



**ZAO & JIO (Minors Suing Through their Father and Next Friend DOI) v MKC
(Civil Appeal E068 of 2021) [2024] KEHC 87 (KLR) (15 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 87 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E068 OF 2021**

DK KEMEL, J

JANUARY 15, 2024

**IN THE MATTER OF ZAO AND JIO (MINORS SUING
THROUGH THEIR FATHER AND NEXT FRIEND, DOI)**

BETWEEN

**ZAO AND JIO (MINORS SUING THROUGH THEIR FATHER AND NEXT
FRIEND DOI) APPELLANT**

AND

MKC RESPONDENT

Joint custody of the children granted to the deceased mother's partner (who is not the biological father) and the children's biological father.

Reported by John Ribia

***Children Law** – custody – best interest of the child – value of child's preference in a custody battle - whether the wishes and preferences of minors should significantly influence custody decisions especially in cases involving unfamiliarity with a biological parent - Constitution of Kenya article 153(4); Children Act, 2022 (Cap 141) sections 4, 23, and 24.*

***Children Law** – custody – parental responsibility – claim where a deceased mother raised her children with her partner – where the partner was not the biological father of the children – where the mother at the time of her death was considered to be legally married to the biological father – where the biological father sought custody – where the application for custody was contested with the deceased mother's partner and the children – value of a child's wishes in a custody battle - whether the wishes and preferences of minors should significantly influence custody decisions, especially in cases involving unfamiliarity with a biological parent - whether the mother's partner, who lived with the mother and raised the children prior to her death, could be deemed to have parental responsibility for the children, despite the mother's marriage to their biological father remaining legally intact – Constitution of Kenya article 153(4); Children Act, 2022 (Cap 141) sections 4, 23, and 24.*



Brief facts

The appeal related to an issue over a dispute on custody of the minors between the appellant and the respondent. The appellant was the biological father of the children and was married to their deceased mother. Their relationship had however not blossomed, and the deceased mother, before her death, was in a relationship with, and was living and raising the children with the respondent. She never pursued a divorce before her death, meaning that she remained married to the appellant at the time of her death.

Upon her death, the appellant filed a suit for custody of the children before the Children Court in Bungoma (Magistrates Court) on grounds that he was the biological father of the children and the husband to their mother before her death. The respondent objected as he had raised the children along with the mother. The children testified that they did not know who the appellant was as they had not seen him before. Their preference was to be in the custody of the respondent.

The High Court held that both parties shall have joint custody and that both parties should meet the costs of upkeep equally. Aggrieved the appellant filed the instant appeal on grounds that the trial court erred in law and fact in failing to find the appellant was the only surviving biological parent of the minors. The respondent contended that although he was not the biological parent, it was the best interests of the children to remain in his custody.

Issues

- i. Whether the court could grant custody of a child to a partner of a child's deceased mother where the biological father of the child also sought custody of the child.
- ii. Whether the wishes and preferences of minors should significantly influence custody decisions, especially in cases involving unfamiliarity with a biological parent.
- iii. Whether the mother's partner, who lived with the mother and raised the children prior to her death, could be deemed to have parental responsibility for the children, despite the mother's marriage to their biological father remaining legally intact.

Held

1. Article 53(2) the Constitution and section 4(2) and 3(b) of the Children Act provided that the paramount consideration in any decisions concerning children must always be the best interests of the child.
2. The law under the Constitution and the Children Act succinctly sets out parental responsibilities of each parent of a child. Section 23 of the Children Act gave the definition of parental responsibility as all the duties, rights, powers, responsibilities and authority which by law a parent of a child had in relation to the child and the child's property in a manner consistent with the evolving capacities of the child. Section 24 further apportioned parental responsibility by providing that where a child's father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility.
3. Legal custody referred to rights and responsibilities that were conferred by a custody order. It was the right to make decisions relating to the welfare of the child. The rights included in legal custody were all the duties, rights, powers, responsibilities and authority which a parent had in relation to the child. Those included the responsibility to maintain a child and provide them food, shelter, medical care, education, clothing and duty to protect the child from neglect, discrimination and abuse.



