DNW v FWK (Civil Appeal 37 of 2019)
[2023] KEHC 1408 (KLR) (28 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1408 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL 37 OF 2019

LN MUGAMBI, J

FEBRUARY 28, 2023

BETWEEN

DNW ..... APPELLANT

AND

FWK ..... RESPONDENT

(Being an appeal from the decision and order of the Honourable N. M. Kyanya Nyamori delivered on the 11th of February, 2019 in Thika Chief Magistrates Court Children's Case Number 159 of 2018)

JUDGMENT

1. This appeal arises from the judgement of the Honourable N. M. Kyanya Nyamori delivered on the 11th of February, 2019.

Summary Pleadings

2. By a Plaint dated 31st August 2018, the Respondent (then plaintiff in lower court) sued the Appellant who she described as her husband with whom they had lived together in Juja from 2001 to the year 2014 when they separated.

3. She gave birth to two children during the said marriage, a daughter and son- ZNN and AWN born on 6/9/2001 and 1/2/2012 respectively.

4. It was alleged that after separation, the Appellant shirked his parental responsibility by failing to provide any support to the family hence this suit which was filed in the Children Court at Thika. The Respondent prayed for:-

    a) Legal, actual and physical custody and care of the minors

b) Maintenance of the minors: education expenses as per fees structure, food-Kshs. 5000 per month, clothing-Kshs. 1000 per month, medical expenses-comprehensive medical cover, miscellaneous- Kshs. 2000; Total per month Kshs. 8000/-.

c) The defendant be obligated to pay school fees and education related expenses for minors.

d) The plaintiff be at liberty to apply to vary the amount of the maintenance as per evolving child's demand.

e) Cost of the suit.

5. On 14/12/2018, the Appellant, (then the defendant) filed his defence dated 7/12/18. He admitted marriage to the Respondent and the the two children of marriage with her.

6. He denied he had abandoned his family. He alleged that he had discussed with the Respondent that in view of the hard-economic situation they were facing, they needed to relocate to their rural home in Nyeri to save on rent, food and other related expenses but the Respondent declined and insisting that she was not familiar with life in the village.

7. In 2014, he left for Nyeri for five days to prepare a place for his family to move to but when he returned, he found the Respondent had carted away everything including the children to an unknown place. Efforts to trace her were futile.

8. Several weeks later, the Respondent caused the 2nd born child who was 2 years old then to be dropped by a motor-cycle 10 metres to the Appellants homestead and from that time, the Appellant has singularly been fending for the said child.

9. The Appellant thus pleaded that the Respondent did not deserve custody of their 2nd born child who she had abandoned at the age of 2 years and had now reached 7 years. He stated that the said child was already used to the family and environment that the Appellant had been bringing him up in.

10. He further pleaded that the Respondent was violent, abusive and erratic and was thus unsuitable.

11. Besides praying that the suit be dismissed, he equally pleaded that since he had all along singularly taken care of the 2nd born child alone since 2014; the Respondent should also provide support in terms of school fees as per the fees structure, food at Kshs. 8000/- per month, clothing at Kshs. 5000/- every three months, and medical expences- Kshs. 500/- NHIF.

12. In the trial before the lower court, only the Respondent (plaintiff) testified. The Appellant's Advocate was not present on 28/1/2019 when the Appellant (defendant) was scheduled to testify in his defence. The court after declining an adjournment gave a time allocation of 11.30 a.m. but the Appellant also melted away after that and did show up to testify. The Court closed the defence case and gave a judgement date.

13. This suit was thus decided only on the testimony of the Respondent (Plaintiff) since the Appellant (Defendant) never testified.

