirmary School, Clevedon England in order to facilitate her treatment with the attendant educational instruction in the said school",

and in paragraph 12 she averred that -

"because the respondent has not set his eyes on the female child for almost eleven years now the said female child will be in the hands of strangers if she is removed and placed in the custody of the respondent pending the determination of my appeal."

Surely these materials and more in that affidavit ought to have been before the trial Court if it was to decide what was in the best interest of the child. It follows that I do not, with all respect, find anything wrong with the conclusion of Nnaemeka-Agu, J.C.A. that -

"it appears to me that although the learned trial Judge stated the principle of law that governs the situation correctly, that is, the paramountcy of the welfare of the child he was in error in not applying that principle to the legal evidence before him."

It is apposite to refer to the views of Davies L.J. in Re O (infants) (1971) 2 All E.R. 744 at 748. The learned Justice of the Court of Appeal in England said, and I agree with him, that,

"In my considered opinion the law now is that if an appellate court is satisfied the decision of the court below is wrong it is its duty to say so and to act accordingly ... Every Court has a duty to do its best to arrive at a proper and just decision. And if an appellate court is satisfied that the decision of the court below is improper, unjust or wrong then the decision must be set aside. I am quite unable to subscribe to the view that a decision must be treated as sacrosanct because it was made in the exercise of 'discretion': so to do might well perpetuate injustice".

If I disagree with the majority decision of the Court of Appeal it is over their failure to order a retrial when they obviously felt that would have met the justice of the case. The reason given for this was that the respondent before them did not ask for such relief. I am of the view that on the state of the evidence before them, particularly since the paramount consideration is the welfare of the child, the learned majority Justices could have made such an order under Order 3, Rule 23 of the Federal Court of Appeal Rules, 1981. The section gives power to the Court to -

"give any judgment or make any order that ought to have been made, and to make such further or other order as the case may require ..... These powers may be exercised by the court, notwithstanding that the appellant may have asked that part only of a decision may be reversed or varied, and may also be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have appealed from or complained of the decision."

I would myself have thought of an order of retrial for there is no doubt that this Court has power to make such an order under Order 8, Rule 13 of the Supreme Court Rules, 1985. I will, however, refrain from making such an order as even after the delay, expense, worry and trouble which it will entail, I am not sure that the result will meet the justice of this case. It seems to me that the circumstances of this case dictate another course if the Court is to arrive at a determination that will protect the interest of the female child or indeed all the children of the marriage. One cannot read all the papers in this case without coming to the unfortunate conclusion that unless decisive action is taken, the obvious bitterness which now pervades the relationship between the parties will spill over to the children. There is also a great danger of the children growing apart. A situation in which a young boy has to be introduced to his own sister of the whole blood is serious enough. The truculent nature of Exhibits 6 and 7, which I have no doubt may have arisen from the bitter feelings between the parties, is a clear indication that a custody order in favour of either parent cannot be in the overall interest of the child. I think that an order for joint custody of the girl with care and control in the mother, appellant, would more meet her interests. It has been said, as arose in *Jussa v. Jussa* (1972) 2 All E.R. 600 that a joint order of custody with care and control to one parent should only be made where there is a reasonable prospect that the parties will co-operate. One can only hope that the parties herein, who are indeed very responsible citizens, will co-operate. Mr. Lardner did indeed request for a coercive order, but I do not think this is necessary at this stage.

In the result, I would also allow this appeal, set aside the judgment and order of the Court of Appeal. In its place, I hereby adopt the order for Joint custody of the girl with care and control with the appellant made by Obaseki, J. S. C. For the avoidance of doubt, I wish merely to add that payment for the education and maintenance of the girl, Kafilat Abimbola Williams, shall be the responsibility of the father, respondent, and this will be by way of settlement of bills to be presented, by the mother, appellant, as and when due. I also endorse the order as to costs made by learned brother, Obaseki, J.S. C.

**KARIBI-WHYTE, J.S.C.:**

I have had the privilege of a preview of the judgment of my learned brother Obaseki, JSC. in this appeal. I agree with his reasoning and conclusion that this appeal be allowed.

The issue before us concisely stated, is whether the Court of Appeal was right in reversing the trial Judge's exercise of discretion and awarding custody of all the three children of the marriage to the petitioner; who was the Appellant in the court below, but is the Respondent before us.

