



RA v JNO (Suing as the Next Friend and Mother to the Minors IO and MM) (Children's Appeal Case E001 of 2024) [2024] KEHC 2557 (KLR) (13 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2557 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CHILDREN'S APPEAL CASE E001 OF 2024**

**TA ODERA, J
MARCH 13, 2024**

BETWEEN

RA APPELLANT

AND

JNO (SUING AS THE NEXT FRIEND AND MOTHER TO THE MINORS IO AND MM) RESPONDENT

(Being an appeal from the Judgment delivered by Hon. B. OKONGO (RM) on 14th December, 2023 in NYAMIRA CMC CHILDREN CASE NO E008 OF 2023)

JUDGMENT

1. The appellant herein vide a Memorandum of Appeal filed in this court on 4th January 2023 lodged an appeal against the ruling of Hon. B Okongo (RM) dated 14th December 2024 in Nyamira Chief Magistrate Court Children Case No E008 of 2023.
2. The Appellant set out the following as the grounds of Appeal;
 - a. THAT the honorable trial magistrate erred both in law and in fact by misapprehending and disregarding and/or ignoring to take into consideration the ascertainable wishes of IO who emphatically stated that he wished to be in custody the appellant and/or further that IO is a pupil at Hill School Eldoret, with a special identification number and that he has continuously been in the actual custody of the Appellant for more than three (3) years on an account of the minor's election.
 - b. That, the honorable trial magistrate erred both in law and in fact by not considering the import of the Respondent's carelessness, recklessness and/or



negligence of unilaterally and maliciously changing the name of the of MM to AKT

- c. That, the honorable trial magistrate erred both in law and in fact by not analyzing and evaluating the evidence on record properly and by making a Judgment and decree that evidently and clearly biased the Appellant without reckoning the best interest of the subject minors.
 - d. That, the honorable trial magistrate erred both in law and in fact by misapprehending and failing to uphold the best interest of the subject minors as the paramount consideration when making the decree and Judgement.
 - e. That, the honorable trial magistrate erred both in law and in fact by ordering that the actual custody of IO substantially be in the Respondent's hands without reckoning that MK was a pupil in a boarding school wherein her name was shown as AKT and therefore the two subject minors will not live together as assumed by the honorable trial court Magistrate.
 - f. That, the honorable trial magistrate erred both in law and in fact by not taking into consideration of all circumstances of the matter before subject minors.
 - g. That, the honorable trial magistrate erred both in law and in fact by failing to grant the actual custody of both minors in favor of the Appellant considering the ascertainable wishes of IO and in violation of the right to a name unilaterally and maliciously changed to ARK under the circumstances that are clearly criminal and which she needed to sanctioned on.
3. Based on the above ground the appellant sought from this court the following orders;
- a. THAT; this honorable court be pleased to allow this appeal
 - b. That, this honorable court be pleased to set aside the decree and Judgement
 - c. That, this honorable court be pleased to grant such orders as it may deem fit and just in the interest of justice upholding the best interest of the child as the paramount consideration.

Background

4. This court being the first appellate court must proceed to examine the evidence before the trial court with a view of re-evaluating it and arriving at its own conclusions. 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.

5. The facts of this case are that the Appellant and the Respondent got married to each other in the year 2015. Their union was blessed with two children; a son and daughter (MM and IO) who are the subject of these proceedings. The minors are aged about seven (7) year and nine (9) years respectively. The marriage between them broke down and the couple parted ways in May 2021 wherein the Appellant moved to Eldoret where he currently works as a high school teacher while the Respondent remained in Nyamira where she works as a Nutritionist.



