



AOO v SAM (Civil Appeal E006 of 2024) [2025] KEHC 6641 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6641 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E006 OF 2024**

A MABEYA, J

MAY 23, 2025

BETWEEN

AOO APPELLANT

AND

SAM RESPONDENT

(Being an appeal from the judgment and decree of Hon. L.N. Kiniale SPM delivered on the 29/8/2024 in the Nyando Children’s Case No. E013 of 2023, SAM (Suing on behalf of minor and as next friend of minor – VW & SM) v AOO)

JUDGMENT

1. The respondent filed the primary suit before the trial court seeking custody of the minors. He also sought an order to compel the appellant to pay a monthly sum of Kshs. 40,000/- for upkeep to include school fees, health expenses, shopping, shelter, utility bills, food and clothing.
2. The appellant entered appearance but did not file a defence. Instead, he opted to file a written statement in which he denied the respondent’s averments. He stated that he was willing and able to have custody of the two minors and provide for them with him and that the minors were staying well with him until the respondent forcefully took them from school in 2023 and took them to an unknown place.
3. The matter proceeded for trial and by a judgment delivered on 29/8/2024, the trial court decreed that: -
 - a. Joint legal custody to both parents with the respondent getting actual/residential custody of the minors.
 - b. The appellant to pay the schools and all school related expenses of both minors at the school they are enrolled in.
 - c. The appellant to contribute Kshs. 6,000/- as food and clothing on his part to the respondent.



- d. The respondent to cater for shelter of the minors and to contribute her share as above for food and clothing towards the minors.
 - e. The parties to agree amicably on how the minors will visit the appellant at least one of the school holidays or if the appellant can visit them. This was subject to the convenience of the parties and with the help of the children's officer and to the appellant fulfilling his parental obligations.
4. Being dissatisfied with the said Judgment/decree, the appellant lodged this appeal vide the Memorandum of Appeal dated 23/9/2024 and raised eleven (11) grounds of appeal that may be summarized as follows: -
- a. The trial court erred in law and fact when it failed to consider the fact that the respondent failed to table sufficient evidence to prove her case.
 - b. The trial court erred in law and fact when it failed to consider the fact that the appellant is better placed to stay with the two minors as compared to the respondent who voluntarily walked out on the matrimonial home on the 2/10/2023 to an unknown destination and her main aim was to have the appellant's salary attached for her personal gain.
5. The appeal was disposed of by oral submissions. The appellant submitted that he had not accessed the minors and that when he calls the respondent, he always finds the children not to be okay. That the respondent is not responsible and he wants custody.
6. That the health of the minors, one who is in Grade 2 and the other in PP2, was not good as they have mental problems due to the fact that the respondent exposes them badly at their tender age. That the respondent is not capable of staying with the children.
7. That the respondent keeps moving the minors from school to school and has since moved them to their 5th school. That she is not working and cannot support the children. He submitted that he did not want the respondent near his home in Migori as she beat his wife when she was last there. He stated that he pays rent of Kshs. 3,000.
8. In response, the respondent stated that she wanted the appellant to have custody of the children and stay with them as they have been having problems since 2019 when he married another wife who has other children. That the appellant had not been maintaining the children as ordered by the trial court and that she had been the one taking care of them.
9. That the appellant can have custody of the children while she has them during school holidays. She respondent admitted that she had a child with another man and that it was difficult for her to maintain all the children.
10. This court notes from the submissions that the respondent is not opposed to the appeal. She admits that she cannot maintain the minors and seeks to only have access to them during the school holidays.
11. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial afresh and come to its own independent findings and conclusions. See *Selles & Anor vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123.
12. Before the trial court, the respondent told the court how they lived with the appellant as man and wife since 2013. They got two children, the subject of the case. However, since 2019, the parties began experiencing difficulties because the appellant was involved with another woman whom he



subsequently married. That ever since, the appellant became hostile to the children and no longer provided for them.

13. In his testimony, the appellant admitted having lived with the respondent whereby they begot the two minors. He was working in Migori but the respondent went to his office and caused a scene. That he was willing to live with and take care of his children. It was the respondent who kept moving the minors from school to another.

14. I have considered the evidence tendered before the trial court and the submissions made before me. I am mindful of the constitutional and statutory imperative that the best interests of the child is paramount. Article 53(2) of *the Constitution* of Kenya, 2010 provides that: -

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

15. Section 103 of *Children Act*, 2022 stipulates the principles to be applied in making a custody order as follows:

“83(1) In determining whether or not a custody order should be made in favour of the 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 any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;
- d. the ascertainable wishes of the child;
- e. whether the child has suffered any harm or is likely to suffer any harm if the order is not made;
- f. the customs of the community to which the child belongs;
- g. the religious persuasion of the child;
- h. whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;
- i. the circumstances of any sibling of the child concerned, and of any other children of the home, if any;
- j. the best interest of the child.”

1. In *J.O. v S.A.O.* [2016] eKLR, the Court of Appeal stated:-

“There is a plethora of decisions by this Court as well as the High Court that in determining matters of custody of children, and especially of tender age, except where exceptional circumstances exist, the custody of such children should be awarded to the mother, because mothers are best suited to exercise care and control of the children. Exceptional circumstances include: the mother being unsettled;



where the mother has taken a new husband; where she is living in quarters that are in deplorable state; or where her conduct is disgraceful and/or immoral.”

