



**NK & 2 others ((Minor) suing through their mother and guardian) v ANM
(Civil Appeal 9 of 2020) [2022] KEHC 12014 (KLR) (24 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 12014 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 9 OF 2020
RN NYAKUNDI, J
JUNE 24, 2022**

BETWEEN

NK & 2 OTHERS APPELLANT

(MINOR) SUING THROUGH THEIR MOTHER AND GUARDIAN

AND

ANM RESPONDENT

*(Being an Appeal from the Judgement of Honourable Dr. Julie Oseko (CM)
delivered on the 18th September, 2017 in CM Children Case No.8 of 2017)*

JUDGMENT

1. This Appeal arises out of the judgment of the court below delivered on September 20, 2017 by the Chief Magistrate Hon Julie – Oseko of Malindi Law Courts in which she dismissed the plaintiff’s claim (appellant) against the defendant with costs.
2. The claim as premised in the Plaint dated 1 February 5, 2017 sought leave of the Court for the orders; of compelling the Defendant/Respondent to release the keys of the family house situated at Muyeye, to compel the Defendant/Respondent to provide reasonable maintenance for the minors namely CB, RI and WM on appeal, the Appellant raises the following grounds in the Memorandum of Appeal dated February 5, 2020.
 1. The Learned trial magistrate erred in law and in fact by failing to grant all the prayers sought in the case despite gravity of the evidence and authorities adduced during trial.
 2. The Learned trial magistrate erred in law and in fact by failing to address herself to the evidence adduced by the appellant together with the submissions.
 3. The Learned trial magistrate erred in law and in fact by ordering the appellant to pay costs to the respondent in a children matter.



4. The Learned trial magistrate erred in law by failing to deal with the issue of access and maintenance of the minors, by leaving the issue to the parties themselves.
 5. The Learned trial magistrate erred in law and in fact by failing to analyze the testimony of the witness.
 6. The Learned trial magistrate erred in law and in fact by failing to analyze the documents produced in evidence and adopted by the witness as testimony.
 7. The Learned trial magistrate erred in law and in fact by awarding costs to the defendant.
 8. The Learned trial magistrate erred in law and fact in arriving at the entire judgment on wrong principles of law.
3. Notwithstanding that, at the hearing of the appeal learned counsel for the appellant condensed them into two namely; that the learned magistrate erred in two by failing to deal with the issue of access and maintenance of the minors by leaving the issue to the parties. Secondly, that the learned trial magistrate erred in law and fair in armoring at the entire judgment on wrong principles of law.
 4. The case for the appellant on appeal is hinged on article 53 of *the Constitution* section 4 (1) of the Children’s Act and the principles in *Telkom Kenya Limited v John Ochwadai* [2014] eKLR *B vs Attorney General* [2004] IKLR 43, it is not clear from the record what happened to the import by way of submissions on the part of the respondent. However, in considering the issues raised in the Memorandum of Appeal I take it that in exercising appellate jurisdiction there would be no mistrial of the matter.

Determination

The Law

5. *The Constitution* of Kenya under article 53, and section 4 of the Children’s Act places the best interest and welfare of the children at the very apex of parental responsibility. As such the right to benefit from social security, right to adequate standard of living, right to clean environment, right to medicare, right to education, right of physical, material property, spiritual, moral and social development as obligations for the parents to take appropriate measures within their means for the survival of the children.
6. Constitutionally and by statute, both parents are enjoined to use their best efforts to ensure recognition and provision of the “means” for the realization of these captioned rights. It is therefore the duty and right of the parents to see to it that the highest stewardship of care and upbringing of their children is achieved without any discrimination.
7. In the case of *Mariam Hassian v Mohammed the High Court of Uganda* [1977] HCB – 43 it was held inter alia that; -

The welfare of the child is a paramount consideration and the matter of custody is best determined after hearing both parties.”
8. *In REF* [1969] 2 All ER it is as the Courts view that one cannot solve the problem arithmetically or quantitatively by using some sort of points system. The first and paramount consideration in determining such questions will be the best interest of the child.
9. This principle is of greater significance and in making of findings on custody and maintenance no parent is entitled to enjoy superior rights and control for reason that he or she has the financial ability.



What matters is the best interest and welfare of the child. What our law envisages is that where the rights under article 45 (3) and 53 of *the Constitution* are concerned of parents and more of the child or group of children are at stake, the child's or children rights must be the paramount consideration. If any balancing is necessary, the interests of the child or children must prevail. The English Court of Appeal in *Re-G* [2013] EWCA GV 965 held that:

The judicial exercise should not be a linear process whereby each option, other than the most draconian; is looked at in Isolation and then rejected because of internal deficits that may be identified, with the result that, at the end of the line, the only option left standing is the most draconian, and that is therefore chosen without any particular consideration of whether, there are internal deficits within that option. The global holistic evaluation of each of the options for the child's future upbringing is the duty of a judicial officer before deciding which of the options best meets the duty to afford paramount consideration to the child's welfare, so the decision maker must keep an open mind about the eventual outcome until all options are considered. I believe that it would be promoting the purpose of *the constitution* under article 53 when courts advance the best interest in their decisions. The materially test is as propounded in *ZH (Tanzania FC V Secretary of State for the Home Department* [2011] UKSC 4) where Lord Kerr said; -

“Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be a child's best interests should customarily dictate the outcome of cases such as the present suit, therefore, and it will require considerations of substantial moment to permit a different result.” (Underlined emphasis mine.)

