



**SNM v Sub-County Children’s Officer & another (Family Appeal  
015 of 2020) [2022] KEHC 12758 (KLR) (24 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12758 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY APPEAL 015 OF 2020  
JO NYARANGI, J  
AUGUST 24, 2022**

**BETWEEN**

**SNM ..... APPELLANT**

**AND**

**SUB-COUNTY CHILDREN’S OFFICER ..... 1<sup>ST</sup> RESPONDENT**

**PNN ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the orders of Hon L K Sindani issued November 16, 2020  
at the Tononoka children’s court in guardianship case number 23 of 2020)*

**JUDGMENT**

1. Vide an originating summons dated July 24, 2020, SNM (herein after the appellant) moved Tononoka children’s court on July 27, 2002 against the District Children Officer seeking an order granting her a certificate appointing her as guardian of the minor known as KNN.
2. The summons is based on the ground that the minor the subject of these proceedings was a son to CMN now deceased and that the appellant having been a mother to the late C is therefore a grandmother to the minor. That since the death of the minor’s mother on January 11, 2020, the child has been under the care of the appellant hence the only person who is fit to be granted guardianship. That even before the minor’s mother died, she (appellant) was the guardian ad litem hence the desire to look after the minor and the minor’s estate.
3. Subsequently, one PNN the biological father to the minor filed a notice of motion dated September 28, 2020 seeking; to be enjoined in the proceedings as a party; an order directing the appellant to grant him access to the minor pending hearing and determination of the application and that he be granted custody of the minor.



4. In his affidavit in support to the application sworn on September 28, 2020, he averred that; since the death of C, the appellant who was the cause of his separation with the deceased had denied him access to the baby without any reasonable cause. He deposed that the appellant had filed for guardianship of the minor without his knowledge being the biological father to the baby hence the proceedings were made in bad faith.
5. During the hearing, the appellant told the court that her daughter C was a girl friend to the 2nd respondent and that out of their cohabitation, the minor herein was born. That when her daughter C fell sick, she (C) went to stay with her (appellant) together with the minor herein. That when the minor's mother died, the minor remained in her custody to date. She stated that as the next of kin to her late daughter, she was entitled to pursue her benefits hence the need for a guardianship certificate. On cross examination by the respondent in person, she stated that the 2<sup>nd</sup> respondent had not paid any dowry hence was not married to the deceased.
6. Pw2 NN husband to the appellant and a retired civil servant associated himself with the testimony of the appellant. He confirmed that the 2nd respondent is the biological father to the minor. He also stated that his late daughter (C) had cohabited with the 2<sup>nd</sup> respondent but their relationship was acrimonious resulting to their separation.
7. On his part, the 2<sup>nd</sup> respondent a businessman also claimed that he was married to the deceased customarily and that he was the biological father to the minor who was withdrawn from his custody after the mother died. He claimed that he was a businessman and capable of taking care of his son. He called one witness one AM his friend also a businessman who stated that he (the 2<sup>nd</sup> respondent) was married to the deceased and that he was the Godfather to the baby during his baptism. He contended that the 2<sup>nd</sup> respondent was capable of taking care of the baby.
8. After hearing both parties, the court granted custody of the minor to the father (2<sup>nd</sup> respondent) with unlimited access to the appellant (grandmother).
9. Aggrieved by the said decision, the appellant moved to this court through a memorandum of appeal dated May 10, 2020 citing 6 grounds of appeal as follows;
  - a. The learned magistrate erred in law and fact by granting the 2<sup>nd</sup> respondent custody of the minor without considering the best interest of the minor as required by the law specifically section 83(1) (j) of the *Children's Act No 8* of 2001.
  - b. The learned magistrate erred in law and fact by failing to examine and consider the ascertainable wishes of the child as required by the *children's Act* section 83 (1) (d) as well as section 76 (3) (a).
  - c. The learned magistrate erred in law and fact by failing to consider the customs of the community to which the child belongs as required by section 83(1) (f) and section 76(3) (d), (g).
  - d. The learned magistrate erred in law and fact by granting the 2<sup>nd</sup> respondent actual custody of the minor whereas the said minor has been living with the appellant since his mother died and that the minor has developed a deep bond with the appellant. The learned magistrate negated the fact that the minor has never lived with the 2<sup>nd</sup> respondent and the baby does not know him despite being the biological father.
  - e. The learned magistrate erred in law and fact by overlooking the ascertainable wishes of the appellant who has been living and providing parental care to the minor since the mother died



in January 2019. By doing so, the learned magistrate bypassed the provisions of section 83(1) (c) of the *Children Act*.

