



**N M M v J O W (Civil Appeal 30 of 2016)
[2016] KEHC 3112 (KLR) (27 September 2016) (Judgment)**

N M M v J O W [2016] eKLR

Neutral citation: [2016] KEHC 3112 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 30 OF 2016
CM KARIUKI, J
SEPTEMBER 27, 2016**

BETWEEN

NMM PLAINTIFF

AND

JOW DEFENDANT

Custodial orders of children of tender years should be to the mother except where special and peculiar circumstances exist to disqualify her

The main issue was whether as a general rule, custody of young children should be awarded to the mother. The court held that the custody of young children should be awarded to the mother unless special and peculiar circumstances existed to disqualify her from being awarded custody. Those would include disgraceful conduct, immoral behavior, drunken habit, or bad company.

Reported by John Ribia

Children Law – custody – custody of children of tender years – best interests of the child - what factors should courts consider in custody applications to determine what was in the best interests of a child - whether as a general rule, custody of young children should be awarded to the mother - what were the circumstances in which custody of young children would be denied to the mother – Constitution of Kenya, 2010, article 53(2); Children Act (Cap 141) section 83

Brief facts

The appeal arose from a child custody matter in Butere Children Case No 19 of 2015 that ordered the custody of the girl child be granted to the father (respondent) while that of the boy child to remain with the mother (appellant). The appellant was aggrieved by the judgment and filed the instant appeal. The plaintiff and the defendant were the father and mother respectively to the children.

At the trial court the respondent filed the custody claim for the daughter on grounds that the appellant deserted the matrimonial home with the younger child and left the school going child in the custody of the respondent. He further pleaded that the appellant without notice and permission from the school administration went to



the school and took the girl child from school to a place not known to the respondent. His claim against the respondent was for protection of the child in court whereupon the plaintiff was to have custody of the child. The appellant denied the respondent's claim for custody of the girl child. She averred that she sought for an order of custody of birth issues of the marriage in her favour particularly considering their tender age and further since the girl was aged 6 years and required the care of the mother.

The trial court granted the respondent custody of the daughter and the plaintiff custody of the son. The appellant was aggrieved by the trial court's judgment and filed the instant appeal on grounds that the trial court erred in law in failing to satisfactorily appreciate and correctly apply the afore-interpreted principle of the best interest of the child; that only mothers were specially and suitably equipped to take adequate care of the girl child and that it was also not in the best interests of the subject children to grow so far apart from one another.

Issues

- i. What factors should courts consider in custody applications to determine what was in the best interests of a child?
- ii. Whether as a general rule, custody of young children should be awarded to the mother.
- iii. What were the special circumstances in which custody of young children would not be awarded to the mother?

Held

1. Article 53(2) of the Constitution provided that a child's best interests was paramount in every matter concerning the child. Section 83(1) of the Children Act set out the factors to be considered by the court while determining whether or not a custody order should be made in favour of an applicant. Section 83(1)(j), required the court to have regard to the best interests of the child as fundamentally obligated. The principle of the best interests of the child was the supreme parameter in matters concerning the welfare of a child such as the question of the custody of the subject child/children.
2. The custody of young children should be awarded to the mother unless special and peculiar circumstances existed to disqualify her from being awarded custody. Those would include disgraceful conduct, immoral behavior, drunken habit, or bad company.
3. The children were aged 12 and 9 years. They were about to enter adolescence and puberty age and required the mother's special attention at the instant stage. Those were special and unique circumstances which could only be addressed and attended to by the mother of the children of the marriage.
4. Although the best interest standard could be hard to define in some situations, some factors were common in "best interest" analysis in most custody situations: -
 1. wishes of the child (if old enough to capably express a reasonable preference);
 2. mental and physical health of the parents;
 3. religion and/or cultural considerations;
 4. need for continuation of stable home environment;
 5. support and opportunity for interaction with members of extended family of either parent;
 6. adjustment to school and community;
 7. age and sex of child;
 8. parental use of excessive discipline or emotional abuse; and
 9. evidence of parental drug, alcohol or sex abuse.
5. The factors relating to the best interests of the child in adoption matters were also contained in section 83 (1) of the Children Act.
6. The trial court used wrong principles in applying the principle of the best interest of a child. Female children were vulnerable; they needed their mother at all times when they were growing up. They had their own natural needs.



