



REPUBLIC OF KENYA



**HWK v MWC (Family Appeal E093 of 2022)
[2023] KEHC 21852 (KLR) (Family) (11 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21852 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

FAMILY APPEAL E093 OF 2022

PM NYAUNDI, J

AUGUST 11, 2023

BETWEEN

HWK APPELLANT

AND

MWC RESPONDENT

(Being an Appeal arising from part of the judgment/ order of the Honourable Senior Resident Magistrate M W Kibe (Ms.), in Children's Case Number E1219 at Milimani Children's Court in Nairobi delivered on 24th August 2022)

JUDGMENT

1. The Appellant, HWK, filed the Memorandum of Appeal dated 22nd September, 2022 seeking to disturb the judgement of the lower court and sought the following orders:
 - a. That this Honorable Court do set aside part of the Judgment delivered on 24th August, 2022.
 - b. That this Honorable Court do determine this case finally.
 - c. That the prayers in the Counterclaim be granted.
 - d. That this Appeal be allowed with costs.
2. The respondent, MWC, opposes the Appeal.
3. The matter was canvassed by way of written submissions. The appellant filed his written submissions dated 19th April 2023 and reply to the respondent's submissions dated 5th July, 2023. The respondent filed her written submissions dated 5th June, 2023. Parties highlighted their submissions before this Court on 14th July, 2023.



4. This being a first appeal, the court is obliged to reconsider and reevaluate the evidence adduced in the trial court and to draw its own conclusions on the same. This well-established principle was enunciated by the Court of Appeal in Kenya Ports authority versus Kustron (Kenya) Limited (2009) 2EA 212 when it stated, inter alia that,

“... On a first appeal from the High Court, the Court of appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make the allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in evidence.”

Background

5. This appeal arises from the judgment delivered on 24th August, 2022 by Hon. M. W. Kibe (Ms) Senior Resident Magistrate in Nairobi Children’s Court Case No. E1219 of 2021.
6. In that case, the respondent had filed suit seeking:
 - a. Sole custody, care and control and possession of MHC and MWC.
 - b. The Defendant to pay maintenance of the children of the marriage.
 - c. Costs of the suit.
 - d. Such other relief as this honorable court may deem fit to grant.
7. The appellant, filed defense and counter claim seeking the following orders:
 - a. That MWC and HWK be and are hereby granted joint legal custody of MHC and MWC.
 - b. That MWC and HWK be and are hereby granted shared care and control of MHC and MWC.
 - c. That MW be and is hereby ordered to return MHC and MWC who are to be accompanied by HWK to Netherlands within 7 days of issuance of this order and in default of compliance by the plaintiff, HWK who will be at liberty to return to the Netherlands.
 - d. That MWC be and is hereby ordered to contribute towards maintenance.
 - e. That the plaintiff is hereby restrained from interfering with the relationship between the defendant and his children MHC and MWC by denying them or frustrating communication between them, negatively influencing them against their father denying or frustrating access using the children as bargaining chip or in any other manner hindering or negatively impacting the father – children relationship.
 - f. That the mediator namely Rev. GN of Hope Centre International be and is hereby ordered to release the children’s passports to HWK.
 - g. Any other order that this honorable court may deem fit and just to grant.
8. After hearing evidence from both parties, the learned trial magistrate rendered her judgment in which she ordered that:

“Legal custody:

- a. Both parties are hereby granted joint legal custody of the subject minors.



Actual custody, care and control and access:

- b. The plaintiff, who is the biological mother of the subject minors, shall have actual custody, care and control of the subject minors as the minors are of tender years.
- c. The defendant who is the biological father of the subject minors is hereby granted access to the subject minors. The defendant who is based outside the country shall have virtual access to the subject minors from 6. 00 pm – 8. 00 pm Kenyan time at least 2 times a week. The defendant shall also have access to the subject minors on 3rd and 4th weekend of any given month when in the country with prior arrangement and notice to the plaintiff.
- d. The plaintiff is hereby restrained from interfering with the relationship between the defendant and his children MHC and MWC by denying them or frustrating communication between them or access.
- e. The defendant is at liberty to apply for shared actual custody when the subject minors are old enough as to be able to be separate from their mother for long periods. The subject minors are in my view quite young to be kept away from their mother for long periods.