- f. The learned magistrate erred in law and fact by failing to consider the profound changes in environment the minor, who is of tender age is likely to be subjected to considering that the 2<sup>nd</sup> respondent works and resides in Embu and the appellant in Mombasa where the child has spent most of his life in.
10. When the matter came up for directions, parties agreed to file submissions in disposition of the appeal.

### **Appellant's submissions**

11. Mr Birir and Co advocates appearing for the appellant filed his submissions on November 9, 2021. Counsel submitted on two issues; on the 1<sup>st</sup> issue, Mr Birir contended that the trial court erred in granting custody of the minor to the father (respondent) without considering the principles applicable under section 76 and 83 of the children's Act No 8/2001. According to Mr Birir, the court did not consider the ascertainable wishes of the child and those of the appellant who had actual custody of the minor since the death of the minor's mother the year 2019. That despite the children officer's report recommending custody orders in favour of the appellant, the trial court did ignore the same.
12. Further, learned counsel contended that the court failed to consider the Kamba traditions which requires that a father who had not paid dowry to the deceased wife had no right of custody over the child or children arising out of such relationship.
13. On the second issue, learned counsel submitted that the trial court misapplied the relevant provisions of the law in particular section 83 of the *Children Act* which provision recognizes a parent or any other person who applies for guardianship over a minor as being entitled to such orders if circumstances so permits.
14. On his part, the appellant who appeared in person orally submitted thus opposing the appeal on grounds that; as the biological father, he has the right to take custody of the baby and that the appellant is only interested with the deceased's benefits and not the baby. He expressed disgust that his child who was born in her good health condition has since contracted HIV/AIDS under unclear circumstances. He contended that he was capable of taking care of his child without the appellant's support and that he was not interested in the benefits of the late C (his late wife).

### **Determination**

15. I have considered the record of appeal, grounds of appeal herein and submissions by both parties. This is a first appeal. It is the duty of this court to re-evaluate, re-analyze and re-consider afresh the evidence tendered before the trial court without losing sight of the fact that the trial court had the advantage of listening to, seeing and assessing the demeanor of the witnesses. See *Selle and Another Vs Associated Motor Boat Company Limited and Another* (1968)EL123 where the court held that;
- “An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must consider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect...”
16. The only issue for determination is whether the appellant is entitled to guardianship of the minor herein against the respondent's claim for custody of the minor.



17. There is no dispute that the 2<sup>nd</sup> respondent herein is the biological father to the minor. There is no dispute also that the appellant is the maternal grandmother to the minor. From the record, the minor's mother is deceased and since her death, the child has been staying with the appellant. According to the birth certificate of the minor, the minor was born on June 6, 2017 hence aged about 5 years now.
18. The issue in contention therefore is the determination of the right of the minor's grandmother to assume guardianship over the minor against the competing interest of the biological father who wants actual custody of the baby. Section 102 (1) of the *children Act* does define a guardian as a person appointed by will or deed by a parent of the child or by an order of the court to assume parental responsibility for the child upon the death of the parent of the child either alone or in conjunction with the surviving parent of the child or the father of a child born out wedlock who has acquired parental responsibility for the child in accordance with the provisions of the *children act*.
19. Section 103 (2) of the *children Act* further provides that; on the death of the mother of a child, the father, if surviving, shall be the guardian of the child either alone or jointly with any guardian appointed by the mother or if the guardian appointed by mother is dead or refuses to act, the court may appoint a guardian to act jointly with the father.
20. Article 53 (1) of the *Constitution* does recognize the role of a parent in taking care of his or her child by providing as follows;
- “Every child has a 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”
21. In the instant case, the deceased did not appoint by deed or will any specific person to take up the minor's guardianship. It then follows that it was upon the court to appoint a guardian pursuant to the *Constitution* and the *children Act*. In compliance with section 103 (2) of the *children Act* upon the death of the mother, the surviving father is in priority expected to assume the role of guardianship in respect to the baby. Unless there exist exceptional circumstances to warrant exclusion, the 2<sup>nd</sup> respondent being the surviving parent is deemed and indeed is entitled to assume the role of a guardian to the minor. See *MJC VS LAC & Another* (2020) eKLR where the court held that;
- “para 36” there can be no basis for imposing parental responsibility on a person except in limited circumstances provided under the *children Act*, where guardians are appointed and take up parental responsibility for the child...”
- “Para 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 the best interests 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”.
22. According to the appellant, the father to the minor was not married to the deceased and that she wants guardianship certificate to enable her process her late daughter's benefits. In determining guardianship, the issue of marriage or processing terminal benefits is not a key consideration. The paramount consideration is the best interest of the child pursuant to article 53 (2) of the *Constitution*.
23. The 3<sup>rd</sup> ground relied on by the appellant is that the 2<sup>nd</sup> respondent is not fit to look after the child as he had mistreated and neglected the minor and her mother while alive and that he has never stayed with



