



**DMO v TKT & another (Civil Appeal E059 of 2023)  
[2025] KEHC 3109 (KLR) (18 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3109 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL APPEAL E059 OF 2023  
WA OKWANY, J  
MARCH 18, 2025**

**BETWEEN**

**DMO ..... APPELLANT**

**AND**

**TKT ..... 1<sup>ST</sup> RESPONDENT**

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

*(Being an Appeal from the Judgment in Keroka Chief Magistrate’s Court in Keroka PMCC Children Case No. No. E002 of 2023 delivered by Hon. C. Ombija, Senior Resident Magistrate on 25th October 2023)*

**Grandparents and the surviving parent of a minor can be granted joint and legal custody over the minor if it is in the minor’s best interests**

*The appellant, who was the biological father of the minor, sought full custody of the minor in the instant appeal. The court took cognizance of the law on the right of the surviving biological parent to have first priority on custody and access to the child unless there were compelling reasons to hold otherwise. The court found that it would not be in the minor’s interest to remove her from the loving care of her grandparents. The court thus held that it would be appropriate to grant the parties joint legal custody of the minor since the appellant was her only surviving parent.*

Reported by Kakai Toili

**Family Law** – child custody – custody of a child whose mother had passed on but the father was alive – where the child’s maternal grandparents had the custody of the child - whether the grandparents of a child could be granted the custody of a child upon the demise of the child’s mother where the child’s father was still alive – Constitution of Kenya, article 53(2); Children Act (cap 141), sections 8, 103 and 123.

**Brief facts**

The appellant was the biological father of the minor while the respondents were the minor’s maternal grandparents. The appellant sued the respondents at the trial court seeking full custody of the minor. It was the appellant’s case that after the minor’s mother passed on, the respondents took the minor under their custody



and had since denied him access to her. He contended that he was in gainful employment and therefore capable of taking care of the minor.

The respondents, on their part, averred that they had been the sole caregivers of the minor following her mother's death. They averred that their daughter's death was the subject of police investigations which indicated that she died of poisoning. They contended that the appellant willingly handed over the minor to them following the death of her mother and that custody was not an absolute right as the circumstances of each case must be considered. Through a consent, parties agreed that the appellant be allowed access/visitation rights to the minor.

The appellant was not successful at the trial court which issued among other orders; that legal and actual custody of the subject minor was granted to the respondents. Aggrieved, the appellant filed the instant appeal.

### **Issues**

Whether the grandparents of a child could be granted the custody of a child upon the demise of the child's mother where the child's father was alive.

### **Relevant provisions of the Law**

#### **Children Act, Cap 141**

#### **Section 123 - Rights of surviving parent as to guardianship and power of Court**

*(1) On the death of the father of a child, the mother, if surviving, shall be the guardian of the child either alone or jointly with the guardian appointed by the father if any, but if no guardian has been appointed by the father, or the guardian appointed by the father is dead or refuses to act, the Court may appoint a guardian to act jointly with the mother.*

*(2) 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 the guardian, if any, appointed by the mother, or if such guardian is dead or refuses to act, the Court may appoint a guardian to act jointly with the father.*

*(3) Where a surviving parent is separated from the deceased parent before his or her death, the Court may, on application by any other person, determine whether the surviving parent is fit to act as guardian of the child.*

### **Held**

1. The overriding principle in children's matters was the best interests of a child. The child's interest was paramount when considering any issue involving children. That principle was embedded in article 53(2) of the Constitution. Section 8 of the Children Act expounded on what the best interests of the child entailed.
2. The appellant was the biological father of the minor whose biological mother was deceased. The Children Act did not make provision for the granting of custody to grandparents in the event of the death of a parent. Stemming from section 123 of the Children Act, the appellant was the rightful person to be granted custody of the minor unless there existed valid reasons for making a different order.
3. A child of tender years, such as the minor in the instant case, required constant care and attention as she continued to grow and develop. That meant that such a child must be afforded an opportunity to enjoy the best care and be raised in a secure environment where she could be nurtured. The respondents had been living with the minor and taking care of her even before the death of her mother. No material was placed before the court to show that the respondents were incapable of taking care of the child or that the child was facing any challenges while under their care.
4. The appellant did not impress the court as a responsible father as he did not present any material to show that he had been providing for the minor while she was in her grandparents' custody. On the contrary, it was DW2, the minor's aunt who demonstrated that not only was she sending monthly support to the respondents to cater for the minor, but that she had also taken out an insurance cover for the minor.



