



**ASA v NKN (Civil Appeal E012 of 2023) [2024] KEHC 9314 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9314 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NYAMIRA**  
**CIVIL APPEAL E012 OF 2023**  
**WA OKWANY, J**  
**JULY 11, 2024**

**BETWEEN**

**ASA ..... APPELLANT**

**AND**

**NKN ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree in the Principal Magistrate's Court at Keroka, MCCHCC NO. E001 of 2023 delivered by Hon. C. Ombija, Senior Resident Magistrate on 5th April 2023)*

**JUDGMENT**

1. The Appellant was the Plaintiff before the trial court where he sued the Respondent/Defendant seeking orders for legal, actual and physical custody of the subject minors, access to the minors and costs of the suit.
2. The Appellant's case was that he married the Respondent sometime in 2014 and that he sired the two minors but that on 12<sup>th</sup> December 2022, the Respondent travelled to Nairobi with the children and has never come back despite numerous requests and appeals thereby jeopardizing the children's education and welfare. The Appellant averred that he is capable of providing for his two children.
3. The Respondent filed a Statement of Defence and Counter Claim dated 14<sup>th</sup> March 2023 wherein she claimed that the Appellant had refused and/or neglected to contribute towards the minors' upkeep and maintenance.
4. The trial court called for the Children Officer's Report after which the matter proceeded for hearing. The Appellant testified (PW1) testified that he is a Police Constable. He produced his Appointment Certificate (P.Exh1) and the minors' Birth Certificates (P.Exh 2 & 3).
5. The Respondent (DW1) and produced a school fees payment receipt from [Particulars Withheld] Primary School (D.Exh1).



6. The trial court delivered a judgement in which the Respondent was granted legal and actual custody of the minors while both parents were granted joint parental responsibility but. The Appellant was also ordered to pay Kshs. 8,000/= for child maintenance and to pay the children's school fees whenever the same was due. The trial court further directed that the older child be retained at her current school, [Particulars Withheld] Primary, and that the Appellant was at liberty to visit the minors whenever he wished. The Respondent was cautioned that should she relocate to another country, parental custody will revert to the Appellant. No orders were made as to costs.
7. Aggrieved by the trial court's decision, the Appellant filed the instant appeal seeking orders to set aside the said judgment. He listed the following grounds of appeal in the Memorandum of Appeal: -
  1. The learned Trial Magistrate erred in law and fact by making an order that the Appellant had superior right or claim against the other in exercise of parental responsibility contrary to the provisions of Section 24 of the *Children Act* Cap 141 Laws of Kenya.
  2. The learned Trial Magistrate erred in law and fact by making provision that the Appellant shall pay Kshs. 8,000/= per month towards maintenance of the said children without considering the fact that child maintenance was a shared legal responsibility.
  3. The learned Trial Magistrate erred in law and fact by making an order that the Appellant shall consult the Respondent on matters concerning the said children.
  4. The learned Trial Magistrate erred in law and fact by giving the Appellant more rights over maintenance of the said children at the expense of the Respondent.
  5. The learned Trial Magistrate erred in law and fact by failing to make provision for clothing, medical care over the said children.
  6. The learned Trial Magistrate erred in law and fact by failing to make provision for the said children over the responsibility related to shelter.
  7. The learned Trial Magistrate erred in law and fact by failing to consider, analyse the evidence tendered by the Appellant and thereby disregarded the same without assigning any credible and/or valid reasons whatsoever. Consequently, the decision of the trial magistrate has occasioned a miscarriage of justice.
  8. The learned Trial Magistrate erred in law and fact in believing the evidence of the Respondent without considering the evidence tendered by the Appellant.
  9. The learned Trial Magistrate erred in law and fact by failing to properly or at all analyse, evaluate and consider the totality of the evidence adduced by the Appellant. The trial court arrived at a biased conclusion contrary to the evidence on record.
  10. The judgment by the learned Trial Magistrate is unbalanced, perfunctory, passionate and substantially at variance with the evidence tendered by the parties. Consequently, the judgment is fraught with errors of facts and law.
8. The Appeal was canvassed by way of written submissions which I have considered.
9. The duty of a first appellate court was restated in the case of *Peters v. Sunday Post Limited* {1958} EA page 424 where the court held thus:-

