



REPUBLIC OF KENYA



KENYA LAW
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GO v NKO (Civil Appeal E015 of 2024) [2025] KEHC 2972 (KLR) (5 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2972 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E015 OF 2024**

DKN MAGARE, J

MARCH 5, 2025

BETWEEN

GO APPELLANT

AND

NKO RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of trial court delivered on 5.2.2024 by Hon. P.K Mutai (PM) in Kisii Children Case No. 40 of 2019.
2. The Children Court entered Judgment and granted the following orders:
 - a. The Plaintiff will provide shelter, clothing and medical costs.
 - b. The Defendant will provide school fees and school-related expenses
 - c. The Plaintiff will have physical custody while the Defendant for the purpose of bonding will have limited access. The access will happen in the presence of the Plaintiff while the Defendant is in Kenya between 8 am to 5 pm in the first week. In the second week, the Defendant will take the minor on Friday evening and hand over the minor to the Plaintiff on Sunday evening. For now the Defendant will have access to the minor through communications in a manner not to interfere with the learning of the minor.
 - d. Going in future, the parties to consult on which school to enroll the minor for the purpose of school fees payment.
 - e. Each party to bear its own costs.
3. The Appellant was the Defendant. Being aggrieved, he preferred the following grounds in the Memorandum of Appeal dated 19.2.2024.
 - a. The trial court erred in law and fact in granting the Appellant limited access.



- b. The trial court erred in law and fact in failing to take into account that the Appellant lived with the minor until he was 5 years before divorcing.
- c. The trial court erred in law and fact in failing to consider evidence that the Appellant was biological father of the minor.
- d. The trial court erred in law and fact in granting orders that were against the welfare and best interest of the minor.
- e. The trial court erred in law and fact in failing to consider the submissions of the Appellant.
- f. The trial court erred in law and fact in rendering a decision against the weight of evidence.

Pleadings

- 4. The Respondent filed the suit vide the Plaint dated 18.6.2019. The Respondent sought an order for legal and actual custody, care and control of the minor.
- 5. The Respondent averred in the plaint that on 17.6.2019, the Appellant chased her out of the matrimonial home and forcefully took the minors away. The Appellant let the minors unattended as he was busy at work. As a result, the health of the minors deteriorated and they needed parental care.
- 6. The Appellant as Defendant filed Defence dated 12.7.2019. He denied the averments in the plaint. It was averred in the defence that the Appellant took good care of the minors and the matters in the plaint were exaggerated and untrue.
- 7. When the matter came up for hearing in the Children's Court on 20.11.2023, the parties agreed that the Appellant will take care of school fees and school related expenses while the Respondent provides shelter, medical expenses and food.
- 8. The court heard the parties as regards the issue of custody only. The Respondent's position was that the Appellant was her friend. The minor was their biological son. She also testified that she had no problem with the Appellant being granted limited access.
- 9. The Appellant also testified that he was paying school fees, had limited access, and he was going to the USA in the following week.
- 10. The minor testified in court that the Appellant was not his father. His father was a Mr. B. The minor wanted to stay with his mother.
- 11. I have not had sight of the parties' submissions.

Analysis

- 12. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
- 13. In the case of Mbogo and Another vs. Shah [1968] EA 93 the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to



take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

14. The duty of the first appellate court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of *Selle and another Vs Associated Motor Board Company and Others* [1968]EA 123, where the judges in their usual gusto, held as follows:-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

15. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

16. Further, in the case of *Peters vs Sunday Post Limited* [1958] EA 424, the court therein rendered itself as follows:-

It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...

17. The issue that falls for this Court’s determination is whether the trial court erred in law and fact in its finding on the custody of the child herein. The Appellant did not appeal against maintenance.

18. Article 53(1) of *the Constitution* of Kenya provides that a child’s best interests are paramount in every matter concerning a child. This position is enshrined in the Children’s Act in Section 4 which provides for the child’s welfare. Section 8(1) of the *Children Act* of 2022 provides as follows:-

“8(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.

19. The Appellant’s case in this appeal is that the trial court erred in its finding on custody. The aforesaid principles are well anchored in the Convention on the rights of the child to which Kenya is a party. Under the UN Convention on the Rights 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, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

20. I have no doubt that there are enough safeguards to guide this court in arriving at a finding founded on the welfare and best interest of the children in this case.



