



JJK v DB (Civil Appeal 207 of 2023) [2024] KEHC 16379 (KLR) (23 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16379 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 207 OF 2023
RN NYAKUNDI, J
DECEMBER 23, 2024**

BETWEEN

JJK APPELLANT

AND

DB RESPONDENT

(Being an appeal from the judgment delivered by Hon. Keyne Odhiambo Gweno (SRM) on 5/10/2023 at Eldoret in Children Case No. 76 of 2017)

JUDGMENT

Representation:

M/s Kiplat J Misoi & Co Advocates

Isiaho Sawe & Co. Advocates

1. This appeal arises from a judgment delivered in Eldoret Children’s Case No. 76 of 2017. The Appellant is aggrieved by the decision of the Honourable Keyne Odhiambo Gweno (SRM), and has preferred this appeal. In the suit before the lower Court, the Appellant was the Plaintiff. In her Complaint, the Appellant sought for actual custody of their two children and further sought that the Respondent be compelled to maintain the children. The Appellant alleged that their marriage had broken down and that she left her matrimonial home leaving the Respondent with their two children. The two issues are boys: BKT – born on 2/09/2010 and MKT – born on 3/10/2012.
2. After hearing the parties, the trial Magistrate rendered his decision on 5/10/2023 directing as follows;
 - a. The Defendant shall have actual/physical custody of the two minors herein.
 - b. That legal custody of the two minors shall be shared jointly between the Plaintiff and the Defendant.



- c. The Plaintiff shall have unlimited access to the minors with prior arrangements between the parties herein.
 - d. The custody of the two minors shall be shared equally between the Plaintiff and the Defendant during school holidays.
 - e. The Plaintiff shall provide monthly upkeep of Kshs.6,000 for maintenance of two minors.
 - f. The Defendant shall continue to provide school fees and other school related expenses, medical needs, shelter, food and clothing for the two minors.
 - g. Each party to bear their own costs.
3. Aggrieved by the said judgment the Appellant filed a Memorandum of Appeal dated 24/10/2023 listing the following grounds:
1. That the Learned Trial Magistrate erred in law and in fact in failing to appreciate the tender age of the two minors.
 2. That the Learned Trial Magistrate erred in law and fact in failing to award full custody of the minors to the Appellant.
 3. That the Learned Trial Magistrate erred in law and in fact in failing to call for the opinion of the children in awarding custody to the Respondent.
 4. That the Learned Trial Magistrate erred in law and fact in failing to consider the evidence on current marital status of the Respondent to another wife in granting custody of the minors to the Respondent.
 5. That the Learned Trial Magistrate erred in law and fact in proceeding to direct the Appellant pay Kshs.6,000/= per months to the Respondents towards maintenance, not considering the existence of another wife and current economic situation in the country and the ability of the Appellant.
4. The appeal was canvassed vide written submissions. The Appellant filed her submissions on 9/08/2024 while the Respondent filed on 6/11/2024.

The Appellant's Submissions

5. Counsel for the Appellant submitted that the Appellant is appealing against the orders of custody and maintenance made by trial Court. Counsel further submitted that the trial Court granted custody to the Respondent and ordered the Appellant to meet the maintenance costs of the minor while in custody of the Respondent..
6. Counsel urged that the appeal raises the pertinent question off the best interest of the child principle which is of paramount importance in arriving at a fair decision in this appeal. In that regard Counsel cited Article 53 and the *Children Act*, 2022 and the Convention on the Rights of a Child (CRC) which underscore the centrality of the child's best interest.
7. Counsel submitted that it is Appellant's contention that the minors, being of tender age are better placed being in the custody of the Appellant, who is their biological mother. According to the Appellant, the Court erred in granting custody of the two minors to the Respondent who is married to another wife hence subjecting the minors to extreme hardship adjusting to the living environment of the Respondent's new wife.



