



**In re KH (Minor) (Civil Appeal E001 of 2023)
[2023] KEHC 23072 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23072 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E001 OF 2023
SC CHIRCHIR, J
SEPTEMBER 29, 2023
IN THE MATTER OF KH (MINOR)**

BETWEEN

FOC APPELLANT

AND

EA 1ST RESPONDENT

CHILDREN OFFICER – EMUHAYA 2ND RESPONDENT

JUDGMENT

1. The appellant herein filed suit at the Children’s Court in Butere seeking for legal custody/ uninterrupted access to (KH) whom he described as his child. The suit was against his estranged spouse and the children’s officer for Emuhaya sub-county. At the conclusion of the hearing, the trial court dismissed his claim and granted custody to the respondent, with access to the appellant. The appellant was also ordered to take out a medical cover for the child and the pay Kshs 2, 500 monthly for maintenance. The appellant was aggrieved by the outcome and proffered this appeal.

Memorandum of Appeal:

2. The appellant has set out grounds of appeal which are hereby paraphrased as follows:
 1. That the learned magistrate erred on relying on the report of a children’s officer when the said officer was a party to the proceedings.
 2. That the trial court gave a finding that was not supported by evidence.
 3. That the trial magistrate erred in giving full custody to the mother.
 4. That the trial court failed to take into consideration, the best interest of the child.



Summary Of The Evidence In The Lower Court.

3. The appellant was the first and only witness . He told the court that the defendant had denied him access to the child. He denied ever taking away the child forcefully from the defendant and that he only took the child to hospital and later stayed with her for one week as he felt the respondent was not taking good care of her .
4. The respondent on the other hand testified that the appellant took away the child using trickery; that his monetary provisions for the child has been sporadic; that she has no problem with the appellant accessing the child. At cross-examination, she insisted that she wants to remain with the child as the child was still young.
5. The 2nd witness for the respondent was her mother . She told the court that the appellant has never made any financial provisions for the child ,neither as he ever come to see her.
6. The rest of the parties testimonies centered around on accusation and counter accusations regarding the appellant's act of allegedly sneaking away with the child.
7. The appeal proceeded by way of submissions:

Appellant's Submissions:

8. It is the appellant's submission that the children's officer was biased in her reporting and yet the magistrate relied on her evidence to deny him the legal custody of the minor.
9. It is further submitted that there was no basis upon which the court used to determine custody in favour of the respondent. The appellant further contends that, using the age and gender of the child as the basis of custody was faulty.
10. It is further argued that the lower court's decision was not in the best interest of the child . The appellant cites the following reasons for his assertion:
 - i. That he is in a better financial position than the respondent.
 - ii. That he holds a bachelor's degree in early childhood studies and thus has a better understanding on matters children ,as compared to the respondent.
 - iii. That he has a home which will offer total comfort to the child, unlike the respondent's residence which she shares with her parents and other children.
11. The appellant submits that he was only given restricted access, that the trial court's decision will deny him the chance to make decisions on the education, health and bonding with the child.
12. The appellant further submits that the child in any event is not very young; that the respondent has been given the child notwithstanding the fact that she doesn't have the means to take care of her.
13. The appellant contends that the trial court relied on old past decisions in giving custody to the respondent, and has not considered the recent trends on child custody issues.
14. The appellant further complains that the lower court judgment was based on emotions, fallacy or stereotypes.
15. He has relied on a number of decisions which I have located and perused as no copies of the decisions were availed.



Respondent's Submissions:

16. The respondent, while citing the provisions under the *Constitution* and the children's Act on issues affecting the child, the respondent asserts that the standard of education and financial capability and are measures of a good parent.
17. The respondent further submits that the appellant has not given any tangible reason as to why the respondent should not be given custody. The respondent has cited the case of *J.O v S.A.O* (2016) eKLR and *Githunguri v Githunguri* (1979) e KLR to restate the general rule that unless prevailing circumstances or conditions otherwise warrant, the custody of children of tender age should be given to the mother.
18. The respondent contends that the child, who is 5 years and female, needs the mother as she grows up. The respondent relies further on the case of *N.M.M v JOW* (2016) eKLR to buttress her submissions

Determination

19. I have considered the memorandum of appeal, the record of the trial court and the respective submissions. It is the role of this court, as the first appellant court to review the evidence afresh re-evaluate it and arrive at its own findings (see *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co Advocates*(2013) e KLR)
20. The following issues present themselves for determination :
 - a. Who should have custody of the child?
 - b. The question of access

Who should have custody of the child?