4. Section 83 of the Children Act set out the following principles guiding the court in making a custody order. The court must consider:
 1. the conduct and wishes of the parent or guardian of the child.
 2. The ascertainable wishes of the relatives of the child.
 3. The ascertainable wishes of any foster parent, or any person who had actual custody of the child and under whom the child has made his/her home in the last 3 years before the application to the court.
 4. The ascertainable wishes of the child.
 5. Whether the child had suffered any harm, or was likely to suffer any harm if the order was not made.
 6. The customs of the community to which the child belonged.
 7. The religious persuasions of the child.
 8. Whether a care order, or a supervision order, or a personal protection order, or an exclusion order had been made in relation to the child concerned and whether or not those orders remained in force.
 9. The circumstances of any sibling of the child concerned; and of any other children of the home, if any.
 10. The best interest of the child.
5. The High Court had inherent powers and discretion to make orders that took into account the best interest of the child. When it became necessary for the orders of the court to further the best interest of the children in the matter and to protect them, the court did not shy away from taking that extra mile to ensure that was achieved.
6. The minors made it clear that they did not know the appellant and that they had never met him. They noted that they were seeing the appellant for the first time in court and that the only father they knew was the respondent. The respondent alluded to the fact that the appellant might be the father of both minors but it was clear that he was the one whom they knew and who according to the minors, took care of them, lived with them and they were comfortable with.
7. It was imperative for the court to caution itself on the importance of the best interests of the child and the fact that the same overrode the issues to do with paternity of the minors. The court in reaching a determination should consider the feelings and wishes of a child but must take into account the age of the child and the degree of maturity as stipulated in section 4(4) of the Children Act that provided that in any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate while having regard to the child's age and the degree of maturity.
8. At the time of their examination, the minors, ZA and JC, were 14 years and 9 years respectively and they made it clear that they only wanted to live with their father, the respondent. ZA told the court that he did not know the appellant and that the appellant had never visited her or sent her any pocket money and that her home was in Nandi. JC on the other hand, identified the respondent as the father and noted that he only wanted to live with him and did not want to go with the appellant. Such reasoning from the children especially the eldest one indicated that she was mature enough to sway the court's opinion on custody and the child's best interest absent of any exceptional circumstances. Likewise, for the younger child aged nine years, he gave the same request.
9. The minors had begun to develop coping skills and were adapting to the loss of their mother. They should be provided with a secure base which should include their close care givers being their father, the respondent, teachers and classmates, in the situation of the 9-year-old. It was recommended that that should not be tampered with for the next couple of years to prevent interference with the process of emotionally digesting the trauma. The secure base would give the minors a secure footing to deepen their relationship with the respondent who had been with them frequently and also provided a better



- opportunity for development of a relationship unlike the appellant, whom they did not know. Their relationship with the appellant was non-existent compared to the relationship they had with the respondent. The best interest of the children was paramount and must be given due consideration. It would not be appropriate to uproot the children from their present abode. The respondent merited to have physical custody of the minors in the circumstances while the parties could have joint legal custody.
10. Parental responsibility was premised on article 53(e) of the Constitution which accorded all children the right to parental care and protection which included equal responsibility of the mother and father whether married or not. At the time of the demise of E, she was married to the appellant and that the appellant adduced evidence in form of a marriage certificate and birth certificates for the two minors. That simply meant that the late E was not yet divorced from the appellant and that made it his parental responsibility to care for the children.
 11. Although the respondent did not avail evidence of his capability to take care of the minors, he was very willing to do the same as was the norm even before the demise of their mother. The ability to provide a better life to a child in a material sense did not give one priority over another since the children's psychological growth and happiness were not based on material provisions alone. Nonetheless, financial provision was equally an important consideration in a child's upbringing.
 12. Both parties testified to the fact that they were both capable of taking care of the minors. It had not been demonstrated that the appellant had no ability to financially support, maintain, and provide for the minors. The extended family nearby would also help with the minors' psychological growth and happiness. However, what transpired from the evidence of the minors was that they viewed the appellant as a stranger to them as he did not live with them. The minors had gotten accustomed to the respondent whom they had known to be their father. It would be a travesty and an injustice to uproot the minors from the place they had known to be their home and for the minors to be forced to go and live with the appellant. The appellant must accept the fact that it would take time for the minors to be psychologically prepared and become accustomed with the appellant in the fullness of time.
 13. The appellant was their father but that alone should not be a ground to uproot the minors from their circumstances. It was proper to have the minors remain with the respondent and that the appellant and the respondent shall ensure the upkeep of the minors equally.