7. Even looking at the animal kingdom, it was their nature that their young ones remain in the custody of the mother until they were able to take care of themselves. Most of the time the fathers were never there. In the context of child custody cases, focus on the child's best interest meant that all custody and visitation discussions and decisions were made with the ultimate goal of fostering and encouraging the child's happiness, security, mental health and emotional development into young adulthood.
8. There was no proof that the appellant used to beat the child. The allegations of beating and other complaints by the respondent did not meet the threshold of being or amount to exceptional circumstances to deny the appellant custody of the minor. The custody of the girl should be given to the mother rather than the father.

Appeal allowed.

Orders

- i. *The trial court's judgment/decreed dated March 10, 2016 was set aside, the plaintiff's suit was dismissed and legal and actual custody of the minor MPO was restored to the appellant.*
- ii. *The respondent was entitled to visitation of the children of the marriage.*
- iii. *Liberty to apply granted to parties herein.*

Parties were to bear their own

Citations

Cases

1. B v M (divorce cause No 34 of 2002; (2008) 1 KLR 531) — Explained
2. D.K v J.K.N (Civil Appeal 54 of 2010; [2011] KEHC 3044 (KLR)) — Explained
3. G v G (civil appeal No 30 of 1978; (2008) 1 KLR 497) — Explained
4. J.K.W v M.A.A (Civil Appeal 68 of 2015; [2015] eKLR) — Explained
5. Jusab v Gamrai & another (? 15 of 2009; [2009] KEHC 3959 (KLR) 1EA 164) — Explained
6. Karanu v Karanu (? 270 of 2001; [2001] KEHC 554 (KLR)) — Explained
7. KA v KB (civil appeal No 60 of 1974; (2008) 1 KLR 494) — Explained
8. Mwangi v Wambugu (civ app 77 of 82[1]; (1984) KLR 453) — Mentioned
9. Olela, Martha & another v Jackson Obiera (C.A 16 of 1979) — Explained
10. P.W.M v C.M.M (Civil Appeal 70 of 2011; [2015] KEHC 6457 (KLR)) — Explained
11. SON V EAO (Civil Appeal 25 of 2013; [2013] KEHC 3781 (KLR)) — Explained
12. Wambua v Okumu ([1970] EA 578) — Explained
13. Re L (infants) ([1962] A11 ER 1) — Explained

Statutes

1. Children Act, 2001 (Act No 8 of 2001) — section 2, 4(2); 79, 83(1)(c); — Interpreted
2. Civil Procedure Rules, 2010 (cap 21 sub leg) — order 9 — Interpreted
3. Constitution of Kenya, 2010 — article 45(1); 53(1)(b)(c)(d)(e)(2); 159 — Interpreted

Advocates

None mentioned

JUDGMENT

Introduction

1. After hearing the parties herein case, the trial court in Butere Children Case No 19 of 2015 ordered that custody of the girl child MPO be granted to the plaintiff/respondent while that of the boy child remain with the defendant/appellant. The appellant was aggrieved by the said judgment and filed the instant appeal.



