**In re EK and MW (Minors) (Civil Appeal 036 of 2020)**
**[2022] KEHC 12528 (KLR) (Family) (22 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12528 (KLR)

**REPUBLIC OF KENYA**

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

**FAMILY**

**CIVIL APPEAL 036 OF 2020**

**MA ODERO, J**

**JULY 22, 2022**

**IN THE MATTER OF THE ESTATE OF EK (MINOR)**

**IN THE MATTER OF MW (MINOR)**

**BETWEEN**

**MMM ..... 1ST APPELLANT**

**ENM ..... 2ND APPELLANT**

**AND**

**SMK ..... RESPONDENT**

***(Being an appeal against the judgment delivered on August 25, 2020 by Hon MW Kibe Resident Magistrate in Nairobi Childrens Case No 763 of 2018.)***

## JUDGMENT

1. Before this court is the memorandum of appeal dated September 15, 2020 by which MMM and ENM (hereinafter jointly referred to as "the appellants) seek the following orders:-

> "(a) That the appeal be allowed with costs.
>
> (b) The judgment of the Honourable Resident Magistrate be set aside and a proper finding be made.
>
> (c) The appellants' be granted actual and legal custody of the minor children and that the appellants and respondent are ordered to appear before the Nairobi County Children's Officer or their designate to work out, through mediation the details of the joint custody agreement."

3. The respondent SMK opposed the appeal. The matter proceeded by way of written submissions. The appellant filed the written submissions dated December 15, 2021 whilst the respondent filed submissions dated March 21, 2022.

**Background**

4. The appeal emanates from a judgment delivered on August 25, 2020 by Hon MW Kibe Resident Magistrate in Nairobi Childrens Case No 763 of 2018. In the lower court case, the respondent who is the biological Father of the two minors sought to be awarded legal and actual custody of the two children.

5. The applicant herein are the maternal grandparents of the two minors. The children's biological mother passed away in the year 2014

6. After a full hearing the trial court entered judgment in favour of the respondent (father) and vide a judgment delivered on August 26, 2020 the following orders were made.

> "a. That the plaintiff/father is hereby granted legal and actual custody, care and control of the minors while the defendants are hereby granted access to the minors.
>
> b. That parties shall agree on modalities of access, in default the court will set guidelines.
>
> c. That the parties are encouraged to pursue reconciliation in the best interest of the minors.
>
> d. That this being a children's case, no orders as to costs."

7. Being aggrieved with the orders made by the trial court the appellants filed this present appeal dated September 15, 2020. The appeal was premised upon the following grounds –

   a. That the learned trial magistrate erred in law and in fact by failing to consider that the appellants have stayed with the minors for more than three (3) years including the time the children's mother was alive. The appellants have always paid for the children's school fees, providing food, shelter, clothing and the welfare of the minors.

   b. That the learned trial magistrate erred in law and in fact when he did not put into consideration that there is an existing criminal case in Kikuyu Law Courts No 1 of 2018 (R v SMK) where the respondent is an accused and suspected of having been involved in the brutal murder of the children's mother.

   c. That the learned trial magistrate erred in law and in fact by not considering that the respondent had neglected the subject children while they were of very fragile ages, and its appellant who have brought up single handedly to the current status of responsible school going students.

   d. That the learned trial magistrate erred in law and in fact by not putting into consideration that the children's mother had expressed her wishes to have the appellants as the guardians to her children.

   e. That the learned trial magistrate erred in law and in fact because when he did not consider that there was no dowry ever paid and that the respondent did not prove marriage to the appellant's deceased daughter.

f. That the learned trial magistrate erred in law and in fact by failing to consider that section 83 of the Children Act does not dictate that custody –whether actual or legal – must be given to only one parent or person. The section envisages that custody can be shared or joint.

g. That the learned trial magistrate erred in law and in fact by failing to put into consideration and appreciate the uniqueness of the matter.

h. That the learned trial magistrate erred in law and in fact by filing to appreciate the subject children have known the appellants as their parents/guardians since 2017 when children started living with the appellants when they were two years and two months respectively. The decision of the trial magistrate to grant the respondent legal and actual custody is a violation of the *Children Act*. The sudden removal of the children from their current home will not be in the best interest of the children.

i. That the learned trial magistrate erred in law and in fact by showing outright bias by failing to interview the children before arriving at her judgment.

j. That the learned trial magistrate erred in law and in fact by failing to call for a children officer report from the appellants side accessing the welfare of the children when they have lived with the appellants for more than 3 years. The only children officer report availed was in regards to the respondent. There was no evidence that the appellants are unfit for custody.