14. Judgement was delivered on 11/2/2019. The Respondent (Plaintiff) was granted legal, actual and physical custody of the minors while the defendant was to have custody during school holidays and

visitation rights over the minor. In addition, the Appellant was ordered to provide maintenance as follows:

i) School fees & school related expenses for both minors as per fees structure

ii) Medical expenses- NHIF cover Kshs. 500 per month

iii) Food- Kshs. 500 per month

iv) Clothing- Kshs. 1000 per month

v) Housing – Kshs. 1000/- per month

The Appeal

15. The Appellant was dissatisfied with the decision of the trial court. He thus filed a Memorandum of Appeal dated 7th March, 2019 listing the following grounds of appeal:

1) The Learned Magistrate erred in law and in fact in failing to appreciate the provisions of Article 50 of *the Constitution* on fair hearing by failing to accord the Applicant an opportunity to prove his testimony before the Court;

2) That the Learned Magistrate erred in law and in fact by failing to take into account that the Respondent had not been subjected to a fair hearing process with due regard to the rules of natural justice, procedural fairness and the relevant provisions of *the Constitution*;

3) That the Learned Magistrate erred in law and in fact in failing to satisfactorily appreciate and correctly apply the afore-interpreted principle of the best interest of the child respecting the subject child /children while conferring the full legal custody of the second born minor to the Respondent;

4) That the Learned Magistrate misdirected herself in failing to appreciate that giving full custody of the 2nd born to the Respondent is denial a fundamental right under the Children's Act which is also enshrined in *the Constitution* of Kenya. This denial is an impediment to the welfare of the said minor and not in his best interest at all;

5) That the Learned Magistrate erred in law by negation of the subject child's/ children's constitutional right to protection;

6) That the Learned Magistrate erred in law and in fact by misdirecting herself and failing to consider that the Appellant had been having continous and uninterrupted custody of the minor sicne 2014 when the Respondent abandoned the minor outside the Appellant's rural home while the minor was seriously unwell and without any clothing;

7) That the Learned Magistrate erred in law in failing to consider that there was material non-disclosure of facts on the part of the Respondent who had abandoned the second born minor at the Appellant's rural home in 2014 when the minor was at the age of two(2) years;

8) That the Learned Magistrate erred in law in failing to consider that the Respondent never bothered to care, maintain, visit or have access to the second born minor who is six years old and therefore a complete stranger to the child;

9) That it was not open for the Learned Magistrate to grant legal, actual and physical custody of the minor to the Respondent who abandoned the second born minor while he was two (2) years of age and as such the minor is a stranger to the Respondent;

10) That it was not open for the Learned Magistrate to grant legal, actual and physical custody of the minor noting that the Respondent's current residence, place of work and/or her ability to care for the minors was unknown;

11) That the Learned Magistrate erred in law in finding that that the Respondent was entitled to legal custody not minding the great psychological harm and mental anguish the minor will incur by being subjected to the custody of the Respondent whom he barely knows;

12) That the Learned Magistrate erred in failing to apply the appropriate legal tests in determining whether granting full custody to the Respondent was justified;

13) That the Learned Magistrate erred in law in failing to consider the effect if the orders he issued. The decision by the Learned Magistrate being a judgement in personum, has the effect of unfairly discriminating the Appellant;

14) That the Learned Magistrate erred in law and in fact in ignoring the evidence that on or around the 9th of December, 2018, the Appellant asked the Respondent to have the minor introduced to her and the Respondent agreed to the same only for her to file an application praying to have the minor produced in Court. The Respondent never showed up on the 9th of December, 2018 for the purposes of introduction to the minor as agreed;

15) That the Learned Magistrate erred in relying on the Respondent's account of events to come to the conclusion that the Appellant's employment had not been unfairly and unlawfully terminated;

16) That the decision of the Learned Magistrate is internally inconsistent and an outright breach of the Appellant's rights.

16. The Appellant urged this Court to find merit in his appeal and allow the same with costs and set aside the decision and orders of the Trial Court dated 11th February, 2019.

17. The Record of Appeal was filed on the 20th of February, 2020. The appeal was then admitted for hearing on the 5th of May, 2022 with the Court directing that the same be canvassed by way of written submissions.

Appellant's Submissions

18. The Appellant filed his submissions and list of authorities on the 26th of August, 2020. He submitted on three issues namely:

a) Whether the trial court failed to consider the Appellant's defence in the trial court;

b) Whether the full legal custody of the 2nd minor should be granted to the Appellant; and

c) Whether the parental responsibility extends with respect to the 1st born daughter.