5. The court took cognizance of the law on the right of the surviving biological parent to have first priority on custody and access to the child unless there were compelling reasons to hold otherwise. Alienating the minor from the care of her father would not be in her best interests. However, while the appellant demonstrated that he had what it took to take care for his daughter and provide for her financial needs, he did not actualize such capability by providing proof that he took care of the child while she was in the custody of her grandparents.
6. The evidence from the appellant was that he would leave the minor under the care of his sister who resided in Githurai in Nairobi/Kiambu County while he worked in Nyamira County. In essence, the appellant intended to cede actual custody of the minor to his sister while he was in a far-flung county where he worked. The appellant conceded that he had not visited the minor even after the parties filed a consent on visitation rights.
7. The court could not ignore or wish away the respondents' apprehension over the safety of the minor if given to the custody of the respondent considering that the minor's own mother died while in the appellant's house under unclear circumstances that had not been resolved. The appellant had two other children with different women but did not tender evidence to show that he catered for the children's needs. Indeed, the appellant had another children's case before another court involving one of children. The appellant did not strike the court as a person who had a stable home environment where he could raise the minor going by his intention to leave the minor under the care of his sister, if he was granted custody.
8. The appellant's confirmation that he intended to leave the minor in the custody of his sister did not bode well for the interests of the minor who had all along been under the constant loving care of her grandparents from the time of her mother's death. Removing the minor from a stable home environment that had so far been provided for her by her maternal grandparents and taking her to a totally new place would not serve her best interests considering that she was only about four years as at the time of delivery of the judgment. Section 103 of the Children Act outlined principles that must be considered by the court when making custody orders.
9. The respondents demonstrated their capability to take care of the minor by offering her a stable environment to grow and thrive, it would not be in the minor's interest to remove her from the loving care of her grandparents and hand her over to the care of the appellant's sister. It would be appropriate to grant the parties joint legal custody of the minor since the appellant was her only surviving parent. The respondents were appointed as the minor's guardians in accordance with the provisions of section 123(2) of the Children Act.

*Appeal partly allowed.*

#### **Orders**

- i. *The appellant and the respondents shall have joint and legal custody over the minor. In that regard, the respondents were granted actual/physical custody of the minor while the appellant was awarded access/visitation rights upon making prior arrangements with the respondents. For the avoidance of doubt, the appellant may have access to the minor during the weekends and school holidays and will undertake full parental responsibility over the child including providing for the minor's medical expenses, clothing, food and education.*
- ii. *The orders on visitation and custody may be revised by the court, should the need arise, on an application being made by any of the parties therein.*
- iii. *Both parties shall ensure that the custody arrangements are adhered to and shall provide a seamless timetable for pick up and return of the minor between the two households.*
- iv. *The appellant shall pay Kshs 8,000 upkeep to the respondents which money shall be payable on or before the 5<sup>th</sup> day of every month, vide M-Pesa number that shall be provided by the respondents.*
- v. *Each party to meet their own costs in the appeal.*



## Citations

### Cases

#### *Kenya*

1. *Athman, Ramadhan Ali v Peter Mwingo Chirima* (Civil Appeal 13 of 2017; [2020] KEHC 10000 (KLR)) — (Followed)
2. *MAK v RMAA & 4 others* (Petition 2 (E003) of 2022; [2023] KESC 21 (KLR)) — (Explained)
3. *Noordin v Karim* (Misc Civil Case 58 of 1985; [1990] KEHC 37 (KLR); [1990] KLR 627) — (Followed)

#### *Regional Court*

*Peters v Sunday Posts Ltd* [1958] EA — (Followed)

### Statutes

#### *Kenya*

1. Children Act (cap 141) sections 4 (1)(2); 6(1); 7; 8; 34; 76 (1); 82 (3); 102; 103; 104; 123 — (Interpreted)
2. Constitution of Kenya article 53(1)(e)(2) — (Interpreted)

### Instruments

1. African Charter on the Rights and Welfare of the Child (ACRWC), 1990 — article 19
2. Convention on the Rights of the Child (CRC), 1989 — article 7