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing



the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

10. The main issue for my determination is whether the Appeal is merited.

### **Analysis and Determination**

11. It was not disputed that the parties got married in 2014 and that they are the biological parents of the two minors. This court is alive to the
12. overriding principles in children matters as outlined under Article 53(2) of the [Constitution](#) which provides as follows: -
- (2) A child’s best interests are of paramount importance in every matter concerning the child.
13. The Appellant sought orders to be granted the actual and legal custody of the two minors. He however testified that he shared a one-roomed house with a colleague at Industrial Area and that he could not give the children accommodation but that added that he was in the process of securing a spacious house. When asked by the trial court where he intended to live with the children if he was to be granted custody, he stated that he would settle the minors at his sister’s house in Industrial Area.
14. The Respondent, on her part, testified that she was currently working as a hairdresser and earning Kshs. 10,000/= . She stated that she shared a two bedroomed house in BuruBuru Phase 3 with her sister but that she planned to move out once she had saved up enough money to enable her rent her own house. She also stated that she had already enrolled the older child at [Particulars Withheld] Primary School in Grade 3.
15. A perusal of the minors’ Birth Certificates reveals that the older child E.N.A. was born on 10<sup>th</sup> January 2015 while the younger one B.K.A. was born on 14<sup>th</sup> January 2020. I note that the children are of tender age. In determining the issue of custody of the said children I find guidance in the decision by the Court of Appeal in [Githunguri v. Githunguri](#) [1979] eKLR where it was held that:-

“...the custody of very young female children should be granted to their mother, in the absence of exceptional circumstances which do not in my opinion exist in this case. The learned judge correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the children. He rejected the proposition, advanced before him by the mother’s advocate, that there was a ‘rule’ in favour of the mother. With respect, this was a misdirection. When dealing with the paramount consideration of welfare, especially where young female children are concerned, there is a rule that the mother is normally the person who should have custody. As Roxburgh J said in *Re S(an infant)* [1958] 1 All ER 783, at 786 and 787:

“I only say this; the *prima facie* rule (which is now quite clearly settled) is that, other things being equal, children of this tender age should be with their mother, and where a court gives the custody of a child of this tender age to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the *prima facie* rule.”

16. The Respondent alleged that the Appellant was a drunkard and that he endangered her life and that of the children. The Appellant claimed that one of the minors informed him that she was being sexually



assaulted. I have considered the allegations and I find that no material was placed before the trial court to establish the truth about them. It is my finding that the allegations may have been intended to discredit the Respondent. I also find that there was no evidence of exceptional circumstances that would have warranted the granting of custody of the children to the Appellant.

17. Section 95 of the *Children's Act* provides as follows: -

General principles with regard to proceedings in Children's Court

1. Subject to subsection (4), where the Court is considering whether or not to make an order under this Act with respect to a child, the Court shall not make any order unless it considers that doing so is in the best interest of the child.
2. Where the Court is considering whether or not to make an order under subsection (1), it shall have particular regard to—
  - a. the ascertainable feelings and wishes of the child concerned having regard to the child's age and understanding;
  - b. the child's physical, emotional and educational needs and, in particular, where the child has a disability or chronic illness or where the child is intersex, the ability of any person or institution to provide any special care or medical attention which may be required for the wellbeing of the child;
  - c. the likely effect on the child of any change in circumstances;
  - d. the child's age, sex, religious persuasion and cultural background;
  - e. any harm the child may have suffered or is at the risk of suffering;
  - f. the ability of the parent, or any other person in relation to whom the Court considers the question to be relevant, to provide for and care for the child;
  - g. the customs and practices of the community to which the child belongs and the need to ensure that the child easily integrates while not subjected to harmful cultural practices;
  - h. the child's exposure to, or use of, drugs or other psychotropic substances and, in particular, whether the child is addicted to the same, and the ability of any person or institution to provide any special care or medical attention which may be required for the child; and
  - i. the powers which the Court has under this Act or any other written law.

18. I have also considered the contents of the Children Officer's Report dated 3<sup>rd</sup> March 2023 which indicates that the older child stated that she loved her father but would wish to stay with her mother and her sister. She also indicated that they were living well at their aunt's house and that she had no concerns. On cross examination, the Appellant conceded that the children were in good health under the care of their mother. I have considered the older child's wishes and the fact that the Appellant did not tender any evidence to show that the Respondent was not taking good care of the children and I find that the trial court arrived at the correct finding in granting actual custody to the Respondent.



