



BM v GKM (Suing as Next Friend and Guardian of LR) (Civil Appeal E005 of 2023) [2024] KEHC 818 (KLR) (1 February 2024) (Judgment)

Neutral citation: [2024] KEHC 818 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E005 OF 2023
JM CHIGITI, J
FEBRUARY 1, 2024**

BETWEEN

BM APPELLANT

AND

GKM RESPONDENT

SUING AS NEXT FRIEND AND GUARDIAN OF LR

*(Appeal from the Ruling of Honorable D.O. Mac'Andere SRM Delivered on/
and Dated 19th day of January, 2023 in Children Case Number E071 OF 2022)*

JUDGMENT

Brief Background

1. At the trial court, the Respondent herein, in a notice of motion application had sought for orders to have the minor [LR] reside and be vested on her, who is also her grandmother. That the mother is in the United States of America and had left the minor under the care of the grandmother [Respondent herein].
2. The learned trial Magistrate ruled in favor of the Respondent herein, and also granted the Applicant herein visitation rights, and be informed of the minor's health conditions. The trial court in its finding agreed with the recommendations of the Children's Officer in the Social Inquiry Report.
3. Dissatisfied with the ruling/decision, the Appellant lodged this instant appeal. The Memorandum of Appeal dated 20th January, 2023. The Appeal is based on the grounds:
 1. That the learned trial Magistrate erred in law and fact by delivering a ruling that is not in the best interest of the minor.



2. That the learned trial Magistrate erred in law and fact by placing over reliance on the Children Officer's Report when in fact the minor's right to parental care and protection was not captured and/or put into consideration in the report thereby arriving at a find that is in express violation of the *Children Act, 2022*.
 3. That the learned trial Magistrate erred in law and fact by issuing a residence order separating the minor from the Appellant (the biological father) who is the only parent in the Country at the moment and who has parental responsibility in favor of the Respondent who is a grandparent to the minor.
 4. That the learned trial Magistrate erred in law and fact by placing more weight on the Children's Report and entirely ignored the Appellant's submissions that the same lacked objectivity and uniformity in the manner the home assessment was done.
 5. That the trial Magistrate erred in law and fact by entirely ignoring the Appellant's grounds of opposition thereby arriving at an erroneous finding.
 6. That the trial Magistrate erred in law and fact by entirely ignoring the Appellant's submissions thereby arriving at an erroneous finding.
 7. That the trial Magistrate erred in law and fact by delivering a ruling not based the evidence tendered by the parties.
4. In advancing his case, supporting the Appeal, the Appellant filed his written submissions dated 21st April, 2023. In the main, the Applicant contended that the impugned ruling delivered by the trial court is an express violation of the minor's right to parental care and protection as contemplated under Article 53(1)(e) of the *Constitution*, and in Section 11 of the *Children Act, 2022*; especially so since the he is the only parent left in the country and would be in the best interest of the minor to reside with him.
 5. Reliance was place on the case of *MUM v PMN & Another* [2020] eKLR where the court affirmed that the grandparents do not have right over a child whose parents are alive and willing to take up the parental responsibility.
 6. In the end, the Appellant beseeched this court to order that the minor continues to reside with him [the Appellant] pending the hearing and determination of Children Case Number E071 of 2022 at the Kisii Chief Magistrate's Court.
 7. Conversely, to buttress her case, opposing the Appeal, the Respondent filed written submissions dated 25th April, 2023. The Respondent posited that the Appeal is an abuse of the court process seeking to restrain the Respondent from enforcing the minor's best interest pursuant to lawful orders of the court through contempt.
 8. That the trial court's ruling was reasonable with the court having considered that the appellant obtained custody of the minor by 'subterfuge' which was unlawful as the consent or knowledge of the Respondent was not obtained. That the Appellant had sent the minor's mother away when he was a few months old and had not even catered for him for more than two (2) years and only became "responsible" after he learned that the minor's mother went abroad for employment.
 9. Relied on the case of *AWK v JS* [2021] eKLR where the court observed that, the learned magistrate ought to have treated as an important factor the fact that the Respondent obtained actual 'custody' of GLS by subterfuge he tricked the appellant that he was taking him for a vacation he refused to return him to his mother... It might not be dipositive but it must be taken into consideration if only to signal to the society that similar conduct by parents — of gaining custody of children against the other parent



by subterfuge in the hope that it would enhance their case for actual custody would be frowned upon by the courts.