Maintenance:

- f. The plaintiff shall take care of the minors' housing, utilities and clothing as part of her parental responsibility. The defendant on his part, shall cater for the subject minors' education expenses, medical cover and food at Kshs. 15, 000 per month.

Minor's school:

- g. I will maintain the status quo as relates to the school which the subject minor M is currently attending in order not to interfere with schooling with a caution to the plaintiff not to make any unilateral decisions on the minors' education expenses should the plaintiff make any unilateral decisions on the minors' schooling in the future. The defendant, noting that he was not involved in the enrollment of the subject minor- M in the current school, shall only pay school fees/ tuition fees equivalent to that he would have paid in former school. The plaintiff shall meet any extra tuition fees and registration charges in respect to the Minor Morata.

Return of subject minors to Netherlands:

- h. As a court, I do not have jurisdiction to enforce judgments or orders and the said application for enforcement of foreign judgments or orders should be made in the High Court.

Conclusion:

- i. This being a children's case, I make no order as to costs. Parties shall agree mutually on which party will keep the minors' passports. Both parties shall not remove the subject minors from the court's jurisdiction without consent of each other or leave of court. Each party is at liberty to apply”.



9. The Appeal is framed as being against part of the judgment of the trial magistrate and as gleaned from the Memorandum of Appeal the Appellant contends that the Magistrate erred in law and in fact in failing to properly consider the Counterclaim of the Appellant.
10. By so doing it is contended that the learned trial magistrate erred by failing to accord the Appellant (father) adequate access to the minors that would facilitate sufficient bonding with the minors and secondly that by declining the relocation of the minors who were Dutch citizens the Court essentially would deny the Children their right to their culture.
11. The appeal was based on the following grounds:
 - a. That the learned magistrate erred in fact and in law by failing to interrogate the circumstances under which the children were brought to Kenya and particularly the fact that the children were brought into the country under deception and have remained here against the appellant's wishes.
 - b. That the learned magistrate erred in fact and in law in failing to take into consideration the conduct of the respondent which shows deliberate intention of alienating the children from the father.
 - c. That the learned magistrate erred in fact and in law by failing to enforce the children's right to live with both parents.
 - d. That the learned magistrate erred in fact and in law by failing to determine whether the children subject matter of this appeal should be returned to the Netherlands.,
 - e. That the learned magistrate erred in fact and in law by treating the counterclaim as an enforcement of foreign judgment suit.
 - f. That the learned magistrate erred in fact and in law by granting the respondent sole care, control and custody of the children purely on the basis of her gender.
 - g. That the learned magistrate erred in fact and in law in giving orders that limit the children's contact with the appellant.
 - h. That the learned magistrate erred in fact and in law by failing to consider all facts and authorities relied upon by the appellant.
 - i. That the learned magistrate erred in fact and in law by failing to protect the dignity of the court by failing to take into account the respondent's defiance of court orders.
 - j. That the learned magistrate erred in fact and in law by failing to appreciate that the appellant and the respondent have an equal right and duty to care for the children under article 53 of the *Constitution of Kenya* .

Analysis and Determination:

12. Having carefully considered the memorandum of appeal, the rival submissions, authorities cited and the relevant international, regional and national laws I discern the following as the issues for determination
 - a. Whether the trial magistrate erred in principle in arriving at the decision in the impugned judgment