6. The Appellant and the Respondent later approached the Children's office at Nyamira where they entered into a joint parental responsibility agreement dated 15th March 2022. The terms of the said agreement were that;
 - a. The status quo to remain- the father to stay with IO and the mother with MM during schooling sessions to enable them continue with their education in their respective schools
 - b. The father to cater for IO's Educational needs while the mother to take care of MM's Educational needs.
 - c. The children holidays session to be split equally such that the children get to stay with either parent.
 - d. The children are to be covered on their father's ION and their mother's TSC Number and the birth certificates for the children.
 - e. Each party to meet food shelter needs for the period they will have custody/ access of the children.
7. However according to the Respondent, after sometime MM who is her daughter informed her she was not comfortable staying away with his brother and thus it was "in the interest" of MM that the Respondent approached the trial court by filing suit against the Defendant (the Appellant herein) vide a plaint dated 1st March 2023 seeking the following orders: -
 - a. Legal custody, care and control of all the minors.
 - b. The Defendant process IO (the son) before the court.
 - c. Costs of the suit.
8. The Appellant entered appearance and filed a statement of defense dated 15th March, 2023 denying the Respondents claim in its totality. He revealed that it was the Plaintiff who deserted the matrimonial home with the two minors. He also claimed that it took the intervention of the Nyamira children office to be granted actual custody of IO and custody of MM during half of school holidays. He revealed that the cohabitation period between him and the Respondent was only between 2014 to 2017 and that the Respondent moved on and got married to one Jared Isanda in 2019.
9. The Appellant reiterated that he has stayed with his son since 2021 and thus would wish that the court allows him to continue staying with him. The Appellant revealed that MM was enrolled in boarding school and had been there since 2021 and urged the court to allow him to continue having unlimited access to her during school holidays and to be accorded school visits as it had been the case since 2021 when the minor joined the school. The Appellant equally revealed that due to the introduction of the Unique Personal Identifier (UPI) Number by the ministry of Education it was going to be cumbersome transferring his son from Hill school.
10. Together with the suit the Applicant filed an application seeking to be granted custody of both the minors especially IO who was residing with the father pending the hearing and determination of the suit. In response to the Application, the Appellant rehashed the contents of the parental responsibility agreement entered between the parties on 15th March, 2022 and urged the court to maintain the same. The trial court upon considering the Application and the response thereto as well as the written submissions filed by the parties delivered its ruling dated 4th May, 2023 dismissing the Application



insisting that it was in the best interest that IO continued to study at Hills' school pending the hearing and determination of the matter.

11. On 12th May, 2023, the trial court was informed that the Respondent disregarded the orders of the court in its ruling dated 4th May, 2023 and took custody of IO. The court ruled that the Respondent was in direct contempt of the orders of the court and was thus ordered to immediately return IO to the Appellant.
12. On 18th May, 2023 when the matter came up for hearing, the respondent requested for the matter to be referred to mediation but the Appellant declined and thus the court ordered the matter to proceed to full hearing wherein the parties testified and minors gave their opinion.
13. During examination in chief, the Respondent testified that she is a nutritionist at Ekerenyo Sub-County Hospital. She adopted her witness statement as evidence in chief. In her statement, she narrated that she got married to the appellant in September, and that during the subsistence of their marriage they were blessed with the two minors who are MM now aged 9 and IO now aged 7, that on or about April, 2021 they had marital disagreements and the respondent chased her from their matrimonial home together with the two minors and she started staying with the minors from that time and that she allowed the Respondent unlimited access to the children. Further that on or about 16th May, 2021, the appellant visited her home where she had relocated to picked IO in pretense that he was taking him for a haircut and disappeared with him.
14. She claimed further that she tried calling the Respondent to return the minor to her but her calls went unanswered and thus she was forced to visit the Nyamira children office and they later entered into a parental responsibility agreement wherein it was agreed that the Appellant was to stay with IO while MM was to stay with her and during school holidays each of them was to have equal access to the children.
15. It was equally his claim that the appellant only complied with the agreement only once but later refused to allow IO visit her sister so that he could spend more time with her; that ever since the two minors were separated from each other they both were mentally disturbed; that during the sole holiday that she got to be with her IO informed her that she was not comfortable about women the appellant would take to the house. Also that her daughter MM has informed her severally she was not happy that she was staying away from his brother and that she dreamt about him several times.
16. The Respondent disclosed that the Appellant celebrated a church wedding on 22nd January, 2023. She contended that the fact that Appellant had now married another woman with whom he was living with it will be a constant discomfort to the minor (IO) who he claimed had confided to him that he was not comfortable with strange women the father was introducing her to.
17. She thus contended that it was in the best interest that the two minors stay together and play together for their peace of mind.
18. During cross-examination she reiterated that there was an agreement between the parties dated 15th March, 2022. She also reiterated that in the said agreement she was to stay with MM and IO was to stay with the Appellant. She revealed that she pays school fees for MM while the Appellant paid fees for IO. She revealed that prior to the 2022 agreement there was a 2021 agreement which provided that the Appellant was to pay school fees for both the children because she was not financially stable then. She reiterated that the kids were disturbed staying separately and that she was now financially stable to take care of minors. She claimed that there was currently no agreement between the parties. She confirmed that the Appellant was the biological father of the children.



