



BNM v ZAA (Family Appeal E012 of 2024) [2025] KEHC 8350 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8350 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA**

FAMILY APPEAL E012 OF 2024

G MUTAI, J

JUNE 12, 2025

BETWEEN

BNM APPELLANT

AND

ZAA RESPONDENT

JUDGMENT

1. In a judgment delivered on 31st January 2024, the Hon Nelly Chepchirchir, Principal Magistrate: -
 1. Ordered that both the appellant and the respondent had equal parental responsibility and equal legal custody of their child;
 2. Gave the respondent actual physical custody with unlimited access to the appellant, subject to the consent of the child;
 3. Ordered the respondent to provide shelter and associated utilities to the minor;
 4. Directed that both parties make equal payment of school fees;
 5. Ordered the appellant to provide a medical cover to the minor;
 6. Ordered the appellant, being a Kenyan citizen, to immediately take deliberate steps on the e-citizen platform for the renewal of the minor's passport.
2. The appellant was aggrieved by the said decision and filed the instant appeal. The appeal raises 13 grounds of appeal, which I need not state here, as they primarily allege that the learned magistrate did not consider the evidence adduced.
3. The subject of these proceedings, Arshi Bilal Noor Mohamed, was born on 5th July 2006. At the time of writing this judgment, she is 18 years and 11 months old and thus is presently an adult. Her mother, the Respondent, is Tanzanian, while her father, the appellant, is Kenyan.



4. The appeal is against the entire decision of the Court below.
5. This being a first appeal, this court must re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that the trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first-hand.
6. The duty of the first appellate Court was settled in the case of *Selle & another vs Associated Motor Boat Company and Others* [1968]EA 123. In the said case the learned Judges of Appeal stated 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.”
7. Further, in the case of *Peters vs Sunday Post Limited* [1958] EA 424, the court 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.”
8. From the record of the Court below, the case was heard on 8th November 2023. The respondent, the plaintiff, testified that she was a Tanzanian citizen. It was her evidence that she got married to the appellant, then the defendant, in 2001 and separated on 24th November 2016. She testified that the child left the residence of the appellant, as he was abusive and threatened her. Since leaving the appellant’s residence, he had refused to pay school fees. She prayed that the appellant be compelled to pay the child’s school fees and healthcare costs.
9. The respondent stated that, being a Tanzanian, she could not renew her daughter’s passport; she prayed that he be compelled to do so.
10. When cross-examined by the appellant, she denied that she forced the appellant to leave work. He averred that the appellant never facilitated the renewal of her passport.
11. The appellant in his evidence in chief testified that he was jobless and that he depended on his brothers and friends. He admitted that the minor was his daughter. He stated that he was unable to afford the child’s school fees. He denied that he had refused to assist the minor in obtaining a new passport and said that he had provided the Court with a copy of his ID and birth certificate to aid in the process.
12. When cross-examined, he insisted that he had been unemployed since 2015. He admitted that he had travelled for Hajj, to Dar es Salaam and to Nairobi. He stated that between 2016 and 2019, he paid school fees in full at the Aga Khan Academy. The fees in the said school were Kes.28,000.00. He claimed that he made Kes.1000.00 per month. He denied knowledge of his daughter’s skin condition.
13. Although the respondent was served through her counsel Mwangi Kihira & Co. Advocates she did not participate in the appellate proceedings.
14. The appeal was canvassed by way of written submissions. As indicated above, the respondent did not file written submissions. Only the appellant did.