- b. Whether the trial magistrate erred in arriving at a decision that failed to factor the minors' best interests having regard to the circumstances of the case
13. Whether the trial magistrate erred in principle in arriving at the decision in the impugned judgment
At the outset it is important to acknowledge that the trial magistrate faced a difficult task, as she was presented with conflicting evidence on the status of the marriage between the two parents and the circumstances under which the minors returned to Kenya.
14. What was evident was that the mother having returned to Kenya is unwilling to return to Netherlands with the minors. It is also evident from the evidence of the parents in the trial court that the couple's relationship has deteriorated and cohabiting is not an option.
15. The Appellant urged that the trial court erred in principle in failing to consider the counter claim of the Appellant and instead treating the counter claim as an enforcement of the decision in the Foreign Judgment suit.
16. I have had opportunity to review the 11-page Judgment of the Trial Court and find that the Court did consider the defence and Counterclaim as evidenced by the following excerpts
'I have duly considered the pleadings filed, oral and documentary evidence and submissions filed...
The plaintiff who is the biological mother of the subject minors prayed for sole custody, care and control and possession of subject MHC and MWC in her plaint dated September 1, 20221 (sic). The Defendant on the other hand prayed in his defense and counterclaim for shared care and control. The Plaintiff resides in Kenya with the children, while the Defendants resides in Netherlands. The subject minors MHC aged 2 years and 6 months while the subject minor was 7 months in the year 2021 when the plaintiff filed this case. The subject minors are of tender years.'
17. Stemming from the Above analysis the Court then proceeded to make the orders as enumerated in paragraph 8 above.
18. From the foregoing it is evident that the Court did not as has been alleged, fail to consider the defence and counterclaim. In fact, I would go further and state that the sequencing of the orders by the Court adopted the sequencing of the Appellant's prayers in his defence.
19. For these reasons I find that the Court did not err in principle.
20. The Second issue is, Whether the trial magistrate in arriving at its decision failed to factor the minors' best interests, having regard to the circumstances of the case
21. Article 53 (2) of the *Constitution* of Kenya provides 'A child's best interests are of paramount importance in every matter concerning the child.' Likewise, the *Children Act*, provides;
Section 8. Best interests of the child.
(1) 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.
22. Schedule 1 of the *Children's Act* provides the following as the Best Interest Considerations:



1. The age, maturity, stage of development, gender, background and any other relevant characteristic of the child.
 2. Distinct special needs (if any) arising from chronic ailment or disability.
 3. The relationship of the child with the child's parent(s) and/or guardian(s) and any other persons who may significantly affect the child's welfare.
 4. The preference of the child, if old enough to express a meaningful preference.
 5. The duration and adequacy of the child's current living arrangements and the desirability of maintaining continuity.
 6. The stability of any proposed living arrangements for the child;
 7. The motivation of the parties involved and their capacities to give the child love, affection and guidance.
 8. The child's adjustment to the child's present home, school and community.
 9. The capacity of each parent or guardian to allow and encourage frequent and continuing contact between the child and the other parent and/or guardian(s), including physical access.
 10. The capacity of each parent and/or guardian(s) to cooperate or to learn to cooperate in child care.
 11. Methods for assisting parental and/or guardian cooperation and resolving disputes and each parent's/guardian's willingness to use those methods.
 12. The effect on the child if one parent/guardian has sole authority over the child's upbringing.
 13. The existence of domestic abuse between the parents/guardian(s), in the past or currently, and how that abuse affects the emotional stability and physical safety of the child.
 14. The existence of any history of child abuse by a parent and/or guardian(s); or anyone else residing in the same dwelling as the child.
 15. Where the child is under one year of age, whether the child is being breast-fed.
 16. The existence of a parent's or guardian(s) conviction for a sex offense or a sexually violent offense under the [Sexual Offences Act](#).
 17. Where there is a person residing with a parent or guardian, whether that person—
 - (a) been convicted of a crime under this Act, the [Sexual Offences Act](#), the Penal Code, or any other legislation.
 - (b) has been adjudicated of a juvenile offence which, if the person had been an adult at the time of the offence, the person would have been convicted of a felony.
 18. Any other factor which may have a direct or indirect effect on the physical and psychological well-being of the child.
23. These Constitutional and statutory provisions mirror those found in the [UN Convention on the Rights of the Child](#) and the [African Charter on the Rights and Welfare of the Child](#) which provide respectively; 'Article 3 (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.’