### Advocates

None mentioned

## JUDGMENT

### Background

1. The appellant herein, is the biological father of the minor SMM (particulars withheld), while the respondents are the said minor's maternal grandparents. The appellant sued the respondents before the trial court seeking full custody of the minor. The appellant also sought an order of permanent injunction to restrain the respondents from removing the minor from his custody.
2. A summary of the appellant's case was that he had a relationship with the minor's mother, one Catherine Kerubo Tongi (deceased), and that they were blessed with the minor sometime in the year 2020. He averred that the minor's mother died on October 10, 2022 after which the respondents took her under their custody and have since denied him access to her despite his numerous pleas. He further claimed that the minor suffers from stomach ailments and requires constant medical attention but that the respondents have refused to take her for medical check-ups. He contended that he is in gainful employment and is therefore capable of taking care of the minor. He averred that it was only fair that the court considers the best interests of the child and grants him full custody.
3. The respondents, on their part, denied the appellant's claims and averred that they have been the sole caregivers of the minor following her mother's death. They averred that their daughter's death is still the subject of police investigations which indicated that she died of poisoning. They contended that the appellant willingly handed over the minor to them following the death of her mother and that custody was not an absolute right as the circumstances of each case must be considered.



4. Through a consent recorded on May 31, 2023, parties agreed that the plaintiff be allowed access/visitation rights to the minor after which the matter was listed for hearing on July 26, 2023. At the close of the case, the trial court issued the following orders: -
  1. Legal and actual custody of the subject minor is hereby granted to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
  2. The plaintiff shall enroll the minor in his medical insurance cover.
  3. The plaintiff shall have access in terms of visits to the said minor as and when he wants, upon prior arrangement with the defendants herein.
  4. The plaintiff shall cater for the school fees and amenities of the said subject minor when that time comes/when she has become of age to start attending school.
  5. The defendants shall enroll the subject minor to a school which is affordable to the plaintiff in terms of school fees. Such school shall be arrived upon consultation with the plaintiff and the defendants.
  6. The plaintiff shall also pay Kshs 8,000 upkeep to the defendants which money shall be payable on or before the 5<sup>th</sup> day of every month, vide M-Pesa number that shall be provided by the defendants.

### **The Appeal**

5. Aggrieved by the trial court's decision, the appellant filed the instant appeal seeking to set aside the judgment on the following grounds: -
  1. That the learned trial magistrate erred in law and fact when he denied legal and actual custody of the minor to the appellant, being the appellant's own biological child and/or flesh and blood against the weight of the evidence tendered before him.
  2. The learned trial magistrate erred in law and fact when it was clearly undisputed that the appellant is the biological father of the minor and the only living parent yet he denied him the legal and actual custody of his own child, clearly amending the hierarchy of section 82(3)(a) of the Children Act.
  3. The learned trial magistrate erred in law and fact by not properly addressing his mind to the relevant provisions of the Constitution making his finding contrary to the provisions of article 53(1)(e), 53(2) of the Constitution and section 4(1),(2), section 6(1) and section 76(1) of the Children Act governing the custody of the minor.
  4. The learned trial magistrate erred in law and fact when he went against article 19 of the African Charter on the Rights and Welfare of the Child and article 7 of the 1989 Conventions on the rights of the child which states that a child shall have a right to live with and be cared for by his or her parents yet he denied the appellant custody of his child.
  5. The learned trial magistrate erred in law and fact by not finding that the respondents are old in age and without proper means and/or supportive structures for the child's upbringing away from her own biological father who has means, love and willing to take care of his child.
  6. That the learned trial magistrate erred in law and fact by not finding that no evidence was tendered in court to prove that the appellant was not fit or capable to assure (sic) full custody of own (sic) child and hence made a wrong finding.