21. The Respondent maintained that it was not in the best interest of the child to be in the custody of the Appellant. It is not in dispute that the Appellant is not fully domiciled in Kenya while the child is in learning institutions in Kenya. It is also uncontested that the Respondent is residing and working for gain in Kenya where the child is learning.
22. The court cannot agree with the Appellant that the best interest of the children would demand that the Respondent be denied actual and, indeed, full access and custody of the child. I say so particularly because the evidence presented in the Children’s Court demonstrated that the best interest of the minor herein would be served if the minor is in the custody of the Respondent. The Appellant did not satisfy the exceptional circumstances under a child of such tender years as 5 years old would properly be in his custody to attain the minor’s welfare and best interest known to the law. As was held in *Sospeter Ojaaamong vs. Lynette Amondi Otieno*, Court of Appeal Number 175 of 2006:
- “The exceptional circumstances would include if the mother is unsettled, has taken a new husband or her living quarters are in a deplorable state.”
23. Therefore, to this court, the welfare and best interest of the child in this case demands that he accesses quality education, health, nutrition, and interaction, among other necessary child developmental parameters. The child, while in Kenya, is already sufficiently getting these necessities for his welfare and best interest. It would be in conjecture for this court to permit custody of the child to the Appellant as admitted without full particulars regarding his permanent presence in Kenya.
24. The court is also alive to the law that parental responsibility is shared and both the Appellant and the Respondent herein properly undertook to take care of the minor. This is regardless of whether they stay together as married or not, or whether they are divorced or separated. This position was stated in *M.K. vs C.K.K HCA. 51/2015* where the court held:-
- “Parental responsibility is shared and not equal based on the financial position of each parent. The mother as the resident parent has a nurturing role to the children and the father to provide maintenance and upkeep of the children.
25. The minor’s testimony that the Appellant is not his biological father is misplaced and misguided. It appears the minor’s evidence needed to be seriously corroborated, and in the absence of any evidence to support it, I consider it an expression of what someone coached her to utter but which has no place in this case.
26. In the interest of justice, however, the children’s court, having found that the Appellant shall meet school fees and school-related expenses, erred in limiting his access to the minor as follows:
- The access will happen in the presence of Plaintiff while Defendant is in Kenya between 8 am and 5 pm in the first week. In the second week, Defendant will take the minor on Friday evening and hand over the minor to Plaintiff on Sunday evening. For now Defendant will have access to the minor through communications in a manner not to interfere with the learning of the minor.
27. The law would not countenance a scenario where the parent of a child meets full school fees and school-related expenses but cannot access the minor even for the purpose of nurturing and ensuring that the child sufficiently benefits from the school fees that the parent pays. That is not in the welfare and best interest of the minor. It does not serve the comity naturally granted between a parent and a child. The equilibrium would be to allow access of the minor by the Appellant during school half of holidays when the Appellant is in Kenya.



28. The Appellant and the Respondent must, as far and near as possible, both take part in the development of the minor herein. This is because both have the common responsibility in upbringing the child and the level of their presence in the life of a child is a matter that a court needs to proceed with caution in arriving at a decision pertaining custody and access. Under Article 18 of the Convention on the Rights of the Child, it is stated thus:

States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.

29. I am guided by the provisions of Section 11 of the Children's Act in my reasoning that parental care is germane to the welfare and best interest of the child and must dictate custody and maintenance. The said section provides thus:

Right to parental care

- (1) Every child has the right to parental care and protection.
- (2) Except as is otherwise provided under this Act every child has the right to live with his or her parents.
- (3) Despite subsection (2), a child may be separated from his or her parents where the Court or the Secretary determines that the separation is in the best interest of the child.
- (4) Where a child is separated from his or her parents under subsection (3), the child shall be provided with the best alternative care available, in accordance with this Act or any other written law, giving priority to family based alternative care.
- (5) Where an order made under subsection (3) applies to two or more siblings, the order shall provide that the siblings be placed under care and protection together and that they may not be separated, except for such compelling reasons as the Court shall record.
- (6) Subject to subsection (3), every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with the parent or parents on a regular basis, unless it is shown to the satisfaction of the Court that such contact is not in the best interest of the child.
- (7) Where a child is separated from his or her parent or parents otherwise than under an order of the Court, and without the consent of the parent or parents, the Secretary shall, on request by the parent or parents, facilitate the tracing and reunification of the child with the parent or parents.

30. The appeal succeeds as to the extent of access by the Appellant.

Determination

31. In the upshot, I make the following orders:

- a. The Appellant's appeal for full custody of the minor is dismissed.
- b. Both parents shall have legal custody of the minor.
- c. The Respondent shall have physical custody while the child is of tender years. This shall be reviewed as circumstances change as the Appellant and the minor bond. Liberty to apply to the trial court is granted.



- d. The Respondent is not a necessary party when the Appellant is bonding with his child, and as such, limited access is unlawful, uncalled for, and is therefore set aside.
- e. While the Appellant is in Kenya, he shall have custody of the minor during half of the school holidays and ensure the minor is returned to the Respondent on the first day of the second half of the School Holidays.
- f. During days other than school holidays, the Appellant shall have visitation rights over the minor.
- g. The rest of the orders remain in so far as they are not amended by these orders.
- h. Each party is to bear its own cost of the appeal.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 5TH DAY OF MARCH, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Omu for Ochoki for the Appellant

No appearance for the Respondent

Court Assistant – Michael

