



**NNM v PMN (Children's Appeal Case E045 of 2023)
[2024] KEHC 1332 (KLR) (14 February 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CHILDREN'S APPEAL CASE E045 OF 2023
LM NJUGUNA, J
FEBRUARY 14, 2024**

BETWEEN

NNM APPELLANT

AND

PMN RESPONDENT

(Appeal from the judgment of Hon. Lucy N. Ambasi CM in Chief Magistrate's Court Embu Children's case No. 24 of 2023 delivered on 27th July 2023)

JUDGMENT

1. The appellant has filed a memorandum of appeal dated 20th February 2023 being dissatisfied with the abovementioned decision, seeking orders that:
 - a. The appeal be allowed;
 - b. The appellant be granted defined access to the minor every alternative fortnight, month or in such other terms as the court will see fit; and
 - c. The current custody orders do stand varied and revised so that both parents can have joint custody of the minor once the respondent demonstrates that she was taking medication for her delusional disorder.

2. The appeal is premised on the grounds that the learned magistrate erred in law and facts by:
 - a. Disregarding the medical report and evidence led by Dr. Ian Kanyanya, a psychiatrist, who testified that the respondent was suffering from delusional disorder and had refused medication hence was not fit to have custody of the minor until she starts taking her medication;



- b. Accepting unsubstantiated evidence that the appellant had another woman whom she assumed would not be able to take care of the minor whereas no such evidence was adduced that the appellant had taken another woman as a wife;
 - c. Assuming that if the appellant remarried, him and his second wife would be incapable of taking care of the minor yet there is no evidence that child might suffer harm in the hands of a stepmother;
 - d. Giving sole custody of the minor to the respondent regardless of the fact that the appellant had stayed with the child for 8 months and was closer to the appellant than the respondent;
 - e. Giving the appellant vague visitation rights, which has caused him to be totally denied access to the child since the order was not specific; and
 - f. Focusing too much on the age of the minor and disregarding the fact that although the minor was 2½ years old at the time, the appellant had spent 8 months with the child when the respondent was suffering from delusional disorder and that the child deserves to live in a socially stable home.
3. The respondent filed a plaint dated 20th April 2023 together with a notice of motion of even date seeking sole custody of EBW a minor of tender age who was still breastfeeding. It was her argument through the plaint that the appellant had forcefully taken the minor from her and did not allow her to have the child for purposes of breastfeeding. That she stayed at the appellant's parent's home for a few months hoping that the appellant would bring the child to her but he did not do so. In the supporting affidavit to the application, the respondent deposed that the appellant took the child away and when the issue was escalated to the children's office, the respondent was sent to Embu Level 5 Hospital for mental assessment. That according to the mental assessment report by Dr. Shavulimu, the respondent was mentally sound and was stressed because of her separation from her breastfeeding child.
 4. The appellant filed his defense and counterclaim and a replying affidavit in response to the plaint and notice of motion filed by the respondent. He stated that the respondent exhibited psychotic behavior in the form of constant irritability, uncontrollable anger, excessive cleaning and threats to kill herself and the minor. That the respondent was assessed by Dr. Kanyanya and was diagnosed with delusional disorder for which medication was prescribed. That the respondent refused to take her medication and the same doctor recommended that the respondent be involuntarily admitted at a mental facility. That it was necessary for him to take away the minor into his care as the respondent was incapable of taking care of her. That the minor had suffered unexplained injuries when left in the hands of the respondent. He counterclaimed sole custody of the minor in the best interest of the child, stating that signs of mental illness as exhibited by the respondent cannot be ignored as they may end up in fatalities.
 5. The respondent filed a reply to defense and counterclaim stating that she and the appellant had been having differences and the best way he knew to punish her was by taking the minor away from her. That the allegations that she was mentally ill were started by the appellant who told the children officer as much, thereby subjecting her to a mental assessment. She reiterated that she is of sound mind and is a teacher by profession, and if she was of unsound mind then she wouldn't be working in the first place. That she wanted the court to grant her custody of the minor since the appellant has placed the child into the care of house helps and she is apprehensive that the child could be mishandled or even die in the hands of the appellant and his accomplices like it had happened before.
 6. At the hearing, PW1 was the respondent who stated that she is fit to take care of the minor and that she did not inflict any injuries on her. That after the appellant took the child away, they agreed to meet at the chief's office so that she can spend time with the child and she went to the meeting unaccompanied