17. In the persuasive case of *KMM v JIL* (2016) eKLR, Muigai J emphasized this principal and stated that: -

“..... a child of tender years best interest and welfare are where legal custody is awarded to the mother barring extenuating circumstances that would prevent the mother from protection and care of the child. Case law lends credence to the proposition that cases of child of tender years less than 10 years old as defined under section 2(1) of the children’s Act 2001, custody is granted to the mother.”
18. On the first ground of appeal, the appellant pleaded that the respondent failed to provide sufficient evidence to prove the prayers sought in her plaint.
19. As earlier stated, the respondent sought custody of the minors as well as an order compelling the appellant to pay school fees and monthly upkeep of Kshs. 40,000/-. She testified that she had been cohabiting with the appellant since 2013 and out of which the two minors were born. However, things began to go south in 2019 when the appellant got another wife. He failed to provide for the family and became hostile to the children. The appellant confirmed the respondent’s story but denied failing to provide for the family. He accused her of being irrational as far as the schooling of the minors was concerned.
20. In its judgment, the trial court found that despite the appellant’s assertion that he is better placed to provide for the children, ability is not the only thing that the court considers in determining custody. It held: -

“The defendant also wants custody citing he is better placed to provide for the children. However, a look at the Safaricom statement he has attached since the year 2022 shows the money sent to the plaintiff has been erratic both in the amount and period and clearly not sufficient to meet the needs of the minors. If ability was the only thing the court was looking at then this would have been a very simple and easy decision. However, the court also looks at the emotional needs of children of such tender age which at this stage can only be provided by their mother despite her financial situation. The court considering all the above provisions of law, children officers report and the peculiar circumstances of this case finds that the plaintiff is therefore better placed to have custody of the child.”
21. It is clear from the extract above that the trial court was guided by the evidence presented before it before awarding custody to the respondent. It was also guided by the Children Officer’s report. In my view, the appellant did not prove to the courts satisfaction that there was evidence to warrant the court to form an opinion of adverse inference as to the character and suitability of the respondent as a parent. There was nothing to hinder her from being given physical custody of the minors.
22. In the view of this Court, the trial court properly considered the evidence before it and arrived at a proper finding. In any event, this Court finds that the minors are of tender age. The appellant has married and or is living in Migori with another woman who has other children. That the said woman and the appellant have hitherto been hostile to the minors. That ground fails.
23. On the second ground of appeal, the appellant impugned the trial court’s finding on the basis that it failed to consider the fact that the appellant is better placed to stay with the two minors as compared to the respondent.



24. As noted hereinabove in the extract of the trial court's judgment, that court noted that financial ability is not the only thing that the court is to consider when granting custody. It also found that in any event, the appellant's own financial records proved that he had not been consistent in the amount and period of provision for the minors.
25. Consequently, I am inclined to find that the trial court duly considered the appellant's ability to provide for the minors and found it wanting as it was not the only issue in consideration. This limb of his appeal is thus found to lack merit.
26. That being said, I reiterate the paramountcy of upholding the principle of the best interest of the child in issues to do with children as entailed in *the Constitution* and Children's Act.
27. At the hearing of the appeal, the respondent admitted that she cannot maintain the minors because the appellant was not providing as ordered by the trial court. That in the premises, the appellant should be granted actual custody while she is granted custody during the school holidays.
28. The appellant told the Court that he was ready and willing to take up custody and maintenance of the minors and as such he should be granted the same.
29. It is most unusual for a mother having custody of her children to surrender such custody. In the present case, the Court saw the two protagonists in court. The change in the position of the respondent was founded on the fact that, although the trial court had ordered the appellant to pay for the maintenance and upkeep of the minors, he had not done so. He withheld any provision and made the respondent desperate.
30. He alleged that he had been providing but he did not produce any evidence to prove the allegation. The Court directed him to file such evidence within 7 days but he never did so. The appellant is in gainful employment in Migori. He sired two minors with the respondent, abandoned them and eloped with another woman whom he is living with in Migori. He has abandoned the first family in favor of the second.
31. He never denied before the trial court or this Court that he and the woman he is living with had beaten or become hostile to the children. He wants to use all the tricks in the book to wrestle custody of the children from the respondent by refusing to pay the maintenance ordered by the trial court. A man cannot sire children and walk away at will. He cannot be ordered by the court to maintain his children and refuse with the hope of cajoling the woman to give in to his demands. That won't do! The law will come hard on him!
32. Accordingly, the appeal is found to be without merit and is dismissed with costs. The judgment of the trial court of 29/8/2024 is hereby upheld with the following orders: -
 - a. Since the appellant had not made any payment as directed by the trial court as at the time of the hearing of this appeal, the appellant do pay to the respondent maintenance since September, 2024 to-date in the sum of Kshs.42,000/- forthwith, being the arrears of the maintenance. In default, execution in the normal manner to issue.
 - b. The matter be mentioned before the trial court on 5/6/2025 to ensure compliance.

It is so decreed.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF MAY, 2025.

A. MABEYA, FCI ARB

JUDGE

