



**In re DNK (Minor) (Civil Appeal 138 of 2019)
[2022] KEHC 3034 (KLR) (Family) (1 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 3034 (KLR)

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

FAMILY

CIVIL APPEAL 138 OF 2019

MA ODERO, J

APRIL 1, 2022

NKP.....APPELLANT

VERSUS

KKP.....1ST RESPONDENT

DKKP.....2ND RESPONDENT

(An appeal from the judgment and decree of the children court at Milimani Law Courts against part of the judgment of Hon. G.M Gitonga-Senior Resident Magistrate delivered on 28th October, 2019 in the Children's Court at Milimani Children's Cause No. 47 of 2018)

JUDGMENT

1. Before this court for determination is the Memorandum of Appeal dated 15th November 2019 by which the Appellant NDP seeks the following orders:-

- a) That part of the judgment the Honourable Senior Resident Magistrate G.M. Gitonga (Mr) be set aside in the terms of the orders granting joint legal custody of the subject minor to both the Appellant and the Respondents herein and orders granting unlimited but reasonable access of the subject minor on every alternate weekends and half of the holidays.
- b) That this Honourable court be pleased to hold that the Respondents were not entitled to the said orders for joint custody and unlimited access as they were made by the trial court without verification of their affidavits, statements and evidence despite the Respondents having been given Notice of Intention to be cross-examined.
- c) That the Appellant be granted legal, actual custody, care and control of the subject minor.
- d) That an injunction to restrain the Respondents whether by themselves, their servants, agents or otherwise howsoever from harassing, intimidating or otherwise interfering with the Appellant's custody of the minor.



e) That the orders restraining the parties herein from leaving the court’s jurisdiction with the child without the leave of the court or consent of each other be set aside.

f) That the Appellant be granted damages for harassment, intimidation and physical and psychological trauma the Respondents have put him through by the act of taking away his only son barely months after his beloved wife passed on.

g) That this Honourable court be pleased to make any other orders that it may deem fit and just in the best interest of the subject minor herein.

h) That costs of this Appeal be borne by the Respondents.”

2. The Respondents KKP and DKKP opposed the Appeal. The matter was canvassed by way of written submissions. The Appellant filed his written submissions dated 7th September 2021 and supplementary submissions dated 26th October 2021 whilst the Respondents relied upon their submissions dated 4th October 2021.

Background

3. The genesis of this Appeal is the judgment delivered on 28th October 2019 by Hon G.M. Gitonga, Senior Resident Magistrate in Nairobi Children’s Case No. 47 of 2018. In that case, the Plaintiffs (the Respondents herein) namely KKPP and DKKP who are the maternal Grandparents of the subject child had filed a suit seeking legal and actual custody care and control of the minor DNK (‘DNK’).

4. The Defendant (the Appellant herein) the biological father filed a defence and counterclaim to the suit in which he also sought to be granted legal and actual custody care and control of the minor.

5. After hearing both parties, the learned trial magistrate delivered a judgment in which he made *inter alia* the following orders: -

“ 1. That actual custody, care and control of the child DN.K is hereby granted to the defendant father as the primary care giver.

2. That joint legal custody of the said child is granted to both parties to enable them to always consult in making important decisions that affect the child’s life.

3. That unlimited but reasonable access of the said child is granted to the plaintiffs on every alternate weekends and half of school holidays.

4. That the earlier access arrangements are hereby vacated. The first of such weekend access by the Plaintiffs shall be 9th and 10th of November 2019.

5. That parties may agree on pick up and drop off points.

6. That the Defendant/father shall take full parental responsibility for the child’s needs while the Plaintiff’s shall supplement such needs whenever circumstances demand. The Plaintiff shall however continue paying school fees for the child until he reaches the official school going age of 4 years.

7. That neither party shall leave the court’s jurisdiction with the child without the leave of the court or consent of the other.

8. That each party shall bear its own costs.

9.”



6. Being aggrieved by the decision of the trial court the Appellant filed this Appeal. In challenging the judgment delivered on 28th October 2018 by Hon G.M Gitonga, Senior Resident Magistrate in Nairobi Childrens Case No. 42 of 2018 the Appellant relied on sixteen (16) Grounds of Appeal as follows:-