2. The plaintiff and the defendant are the father and mother respectively to the subject children herein.
3. The claim seeking the custody of the subject girl child was filed by the father as borne out by the plaint dated and filed on March 20, 2015). The respondent prayed for judgment against the appellant for the “custody of the girl child (MPO).
4. The subject children are the girl (MPO) and the baby boy (TWN) aged six (6) and two (2) years respectively.
5. According to the respective party pleadings and testimony, the said parties stopped cohabiting as husband and wife sometime in December 2014 and to date they remain estranged.
6. Further to the foregoing, it was established before the lower court that the respondent father was and still is a resident at Khwisero, Butere while at all material times the appellant mother had gone back to her parent’s home in Mbeere south sub-county, Embu County. She is now teaching at [particulars withheld] – Mbeere south sub-county, Embu County.
7. As per the decree dated March 10, 2016, the appellant mother is having the actual custody of the baby boy in Mbeere south sub-county while the respondent father is having the actual custody of the girl child. In other words, the two children/siblings are being brought up apart.
8. The respondent only applied for the custody of the girl child on the basis that the appellant “deserted the matrimonial home with the younger child and left the school going child in the custody of the respondent.
9. He further pleaded that , the appellant without notice and permission from the school administration went to the school and took the girl child from school to a place not known to the respondent.
10. Thus his claim against the respondent was for protection of the child in court whereupon the plaintiff to have custody of the said child.
11. The appellant denied the respondent’s claim for custody of the girl child. She averred that she sought for an order of custody of birth issues of the marriage in her favour particularly considering their tender age and further since MPO is a younger girl aged 6 years who requires the care of the mother.
12. The appellant was aggrieved by the subordinate court judgment and thus filed the appeal herein on the following grounds:
 - The learned magistrate erred in law in failing to satisfactorily appreciate and correctly apply the afore-interpreted principle of the “best interest of the child” respecting the subject child/children while conferring the legal custody of the
 - (i) baby girl MPO to the respondent;
 - (ii) The learned magistrate erred in law and that in finding it had been credibly proved that the appellant as the natural mother to the 6 year old subject child MPO was unsuitable to have the legal custody of the said girl child without evaluating any compelling reasons thereof;
 - (iii) The said decision is a negation of the subject child’s/children’s constitutional right to protection under articles 45(1), 53(1)(b), (c), (d) and (e) and 53(2) of the *Constitution of Kenya, 2010*. The appellant wants the appeal allowed and the judgment/decreed dated March 10, 2016 set aside and substituted thereof with an order dismissing the plaintiff’s suit and restoring the legal custody of the baby girl MPO to the appellant. On the April 23, 2016 the appeal was amended to replace the word “actual custody” with the word “legal custody.”



13. The respondent opposed the appeal on the ground that the decision of the children's court is in the best interest of the child MPO.
14. The respondent further filed a notice of preliminary objection dated June 8, 2016 seeking the striking out of the memorandum of appeal and the amended memorandum of appeal and furthers the striking off the firm of M/S Njaki Wanjeru & Co Advocates from the record.
15. The appeal together with the preliminary objection was canvassed by way of written submissions which the parties highlighted.

Appellant's Submissions

16. On PO raised the appellant took refuge on the provisions of art 159 of the Constitution and section 79 of Children's Act and the rules thereof. They all lay emphasis on determination of matters without undue regard to procedural technicalities.
17. On the merit of the appeal, the appellant counsel submits that, the lower court focused on extraneous matters rather than issues that related directly to the question of the best interests of the subject child/children.
18. That considering the young and tender age of the subject child/children, the lower court should primarily have focused on the question of the existence of any exceptional circumstances that would demonstrate the unsuitability/hopelessness of the appellant as the biological mother to take care of the said child/children as to warrant her being deprived of their custody.
19. As observed by the court in the Karanu v Karanu case, the mother indeed has a "natural right" to have her children with her.
20. The respondent father did not plead in his plaint dated March 20, 2015 that the appellant mother was "hopelessly" unfit to have the actual custody of the subject child/children.
21. Even in his witness statement filed on March 20, 2015 together with the said plaint as well as the notice of motion dated March 20, 2015 and his supporting affidavit thereto sworn on March 20, 2015, the said respondent father did not plead any allegations against the appellant mother regarding any exceptional circumstances that would show that she was/is unsuitable to have the custody of the subject child/children.
22. The appellant argues that, the respondent did not plead in his plaint as required by law the belated allegations of cruel character against the appellant mother. It is clear that the said allegations were fabricated so as to characterize the appellant as a cruel mother.

None of the other witnesses testified that the appellant was cruel to the subject child/children as stated by the respondent or at all.
23. Further the Children's Report does not bear out the respondent father's allegations of cruelty and child abuse against the appellant
24. It is submitted that, the lower court did not decide the question of the custody on the basis of the parties' allegations and counter-allegations but on the basis of section 83(1)(c) of The Children Act while holding that "in my view, the best interests of the two children of the marriage will be served by not disturbing them from where they currently are".



25. Appellant argues that, of utmost importance is the inescapable fact that the subject child is a girl child of the tender and young age of six (6) years, thus, the appellant has the natural and prima facie right to have the custody of the said girl child.
26. Only mothers are specially and suitably equipped to take adequate care of the girl child. It is also not in the best interests of the subject children to grow so far apart from one another.
27. They should experience the joy of growing and playing together as siblings.