19. The Appellant equally adopted his statement dated 16th March, 2023 as well as the exhibits attached thereto as his evidence in chief. In his statement the Appellant averred that between 2014 to 2017, he cohabited with the respondent and as result they were blessed with two minors; MM and IO. In, 2019 he got employed by the Teachers' Service Commission as a teacher and was posted at Uasin Gishu Secondary School and that he was forced to relocate from Nyamira where he had been living with the Respondents with the two minors. Further that the respondent demanded that he moves with the children to Eldoret while she remains at Ekerenyo where she is working. He asked her for time to settle down but she refused and insisted on her demand.
20. The Appellant also stated that the Respondent unfortunately egregiously and with unmatched arrogance left to her parent's home in Nyamira without any notice; that the Respondent eventually deserted decided to move on and started cohabiting with one Jared Isanda; that since the Appellant had avoided to pick his calls, he one day in the year 2021 walked into the house where she had moved into to see his children; while there IO requested him to go with him to Eldoret; that he proceed to take IO with to Eldoret and enrolled him at Hills School, Eldoret; that the Respondent however threatened MM to stay with her; that since he did not want any altercation with the Respondent, he conceded to an idea enrolling her in a boarding school paid all the incidental fees that was required. Further that on 15th March, 2022 the parties decided to enter a joint parental responsibility agreement before the children's officer wherein he was to retain the actual and Physical custody of IO while the Respondent was to retain actual custody of MM; that both parents were granted unlimited access to the children. He stated that he had complied with terms of the Parental responsibility agreement by granting unlimited access of I.O to the Respondent.
21. He stated that the children and their mother were covered under his Minet Medical cover and NHIF in his bid to ensure that their welfare was fully taken care of. He stated too that he had invested so much in the lives of the kids that he would not want them taken away from him. He stated further that since had been custody of IO since 2021 he applied to this court to grant him physical custody of him. Regarding his daughter, he contended since he was in a boarding school and has been with the Applicant since 2021 she applied that such arrangement continues so long as he was granted unlimited access to her and actual custody every half of school holidays as the parties had agreed. He conceded that he got married in 2023 and his new wife stays in Kisii where she works for gain. He revealed to that he stays with his young sister, Nelvin Nyakerario Atera who helps him take care of his son when he is away at work.
22. During cross-examination by the Respondent the Appellant he reiterated that he cohabited with her between 2014 to 2019 as husband and wife. He stated that the respondent was unable to stay with the two children together. He also stated that there was no evidence to show that the performance IO had dropped since he moved to HILL SCHOOL. He admitted that he has never introduced to IO to his current wife.
23. The court took its time to listen to the two minors. IO stated that he was aged 7 years and was staying with his father. He revealed that he studies at Hill School in Eldoret. He was categorical that he has never stayed with his mother. He stated he wanted to stay with his father because he was eating well and had an aunt who was taking care of him very well. MM on her part stated that she was aged 9 years and IO was his brother. She revealed that she stays with her mother who takes care of her so well and that she eats well. She stated too that she wanted to stay with the mother. She also indicated that she wanted to be close to his brother.
24. Upon the court hearing both parties and the minors it ordered that a children officer's report from the children department to be filed in court. The report was filed on 5th November 2023. In the report the



officer observed that MM was hurt when she saw her parents quarreling and admitted to be missing his brother and wished to live with his brother and both her parents. She revealed she was currently known as Angel Trizah Kemunto after her enrolment in her current school in term one of 2023. Regarding IO, the report read that the boy was still very innocent and young to understand what is going on. He indicated he stayed in Eldoret that he missed the sister. The report left it upon both parents to sit down and agree on how they were going to take care of their children jointly.