Appeal partly allowed.

Orders

- i. *The respondent shall have physical custody of the minors ZA and JC.*
- ii. *The legal custody of the minors ZA and JC was awarded to both the appellant and the respondent. Maintenance was to be provided by both parties as follows:*
 1. *the respondent shall provide housing, food and other incidentals as may be necessary;*
 2. *both parties shall share the payment of school fees and school related expenses equally;*
 3. *the appellant shall provide medical cover.*
- iii. *The appellant shall have supervised day access to the children within Nairobi from 10.00 am, pick-up time, to 4.00 pm, drop-off time, two days a week Saturdays and Sundays during school terms and any day of the week during holidays as may be agreed upon between the appellant and the respondent until the children familiarized themselves with him. Any travel of the minors to the appellant's home county had to be with the notification and permission of the respondent.*
- iv. *Any travel of the minors to the appellant's home county was not permitted for now. The order can be reviewed when the circumstances changed.*
- v. *The appellant was also cautioned that he should not make surprise visits to pick the children but should communicate his visit in advance to the respondent.*
- vi. *Each party was to bear their own costs.*



Citations

Cases

1. *Bhutt, Regine v Haroon Bhutt & another* Civil Suit 8 of 2014; [2015] KEHC 6902 (KLR) — Explained
2. *JWN v MN Children's Case* 38 of 2017; [2019] KEHC 8527 (KLR) — Explained
3. *LAC & another v MJC* Civil Appeal E119 of 2021; [2022] KECA 68 (KLR) — Mentioned

United Kingdom

In re G (children) (FC) [2006] UKHL 43 — Mentioned

Statutes

1. African Christian Marriage and Divorce Act (Repealed) (cap 151) In general — Cited
2. Children Act (cap 141) sections 4, 23, 24 — Interpreted
3. Constitution of Kenya article 53 - Interpreted

Advocates

Sabwan for Bw'Onchiri for Appellant

JUDGMENT

1. This appeal relates to an issue over a dispute on custody of the minors herein between the appellant and the respondent. It all started in the Children's Court at Bungoma and ended up before this court on appeal. The gist of the appeal herein revolves around the issue of shared custody of the minors as ordered by the trial court and the subject of these proceedings made to the appellant and respondent.
2. The orders that were extracted from the impugned lower court's judgment read:
 - i. That both parties shall have joint custody of the two issues. The arrangement to be made under the supervision of the Children Department for the issues to spend their holidays with the parties for equal duration.
 - ii. That both parties meet the upkeep of the issues equally.
 - iii. That each party meets their own costs.
 - iv. That orders made shall be in line with section 4 of the *Children Act* which shall be in best interest of children.
3. Aggrieved by the trial court's judgement, the appellant filed an appeal *vide* memorandum of appeal dated 8 November 2021 wherein he listed grounds of appeal as follows:
 - i. That the Hon Magistrate erred in law and fact when he failed to find that the appellant, DOI was the only surviving biological parent of the minors herein.
 - ii. That the Hon Magistrate rightly held on one hand that the respondent failed to prove his income but erred on the other hand when he awarded custody of the minors to the respondent without regard as to the best interest of the minors hence occasioning a miscarriage of justice.
 - iii. That the Hon Magistrate erred in law and fact when he failed to take into consideration the submission and case laws cited by the appellants hence occasioning miscarriage of justice.
 - iv. That the judgement by the Hon Magistrate is contradictory when he held that the respondent failed to prove his means of income but further held that both the appellant and the respondent meet the upkeep of the minors equally hence occasioning a miscarriage of justice.