The Respondents Submissions

28. The respondent submitted that, there was no need to go into the merits or demerits of this appeal as the same is a blatant abuse of the court by virtue that it offends the provisions of order 9 of the *Civil Procedure Rules*.
29. On the basis that the memorandum of appeal has been presented in court by an advocate who is not on record for the appellant thus it should be dismissed and or struck out with costs to the respondent.
30. Further on the merit of the appeal, the respondent submitted that, the that the lower court considered and focused on the best interest of the child, upon analysis of the evidence from both parties and the children's report the court finds that, the best interest of the two children of the marriage will be served by not disturbing them from where they currently are.
31. It was also submitted that, the evidence was clear that the appellant used to beat the child making the child seek refuge in the tender caring arms of the respondent father.
32. It is submitted that under the *Children's Act*, custody of a child may be granted to a parent and the respondent herein is such a parent. What the court is to establish is whether from the record of the trial court exist exceptional circumstances that would displace these *prima facie* rule evolved in favour of the mother by a plethora of authorities.
33. The respondent argued that a look at the authorities cited by the appellant and the appeal and all of them point to the principle of the mother's natural right in the absence of exceptional circumstances. The record of appeal contains what amounts to exceptional circumstances such as beating up the first child.

Analysis and Determination

34. On PO raised by the respondent, the court disposes the same without much ado. The children matter are determined on platform of best interest of the child *vide* article 53. The provisions of article 159 and section 79 and rules thereunder are in favour of expeditious disposal of children's matter without being tied down by technicalities.
35. In any event the respondent does not demonstrate any prejudice by the matter being heard on merit. The court therefore finds no merit on the PO and same is rejected.
36. On merit of the appeal, it is not in dispute that the issue herein concerns a minor girl child of tender years as defined in section 2 of the *Children's Act* cap 141 Laws of Kenya.
37. The appellant is the biological mother to the child MPO whereas the respondent is the father. Custody of the child was given to the father by the lower court after the court was satisfied that the child bonded well with the father and that the mother trusted her former husband with her girl child.



38. In the learned magistrate's view the best interest of the children of the marriage would be served by not disturbing them from where they were.
39. This being the first appeal, this courts duty is to analyze the evidence on record afresh and come up with its own findings and conclusions bearing in mind that it never heard the testimonies of the witnesses to determine their demeanor as they testified.
40. The court will only rely on that evidence on record as it is, and will not in any way interfere with it.
41. The court also will not ordinarily interfere with the judgment of the trial court unless the findings are based on no evidence or on a misapprehension of the evidence or, the trial court acted on wrong principles in reaching its findings see *Mwangi v Wambugu* [1984] KLR 453.

Issues

42. The main issue for determination is the issue of the best interest of the child MPO (See section 4(2) *Children's Act* No 8. Did the trial court properly address itself on this issue when it came up with its judgment on the March 10, 2016?
43. It is true that the matter herein relates to a girl who is aged 6 years and who is now in the actual custody of her father. The couple as it is, is estranged, the father living and working for gain in Western Kenya and the mother living and working for gain in Eastern part of Kenya.
44. From the authorities relied on by the parties herein, most if not all authorities show that courts give custody of children of tender years to the mother unless exceptional circumstances are shown to deprive a mother of custody. Both the appellant and the respondent are teachers and they are gainfully employed.
45. As provided by article 53(1)(e) they have equal responsibility to provide for the child MPO. None of them is incapacitated in any way and it has not been shown by evidence that anyone of them has abused drugs or are addicted to alcohol or incapacitated mentally to be incapable of taking care of their children.
46. It has been submitted by the respondents that the appellant has no time for the girl child because she has failed to attend court and has most of the time left the respondent with the responsibility of catering and caring for the girl (MPO) child's needs eg taking her to the salon, not visiting her regularly etc.
47. There was allegation of beating of the child by the appellant. Can these therefore be termed as exceptional circumstances? The answer will be found later in the conclusion.
48. The responsibilities to the children are nowadays taken care of by both parents who can either go to the salon and/or barber shop and ensure their children are well groomed. This is common in our modern society.
49. The appellant opted to stay away from the respondent after they separated. It is not clear from the proceedings what happened between the appellant and the respondent that led to their separation. It is trite law that the custody of every young female child should be granted to their mother.