My learned brother Obaseki, JSC. has stated the facts comprehensively. I need not repeat them. I merely will state very summarily, that this appeal arose from an uncontested petition by the Respondent for the dissolution of his marriage with the Appellant. Respondent wanted custody of the three children of the marriage, namely the two boys, Rasheed Ayodele Williams and Hakeem Akintola Williams, who were already under his care and at his expense at school in England; and the only girl of the marriage Kafilat Abimbola Williams, who was living with and under the care of the Appellant and was in school in Nigeria. Appellant was not contesting custody of the boys, but wanted access to them. She in answer to the petition, contested custody of the girl. At the hearing, Appellant did not testify in support of her application for custody. She did not put in appearance at the hearing. Respondent gave oral testimony in support of his application. The trial Judge awarded custody of the two boys to the Respondent, and awarded custody of the girl to the Appellant. This decision was reversed by the Court of Appeal which awarded custody of all the children to the Petitioner.

Appellant filed three grounds of appeal against the judgment of the Court of Appeal. All the grounds of appeal relate to errors by the Court of Appeal in interfering with the exercise of the discretion of the trial Judge with respect to the award of custody of a child of the marriage. The grounds raise five questions for determination as formulated in appellant's brief of argument. The questions are as follows:-

QUEST1ONS FOR DETERMINATION

"3.1. Did the learned trial Judge correctly direct himself as to the law applicable to the matter?

"3.2. Did he correctly identify all the facts and circumstances he had to take into account in reaching a decision?

"3.3. Can it be affirmatively asserted that he gave improper weight to or ignored any of the relevant facts and circumstances?

 "3.4. Can it be affirmatively asserted that his decision is otherwise wrong?

 "3.5. If the answer to Questions 1 and 2 are in the affirmative and to Questions 3 and 4 are in the negative, was the majority decision of the Court of Appeal correct in law in re-opening the learned trial judge's decision in the exercise of his discretion and reversing his decision on the grounds upon which they did?"

It is convenient to consider all the questions together since they cumulatively raise the single question of the application of the provisions of section 71(1) of the Matrimonial Causes Act 1970 which states as follows -

"(1) In proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage, the Court shall regard the interests of those children as the paramount consideration; and subject thereto, the court may make such order in respect of those matters as it thinks proper."

Both counsel in this appeal agree that the interest of the child is the paramount consideration in the determination of to who to award custody. This principle was recognised by the trial Judge who claims to have applied it to the evidence before him, when he said, at p.20:

"It is well settled that in deciding matters such as this the claim of  the petitioner should not be regarded as superior to that of the respondent neither must the claim of the respondent be regarded as superior to that of the petitioner. It is the welfare of the child or children that must be regarded as the first and paramount consideration. It is also reasonable to say that the best arrangement for the welfare of any child is that he or she should be with his or her parents."

The majority and minority judgments of the Court of Appeal also accept this principle. The only area of dispute in the Court of Appeal was whether there was sufficient evidence before the trial Judge in respect of which he could exercise his discretion to award custody of Kafilat Abimbola Williams to the Appellant. As I have already observed Appellant only answered to the Petition, but did not testify orally at the hearing. It is pertinent to set out portions of Appellant's answer to the Petition and the Petitioner's reply which affect the issue of custody of children of the marriage. They are as follows: -

"10. That she rejects and objects to the petitioner's proposal for the custody and supervision of the children particularly Abimbola."

In paragraph 11, Appellant gave reasons why she rejected totally the children being under the supervision of Madam Ayoka Akeju, and went on to make  specific proposals as to the custody of the children at paragraph 12 as follows:-

"12. The Respondent therefore makes the following proposals as to the custody of the children:

(a) That Rasheed Ayodele Williams shall continue to attend King's School, Canterbury Kent and from there proceed to a University of his Choice and SHALL be financed and wholly maintained by the Petitioner.

(b) That Hakeem Akintola Williams shall continue to attend King's Junior School, Canterbury Kent and from there proceed to King's School, Canterbury Kent or any reputable Secondary School in Britain from where he shall proceed to any University of his choice and shall be financed and wholly maintained by the Petitioner.

(c) That the respondent shall have full access to the two boys i.e. Rasheed Ayodele Williams and Hakeem Akintola Williams in their schools and that both shall be allowed to spend a reasonable part of their holidays spent in Nigeria with the respondent.

(d) That Kafilat Abimbola Williams shall continue to reside with the respondent and attend a reputable Primary School and thereafter proceed to a reputable Secondary School and University of her choice and shall be financed and wholly maintained by the respondent.

13. That the respondent by virtue of her professional training and sound financial status is capable and has the full ability to finance and maintain wholly the said Kafilat Abimbola to a standard that will be at par with that of her siblings.

14. That to take the said Kafilat Abimbola Williams out of the respondent now will cause an irreparable loss to her in life."