7. The learned trial magistrate erred in law and fact when he ignored the provisions of section 102, 103 and 104 of the *Children Act* when he handed over the minor to the guardians without appointing them as such against the biological father of the child.
  8. That the learned trial magistrate erred in law and fact when he reduced the minor's biological father to a mere provider with visitation rights only which again are qualified by the respondents (sic).
  9. The learned trial magistrate erred in law and fact when he denied the minor the love of her own biological father which every child requires, he even ignored the Children's Officer's report which recommended strongly for both legal and actual custody of the minor be handed over to the appellant.
  10. That the learned trial magistrate erred in law and fact when he failed to take into consideration that the Minor and her mother were happily living together with the appellant till the untimely death of the minor's mother.
6. The appeal was canvassed by way of written submissions which I have considered.
  7. The Court of Appeal rendered itself on the duty of the first appellate court in the case of *Peters v Sunday Posts Ltd* [1958] EA thus: -
 

“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.”
  8. Having regard to the principles set out in the above cited case, I will turn to consider the evidence that the parties presented before the trial court and the law governing child custody in determining this appeal.

### **The Appellant's Case**

9. The appellant adopted his witness statement as his evidence in chief and testified that he lives in Nyamache and works at Co-operative Bank. He stated that he lived with the minor and her mother until her demise. He stated that he was not charged with the deceased's murder. He explained that he had not visited the minor despite being granted visitation rights as he was away on a three months' work-related training that commenced on June 1, 2023 and ended in August 2023. He produced the documents in his list of documents as P.Exh 1-6.
10. On cross examination, the appellant confirmed that he had two other children from different mothers and that one of the children was the subject of a case before the Children's Court. He also confirmed that he had not seen the minor herein for one year from the time he surrendered her to the respondents. He further stated that he lived with the deceased and his sister, one Lilian Ogare (PW2) prior to the death of the deceased. He stated that the said Lilian has her own 3 children who live with his parents (their grandparents).
11. On re-examination, he confirmed that he voluntarily handed over the minor to the respondents following the death of her mother.



12. PW2, Lilian Kwamboka, testified that she is unemployed but is capable of taking care of the minor as she had done before when she lived with the deceased and the appellant. She added that she has a child who is the minor's age mate and she is capable of taking care of the minor. She stated that she lives with her two children in Githurai where the plaintiff pays her rent.

### **The Defendant's/Respondents' Case**

13. The 2<sup>nd</sup> respondent (DW1) testified that she has lived with the minor from the time she was born. She added that she took full custody of the minor following her mother's death and that the appellant had not lived with the minor. She stated that the minor was not sickly and that she wished to be granted custody over the minor. She produced the documents on the defendants' list of documents as exhibits (D.Exh 1-8).
14. On cross-examination, she stated that the deceased's relationship with the appellant was abusive as he would severally assault her besides being engaged in numerous love affairs with other women. She testified that they had opened a bank account to cater for the minor's needs and that the appellant was a prime suspect in the deceased's death. She added that at one time the appellant threatened her and sent people to kidnap the minor an event that she reported to the police. She confirmed that she lives with the 1<sup>st</sup> respondent and other grandchildren.
15. DW2, Caroline Kwamboka, the minor's maternal aunt, testified that the minor was born while the deceased was under her care and that the minor has been under the respondents' custody following the death of the deceased. She testified that she opened an investment account to cater for the minor's education and had taken out life insurance cover for her. She stated that she sends monthly support of Kshs 20,000 towards the minor's upkeep. She urged the court to grant custody of the minor to the respondents as the appellant had never lived with nor catered for the minor.

### **Analysis and Determination**

16. I have carefully considered the record of appeal and the parties' submissions. I find that the main issue for determination is whether the Appeal is merited.
17. I am alive to the fact that the overriding principle in children's matters is the best interests of a child. It is trite that the child's interest is paramount when considering any issue involving children. This principle is embedded in article 53 (2) of the Constitution which provides as follows:-
- (2) A Child's best interests are of paramount importance in every matter concerning the child.
18. Section 8 of the Children Act (the Act) expounds on what the best interests of the child entails as follows: -
8. Best interests of the child
1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—
    - a. the best interests of the child shall be the primary consideration;
    - b. the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.
  2. All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written



law, 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; and
- c. secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.