Applicable Law

50. Article 53(2) of the *Constitution of Kenya, 2010* provides that:

“A child's best interests are of paramount in every matter concerning the child”.



This constitutional provision anchors the principle of the best interest of the child in our constitutional dispensation and does not require further exposition.

51. Section 83(1) of the *Children Act* (cap 141) sets out the factors to be considered by the court while determining whether or not a custody order should be made in favour of the applicant.
52. Under sub-section 83(1)(j), the court is required ultimately to have regard to the “best interests of the child” as fundamentally obligated under the afore-analyzed article 53(2) of The *Constitution* of Kenya.
53. Accordingly, the principle of the best interests of the child is the supreme parameter in matters concerning the welfare of a child such as the question of the custody of the subject child/children.
54. In Civil Appeal No 60 of 1974 at Nairobi: *KA v KB*, [2008] I KLR at page 494, the court of appeal held:

“The substantial question in this appeal is whether or not the judge was right in giving custody of the children to the father. At the time the application was heard, the daughter of the parties was just over seven years of age, and the son was six years old. The judge correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the children, but he did not specifically refer to the generally accepted rule that, in the absence of exceptional circumstances, the custody of young children should be given to the mother, see *Wambua v Okumu* [1970] EA 578....Sickly children of six and seven years of age need constant care and attention, and in my opinion – other things being equal – they should be in the custody of their mother rather than their father. We have no doubt that this would be in their best interests, at least until the petition for divorce is heard and the question of custody more thoroughly investigated....

With respect, we think the judge in this case came to a wrong decision. The evidence before him was scanty and unsatisfactory, but it is not in dispute that the children are very young, and that they are not in good health, and that they are in need of constant care and attention. This care and attention, we have no doubt, they are more likely to get from their mother than their father, and consideration of their welfare demands that, for the time being at any rate, they be entrusted to their mother’s custody”.

55. In civil appeal No 30 of 1978 at Nairobi: [2008] I KLR *G v G* at page 497, the court of appeal held:

“....Basically, these reasons are that the custody of very young female children should be granted to their mother, in the absence of exceptional circumstances which do not in my opinion exist in this case. The learned judge correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the children. He rejected the proposition, advanced before him by the mother’s advocate, that there was a ‘rule’ in favour of the mother. With respect, this was misdirection. When dealing with the paramount consideration of welfare, especially where young female children are concerned, there is a rule that the mother is normally the person who should have custody. As Roxburgh J said in *Re S (an infant)* [1958] 1 All ER 783, at 786 and 787:

“I only say this; the *prima facie* rule (which is now quite clearly settled) is that, other things being equal, children of this tender age should be with their mother, and where a court gives the custody of a child of this tender age to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the *prima facie* rule”.



56. In *Re L (infants)* [1962] All ER 1, Lord Denning MR said:

“I realize that as a general rule it is better for little girls to be brought up by their mother.”

57. There are also authorities to the like effect to be found nearer home. In *Wambua v Okumu* [1970] EA 578, a Kenya case, Mosdell J had this to say:-

“I do not think it can be controverted that in absence of exceptional circumstances, the welfare of a female infant aged four years ... demands that the infant be looked after by its mother rather than its putative father.”

58. In *Karanu v Karanu* [1975] EA 18, also a Kenya case, the then Court of Appeal approved the *dictum* of Mosdell J in *Wambua's* case (*supra*) and stated as follows:

“At the time the application was heard, the daughter of the parties was just over seven years of age, and the son was six years old. The judge correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the children, but he did not specifically refer to the generally accepted rule that in the absence of exceptional circumstances, the custody of young children be given to the mother.”....He did not say that the mother was an unsuitable person, or that she was unfit to have the care and custody of her little daughters. In my view, there are no ‘exceptional circumstances’ shown in this case to justify depriving the mother of her natural right to have her children with her, so as to exclude the *prima facie*, or generally accepted rule or principle recognized in the cases to which I have referred in this judgment. This is not a case of a mother abandoning her children. Although she left the matrimonial home after a quarrel, she came back to fetch her little daughters the following morning, but was prevented from taking them away”. (Underlining ours)

