



REPUBLIC OF KENYA



KENYA LAW
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**PNM v ECW (Civil Appeal E095 of 2021)
[2025] KEHC 2447 (KLR) (Family) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2447 (KLR)

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

**FAMILY
CIVIL APPEAL E095 OF 2021**

**EKO OGOLA, J
FEBRUARY 13, 2025**

BETWEEN

PNM APPELLANT

AND

ECW RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. G.N. Opakasi at Milimani Children's Courts in Case No. 1165 of 2019 delivered on 1st October 2020)

JUDGMENT

1. The parties solemnised their union on 5th March 2016. During the subsistence of their marriage, they were blessed with one issue: ZMMN, who was born on 20th June 2017. The marriage irretrievably broke down, and the respondent moved out of the matrimonial home sometime in December 2017.
2. According to the averments in the Complaint, the appellant stated that the respondent denied him access to the minor; all communications to the respondent were through her parents; the respondent denied the appellant's request to baptise the child as per his catholic faith; and that the respondent is neglectful to the minor.
3. It is for these reasons that the appellant initiated a children's cause in the trial court on 20th August 2019. He prayed that the trial court makes orders for joint legal and actual custody, care and control of the minor; joint parental responsibilities over the minor; restriction of the respondent's parents from interfering and influencing the minor's upbringing; and an order for the baptism of the minor in the catholic church.
4. The trial court on 1st October 2020 delivered its Judgment. It ordered as follows: parties granted joint legal custody of the minor; the respondent to have actual physical custody, care and control of the



minor; the appellant to access the minor on every alternative Saturday of the month from 10 am to 5 pm and sleepovers with prior arrangement with the respondent; the appellant to cater for the minor's school fees, school-related expenses, and part of minor's food at a rate of Kshs. 30,000/= per month; both parties are to cater for the minor's medical expenses; the respondent is to cater for the minor's housing, utility bills, house-help, and clothing expenses and that parties shall give appropriate guidance to the minor regarding religious education and that the appellant is at liberty to have the minor baptized in the catholic church.

5. Aggrieved with the Judgment of the court, the appellant filed a Memorandum of Appeal dated 12th October 2020. The grounds of appeal were as follows:-
 - a. That the learned trial magistrate misdirected herself by limiting the access hours and times the appellant has with the minor which is not in the best interest of the minor.
 - b. That the learned magistrate erred in law and fact by failing to expressly stipulate that the minor shall have sleepovers at the appellant's place leaving the same at the whims of the respondent.
 - c. The learned magistrate erred in law and fact by failing to expressly state how the joint legal custody shall work.
 - d. That the learned trial magistrate misdirected herself and erred both in law and in fact by failing to consider the evidence of the affidavit of means when arriving and apportioning the maintenance.
 - e. That the learned magistrate erred in law and fact by failing to consider evidence of interference of the respondent's parents in the affairs of the minor of which the appellant as a father ought to be doing or involved in.
 - f. The learned trial magistrate erred in law and in fact by failing to uphold precedent and the constitutional provisions regarding parental responsibility hence leaving the respondent to shoulder much responsibility with limited access to the minor.
6. The appeal was canvassed by way of submissions which I have duly considered.

Determination

7. This is a first appeal. A first appellate Court must re-evaluate the evidence tendered in the trial court, both on points of law and facts, and arrive at its finding based on such law and facts. I have recited the essential facts of the case above.
8. Before addressing the issue at hand, it must be noted that no evidence from either party would lead to the conclusion that either of them is an unsuitable parent. Consequently, this decision will not turn on the unsuitability of either parent to have custody of the child in question. It will turn, instead, to the question of who would be best placed to advance the best interests of the child
9. On the issue of custody, the appellant submitted that the minor is approximately 7 years of age therefore the doctrine of tender years was not appropriately applied when considering the issue of actual and physical custody of the minor. At the time the trial court rendered its Judgment, the minor was approximately 3 years of age. The trial relied on Article 53(2) of *the Constitution* and Section 4 of the Children's Act, 2001 and stated that in all matters regarding minors, the child's best interest should be considered. The court held that 'No exceptional circumstances have been tendered to the court to warrant the removal of the physical custody of the minor from the mother.'