Article 4(1)

In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

24. Kenya is a signatory to both instruments. Section 2 of the *Children Act* defines ‘best interests of the Child’ to mean the principles that prime the child’s right to survival, protection, participation and development above other considerations and includes the rights contemplated under article 53 (1) of the *Constitution* and section 8 of this Act.
25. I have set out the provisions in extenso as in the impugned judgment the trial magistrate did not at any point refer to ‘the best interest principle’ in spite of the mandatory nature of the requirement.
26. In exercise of the Appellate jurisdiction I will proceed to determine whether the decision did conform with the best interest’s principle given the circumstances of the case.
27. The issues that arise for consideration in these circumstances, (where the parents reside in different countries), when it comes to parental rights and access in matters of custody are distinct from those that arise when the parents are located in the same country or locality.
28. In the instant case owing to the fall out between the parents, each has a preferred location to set up residence that is not within the same country.
29. I think it is easier to provide for shared custody and access between estranged parents where they both live in the same town and country as the obstacles to movement of the child from one parent to the other will not be compounded by the challenges present when dealing with inter country movements, that include distance and cost.
30. This is the situation that the Court was faced with and which unfortunately the Court did not delve into. Section 32 (1) of the *Children Act*, 2022 provides;

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 exercise of such parental responsibility whether or not the child is born within or outside wedlock.
31. So, whereas it is in the best interests of the Child that the Child have equal access to both parents, this will not be possible when the parents are separated by distance, time and attendant costs.
32. The learned Magistrate in making the orders as to custody and access seems to have been swayed by the ‘tender age principle’ to the exclusion of ‘the best interest principle.’
33. As stated by Hon. J Ngugi J (as he then was) in *SMM v ANK* [2022] eKLR

(76) 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.

34. The facts in the instant case are almost identical to those in Australian Case of *U v U* [2002] HCA 236, where the Appellant in that case following the breakdown of the marriage sought to relocate with the Child of the marriage to India.
35. Having cautioned myself, as did the Hon. J. Ngugi J (as he then was), in *SMM v ANK*, cited above, against reliance on foreign jurisprudence, I take cognizance that with the increase in number of inter nationality marriages and thus the increase in disputes of this nature when such unions do break up it is prudent that decisions emerging from Kenyan Courts are consistent with those emerging from other courts internationally, given especially the international applicability of the best interests of the child principle.
36. In that case the Court in dismissing the Appeal of the mother, the Court restated the 3-stage process to guide a court in considering a relocation application; these are 1. The Court to identify the relevant competing proposals 2. For each relevant factor, the court to set out the relevant evidence and submissions with particular attention on how each proposal is said to have advantages and/ or disadvantages for that factor and make findings on each factor. 3 On the basis of the prior steps of analysis, a court will determine and explain why one of the proposals is to be preferred, having regard to the principle that the child's best interests are the paramount not the sole consideration.
37. The Respondents proposal in this regard was that the Children remain in Kenya and that she has sole custody, care, control and possession.
38. The Appellant on the other hand proposed that the Children relocate to Netherlands and has offered to secure separate accommodation for the Respondent.
39. Under the Respondents proposal the Appellant would have restricted and almost nil access to the children. The proposal of the Appellant provides for the Respondent to return to Netherlands and is premised on the fact that the Children are Dutch citizens and have family and social networks in Holland and would have access to superior social services such as education. It is also submitted that the relocation of the children to Netherlands would allow the Appellant access to the children as opposed to if they were to stay in Kenya.
40. Both proposals are therefore hinged on parental rights. With regards to parental rights vis-a-vis best interests of the Child, the Supreme Court of Kenya stated in *MAK v RMAA & 4 others* (Petition 2 (E003) of 2022) [2023] KESC 21 (KLR) (Civ) (2 March 2023) (Judgment)

[67]..... In other words, all the rights provided under article 53 are in the child's best interest. The 'best interests' concept is further strengthened by being the 'paramount' consideration. This means that the best interests of the child are to be the determining factor when making a decision on the child. It is against this aspect that parental rights ought to be balanced. This is also taking into consideration that no right should be compromised by a negative interpretation of a child's best interest.



41. The Supreme Court went further and cited the recognition by the *UN Convention on the Rights of the Child* of the family as the fundamental unit of society and the natural environment for growth and well-being of its members particularly children. In particular article 9 of the Convention provides

- “1. States parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.”

42. The Court proceeded to pronounce on the centrality of parental rights and the linkage with the child's rights as follows-

(81) ...section 24(5) on parental responsibility stated “a person who has parental responsibility for a child at any time shall not cease to have that responsibility for the child.” This means parental responsibility is a mandatory ongoing obligation. Parental responsibility attaches to the right of the child as it is the parent who has the responsibility to ensure that the needs of the child are catered for.