- by her relatives as demanded. That She went with the village manager who was not a relative. She sought custody of the child and demanded that the appellant to assist with maintenance.
7. PW2 was Peter Njeru, the village manager who stated that he received a call from the respondent who informed him that she has been sent away from her house and was looking for a place to stay. That the following morning, she asked him to escort her to the appellant's house to breastfeed the baby since she was suffering from pain associated with failure to breastfeed. That the appellant refused to let her breastfeed and he went away with the child. That respondent stayed at the appellant's parents' home for 5 months but the appellant did not bring the child. That the appellant later returned and took the respondent to the hospital for examination and the doctor ascertained that she was not sick.
 8. DW1 was Dr. Kanyanya, a psychiatrist, who stated that the respondent was referred to him for assessment. That the appellant said that the respondent was erratic, unusually angry and would clean the house all the time to avert dust. That she would also not let the child out for long periods of time. In his opinion, the respondent was suffering from delusional disorder, and he prescribed medication to her. That the appellant reported that the respondent was not taking her medication. That he recommended the respondent's involuntary admission to a mental facility if she did not take her medication.
 9. DW2 was the appellant who stated that on several occasions, the respondent had threatened to kill herself and the child and when she did so, the appellant reported the threat to the police and took out an OB. That the child had suffered unexplained injuries while under the care of the respondent when she pulled a cuticle with her teeth, leading to an infection. He asked the court to grant him sole custody of the child and he would be willing to share custody with the respondent once she gets well.
 10. In its ruling, the court ordered that custody be joint between the appellant and the respondent but the minor shall be in actual/physical custody of the respondent while the appellant would have access to the child from time to time with prior notice. In reaching the decision, the trial magistrate relied on Article 53 of *the Constitution*, Section 103 of the *Children Act* and the cases of J.O. v R.M.M. Nakuru DC No. 4 of 2004 (2005) KLR and J.K.N. v H.W.N. (2019) eKLR.
 11. Following this ruling, the appellant herein filed chamber summons dated 30th August 2023 seeking review of the orders of the court issued in the ruling delivered on 27th July 2023. It was his argument that the order was not specific on the arrangements for the appellant to access the minor and so he asked the court to review the same defining the times when the appellant should access the minor. That owing to the ambiguity of the order, the respondent has been completely denying him access to the child. In her replying affidavit to this application, the respondent stated that the appellant had already filed this appeal before filing the review application, therefore the matter is res judicata. She urged the court to dismiss the application.
 12. The trial magistrate found merit in the application and vide ruling dated 03rd October 2023, he ordered that:
 - a. The plaintiff shall remain having custody of the child;
 - b. Both the plaintiff and defendant to have access to the child on alternate weekends and holidays;
 - c. The defendant to have access to the child on the first and last weekend of every month;
 - d. The defendant to access the child in Embu and not to take her outside of the jurisdiction of Embu Law Courts; and
 - e. No order as to costs.



13. The appeal herein was canvassed by way of written submissions.
14. The appellant submitted that the case at hand is not a subject of res judicata as the principle is not applicable in cases involving children. That the court is able to decide on the issues raised even if the same were already determined by the trial court. He cited the cases of C.N v. D.M.K Machakos HCCA No. 18 of 2019 and A.N.N.M. v. P.M.N. (2016) eKLR. That through the ruling dated 03rd October 2023, the order of the court was reviewed according to Section 117 of the Children’s Act. Regardless, this court should determine the issue since the reviewed order still bars the appellant from taking the minor to his home in Nairobi.
15. It was his argument that alienation of a child from her parents affects the child’s development. Reliance was placed on the case of B.O.G. v. E.N.K. HCC (Family Division) Civil Appeal No. 20 of 2019 where the court held that parental responsibility is to be held by both parents at the same time. He also relied on Articles 45 and 53 of *the Constitution* and stated that the respondent’s mental capacity is in question and the same was proved through evidence meaning that the respondent is not capable of securing the best interest of the child. Reliance was placed on the cases of Re L (infant) (1962) 3 All ER 1, Sospeter Ojaamong v. Lynette Omondi Otieno CA No. 175 of 2006 and Martha Olela & Another v. Jackson Obiera CA 16 of 1979 where the general sentiment was that girl children are better raised by their mothers unless under exceptional circumstances including disgraceful conduct, drunken habits or bad company.
16. The respondent submitted that she was granted custody in the best interest of the child and considering the facts of the case. That according to the ruling dated 03rd October 2023, the court underscored the safety of the child and the need for the child to be visited by the appellant within the jurisdiction of the court. That this was necessary because in the past, the appellant had concealed the location of the child and the visitation arrangements are to follow the order of the court. That the appellant has attempted to delay the case by tiring the court system with unnecessary applications, thereby abusing the court process. She urged the court to dismiss the appeal.
17. The issues for determination herein are:
 - a. Whether the issues herein are res judicata; and
 - b. Whether the appellant has a right to custody of the child.
18. To begin with, this court is cautioned that the matter herein regards a child and so I am well mindful of the provisions of *the Constitution* of Kenya 2010 and the *Children Act*. Article 53(2) of *the Constitution* provides:

“ A child’s best interests are of paramount importance in every matter concerning the child.”

Further, Section 4(3) of the *Children Act* 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 interests of the child shall be a primary consideration.”
19. The trial court heard and determined the case through the impugned ruling dated 27th July 2023. The appellant sought review of this ruling through an application dated 30th August 2023. The court heard the said application and defined the visitation arrangements and location through its ruling dated 03rd October 2023. I do note that the memorandum of appeal herein is dated 24th September 2023 and the same challenges the decision of the trial court on 27th July 2023. This means that before the



application for review was determined, the appellant filed the memorandum of appeal. At the time of determination of the review application, the appeal was pending hearing.