- “ 1. That the learned magistrate erred in law and fact by framing issues to be determined for trial from issues framed by the parties as opposed to framing issues from the pleadings filed by the parties thereby exceeding its jurisdiction.
2. That the learned magistrate erred in law and fact by failing to satisfactorily appreciate and correctly apply the principle of the best interest of the child thus arrived at a wrong conclusion.
3. That the learned magistrate erred in law and fact by exhibiting biasness from the onset of the case before him by being eager to grant joint legal custody of the subject minor to both the Appellant and the Respondents without any bias, justifiable cause or reason.
4. That the learned magistrate erred in law and fact by declining to grant the Appellant full legal custody, actual physical custody, care and control of the subject minor when it was evident that no evidence was produced to persuade the trial court that the Appellant was not only unsuitable but also unfit as a parent.
5. That the learned magistrate erred in law and fact by failing to find and hold that it had been credibly proved after evaluating the evidence placed before it that the appellant as the natural father to the subject minor was suitable to have legal custody of the subject minor alone and the death of his wife did not make him a lesser parent.
6. That the learned magistrate erred in law and fact by totally disregarding the testimony and evidence tendered by the Appellant which was neither disputed nor shaken during cross examination.
7. That the learned magistrate erred in law and fact by failing to use his discretion properly, fairly and judiciously in considering the Appellant’s case and the glaring evidence produced by the Appellant rebutting all the allegations by the Respondents as well as the well thought written submissions and extensive authorities made on his behalf thus arrived at a wrong conclusion.
8. That the learned magistrate erred in law and fact in misdirecting himself and concluding that the Appellant had conceded not to have taken any steps to correct the problem identified by Dr Lessan on the Childs penis which was true thereby ended up contradicting his directions of 27th November 2018 where the trial court was of the opinion that the medical opinion by the same doctor would be subjected to further medical opinion before the parties could take a precipitate action on the same.
9. That the learned magistrate erred in law and fact in relying on the statement and evidence of the Respondents witness – HP in support of the Respondents case yet neither the said witness had ever sworn any affidavit on record nor the Respondents appeared in court for verification of their statements, affidavit on record by way of cross-examination thereby contradicting himself and further failed to honour the terms of his Ruling and/or directions made on 11th May 2018 and 21st November 2018 that held a different view.
10. That the learned magistrate erred in law and fact by failing to consider the Respondent’s witness admission that most of her evidence amounted to hearsay and therefore the



Respondents were better placed to testify in her place thus putting their interests before those of the subject minor contrary to the Children’s Act No. 8 of 2001.

11. That the learned magistrate erred in law and fact in directing that the Appellant not to leave the Court’s jurisdiction with the child without the leave of court or consent of the other without any basis thus curtailing the freedom and rights of the subject minor as provided under Articles 28, 39, 53 of *the Constitution* of Kenya 2010.

12. That the learned magistrate erred in law and fact in failing to note the conduct of the Respondents in the suit was not in the best interest of the subject minor.

13. That the learned magistrate erred in law and fact in showing outright bias and discrimination against the subject minor’s surviving paternal grandparent by putting the Respondents (maternal grandparents) in equal footing as the Appellant (remaining biological parent of the minor after the death of his wife in July 2017) which he granted them unlimited but reasonable access of the minor on every alternate weekends and half of school holidays.

14. That the learned magistrate erred in law and fact by misguiding himself that the evidence led by the parties tended to underline the parties feeling of disdain against each other rather than promote the child’s best interests contrary to the Appellant’s evidence that showed he was brought to court by the Respondents out of malice when he was already fulfilling his parental obligations as required under the Children’s Act and *The Constitution*.

15. That the learned magistrate erred in law and fact by seriously misdirecting itself by reasoning that the child’s life would be richer if decisions about his welfare were made in a consultative way between the Appellant and the Respondents, by taking judicial notice of the limited way of fathers when it came to confronting difficult situations touching on the welfare of the child. The trial court went further ahead to state the Appellant as a man may be vulnerable in taking quick and decisive actions when called upon to do so. Further, the trial court misdirected itself by reasoning that the child’s best interests demand that the Respondents be in his life to supplement love and care of the Appellant which reasoning was steeped in a dangerous fallacy born of stereotypes relying on the stereotypes to reach an unfair verdict on the Appellant as an individual.

16 That the learned magistrate erred in law and fact by assuming the Respondents to be persons of sound financial means capable of assisting in taking care of the needs of the minor without any evidence placed before it”.

7. The Appeal was strenuously opposed by the Respondents

Background

8. The Appellant NKP got married to one SKP the daughter of the Respondents under Hindu Religious Rites on 2nd January 2005, at the Shree Cutchi, Leva Patel Samaj Hindu Temple in Nairobi. A copy of their marriage Certificate Serial No. 13---- appears at page 62 of the Record of Appeal. The couple bore one child together, a son who was born on 24th May 2016 which child is the subject of these proceedings. A Copy of the Childs Birth Certificate Serial No. 59----- appears at page 63 of the Record of Appeal. Unfortunately, the minors biological mother passed away on 22nd July 2017. A copy of her Death Certificate Serial Number 07----- appears at page 65, of the Record of Appeal. This was the beginning of this monumental legal battle between the maternal grandparents of the child and the child’s biological father.



