



**IMM v JMN (Civil Appeal E033 of 2023)  
[2024] KEHC 4766 (KLR) (Family) (19 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4766 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL APPEAL E033 OF 2023  
PM NYAUNDI, J  
APRIL 19, 2024**

**BETWEEN**

**IMM ..... APPELLANT**

**AND**

**JMN ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon Festus Terer, Senior Resident Magistrate at Nairobi Children’s Case No.E 948 of 2021 delivered on 28th March 2023)*

**JUDGMENT**

1. This Appeal arises from a judgment delivered in Milimani Children’s Case No. E948 of 2021. The Appellant is aggrieved by the decision of the Honourable F. Terer and has preferred this Appeal. In the suit before the Lower Court, the Respondent vide plaint dated 4<sup>th</sup> August 2021 sought the following orders;
  - a. The Plaintiff do have sole legal, physical, actual custody, care and control of the minor.
  - b. Costs.
  - c. Any further relief which this honourable court deems fit and just to grant.
2. The Appellant entered appearance and filed a defence and counterclaim dated 4<sup>th</sup> November 2021. He later amended his defence and counterclaim on 22<sup>nd</sup> August 2022. In his counterclaim, he prayed for judgment against the Appellant as follows;
  - a. That the plaintiff’s suit be dismissed with costs.
  - b. That the parties be granted joint legal custody of the child namely ACM.



- c. That the parties be granted equal actual custody, care and control of the child.
  - d. That in the alternative, the Honourable Court be pleased to grant the defendant access on every other weekend and half of the school holidays.
  - e. That the plaintiff be ordered to include the defendant's name and contacts in the child's school records.
  - f. That the defendant be allowed to contribute a maximum of Kshs. 200,000 per term towards the child's school fees and school related expenses.
  - g. Costs of this suit and interest thereon at court rates.
  - h. Such other or further relief as this Honourable Court may deem fit to grant. At the Conclusion of the trial, judgment was entered on the following terms;
    1. That the Plaintiff is granted the sole legal and actual custody, care and control of the minor A.C.
    2. That the Defendant's Amended Counterclaim dated 22<sup>nd</sup> August, 2022 is dismissed.
    3. That each party to bear own costs.
3. The Appellant being dissatisfied with the trial court's decision has preferred an appeal and in the Memorandum of Appeal dated 11<sup>th</sup> April 2023, has listed twelve grounds of appeal as follows;
1. The learned trial magistrate erred in law and in fact in granting the Respondent sole legal and actual custody, care and control of the child despite the defendant being the biological father of the child and is willing and capable of being fully involved in the child's life.
  2. The learned magistrate erred in law and in fact by holding erroneously that it would not be in the best interest of the child to introduce the Appellant at 10-year-old but failed to take cognizance of the fact that children from that age seek out their biological fathers.
  3. The learned trial magistrate failed to appreciate that the social, emotional and physiological well-being of the child will be irreparably prejudiced if she is denied the opportunity to bond with her biological father.
  4. The learned magistrate erred in law and in fact in finding that introducing the Appellant to the child's life will drastically affect her studies and social well-being when no evidence was adduced to that effect.
  5. The learned trial magistrate failed to appreciate that the child has been introduced to her paternal family and will inevitably seek out her biological father.
  6. The learned trial magistrate erred in law and in fact in failing to consider the role of a biological father plays in the life of a child.
  7. The learned trial magistrate erred in law and fact law in finding the Appellant relegated his parental responsibility which is not capable of being relegated under Section 32 of the *Children Act, 2022*.
  8. The learned trial magistrate erred in law and in fact in failing to take into account the conduct of the respondent in denying the appellant any meaningful participation in the child's life.