- v. That the Hon Magistrate erred in both law and fact when he failed to address the issue of the minors' education hence occasioning a miscarriage of justice.
 - vi. That the Hon Magistrate failed to find the respondent had interfered with 2nd minor, JMO, by changing his name from JMO to JK as per OB NO xx/xx/x/2021 at Amagoro Police Station hence not a proper person to have the custody of the minors.
 - vii. That the judgement by the Hon Magistrate is contrary to the spirit and letter of article 53 of the Constitution 2010 hence occasioning a miscarriage of justice.
 - viii. That the judgement by the Hon Magistrate is incapable of being implemented taking into account the peculiar circumstances of the case hence the Hon Magistrate erred in law and fact when he held that both parties to meet the upkeep of the issues equally.
 - ix. That the Hon Magistrate erred in law and fact when he failed to find that the respondent was a stranger and an intruder in the minors' lives and hence incapable of being awarded custody of the minors.
 - x. That the Hon Magistrate erred in law and fact when he failed to find that the respondent's primary interest in the minors' lives was the pension and other gratuity left behind by the minors' late mother, the late JEO formerly of MP Shah Hospital and thus incapable of being awarded custody of the minors hence occasioning a miscarriage of justice.
 - xi. That the judgement is poorly reasoned, incoherent and an abuse to the basic rights of the minors.
4. The appellant prayed that the appeal be allowed and that the judgement of the lower court be set aside and an order bestowing the full custody of the minors to him be issued by this court.
 5. Vide court directions issued on 25 September 2023, the appeal was canvassed by way of written submissions. It is only the appellant who filed and exchanged his submissions.
 6. The appellant vide submission dated 30 September 2023, submitted that he was married to the late JEO under the African Christian Marriage and Divorce Act cap 151 and that he is the biological father of the minors herein.
He submitted that the trial Magistrate erred by granting both the appellant and the respondent shared custody of the two minors. He urged this court to set aside the same and substitute the orders with an order allowing the appellant's claim as prayed. He relied on the cases of LAC & another v MJC (Civil Appeal E119 of 2021) (2022) KECA 68 (KLR) and Re G (2006) 545.
 7. This is a first appeal. The duty of a first appellate court was succinctly stated by 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."
 8. This is the standard of review upon which it is incumbent upon the court to utilize in determining this appeal.
 9. It is imperative to begin with the facts. At the hearing, the trial court interviewed both the minors herein. According to ZA, she was fourteen years of age and was set to join form one. She told the court