3. In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases, having regard to the child's age and degree of maturity.

4. The Cabinet Secretary shall issue guidelines to give effect to this section.

19. In the instant case, the court has to deal with the issue of who, between the appellant and the respondents, is best suited to get custody of the minor herein. Section 2 of the Act defines custody as follows:

“custody” means lawful custody, whether by operation of law, written agreement or order of a Court of competent jurisdiction;

20. Section 102 of the Act outlines the persons who are eligible to be granted custody of a minor under as follows: -

102. Custody order

1. A court may, on the application of one or more persons qualified under subsection (3), make an order vesting the legal custody of a child in the applicant or applicants.
2. An order under subsection (1) may be referred to as a custody order, and the person to whom legal custody of the child is awarded is referred to as the custodian of the child.
3. Any of the following persons may be granted custody of a child—
  - 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 a period of three years preceding the making of the application, unless the Court is satisfied on evidence that a shorter period is sufficient to justify an order made in determination of the application; or
  - d. any person who, while not falling within paragraphs (a), (b) or (c), can show cause, having regard to section 101, why an order should be made awarding the person custody of the child.

21. Article 53 of the [Constitution](#) provides that every minor is entitled to be cared for by their parents. The Article stipulates as follows: -

53. Children

- (1) Every child has the right—



- (e) 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; and

22. Section 7 of the Act stipulates as follows: -

Section 7. Name and nationality

- 1. Every child shall have a right to a name and nationality and, as far as possible, the right to know and be cared for by their parents.

23. Article 7 of the [\*UN Convention on the Rights of the Child \(1989\)\*](#) provides thus: -

- (1). The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

24. Article 19 of The [\*African Charter on The Rights and Welfare of the Child\*](#) stipulates that: -

- 19. Every child is entitled to parental care and protection and shall wherever possible reside with his or her parents.

25. In the instant case, it was not disputed that the appellant is the biological father of the minor whose biological mother was deceased. The issue in contention is whether the trial court erred in granting the custody of the minor to her grandparents. It is to be noted that the Act does not make provision for the granting of custody to grandparents in the event of the death of a parent.

26. In its judgment, the trial court referred to section 34 of the [\*Children Act\*](#) and rendered itself as follows on the issue of custody: -

“...it has been clear to this court that whereas the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein have not had the legal custody of the minor herein, whom they have been living (sic) and exercising parental care since the demise of her mother, they have not only shown duty of care and control of the child but have also shown affection and have acted to safeguard her interest and welfare. Given an opportunity by the court during the hearing of this matter, the plaintiff was not able to establish and/or demonstrate to the satisfaction of the court how unfit the 1<sup>st</sup> and 2<sup>nd</sup> defendants were in so far as achieving the best interest of the child is concerned.

It also came out clearly to the court that the plaintiff intends to have the large care of the said minor in the hands of his sister. The plaintiff has explained by himself that he has a busy work schedule the leads him to travel outside the country for long periods as demonstrated by the one-time training he attended in Tanzania for about 2 months during the pending (sic) of this matter. To me therefore, the plaintiff may not be able to have full time attention on the said minor who is of tender years still (sic).

27. Section 123 of the [\*Children Act\*](#) provides as follows: -

123. Rights of surviving parent as to guardianship and power of court

- 1. On the death of the father of a child, the mother, if surviving, shall be the guardian of the child either alone or jointly with the guardian appointed by the father if any, but if no guardian has been appointed by the father, or the guardian appointed by the



father is dead or refuses to act, the Court may appoint a guardian to act jointly with the mother.

2. 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 the guardian, if any, appointed by the mother, or if such guardian is dead or refuses to act, the Court may appoint a guardian to act jointly with the father.
3. Where a surviving parent is separated from the deceased parent before his or her death, the Court may, on application by any other person, determine whether the surviving parent is fit to act as guardian of the child. [Emphasis added]

28. Stemming from the above provision, it is clear that the appellant herein was the rightful person to be granted custody of the minor unless there existed valid reasons for making a different order. In MAK v RMAA & others(2023) KESC21(KLR) Petition No 2 (E003) of 2022) the Supreme Court rendered itself thus: -

“It is evident from the foregoing provisions that the child has a right to parental care and it in the best interest of the child that he is brought up and cared for by his or her parent. This right can only be denied if it is proved with cogent evidence and valid grounds that a parent is not suitable or is incapable of taking care of the child.”

29. In the present case, it was alleged that the appellant was abusive to the minor’s mother and that he was involved in a string of sexual affairs during the mother’s lifetime. The respondents’ case was that the deceased was in an abusive relationship with the appellant and that she died under very disturbing circumstances, while at the appellant’s house, and that the appellant was a prime suspect in the said death. They further stated that at no time did the appellant live with the minor during her mother’s lifetime and that he has never visited the minor even after the court had granted him visitation rights following the recording of the consent.