9. The learned trial magistrate erred in law and in fact in rejecting the appellant's evidence that he contributed to the child's financially and sought to know about her wellbeing which efforts were frustrated by the Respondent.
  10. The learned trial magistrate erred in law and in fact in finding that the child had a father figure which allegation was not proven.
  11. That the learned trial magistrate erred in both law and fact by failing to consider the appellant's written submissions and authorities.
  12. The learned trial magistrate's judgment was harsh, punitive and biased against the appellant and the child and was against the weight of the evidence and law.
4. He sought the following prayers in the appeal: -
- i. This appeal be allowed.
  - ii. The judgment entered by the Honourable F. Terer on 24<sup>th</sup> March 2023 in Nairobi Children's Court Civil Case No. E948 of 2021 and all other consequential orders be set aside.
  - iii. This Honourable Court do grant the following prayers set out in the Amended Defence and Counterclaim dated 22<sup>nd</sup> August 2022 filed in Nairobi Children's Court Civil Case No. E948 of 2021;
    - a. That the parties be granted joint legal custody of the child namely ACM.
    - b. That the parties be granted equal actual care and control of the child namely ACM.
    - c. That in the alternative, the Honourable Court be pleased to grant the Appellant access on every other weekend and half of the school holidays.
    - d. That the Respondent be ordered to include the Appellant's name and contacts in the child's school records.
    - e. That the Appellant be allowed to contribute a maximum of Kshs. 200,000 per term towards the child's school fees and school related expenses.
  - iv. This Honourable Court be pleased to make any other orders in the interest of justice.
  - v. The costs of this Appeal be awarded to the Appellant.
5. The appeal was canvassed by way of written submissions. Both parties have filed submissions.

#### **Appellant's Submissions.**

6. On ground number one, the Appellant submitted that in granting sole legal custody to the Respondent, the trial court did not adhere to the principles to consider when making a determination on custody orders enshrined in Section 103(1) and Section 83 the Children's Act. The court did not consider the Appellant's conduct of inquiring about the child's well-being, contribution towards the child's maintenance and his express wishes to participate in the child's life and that there was no cogent reason to deny him his parental right to participate in the child's life as he was a fit parent. He relied on the decisions in JKN v HWN (Civil Appeal No. 40 of 2024) KEHC 6737 (KLR) 13 and ANNE BITOK V MARY YATOR [2011] eKLR .
7. On grounds 2,3, 4,5& 6, the Appellant submitted that the finding by the trial court that introducing the minor to him was not in the best interest of the child was not supported by any psychological



or sociological fact and/ or evidence. Reliance was placed on Section 7 of the children’s Act which provides for the right to a name and nationality and the right to know and be cared for by the parents. Further, that the court should be guided by Article 8 of the Convention on the Rights of the Child of 1989, Article 53(2) of *the Constitution* on the best interests of the child. The Appellant submitted that denying the minor an opportunity to bond with him would affect her psychologically, emotionally and mentally. On this point, he relied on the decisions in PNN v BMK [2021]eKLR and MAK v SNMM & Another [2019] eKLR

8. On ground 7, the Appellant submitted that the trial court erred when it stated that he had relegated his parental responsibility. He stated that both parents have equal parental responsibility according to Article 53 (1) of *the Constitution* and Section 31 of the Children’s Act 2022. That parental responsibility begins at birth and cannot be extinguished. He relied on the decisions in NSA & another v Cabinet Secretary for Ministry of Interior and Coordination and National Government & another [2019] eKLR and MAK v RMAA & 4 others (Petition 2 (E003) of 2022) [2023] KESC 21 (KLR) (Civ) (2 March 2023).
9. On ground 8, it was submitted that the court erred when it granted sole custody to the Respondent without considering the conduct and wishes of the appellant to be present and active in the minor’s life. The fact that the Respondent had remarried was not reason enough to conclude that the minor had found a father figure and locking out the biological father. He relied on the decisions of Re G (Children) (FC) (2006) UKHL and Re WG 31/1975(1976) 6 Fam. Law 210.
10. On ground 9, the Appellant submitted that the trial court disregarded evidence provided that the Appellant had contributed towards the maintenance of the child. The court disregarded screen shots, mpesa statements, photographs and emails between the two parties. The court went against the standard of proof in civil proceedings on a balance of probabilities as was held in the case of Palace Investment Ltd v Geoffrey Kariuki Mwensa & Another [2015] eKLR.
11. On ground 10, the Appellant submitted that the fact that the stepfather of the minor should have been enjoined in the proceedings in the lower court to expressly state that he was interested in the minor’s wellbeing. It was submitted that the Appellant had not relegated his duties and the stepfather cannot replace his role as the biological father as he was willing and capable of being fully involved in the minor’s life.
12. On ground 12, it was submitted that the trial court’s judgement was harsh, punitive and biased against the appellant. The trial court should have at least granted minimum access as was held in the decision in MAK v RMAA 7 4 others (Petition 2 (E002) of 2022) [2023] KESC 21 (KLR) (Civ) (2 March 2023).