59. In Civil Application No 170 of 2013 at Nairobi: *EAO v SON*, the Court of Appeal held:

“On the second limb on the nugatory aspect, we are of the view that this is a matter that should be considered within its own peculiar facts and circumstances. If VAAO gets into that stage of a girl’s life where she definitely needs counseling and guidance from her mother, and she has no trusted female she can confide in, the psychological trauma she could be subjected to is irreversible. Thereafter, were the court to restore her back to her mother’s custody, it would be too late. Such a situation would be avoided if she is restored to her biological mother. We appreciate that she is said to be living with her father’s fiancée who could be at hand to give her necessary counsel and support, but in our view the father’s fiancée cannot be a suitable substitute for the child’s mother particularly when the mother is available and willing to take up her responsibility as a mother. There is no evidence placed before us to even remotely suggest that the applicant is an unfit parent....

We also order that the child be released to the applicant forthwith and that she remain in her custody pending the hearing and determination of the intended appeal....”

60. In *Jusab v Gamrai & another* [2009] I EA at page 164, the court (Rawal J) held:

“Having considered all the cases cited before me by both parties, including *Re: L (minors)* [1974] WLR 250, *Re: R (minor)* 1981 I FLR 416, I shall quote the following passage from the last-referred case to show how I have and shall deal with this case:-



“but the weight to be given to either of them must be measured in terms of the interest of the child not in terms of penalizing the ‘kidnapper’ or of comity, or any other obstruction ‘kidnapping’ like other kinds of unilateral action in relation to children, is to be strongly discouraged, but the disagreement must take the form of a swift, realistic and unsentimental assessment of the best interests of the child leading, in proper cases, to the prompt return of the child to his or her own country, but not the sacrifice of the child’s welfare to some other principle of law.” (underlining ours).

61. In divorce cause No 34 of 2002 at Mombasa [2008] I KLR: [B v M](#) at page 531, the court (Onyango Otieno J) held:

“Section 83(1) of the Children Act provides matters which the court shall have regard to in determining whether or not a custody order should be made in favour of the applicant. I have considered the same and I have called for and received a report from the District Children’s officer Mombasa which ends by stating as follows: -

“Your Lordship, the children do not seem to lack any basic needs other than the love of both parents as they both live with one parent each”.

“The officer has visited and talked to each child. AM is living with the father. He is 7 years old while DW is living with the mother at their maternal grandparent’s home. Each of them is comfortable according to the report. I do not feel in such a situation where all things seem to be equal, the age of the children is the deciding factor. The children are still within the ages that dictate that they live with their mother unless the mother is found to be hopelessly unable to take care of them and to give them the moral upbringing required”.

62. In Civil Appeal No 54 of 2010 – [DK v JKN](#) [2011] eKLR the court (Kimaru J) held:

“The general rule is that, where the custody of a child of tender years as defined by section 2 of the Children Act is in issue, the mother of the child should have the custody unless special circumstances are established to disqualify the mother from having the custody of such a child. The child that is the subject of these proceedings is a child of young and tender age. She is a girl of nine (9) years of age. In *Midwa v Midwa* [2002] 2 EA 453 at page 455 the Court of Appeal had this to say:

“It is trite law that, *prima facie*, other things being equal, children of tender age should be with their mother, and where a court gives the custody of a child of tender age to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the *prima facie* rule, see *Re S (an infant)* [1958] 1 All ER 783 at 786 and 787 and *Karanu v Karanu* [1975] EA 18. The learned judge, in our view, did not correctly direct herself on the principle that in cases of custody of the children the paramount consideration is their welfare. Moreover, as the record shows, there were no exceptional circumstances shown to justify depriving the mother of her natural right to have her children with her”.

In the present application, it was evident from the facts of the case that the subordinate court failed to take into consideration the applicable law in regard to custody of children before he reached the determination granting custody of the child to the respondent. The respondent did not place before the trial court any special circumstances that would deny the appellant the *prima facie* right to have custody of a girl child of young and tender age.

In the premises therefore, this court is of the considered opinion that the appellant established that she would suffer substantial loss if the order of the subordinate court



granting custody of the child to the father (the respondent) is not stayed. The subordinate court did not take into consideration the best interest of the child when it reached the decision denying custody of a girl child of young and tender years to the mother. That decision of the subordinate court is stayed pending the hearing and determination of the appeal.”

