



**JOO & another v CGM (Appeal E050 of 2024)
[2025] KEHC 5456 (KLR) (Family) (2 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5456 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
APPEAL E050 OF 2024**

**H NAMISI, J
MAY 2, 2025**

BETWEEN

JOO 1ST APPELLANT

HBO 2ND APPELLANT

AND

CGM RESPONDENT

(Being an Appeal from the Judgement of Hon. Festus Terer, Senior Resident Magistrate delivered on 17 May 2024 in Nairobi Children Cause No. E1143 of 2022)

JUDGMENT

1. The appeal herein emanates from a suit in the Children’s Court relating to 3 minors. The suit was filed by the Appellants herein, in their capacity as biological father and paternal aunt, respectively, to the children, BOO, WO and GS, who were aged 12, 10 and 3 years at the time. The Appellants sought sole custody of the children and legal guardianship to be granted to the 2nd Appellant. The 1st Appellant, the biological father, resides and works in Qatar.
2. It was the 1st Appellant’s case that he had been frustrated by the Respondent’s actions. He accused the Respondent of neglecting the children and leaving them in deplorable conditions, frequently changing her residence yet the 1st Appellant had paid the rent in full and making contact between the 1st Appellant and the children difficult.
3. In her Defence, the Respondent pleaded that the 1st Appellant left the country for the USA in 2009 after he won the green card lottery and that the 1st Appellant had not provided for the minors since December 2018. His visits would be once a year, at best. The Respondent further pleaded that the 1st Appellant rented a house for the Respondent and the children in Umoja Estate, but failed to pay



rent, which resulted in their eviction in April 2019. She averred that the 1st Appellant had abdicated his parental responsibilities and abandoned the minors.

4. The Respondent filed a Counterclaim in which she pleaded that the 1st Appellant would send some money for monthly maintenance until December 2018 when he abruptly stopped. Thereafter, his communication became erratic. The Respondent averred that in April 2021, the Appellants and their relatives forcefully took custody of the 2 older minors at Chiromo Mortuary. Further, following some coercion, in April 2022, the Respondent handed over custody of the youngest minor, GS. It was the Respondent's claim that the 1st Appellant withdrew actual custody, care and control of the minors from her and unlawfully granted the same to the 2nd Appellant, who is an aunt to the children, which action is contrary to the best interests of the children.
5. In her Counterclaim, the Respondent sought the following orders, inter alia:
 - i. Sole legal custody of the minors herein;
 - ii. Sole actual care and control of the minors;
 - iii. School fees and school related expenses to be borne by the 1st Appellant;
 - iv. Maintenance of at least Kshs 20,000/= per month to cater for food;
 - v. An order restraining the 1st Appellant or any of his agents, relatives, acquaintances or anyone acting through him from taking the minors out of the jurisdiction of the court without leave of court;
6. In its judgement, the trial court succinctly summarised the testimonies of the various witnesses. Therefore, I will not repeat the same. The trial court also referred to 3 reports filed by different Children Officers as well as interviews of the two older minors by the Court. The issues for determination were summarised as: (i) whether the Appellants should be granted actual custody, care and control of the minors; and (ii) what other orders are available in the circumstances?
7. In its judgement, the trial court addressed one preliminary issue: whether the 2nd Appellant has a legal right to seek custody of the minors to the exclusion of the Respondent. In making reference to the provisions of section 11 (2) of the *Children Act*, the learned Magistrate held that since the biological mother of the minors is alive, her rights rank in priority to the 2nd Appellant. The 2nd Appellant's custody of the minor was, therefore, in violation of section 11 (2) of the Act.
8. The learned Magistrate also took a moment to address the interview with the two older children. He noted that the children were categorical that they wanted nothing to do with their biological mother, the Respondent. At the time, the children were aged 13 and 11 years, respectively. The learned Magistrate stated thus:

“From the evidence on record, there would have been no way BOO and WOO would disown their biological mother in the manner they have done. This is the person who has raised them to the exclusion of the 2nd Plaintiff for the better part of their lives.