8. On October 28, 2020, Hon Justice Onyiego delivered a ruling in which he stayed the judgment delivered by the Magistrate Court on August 25, 2020 pending the hearing and determination of this appeal.

**Analysis and Determination**

9. At the outset, I wish to state that this court being of the view that this was a matter which ought in the interests of the children be settled amicably referred the parties to court annexed mediation. The parties were unable to reach any agreement. Thereafter the court on of its own volition did engage the parties in an attempt to reach a settlement, as this would be to the benefit of the children who were already traumatized by the death of their mother. Unfortunately, the parties were not able to rise to the occasion and no agreement was reached. I will therefore proceed to render my decision on this appeal.

10. I have carefully considered the grounds of appeal in the memorandum of appeal dated December 15, 2021, the submissions filed by both parties as well as the relevant law.

11. The appellants submit that they have lived with and cared for the minors even whilst their late mother was alive. That the minors have been in their custody from the time their biological mother was murdered when the children were aged just 3½ years and 1½ years respectively.

    They submit that to remove the minors from the only home they have known for the past three (3) years will only serve to traumatize the children.

12. The appellants submit that having already established parental and social links with the two minors they are entitled to legal and actual custody of the children.

13. The appellants fault the learned trial magistrate for failing to interview the children herself. They state that the respondent does not have anyone to provide proper care for the children.

14. The appellants insists that the respondent is a key suspect in the murder of the children's mother. They submit that there is currently an inquest ongoing at the Kikuyu Law Courts in which the respondent has been adversely mentioned. That if as a result of said inquest the respondent is charged and convicted

of murder then the minors will be subjected to even greater trauma and will be rendered emotionally vulnerable. They assert that the children's biological mother had expressed her desire to leave the appellants as the primary guardians of the children.

15. On his part, the respondent asserted that as the biological father of the two minors, it is he who ranks in priority on the issue of custody. The respondent denies the allegation that he had abandoned his children. The respondent admits that after the death of her wife he was detained by police but states that following his release from custody he sought to obtain custody of his children but this was resisted by the appellants. That as a result he filed the case at the Nairobi Children's Court seeking to be awarded legal and actual custody of the minors.

16. The respondent states that he has always been ready and willing to take up the care of his two children but has faced constant frustration from the appellants. That the appellants have been extremely hostile towards him emanating from their belief that he was involved in the death of their daughter. He submits that the police investigations have not linked him to the murder of his wife and that he has not to date been charged and/or convicted of any offence in relation thereto.

17. The respondent urges the court not to reward the appellants unlawful action of keeping the children away from their father. He urges the court to dismiss the appeal in its entirely.

18. This being a first appeal this court must be mindful of the fact that it did not see or hear the witnesses testify. However, the court must re-examine and re-evaluate the evidence adduced in the lower court and draw its own conclusions on the same. In *Peters v Sunday Post Ltd* [1958] EA the Court of Appeal stated as follows –

> "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."

19. It is also important at the outset to state that this is an appeal which emanates from the children's court and concerns the question of custody of minor children. Accordingly, it must be borne in mind that the best interest of the minors are of paramount priority.

20. The *Constitution of Kenya 2010* provides at article 53 (2) that:

> (2) A child's best interests are of paramount importance in every matter concerning the child."

21. Likewise *Children Act* at section 4(2) provides as follows:-

> "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". (Own emphasis)

22. 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 2010*, The *Children Act* and International Instruments, which have been ratified in Kenyan law.

23. In case of *MA v 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)

24. Section 83 of the *Children Act, 2001* provides for the factors which a court must bear in mind whilst considering the issue of custody of children. These include-

> "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 I 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."

25. It is not in dispute that the respondent herein is the biological father of the minors. The children's mother unfortunately passed away on April 12, 2014 under suspicious circumstances. The appellants argue that the trial court erred in awarding legal and actual custody of the minors to the respondent. They submit that the trial court failed to take into consideration the fact that they have been living with the children since their mother passed away. That having lived with the minors for the past three (3) years and have provided for all their material and education needs, custody ought to have been awarded to the appellants.

26. In opposing the appeal, the respondent states that he is the biological father of the minors and expressed his desire and willingness to reside with and raise his own children.

27. The appellants claim that the children's mother had expressed the desire that her children be raised by her parents (the appellants). However, there is no evidence to show that such desire was ever expressed by the children's mother. There is no witness who heard her express this wish and the mother did not

leave a will or any other written document indicating who was to take up custody of her children in the event of her demise.

