



**YMM v JDDD (Civil Appeal E004 of 2022)
[2023] KEHC 27446 (KLR) (4 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 27446 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E004 OF 2022**

**G MUTAI, J
AUGUST 4, 2023**

BETWEEN

YMM APPELLANT

AND

JDDD RESPONDENT

(Appeal arises from the Judgement and Decree of the Trial Court delivered on 13th January 2022 by Hon. L.K. Sindani, Senior Resident Magistrate in Tononoka Children Case No. 541 of 2019)

JUDGMENT

1. This Appeal arises from the Judgement and Decree of the Trial Court delivered on 13th January 2022 by Hon. L.K. Sindani, Senior Resident Magistrate in Tononoka Children Case No. 541 of 2019.
2. The Trial Court entered Judgement and granted the following Orders:
 - a. Legal Custody of the children to be joint between the Plaintiff and the Defendant;
 - b. The Plaintiff and the Defendant to have shared actual custody with the Plaintiff having physical custody, care and control of the first-born son, DDD and the last-born girl ADD while they are in school and the Defendant to have physical custody, care and control during school vacation.
 - c. The Defendant to have physical custody, care and control of the second born child DDD (autistic child) and allowed to transfer the child to a good school that caters for the child's needs near her residence in Juba in the new term.
 - d. The Defendant to cater for the second born child's needs at the said school she wishes to transfer the child to and the Plaintiff to have unlimited access to the said child whenever he is in South Sudan but not to interfere with his schooling and therapies and during school holidays but parties to ensure that the siblings are not separated for a longer period during school vacations.



- e. Each party is to cater for the children's needs while in their custody, but nothing bars the other from chipping in when the need arises.
 - f. Each party to bear its own costs.
3. The Appellant was the Defendant. Being aggrieved with the said decision she preferred the following grounds in the Memorandum of Appeal: -
- a. The Trial Court erred in law and fact in ordering the Respondent to have actual custody, care and control of children during school days without considering their best interest which is with their mother who cares and loves them.
 - b. The Trial Court erred in law and fact in ordering that the children be separated and for the second born to be taken to Juba.
 - c. The Trial Court erred in law and fact in granting the Respondent actual custody without acknowledging the frustrating nature of the Respondent in adhering to the court's judgement.
 - d. The Trial Court erred in law and fact in Ordering the Appellant to solely cater for the 2nd born child's school fees.

Pleadings

4. The Respondent filed the suit vide the Complaint dated 23rd December 2019.
5. He sought to permanently bar the Appellant from moving near the Respondent's home, removing the children from the Respondent's custody, school and jurisdiction of the Court.
6. The Respondent further averred in the Complaint that the Appellant had abandoned the children and they were in the custody of the Respondent since 2014 but that the Appellant who resided in Juba resurfaced into Kenya from time to time and disturbed the children's lives.
7. The Respondent was thus apprehensive that without intervention of the Children's Court, the Appellant would interfere with the welfare and best interest of the children.
8. The Appellant as Defendant filed Defence dated 4th December 2020. She denied the averments in the Complaint.
9. In her defence she stated that she fully maintained the minors from the time of their birth up to the year 2015 when she moved to South Sudan due to work.

Evidence

10. During the trial, PW1, the Respondent herein, testified that he was the biological father of the minors. He relied on his witness statement and documents filed on 23rd December 2019.
11. It was his case that the Appellate was his estranged wife with whom they had 4 children. One of the children was deceased.
12. He testified that he had been living with the children for the past 5 years since moving to Mombasa. They divorced in June 2015.
13. The Respondent further testified that the Appellant paid no attention to the children and that one child even drowned due to her negligence.



14. He further testified that the children were in Light Academy, and the autistic child was also in a special school in Eldoret where he was boarding.
15. He testified in cross-examination and reexamination that he was taking care of the children alone while the Appellant was away in South Sudan while he resided in Mombasa.
16. Further, he accused the Appellant of being brutal and of having beaten the children, causing them bodily marks.
17. He denied that the Appellant was not granted access to the children.
18. PW2 was Isaack Gitau Wanjiru, who introduced himself to the court as a long-time friend of the Respondent. He relied on his witness statement and testified that he never found the Appellant whenever he visited the Respondent.
19. PW3, Chol Deng, introduced herself as a cousin to the Respondent.
20. She relied on her witness statement and stated that the Respondent provided the children with all their needs.
21. On cross-examination, it was her case that the Appellant lived in Juba for more than two 2 years without coming back.

