**Midwa v Midwa**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of Ruling:** 31 July 2000

**Case Number:** 197/2000

**Before:** Kwach, Tunoi and Keiwua JJA

**Sourced by:** LawAfrica

**Summarised by:** H K Mutai

*[1] Children – Custody – Custody of children given to husband – Principles to be applied in custody*

*disputes where children are of tender age – Whether mother should be deprived of custody of the*

*children.*

*[2] Practice – Application for stay of execution – Divorce petition – Grounds of cruelty – Wife tested*

*positive for HIV – Court order given removing wife from matrimonial home – Whether wife should be*

*allowed back in matrimonial home.*

**Editor’s Summary**

In January 2000 the Respondent filed a petition before the High Court seeking a divorce from his wife of ten years on the grounds of cruelty. In particular, he alleged that the Applicant, having tested HIV-positive around December 1996, was endangering his life and that he could not live under the same roof with her. On 6 June 2000, the High Court ordered that the Applicant be expelled from the matrimonial home and consigned to the servants’ quarter and that the Respondent be awarded custody of the parties’ two children pending the hearing of the cause. The Applicant applied to the Court of Appeal for stay of the High Court’s orders pending the hearing and determination of her appeal against them. She contended that part of her salary went towards the payment of the mortgage on the house and it was therefore totally unjustified for her to be confined to the servants’ quarter. She also averred that no exceptional circumstances existed to justify giving custody of the children to the father.

**Held** – The order compelling the Applicant to live in the servants’ quarter of her own house, whose mortgage her salary was servicing, was traumatizing, dehumanizing and likely to adversely affect her health. All things being equal, children of tender age ought to be with their mother and, in giving custody of such children to the father, it was incumbent on the court to ensure there were sufficient grounds for doing so; *Re S (an infant)* [1958] 1 All ER 783 and *Karanu v Karanu* [1975] EA 18 applied. The High Court judge had erred in applying this principle as no exceptional circumstances had been shown to justify depriving the mother of custody. The intended appeal was thus arguable, the application would be allowed and the Applicant restored to the matrimonial home.

**Cases referred to in ruling**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**”

means disapproved; “**DT**” means doubted; “**E**” means explained; “**F**” means followed; “**O**” means

overruled)

***East Africa***

*Karanu v Karanu* [1975] EA 18 – **AP**

***United Kingdom***

*Re S (an infant)* [1958] 1 All ER 783 – **AP**