



**HML v JKK (Family Appeal E037 of 2023)  
[2024] KEHC 15325 (KLR) (29 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15325 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY APPEAL E037 OF 2023**

**G MUTAI, J**

**NOVEMBER 29, 2024**

**BETWEEN**

**HML ..... APPELLANT**

**AND**

**JKK ..... RESPONDENT**

**JUDGMENT**

1. In a decision delivered on 27<sup>th</sup> November 2023, the trial court ordered that the Respondent herein (the defendant in the matter before the court below) would have the actual physical custody of children herein, with the Plaintiff having custody during the first part of the (school) holiday and on every Saturdays during the school term, from 7 am to 6 pm.
2. The execution of the ruling was suspended to enable the Court to obtain the Children Officer’s report. This was expressed in the following terms:-
  - “2. That this order shall, however not take effect until the children officer of the sub-county where the children reside does prepare a social enquiry report informing the Court:-
    - where the defendant lives and with whom;
    - whether the minor attended the last term of his school and in which school;
    - and
    - where the Plaintiff lives and with whom.”
3. The Appellant was aggrieved by the said decision and filed the instant appeal. The appeal raises seven grounds to wit:-



1. The learned trial magistrate erred in law and in fact, in handing over the custody of the minor to the Respondent without considering the fact that at the time of her ruling, the minor was in the custody of the Appellant;
  2. The learned trial magistrate erred in law and, in fact, by failing to consider the fact that the appellant is the biological father of the minor and, therefore, well placed to have the custody of the minor as opposed to the Respondent, who is the minor's grandmother;
  3. The learned trial magistrate erred in law and, in fact, in finding that before the demise of the minor's mother, she was the one who had custody of the minor and without considering the fact that the Respondent never at any given time stayed with the minor, but ended up handing the custody of the minor to the Respondent;
  4. The learned trial magistrate erred in law and in fact by finding that the minor's education was disrupted without considering the overwhelming evidence that the minor at no given time changed school;
  5. The learned trial magistrate erred in law and fact in finding that the minor and his sister were in the same school when the overwhelming evidence on record is to the contrary;
  6. The learned trial magistrate erred in law and, in fact, in finding that the separation of the minor from his sister was traumatic without taking into consideration the fact that the minor was 7 years old and the sister 17 years old and hence shared nothing in common;
  7. The learned trial magistrate erred in law and fact in not taking into account the best interest of the minor given that the minor is well settled with the Appellant, and it will be disruptive and traumatic to hand him over to the Respondent against his will.
4. The Appellant, therefore, prayed that the ruling and or orders of the trial Court of 27th November 2023 be set aside.
  5. The appeal is in respect of the decision of the Court on an application for custody by the appellant. The main suit has not been heard. As is evident from the ruling, the Court could not tell at the time of the delivery of the ruling which party had custody of the child TIL and whether the said child had attended school in the then-current school term. It was for that reason that the report of the Children Officer was sought.
  6. The appeal was canvassed by way of written submissions.
  7. The submissions of the Appellant are dated 8<sup>th</sup> August 2024. The Appellant condensed his seven grounds of appeal into two to wit that:-
    1. The trial magistrate failed to consider that the appellant had custody at the time the ruling was delivered;
    2. The learned trial magistrate erred by failing to consider that the appellant was the biological parent of the child as opposed to the Respondent, who is the minor's grandmother.
  8. The submissions of the Respondent are dated 12<sup>th</sup> August 2024. The Respondent's counsel submitted that the appeal was premature as the decision of the trial Court was suspended awaiting the receipt of the report of the children's officer. Counsel urged that the matter be remitted back to the trial Court for its final orders on the interim application, which is awaiting the hearing of the main suit.



9. Counsel submitted that the minor has a sister and that it wasn't desirable that he be separated from her. It was urged that the Court ought to balance the interests of the two children, who are siblings. Counsel submitted that the appellant took custody through subterfuge.
10. Reliance was placed on the following cases AM vs MAM [2012]eKLR and AWK v JS [2021] KEHC 3863 (KLR) for the proposition that the appeal ought to be dismissed.
11. I have read the submissions of the parties and carefully considered the record of appeal.
12. It is evident that the trial on merits has not taken place. The facts are thus disputed.
13. In adjudicating this matter, I must have regard to the best interests of the subject child under Article 53(2) of *the Constitution* and Section 8(1) and (2) of the *Children Act*, 2022. These two provisions of *the Constitution* and the law are well-known and need not be rehashed here.
14. Section 32 of the *Children Act*, 2022 states that:-  
“  
“(1) Subject to the provisions of this Act, the parents of a child shall have parental responsibility over the child on an equal basis, and neither the father nor the mother of the child shall have a superior right or claim against the other in the exercise of such parental responsibility whether or not the child is born within or outside wedlock.”  
Section 34(1) of the said Act provides that:-  
“(1) On the death of the mother of the child, the father of the child, if still living, shall have parental responsibility for the child either alone or with the testamentary guardian (if any) appointed by the mother.”
15. It is not disputed that the Appellant is the child's father while the Respondent is the grandmother. As the father of the child, the Appellant has the primary claim to his custody, as the sole surviving parent, unless it was shown by cogent evidence that he is unsuitable, and that it would therefore be in the best interest of the child to grant custody to the grandmother.
16. I agree with the decision of the Court MJC VS LAC & Another ( 2020) eKLR where it was held that:-  
” there can be no basis for imposing parental responsibility on a person except in limited circumstances provided under the *children Act*, where guardians are appointed and take up parental responsibility for the child...”  
and  
“the appellant being the surviving parent, has parental responsibility for the child absent of any legal guardian to act jointly with him. I find that it is the best interests of the child in this cause to be placed in the custody of the surviving parent, her father. No exceptional circumstances have been demonstrated to justify why the appellant should not have full custody of his child.”
17. section 11 of the *Children Act*, 2011, gives children the right to live with and be cared for by their parents. There is no corresponding right in respect of the grandparents.



18. Onyiego, J in SNM v Sub-County Children’s Officer & another[2022] KEHC 12758 (KLR) held as follows:-

“My understanding of Section 83(3) of the children Act is that priority in granting custody of a minor is given to the parent unless there are exceptional circumstances to exclude such parent from assuming custody. The allegation that the deceased and the 2<sup>nd</sup> respondent were not married under Kamba customary law hence the father cannot claim custody is not tenable. We are not dealing with the issue of marriage in this case in which the 2<sup>nd</sup> respondent claimed that he was married to the deceased customarily. Under section 6(1) of the Children Act, a child shall have a right to live with and to be cared with by his parents. This is further recognized by the Constitution under Article 53 (1)

19. In my view, the trial court made decisions about custody without first establishing the facts of the matter. In so doing, the court erred.

20. Given that the parties had very diametrically opposed views on custody, it was incumbent on the trial Court to first ascertain facts before delivering its ruling. To the extent that it called for the report of the Children’s Officer after making its decision, the Court, in a nutshell, in my view, put the cart before the horse.

21. In the circumstances, I find and hold that the trial Court erred in its decision. The appeal is thus allowed. I order that the status quo currently holding be maintained while the trial continues so that the Court below can decide on the merits of the suit. In the interest of justice, I order that the hearing of the main suit be done on a priority basis.

22. As this is a children's appeal, each party shall bear his/her own costs.

23. It is so ordered.

**DATED AND SIGNED AT MOMBASA THIS 29<sup>TH</sup> DAY OF NOVEMBER 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of: -

Mr Makau, for the Respondent;

Mr Ajigo, for the Appellant; and

Arthur - Court Assistant.