To these answers, the Petitioner replied as follows -

“10. With regards to paragraphs 10, 12(d), 13 and 14 of the Answers the petitioner takes serious objection to the Respondent's proposals for the upbringing of the children of the marriage in so far as they differ from paragraphs 7(b) (c) and (d) on the Petition.

11. The Petitioner avers that contrary to paragraph 13 of the Answer, the Respondent has not the capabilities, temperament nor the time to look after the said Kafilat Abimbola Williams.

12. The Petitioner avers that it will not be possible to raise the children of the marriage together in the same environment as siblings if custody of Kafilat is granted to the Respondent.

13. The Petitioner avers that the attitude of the Respondent is not in the best interest of the children. The Petitioner will rely on letters dated 27/7/76, 28/7/76 and 14/3/78."

This being the state of the pleadings, the Petitioner has joined issue with the ability of the Respondent to look after all the children and in particular, Kafilat Abimbola Williams, or the desirability of the children being brought up in different environments. It was in the circumstance obvious that it was necessary for the parties to give oral evidence in support of the issue so contested. Unfortunately, the learned trial Judge relied on this same issue that was being contested, without the oral testimony of the Respondent, in determining that she could have custody of Kalifat Abimbola Williams.

He said,

"There is no evidence that the girl who now lives with the respondent is unhappy or is suffering unduly because she has not as yet been given the sophisticated education which her brothers are now receiving abroad. The two sons could be more comfortable in their present environment in the United Kingdom and during their brief visits to this country but great comfort is not the criterion for measuring the welfare of a child. It has been held that if a parent could provide a home and necessities of life to a child, he or she should not be deprived of custody unless guilty of misconduct. - See (*In re O'hara* (1900) 2 I.R. 232). It is the evidence of the Petitioner that the Respondent is a Chief Magistrate in the Lagos State Judicial and one should be able to say with some degree of certainty that the respondent should be able to afford to give her daughter, a home and necessities of life. It should be mentioned that the petitioner did say in his evidence that the respondent usually left her daughter after school in the care of her friends while she was at work. Without any other evidence there is no evidence that the girl is unhappy or is likely to be unhappy. The girl's situation as I see it cannot be very much different from the situation of other girls in our society today. The desire of the petitioner that the girl be allowed to enjoy the more comfortable and sophisticated environment of her brothers is quite understandable, but if one were to accede to that wish, one would be running the risk involved in breaking a tie which must have existed between the respondent and her daughter - see *Laxton v. Laxton and Eaglan* (1966) 2 All E.R."

He then concluded based on the above reasoning, as follows -

"I am of the considered view that it would be in the best interest of the children that the two sons should remain under the care and control of the petitioner, and that the girl should remain with the respondent."

He then gave access to either parent in respect of the children. The views expressed cannot be said to have been based on any evidence before him since the answers to the petition were disputed by the petitioner. I think the Court of Appeal was right to observe in its majority judgment that:

"In considering whether the learned Judge exercised his discretion correctly I must bear in mind also the fact that the disputed issue of custody of a child must of necessity be settled on the evidence before the Court and that that makes the appearance of the parties in Court rather imperative. The absence of the respondent in this case made it impossible to judge either her character which could be decisive in such matters or to know that she has been exercising good care and attention on the girl in question. - (see *H v. H. & C*. (1969) 1 All E.R. 262)" The Court of Appeal observed on the failure of the Appellant to testify and that the oral testimony of the Petitioner now Respondent stood unchallenged. Custody of Kafilat Abimbola Williams was accordingly awarded to the Petitioner.

This is a very delicate case involving determination of the fragile future of a young adolescent. The solution was made intractable by the behaviour of the two recalcitrant parents who preferred the false notions of their self-esteem and vanity to becloud what they should appreciate to be in the best interests of their children. The only issue here is the question of the custody of Kafilat. As has been stated, the trial Judge gave custody to the Respondent in the exercise of his discretion when there was no evidence before the Court for the exercise of his discretion.

The Court of Appeal having set aside the exercise of discretion by the trial Judge, exercised its discretion in favour of the Respondent probably on the evidence before the Court of trial. The only evidence of what Respondent proposed to do for Kafilat Abimbola Williams, is contained in his evidence before the Court which was as follows -

"I want Abimbola to join her brothers in United Kingdom read to up to "A" Level and go to a University of her choice and come home for holidays."

This was the proposal of the Respondent having disputed Appellant's capability in looking after Kafilat.