- the baby. It is clear that the baby has been staying with the appellant since his mother's death albeit misunderstandings between the appellant and the 2<sup>nd</sup> respondent over the minor's custody.
24. The allegations of neglect and mistreatment of the minor were not demonstrated by any tangible evidence by the appellant. In the absence of any exceptional circumstances to warrant denial of the father to guardianship, the court will as a matter of priority consider the biological father first.
25. Is the second respondent entitled to custody of the minor? Section 83 (1) of the *Children Act* provides factors to be considered before granting custody of a minor in favor of an applicant 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;
  - (j) the best interest of the child.
26. Section 82(3) of the *Children Act* does recognize that custody of a child may be granted to the following persons-;
- (a) a parent;
  - (b) a guardian;
  - (c) any person who applies with the consent of a parent or guardian of a child and has had actual custody of the child for three months Preceding the making of the application;
27. My understanding of Section 83(3) of the *children Act* is that priority in granting custody of a minor is given to the parent unless there are exceptional circumstances to exclude such parent from assuming custody. The allegation that the deceased and the 2<sup>nd</sup> respondent were not married under Kamba customary law hence the father cannot claim custody is not tenable. We are not dealing with the issue of marriage in this case in which the 2<sup>nd</sup> respondent claimed that he was married to the deceased customarily. Under section 6 (1) of the *Children Act*, a child shall have a right to live with and to be cared with by his parents. This is further recognized by *the Constitution* under Article 53 (1)
28. It is clear that the 2<sup>nd</sup> respondent's financial ability to look after the child has not been challenged. He is a businessman engaged in government tenders hence a man of means. It would appear that the appellant is more interested with accessing benefits of the minor's mother using guardianship proceedings.



29. Is custody of the minor with the father in her best interest? The court of appeal emphasized the best interests principle when making orders of custody in respect of a minor in the case of *LAC and another vs MJCC* Civil Appeal E 119 /2021) delivered on February 4, 2022.
30. In the absence of any consent from the biological father, will or deed from the deceased mother for the appellant to assume guardianship, I do not find any specific reason to deny the father custody to his baby.
31. The fact that the appellant denied the father access to his baby does not mean that he had neglected his child. He was simply denied the opportunity to exercise his parental responsibility. Although the children officer's report found that the appellant had bonded with the baby, the same is not fixed. As correctly stated by the trial court, a child will always and very quickly adjust to a new environment. It is in the best interest of the baby that she bonds with the father the only surviving parent.
32. To remove the child from her father will not serve her interest under article 53 (1) and (2) of the *Constitution*. I do not find any principles under Section 76, 82 and 83 of the *Children Act* that were not considered. The learned magistrate adequately and properly addressed all salient issues worth consideration and arrived at a proper conclusion. Issues regarding the late Caroline's death benefits is a matter for the probate court and should not be a ground to gain custody or guardianship of the baby.
33. Accordingly, it is my holding that the appeal herein is not merited and the same is dismissed with no order as to costs. The lower court file be returned to the trial court for implementation of its orders.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24<sup>TH</sup> DAY OF AUGUST, 2022.**

**J N ONYIEGO**

**JUDGE**