10. In the end the Respondents prayed for orders that the minor be returned to her actual custody pending the hearing and determination of the custody suit and this is based on the Children's officer's report, as well as the wishes of the mother. Beseech the Honorable court to dismiss the Appeal with costs to the Respondent.
11. I find the issue for determination being as to whether the appeal is merited.

Analysis and Determination

12. This being a first appeal, the court is obliged to reconsider and re-evaluate the evidence adduced in the trial court and to draw its own conclusions on the same.
13. 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.”

14. Further in the case of *Selle & another vs Associated Motor Boat Co. Ltd* [1968] EA the court held 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 retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

15. At the trial court, the Application was based on the grounds on the face of it, and further supported by the Respondent's affidavit sworn on the 9th day of November, 2022 (Page 8 to 9 of the Record of Appeal). The Appellant herein vehemently opposed the Application by way of filing Grounds of Opposition dated 16th day of November, 2022 (Page 12 of the Record of Appeal) and a Replying Affidavit sworn 18th day of November, 2022 (Page 13 to 18 of the Record of Appeal).
16. In response to the Grounds and Replying Affidavit, the Respondent filed Supplementary Affidavit sworn on the 22nd day of November, 2022 (Page 20 to 22 of the Record of Appeal) prompting the Defendant/Respondent to file a Further Replying Affidavit sworn on the 28th day of November, 2022 (Page 32 to 33 of the Record of Appeal).
17. The Respondent herein presented her case at the trial court that the mother of the minor had left him under her care. That the Appellant herein abducted the minor thus putting the minor's welfare at risk.
18. In Response, at trial court, the Appellant herein, denied the claims and contended that he was called to collect the minor by the Respondent's husband because the minor needed medical attention.
19. The learned Magistrate ordered for a social inquiry report by the children's officer. The report concluded that the minor would have his welfare taken care in either the Appellants or the Respondents homestead.



20. However, the report recommended that since the minor was left under the care of the Respondent the status quo should remain pending the hearing and determination of the case. Also, recommended that the Appellant be allowed visitation rights.
21. In [AWK v JS](#) [2021] eKLR the court observed that,

“In particular, the Trial Court must request and receive a Social Inquiry Report on the two minors. It must also consider whether it would be beneficial to interview the children before making its determination. The Court should also consider the effect of the fact that the Respondent came to be with GLS as a result of subterfuge...”
22. In the present case, it is clear that the learned magistrate ordered for a social inquiry report by the children’s officer. The magistrate was guided by the generated report. The report though not binding on the learned magistrate, it guides the court. It is worth noting that the ruling on the issue of residence and custody of the minor is in the interim pending the determination of the suit.
23. It is in the best interest of the minor that his stability will be achieved if the minor’s movement is reduced, by upholding the trial courts order. The court has considered the First Schedule of the [Children’s Act, 2022](#).
24. The conduct of the Appellant in pretending to take the child for medical attention purposes amounted to an act of impunity and dishonesty on a serious issue. He displaced the child’s stability through deception and he should not expect the court to act in his favors in allowing the appeal.
25. In the premise, this court finds no error of fact or law in the ruling of the trial court. Consequently, the appeal is dismissed for lack of merit. The suit in the trial Magistrate’s court be heard and determined within thirty (30) days.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF FEBRUARY, 2024.

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J. CHIGITI (SC)

JUDGE