63. In Civil Appeal No 68 of 2015 at Migori: *[JKW v MAA](#)* [2015] eKLR the court (Majanja J) held:

“In addition, the general principle that has been approved by our courts is that where custody of a child of tender years is in issue, is that the mother should have the custody unless special circumstances are established to disqualify the mother from having the custody of such child...Under section 2 of the Act, “child of tender years” means a child under the age of 10 years. The children subject to these proceedings are children of tender years.”

The testimony before the subordinate court largely focused on the events that led to the separation between the appellant and the respondent. The consequence of the separation was that the respondent left the matrimonial home with the parents. The appellant has not shown or demonstrated that there are exceptional circumstances that would entitle the appellant as the father of the children, to have custody of the children.”

64. In Civil Appeal No 70 of 2011 at Nairobi: *[PWM v CMM](#)* [2015] eKLR, the court (M Muigai J) held:-
In *Sospeter Ojaamong v Lynnette Amondi Otieno* Court of Appeal Civil Appeal No 175 of 2006 the court held:

“The principles that guide the court in custody of children are that except where exceptional circumstances exist, the custody of such children should be awarded to the mother, because mothers are generally best suited to exercise care and control of the children.

The exceptional circumstances would include if the mother is unsettled, has taken a new husband or her living quarters are in a deplorable state”

65. *Martha Olela & another v Jackson Obiera* CA 16 of 1979 explained the general principle that the custody of young children should be awarded to the mother unless special circumstances and peculiar circumstances exist to disqualify her from being awarded custody. These would include disgraceful conduct, immoral behavior, drunken habit, or bad company.

66. The court has considered the children’s emotions, physical and educational needs. Also the children’s age, sex, background and characteristics. The children V and T are children of the female gender who are 12 years and 9 years respectively and are about to enter adolescence and puberty age and require the mother’s special attention at this stage. These are special and unique circumstances which can only be addressed and attended to by the mother of the children of the marriage.

67. Although the best interest standard can be hard to define in some situations, some factors are common in “best interest” analyses in most custody situations:-

- (1) Wishes of the child (if old enough to capably express a reasonable preference);
- (2) Mental and physical health of the parents;
- (3) Religion and/or cultural considerations;
- (4) Need for continuation of stable home environment.



- (5) Support and opportunity for interaction with members of extended family of either parent;
- (6) Adjustment to school and community;
- (7) Age and sex of child;
- (8) Parental use of excessive discipline or emotional abuse; and
- (9) Evidence of parental drug, alcohol or sex abuse.

These factors are also contained in section 83(1) of The *Children Act*.

68. I have looked at the authorities relied on and I am convinced that the trial magistrate used wrong principles in applying the principle of the best interest of a child. Female children are vulnerable; they need their mother at all times when they are growing up. They have their own natural needs.
69. Even looking at the animal kingdom, it is their nature that their young ones remain in the custody of the mother until they are able to take care of themselves. Most of the time the “fathers” are never there. On the context of child custody cases, focus on the child’s “best interest” mean that all custody and visitation discussions and decisions are made with the ultimate goal of fostering and encouraging the child’s happiness, security, mental health and emotional development into young adulthood.
70. As already stated herein above, the respondent alleged that the appellant used to beat the child but same was not proved. The allegations of beating and other complaints by the respondent do not meet the threshold of being or amount to exceptional circumstances to deny the appellant custody of the minor “MPO” child.
71. The trial magistrate came to a wrong decision. In my holding, the custody of the girl should be given to the mother rather than the father.
72. The court thus makes the following orders;
 1. The appeal is hereby allowed.
 2. The learned magistrate’s judgment/decreed dated March 10, 2016 is set aside, the plaintiff’s suit is dismissed and legal and actual custody of the minor MPO is hereby restored to the appellant.
 3. The respondent is entitled to visitation of the children of the marriage.
 4. Liberty to apply granted to parties herein.
 5. Parties to bear their own costs.

SIGNED, DATED AND DELIVERED AT KAKAMEGA THIS 27TH DAY OF SEPTEMBER, 2016.

C. KARIUKI

JUDGE