### **Analysis and Determination**

13. 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.”
14. This Court is under a duty to delve into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but bearing in mind that the trial court had the advantage of hearing the parties.



15. I have read the evidence tendered in the trial court and have analyzed the same. It is not in dispute that the parties are the biological parents of the minor. At the trial the Respondents contended that the Appellant having abandoned the minor while she was an infant was a ‘stranger’ to the child and that she had since moved on and there was a father figure in the life of the Child and connecting the minor to the father at this stage would be disruptive and not in the minor’s best interests.
16. The Appellant on the other hand contended that owing to the strained relationship with the Respondent and on the advice of his family he stepped back. That he had maintained contact with the minor and he was willing to support the minor and wanted to now build the relationship with the minor.
17. The position of the Respondent is supported by the Children officer in report dated 20<sup>th</sup> September 2022 who makes the following observation

‘ The minor has forgotten her father Mr IM because she has not seen him for long.’

18. Evidently the Trial Court was persuaded that the Appellant had been absent from the life of the minor and stated as follows

“ ..... from the material before me, it is apparent that the defendant relegated his parental responsibility over the minor ever since she was 3 months old. If it was the case he had keen interest on the minor, he would not have yielded to the plaintiff’s decision to deny him access, if that was the case. He ought to have moved to court to challenge the said denial. He did not do so. ( Emphasis mine)

Secondly, the defendant was not under any obligation to yield to the alleged advice from his family to cut ties with the minor until she attained the age of 8 years. The said decision was totally not in the best interest of the minor.

Therefore, taking into account the totality of the material before me, it is my considered view that it will not be in the best interest for the defendant to be introduced into the life of the minor late in the day. The minor is now 10 years old. She will be affected mentally, physically and emotionally if such a drastic step is taken. Her studies and social well-being will be affected adversely.”

19. It is this conclusion of the Court, to the effect that the Appellant had relegated his parental responsibility that constitutes the gravamen of this Appeal.
20. Having considered the facts, the pleadings and submissions filed herein I identify the following as the issues for determination
  1. Whether the Court erred in law and in fact in concluding that the Appellant had relegated his parental responsibility
  2. Whether the Court erred in law and in fact in holding that it was in the best interests of the minor that the father be denied custody
  3. Who should pay costs
21. On the 1<sup>st</sup> issue, whether the Appellant relegated his parental authority. It is not controverted that the Appellant was absent from the life of the minor for an extended period. The issue for determination though is whether a parent can relegate their parental responsibility.



22. Section 31 of the *Children Act*, 2022 defines Parental responsibility to mean ‘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 manner consistent with the evolving capacities of the child’
23. Section 32 speaks directly to the facts of this case as it states
  1. Subject to the provisions of this Act, the parents of a child shall have parental responsibility over the child on an equal basis, 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 whether or not the child is born within or outside wedlock.
  2. ....
  3. ....
  4. A person who has parental responsibility over a child may not relinquish or assign such responsibilities to another person (Emphasis supplied)
24. The Court found that the Appellant had relegated his parental responsibility and determined that the vacuum so created was filled by the ‘father figure’. By so holding Court in effect held that the Appellant had relinquished his parental authority
25. Black’s Law Dictionary defines relinquish to mean give up or abandon. The only time the law recognises that a parent can relinquish their parental responsibility is when they give consent to the adoption of the minor. Section 194(1)(b) of the *Children Act* states-

In the case of a parent, the parent understands that the effect of the adoption order is to permanently deprive him or her of his or her parental rights
26. It is settled at law therefore that a parent cannot relinquish their parental rights and responsibility. This is because parental responsibility is a right that the Child has, to be taken care of and provided for. The law vests this responsibility on the parent. Even in instances where the parent as in the instant case is an absent father, the law is equipped with the tools to ensure that the Child is not denied their right to identity, parental care and support.
27. In the judgment the Court snuffed out the rights of a biological parent on account of a nebulous character referred to as a ‘father figure’. This individual did not participate in the proceedings and was not interviewed by the Children’s Officer. The Court was however satisfied that the Child regarded this character as having taken on the role of father for the minor.
28. The law does not support the conclusion by the Court, as stated, a parent cannot relinquish parental authority except by consent to an adoption and neither can parental responsibility be assumed by another person except by formal application and order by the Court.
29. For this reason, I find that the Court erred in finding that the Appellant had relegated or relinquished his parental authority.
30. On the Second issue whether the Court erred in denying the father custody? In answering this, I have considered Article 53 (2) of *the Constitution* and Section 4(3) of the *Children Act* that obligate this court to give primacy to the best interest of children in all matters dealing with the child. It is also the duty of a court in determining issues of custody of children to ensure that the provisions of Section 83(1) of the *Children Act* are taken into account. This Section provides that:



- (1) 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.