15. In his submissions filed on 6th October 2024, the appellant urged the Court to set aside the judgment of the Court below, to order that the minor attend public school and hospital and for her to process her own travel documents.
16. The appellant submitted that the learned magistrate did not consider his evidence, in particular his finances. He urged that the child be taken to a public school and to use public hospitals whenever she required care, as those were within his means.
17. Regarding the passport, he submitted that the respondent was married to a foreigner. He argued that the minor had refused to stay with him. The respondent was accused of being immoral and an unsuitable parent.
18. The appellant urged that he had been denied access to the child. He submitted that the child was incited against him to the extent that she denounced him.
19. He submitted that he was jobless but that he was nevertheless struggling to pay whenever he could. That notwithstanding, he had paid whatever he could. It was stated that the appellant was ready to renew the child's passport, provided that he had a say on where the child would travel. The appellant submitted that the respondent was seeking to make his life miserable using the children's case. He therefore prayed that the appeal be allowed with costs.
20. I have considered the appeal, the record of the Court below and the oral and written submissions of the appellant. Although the respondent did not participate in this appeal, I must consider it on the merits and determine whether to allow it or not.
21. In my view, the sole issue for determination is whether the Court below properly considered the evidence and the law and arrived at the correct decision. To determine the matter, I will outline the relevant statutory provisions as well as regional and international instruments.
22. This Court notes that in every decision undertaken concerning a child, the best interest of a child is paramount. See the Convention on the Rights of the Child and the African Charter on the Rights of the Child. The best interest doctrine is stated in Article 53(2) of *the Constitution* of Kenya, 2010. The latter states as follows:

“ a child's best interests are of paramount importance in every matter concerning the child.”
23. The Court, in the case of *MAA v ABS* [2018] eKLR, held as follows:-

“... While considering this matter, this Court is alert to the welfare of the children herein who are of tender years. The matter is not about the applicant/appellant and the respondent; and their interests are secondary to those of the child. The foregoing provisions require this Court to treat the interests of the child as the first and paramount consideration and must do everything to inter alia safeguard, conserve and promote the rights and welfare of the child herein. Acting in the best interest of the children in question.”
24. Since there is a consensus that the child belongs to both parties, they have equal parental responsibilities for her. Aroni, J as she then was, stated as follows in *P.K.M v A.N.M* [2020] eKLR:-

“in my view therefore one need not go further to look at what parents need to do for a child and to what extent. In this instance the parties have joint responsibility towards their son and no one is superior to the other...”



25. I have considered the judgment of the Court below. In my view, the Court properly considered the evidence before it and made the correct finding, which I am unable to fault.
26. Although the appellant has gone to extra ordinary lengths to claim that he is indigent I note that he admitted that he paid school fees at Aga khan Academy from 2016 to 2019, during the period he claims to have been unemployed and that he stopped doing so in 2019 when the minor left his residence. I am persuaded that the reason he stopped paying school fees was not due to inability, but rather his disapproval of the choice the minor made, which the appellant was unhappy with. In any event, the claim he made before me that he only makes Kes.1,000/- a month, and that he depends on his brothers and friends is a most unserious allegation.
27. The Court below did not impose the cost of paying for education on the appellant alone. The learned magistrate, in fact, ordered that the said expense be shared. It does not seem to me that the Court found for the respondent. The appellant's fervent insistence that the subject must be educated publicly and treated in public hospitals is not borne of a desire to protect the subject and to maintain her within the living standards she was used to. This Court is required under Article 53(2) of *the Constitution* to consider the best interests of the child. The constitutional edict is given effect by section 8 of the *Children Act, 2022*.
28. I am also not convinced by the reasons given for refusing to process the child's passport. In my view, the appellant appears to be motivated by a desire to make the life of the child as uncomfortable and difficult as possible.
29. The upshot of the foregoing is that I find no merit in the appeal. I cannot fault the learned magistrate for making what to me is a fairly well-grounded decision. The appeal should be dismissed.
30. In the circumstances, I dismiss the appeal filed herein forthwith.
31. As the respondent did not file submissions, I will not grant her costs.
32. It is so ordered.

DATED AND SIGNED AT MOMBASA THIS 12TH DAY OF JUNE 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Bilal Noor Mohamed (pro se litigant) (present);

No appearance for the Respondent; and

Arthur - Court Assistant.