9. The Respondents in their plaint accused the Appellant who is the Child's only surviving parent of neglecting the child and of failing to take steps to ensure the physical and emotional wellbeing of the minor. They claim that the Appellant was negligent in taking action to secure treatment for the child in a timely manner, that he failed to provide a balanced diet for the child and also that he failed to enroll the child to school.
10. The Respondents stated that they were apprehensive that due to the Appellants' dire economic situation and given his inability to provide nurturing care for the minor, the Appellant was planning to take the child to Australia where he planned to give up the minor for adoption.
11. The Appellant in his defence and counterclaim strenuously denied the allegations made by his parents-in-law. He asserted that following the unfortunate demise of his wife (the minor's mother) he has been a loving, attentive and responsible father to the child. That he has made adequate provision for all the Child's needs including food, medical care, shelter and clothing without any external help.
12. After hearing evidence from both parties the trial court delivered its judgment granting actual custody care and control of the minor to the Appellant (father) as primary caregiver. The court further directed that the parties be granted joint legal custody of the minor to enable them consult in the making of important decisions affecting the minor's life. The court also made orders granting the Respondents regular access to the minor.
13. As stated earlier the Appellant was aggrieved by the orders made by the Children's Court and appealed against the same. The gist of the Appellants appeal is that the trial court erred in awarding legal custody jointly to himself and the Respondents. The Appellants position is that as the only surviving parent of the child he ought to have been granted full legal and actual custody of the child. He objects to having to receive input from the Respondents in making major decisions regarding the welfare of his son.

Analysis and Determination

14. I have considered the Memorandum of Appeal, the Record of Appeal as well as the submissions filed by both parties. As this being a first appeal the court is obliged to re-consider and re-evaluate the evidence adduced in the lower court, but bearing in mind the fact that it did not see or hear the witnesses testify. In the case of *Peters – vs- Sunday Posts Ltd* (1958) E.A the Court of Appeal stated thus:-

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”
15. At the outset this court must remind itself that this matter involves the wellbeing and welfare of a child Article 53 (2) of *the Constitution* of Kenya 2010 provides as follows:-

“A Child's best interests are of paramount importance in every matter concerning the child”.
16. Likewise Section 4(2) of the *Children Act* 2001 provides:-

“(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration”. (Own emphasis)



17. The *Convention on the Rights of the Child* and the African Charter on the Rights of the Child have also both emphasized the centrality of the best interest of the child. There is no definition of what constitutes the best interest of the child. The best interest of the child is to be determined based on the circumstances of each individual case. However, suffice to say that the priority must be given to the child and what is best for him/her. Consideration of what constitutes the Child's best interest will be guided by the basic rights of the child which are provided for under *the Constitution* of Kenya Children Act and International Instruments, which have been ratified in Kenyan Law.
18. In case of *Ma vs Roo* [2013] eKLR Hon Justice Kimaru stated as follows:
- “What is the best interest of the child has not been defined by the law. This is as it should be because the best interest of each particular child will depend on the circumstances of each particular case at any one particular time. What is not in dispute, however, is that there are certain minimum requirements that have universally been accepted to constitute the best interest of the child. This includes the right of a child to be provided with shelter, food, clothing and education. The child is entitled to medical care. The child's welfare should be taken care of under the best possible circumstances”. (own emphasis)
19. Section 83 of the Children Act lists the principles which a court ought to take into account in making an order of custody as follows:-
- “(a) the conduct and wishes of the parent or guardian of the child;
- (b) The ascertainable wishes of the relatives of the child;
- (c) The ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;
- (d) The ascertainable wishes of the child;
- (e) Whether the child has suffered any harm or is likely to suffer any harm if the order is not made;
- (f) The customs of the community to which the child belongs;
- (g) The religious persuasion of the child;
- (h) Whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;
- (i) The circumstances of any sibling of the child concerned, and of any other children of the home, if any.”
20. In the Memorandum of Appeal the Appellant submitted that the learned trial magistrate framed for determination issues that did not arise from the pleadings before the court. With respect, I do not agree. The issues framed by the trial magistrate related to the question of custody of the minor, an issue which clearly emanated from the pleadings before the court.
21. Moreover, the court was not obliged to adopt the issues as framed by the Appellant. Order 15 Rule 2 of the *Civil Procedure Rules 2010* permits a court to rely either on issues as framed by the parties or frame its own issues for determination from the pleadings. I find no merit in this ground of Appeal and the same is hereby dismissed.