25. The trial court upon considering the pleadings of the parties their evidence produced in court, their testimonies and those of the minors and their submissions delivered its Judgment on 14th December 2023 making the following orders: -

- a. That both the plaintiff and the defendants shall have Joint Custody of the minors IO and MM.
- b. That the Joint Custody shall be implemented in the following terms; Actual Custody of the minors IO and MM is granted to the plaintiff;
- c. That during school holidays the plaintiff shall have Custody of the minors IO and MM for the First Half of All School Holidays.
- d. That the defendant is granted the Custody of the minors during the Last Half of All School Holidays;
- e. That the maintenance of minors with respect to food, shelter clothing and education Shall Be shared Equally between the Plaintiff and the Defendant. No party shall have been overburdened by the said shared parental responsibility in maintaining the minors IO and MM.
- f. That both the plaintiff and the defendant shall have unlimited access and visitation rights of the minors IO and MM during the subsistence of the Shared Joint Custody upon making prior arrangements with each other.
- g. That the order of Shared Joint Custody shall remain in force until the children are old enough to decide which parent wish to have Sole custody of them.
- h. That this being a children's matter parties shall bear their own costs.

26. Being aggrieved by the decision of the trial court the Appellant filed this Appeal. The court directed that the Appeal be canvassed by way of written submissions which the parties filed.

Issues for Determination

27. I have carefully considered this Appeal on record as well as the written submissions filed by both parties. The issues for determination by this court are

- a. Whether the trial court erred in granting actual custody of both minors to the appellant.
- b. Whether the trial court erred in not considering the glaring fact that the Respondent had unilaterally changed the name of the MM.
- c. Whether the appellant should be granted the prayers sought in the Appeal



Analysis and Determination

Whether the trial court erred in granting actual custody of both minors especially IO to the appellant.

28. The Appellant herein has comprehensively submitted that the trial court disregarded his evidence, his submissions and the best interest of IO in granting the actual and physical custody of both minors to the Respondent. He Submitted that the learned trial Magistrate completely ignored his evidence that IO had been enrolled at Hill Eldoret school where had been studying since 2021. The respondent supported the findings of the trial magistrate saying that they were made in the best interest of the children.
29. From my re-evaluation of the evidence tendered before the trial court hereinabove, it was a common ground between the parties is a that dispute regarding the custody of their children began in 2021 after their separation wherein they sought the assistance of the children office at Nyamira. It was equally a common ground between the parties that they indeed entered into a parental responsibility agreement on 15th March, 2022 wherein the Appellant was to have actual custody of IO and respondent was to have actual custody of MM and that both of them were to have unlimited access to the children.
30. However, from the testimonies of the parties it is clear that hell broke loose when the Appellant decided get married to another woman in January, 2023 such that the Respondent got uncomfortable with the idea of his son being introduced to the new woman in the life of her ex-husband as his mother. On 1st March, 2023. Respondent moved the lower court seeking custody the child I.O and in her suit she claimed IO had expressed discomfort of being introduced to other women as his mother especially the new woman the appellant had eventually married and thus it was in the best interest that the court granted her the custody of the son. That aside she also alleged that that her daughter had expressed concern about his brother being away from her and thus it was in the best interest the two be reunited under her custody.
31. In response, the Appellant stated categorically that there was a binding agreement between the parties regarding the custody of the two minors that the trial court was to look at and uphold. He stated that after gaining custody of his son he enrolled him at Hill School in Eldoret where he was progressing well with his studies. He explained that he had been granting the respondent unlimited access to son during long holidays. In order to clear the air about the women the Respondent was expressing fear of, he stated that he had indeed gotten married to a lady who was working in Kisii. He denied ever introducing his son to her. He revealed that he was only staying with his younger sister who was helping him take care of his son. He revealed that he had enrolled his daughter MM who was in custody of the Respondent in a boarding school and was paying school fees for her. He requested the trial court to allow him continue being in the lives of his children whom he invested in and had included in his medical cover.
32. The trial court interviewed the minors regarding their wishes. MM insisted that she wanted to be with the mother who was taking care of her despite the fact she missed her brother. IO on the other hand insisted that he wanted to be with his father whom together with her aunt was treating him so well. The trial court also requested for a children officer's report. The Report expressed similar positions which the children had stated in court save for a new revelation that MM had a new name which her mother had used to register her in a new school