19. On the first issue, the Appellant submitted that although he filed a defence dated 7th December, 2018 in the Lower Court, he did not get an opportunity to testify in the case. He submitted that he indicated to the Court during the hearing on the 28th of January, 2018 that his advocate was handling another matter and sought an adjournment. However, the Court declined to grant the adjournment and proceeded to issue a judgement date. He contended that this was an infringement of his rights under Article 50 (1) and Article 159(2) (d) of *the Constitution* and that while determining this appeal, this Court should take into account that he was not heard. That not affording a litigant an opportunity to be heard is a premature determination of suit and as such the instant suit was not ready for final submissions and judgement.

20. He relied on the cases of John Peter Kiria v Alice M. Kanyithia [2013] eKLR, M.K v MWM & another [2015] eKLR and Philip Keipto Chemwolo & Another v Augustine Kubende [1986] eKLR and submitted that he was not accorded an opportunity to testify and advance his case during the hearing of the matter in the lower court. He argued that the principles of natural justice thus violated and so was his protected rights under *the Constitution*.

21. While submitting on his second issue, the Appellant stated that the second minor still lives with him because of the application for stay that he filed and the Court ruled that the status quo be maintained pending hearing and determination of this present appeal. He quoted Article 3 of the United Nations Convention on the Rights of a Child as read with Article 53(2) of Constitution of Kenya which provide for the principle of the best interest of the child to be primary consideration in matters involving children. That this was also echoed in section 4(2) the Children's Act, No. 8 of 2001. The Appellant submitted further that section 83 of the Children's Act listed the factors to be considered for an order of custody to be made including the best interest of the child.

22. The Appellant stated that the Respondent testified in the lower court that after she separated from the Applicant she left the minor child with him at a tender age of two (2) years and since then the minor has been in the custody of the Appellant. That the Trial magistrate based her decision on the fact that the minor was of tender age. The Appellant quoted the case of Githunguri v Githunguri [1981] KLR 598 where the Court pronounced itself on the issue of tender years and stated thus:

> " The prima facie rule (which is now quite clearly settled) is that other things being equal, children of this tender age should be with their mother, but where the Court give custody to their father it is incumbent on it to make sure that there are really sufficient reasons to exclude the prima facie rule."

23. The Appellant relied on two other cases, one being CNB v MSM [2015] eKLR where the Court stated that:

> " Thirdly, the Applicant has not disputed to the Respondent's contention that she does not actually stay with the children. In my view therefore, this is a special circumstance that would make any Court depart from the principle that the custody of children of tender years should be given to the mother."

24. The other case is the case of JKN vs. HWN (2019) eKLR where Justice Ngugi made the following observation:

> " The two biggest problems with the reasoning in this portion of the judgement is that it assumes that:
>
> i. There is a clear and natural bifurcation between care giving and bread winning and that men do the latter while women do the former;
>
> ii. Mothers should be given custody because they are not involved in bread winning (especially if they are living with a man) and that therefore they take care of children themselves rather than rely on paid help. This strand of reasoning is dangerous because it somewhat implies that women who rely on paid help to supplement their caregiving work as they pursue their careers or business opportunities are somewhat giving less optimal form of care giving than women who have chosen to be stay at home mothers. This is a strand of judicial reasoning that could the easily send a message that 'good' mothers stay home with their children while "good" fathers go out and "win bread" for the family. With tremendous respect, I find this reasoning to be dangerously problematic. It does no favours to women to espouse these kinds of stereotypes. Moreover, relying on the stereotypes to reach a verdict on an individual and specific case is unfair to the parties concerned. At this point in the judgement, the Learned Trial Magistrate does not apply the scalpel of the prima facie rule and its exceptions to the facts and context at hand. Instead she uses the hammer of stereotypes to reach conclusion."