- that her mother was the late JEO and her father is the respondent herein and that she did not know the appellant herein.
10. On cross examination by counsel for the appellant, she told the court that her father's name is DO, the appellant, as per her birth certificate but that she did not know the appellant herein. She testified that she does not have a birth certificate indicating the respondent is her father. She testified that JC is her brother and that both of them were born at MP Shah hospital. She told the court that to her, a father is a person who has been there for you and that she was not ready to take any DNA test.
 11. On cross-examination by counsel for the respondent, she told the court that she has never lived with the appellant and that the appellant has never visited her and that she has never seen him before. She told the court that she is comfortable staying with the respondent as she knows him as her father.
 12. JC, testified that he was nine years old and that he is in grade three. According to him, his father is the Respondent herein and that he wished to live with him and not somebody else.
 13. On cross examination by counsel for the appellant, he told the court that he did not know the appellant and that he did not wish to go with the appellant.
 14. On cross examination by counsel for the respondent, he told the court that the appellant has never come to see him nor has he provided for him and that he only saw him for the first time in court. He told the court that he is used to the respondent
 15. The court proceeded to hear the evidence from the parties. the appellant as PW1 testified and called two witnesses. In his testimony, he adopted his statement dated 30 June 2021 as his evidence in chief. He also relied on his list of documents dated 30 June 2021 which he produced in court as plaintiff's exhibit 1-17. He told the court that he was married to the late JEO on 13 August 2005 at Amagoro church and that they resided at Kangemi in Nairobi from 2004 to 2007 then moved to Uthiru where they lived from 2007 to 2009. He testified that in 2010 he moved to Kocholia, Teso North within Busia County but still lived with the late JEO in Amagoro but in 2018 he separated from the late JEO and that the minors resided with her. According to him, he used to visit the children and provide for them by paying for their school fees and even took medical covers for them, and that he also has an education insurance for the minors that was maturing in August 2021. He told the court that he wanted his children to be with him as he was apprehensive that the ZA might be sexually assaulted.
 16. On cross-examination, he told the court that the late JEO was living in Nairobi and that they stopped living together since 2018. According to him, the late JEO was living with somebody else and that it did not bother him as he knew his children were with their mother. He testified that he used to meet with the children but could not take the children home with him. He used to pay school fees and that he had taken an NHIF medical cover that included each child. He also mentioned that he took out an education insurance cover with a maturity date for August 2021. He also testified that there was an alleged incident of ZA being given alcohol.
 17. On re-examination, he told the court that he found out about the alcohol incident involving ZA from the grandparents and clarified that the education insurance was maturing in the month of August 2021.
 18. PW2 was ROO who adopted his statement dated June 30, 2021 as his evidence in chief. He told the court that PW1 is his son-in-law as he had married the late JEO through a Christian marriage. According to him, they were blessed with two children, ZA and JC, and that the respondent is not the father of the children. He testified that a DNA test can be conducted to ascertain the paternity of the children. He told the court that the appellant should take his children.



19. On cross examination, he stated that he is aware that the late JEO separated from the appellant. According to him, he saw the respondent before at his home and that the respondent had come to him for negotiation. He attended the burial of his late daughter and that he never stopped the burial. He further testified that he did not make an application for the exhumation of the body of his deceased daughter.
20. At that juncture the appellant closed his case.
21. During the defence hearing, the respondent testified as DW1. He adopted his statement dated 5 August 2021 as his evidence in chief. He told the court that he is a businessman. He also relied on his list of documents dated 5 August 2021 which he produced in court as defence exhibit 1-6. According to him, he lived with the late JEO from the year 2010 but knew her from the year 2008. He told the court that the late JEO had children and that she came to him with ZA but that he is not certain of the paternity of JC. He told the court that he heard that the appellant would pass by when he was not around and that he lived with the late JEO till her death.
22. On cross examination, he stated that he was before court for purposes of the children, their happiness and future. According to him, he was sure who was the father of JC and that the appellant might be the biological father of JC. He stated that he was not the one who processed the birth certificate of JC as that was done by the late JEO and that the same indicated him as the father to JC. He stated that he has a source of income but did not avail any evidence to that effect. He added that he had married the late Everlyne as he had paid her dowry and that he had buried her.
23. On re-examination, he stated that he took the children to school and confirmed that JC has two birth certificates. He testified that he is still living with the children.
24. DW2 was NC who adopted his statement dated August 9, 2021 as his evidence in chief. He testified that he is a business man and that he knew of the late JEO in the year 2018 when she had ZA who was only three years old. He testified that the late JEO later had another child, JC and that the respondent has been living with the late JEO until her death.
25. On cross examination, he stated that he is the younger brother to the respondent and that he did not know what the respondent was doing for a living. He stated that he resides in the USA and that they visit him often. He added that he did not know who the biological father of JC is.
26. At the close of the defence hearing, the matter was set down for judgement. The trial court held that:

“ From the evidence on record, the issues chose to live with the defendant as they were familiar with him. it is also likely that these children were influenced as a result of this familiarity with the defendant. I am however concerned with the fact that the defendant did not support his means through the production of a payslip or a bank account. It is the responsibility of a Children’s Court to make findings in the best interest of the children. Section 4 of the *Children Act* and article 53(2) of the *Constitution*.

In the view of this I will an order which order shall be dependent on certain future events. It is ordered that both parties shall have custody of the two issues. That arrangement to be made under the supervision of the children’s department for the issues to spend their holidays with the parties for equal duration. That both parties to meet the upkeep of the issues equally.