Mr. Lardner S.A.N. for the Appellant has argued that the testimony of the Respondent was not sufficient to justify the order of the Court of Appeal granting him custody of Kafilat. I agree that an exercise of discretion founded on irrelevant considerations, or on matters not before the Court as the trial Judge did in this case, will be set aside on appeal - See *Jammal Engineering Co. Ltd. v. Mist (Nigeria) Ltd.* (1972) 1 All NLR (Pt. 1) 322. It is however well settled principle that a Plaintiff can only succeed on the strength of his own case , and not on the weakness of the case of the opponent - See *Kodilinye v. Odu* (1935) 2 W.A.C. A. 336. Thus in the question of custody the Petitioner must show that his proposal for Kafilat is in her best interests. It is not sufficient to show that Respondent made no proposals.

The Court of Appeal having established that the trial Judge did not exercise his discretion on any evidence properly before him, went on to grant custody to the Respondent on the only evidence before the Court. The Court of Appeal by granting custody to the Respondent on the evidence before him was substituting his discretion for that of the trial Court. This Court of appeal cannot do so. - See *Enebeke v. Enebeke* (1964) 1 All NLR 102. The Respondent is only entitled to custody on the evidence before the Court. It is not in my respectful view sufficient ground to grant custody to the opposite party merely because one of the parties asking for custody has failed to satisfy the requisite tests.

In this case, the Court of Appeal was unable to consider other factors because appellant did not appear orally to testify before the trial court to enable the trial judge determine her character. Furthermore, there was no adverse comment in connection with appellant's exercise of her care and supervision of Kafilat. This made it impossible for any condemnation of her conduct. It seems to me that the Court of Appeal appreciated that in the circumstance where a trial court grants custody where there was insufficient material before it to exercise its discretion to grant custody, the proper order to make is for a new trial. The court said,

"Although sometimes when evidence given by the parties on the issue of custody is insufficient, a new trial may be ordered (see *W. v. W.* (1971) 1 17 Sol. J. 367 C. A.). In the instant case, the respondent had opportunity to testify but chose to rely only on the cross-examination of her solicitor which I have shown is inadequate, *and she has not asked us for a new trial. I shall order none. "*

Because the Court of Appeal did not consider it fit to order a new trial, their Lordships decided to grant custody to the Respondent, as they said, "on the only evidence before the Court." As I have already pointed out in this judgment, the only evidence pertaining to the interest of Kafilat, was the proposal for her to join her brothers in the United Kingdom , to live and continue her studies there.

It is now well settled that in proceedings with respect to the custody of children the Court shall regard the interests of the children as of paramount consideration. The determination of the welfare of a child is a composite of many factors. Considerations such as the emotional attachment to a particular parent, mother or father; the inadequacy of the facilities, such as educational, religious, or opportunities for proper upbringing are matters which may affect determination of who should have custody. What the court deals with is the lives of human beings and ought not to be regulated by rigid formulae. All the relevant factors ought to be considered and the paramount consideration being the welfare of the child. By paramount consideration, I mean pre-eminent and superior consideration. *In Re L (infants)* (1962) 3 All ER. 1, it was held that "paramount" does not mean exclusive. So regard should be had to considerations other than the predominant factor.

On a careful consideration of the totality of the averments in the petition, the answers by the Respondent, the reply by the Petitioner and the oral testimony of the Petitioner before the trial Judge, it is clear that the welfare of Kafilat was the paramount consideration of both the appellant and the Respondent. Both are determined and anxious to do their best in the interest of their child. There is no evidence to disqualify either party from being awarded custody. There are two factors worthy of consideration. First, in favour of the Appellant is the fact of Kafilat being a girl of tender age and in her care and custody since 1975. Secondly, the absence of any evidence of emotional attachment to the Appellant, and proposal for her future education is definitely against her. On the other hand, the proposal for the future education of Kafilat by the Respondent even if in far away England and away from both parents is in favour of the Respondent. The fact that Kafilat has never lived with respondent is against him. In the circumstance an order for joint custody by both parents is in my opinion the ideal solution. Whilst care and control is with the Appellant, the responsibility for education shall be in the Respondent.

In a case like this one where both parents are eminently qualified, able and anxious to give affection and proper guidance to their child for whom they are responsible; they are likely to co-operate and swallow their vanity in the interest and welfare of the child because of the affection they have for the child. There can be no real objection in this circumstance for an order for joint custody. - See *Jussa v. Jussa* (1972) 2 All E.R. 600 at p.603. Mr. Lardner had requested for a coercive order. I do not think that is necessary.

I would also allow this appeal, set aside the judgment and order of the Court of Appeal. I also adopt the order for joint custody of the girl, Kafilat Abimbola Williams, with care and control to the Appellant made by Obaseki, JSC. The Respondent shall be responsible for the education and maintenance of Kafilat Abimbola Williams, and this will be by way of settlement of bills to be presented by the Appellant, as and when due.