22. Further the Appellant took issue with the fact that the Appellants did not personally testify in this matter. Rather the Plaintiffs case was founded on the testimony of one HP who was the daughter of the Plaintiffs and the maternal Aunt of the minor. The decision of how to conduct their case and whom to call as witnesses is one which was to be made by the Plaintiffs and their Advocate.
23. However, the trial court was under an obligation to consider the entire body of evidence presented before the court. This included witness statements, Affidavits, medical Reports etc. There is no evidence that the learned trial magistrate failed to put into consideration any piece of evidence presented before him. The said HP was a competent witness and indeed was cross-examined on her evidence.
24. That being said it cannot be ignored that the persons who were seeking custody of the minor were the grandparents (the Respondents herein). As such their evidence was crucial to enable the court determine their suitability or otherwise as custodial parents. The witness who testified i.e., HP was not the person seeking custody of the child. Indeed the said HP conceded under cross-examination that she had relocated at Canada where she lives with her family. Therefore, she has no real idea of how the child was being raised here in Kenya. Similarly, this witness had no idea where the Appellant worked or where he lived. She was not a competent witness regarding his suitability as a caregiver to the child. Her evidence was based on information largely obtained from her parents.
25. Therefore, the Respondents ought to have testified on their own behalf. Their failure to testify meant that the counsel for the Appellant was denied an opportunity to test their evidence by way of cross-examination. The failure of the Respondents to testify certainly had a negative effect on the weight of their case.
26. In *Federation of Women Lawyers (FIDA) Kenya – vs Inspector General of Police & 2 others* (2016) eKLR it was held as follows –

“...whether the witnesses come and give oral evidence or their statements are adopted as evidence does not change much.... The court can admit a statement even if the maker is available but has not been called as a witness. Section 30 of the Evidence Act provides for the weight to be put to statements admitted under Section 35....”
27. The Appellant has faulted the trial court for awarding legal custody jointly to himself and to the Respondent. The Appellants contention is that as the biological father and the only remaining parent of the minor, the court ought to have awarded him full legal and actual custody of the child. The Appellant further asserted that he is a suitable parent who has the best interests of his child at heart.
28. The Respondents on the other hand were equally aggrieved by the decision of the trial court concerning the custody of the minor. They submitted that in light of the fact that the trial magistrate found their allegation of neglect against the Appellant feasible, the court ought not have found the Appellant to be a parent who is suitable to be awarded actual custody of the child.
29. At the outset I wish to point out the following. It is very unfortunate that this matter has ended up in the courts at all. It is manifestly clear that the relationship between the two parties is toxic. Indeed the learned trial magistrate made a similar observation in his judgment when he stated as follows:-

“It is therefore unfortunate that the evidence led by the parties in this case has tended to underline the parties’ feelings of disdain against each other rather than their desire to promote the child’s best interests.”



30. The parties herein have engaged in a long drawn out legal battle over a matter, which in my view could easily have been settled in an amicable manner through mediation. Neither the Appellant nor the Respondents have approached this matter in a mature and civilized manner. None of the parties has put the interests and welfare of the child above their disdain for each other and their own inflated egos. Instead, the courts have become an arena for a supremacy battle between the parties and the poor minor has been relegated to second place.
31. The Appellant submitted that as the sole surviving parent of the minor the learned magistrate erred in failing to award him full actual and legal custody of the minor. He stated that prior to the demise of the child's mother both he and the child's mother had been the primary caregivers of the child. The Appellant insisted that he was a suitable parent and asserted that he had the financial capacity to provide for the child. He testified that he was physically fit and that aside from his business he was drawing rental income from six apartments in Westlands which gave him ample income to provide for the child. That he lives with his mother who assists in providing care for the child. The Appellant denied that the house help was the primary caregiver for the child. The Appellant also submitted that the learned trial magistrate erred and misdirected himself by acting on the stereotype that 'fathers are poor caregivers'.
32. I have carefully perused the judgment of the lower court. At no point did the court dismiss Fathers as 'poor caregivers'. In my view, the court was merely considering in a wholesome manner the best interests of the child, and the benefit to be derived by having the Childs maternal grandparents involved in his upbringing and care. It cannot be denied that the Appellant as the Childs father would benefit from the wisdom and input of the Childs maternal grandparents. Their joint involvement in the Childs upbringing can only enrich the welfare of the child.
33. However, the trial court failed to give equal consideration to the role of the paternal grandparents. There was evidence that the Appellants mother was alive and had indeed re-located to Kenya in order to assist in the care of her grandson. She too has a role to play in the upbringing of the child and her input should have been considered by the court to be of equal importance.
34. The fact of the matter is that in question of custody of a minor, the bottom line is the best interest of the child not the wishes of the father or the Grandparents. The question of custody must be determined by making the child the priority – it does not depend on the relationship the person seeking custody has with the minor.
35. In the case of *MAA – vs – ABS* [2018] eKLR, it was held as follows:-
- “What is stated in Section 4 (3)(b) of the Act is the paramountcy principle which is vital in all matters concerning children and must be given prominence. While considering this matter, this Court was alert to the welfare of the child herein who is of tender years. The matter is not about the Appellant and the Respondent and their interests are secondary to those of the child. The foregoing provisions require this Court to treat the interests of the child as the first and paramount consideration and must do everything to inter alia safeguard, conserve and promote the rights and welfare of the child herein. Acting in the best interest of the child.” (own emphasis)
36. The Appellant and the Respondent each claim to be the best caregiver for the child and each denigrates the other as unsuitable. The fact of the matter is that this child who is already vulnerable having lost his mother at a tender age. The best interests of the child requires that he have stability in his life. In an ideal situation both his father and both sets of grandparents would play a role in his life to enable him grow up to be a confident and well adjusted young man. They all have an important role to play