30. DW1 testified as follows during re-examination: -

“I am able to raise the subject minor. My youngest child is 18 years old. My late daughter called me from time to time over gender-based violence meted on her by the plaintiff. It was a distress call which came from time to time. The plaintiff does not have time to raise the subject minor. He is always at work. I have never denied the plaintiff access to the minor.”

31. The appellant, on his part, averred that he went to Tanzania for three months work training after he was granted visitation rights and could not visit the minor within that period. He submitted that his involvement at work should not be a ground for denying him custody of his own child. He added that if he is granted the custody of the minor, his younger sister who lives with him would take care of the minor while he is away at work.

32. I find that a child of tender years, such as the minor in this case, requires constant care and attention as she continues to grow and develop. This means that such a child must be afforded an opportunity to enjoy the best care and be raised in a secure environment where she can be nurtured. I note that the appellant testified that he would leave the minor under the care of his sister (PW2) while he is away at work. This court notes that the said sister testified that not only is she unemployed but that she also has two (2) children of her own.

33. The respondents herein, on the other hand, are retired citizens who are now engaged in farming activities at their rural home where they live with other grandchildren and are taking good care of them.



The evidence on record reveals that the respondents have been living with the minor and taking care of her even before the death of her mother. No material was placed before this court to show that the respondents are incapable of taking care of the child or that the child is facing any challenges while under their care.

34. The appellant did not impress this court as a responsible father as he did not present any material to show that he has been providing for the minor while she is in her grandparents' custody. On the contrary, it was DW2, the minor's aunt who demonstrated that not only was she sending monthly support to the respondents to cater for the minor, but that she had also taken out an insurance cover for the minor.

35. This takes cognizance of the law on the right of the surviving biological parent to have first priority on custody and access to the child unless there are compelling reasons to hold otherwise. It is for this reason that I find that alienating the minor herein from the care of her father would not be in her best interests. I find guidance in the decision in Noordin v Karim Misc. Civil Case No 58 of 1985 (O.S) where it was held that: -

“That children's father is alive and it is normally wrong to take over the place of their father. The respondent is a suitable parent. He has sufficient income to guarantee the children a good life, better education and a sense of belonging. He does not have a large family. At present, the children have been alienated from the respondent and it is not for their long term wellbeing that they should be made to forget their father.”

36. In the instant case, however, I find that while the appellant demonstrated that he has what it takes to take care for his daughter and provide for her financial needs, he did not actualize such capability by providing proof that he takes care of the child while she is in the custody of her grandparents. Furthermore, the evidence from the appellant was that he would leave the minor under the care of his sister who resides in Githurai in Nairobi/Kiambu County while he works in Nyamira County. In essence, the appellant intends to cede actual custody of the minor to his sister while he is in a far-flung County where he works. It was also instructive to note that the appellant conceded that he had not visited the minor even after the parties filed a consent on visitation rights.

37. This court cannot also ignore or wish away the respondents' apprehension over the safety of the minor if given to the custody of the respondent considering the undisputed fact that the minor's own mother died while in the appellant's house under unclear circumstances that have not been resolved to date. It did not also escape this court's attention that the appellant concedes that he has two other children with different women but did not tender evidence to show that he caters for the children's needs. Indeed, it also came out in evidence that the appellant has another children's case before another court involving one of children. The appellant does not strike this court as a person who has a stable home environment where he can raise the minor going by his intention to leave the minor under the care of his sister, if he is granted custody.

38. I find that the appellant's confirmation that he intends to leave the minor herein in the custody of his sister (PW2) does not bode well for the interests of the minor who has all along been under the constant loving care of her grandparents from the time of her mother's death. This court is of the view that removing the minor from a stable home environment that has so far been provided for her by her maternal grandparents and taking her to a totally new place would not serve her best interests considering that she is only about 4 years as at the time of delivery of this judgment. I find guidance from the provisions of Section 103 of the Act which outlines principles that must be considered by the court when making custody orders as follows:



103. Principles to be applied in making custody order

1. In determining whether or not a custody order should be made in favour of an applicant, the Court shall have regard to—
  - 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 the child taking into account the child's evolving capacity;
  - d. whether the child has suffered any harm or is likely to suffer any harm if the order is not made;
  - e. the customs of the community to which the child belongs;
  - f. the religious persuasion of the child;
  - g. whether a care order, supervision order, personal protection order or an exclusion order has been made in relation to the child concerned, and whether those orders remain in force;
  - h. the circumstances of any sibling of the child concerned, and of any other children of the home, if any;
  - i. any of the matters specified in section 95(2) where the court considers such matters to be relevant in the making of an order under this section; and
  - j. the best interest of the child.
2. Where a custody order is made giving custody of a child to one parent, or in the case of joint guardians, to one guardian, the Court may order that the person not awarded custody shall nevertheless have all or any rights and duties in relation to a child, other than the right to actual possession, jointly with the person who is given custody of the child.
3. The rights specified in subsection (2) include the right of access to the child on such terms as the Court may direct.
4. In any case where a decree for judicial separation or a decree for divorce is pronounced, and the Court pronouncing the divorce decree determines that the parent by reason of whose misconduct the decree is made to be unfit to have the legal custody of the child or children of the marriage, the parent so declared to be unfit shall not, upon the death of the other parent, be entitled to legal custody of the child without leave of the Court.

39. In the case of *Ramadhan Ali Athman v Peter Mwingo Chirima* [2020] eKLR, Thande J. upheld the trial court's decision to grant custody to a minor's maternal grandparents as opposed to the father and held thus:-

“Upon their mother's demise, the respondent took the children to live with their grandmother. The trial Court was persuaded that the appellant had abdicated his parental responsibility. He had not been providing for the children both prior to and following the demise of their mother. The trial magistrate also found that the children were comfortable



at their grandmother's home and that it would be in their best interest to continue being in her physical custody....

23. When examined by the trial court, the children were unanimous that they were happy at their grandmother's home and wished to continue staying with her. The grandmother has been taking care of the children during the critical period of their mother's illness and after her demise. The court is being asked to remove the children from the loving care of their grandmother to live with a father who neglected and abandoned them and their mother in her illness; to remove them from a happy and loving home and place them in a hostile environment in the home of the appellant with step mothers. This court has objectively considered the ascertainable wishes of the children and finds that they are not dictated by selfish whims. To make an actual physical custody order in favour of the appellant at this stage would most certainly militate against the short and long term interests of the children herein as safeguarded by article 53(2) of the Constitution and section 4 of the Act."

40. Taking a cue from the above decision and having noted that the respondents demonstrated their capability to take care of the minor by offering her a stable environment to grow and thrive, I find that it would not be in the minor's interest to remove her from the loving care of her grandparents and hand her over to the care of the appellant's sister. In this regard, I find that it will be appropriate to grant the parties joint legal custody of the minor since the appellant is her only surviving parent. The respondents herein are hereby appointed as the minor's guardians in accordance with the provisions of section 123 (2) of the Act.

41. The appellant will, in this regard be expected to provide for the minor's needs until she attains the age of majority. The respondents are granted both actual and legal custody of the minor and will accord her a suitable family environment until she attains the age of majority or upon the court granting further orders, should the need arise.

42. In conclusion, I find that the appeal is merited, albeit partly, in the following terms: -

- i. The appellant and the respondents shall have joint and legal custody over the minor. In this regard, the respondents are granted actual/physical custody of the minor while the appellant is awarded access/visitation rights upon making prior arrangements with the respondents. For the avoidance of doubt, the appellant may have access to the minor during the weekends and school holidays and will undertake full parental responsibility over the child including providing for the minor's medical expenses, clothing, food and education.
- ii. The orders on visitation and custody may be revised by this court, should the need arise, on an application being made by any of the parties herein.
- iii. Both parties shall ensure that the custody arrangements are adhered to and shall provide a seamless timetable for pick up and return of the minor between the two households.
- iv. The appellant shall also pay Kshs 8,000/= upkeep to the respondents which money shall be payable on or before the 5<sup>th</sup> day of every month, vide M-Pesa number that shall be provided by the respondents.
- v. Each party will meet their own costs in this Appeal.

43. Orders accordingly.



**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA  
MICROSOFT TEAMS THIS 18<sup>TH</sup> DAY OF MARCH 2025.**

**W. A. OKWANY**

**JUDGE**