28. The court is mindful of section 6 of the *Children Act*, which provides that –

> " 6 A child shall have a right to live with and to be cared for by his parents.
>
> (1)
> (2) Subject to subsection (1) where the court or the Director determines in accordance with the law that it is in the best interests of the child to separate him from the his parent, the vest alternative care available shall be provided for the child."
>
> (3) ....." (own emphasis)

29. Similarly article 19 of the *African Charter on Rights and Welfare of the Child* provides that –

> Every child is entitled to parental care and protection and shall whenever possible reside with his or her parents." (own emphasis)

30. The minors herein have a right in law to live with and be raised by their biological parents. In the absence of the mother, then the respondent who is the biological father would rank in priority over any other person in awarding custody.

31. It is recognized that there do exist certain circumstances when it will serve the best interest of a child to separate him/her from the biological parents. No such determination has been made in this case. The only factor which would disqualify the respondent as a custodial parent is if it is demonstrated that he is unsuitable to have custody or if it is shown that he has harmed and/or threatened to harm the minors in any way. There is no evidence nor has there been any allegation that the respondent has harmed or has threatened in any way to harm his children.

32. The appellants submit that the respondent is not a suitable custodial parent as he had neglected the children. This remains a mere allegation. The facts reveal that the respondent lived together with the children mother and the children as a family unit until the year 2018 when the children's mother relocated to Nairobi from Tala. During this period, the couple regularly visited the children who were living with their maternal grandmother every weekend. The only time when the respondent ceased the weekend visits to his children is when he was placed into custody by the police.

33. Upon his release from police custody the respondent sought to have access to his children but the appellants who had become bitter towards him following the death of their daughter were hostile. The respondent then filed the cause at the Nairobi Children Court seeking to be awarded custody.

34. It is evident that the respondent was father who was involved in the lives of his children. He was not been a 'dead beat dad'. His attempts to continue relating with his children have been thwarted by the appellants.

35. The appellants submit that the respondent is not a suitable custodial parent as he is a suspect in the death of the children's mother. On this allegation the trial court observed as follows:-

> " the children officer termed the defendant's allegation that the plaintiff was involved in their daughter's death was unproven and the minors continued stay with their grandparents offends the plaintiffs right of parental care."

36. The allegations of the respondents involvement in the death of the minors mother are unsubstantiated. The fact is that the police did initially arrest the respondent but he was later released. Had there been

any concrete evidence linking the respondent to the death of the deceased, I have no doubt he would have been arraigned in a court of law and charged with murder. As it is, the respondent is not facing any charges over the death of the deceased.

37. The appellants cite the fact that there is an ongoing inquest enquiring into the circumstances leading to the death of the children's mother as proof of the fact that the respondent is culpable. They state that the respondent is a suspect in the ongoing inquest. An inquest is an 'enquiry' into the circumstances leading up to the death of a person. There is no 'suspect' in an inquest. It is not proof of culpability I have no doubt that the respondent and indeed the appellants will be called to testify in said inquest. This court cannot deny the respondent custody of his children on the presumption that the inquest will name him as a suspect. Suffice to say the existence of an inquest is not 'proof' of any wrongdoing on the part of the respondent.

38. There is no evidence that the respondent poses any threat to the wellbeing of the minors. The trial court had the benefit of a report from the children officer which report was filed on September 27, 2019 prepared by Mr Ezekiel Kimani a principal children officer. The trial court considered that report and stated as follows:-

> " the plaintiff/father wish is to be granted custody over the subject minors. Nothing in the court proceedings show any conduct that would disqualify him to be granted custody. The principal children officer EK Kimani, Nairobi Children's court in his report filed in court on September 27, 2019 indicated that upon conducting his social inquiry he did not find anything that would warrant the limitation of the plaintiff right to his children and recommended that the plaintiff be granted actual physical custody of his children and the defendants should access them with his consultation and concurrence. The Children Officer termed the defendant allegation that the plaintiff was involved in their daughter's death as unproven and the minors continued stay with their grandparents offends the Plaintiffs right to parental care." (Own emphasis)

39. The appellants fault the trial magistrate for failing to have the children availed before him for an interview by the court itself. It must be remembered that in the year 2020 when this trial was proceedings the minors were aged four (4) years and two (2) years respectively. They were too young to be questioned by the court. The children's officer was qualified to interview the minors in a conducive and non-threatening environment and to conduct a home visit, which would enable him make a qualified assessment of what was best for the minors. This is precisely what happened. In his report, the childrens officer observed that the minors were shy and were not able to express themselves on the issue of custody.

40. I have no doubt that the appellants love their grandchildren dearly. I have no doubt that they want the best for the minors. However it would appear that in their grief over the death of their daughter they have allowed their hostility towards the children's father to cloud the pertinent issue which is the best interest of the children.