The Appellant's evidence

Respondent's evidence

22. The Appellant testified as Defendant in the lower court case. She relied on her witness statement and documents filed in court.
23. It was her case that the Respondent was the father of her children. She stopped living with the Defendant when he moved to Kenya in 2017.
24. Further, in 2020, the Respondent threw the Appellant out of the house and beat her.
25. It was her case that she was taking care of the kids while in Juba.
26. In cross-examination, the Appellant stated that the children were not loved and that she had been going to the Respondent's house because of them.
27. DW2, Eva Maputune Nyoike relied on her witness statement dated 30th November 2020. She testified that she was a medical professional at Econ Special Tutorial School.
28. It was her case that the Appellant was available all the time to see the minor who had autism.
29. Further, that the Appellant provided the needs of the minor.
30. She recommended the Appellant for the children's custody.
31. DW3, Jacinta Achieng, also a teacher testified that the Appellant used to take close care of the children.

The Appellant's Submissions

32. The Appellant filed submissions dated 22nd June 2022 reiterating the Grounds in the Memorandum of Appeal.



33. It was submitted that the Respondent had neglected the children since 2017 in breach of Article 53 of *the Constitution*.
34. It was further submitted that the Trial Court ordered for custody of the children against Section 83 of the Children's Act and as such undermined their wishes, community interest and safety as they were subjected to harm.
35. They relied inter alia on the case of JO v SAO (2016)e KLR to submit that the mother is the most preferred parent to have the custody of the minors.
36. It was also submitted that parental responsibility is shared and not equal based on the financial position of each parent. Therefore, that parental responsibility of the 2nd Born child should have been apportioned to both parents and not only to the Appellant. Reliance was placed on the case of MK v CKK HCA No. 51 of 2015.
37. I was urged to allow the Appeal.

Respondent's Submissions

38. The Respondent filed submissions dated 8th July 2022.
39. It was submitted that the child's welfare and best interest were the paramount consideration when determining child custody and maintenance cases and that the trial court correctly observed these parameters. Reliance was placed on Article 53 of *the Constitution*.
40. It was the submission of the Respondent that the Tender Years Doctrine is persuasive in considering custody but that it was not an inflexible rule and was inapplicable in the circumstances of this case. Reliance was placed inter alia on the case of SMM v ANK (2022)e KLR.
41. I was urged to dismiss the Appeal.
42. The parties also highlighted their written submissions. I have taken note of the contents of the submissions as filed and highlighted, as well as the authorities referred to.

Analysis

43. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
44. In the case of Mbogo and Another vs. Shah [1968] EA 93 the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”



45. The duty of the first appellate Court is well settled. The Court of Appeal for Eastern Africa, in its decision in *Selle and another Vs Associated Motor Board Company and Others* [1968]EA 123, held as follows:-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

46. Further, in the case of *Peters vs Sunday Post Limited* [1958] EA 424, the Court held as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution; it is not enough that the appellate court might have come to a different conclusion...”

47. The issue that fall for this Court’s determination is whether the Trial Court erred in law and fact in its finding on the custody and maintenance of the children herein.

48. I understand Article 53(1) of *the Constitution* of Kenya provides that a child’s best interests are of paramount importance in every matter concerning the child. This position is enshrined in the Children’s Act, 2022. Section 8(1) of the Children’s Act of 2022 provides as follows:-

“8(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.

49. In my reevaluation of the pleadings and evidence, I note that the Appellant’s case in this appeal is that the Trial Court erred in its finding on the custody and maintenance.

50. 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.

51. I therefore have no doubt that there are enough safeguards to guide this court in arriving at a finding founded on the welfare and best interest of the children in this case.

52. The Appellant consequently submitted that Trial Court erred in law and fact in ordering the Respondent to have actual custody, care and control of children during school days without considering their best interest which is with their mother who cares and loves them.