33. It is trite law the courts cannot re-write agreements between the parties as was held in the case of *n National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd* [2002] 2 EA 503 [2011] eKLR at 507, “A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved.” See also *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited* [2017] eKLR. It is however unfortunate that the trial court in its judgment disregarded the Parental Responsibility Agreement the parties had entered into on 15th March 2022 in granting actual custody of both minors to the Respondent and made orders which were at variance with the said agreement. In fact, the learned trial Magistrate did not at all comment on the agreement in his analysis of the evidence that was before him. Section 103 (1) of the *children Act* 2022 provides that;
34. 103. (1) In determining whether or not a custody order should be made in favour of an 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 the child taking into account the child’s evolving capacity; (d) whether the child has suffered any harm or is likely to suffer any harm if the order is not made; (e) the customs of the community to which the child belongs; (f) the religious persuasion of the child; (g) whether a care order, supervision order, personal protection order or an exclusion order has been made in relation to the child concerned, and whether those orders remain in force; (h) the circumstances of any sibling of the child concerned, and of any other children of the home, if any; (i) any of the matters specified in section 95(2) where the court considers such matters to be relevant in the making of an order under this section; and (j) the best interest of the child.
35. In the case of *MAK v RMAA & 4 others* (Petition 2 (E003) of 2022) [2023] KESC 21 (KLR) (Civ) (2 March 2023) (Judgment) the Supreme Court of Kenya listed guidelines for determining custody matters to wit “Courts, therefore, while making a decision that will impact the child are mandated to consider all circumstances affecting the child. As such, we are of the view that the following guidelines are necessary and ought to be considered when balancing a child’s best interests and parental rights and responsibility:
- 1.The existence of a PRA between the parties.
 - 2.The past performance of each parent
 - 3.Each parent’s presence including his or her ability to guide the child and provide for the child’s overall well-being.
 - 4.The ascertainable wishes of a child who is capable of giving / expressing his /her opinion
 - .5. The financial status of each parent
 - .6. The individual needs of each child.
 - 7.The quality of the available home environment
 - .8. Need to preserve personal relations and direct contact with the child by both parents unless it is not in the best interests of the child in which case supervised access to the child must be granted.
 - 9.Need to ensure that children are not placed in alternative care unnecessarily.
 - 10.The mental health of the parents and
 - 11.The totality of the circumstances. ”