(82) In addition, it is not in the interest of justice to deny the child access to his mother. We are cognizant of article 19 of the *African Charter on the Rights and Welfare of the Child* which stipulates that: “every child is entitled to parental care and protection and shall wherever possible reside with his or her parents.”

(83) It is evident from the foregoing provisions that the child has a right to parental care and it is in the best interest of the child that he is brought up and cared for by his or her parent. This right can only be denied if it is proved with cogent evidence and valid grounds that a parent is not suitable or is incapable of taking care of the child. Ultimately, therefore, a child needs both of their parents which is their right, especially where a parent's incapacity has not been proven as we have found in this case.

43. Having determined that parental rights cannot be ignored if they are in the best interests of the child, the Court proceeded to provide guidelines to be considered when balancing a child's best interests and parental rights and responsibility;

(87)

1. The existence of a PRA between the parties
2. The past performance of each parent.
3. Each parent's presence including his or her ability to guide the child and provide for the child's overall well-being.



4. The ascertainable wishes of a child who is capable of giving / expressing his /her opinion.
5. The financial status of each parent.
6. The individual needs of each child.
7. The quality of the available home environment
8. Need to preserve personal relations and direct contact with the child by both parents unless it is not in the best interests of the child in which case supervised access to the child must be granted.
9. Need to ensure that children are not placed in alternative care unnecessarily.
10. The mental health of the parents and
11. The totality of the circumstances.

44. In the instant case I find the following circumstances to be obtaining

- i. The relationship between the parents has soured to the extent it is not realistic to expect that they can provide a common home for the children in the foreseeable future.
- ii. The Children (at the time of this decision) are aged 4 years 6 months and 2 years and 2 months and therefore, children of tender years
- iii. The mother has relocated or has expressed her intention to permanently relocate back to Kenya from Netherlands.
- iv. The father is a citizen of Netherlands and is desirous of relocating back to Netherlands with the Children as the country of their citizenship.
- v. The father is in employment in Netherlands while the mother is a stay at home mum.
- vi. By virtue of having a Kenyan mother, the Children have dual citizenship, Kenyan and Dutch. Article 14 (1) of the Constitution of Kenya, 2010 states that, "... A person is a citizen by birth if on the day of the person's birth, whether or not the person was born in Kenya, if either the mother or the father of the person is or was a citizen..." Article 16 of the Constitution of Kenya, 2010 further states that, "... A citizen by birth does not lose citizenship by acquiring the citizenship of another country..."
- vii. There is no evidence challenging the suitability of either parent.

45. Based on the above in the instant case the Court is required to provide an arrangement that would allow access of both the parents in a manner that would allow sufficient bonding with the minors.

46. On parental contact I refer to the words of Kirby J (dissenting opinion) in *U v U* cited earlier at para 152, the Court stated

“It is always difficult in these cases when marriages break up where a wife who, as this one is, is very isolated in this country feels the need to return to her own family and her own country; ... The fundamental question is what is in the best interest of the child; and once it has been decided with so young a child as this that there really is no option so far as care and control are concerned, then one has to look realistically at the mother's position and ask oneself the question: where is she going to have the best chance of bringing up this child



reasonably well? To that question the only possible answer in this case is Hong Kong. It is true that it means cutting the child off to a large extent – almost wholly perhaps – from the father; but that is one of the risks which have to be run in cases of this kind."