25. The Appellant submitted that the Respondent is a stranger to the 2nd minor something she confirmed to lower court when she admitted that she abandoned the 2nd minor while she was two years old and that from 2014 the minor has constantly grown apart from the Respondent. That this being the case, granting the Respondent full custody of the 2nd minor, a child she has not cared for, nurtured or raised for the last 6 years, would be deeply unsettling for the child and would likely result into psychological trauma to the minor. That the Respondent lives in a high-risk area and provides no guarantee that she is free from infection or being asymptomatic to corona virus. That placing the minor under the custody of the Respondent who has not undergone any tests poses a grave threat upon the 2nd minor and it is best interest of the child, in the current circumstances to be under the custody of the Appellant. He relied on the case of EMN v EKG [2020] eKLR where the Court stated:

> " .....I note that the appellant had made a request to court: to be allowed to have the child during the holidays so as to engage him in extra curricula activities. The request was opposed by the Respondent who stated that the child was lagging behind in school hence the need for extra couching.....the pandemic has also come with other demands: strict adherence with hygiene; and the government has inter alia imposed restrictions on movement and social engagements by the people. All learning institutions were also shut until further instruction from the government. In light of the difficult prevailing conditions, the said request is not tenable. The best interest of the child herein in these circumstances is for him to remain where he is. This is in line with the government directives on physical distancing and staying home to minimize spread of the virus."

26. While submitting on his final issue, the Appellant submitted that the first-born daughter was aged 16 years at the time of filing the Plaint in 2018 as she was born on the 6th September, 2001 as proved by the birth certificate. That the daughter is now aged 19 years and is no longer a minor as described in section 2 of the Children's Act. That given that the child is no longer a minor she is therefore not subject to custody orders. That as such there are no circumstances that warrant the extension of the parental responsibility of the Appellant over the first-born daughter. He relied on the case Allan Njau Waiyaki v Eddie Waiyaki Hinga [2019] eKLR;

> " The appellant went for extended parental responsibility long after he was 18, and when there was no continuing programme that the respondent was providing, or was responsible for. The Respondent may be a rich father. However, in the circumstances of this case, he had no obligation to pay for the appellant's master's programme."

27. The Appellant concluded by stating that all parties have to be accorded a fair hearing as this is the tenet of justice and the rule of law. That the Appellant has had full custody of the minor since 2014 when the Respondent abandoned the minor and as such full custody of the minor rightly rests with him. The Appellant urged this Court to allow his appeal and set aside the judgement and orders granted by the trial court.

Respondent's Submissions

28. The Respondent filed her submissions on the 18th of September, 2020. She submitted on issues that the Appellant had identified and submitted on but added one more issue of whether the trial court applied the relevant provisions of the law and the guiding provisions in arriving at its decision. While discussing the issue of whether the Appellant was accorded a fair hearing, the Respondent agreed that the right to fair hearing is enshrined in Article 50(1) of *the Constitution* of Kenya and that the Appellant was accorded a fair hearing at the trial Court. The Respondent listed a sequence of events that culminated with the trial court ordering the matter to be heard. She submitted that the Appellant was afforded several opportunities to present and argue his case but he always sought for adjournments. That on the date mentioned by the Appellant, the 28th day of January, the Respondent confirmed that the Appellant was present in Court but his advocate was absent and that despite being granted time to contact his advocate, the Appellant chose to abscond and abandon the Court proceedings forcing the Court, at the allocated time for hearing to close the defence case and issue a judgement date. This she argued was contrary to the principle that children cases are unique in nature and ought to be resolved expeditiously. She relied on the case of NK suing through her mother and next friend VA v PKW [2018] eKLR where the Court observed as follows:

> " Children cases are special category of case. The need for expeditious disposal cannot be gainsaid. This explains why the Children Court is given a wider latitude in disposal of these cases by freeing it from the shackles of strict rules of evidence and procedure. This enables quick disposal of the cases."

29. That the Appellant was duly and well in advance informed of the judgement date for the matter but never sought to arrest the judgement or seek to reopen the case for a defence hearing. That despite the options available, the Appellant remained lethargic.