36. In this case, there is a joint parental responsibility agreement between the parties, the wishes of the children were ascertained, IO said he was comfortable with the father While MM said that she was comfortable with the Mother save that she misses playing with the brother and she wishes to stay with the brother and both parents. I note that MM was in a boarding school while I.O in a day school. It is therefore not possible for them to play together daily but on school holidays. The appellant admitted that he is re-married while the respondent did not respond on the issue of re-marriage and the trial court did not comment on it. Since the respondent did not respond to the same, it is clear to me that she is re-married. A look at the examination of I.O indicates that he wished to stay with the father, his statement was very clear despite his tender age and to me he seems to be evolving well and understands his basic circumstances and needs. The views of I.O ought to have been taken into account in determining this custody. MM preferred to be in custody of the mother. Though the children herein are still of tender years, the circumstances are special as both parents have moved on with their new spouses and the parental responsibility agreement seemed to have worked well for both parties until when respondent got wind that the appellant had moved on. I am satisfied based on the evidence on record that the child I.O has a strong relationship with the father whom he has stayed from the year 2022. I thus find that the Parental Responsibility agreement dated 15th March, 2022 was valid as at the time that the suit was filed in the lower court. The trial magistrate erred in not upholding the same.
37. The conduct of the respondent during and prior to her filing the suit presented a picture of a person who cared more of her personal interest and not the best interest of her children. She was more determined to lock out the Appellant from the lives of the minor than focusing on their best interest which is equal parent care. Unfortunately, the trial court did not consider some of the glaringly illegal actions by the respondent in his determination that she was suitable parent to have the actual custody of both the children and especially IO. It has also emerged that the respondent was in contempt of court orders dated 4th May, 2023 denying to grant her custody of IO pending the hearing and determination main suit and ordering her to return the said child to appellant but she did not and the appellant reported the same to the court and she was ordered to hand over the said child to him.
38. On perusing the record of the lower court, I note that the appellant filed a supplementary affidavit dated 8th July, 2023. In the said Affidavit the Appellant decried that he discovered the Respondent had maliciously, unilaterally and fraudulently procured a new birth certificate for MM wherein she changed her name to AKT. The respondent attached a copy of the said new birth certificate purportedly for the child MM which does not reflect the name of the father. This was supported by the social inquiry report filed by the children officer which revealed that the name of MM had been changed to enable her enroll in her current school.
38. The Respondent in her submissions to the lower court strongly urged the court to disregard the evidence in the said supplementary as the same had been filed late in the day and after all the parties had already closed their cases. A reading of the Judgment of the trial court reveals the learned trial magistrate seemed to have agreed with the submissions of the Respondent and totally ignored the Supplementary affidavit especially the evidence that the Respondent had changed the names of the Minor. Though the issues of the change of names and new Birth certificate of MM was raised by the appellant upon closure of the case and just before judgment in the lower court, in view of Article 159 of *the Constitution* and the fact that this is a Children's matter, nothing would have stopped the trial court from re-opening the case and considering magnitude of the issue in the best interest of the child.



39. In fact, the Respondent in her replying affidavit filed in this court in response to the application by the Appellant seeking stay of execution of judgement in this, filed documents that bore the two sets of the names and in all averments used the two names to refer to MM. The respondent did not give any explanation for the said change of names and without knowledge of the appellant.
40. It is trite law under Article 53 (2) every child has a right to a name. Section of 14 the registration of persons Act provides that fraudulent change of name and multiple registration are criminal offences punishable under the said law. Article 53 of the Constitution of Kenya Enjoins the courts to consider the best interest of a child in determining children matters. It is clear that the Respondent illegally procured a new birth certificate for MM and removed the name of the respondent from it and proceeded to change her name to conceal her identity. Unless the said acts are stopped, the same will violate the rights of the child to a name and identity, will deny the child the right to medical attention (since the Appellant had testified emphatically stated that during the hearing of the case at the trial court that he included her name (MM) in his Medical cover using her name in her original birth certificate). I also note that upon this court delivering the ruling on application for stay pending appeal, appellant posed a question to court as to which child he was to pay school fees for, whether it was MM or the strange child ATK? These are the complications the respondent has caused to the life of this child herein.
41. Hence, without further ado I find that the trial court erred in ignoring to consider the glaring fact that the respondent had illegally and fraudulently procured a new birth certificate and changed her name a move that was not in the best interest of the said minor but it was meant to deny the appellant access to the child MM. It will therefore be in the best interest that the illegally procured birth certificate be revoked so that the original one that bears her real name (MM) can remain in force. The MM's registration in school using the names ATK be deregistered and the Birth certificate be substituted with the original one and be registered afresh. The Respondent is warned that such a move is a serious criminal offense under Section 14 of the Registration of Persons Act for which she can be prosecuted in a criminal court.
42. I have carefully re-evaluated the entire evidence on record, the best interest of the children, the ascertained wishes of the children, the fact that the respondent altered the name of MM and fraudulently and maliciously took out a new Birth certificate for MM in the name AKT which does not indicate the appellant as the father and the totality of the circumstances.
43. It is trite law that parents have equal a both responsibility towards the welfare of their children under Article 53 of the Constitution and the doctrine that custody of children of tenders belongs to the mother has to be considered together with the principle of the best interest of the child as was held in the case of SMM v ANK [2022] eKLR which I find persuasive in my determination of this case, the court observed as follows;