47. On the concern that an order that would result in the children staying in a country separate from the father and therefore limit the physical contact the judge stated thus
- (161) I consider that this conclusion is borne out not only by reference to Australian legislation and relevant judicial authority. It is reinforced by a proper analysis of this case in terms of the principles of international human rights law. Such principles may influence local law on such questions. The principles are obviously concerned with the interests of a father and also of a child to have, and maintain, regular contact. Such contact can include telephonic, Internet, photographic, filmed and intermittent physical contact. Today contact does not have to be exclusively physical or face to face if the cost of insisting on such physical contact is to impose serious deprivations upon the human rights of custodial parents, who are mostly women. To take the contrary view is to entrench gendered social and economic consequences of caregiving upon women in a way that is contrary to the *Convention on the Elimination of All Forms of Discrimination against Women* to which Australia is a signatory. That Convention requires that such discrimination and inequality should be eliminated from the law of this country.
48. For the foregoing reasons I find that it would not be in the best interests of the children to order for their relocation. In so doing I find that the learned Magistrate was right in declining to order the relocation of the Children albeit she arrived at her decision by a different route.
49. Further as observed in *SMM V ANK*, the effect of granting this request would be to remove the minors from the Country and jurisdiction of the Court. The Court observed
- (78 (b)) This is an important factor because it removes or at least makes it unreasonably difficult for the Respondent to have access to the children or to participate in their upbringing without unreasonable expenses and inconvenience. It would take the Respondent to subject himself to the US visa process in circumstances in which success is not guaranteed. Moreover, the expenses and inconvenience of the process makes it needlessly costly and impracticable for joint custody arrangements. Additionally, once out of the jurisdiction, it would be difficult for the Court to enforceably review any custody decisions it makes or supervise them.
50. I am particularly persuaded by the reason that the Court must be able to review its orders and supervise them. Once the children leave our jurisdiction this will not be possible.
51. On actual custody the Court correctly observed that the mother resides in Kenya and the father in Netherlands. She also correctly observed that the Children were of tender years and therefore in their best interest to have the mother as the primary carer.
52. The Court observing that the father was outside Kenya provided for virtual access and proceeded to set out the times. I observe that the Court was guided by the fact that the parties live in different countries. In addition to the virtual access the Appellant would have physical access over the weekend while in the Country.
53. Most importantly the Court reserved the father's right to apply for review of the orders once the children were old enough to spend extended periods away from their mother.
54. The Appellant took issue with the order that neither parent would remove the children out of the jurisdiction of the Court without prior consent of the other spouse or the Court. I find that in the circumstances of this case that order was reasonable and I would not disturb it.



55. I do find however that the Learned Magistrate erred to the extent that she sought to limit the access of the father to the minors. I am guided by the decision in *SMM v ANK* where Hon. Ngugi J (as he then was) observed that with the technological advances' courts would not be hampered by considerations such as distance. Accordingly, I would vary the decision of the Lower Court as follows

- a. Both parties are hereby granted joint legal custody of the subject minors.
- b. The Respondent, who is the biological mother of the subject minors, shall have actual custody, care and control of the subject minors as the minors are of tender years. The minors shall reside in Kenya.
- c. Appellant who is the biological father of the subject minors shall have access to the minors when he is in Kenya as follows (subject to adequate sufficient notice being granted)
 - a. Unlimited access during school holidays
 - b. Unlimited access over the weekend while the schools are in session
 - d. While the Appellant is out of the Country he shall have unlimited access to the minors through telephone, video calls and email and any other available means of communication.
 - e. The Respondent is hereby restrained from interfering with the relationship between the Appellant and his children MHC and MWC by denying them or frustrating communication between them or access.
 - f. The Appellant is at liberty to apply for shared actual custody when the subject minors are old enough as to be able to be separate from their mother for long periods.
 - g. The Respondent shall take care of the minors' housing, utilities and clothing as part of her parental responsibility. The Appellant on his part, shall cater for the subject minors' education expenses, medical cover and food at Kshs. 15, 000 per month.
 - h. The status quo as relates to the school which the subject minor M is currently attending to be maintained. The Respondent cautioned not to make any unilateral decisions on the minors' education expenses. The Appellant, if not consulted when such decisions shall only pay school fees/ tuition fees equivalent to that he would have paid in the former school. In that event the Respondent shall meet any extra tuition fees and registration charges in respect to the Minors.
 - i. For the reasons forgoing I decline the request by the Appellant to order the relocation of the minors to Netherlands
 - j. Passports of both the minors to be released to the Respondent (mother).
 - k. Both parties shall not remove the subject minors from the court's jurisdiction without consent of each other or leave of court. Each party is at liberty to apply.
- l. This being a children's case, I make no order as to costs.

It is so ordered

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF AUGUST, 2023.

P M NYAUNDI



JUDGE

In the presence of:

Advocate Ms. Anne Mbugua for the Appellant

Advocate Mr. Musyoka for the Respondent

Sylvia Court Assistant