20. The determination of the review application partly addressed the issues herein because in both, the appellant sought for orders that the visitation rights be defined as stated in the 5th ground of appeal. It is the respondent's argument that the issues sought through this appeal were addressed through the review application and are res judicata. The appellant submitted that the principle of res judicata does not apply to children cases and cited several precedents in reference. The appellant relied on the case of *A N M v. P M N* [2016] eKLR where it was held:

“Res judicata is not applicable to children matters as it is not expressly provided for in Children's Act 2001. Practically, it behoves, parents, family community and society to support the child in growth and development up to the stage the child or young adult has ability to fend for himself/herself. Therefore, naturally there will be upcoming issues with regard to the child to safeguard the child's interest.”

21. While this is true, it is also true that when a matter is conclusively determined by one court, the parties would act unconscionably in revisiting the very same issues. While keeping in mind that similar issues regarding the minor may arise in the future and be placed before the court, it is my view that the issue raised in the 5th ground of this appeal were determined by the trial court through the review application. As far as the timelines for filing this appeal and the review application are concerned, the circumstances of the case have not changed. It is still in the best interest of the child to uphold the findings of the trial court reviewing the ruling dated 27th July 2023. Therefore, as far as the 5th ground of appeal is concerned, the same does not hold water on the basis that the trial court's ruling dated 03rd October 2023 already secured the best interest of the child.

22. On the second issue of whether the appellant should be granted custody of the minor, this court is required to revisit the evidence adduced before the trial court and make a finding. This was emphasized in the case of *Selle vs. Associated Motor Boat Co.* [1968] EA 123 that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

23. Through the plaint, it was the respondent's case that the appellant took the child away forcefully at a time when the minor was still breastfeeding. The appellant stated that the respondent was an unfit parent and that she had a mental illness. That when the issue was escalated to the Children's office, the respondent was subjected to a mental assessment at Embu Level 5 Hospital and the respondent produced a mental assessment report dated 23rd November 2022 issued by Dr. Shavulimo S.L, a psychiatrist. In the report, the doctor noted that the respondent did not exhibit any signs of a mental illness and that the low mood could be attributed to the separation from her child. The report recommended couples and individual therapy.



24. The appellant stated that he referred the respondent for another mental examination which was conducted by Dr. Ian M. Kanyanya, a psychiatrist in his independent practice. The report is dated 01st December 2022 and in it, he concluded that the respondent is suffering from delusional disorder and he prescribed medication for her. The report also stated that he first attended to the respondent on 15th July 2022 and was scheduled to return for another visit on 02nd September 2022 but she did not attend the visit and he recommended her involuntary admission to a psychiatric unit. From the evidence adduced, it is clear that the appellant is the one who gave the history of the respondent to both psychiatrists who examined her. The reports of the 2 doctors were authored 7 days apart even though the report by Dr. Ian M. Kanyanya indicates that he first attended to the respondent on 15th July 2022 but no medical record proving this were produced.
25. The appellant also stated that the child suffered unexplained injuries in the hands of the respondent who was allegedly biting the child. The respondent in her testimony stated that she was biting off a cuticle from the child's nail and it began to bleed and became septic. In my view, it is no unusual for a mother to clip a child's nails using her teeth, and sometimes pull a cuticle abit too far. This kind of injury is not enough to fuel the narrative that the respondent is an unworthy parent to the child.
26. The trial magistrate put the best interest of the child before all else, as it should be, and granted sole custody to the respondent. I am persuaded that in the circumstances and given the age of the child, the trial court did not err in granting custody to the respondent. This is not to mean that the appellant is unworthy of the child but the circumstances dictate that the child is better off living with her mother. In any event, the visitation arrangements were defined through the ruling dated 03rd October 2023 by the trial court and I do hold the same view as the trial magistrate therein. Further, both findings on custody and access to the child are in line with Section 83 of the [Children Act](#) which states:
- In determining whether or not a custody order should be made in favour of the applicant, the court shall have regard to –
- a. the conduct and wishes of the parent or guardian of the child;
 - b. the ascertainable wishes of the relatives of the child;
 - c. 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 home in the last three years preceding the application;
 - d. the ascertainable wishes of the child;
 - e. whether the child has suffered any harm or is likely to suffer any harm if the order is not made;
 - f. the customs of the community to which the child belongs;
 - g. The religious persuasion of the child;
 - h. 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 those orders remain in force;
 - i. the circumstances of any sibling of the child concerned, and of any other children of the home, if any;
 - j. The best interest of the child.



Where a custody order is made giving custody of a child to one party to a marriage, or in the case of joint guardians to one guardian, or in the case of a child born out of wedlock to one of the parents, the court may order that the person not awarded custody shall nevertheless have all or any rights and duties in relation to a child, other than the right of possession, jointly with the person who is given custody of the child.

27. In the end, I find that the appeal lacks merit and the same is hereby dismissed. There shall be no order as to costs given that the parties are co-parents of the child.

28. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF FEBRUARY, 2024.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