30. On the issue of whether the trial court applied the relevant provisions of the law and the guiding principles in arriving at its decision; the Respondent submitted that the Court took into consideration the applicable law, facts and evidence adduced. That the issues before the trial court were on custody and maintenance for the two minors and based on the evidence adduced before the Court, the court

referred to the relevant provisions of the law and precedents in determining these issues. That although the Appellant never testified before the Court, the Trial Court still considered the averments in the defence filed by the Appellant. The Respondent confirmed that she was the one who took the minor "AWN" to the Appellant and that the issue of her residence, her workplace, ability to take care of the minors and any likely psychological harm to the said minor were well captured in the trial Magistrate's analysis of the law, facts and evidence availed at the trial court.

31. On the issue of the custody of the second minor, whom the Respondent refers to as "AWN", the Respondent submitted that in matters of custody the paramount consideration is the welfare and best interest of the child as provided under section 4 (2) of the Children Act No. 8 of 2001 and Article 53 (2) of *the Constitution*. She submitted that the minor is only eight years old and is therefore a child of tender years as defined in section 2 of the Children Act. Like the Appellant, the Respondent relied on the case of Githunguri v Githunguri [1981] KLR 598. The Respondent laid the burden on the Appellant to establish exceptional circumstances that would warrant this Court to depart from this general rule. That it was their opinion that the Appellant did not demonstrate the same whether in this appeal or at the Trial Court to warrant the grant of custody of "AWN", a child of tender years as the father. She rebutted the allegations that she is a stranger to the minor and submitted instead, during the pendency of this suit, she was granted visitation rights in regard to the minor and has since bonded with the minor. She stated that she has owned up to her mistake of leaving the minor in the Appellant's custody and has been trying to correct her mistake since 2016. That the Appellant has however hindered her contact with the minor making it difficult for the relationship between the Respondent and the minor. She was guided by the case of U v U [2002-2003] CLR 238 at page 257 and urged the Court to uphold the trial court's decision and award custody to her.

32. On the final issue of whether parental responsibility to the first-born daughter should be extended, the Respondent relied on section 28 (1) of the Children Act submitted that this Court is clothed with jurisdiction on its own motion to extend parental responsibility. That at the time of filing of the suit at the trial court and at the time of judgement the first-born daughter, "ZNN" was still a minor. That while she is now an adult, she has completed her secondary education and that based on the Kenyan educational system, a child remains reliant upon its parents for school fees, university or college fees even beyond the age of 18 years. That despite the fact that "ZNN" has attained the age of majority it is in her best interests to continue with her education.

33. The Respondent admitted that she had not applied for the extension of parental responsibility at the trial court, on behalf of 1st born daughter he contended that the Court having ordered that the Appellant take parental responsibility of the first-born daughter, it is within this Court's jurisdiction and it is only fair and practicable that this court extends the Appellant's parental responsibility towards the first-born daughter's tertiary education as the same is now globally accepted as basis education. The Respondent concluded by reiterating that the Appellant was accorded a fair hearing and urged this Court to uphold the decision by the trial court and not to interfere with the said decision. She prayed that the appeal be dismissed with costs.

34. Arising from the pleadings and submissions, the following are the issues that fall for determination:

    a) Whether the Appellant was denied an opportunity to be heard in his defence

    b) Whether the custody of the 2nd minor should remain with the Appellant

    c) Whether this Court has jurisdiction to extend parental responsibility in respect of the 1st minor, "ZNN";

    d) Who pays for the costs of the appeal.

a) Whether the Appellant was denied an opportunity to be heard by the trial court

35. The Appellant submitted that despite filing his defence dated 7th December, 2018 before the Lower Court, an opportunity was not accorded to him to give evidence as on that date, the 28th of January, 2018 when the matter came for hearing his advocate had another matter in the High Court which he informed the Court but the Court declined an adjournment and proceeded to issue a judgement date. He contended that this was an infringement of his rights under Article 50 (1) and Article 159(2) (d) of *the Constitution* hence in determining this appeal, this Court should consider that the matter was not resolved fairly as failure to afford a litigant an opportunity to be heard is a premature determination of suit.