10. Historically, under common law, the custody of children was given to their fathers as part of their property rights. This was until the introduction of the doctrine of a child of tender years. Some historians attribute this to the specification of gender roles during the Industrial Revolution. Over time, the doctrine has continued to evolve with many Courts in various jurisdictions moving away from the doctrine to the more inclusive ‘best interest of the child’ principle. The Kenyan jurisdiction has further codified the principle of ‘best interest of a child’.
11. In matters concerning a child, it is a constitutional imperative that is of paramount importance in the best interests of the child. To that extent, Article 53(1) of *the Constitution* provides that a child’s best interests are of paramount importance in every matter concerning the child.
12. Since this suit was instituted in the year 2021, the applicable law is the Children’s Act 2001 (repealed). The position of Article 53(1) is enshrined in Section 4 of the Children’s Act, which provides for the welfare of the child. Section 4(2) and (3) of the Children’s Act provides as follows:-
 - “(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
 - (3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration... to the extent that this is consistent with adopting a course of action calculated to-
 - a) Safeguard and promote the rights and welfare of the child;
 - b) Conserve and promote the welfare of the child;
 - c) Secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.
13. So, the question is, which party should have actual and physical custody of the minor? The child has always lived with the mother. It would be in her best interest to move her to a new environment at this time. I agree with the trial court that actual and physical custody should be with the respondent and for both parties to have legal custody.
14. The appellant is also aggrieved with the limited time granted by the trial court. From the evidence before the trial court, the appellant has shown that despite the differences between them that caused their marriage to break down, he would want to spend as much time as possible with the minor and be part of her upbringing. Parental responsibility for both financial and physical care is on both parties. Sections 23 and 24 of the Children’s Act and Article 53(1)(e) of *the Constitution* both provide that each parent has a duty to provide the child with the necessities of life. Parental responsibility includes the emotional and mental care of the minor. Part of this would include the father having as much time as he can raising and influencing the upbringing of the minor.
15. From the foregoing, I find that the access time allocated to the appellant is not sufficient. I hereby direct that the appellant shall access the minor every alternative weekend of the month. That is from 5:00 pm on Friday to 3:00 pm on Sunday. Since the minor is of school-going age, the appellant shall have the minor for the first half of each school holiday and mid-term break. The pickup and drop-off point shall be agreed upon by the parties.



16. The appellant has also complained that the respondent's parents are heavily influencing the upbringing of the minor. I agree with the trial court that the relationship between a child and her grandparents is vital for the child's development. It must be noted that parental responsibility is on the father and mother of a child. On the other hand, the emotional and mental well-being of the minor includes spending time with her grandparents. This is in her best interest.
17. The appellant was aggrieved with the orders of the courts regarding the share of maintenance apportioned to him. As mentioned, parental responsibility, including financial responsibilities, is shared between both parents. Both parties are pilots by profession. The applicant is paying a mortgage in the house that the minor is currently living in. The trial court ordered that the respondent should take up the cost of the minor's housing, utility bills, house help and clothing expenses. The appellant was to cover all the school-related expenses and pay for the minor's food at the rate of Kshs. 30,000/= per month.
18. I agree with the trial court that shared responsibility does not equate to an exact 50:50 basis. Since the appellant's access to the minor has increased, it will not be just for him to continue paying for the minor's food. I hereby direct that the trial court's orders on maintenance subsist save for the order that the appellant pays Kshs. 30,000/= monthly for the minor's food.

Disposition

- a. The appeal succeeds in part.
- b. The appellant is granted access to the minor on every alternate weekend of the month from 5:00 pm on Friday to 3:00 pm on Sunday.
- c. The appellant is granted access to the minor for the first half of the school holidays and mid-term breaks.
- d. The pickup and drop-off points shall be agreed upon by the parties.
- e. All decisions regarding the welfare of the minor, such as school, and medical care, and spiritual welfare, shall be made solely by the parties
- f. The appellant shall cater for the minor's school fees and school-related expenses.
- g. The respondent shall cater for the minor's food, housing expenses, utility bills, house-help expenses and clothing whenever the minor is in her custody.
- h. The appellant shall cater for the minor's food, housing expenses, utility bills, house help expenses and clothing whenever the minor is in his custody.
- i. Both parties shall equally cater for the minor's medical expenses.
- j. Each party to bear own costs.

It is so ordered!

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2025

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E.K. OGOLA

JUDGE

In the presence of:



Mr. Okach for the Appellant

Mr. Njeru h/b for Mr. Sitechi for the Respondent

Ms Gisiele M court Assistant