That the said arrangements shall be in place until the minors reach the age of 18 years when they shall be at liberty to make choices. That any disobedience of the above order shall be deemed to be contempt of court.....”

27. In my view, the court must bear in mind two major issues in deciding the custody question namely:
- i. 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 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.
 - ii. 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.
28. There are numerous precedents on the impact of the best interest of the child. In the case of *Bhutt v Bhutt* HCCC No 8 of 2014, the court stated that:
- “The best interests of a child are superior to rights and wishes of parents, and they incorporate not just the physical comfort of the child but the welfare of the child in its widest sense.”
29. The law under the *Constitution* and the *Children Act* succinctly sets out parental responsibilities of each parent of a child. Section 23 of the *Children Act* gives the definition of parental responsibility as follows; -
- (1) In this Act, “parental responsibility” means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child’s property in a manner consistent with the evolving capacities of the child.
 - (2) The duties referred to in subsection (1) include in particular—
 - (a) the duty to maintain the child and in particular to provide him with—
 - (i) adequate diet;
 - (ii) shelter;
 - (iii) clothing;



- (iv) medical care including immunization; and
- (v) education and guidance;

30. Section 24 goes further to apportion that responsibility as follows;

“(1) Where a child’s father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility.”

31. Regarding legal custody, it refers to rights and responsibilities that are conferred on by a custody order. It is the right to make decisions relating to the welfare of the child. The rights included in legal custody are all the duties, rights, powers, responsibilities and authority which a parent has in relation to the child. These include the responsibility to maintain a child and provide them food, shelter, medical care, education, clothing and duty to protect the child from neglect, discrimination and abuse.

32. Section 83 of the Children’s Act sets out the following principles guiding the court in making a custody order. The court must consider the following:

1. The conduct and wishes of the parent or guardian of the child
2. The ascertainable wishes of the relatives of the child
3. 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/her home in the last 3 years before the application to the court.
4. The ascertainable wishes of the child.
5. Whether the child has suffered any harm, or is likely to suffer any harm if the order is not made,
6. The customs of the community to which the child belongs.
7. The religious persuasions of the child
8. 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 or not those orders remain in force.
9. The circumstances of any sibling of the child concerned; and of any other children of the home, if any.
10. The best interest of the child.

33. I wish to make it clear that this court has inherent powers and discretion to make orders that take into account the best interest of the child. When it becomes necessary for the orders of this court to further the best interest of the children in this matter and to protect them, this court will not shy away from taking that extra mile to ensure that this is achieved.

34. From my reading of the Judgment of the trial court, delivered on October 12, 2021, it is clear to me that there is a dispute regarding the award of shared custody to each party in this appeal and the maintainance of the issues by the Respondent despite him not proving his means of income.

35. As duly held by the trial court, the minors during their interviews made it clear that they did not know the appellant herein and that they have never met him. They noted that they were seeing the appellant



for the first time in court and that the only father they knew was the respondent. The respondent alluded to the fact that the appellant might be the father of both minors but it is clear that he was the one whom they knew and who according to the minors, took care of them, lived with them and were comfortable with. It is imperative for this court to caution itself on the importance of the best interests of the child and the fact that the same overrides the issues to do with paternity of the minors. The court in reaching a determination should consider the feelings and wishes of a child but must take into account the age of the child and the degree of maturity as stipulated in section 4(4) of the *Children Act* as follows:

(4) In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity.”