31. *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.

32. Section 4(2) and 3(b) of the Children's Act echo the Constitutional imperative as follows:

- a. 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.
- b. 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 the 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.

33. Under sub-section 83(1)(j), the court is required ultimately to have regard to the "best interests of the child" as fundamentally obligated under the afore-analyzed article 53(2) of *The Constitution* of Kenya.

34. Accordingly, the principle of the best interests of the child is the North pole that will guide the court in matters concerning the welfare of a child such as the question of the custody of the subject child/ children.

35. Section 83(1) of The *Children Act* lists the following factors to be critical in "best interest" analysis:



1. Wishes of the child ( if old enough to capably express a reasonable preference);
  2. Mental and physical health of parents;
  3. and/or cultural considerations;
  4. Need for continuation of stable home environment;
  5. Support and opportunity for interaction with members of extended family of either parent;
  6. Adjustment to school and community;
  7. Age and sex of child;
  8. Parent use of excessive discipline or emotional abuse; and
  9. Evidence of parental drug, alcohol or sex abuse.
36. In denying the Appellant custody, the Court concluded  
Therefore, taking into account the totality of the material before -me, it is my considered view that it will not be in the best interest for the defendant to be introduced into the life of the minor late in the day. The minor is now 10 years old. She will be affected mentally, physically and emotionally if such a drastic step is taken. Her studies and social well-being will be affected adversely.
37. This conclusion of the Court has no evidential basis. The Court called for a report by a Children’s Officer. The report dated 20<sup>th</sup> September 2022 was presented to Court. After interviewing both parents, the officer made the following recommendations Both parents are to be granted legal custody as per Kenya Gazette Supplement Acts, 2022 Part IX SECTION 102 (1)(2)The Applicant is to be granted actual custody as per Kenya Gazette Supplement Acts, 2022 Part IX Section 101(2)Both parents to share parental responsibility equally as per Kenya Gazette Supplement Part IX Section 110 (a)The defendant to be given access under supervision as per Kenya Gazette Acts, 2022 Part IX Section 135 (1) (a)
38. In his judgment the learned Magistrate did not make reference to this report and by doing so misdirected himself when it came to making the orders relating to the custody of the minor.
39. Article 53 (1) (e) of *the Constitution* of Kenya 2010 provides- Every Child has a right-  
to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not;
40. At the heart of this case is what is the best interests of the child. In my view the best interests of the child require that she be given an opportunity to know her father and to establish a relationship with him. Further no satisfactory basis has been laid to deny the father the right to provide for the Child.
41. On the 2<sup>nd</sup> Issue I find that the trial magistrate erred in ignoring the report of the Children officer and granting sole, legal and actual custody , care and control of the minor to the mother. It is not lost on me that the father has performed dismally as a father and that the reunification may pose a challenge to the minor. This concern in my view will be addressed by providing for supervised visits in the first instance and then reviewing the orders at the opportune moment.
42. In conclusion the appeal succeeds on the following terms;
- a. The child, AC, shall remain in the physical custody of the mother, JMN.



- b. The father, IMM and mother, JMN shall have joint legal custody of the child and shall be consulted on the child's welfare, maintenance and upkeep.
- c. The Appellant will have supervised access to the minor in a public place on Saturdays and Sundays for a maximum of 6 hours, details to be agreed upon between the parties under the supervision of the Children's Officer, Sub County Westlands.
- d. The Appellant will pay school fees for the minor in the school that she is currently attending. In addition the Appellant to meet the school related expenses amounting to no more than Kshs 50000 per term. The said fees to be paid within 2 weeks of school opening
- e. Either party to move the Court for review of these orders upon the expiry of 3 months and such application to be supported by report of the Children's Officer, Sub County Children's Office Westlands
- f. There shall be no order as to costs.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY OF APRIL 2024.**

**P. M. NYAUNDI**

**JUDGE**

**In the Presence of;**

Sylvia Court Assistant

Ms Irene Kiarie Advocate for Appellant

Ms Wanjala Adv. H/BRIEF for Ms Nderu for the Respondent