and all have a contribution to make in the welfare of the minor. However, in the circumstances of this particular case unanimity of purpose between the parties appears to be an impossible outcome.

37. The Respondents have harped on the fact that they are better off financially than the Appellant and are capable of meeting all the needs of the child. Money is not the determining factor of a Child's well-being. The ability to provide a better life for a child in a material sense does not give one priority in determining custody. A Child's psychological growth and happiness is not based on material things alone. How many children from affluent families are saddled with depression and low self-worth. Alternatively, how many testimonies of success do we hear from children raised by parents who are financially challenged. Money is certainly useful and beneficial in helping to acquire for a child the best education and needs of life but money alone does not mean that the welfare of a child is best provided for. In any event, even without an order of custody in their favour the Respondents would still be at liberty to utilize their vast financial resources to provide for their grandchild.

38. In his judgment the learned trial magistrate stated as follows:-

“From the totality of the evidence on record, I am not persuaded that the said evidence is sufficient to show that the defendant/father is hopelessly incapable of taking up parental responsibility of his son in the absence of the child’s biological mother. However, there was fairly reasonable evidence that the child would be richer if decisions about his welfare were made in a more consultative way between the defendant and his parents in law. I have had occasion to see and hear the defendant in court he appears to have genuine love for the child. He would not, in court’s view deliberately or recklessly put the child in harm’s way”. (own emphasis)

39. The learned trial magistrate went on to state as follows:-

“However, as a court, I take judicial notice of the limited way of the fathers when it comes to confronting difficult situations toughing on the welfare of the child. The defendant as a man may be vulnerable in taking quick and decisive actions which called upon to do so. However, this cannot be equated to negligence. The child’s best interests demand that the Plaintiffs be in his life, if only to supplement the love and care of the defendant...” (own emphasis)

40. The learned trial magistrate appeared to justify his decision to award legal custody jointly to the father and grandparents on the hitherto held view that fathers are incapable providing the parental love and care required by minors. This is not the case. There exists in our society many single fathers who are successfully raising their young children all on their own. The stereotype that fathers are not the best caregivers no longer has a place in modern society. In a recent case of *Sylvia Mueni Musyoka vs Alex Njuguna Kagwe*, Nakuru Children Appeal No. E011 of 2021 Hon Justice (Prof) Joel Ngugi in granting actual physical custody of the minor children to the Respondent who was their father observed as follows:-

“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 HC Children Appeal No. E011 of 2021 Page 34 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”. (own emphasis)

41. The old stereotype that fathers do not make good caregivers for young children was demolished by this Nakuru case. The court in the Nakuru case also took into account the fact that the minors had been living with their father in Kenya. Whilst in the present case both parties reside in Kenya. I am mindful of the fact that this minor had always resided with his father and even after the demise of his biological mother the child continued to reside with his father but with access to his grandparents.
42. In the circumstances I do find that the learned trial magistrate erred in taking ‘judicial notice’ of the limited way in which fathers approach the welfare of their children, without specifying the precise limitations of this particular Appellant. This was not sufficient grounds to grant legal custody to the Respondent. From the record, it was evident that the Appellant had the support and assistance of his family in raising the child. Following the demise of the child’s mother, the Appellants mother travelled to Kenya to assist in raising the child.
43. Having noted that there was no evidence to show that the father was hopelessly incapable of taking up parental responsibility for the child and having observed that the father had a genuine love for his son there existed no justification for the court to make an award of joint custody.
44. This court is mindful of the provisions of Section 6(1) of the [Children Act](#), which provides as follows:-

“ A child has a right to live with and to be cared for by his (or her) parents.”
45. Further section 27 (1) of the [Children Act](#) provides thus-