36. The Respondent submission was that the Appellant was accorded a fair hearing by the trial Court. The Respondent referred to a series of events that culminated in the trial court ordering the matter to be heard. She submitted that the Appellant had previously been afforded other opportunities to present and argue his case but he always sought for adjournments. That on the 28th day of January, the Appellant was present in Court but his advocate was absent. He granted time to contact his advocate, but the Appellant also absconded and did not return to be heard forcing the Court at the allocated time for hearing to close the defence case and issue a judgement date. She argued this was contrary to the principle that children cases are unique in nature and ought to be resolved expeditiously.

37. Further, the Respondent argued that the Appellant was well aware and in advance about the judgement date yet he never sought to arrest the judgement or seek to reopen the case for the defence hearing. That despite the options available, the Appellant remained lethargic.

38. It is indeed true that the Kenyan Constitution under article 50 (1) provides for fair hearing. It states:

'50 (1)- Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent, and impartial tribunal or body'

39. I have examined carefully the record of the trial court the from the point the Respondent testified in order to appraise myself on the reasons that caused the Appellant not to testify despite filing a defence.

40. On 14/12/18 is the day the Respondent testified and closed her case. Immediately after indicating that the plaintiff's case was over, the defence counsel, Mr. Wathuta sought an adjournment. He said:

> "I am not ready to proceed with the defence case. I was on mistaken belief today was a mention."
>
> The Court obliged him and fixed the defence hearing on 18/12/18.

41. On 18/12/18, Advocate Vundi, on behalf of Mr. Wathuta informed the Court that Mr. Wathuta was appearing before Justice Gacheru in ELC case Number 274/18 and thus specifically requested to be allocated the date of 28/1/19.

42. Come 28/1/19, the defence Counsel was once more unavailable. The defendant was however personally in Court and upon indicating that his Advocate was not present, the Court gave him up to 11.30 a.m. to prepare and proceed with his case. He was nevertheless a no show at the appointed hour of the hearing hence the Court closed the case without his evidence.

43. As it were, the Appellant disappeared without trace and it was only after the judgement was delivered that he resurfaced.

44. The question therefore becomes, Was the Appellant shut out from offering his defence by the trial court given the circumstances outlined above or was it a case of the Appellant failing to take up the opportunity presented?

45. It needs to be appreciated that the major bottlenecks afflicting the courts nowadays is delay in conclusion of cases and the biggest culprit is endless applications for adjournments. Adjournment of cases will definitely continue to be there but in any proper judicial system, it should only be reserved for the most deserving cases or circumstances.

46. The Constitution}} which the Appellant cites and says was violated in relation to Article 50 (1) also places prime importance on the need for the courts to hear and determine cases without undue delay in (article 159 (2) (b) which provides:

> " Article 159 (2)- In exercising judicial authority, the courts and tribunals shall be guided by the following principles-
>
> b) justice shall not be delayed...'
>
> Equally, the Children Act stresses the importance of hearing children cases with expedition. Under the General rules and Regulations, Rule 1 provides:
>
> 'All Civil matters under part III, VI and XIII of the Act shall be conducted in accordance with these rules and regulations but the court shall have the power and discretion to decide all matters with due speed and dispatch without undue regard to technicalities of procedure..."
>
> Additionally, under rule 5 thereof, some of the orders of the Civil Procedure Rules that specifically apply is Order XV11 on Hearing of suits and Examination of Witnesses. Under said order rule 1, it is provided as follows:
>
> 'Rule 1 (1) Once the suit is set down for hearing, it shall not be adjourned unless the party applying for adjournment satisfies the court that it is just to grant the adjournment..."

47. Granting or denying an adjournment is thus an exercise of the Court's judicial discretion which an appellate court must not touch unless it is clearly and manifestly demonstrated that the trial court in declining the particular adjournment failed to act judiciously and caused a miscarriage of justice.

