



**KM & another v SMHM (Family Appeal E031 of 2022)
[2025] KEHC 8351 (KLR) (3 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8351 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E031 OF 2022**

G MUTAI, J

JUNE 3, 2025

BETWEEN

KM 1ST APPELLANT

VM 2ND APPELLANT

AND

SMHM RESPONDENT

JUDGMENT

1. In a judgment delivered on 22nd June 2022, the Court below found that since the biological father of the minor was alive and the mother was deceased, the defendants had “no legal standing to have custody of the subject minor.” The Court held that “the law provides that it is the parent of a child who has parental responsibility”. The Court thus granted the Respondent sole legal and actual custody of the child TZM with access to the appellants for half the period of the school holidays. For the child KMS, the respondent was given access only if the child was agreeable. Thus, the custody of the said child remained with the appellants.
2. The appellants were aggrieved by the said decision and filed the instant appeal on 25th October 2022. The appeal is based on six grounds, to wit:-
 1. The learned magistrate erred in fact and in law in failing to appreciate that the best interest of the child in this case would be best suited by the maternal grandparents, since the effect of the judgement of the trial court would result into the separation the two siblings which would amount to psychological torture of both children;
 2. The learned magistrate failed in fact and in law to consider any of the compelling evidence adduced by the appellants at the trial court to show the difference in the physical health of the younger minor upon being put in the hands of the maternal grandparents as opposed to when she lived with her father and ailing mother;



3. The learned magistrate erred by failing to find that in fact the appellants are best suited to take care of the minor since the child has been diagnosed with HIV/AIDs and she is continuously unwell, and the grandparents;
 4. The learned magistrate failed to appreciate the negligence by the father hurt the young minor and will certainly hurt the minor because he failed to offer medication of the minor or revealing to the paternal grandparents of the case until a diagnosis was conducted by a medical officer;
 5. The learned magistrate erred in law by granting custody to the plaintiff despite his failing to be truthful and refusing to obey the court order when the court directed that the DNA be conducted on his own allegations of being the father of the first child, which turned out to be false; and
 6. All in all, the learned magistrate so misdirected herself on matters of both law and fact as to occasion a miscarriage of justice against the appellant.
3. The appellants thus prayed for the following orders:-
1. That the appeal be allowed and an order be made to the extent that the appellants retain custody of all the minors;
 2. In the result, the judgment and orders made by the learned magistrate be set aside;
 3. Stay of execution of the lower Court judgment pending hearing of the main appeal; and
 4. The costs of this appeal be granted to the appellants.
4. 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.
5. 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.”
6. 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.”
7. I have considered the evidence presented in the Court below. The respondent was the plaintiff witness 1(PW1). He testified that he married his deceased wife in 2011. She had one child from a previous relationship. They lived together happily until the deceased became critically ill and was relocated to the home of the appellants, where she died. The appellants refused to allow him to bury her. The non-



- biological son lived with him for five years and then left to live with his grandparents, but would spend holidays with him.
8. His sister, PW2, corroborated the testimony of the Respondent.
 9. The 1st appellant was the defendant's witness 1. He testified that he never consented to the marriage between his daughter and the respondent and that for that reason the marriage was a nullity. When he discovered that the child was extremely unwell, he asked his son to pick her up. The daughter had HIV, and she succumbed a few days later. When cross-examined, he admitted that he had no evidence that the respondent wasn't taking good care or that his daughter was mistreated.
 10. The second appellant agreed with the 1st appellant. She stated that their daughter had accused the respondent of infecting her with HIV. She accused him of not disclosing that the child also had HIV and was on antiretroviral drugs. When cross-examined, she admitted that their daughter had not complained that the respondent had mistreated her.
 11. The court below interviewed the children. The first child stated that the respondent didn't mistreat him. He expressed a desire to remain with the grandparents. The second child confessed that the grandparents had asked her not to greet her father.
 12. The appeal was canvassed through written and oral submissions.
 13. The submissions of the appellants are dated 25th September 2024. In their submissions, the appellants averred that there were exceptional circumstances that justified giving them custody. This was to the effect that the child was unwell with HIV, and the father had not taken good care of her, as a result of which she almost died.
 14. The appellants accused the father of negligence and averred that the Court could not ignore this conduct. It was argued that the effect of the court's orders below was to separate the children. They urged that since the mother died, the respondent had not supported the children.
 15. Counsel for the appellants submitted that the Court had the constitutional and statutory duty to ensure that the best interest of the children was secured.
 16. For the foregoing reasons, counsel prayed that the appeal be allowed and the Respondent be given access to the child.
 17. The respondent's submissions, on the other hand, are dated 2nd December 2024. In his submissions, the respondent averred that the appeal lacked merit and should be dismissed.
 18. The Respondent averred that he was a prominent businessman in Mariakani and Mombasa and that he was capable of taking care of his children and that he had done so. He denied that the appellants could care for the children, as they are old and unemployed.
 19. He also denied that the child would suffer if the custody were given to him. He stated that it had not been demonstrated that he would be unable to take care of the said child. He accused the appellants of being busybodies who wanted to deny the child the love of the biological father.
 20. He submitted that, as the biological father of the child, he was best placed to take care of the child. He had enrolled her in NHIF and had not hurt her in any way.
 21. The respondent submitted that the finding of the court below was in order and accorded with the evidence. He prayed that the appellants be allowed to visit the children.
 22. The Respondent stated that he was the right person to have custody of the children.