8. Counsel contended that the Court also erred in directing the Appellant to meet the monthly maintenance of the minors without due regard to the fact that the minors are in boarding school and also in the hands of the Respondent's second wife.
9. Counsel urged that the Appellant through this appeal in asking for an order of the return of the minors legal and actual custody in her favour and quashing of the maintenance order against her.
10. According to Counsel, the trial Court misinterpreted the best interest principle by awarding legal custody of the minors to the Respondent without granting the access to the Appellant, that the Court failed to appreciate the wishes of the Appellant with respect to custody and maintenance. Additionally, Counsel submitted that the trial Court failed to appreciate the psychological harm caused to the minors while in custody of the Respondent and also did not take into consideration the best interest principles in granting custody of the minors to Respondent. Counsel maintained that the main principles which the Court disregarded are stability of the proposed living arrangement and the Respondent's ability to give the minors love, affection and guidance.
11. Counsel further submitted that during the trial, the issue of the minor's mistreatment by the Respondent emerged. Counsel added that the other principle ignored by the trial Court was the minors adjustment to their new mother and the impact to their general upkeep, growth and well being and the inability and unwillingness on the part of the Respondent to allow the minors visit the Appellant during holiday or the Appellant to visit the minors in their respective schools. Counsel contended that the Respondent herein has denied the minors their freedom to visit the Appellant who is their biological mother. Counsel maintained that any parent, whether providing or not should have custodial right over a child. Counsel reiterated the sentiments in Article 53 (2) of *the Constitution* and relied on the Supreme Court decision in MAK Vs. RMAA & 4 Other [2023] eKLR.

The Respondent's Submissions

12. Counsel for the Respondent submitted that the Appellant moved the trial Court vide Eldoret Children's case No. 76/2017, that in her plaint dated 31st March, 2017, she sought among others custody orders, that alongside the plaint, the Appellant filed an interim custody application of even date, (31/03/2017) seeking the custody of the subject minors pending the hearing and determination of the substantive suit, that the application was determined in favour of the Respondent vide the ruling delivered by the trial Court on 29th September, 2017 when the Respondent retained the custody of the minors, that in an ardent attempt to overturn the said custody orders, the Appellant lodged an appeal before this vide Civil Appeal No. 15 of 2020 and that in the appeal the Appellant herein filed a Notice of Motion dated 4th February, 2020 seeking inter alia to have the interim custody of the subject minors vested in her while awaiting the determination of the main case, that the said application was dismissed by Lady Justice Olga Sewe vide a ruling she delivered on 14th September, 2021 and the Respondent retained the custody of the minors as directed by the trial Court. Counsel added that in dismissing the application as aforesaid, the Learned Judge noted that the prayers sought in the application were similar to those sought in the main appeal hence the same could not be granted vide the interim application as sought.
13. Counsel contended that the Appellant neither appealed against the above decision to the superior Court nor prosecuted the appeal to its logical end, more than four years later.
14. Counsel added that the matter before the subordinate Court proceeded for hearing on merit when the trial Court on considering the fact that it was indeed the Appellant who abandoned the minors a formative age in March, 2017 confirmed the interim orders of custody in favour of the Respondent



vide its judgment delivered on 5th October, 2023 and that this judgment is what forms the gist of this appeal.