The foregoing leaves me with the conclusion that the Plaintiffs have coached the minors to disown the Defendant. this is against their best interest. If such conduct continues, this court will be forced to declare them to be children in need of care and protection and take appropriate remedial measures.”
9. Bearing in mind that the two older minors are enrolled in boarding school, the trial court made the following pronouncement:



- i. The 2nd Plaintiff (1st Appellant herein) and Defendant to jointly share the legal custody of the minors, BOO, WOO and GSO;
 - ii. The Defendant to have actual custody, care and control of GSO and the 2nd Plaintiff to have access whenever he is in the country or court's jurisdiction;
 - iii. The 2nd Plaintiff is directed to forthwith cede actual custody of GSO to the Defendant;
 - iv. The parties to share custody of BOO and WOO as follows:
 - a. Equally during school mid-term and school holidays with the Defendant going first;
 - b. During public holidays liker Easter, Christmas and New Year on alternating basis;
 - c. At school subject to school rules and regulations.
 - v. The Plaintiffs, their agents or assigns are restrained from taking the minors out of the court's jurisdiction without an express order of the court;
 - vi. The Directorate of Immigration Services is directed to take note of Order (v) above;
 - vii. Parental Responsibility is appointed as follows:
 - Plaintiff
 - a. School fees and school related expenses;
 - b. Shelter when he has custody/access;
 - c. Food when he has custody/access;
 - d. Medical
 - e. Clothing
 - Defendant
 - a. Shelter when she has custody/access;
 - b. Food when she has custody/access;
 - c. Clothing
 - viii. That no orders as to costs.
10. Aggrieved by this decision, the Appellants lodged the appeal herein on the following grounds:
- i. the Learned Magistrate erred in Law and fact in holding that the children were taken from the respondent by way of subterfuge when the pleadings of the Respondent were to the effect that the children were stolen;
 - ii. The learned Magistrate erred in fact and in law in holding that the Respondent was most suitable to be with the children when she was accused by the same children of abuse and abandonment;
 - iii. The learned Magistrate erred in fact and in law by holding that the 1st Appellant is not suitable to have custody of the children when he is the biological father and the one who has been providing for them all along.



- iv. The learned trial Magistrate erred in law and in fact by denying the evidence of the children and holding that the children had been coached to state what they said to the court;
 - v. The learned trial Magistrate erred in law and fact in disregarding the Children officers' Reports;
 - vi. The learned trial Magistrate erred in law and in fact by not considering the provisions of the law in respect of the children's best interests in the Judgement;
 - vii. The learned Magistrate erred in law and fact in failing to appreciate and apply the provisions of the law on custody of the minors herein which favoured the Appellants and especially the 1st Appellant since there were sufficient compelling reasons or evidence adduced by the Appellants proving the respondent's unsuitability as their mother;
 - viii. The learned Magistrate erred in fact and in law in failing to consider and appreciate the totality of the evidence before him and reached a conclusion that is contrary to the evidence on record as produced by the Appellants and the children Officers;
 - ix. The learned Magistrate erred in law and fact in making outright prejudicial substantive conclusions, applying selective justice and disregarding the evidence tendered by the Appellants;
 - x. The Learned Trial Magistrate considered extraneous issues which vitiated his judgment thus arriving at an erroneous finding;
 - xi. The learned magistrate erred in law and fact in directing that the Appellant not to leave the Court's jurisdiction with the minors without the leave of court without any basis thus curtailing the freedom and rights of the subject minors as provided under Articles 28, 39, 53 of *The Constitution* of Kenya 2010.
 - xii. THAT the learned magistrate erred in law and fact in failing to note the conduct of the Respondent in the suit was not in the best interest of the subject minor.
11. The appeal was canvassed by way of written submissions.

Analysis and Determination

12. This is a first appeal. The duty of a first appellate Court was succinctly stated by Hon. Wendoh J in *JWN v MN* [2019] eKLR in the following words:
- “It is settled law that the duty of the first appellate court is to re-evaluate the evidence tendered in the subordinate court, both on points of law and facts and come up with its findings and conclusions.”
13. This is the standard of review upon which it is incumbent upon the Court to utilize in determining this appeal.
14. I have keenly reviewed the Record of Appeal, Supplementary Record of Appeal and read the submissions by the respective parties. The only issue for determination herein is that of custody of the minors.
15. Even as I review the evidence presented before the trial Court, I am reminded that, unlike the trial court, I do not have the benefit of hearing the witnesses, observing their demeanour or indeed appreciating the nuances that may have characterised this matter as it proceeded before the trial court.



16. The Appellants take issue with the judgement of the trial court on the basis that the Magistrate held that the 1st Appellant is not suitable to have custody of the children. This ground could not be further from the truth and it is troubling that the Appellants could misinterpret the trial court's decision to mean that the 1st Appellant had been denied custody.
17. The Appellants also took issue with the trial court's decision on the basis that the court failed to appreciate and apply the provisions of the law on custody of the minors herein which favoured the Appellants and especially the 1st Appellant since there were sufficient compelling reasons or evidence adduced by the Appellants proving the Respondent's unsuitability as their mother.
18. It is imperative to begin with the facts. It is a fact that the 1st Appellant resides and works for gain in the USA, where he has been since 2011. He visits Kenya once a year. Initially, the 1st Appellant would provide for the children's upkeep, but the said provision stopped in December 2018. In his testimony, the 1st Appellant could not recall the last time he sent money to the Respondent for upkeep.
19. Trouble began when the Respondent moved out of the homes that the 1st Appellant rented for her and the children. According to the Respondent, the problem was that the 1st Appellant was not meeting his obligation to pay rent and the arrears kept accumulating, thus forcing her to seek accommodation elsewhere. The Respondent eventually settled in a two-bedroomed house in Umoja Estate.
20. In deciding the question of custody, two considerations must be borne in mind. In the case of JKN v HWN (Civil Appeal 40 of 2014) [2019] KEHC 6737 (KLR), Hon. JM Ngugi, J opined as follows, which I quote hereinafter at length:

“First, our Constitution and statutory law are clear in making any decisions concerning children, the paramount consideration must, always, be the best interests of the child.

The Constitution of Kenya, 2010 in article 53(2) provides as follows:

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

Section 4(2) and 3(b) of the Children's Act echoes the Constitutional imperative:(2)In all actions concerning children, whether undertaken by Public or Private Welfare Institution, Courts of Law, Administrative Authorities or Legislative bodies, the best interest of the child shall be the 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 the adopting a course of action calculated to –a.Safeguarding and promoting the rights and welfare of the child;

b.and promote the welfare of the child.

The second prime principle taken into consideration in deciding custody questions is honed out of case law: it is that there is a prima facie rule that absent exceptional circumstances, the custody of children of tender years should be awarded to the mother.

This is a rule of esteemed judicial ancestry and pedigree tracing its history in Kenya to long before the passage of the *Children Act* and the promulgation of *the Constitution* of Kenya, 2010. For example, in *Wambwa v Okumu* [1970] EA 578, Mosdell J had this to say:

I do not think it can be controverted that in the 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.



Similarly, the Judges of Appeal in *Githunguri v Githunguri* [1979] eKLR stated as follows... 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 a 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.

The Judges of Appeal in the *Githunguri* case approvingly quoted Roxburgh J 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.

The Judges of Appeal also cited Lord Denning MR In re L (infants) [1962] 3 All ER 1: I realise that as a general rule it is better for little girls to be brought up by their mother.

.Finally, more recently, the Court of Appeal in *JO v SAO* (2016) eKLR 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 suitable 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.

And what amounts to exceptional circumstances? The decision in *Sospeter Ojaaamong v Lynette Amondi Otieno*, Court of Appeal Number 175 of 2006 had this to say about exception circumstances:

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

On the other hand, *Martha Olela & another v Jackson Obiera* [CA 16 of 1979](#) explained the general principle that custody of young children should be awarded to the mother unless special circumstances and peculiar circumstances exist to disqualify her for being awarded custody. As per the judges, the exceptional circumstances would include "disgraceful conduct, immoral behaviour, drunken habit, or bad company."

21. I quote this decision extensively since it addresses the issue of custody comprehensively.
22. The parties accused each other of being unfit parents. Whilst the Respondent accused the 1st Appellant of absconding his parental duties, the 1st Appellant, in turn, accused the Respondent of habitual drunkenness and neglecting the children because of her new boyfriend. Despite these accusations, I make a finding that there is no evidence from either parties that would lead to the conclusion that either of them is an unsuitable parent.
23. Further, and with reference to the foregoing on the suitability of the biological parents, I concur with the trial court that since both biological parents are alive, there is no reason why the trial Court or this



Court ought to entertain the thought of granting custody to the 2nd Appellant, a paternal aunt to the minors.

24. In summary, there is no evidence that either parent is an unfit parent for purposes of custody. There is no evidence that the Respondent behaved dishonourably sufficient to disentitle her from having custody of the children. There is no evidence that either parent is unable to give the children a reasonable upbringing by virtue of deplorable conditions or being financially destitute. There is no proper basis for giving sole legal custody to either party instead of having it shared between the two parents.
25. Having said that, the pivotal point herein is the diverging geographical locations of the parents. Considering that the 1st Appellant is based in the US, it is impossible to grant joint physical custody. The question that arises is who is best placed to advance the best interests of the minors if awarded custody? Would the minors' best interests be served by actual custody of the 1st Appellant who is not physically present in Kenya for a considerable period of time or with the Respondent who is present physically?
26. It is my considered view that the decision of the trial court is the best possible outcome in this situation. I see no reason to fault the same.
27. Based on the foregoing, I do not find any merit in the appeal. The same is dismissed with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 2 DAY OF MAY 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

.Mr. Kiboi.....for the Appellants

1st Appellant present

.Mrs. Mwadumbi for the Respondent

Libertine Achieng..... Court Assistant