41. The fact of the matter is that the minors herein have a father who desires to live with and raise his children. The appellants no matter how well intentioned cannot take over the role of a parent, they will always remain grandparents. In *DMM v PMN* & another [2020] eKLR the Court of Appeal held thus -

> " Grandparents have no right to assume parental responsibility over a child when his parent is alive and have the means and is willing to take up parental responsibility voluntarily. The child has a right to parental care and denying the child the right cannot be in his best

interests. The Act provides that even where the father and mother were not married, the father shall acquire parental responsibility." (own emphasis)

42. The court stated further that-

> " The law is leaning mostly towards a child being raised by a parent. The vest interests of the child are determined depending on the circumstances of the case. Children are unique human beings who are known to adapt to their surroundings very fast. It would not take long for the minor to adapt to the new environment with the father who is his flesh and blood." (Emphasis mine)

43. Likewise in the case of *MAA v ABS* [2018] eKLR the court held thus-

> " 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)

44. The appellants submitted that the respondent was not married to the minors mother. That he had never paid any dowry to marry their daughter. The question of marriage is not an issue in this case. This issue in this appeal is that of custody of the minors. The failure to pay dowry does not negate the fact of paternity. I do agree with the trial magistrate that issues of custody and dowry are separate and distinct. They should not be intermingled.

45. Finally, article 53 (1) of the *Constitution of Kenya 2010* provides that -

> " Every child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child whether they are married to each other or not." (Own emphasis)

46. The fact that the parents of the subject minors were not married to each other is not valid grounds to deny the children, the right to be raised by their biological father.

47. The appellants prayed that the court award joint legal custody of the minors to themselves and the respondent. Indeed the ideal situation would have been to have both the father and the grandparents play an active role in the lives of the minors to enable them grow up to be confident and well adjusted people. They each have a vital role to play in the lives of the minors. However, joint custody would only be a feasible option where there is the anticipation that the parties would work together for the benefit of the minors. In my interactions with this matter, it is manifest that there exists a bad relationship between the parties. Therefore, in the circumstances of this particular case unanimity of purpose between the appellants and the respondent is clearly an elusive goal.

48. In my view, it would not be the best interests of the children to make an order of joint custody given the bad blood existing between the parties.

49. It is a fact that the best interest principle dictates that insofar as possible custody of the child ought to be vested in the biological parents of said child. I find that the children herein have a biological father who is ready and willing to care for them. I have not found any valid reason to disqualify the

respondent as being an unsuitable custodial parent. The minors need to get to know their own parent. The children's officer in his report stated that he found no proof that the respondent had previously harmed the minors.

50. The appellant point to the fact that the respondent admitted that he had 'wrangles' with his wife which led to the couples separation s proof that he is not unsuitable to be awarded custody. Quarrels between married and/or cohabitating couple sis a common occurrence.

51. The fact that a man quarrels with his wife and/or separates from her does not make him an unsuitable parent. It is not sufficient reason to deny the respondent custody of his children.

52. In the American case of *Sellers v Sellers* 638 (MISS 1994) was held as follows:-

> " It is a well-settled rule that a child custody case between a natural parent and/a third party. It is presumed that the best interest of the child will be preserved by being in the custody of the natural parent. In order to overcome that presumption there must be a clear showing that
>
> (1) the parent has abandoned the child
>
> (2) the conduct of the parent is so immoral as to be detrimental to the child or,
>
> (3) the parent is mentally or otherwise unfit to have custody of the child." (Own emphasis)

53. 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 v 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 minors 10th birthday, custody was to revert to the biological father.

54. 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.....

The court went on to state that:

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)

55. 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)

56. 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

57. No exceptional circumstances have been demonstrated to justify denying the respondent custody of his children. This is a case in which the biological mother of the two minors has unfortunately passed away. However, it must be noted that the minors were not rendered 'orphans'. They have a surviving biological father who is ready, willing and able to raise his children. There is no evidence to prove that the respondent is an unfit father who ought to be denied custody of his own children. No matter how well-meaning the maternal grandparents are they can never replace and/or usurp the critical role of the a biological parent in the life of a child. The maternal grant-parents cannot be elevated to the role of "parents" in the lives of the minors.

58. In conclusion, I find no merit in this appeal. The same is dismissed in its entirety. The judgment of the trial court dated August 25, 2020 is hereby upheld. This being a family matter I make no orders on costs.

**DATED IN NAIROBI THIS 22ND DAY OF JULY 2022.**

**MAUREEN A ODERO**

**JUDGE**