15. According to the Appellant, it is an undisputed fact that the Appellant deserted their matrimonial home in March, 2017 in the absence of the Respondent leaving the minors behind. It is on the basis of the abandonment of the minors at a very tender age that the Respondent urged the trial Court to consider her as an uncaring and reckless mother hence undeserving of the custody orders she sought, that in buttressing the Appellant's unsuitability to have the custody of the children, the Respondent told the Court that she has always been cruel to the children by meting her anger on them whenever they disagreed, that it is his undisputed case that the Appellant's harassment caused the children to suffer untold mental anguish and that this can be well demonstrated by the children's refusal to live with the Appellant albeit access orders having been granted by both the subordinate Court and Lady Justice Olga Sewe in favour of the Appellant. Further Counsel submitted that it is not in dispute that the subject minors have been in the sole custody of the Respondent from March, 2017 to-date, the allegations that the Respondent had remarried hence exposing the minors to harassment by their step-mother were never substantiated, the alleged mistreatment of the minors was also not corroborated by any evidence hence remain mere allegations and the learned judge observed in her ruling that albeit the said allegations having been stated by the Appellant, the children indeed preferred living with their father. the Respondent herein.
16. Counsel maintained that having had the actual/physical custody of the minors for the past seven (7) years, the Appellant has not demonstrated to this Court why the said status quo should be changed. Section 104 of the Children's Act, 2022 frowns upon the removal of children from where they have called home for a continuous period of three (3) years and that the subject minors have been with their father for a period of seven (7) years. Counsel urged the Court to sustain the existing status quo, that the Appellant has not demonstrated any harm that has been suffered by the children in the hands of their father for that period and that the insinuation created by the Appellant that the minors need her since they are of tender years is a far cry from the truth, that the subjects are currently aged over 14 and 12 years respectively hence do not fall within the bracket of children of tender years as stipulated by the law. Furthermore, Counsel submitted that the Appellant chose to abandon them at the tender ages of 7 and 4 and a half years and that is the period the children needed her most. Counsel cited the case of Mbogo and another vs Shah the Court underscored the fact that an appellate Court should exercise caution when dealing with discretionary powers exercised by the trial Court.
17. In regard to whether this appeal is properly before this Court, Counsel submitted that having already noted that the issue of custody was dealt with by Hon. Lady Justice Olga Sewe in favour of the [Respondent vide High Court Appeal No. 15 of 2020](#), the same is thus res judicata and the Appellant cannot be heard to be asking this Court to sit in an appellate position over a decision rendered by a Court of concurrent jurisdiction. Additionally, Counsel submitted that the Appellant is indeed guilty of abusing the due process of this Court by filing numerous actions on similar issues. Counsel contended that Appeal No. 15 of 2020 remains unprosecuted four years later.
18. In regard to what orders will serve the best interest of the subjects, Counsel maintained that the subjects in this appeal have been in the hands of their father, the Respondent since March, 2017, he has diligently taken good care of them after being abandoned by their mother, the Appellant. According to Counsel, her prayer seeking their custody at this juncture amount to an afterthought. Further, Counsel believes that the Appellant is only seeking custody so as to avoid remitting the upkeep ordered by the trial Court.
19. Counsel submitted that Article 53 of [the Constitution](#) as well as Section 8 of the Children's Act, 2022 provide for joint parental responsibility of parents over their children, that the Appellant who



is gainfully employed as a teacher by the Teachers' Service Commission has not demonstrated her inability to meet the upkeep ordered by the Court as her share of parental responsibility over their children.

20. In conclusion, Counsel urged that the appeal before this honourable Court is devoid of merit and urge you to dismiss the same with costs to the Respondent

Determination

21. This is a first appeal. The duty of a first appellate Court was succinctly stated by Wendoh J in *JWN v MN* [2019] eKLR in the following words:

It is settled law that the duty of the first appellate Court is to re-evaluate the evidence tendered in the subordinate Court, both on points of law and facts and come up with its findings and conclusions.

22. *The Constitution* of Kenya 2010 provides at Article 53 (2) that;-

“(2) A child’s best interest are of paramount importance in every matter concerning the child.”

23. Likewise *Children Act* 2022 at Section 8 (1) provides as follows:-

“(8) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies

- a. The best interests of the child shall be the primary consideration;
- b. the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule. 19 No. 29 of 2022 Children.

24. The aforesaid principles are well anchored in the Convention on the rights of the child to which Kenya is a party. Under the UN Convention on the Rights of the Child (CRC) that Kenya ratified on 30 July 1990, Article 3 provides that:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

25. It is trite law that parents have equal a both responsibility towards the welfare of their children under Article 53 of *the Constitution* and the doctrine that custody of children of tenders belongs to the mother has to be considered together with the principle of the best interest of the child as was held in the case of *SMM v ANK* [2022] eKLR which I find persuasive in my determination of this case, the Court observed as follows;

However, it is apparent that while the Tender Years Doctrine, is persuasive in considering custody of children, it can no longer be considered as an inflexible rule of law. This is not to



say that the substance of the rule has dissipated completely; it is to say that its inflexibility has been eroded by the evolving standards of decency reflected in Article 53 of *the Constitution*. Differently put, the Tender Years Doctrine must now be explicitly subjected to the Best Interests of the Child Principle in determining custody cases. Differently put, the welfare of the children is the primary factor of consideration when deciding custody cases. The judicial rule that a child of tender years belongs with the mother is merely an application of the principle in appropriate cases. The modern rule begins with the principle that the mother and father of a child both have an equal right towards the custody of the child.