19. Turning to the issue of maintenance, it is trite that parental responsibility is a shared responsibility between two parents. Article 53 (1) of the Constitution provides that: -

53.(1) Every child has the right—

- (e) 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; and

20. Section 111 of the Children's Act emphasises the issue of joint responsibility between parents as follows: -

111. Joint maintenance of children

Unless the Court otherwise directs, and subject to any financial contribution ordered by the Court to be made by any other person, the following presumptions shall apply with regard to the maintenance of a child—

- a. it shall be the joint duty and responsibility of both parents to maintain the child whether or not the parents are married to each other;
- b. where two or more guardians of a child have been appointed, it shall be the duty of all the guardians to maintain the child whether jointly with the parents of the child or not;
- c. where two or more custodians have been appointed in respect of a child, it shall be the joint responsibility of all custodians to maintain the child;
- d. where a residence order is made in favour of more than one person, it shall be the duty of those persons to jointly maintain the child; or
- e. where the mother and father of a child were not married to each other at the time of birth of the child, and have not subsequently married and where the father or mother of the child have acquired parental responsibility of the child, it shall be the joint responsibility of the mother and father of the child to maintain that child.

21. Section 114 of the Act provides for the factors to be considered in making orders for maintenance: -

114. Financial provisions by step-parents and presumptive guardian

- 1. The Court may make a maintenance order in respect of a child, including a child of the other parent who has been accepted as a child of the family notwithstanding the absence of an adoption order.
- 2. Without prejudice to the generality of subsection (1), the Court shall consider all the circumstances of the case and be guided by the following considerations—
  - a. the income or earning capacity, property and other financial resources which the parties or any other person in whose favour the Court proposes to make an order, have or are likely to have in the immediate future;
  - b. the financial needs, obligations, or responsibilities which each party has or is likely to have in the immediate future;
  - c. the financial needs of the child and the child's current circumstances;
  - d. the income, if any, derived from the property of the child;
  - e. any physical or mental disabilities, illness or medical condition of the child;



- f. the manner in which the child is being or was expected to be educated or trained;
  - g. whether the respondent has assumed responsibility for the maintenance of the child and, if so, the extent to which, and the basis on which, he or she has assumed that responsibility, and the length of the period during which he has met that responsibility;
  - h. whether the respondent assumed responsibility for the maintenance of the child knowing that the child was not his child;
  - i. the liability of any other person to maintain the child;
  - j. the liability of that person to maintain other children.
22. Having regard to the above provisions, I find that the trial court was required to grant order in respect of the children's basic needs which include food, clothing, shelter and other incidentals such as medical expenses among other utility needs.
23. The record of appeal reveals that the Respondent filed an Affidavit of Means and a copy of his monthly payslip which indicates that he earns a total of Kshs. 21,986.10/=. He stated that the minors were covered under his National Hospital Insurance Fund cover.
24. The Respondent also filed an Affidavit of Means in which she stated that she earned Kshs. 10,000/= monthly while the minors' monthly expenses amounted to Kshs. 15,000/=.
25. From this evidence, it is clear that the Appellant is in a better position to provide for the minors' financial needs when compared to the Respondent. I therefore exercise my discretion and allocate parental responsibility as follows:
- a. Shelter Expenses will be borne by the Respondent
  - b. Food Expenses will be borne by the Respondent
  - c. Clothing expenses will be shared equally between the parties
  - d. Medical Expenses will be borne by the Appellant
  - e. School fees will be catered for by the Appellant
  - f. Monthly maintenance by the Appellant will be Kshs. 7,000/=
  - g. Any other necessary expenses that may arise in the course of raising the two minors will be shared equally between the two parties.
26. In the end and having evaluated the evidence and the law, I am satisfied that the Appeal is merited, albeit in part, and I therefore allow it in the following terms: -
- 1. Physical (actual) custody is granted to the Respondent but legal custody remains with both parents (Appellant and Respondent).
  - 2. The Appellant shall have open visitation rights and access to the minors.
  - 3. Shelter Expenses will be borne by the Respondent
  - 4. Food Expenses will be borne by the Respondent
  - 5. Clothing expenses will be shared equally between the parties



6. Medical Expenses will be borne by the Appellant
  7. School fees will be catered for by the Appellant
  8. Monthly maintenance by the Appellant will be Kshs. 7,000/=
  9. Any other expenses that may arise in the course of raising the two minors will be shared equally between the two parties.
27. I make no orders as to costs.
28. It is so orders.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS  
THIS 11<sup>TH</sup> DAY OF JULY 2024.**

**W. A. OKWANY**

**JUDGE**