48. In the present case, the trial court indulged the defence on two previous occasions before finally putting its foot down. The date it declined to adjourn the matter further had been suggested by the defence counsel yet he was at it again seeking to be excused on ground that he he had another case at the High Court. No evidence was tabled before the trial court to back up this claim. Further, the Appellant was personally present in Court when the court announced that the case would heard at 11.30 a.m. After that announcement, he too disappeared and was not available when the matter was called later that day for the hearing. No reasons for his abrupt vanishing were given then and even now in this appeal. He only resurfaced after judgement was delivered. As correctly submitted by the Respondent, no attempt was even made to persuade the court to review its decision to close the case without the defence evidence. All was quiet until judgement was delivered.

49. In my view, I do not consider this to be a denial of opportunity to heard. The conduct exhibited by the Appellant and his Advocate was inexcusable and intended to frustrate, obstruct and delay the progress of the trial. When an opportunity to be heard has been availed and the party to whom it is provided decides to squander it for reasons best known to himself, I do not think it is fair to point a finger at

another person for what is basically his own misconduct. I find no reason to fault the trial court for the decision to order the Appellant's (defence) case to be closed in the circumstances.

(b) Who should have the custody of the 2nd minor between the Appellant and the Respondent?

50. The Respondent admitted to taking the 2nd born child to the Appellant's home when the minor was two years old and the said child has lived with the Appellant ever since. She stated during cross-examination that the first born daughter brought to her attention that the minor was suffering under the care of the Appellant. She stated that the minor did not have decent clothes like the siblings he lived with. She confirmed that the minor was in school and she also conceded that she had not catered for any of his upkeep since she took him to live with the Appellant.

51. She however insisted that since their 2nd born was a child of tender years, as his mother she ought to be given custody and the Appellant should only get visitation rights. The trial court while relying on section 2 of the Children's Act was swayed by this submission and found that the custody of a child of tender years should be with the mother. The trial court held: -

> " .... As regards custody of the minor A.W.N, I note the said minor is six years old and this is corroborated by the minor's birth certificate. Section 2 of the *Children Act* defines a child under ten years as a child of tender years. It is trite law that children of tender years in the absence of exceptional circumstances ought to be with their mother. This prima facie rule has been echoed in plethora of famous cases to name but a few, Githunguri v Githunguri [1981] KLR and Wambwa v Okumu [1970] EA 578..."

52. The trial court stated that under exceptional circumstances the general principle can be departed from but it does not appear to me that it properly addressed its mind to facts that were before it even if the testimony of the Appellant (Defendant then) was not presented. There were enough facts on record through the testimony of the Respondent in Chief and cross-examination to decide this issue exhaustively. The minor was born on the 1st of February, 2012. He was taken to the Appellant in 2014, which means that at the time of delivery of the trial court judgement, he had stayed with the Appellant for five continuous years. At the time of this judgement, he would be turning 11 years (past tender age period) and would have lived with the Appellant for 9 years. Both parties agree that the minor had been enrolled to a school in Nyeri where the Appellant lives and has all along been under the exclusive care of the Appellant. The Respondent admitted in cross-examination that the Appellant took care of the second minor while she cared for the first minor.

53. Although the Respondent claimed in her evidence that her first-born daughter had informed her that during the brief visit to the Appellant's home, she observed that their 2nd born child was suffering and did not have decent clothes like the rest of the siblings he was living with, the said testimony was hearsay as the said first-born daughter was not called as a witness to substantiate those allegations before the trial Court. Nevertheless, the trial court which was clothed with wide powers to ensure the best interest of the child, should in my view, even on its own accord, have treated such information that involved a minor with serious concern and should have used it as a ground for further investigation before making its final orders. A Children's Officer report would have come in handy to assist the court in that regard.

54. Moreover, the trial Magistrate reliance on the fact that the minor was of tender age hence should live with its mother, without considering the other salient factors like the fact that he had been living

with the Appellant for five uninterrupted years was also misconceived. The tender years doctrine was exhaustively discussed in the case of *SMM v ANK* [2022] eKLR where the Court held 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."