23. For the foregoing reasons, it was urged that the appeal be dismissed.
24. I have considered the appeal, the record of the Court below and the oral and written submissions of the parties.
25. In my view, the sole issue for determination is whether the Court below properly considered the evidence and the law and whether it arrived at the correct decision. To determine the matter, I will first outline the relevant statutory provisions, as well as regional and international instruments.
26. Section 8(1) of the *Children Act* 2022, provides that:-
- “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.”
27. The foregoing Act states as follows in Section 11(2):-
- “A child has a right to live with and to be cared for by his (or her) parents.”
28. Section 34 (1) of the *Children Act* provides that:-
- “On the death of the mother of the child, the father of the child, if still living, shall have parental responsibility for the child either alone or with the testamentary guardian (if any) appointed by the mother.”
29. Article 7 of the 1989 UN Convention on the Rights of the Child states that a child shall have the right to live with and be cared for by his or her parents. Article 19 of the African Charter on Rights and Welfare of the Child states that:-
- “Every child is entitled to parental care and protection and shall, whenever possible, reside with his or her parents.”
30. There is no doubt that the Respondent is the father of the child. As the child's father, he has the primary right of custody, which supersedes that of the grandparents. I have considered the evidence adduced in the Court below. The evidence adduced does not demonstrate that the respondent is an unsuitable parent, nor does it otherwise justify the denial of custody. The trial magistrate, in my view, correctly analyzed the evidence before her and made a right decision, which I cannot fault.
31. I am guided by the persuasive authority of the case of *MJC v LAC & another* [2020] eKLR, where Achode, J, as she then was, stated as follows:-
- “34. Further, Article 53 is clear with regard to where parental responsibility lies. There can be no basis for imposing parental responsibility on a person except in limited circumstances provided under the Children's Act, where guardians are appointed and take up parental responsibility for the child. In the present case, the Respondents have no legal obligation to assume parental responsibility for the child while the child has a surviving parent who is legally bound and is ready and willing to take on parental responsibility. They may have a moral authority since the child's mother (their daughter) is deceased. The learned trial magistrate was therefore right in her determination that the Respondents were not guardians of the child within the strict meaning of the law.”



32. In the foregoing case the Court went on to hold that:-

“ 38. The Appellant being the surviving parent, has parental responsibility for the child absent of any legal guardian to act jointly with him. I find that it is in the best interest of the child in this cause to be placed in the custody of the surviving parent, her father. No exceptional circumstances have been demonstrated to justify why the Appellant should not have full custody of his child.”

33. Although the holding of the High Court in the foregoing case was appealed, the judgment of Achode, J was upheld by the Court of Appeal.

34. In the case before the court below, no exceptional circumstances warranting the denial of the biological father's custody of his child were produced. In the circumstances, I find and hold that the appeal has no merit. The same is dismissed with no order as to costs.

35. It is so ordered.

DATED AND SIGNED IN MOMBASA THIS 3RD DAY OF JUNE 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Adika, for the Appellants;

Mr Said Mbovu Hassan Mwadzaya; and

Arthur - Court Assistant.