36. At the time of their examination, the minors, ZA and JC, were 14 years and 9 years respectively and that they made it clear that they only wanted to live with their father, the respondent herein. ZA told the court that he did not know the appellant and that the appellant has never visited her or sent her any pocket money and that her home was in Nandi. JC on the other hand, identified the respondent as the father and noted that he only wanted to live with him and did not want to go with the appellant. Such reasoning from the children especially the eldest one indicates that she is mature enough to sway the court's opinion on custody and the child's best interest absent of any exceptional circumstances. Likewise, for the younger child aged nine years, he gave the same request. It is my view that the minors had begun to develop coping skills and were adapting to the loss of their mother. They should be provided with a secure base which should include their close care givers being their father, the respondent herein, teachers and classmates, in the situation of the 9-year-old. I recommend that this should not be tampered with for the next couple of years to prevent interference with the process of emotionally digesting the trauma. The secure base would give the minors a secure footing to deepen their relationship with the Respondent who had been with them frequently and also provided better opportunity for development of a relationship unlike the appellant, whom they did not know. I also note that their relationship with the appellant was non-existent compared to the relationship they had with the respondent. The best interest of the children is paramount and must be given due consideration. It will not be appropriate to uproot the children from their present abode. I am satisfied that the respondent merits to have physical custody of the minors in the circumstances while the parties can have joint legal custody.

37. On maintenance of the two minors, parental responsibility is premised on article 53(e) of the *Constitution of Kenya*, which accords all children the right to parental care and protection which includes equal responsibility of the mother and father whether married or not. It is clear that at the time of the demise of E, she was still married to the appellant herein and that the appellant adduced evidence in form of a marriage certificate and birth certificates for the two minors. This simply means that the late E was not yet divorced from the appellant and that makes it his parental responsibility to care for the children. The respondent, although he did not avail evidence of his capability to take care of the minors, he is very much willing to do the same as was the norm even before the demise of their mother. I am alive to the fact that the ability to provide a better life to a child in material sense does not give one priority over another since the children's psychological growth and happiness are not based on material provisions alone. Nonetheless, financial provision is equally an important consideration in a child's upbringing. It is clear that both the parties testified to the fact that they are both capable of taking care of the minors. It has therefore not been demonstrated that the appellant has no ability to financially support, maintain, and provide for the minors and it is my considered view that the extended family nearby would also help with the minors' psychological growth and happiness. However, what transpired from the evidence of the minors is that they view the appellant as a stranger to them as he



did not live with them. The minors had gotten accustomed to the respondent whom they have known to be their father. It would be a travesty and an injustice to uproot the minors from the place they have known to be their home and be forced to go and live with the appellant. The appellant must accept the fact that it will take time for the minors to be psychologically prepared and become accustomed with the appellant in the fulness of time. It is not in dispute that the appellant is their father but that alone should not be a ground to- uproot the minors from their present circumstances. It is proper to have the minors remain with the respondent and that the appellant and the respondent shall ensure the upkeep of the minors equally.

38. In view of the foregoing observations, it is my finding that the appellant's appeal partially succeeds to the extent that the orders on shared custody be set aside as the circumstances do not allow for the same. Consequently, the trial court's judgement is hereby set aside and substituted with the following orders:
- i. The respondent shall have physical custody of the minors ZA and JC.
 - ii. The legal custody of the minors ZA and JC is awarded to both the appellant and the respondent. Maintenance is to be provided by both parties as follows:
 - (a) The respondent shall provide housing, food and other incidentals as may be necessary;
 - (b) both parties shall share the payment of school fees and school related expenses equally;
 - (c) the appellant shall provide medical cover.
 - iii. The appellant shall have supervised day access to the children within Nairobi from 10.00AM, pick-up time, to 4.00PM, drop-off time, two days a week Saturdays and Sundays during school terms and any day of the week during holidays as may be agreed upon between the appellant and the respondent until the children are familiarized with him. Any travel of the minors to the appellant's home County has to be with the notification and permission of the respondent.
 - iv. Any travel of the minors to the appellant's home County is not permitted for now. This order can be reviewed when the circumstances change.
 - v. The appellant is also cautioned that he should not make surprise visits to pick the children but should communicate his visit in advance to the respondent.
 - vi. Each party to bear their own costs

DATED AND DELIVERED AT BUNGOMA THIS 15TH DAY OF JANUARY 2024.

D. KEMEI

JUDGE

In the presence of:

Sabwan for Bw'Onchiri for Appellant

Noappearance Chungai for Respondent

Kizito Court Assistant