10. In the instant appeal, Learned Counsel submitted that there were numerous irregularities in the impugned judgment of the lower court on issues of access and maintenance of the children. The court decided that the appellant had not proved her case on a balance of probabilities. My take on this finding are that under our supreme law and children's Act where the rights of parents and those of the children, are at stake, the child's rights must be the paramount consideration.
11. The question in this Appeal is whether a fair balance between the competing interests at stake, those of children, the two parents had been struck within the margin of appreciation of the evidence before that court.
12. In my considered view the answer is in the negative. It is quite possible to conclude that the impugned judgement at the conclusion of it was ambiguous and vague. The issues unsettled at the end of it all. There is weak reference to the children's best interests in the judgment of the trial court. My strong opinion is that the judicial officers presiding over children matters need to choose which characterization best reflects the process that secures the best interest of the child or children as set out in article 53 of *the Constitution* and 4 of the *Children Act*.
13. In arriving at its conclusion, the court failed to adopt an approach to demonstrate that the children of both parents cited in the claim shall enjoy special protection or be given opportunities and facilities by all means within reach of the parents to enable them to develop physically, mentally, morally, spiritually, socially, economically, health wise, in a normal manner and in conditions of freedom and human dignity.



14. The Court in *REG, supra* emphasized the following principles; -

Welfare, which in this context is synonymous with wellbeing and interests, extends to and embraces everything that relates to the Child's development as a human being and to the child's present and future left as a human being the Judge must consider the child's welfare throughout the remainder of the child's nurturity and into and through adulthood."

15. The claim before the trial court was concerned with issues to do with access and maintenance. In deciding that question it required the session magistrate to consider the ultimate purposes and values of life itself. The crux of the matter as identified by the trial court was whether the defendant/respondent to this Appeal had violated the best interests of their children. In that context the significant event, which occurred after the divorce as identified by the trial court were whether the Respondent does provide maintenance and support for the children of the marriage.

16. The view of such particulars of prayers dealt with, ought to have borrowed a leaf from the persuasive principles by the constitutional court of South Africa in *MS V M* [2008] 35A 232 UC held that; -

Indeed, one of the purposes of section 28 (1) (b) is to ensure that parents serve as the most immediate moral exemplars for their off spring. Their responsibility is not just to be with their children and look after their daily needs. It is certainly not simply to secure money to buy the accoutrements of the consumer society, such as cellphones and expensive shoes. It is to show their children how to look problems in the eye. It is provide that with guidance on how to deal with setbacks and make difficult decisions. Children have a need and a right to learn from their primary caregivers, that individuals make moral choices for which they can be accountable."

17. Macleod *Conceptions of Parental Autonomy* [1997] 25 Politics and Society – 117 – 119 gave the basis upon which the doctrine of the child is underpinned by these remarks; -

Those who accept the responsibility of raising children frequently do so because the project of creating and raising a family is an important element of their own plans. Viewed from this perspective, parents cannot be seen as mere guardians of their children interests. They are also people for whom creating a family is a project from which they derive substantial value. They have an interest in the family as a vehicle through which some of their own distinctive commitments and concerns can be realized and perpetuated in this matter, it cannot be said that the nature of the Court's jurisdiction determined the issue of access as set out in the law. The course adopted by the trial court obviously deprives both parents to engage with their children in the scope, contemplated in MacLeod's scholarly works."

18. It is no surprise then, that the appellant felt aggrieved with the decision matter and final decree of the court regarding access between her and the children. In other words, the degree to which divorced parents access their children should reflect the letter and spirit of the law anchored in the welfare and best interest principles.

19. In reaching the impugned decision, the court should have drawn from the well settled principles to strike a balance between the sum of the evidence from both parents and the legislative scheme for the need to secure and protect the interest of the children of the marriage.

20. Since, the decision in the court below was delivered sometime back, new factors may have arisen which completely may alter the position of the parties. As regards the merits of the appeal, giving effect to the evidence, entire record and guiding principles illuminated above there is reason to allow the appeal as



argued and guided in the Memorandum of Appeal; The appellant had been deprived of the structure on access and a clear scheme on the model forming part of the maintenance suitable to meet the welfare and best interest of the children of the marriage.

21. To that extent It is clearly desirable for me to refer the case back to the trial court for a re-hearing before a different magistrate with competent jurisdiction on the cause of action. It is so ordered.

RULING READ, SIGNED AND DELIVERED AT MALINDI THIS 24th DAY OF JUNE, 2022.

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R. NYAKUNDI

JUDGE