However, it is apparent that while the Tender Years Doctrine, is persuasive in considering custody of children, it can no longer be considered as an inflexible rule of law. This is not to say that the substance of the rule has dissipated completely; it is to say that its inflexibility has been eroded by the evolving standards of decency reflected in Article 53 of the Constitution. Differently put, the Tender Years Doctrine must now be explicitly subjected to the Best Interests of the Child Principle in determining custody cases. Differently put, the welfare of the children is the primary factor of consideration when deciding custody cases. The judicial rule that a child of tender years belongs with the mother is merely an application of the principle in



appropriate cases. The modern rule begins with the principle that the mother and father of a child both have an equal right towards the custody of the child.

44. The children herein are of tender years of 7 and 9 and it is trite law that custody of children of tender years should go with the mother unless there are exceptional circumstances. What I ask myself at this stage is whether the respondent is fit is a parent to be granted custody of both children considering that she changed the name of the child MM from the birth certificate and removed the father's name. What values is she going to impart on the children especially I.O who is still very young and a day scholar? It is clear from the foregoing that she has no best interest of the children at heart.
45. The case in the lower court was merely filed to use the children to settle scores between estranged a couple here I must stage categorically that this is not a matrimonial matter but a children's case and the concern of this court is the best interest of the children and nothing more. The children herein have really suffered in the hands of respondent as she keeps moving them from one school to the other. It is time that they settle down and concentrate on their studies. Children are not toys to be tossed here and there; their dignity must be protected at all times. This case falls within the exception to the rule that custody of children of tender years go to the mother unless there are exceptional circumstances. I find that from her conduct herein above, the respondent is not fit to take legal and actual custody of both children herein.
46. From the foregoing, I proceed to vary the terms of the parental responsibility agreement dated 15.3.22 and the Judgment of the Lower Court dated 03/11/2021 is varied as follows:
 - **i. The father who is the appellant herein shall have legal and actual custody of both children herein. **
 - **ii. The father to cater for IO's Educational needs while the mother to take care of MM's Educational needs. **
 - **iii. Both parents shall equally share custody of the children during school holidays. Each parent shall have custody of the children for half of the school holidays (50:50)**
 - **iv. The children are to be covered in the medical schemes of both parents. **
 - **v. Each party to meet food shelter needs for the period they will have custody/access of the children. **
 - **vi. In addition to the above; **
 - **vii. The Respondent is ordered to surrender the actual custody of IO to the appellant immediately upon closure of schools at the end of this term (1st term of 2024) to enable the respondent prepare him to continue with his studies at Hill school. **
 - **viii. The Director Registration Persons to immediately commence the process of revocation of the new Birth Certificate Serial number A4134009 issued in the name of Ariel Kemunto Tirzah generated by the Respondent with view of changing the name of the Child MM name to AKT and reinstate the original birth certificate Serial number 0471509 issued in the name MM. **
 - **ix. The Nyamira County Director of education is ordered to ensure the school register is amended to remove the impugned "Birth Certificate" Serial number A4134009 issued in the name of Ariel Kemunto Tirza and the same be substituted with MM as per her



original Birth certificate no. 0471509 issued in the name MM within 30 days from the date of this judgment.**

- **x. The Kenya National Examination Council I(KNEC) to adopt the changes in order ix (herein above) in their records and portal within 60 days from the date of this judgment.**
- **xi. The costs of revocation and the changes be borne by the respondent.**
- **xii. This being a family matter each party to bear their own costs.**
- xiii. It is so ordered. Right of Appeal.

T.A ODERA

JUDGE

13.3.24

Delivered virtually in the presence of;

Obure advocate for appellant

Respondent in person

Appellant

Court Assistant: Oigo

CHILDREN APPEAL HCCA NO.E001 OF 2024 – JUDGMENT Page 7 of 7