There shall be no order as to costs.

**KAWU, J.S.C.**:

I had the privilege of reading in draft the lead judgment of my learned brother, Obaseki, J.S.C. which has just been delivered. I am in complete agreement with his reasoning and conclusions. I am also of the view that in the circumstances of this case, an order for joint custody will be most appropriate. Accordingly, I too will allow the appeal, set aside the decision of the Court of Appeal and direct that the appellant and the respondent should have joint custody of their daughter, Kafilat Abimbola Williams - the appellant exercising care and control of the child while the respondent takes charge of the education of the child. There will be no order as to costs.

**OPUTA, J.S.C.:**

I have had a preview in draft of the lead judgment just delivered by my learned brother Obaseki, J.S.C. and I am in whole and entire agreement with his reasoning and conclusions. I also agree with him that in the surrounding circumstances of this case the main issue is not as between the mother/Appellant and the father/Respondent who is right or who is wrong. That is not the issue. Rather the issue is and had always been - what arrangements will best minister to, and satisfy, the interest of the child of the marriage Kafilat Abimbola Williams.

By Section 71(1) of the Matrimonial Causes Act No. 18 of 1970:-Section 71-(1) In proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage the Court shall regard the interests of these children as the paramount consideration, and subject thereto, the Court may make such order in respect of those matters as it thinks fit".

In custody cases, orders made are by no means aimed at punishing the so-called guilty partner. That would be wrong. Instead any order made is, or should be aimed at getting what is best for the children in the surrounding circumstances of each particular case. And what is best must of necessity relate to the welfare, the progress and advancement as well as the education of the children of the marriage. I agree with Nnaemeka-Agu, J.C.A. that the "interests of those children" as used in Section 71(1) of Act No. 18 of 1970 contemplates, includes and comprehends their welfare, physical and moral, plus their advancement, mental and material, plus their education in the proper sense of that word. All these have to be considered not disjointly and severally but jointly and as complementary and supplementary to the overall interest of the children.

The divorce mentality (as shown in this case as well as in every other case where the custody of children of the marriage becomes a burning issue) reveals an intrinsic contradiction. As long as the marriage subsists no issue as to custody will arise. Both parents are ex debito justitia entitled to the love, affection and company of their children. That is their natural and moral right. These parents break up their marriages and start a fight to finish battle for that which was theirs as of right - the custody of children of the marriage. If all the time, energy, money, and effort put in fighting custody cases are expended in saving the marriage, Nigeria will surely be better for that.

In this case the father had the two boys of the marriage, Rasheed Ayodele Williams and Hakeem Akintola Williams comfortably placed in very good schools in England. He wants the girl, Kafilat to enjoy the same privileges of "better education" as her brothers. This is a praiseworthy aim. But as was aptly observed in the lead judgment such an education may only succeed in giving the child "a distorted view of life". An Education that alienates a child from his roots, its soundness otherwise notwithstanding, is to be viewed with a suspicious eye by the Court in custody cases. A Nigerian should be trained to life in Nigeria and not to become an expatriate in his own country. Sending children too young to England may produce that result. This issue however is no longer a life issue in this appeal as all the three children of the marriage are now studying in England. I wish them luck.

The other issue one might comment upon is the desirability of brothers and sisters - children of the same marriage growing up together and understanding one another and being an inspiration and help each to the other. At least this is the African concept of family relationship. The break of this marriage has been an assault on this concept. The two boys have not met their sister Kafilat since 1975. One only hopes that the injury the breakup of this marriage had done to the children's relationship of brothers and sister can be repaired by the order made in this appeal.

From 1975 the girl Kafilat had been in the custody of the mother. That was good. I do not for one moment subscribe to the view that a boarding school in England is a fitting substitute for a mother's care and attention. There are periods in a girl's life when she is undergoing the slow advance to maturity when she needs her mother to discuss and answer her many questions about herself, her development both physiological and psychological. This again is no longer a life issue as the Appellant has at last succumbed to the temptation of sending her daughter to school in England may be to prove that she too can do it. Yes, but who suffers? - the children of course.

In the final result and for all the reasons given above and the much fuller reasons in the lead judgment of my learned brother Obaseki, J.S.C. which I now adopt as mine, I, too, will allow this appeal and order that **:-**

The Appellant and the Respondent shall have joint custody of their daughter, Kafilat Abimbola Williams, the Appellant exercising care and control of the child while the Respondent takes charge of and pays all the expense incurred in the education of their daughter Kafilat. I, too, will make no orders as to costs.

Appeal Allowed

Joint Custody Granted