26. The Appellant's main contention is that the children herein are of tender age and such are better placed being in her custody and not the Respondent's custody. The Appellant faults the trial Court for granting custody of the two minors to the Respondent who is married to another wife and thus subjecting them to extreme hardship adjusting to their new living environment with the Respondent's new wife.
27. Looking at the copies of birth certificates that were tender in evidence at the trial Court, it is without a doubt that the children herein were born in 2010 and 2012 respectively. They are thus 14 years and 12 years as today. It is trite law that custody of children of tender years should go with the mother unless there are exceptional circumstances. In the circumstances of this case, the children in question can be said to be of tender age. The next question is whether there are any exceptional circumstances that warrant them being in actual custody of the Appellant. And what amounts to exceptional circumstances? The decision in *Sospeter Ojaamong v Lynette Amondi Otieno*, Court of Appeal Number 175 of 2006 had this to say about exception circumstances:

The exceptional circumstances would include if the mother is unsettled, has taken a new husband or her living quarters are in a deplorable state.

28. From the record, it not in dispute that the minors herein have been in actual custody of the Respondent since the year 2017 when the Appellant left her matrimonial home leaving them behind. The Appellant was not able to explain to the trial Court why she had left the minors behind at such tender age. She did produce any evidence whatsoever to substantiate the allegations of violence and threats to her life perpetrated by the Respondent. The Appellant contends that the Respondent herein has remarried and thus it is hard for the children to adjust to the new living environment with Respondent's new wife. She however did not tender any evidence to support the said assertion. From the Appellant's submissions it also evident that the minors herein are also in boarding school and as such cannot be said to be entirely in the custody of the Respondent. In his judgment, the trial Magistrate was so categorical that the Respondent shall have actual custody of the minors and the legal custody of the two minors shall be shared jointly between the Appellant and Respondent. The Appellant also contends that the Respondent is unwilling to allow the minors visit her during the holidays or her visiting the minors in their respective schools. Having appreciated the orders by the trial Court it also clear that the Court directed that the Plaintiff shall have unlimited access to the minors with prior arrangements between the parties and that the custody of the two minors shall be shared equally between the Appellant and the Defendant during the school holidays. Save for submitting that the Respondent has denied her access no evidence whatsoever has been tabled by the Appellant to prove the said allegations.
29. From the trial Court's it safe to say that the Appellant herein was not denied custody or access to the minors. The trial Magistrate in the best interests of the children maintained the living arrangement that they have been accustomed to. The Appellant has in view demonstrated that the minors are in danger and or are being mistreated by the Respondent, as such I find no reason to grant the Appellant actual custody of the children.



30. In regard to maintenance orders, it is clear from the judgment of the trial Court that the Appellant was ordered to provide monthly upkeep of Kshs.6,000/= while the Respondent was ordered to continue providing school fees and other school related expenses, medical needs, shelter, food and clothing for the two minors.
31. The Court must take into account both the minor's requirements and each parent's financial situation while deciding whether to award maintenance. One parent shouldn't be unjustly burdened with maintenance orders at the expense of the other.
32. In SKM -VS- MW1 [2015] eKLR Hon Justice William Musyoka, stated as follows:

“Maintenance orders are not meant to punish or oppress any party. They should be designed to provide for the needs of the children in question while at the same time respecting the financial status of the parent. A child can only be maintained within the means of the parent in question.”
33. I have carefully perused the judgment delivered by the trial Court. I find that the trial Magistrate did carefully analyze the needs of the minors as well as the capacity of the parents. He noted that concerning maintenance, it is with no doubt that parental responsibility is an equal and joint responsibility of the parents to a child, that the evidence before the Court shows that the Plaintiff has not contributed to maintaining the children for the last five years, that she was ordered to pay Kshs.3,000/= as monthly upkeep and she only complied with the Court order when the Notice to Show Cause was issue, that the evidence before the Court indicates that the Plaintiff and the Defendant are gainfully employed and can adequately contribute to maintaining the two children.
34. The trial Court further observed that in paragraph 12 of his Defence, the Defendant pleaded that he had no problem if the Plaintiff provided the children with shelter, food and clothing and that the Defendant did not quantify how much he wanted as maintenance. The trial Court further considered that the monthly contribution of Kshs.3,000/= which the Plaintiff was ordered to pay as little considering the current economic times and the financial burden bestowed on the Defendant through payment of school fees at a boarding school and other needs catered for by the Defendant before enhancing the Plaintiff's contribution towards monthly upkeep to Kshs.6,000/=.
35. Children rights can be captured in the many provisions of the 2010 Constitution spanning through the Bill of rights including in specific greater detail under Art. 53 of the same Constitution. The Children's rights clause in Art. 53 of *the Constitution* complements the general rights of all persons to the civil, political, economical cultural and social rights in part two of the Bill of rights. Similarly, the general provisions under Art. 27 of *the Constitution* on the rights to equality and non-discrimination have proven integral to the way in which Kenya courts interpret the children's rights. This same Constitution and the Children's Act vest judicial authority in courts to adjudicate Human rights with a wide range of options to ensure Children rights are not violated or threatened by the very persons particularly parents who happened to be the first point of call as care givers to ensure implementation of the survival rights. The parents of the Children of Kenya have the primary duty to ensure that the child's best interest whom they bring forth to this world are of paramount importance in every matter concerning that child. It matters not to who earns more or who has more financial resources at his/her disposal. It is both a constitutional dictate, a moral obligation, a command from God who is the author of families and a customary cultural obligation for any parent to assert responsibility for his biological children. Any judicial separation or divorce status that may be governing the relationship of both parents. The reference point for any biological parent is to measure his/her contribution around the doctrine of the welfare and best interest of that child in question. It is the parent's duty to put



reasonable measures of implementing the given rights affecting children as defined in *the Constitution* and other enabling statutes. My appreciation of the case at bar in a functional family should not even form a justiciable issue for adjudication as to who meets which level of rights and obligations between both parents. The responsibilities of any parents who are desirous of begetting children commences from birth of that child. It is my conviction that if any adult member of our society does not want to undertake any legal obligations, moral or societal expectations to safeguard the rights of the child, the best escape route is not to enter into that arena of procreation so that he can be free and free indeed without the economic social demand associated with the protection of the children rights. The court finds it a violation of the welfare and best interest of the children if any biological parent undertakes any action or intermeddles with the marital estate likely to impact negatively in the enjoyment of the Children rights with a legitimate expectation of being cared and taken care of by those two parents. The need for our society to be sensitive to a child's inherent vulnerability is behind the provisions of Art. 53 of *the Constitution*. The interests of children particularly those with tender years and those below 18 years are multifaceted. All that *the Constitution* requires of the Kenyan parents is to undertake a solemn duty to create a caring home where children are treated as children, their rights guaranteed with care compassion and empathy. The children are not in the business of entering into the conflict zone involving their biological parents

36. In the circumstances, I find that the trial Court's decision on maintenance was fair and just and did not overburden one parent at the expense of the other. In fact, from a cursory perusal of the finding by the trial Court on maintenance it is without a doubt that the Respondent herein having been directed to continue providing school fees and other school related expenses, medical needs, shelter, food and clothing for the two minors shoulders a heavier burden than the Appellant.
37. In the premises, the appeal herein lacks merits and is hereby dismissed. This being a family matter each side to bear their own costs.
38. Orders accordingly.

DATED SIGNED AND DELIVERED VIA CTS AT ELDORET THIS 23RD DAY OF DECEMBER, 2024

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R. NYAKUNDI

JUDGE