“ Where the mother and father of a child were married to each other at the time of the birth of the child or have subsequently married each other on the death of the mother the father shall exercise parental responsibility for the child either alone or together with any testamentary guardian appointed by the mother”
46. As pointed out in the judgment of the lower court the Childs mother did not leave any will addressing the question of guardianship for her child. She did not appoint a legal Guardian for the child.
47. Similarly, Article 7 of the 1989 Conventions on the Rights of the Child states that a child shall have a right to live with and be cared for by his or her parents. This is also echoed at Article 19 of the [African Charter on Rights and Welfare of the Child](#), which states that-

“ Every child is entitled to parental care and protection and shall whenever possible reside with his or her parents”.
48. The trial court noted and recognized the valuable input, which the maternal grandparents of the child would have in the upbringing of the child. The Magistrate observed that-

“ The Childs best interests demand that the Plaintiff be in his life, if only to supplements the love and care of the Defendant”.
49. By this the court recognized and in the judgment gave effect to the role to be played by the maternal grandparents in the Childs upbringing. Yet it is a fact that the maternal grandparents however well-meaning cannot replace the role and position of the child’s mother in his life. In making the award of



joint legal custody the learned trial magistrate mistakenly elevated the maternal grandparents to the role of ‘mother’ in the Child’s life. This is my view was an error. The grandparents can only be grandparents to the child. Where the father is alive and is capable of providing for the child then custody ought to be awarded to said father alone.

50. The question of who between the father and the maternal grandparents of a minor ought to be granted custody was considered by the High Court in Civil Appeal No. 108 of 2018 *MJC vs LAC & PFC* This was an Appeal arising from Children’s Case No. 1283 of 2017 in which the trial Magistrate granted custody of the minor to the maternal grandparents for a period of three (3) years. After the minor’s 10th Birthday custody was to revert to the biological father.
51. The father being aggrieved by the decision by the lower court appealed to the High Court. In allowing the Appeal Hon Lady Justice Lydia Achode observed as follows: -

“ 34. Further, Article 53 is clear with regard to where parental responsibility lies. There can be no basis for imposing parental responsibility on a person except in limited circumstances provided under the Children’s Act, where guardians are appointed and take up parental responsibility for the child. In the present case, the Respondents have no legal obligation to assume parental responsibility for the child while the child has a surviving parent who is legally bound and is ready and willing to take on parental responsibility. They may have a moral authority since the child’s mother (their daughter) is deceased. The learned trial magistrate was therefore right in her determination that the Respondents were not guardians of the child within the strict meaning of the law.

35. The learned trial magistrate in granting custody to the Respondents stated that it was in the best interest of the minor to remain in the Respondent’s custody until she attained the age of ten years. She observed that custody of children of tender years was ordinarily granted to the mother unless there were exceptional circumstances. She proceeded to find that the 1st Respondent had taken the role of a mother figure and that the minor was very attached to her. On this part I agree with the Appellants’ argument that the learned trial magistrate failed to appreciate his role as the surviving parent to the minor and that the 1st Respondent was a grandmother to the minor and not the mother.

36. From the evidence the minor is an only child aged 9 years. Children of tender years require a place where they will receive parental care something which cannot be measured monetarily or by tangible things. The Respondents claimed that they were in a better position to provide for the child. However, the ability to provide a better life to a child in material sense does not give one priority over another. The child’s psychological growth and happiness are not based on material provision alone. Nonetheless, financial provision is equally an important consideration in a child’s upbringing. The Appellant stated that he had secured a part time position at [particulars withheld] School to enable him take care of his daughter. In his testimony he also indicated that he had a house which is located near his parent’s and his sister’s house who had two children. It has therefore not been demonstrated that he has no ability to financially support, maintain, and provide for the child and it is my considered view that the extended family nearby would also help with the child’s psychological growth and happiness.

38. The Appellant being the surviving parent, has parental responsibility for the child absent of any legal guardian to act jointly with him. I find that it is in the best interest of the child in this cause to be placed in the custody of the surviving parent, her father. No exceptional



circumstances have been demonstrated to justify why the Appellant should not have full custody of his child”. (own emphasis)

52. The matter did not end there. The maternal grandparents of the child in question filed an Appeal in the court of Appeal being Civil Appeal No. 1191/2021 challenging the decision of the High Court to award full custody to the Childs father. In dismissing the Appeal, the Court of Appeal stated as follows:

“24. In the English case of Re G [2006] 545, Lord Nicholl was considering the best interests of the minor and this is the way he expressed himself thereon:

In reaching its decision the court should always have in mind that in the ordinary way the rearing of a child by his or her biological parent can be expected to be in the child’s best interest in the short terms and also, and importantly, in the longer term. I decry any tendency to diminish the significance of this fact. A child should not be removed from the primary care of his or her parents without compelling reason. Where such a reason exists the judge should spell this out explicitly”. (own emphasis)

53. The above cited cases are virtually on all fours with the present case. Therefore, it is manifest that the surviving parent of a child ought not be denied full custody care and control of said child unless “exceptional circumstances” are shown to exist to warrant such denial. In this case, the Respondents allege that the Appellant is not capable of providing for the child. They have cited the following examples of the Appellants negligence to prove his unsuitability as primary caregiver, his failure to take action to seek medical care to correct a congenital abnormality suffered by the child as well as the Appellant’s refusal to enroll the child in school.