55. One of the reasons fronted for awarding custody in the case of SMM (supra), by the Court was:

> " The upshot of this analysis is that properly calibrated, both the Tender Years Doctrine and the Best Interests of the Child principle would, in the present case, unite to yield the conclusion that custody is best awarded to the Respondent. This is so for at least five reasons:
>
> a. First, the children have been with the Respondent for a significant period of time immediately preceding the suit. The period in question is more than 6 years for SCKK and more than four years for JWKK. Their being with the father was not product of subterfuge, conspiracy or abduction. It was by the mutual agreement of the parties. During that period, the two children have been enrolled in school in Kenya. They have adopted to the social-cultural and educational environment. They have fitted into the socioecological milieu. They have become accustomed to their life here. More importantly, they have bonded with the Respondent as a primary parent. To yank them out of this environment would no doubt cause psychological trauma..."

56. This Court concurs with the reasoning in the above case: the minor in this case has been living with the Appellant from the year 2014 when he was two years old and he still lives there to date (past tender year age) since the trial court decree was stayed in 2019. Article 53 (2) provides that a child bests interests are of paramount importance in every matter concerning the child. Uprooting the minor from his home and school that he has been acquainted with for the last 8 years and introducing him to a new environment and school will not only disorient and confuse him but might also lead to emotional and psychological trauma to him. Nevertheless, the omission to evaluate the living condition and welfare of the minor ought to be remedied too. I will thus order that a Children Officer Report be filed within the next one month to appraise the court of the 2nd minor's present condition.

c). Whether this Court has jurisdiction to extend parental responsibility in respect of the 1st minor, "ZNN";

57. Section 28(1) of the Children's Act provides thus: -

> " Parental responsibility in respect of a child may be extended by the court beyond the date of the child's eighteenth birthday if the court is satisfied upon application or of its own motion that special circumstances exist with regard to the welfare of the child that would necessitate such extension being made."

58. One of the prayers that the Respondent payed for in the Plaint dated 31st August, 2018 and filed in Court on 3rd September, 2018 was 'the plaintiff be at liberty to apply to vary the amount of maintenance as the evolving need of the children demanded."

59. 'Evolving' would mean continuous or emerging needs of the children. However, such order was subject to an application being made before the trial court.

60. The issue of extension of parental responsibility did not arise during the trial court proceedings, a fact that the Respondent also confirmed. Is it therefore within this Court's jurisdiction to deal with new issues that did not arise in the trial Court?

61. This Court's duty is to review and analyze the facts and evidence adduced during trial. The trial Court did not get an opportunity to deal with the issue of the extension of parental responsibility for the first-born minor (now a young adult). As such, this Court cannot decide the matter without having the benefit of hearing the parties' evidence on the same. This Court appreciates that the first-born daughter became an adult as this appeal was pending but again no attempt was made to introduce an application at the moment she was turning eighteen.

62. In light of the analysis I have given herein above, I find merit in this Appeal and set aside the judgement and decree of the trial court and in its place make the following orders:

    a. That the legal custody of the 2nd minor will be shared jointly between the Appellant and Respondent.

    b. The Appellant shall continue having actual/physical custody of the 2nd minor herein.

    c. That the Respondent shall have custody of the 2nd minor during school holidays and visitation rights during the weekends of the school term and to return the minor on Sunday evening in time for school;

    d. The parties herein to agree on maintenance of the 2nd minor and in the event, they fail to agree, parties shall be at liberty to apply;

    e. Each party shall bear their own costs.

JUDGMENT DATED AND DELIVERED VIRTUALLY THIS 28TH DAY OF FEBRUARY, 2023.

L.N. MUGAMBI

JUDGE

<u>In Presence of:=</u>

Coram-

Court Assistant- Annette

Appellant-

Respondent-

Appellant Advocate-

Respondent Advocate-

Judgment delivered digitally to be transmitted by the Deputy Registrar to the Parties Advocates on record through their respective email addresses.

L.N. MUGAMBI

JUDGE