53. I note on this that the trial court directed as follows:



- a. ...
 - b. The Plaintiff and the Defendant to have shared actual custody with the Plaintiff having physical custody, care and control of the first-born son, DDD and the last-born girl ADD while they are in school and the Defendant to have physical custody, care and control during school vacation.
 - c. The Defendant to have physical custody, care and control of the second born child DDD (autistic child) and allowed to transfer the child to a good school that caters for the child's needs near her residence in Juba in the new term.
 - d. The Defendant to have physical custody, care and control of the second born child DDD (autistic child) and allowed to transfer the child to a good school that caters for the child's needs near her residence in Juba in the new term.
54. Inasmuch as the Appellant maintained that it was not in the best interest of the first and last born children to be in the custody of the Respondent while they are in school, it is not in dispute that the Appellant is not domiciled in Kenya while the children are in learning institutions in Kenya. It is also uncontested that the Respondent is resident and working for gain in Kenya where the children are learning.
55. In my re-evaluation, I am unable to agree with the Appellant that the best interest of the children would demand that the Respondent be denied actual custody of the children. I say so particularly because the evidence presented in the Trial court demonstrated that it is the Respondent who sought and enrolled the children in the schools in which they are learning. The Appellant demonstrated that she occasionally chipped in to support the children but as it stands, her residence is in South Sudan. It was also apparent that she does not have a home of her own in South Sudan as she resided with her parents. Therefore, it is not correct for the Appellant to assert that she is the ones who loves and cares for the children more than the Respondent when evidence shows that she only comes in Kenya occasionally. In my view the Appellant is has no fixed abode and is therefore unsettled in Kenya. As was held in *Sospeter Ojaamong vs. Lynette Amondi Otieno*, Court of Appeal Number 175 of 2006:
- “The exceptional circumstances would include if the mother is unsettled, has taken a new husband or her living quarters are in a deplorable state.”
56. Therefore, to this court, the welfare and best interest if the children in this case demands that they access quality education, health, nutrition, interaction, among other necessary child developmental parameters. In my view, the children, while in Kenya are already sufficiently getting these necessities for their welfare and best interest.
57. I now proceed to consider the appeal on maintenance. To this the Appellant maintained that The Trial Court erred in law and fact in Ordering the Appellant to solely cater for the 2nd born child's school fees.
58. I note that the court directed as follows:
- The Defendant to have physical custody, care and control of the second born child DDD (autistic child) and allowed to transfer the child to a good school that caters for the child's needs near her residence in Juba in the new term.
- The Defendant to cater for the second born child's needs at the said school she wishes to transfer the child to and the Plaintiff to have unlimited access to the said child whenever he is in South Sudan but not to interfere with his schooling and therapies and during school



holidays but parties to ensure that the siblings are not separated for a longer period during school vacations.

Each party to cater for the children's needs while in their custody but nothing bars the other from chipping in when need arises.

59. I understand the Appellant's submission to be that the Trial Court erred in separating the children and finding the Appellant to solely cater for the 2nd born child's school fees.

60. This position was stated in M.K. vs C.K.K HCA. 51/2015 where the court held:-

“Parental responsibility is shared and not equal based on the financial position of each parent. The mother as the resident parent has a nurturing role to the children and the father to provide maintenance and upkeep of the children.

61. It is trite law that equal parental responsibility does not mean equal financial or other contribution as it was held in the case of E.M.M Vs M.O.O(2016)eKLR:-

“However equal responsibility does not mean equal and similar contribution as the income of each parent, and other non-monetary contribution must be borne in mind.”

62. I have to reevaluate whether this was in the welfare and best interest of the minor in subject. The minor lives with a medical condition known as autism. He is as such in dire need of specialized treatment and nutrition. The evidence produced in court supported this notion.

63. I understand parental responsibility to be a shared responsibility. Overall, the Trial Court apportioned both legal and actual custody equally to the parties herein. The Evidence produced also indicated that the Appellant closely catered for the needs of the autistic minor. The Director and teacher from the institution were called to support this. This court is unable to interfere with the finding of the Trial Magistrate who had the benefit of seeing and hearing the parties and witnesses. It is not shown how the finding is against the best interest of the minor or diminished or denies the parental rights of the Appellant. Dealing with the same point, the Court of Appeal in Kiruga vs Kiruga & Another [1988] KLR 348, observed that:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”

64. From the foregoing, it is clear that the appeal has no merit.

Determination

65. The upshot of the foregoing is that the appeal is dismissed.

66. This being an appeal regarding the welfare of children, each party will bear her/his own costs of the appeal.

67. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 4TH DAY OF AUGUST 2023.

GREGORY MUTAI



JUDGE

In the presence of: -

Ms Musyoki for the Appellant;

Mr Obonyo for the Respondent; and

Arthur – Court Assistant.