54. It is common ground that the minor in question was born with a congenital condition affecting his private organ. The Respondent alleged that the Appellant had been unwilling to take any action to seek medical intervention on this matter to the detriment of the said child.

55. A look at the record indicates that prior to the filing of the suit in the lower court the Appellant had already taken action regarding treatment of the minors congenital medical condition. The Respondent own witness HP under cross-examination conceded thus:-

“..... this letter a from Dr Lumbai. It shows that the child was first seen by Dr Lumbai in June 2016 the child was born in May 2016. The Defendant had seen the doctor two months after (the Childs) birth....”

56. I have perused the medical report dated 6th February 2018 prepared by Dr LUMBAI (see page 52 of the Further supplementary Record of Appeal) which indicates that the child was seen at his clinic on 11th July 2016, two (2) years before the suit was filed in the lower court). The report confirmed that the minor had received all recommended vaccinations. The report further indicated that the child was to be referred to a Dr Kambuni for the surgical correction of his congenital Hypospadias and an appointment was scheduled for February 2018. The Respondents then proceeded to file the suit in the Children’s Court claiming that the Childs father had failed to seek treatment for the Childs congenital problem. This as demonstrated was not true.

57. The said Dr Fred Kambuni in his report dated 2nd February 2018 (see page 49 of the supplementary Record of Appeal) confirmed that the minor was referred to him by Dr Lumbai and indicated that the minor was scheduled for surgery in February 2018. The said Doctor also noted that the child was “in good general condition, good weight for his age and in good nutritional status”.



58. From the above reports the claim by the Respondents that the Appellant had neglected the child, had failed to seek medical attention for his congenital problem and had failed to ensure proper nutrition of the child are proved to be blatantly false. The Appellant has also proved that he had taken out full international medical cover in respect of the minor through GIGNA Cerotal Insurance Company Limited. Based on the above I reject the allegation that the Appellant had failed to take necessary steps to provide for the medical care and welfare of his son.
59. Regarding the allegations that the Appellant had refused to enroll the child in school it must be noted that at the time the suit was filed in the lower court in January 2018 the child was aged only 1½ years old. The question of when to enroll a child in school is one which lies within the discretion of the parent(s). However generally children start attending play groups at the age of 2-3 years. In his judgment, the learned magistrate stated as follows: -
- “ However Mr Onyony in concert with Ms Machio learned counsel for the defendant sought to rely and I think I agree with them on the Basic Education Act 2013, which prescribes the appropriate age for primary and pre-primary school. The child cannot be said to have reached school age in light of the provisions of the Act.....”
60. Therefore, the allegation that the Appellant had refused to enroll the child in school had no basis. The Appellant cannot be condemned for failing to enroll in school a child who was yet to reach the legal school going age. The argument by the Respondents that the child ought to have been enrolled in Day Care is neither here nor there as this is a decision which is left to the discretion of the custodial parent. I find no evidence of neglect on the part of the Appellant.
61. There was evidence that the Appellant resided with the minor and his own mother (the Childs paternal grandmother) in a three-bedroomed Apartment in the Westlands area of Nairobi County. Indeed, it came to light that the Respondents had gifted their daughter and her husband six (6) Apartments in which Title to same was issued to the couple. However, following the demise of the Childs mother the Respondents filed a suit in the Environment and Land Court being ELC No. 667 of 2017 seeking to reclaim the six (6) Apartments. This is a clear manifestation of malice on the part of the Respondents who are now seeking to render the Appellant homeless in a bid to bolster their case for custody of the minor.
62. The Respondents also alleged that the Appellant intended upon gaining custody to move the child to Australia and there put him up for adoption. Under cross-examination the Appellant categorically denied the suggestion that he was planning to give up the child for adoption. However, he asserted that like any other person, he had the right to re-locate to Australia or to any other country if he so wished. No evidence was tendered to support of the allegation that the Appellant intended to give up his son for adoption. On the whole I find no evidence to support the allegations of negligence made by the Respondents against the Childs father. It is clear that the Respondents are hell bent on painting the Appellant in a negative light in order to bolster their claim to be awarded custody of the minor.
63. The fact of the matter is that the minor herein has a surviving parent who is ready and willing to take up full parental responsibility for his son. I am not persuaded that the reasons advanced justify denying the Appellant full legal and actual custody of the child.
64. This is a case in which the mother of the minor has passed away. However, it is important to note that the minor is not an orphan. He has a surviving biological father who is ready and willing to care for him. I find no evidence that the father is an unfit parent. The learned trial magistrate did observe that there was no evidence to prove that the Appellant was incapable of taking up parental responsibility



for his son. The magistrate went on to justify his decision to award joint custody to the father and grandparents by stating as follows:

“However there was fairly reasonable evidence that the child would be richer if decisions about his welfare were made in a more consultative way between the Defendant (father) and his in-laws”.

65. There can be no doubt about the value that the Respondents input would have in promoting the Childs welfare. However, this in my view was not a reason or justification for the court to award them joint legal custody of the child. The learned trial magistrate did not give explicit reasons why he denied full custody of the child to his biological father. There was no finding of fact that the Appellant was an unfit father nor was there any evidence of abuse or neglect suffered by the child under the Appellants care
66. The magistrate only stated as justification for his decision the opinion that the input of the maternal grandparents would be beneficial in the upbringing of the child. I have no argument with said opinion but the input of the Respondents does not require that they be made joint legal custodians of the child. The Respondents are at liberty to consult with and provide input regarding the welfare of the child even if they do not have joint legal custody of the child. The input and support both material and financial of the Respondents in providing for and raising the subject child ought to flow for their love as grandparents of said child. That support cannot be made a condition for their being awarded joint custody of the child. The maternal grandparents ought not be permitted to oversee and/or supervise as it were the manner in which the Appellant chooses to raise his son. The Appellant as the only surviving parent has the right to sole legal and actual custody of the child. To grant joint legal custody to the grandparents is tantamount to granting them supervisory rights over the manner in which the Appellant raises his son.
67. Given the bad blood existing between the parties it would not be far fetched to predict that the Respondents may misuse their position as joint legal Guardian to frustrate the father be vetoing or shooting down major decision he may make regarding issues relating to the Childs education, medical care etc. which would certainly not be in the best interests of the child.
68. I find that in the circumstances the learned trial magistrate erred in awarding joint legal custody to the Respondents who are the Childs grandparents. The Childs father as the surviving parent is entitled to be given the freedom and space to raise his son without interference from any other party.
69. Moreover given the current bad blood between the parties joint custody in my view is simply not tenable. Joint custody would only be feasible where there is the anticipation that the parties will work together for the benefit of the child. I am not persuaded that this is achievable in this case.
70. I have no doubt that the Respondents who are the Childs grandparents have great love for the minor. However, they cannot replace the Childs late mother as parents of the child. It would appear that during the lifetime of the Childs mother the Respondents were supportive to the couple even involving the Appellant in their business. However, upon the demise of the mother things changed drastically and the father of the child became estranged from the grandparents, which led to the current tug of war over the custody of the child. Given the animosity which evidently exists between the parties joint legal custody would be counterproductive and may well mitigate against the best interests of the child. Based on the above analysis I find that the learned trial magistrate erred in granting legal custody of the child jointly to the Appellant and the Respondents. Accordingly, the said order is hereby set aside.



71. Allegations were made of bias by the trial court against the Appellant. I find no evidence of such bias. The fact that the court did not grant all the prayers sought by the Applicant is not proof of bias by the court.
72. The Appellant also made a prayer for damages for harassment, intimidation and physical and psychological trauma. However, this prayer was not canvassed at all and the same is hereby dismissed.
73. The court reiterates its advice to the parties that they bury the hatchet and work together for the benefit and welfare of the child whom they both love dearly. In recognition of the need for the child to have regular interaction with his maternal grandparents, I will uphold the orders made by the trial magistrate regarding to access to the minor by the Respondents

Conclusion

This appeal is partially successful and this court makes the following orders.

- (1) The orders granting joint legal custody of the subject minor to both the Appellant and the Respondents herein be and are hereby set aside.
- (2) The Appellant NKP is granted sole legal and actual custody, care and control of the minor DNK.
- (3) The Respondents who are the maternal grandparents of the subject minor to be granted reasonable access to the child on every alternate weekend and half of the school holidays as per the orders made by the Childrens Court.
- (4) The orders restraining the parties from leaving the jurisdiction of the court with the child without leave of the court or consent of each be and are hereby set aside.
- (5) The Appellants prayer for damages is dismissed.
- (6) Each part to meet their own costs.

DATED IN NAIROBI THIS 1ST DAY OF APRIL 2022.

.....

MAUREEN A. ODERO

JUDGE