21. Section 2 of the *Children's Act, 2022* defines custody as "lawful custody whether by operation of law, written agreement or order of a court of competent jurisdiction."

The same section defines actual custody as the "physical possession, care and control over a child, whether or not such custody is exercised independently or jointly with another person".
22. Justice Musinga in *J.O v R.M.M* (2005) eKLR expounded the term "actual custody" as follows: "Actual custody is defined to mean the actual possession of the person of the child as opposed to legal custody which means as respects a child, so much so much of parental rights and duties and as to the person of the child including the place and manner in which time is spent".
23. The *Blacks's Law Dictionary* (10th Edition) defines legal custody as "the authority to make significant decisions on a child's behalf including decision about education religious training and healthcare".
24. Custody therefore entails two aspects: legal custody and actual custody as defined herein before.
25. Thus bearing in mind the fact that legal custody entails decisions affecting the child such as her education, religious training, healthcare and generally covering parental rights and duties, I do not find any justification as to why the appellant was denied this role as a parent. There is no evidence, submitted to the trial court that were adverse on the appellant being equally granted custody.
26. It is true that there was evidence that he took away the child using trickery as opposed to using legal means but that does not mean he is a bad parent or should be a ground to take away his right and responsibility to make decisions affecting the child. In the case of *PMW v CMM* (2015) eKLR the court held "In the absence of any adverse conduct of any of the parents of the children of the marriage



or any exceptional circumstances that adversely impact the welfare of the children of the marriage... both parents are entitled to the joint legal custody...”

27. As pointed out herein before there was no reason whatsoever as to why the appellant was denied custody, and to that extent the trial court erred.
28. However as regards the question of actual custody of the child, bearing in mind the definition earlier referred to, focus should be on the age of the child. The child herein is a female child aged 5 years as at the time of trial. The general rule as restated in many past decision is that unless the circumstances rule out, actual custody of children of tender years should be given to the mother (see *Githubunguri v Githubunguri* (1979) e KLR).
29. In the case of *HGG v YP* (2017) e KLR ,the court held : Therefore, for a court of law to depart from the general rule on custody of children of tender years, there must be exceptional circumstances which warrant the mother to be denied custody of children of tender age. Such factors should be ones which affect the welfare and best interests of the child and may include but not limited to; the mother’s mental instability or insanity; disgraceful conduct, say her immoral behavior, drunken habit, abandoning the children; cruelty to children; and the company she keeps etc.”
30. I associate myself with the views of Kimani J in the case of *CIN v J.N.N* (2014) eKLR where he stated “ the children’s court must take into consideration the unique aspect of parenting that nature has endowed on the mother of the child. This includes the role that the mother places in nursing and nurturing a child or children of young and tender years. This function does not come naturally to fathers.”
31. I am alive to the decision of J. Ngugi (as he then was) in *JKN v HWN* (2019) e KLR which the appellant was apparently alluding to in his submissions. However in the cited decisions, the children were not of tender years as the children were then about 10 and 11 years when the high court made the decision; the children had expressed the desire to stay with, the father and were of an age where they had the capacity to express their wishes unlike the child herein. The child herein is of a tender age of 5 years , she may not be possessed of the capacity to express her wishes.
32. The age the child in this case is of an age which requires the mother’s nurturing. Let me hasten to add that contrary to the appellant’s assertion, the nurturing role of a mother is not a case of stereotyping but a fact of nature, applicable generally within the animal kingdom. I will add that it is as natural as the ability of the mother, as opposed to the father, to carry an unborn child. There are unfortunate circumstances like death of a mother at birth or soon thereafter, or where the mother is unfit, that would thrust the father to that role. This is not the case here. The mother is alive and there is no evidence of her unfitness . I agree with the respondent that financial capability or education has no bearing on issues of actual custody. This is an appropriate case therefore where the actual custody of the child should remain with the mother.
33. In view of the foregoing, this partial partially succeeds. The lower courts order on custody is hereby set aside and substituted with the following:
 - a. The appellant and the respondent are hereby granted joint legal custody of the child.
 - b. The actual custody of the child is given to the respondent.
 - c. The appellant is given unlimited access to the child, save that, the same should be at a prior notification to the respondent and on such place, time and period as shall be agreed upon by the parties herein.
 - d. For avoidance of doubt, the orders on maintenance remain undisturbed.



DATED ,SIGNED AND DELIVERED IN AN OPEN COURT AT KAKAMEGA THIS 29TH DAY OF SEPTEMBER 2023.

S.CHIRCHIR

JUDGE

In the presence of:

FO- The Appellant

EA- The Respondent.

