



**PNC v NMC (Family Appeal E111 of 2021)  
[2024] KEHC 8558 (KLR) (Family) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8558 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
FAMILY APPEAL E111 OF 2021  
HK CHEMITEI, J  
JULY 11, 2024**

**BETWEEN**

**PNC ..... APPELLANT**

**AND**

**NMC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant and the Respondent are estranged husband and wife. Between them is one issue who was a subject of the suit at the trial court where the appellant had sought a permanent custody of the minor while the Respondent had equally counterclaimed for the same orders. There was also a prayer for the maintenance and upkeep.
2. The trial court delivered its judgement which granted shared custody to the parties with the appellant having the child on weekdays and the Respondent from 9 am to 4 pm on Saturday and Sunday. Each of the parties were directed to provide food, shelter medical, clothing and other necessities to the minor in equal share. The Respondent was however directed to provide for the educational needs.
3. Aggrieved by the said decision the appellant has filed this appeal citing several grounds in the memorandum of appeal which can be summarised as hereunder:-
  - (a) That the trial court erred in failing to consider the best interest of the child in the circumstances.
  - (b) The court erred by vesting the actual custody to the Respondent without determining the issue of exceptional circumstances.
  - (c) The court failed to take into account the violent behaviour of the Respondent.
  - (d) The court failed to determine who was to have the legal custody of the child.



4. This court directed the parties to file submissions so as to dispose the appeal. They both complied and the court has gladly perused the same.
5. The Appellant's submissions in a nutshell challenges the findings by the trial court in particular the holding that the Respondent should be granted custody of the minor despite the issues raised concerning the tender age of the minor.
6. She submitted that the fact that the Respondent was working would mean that the child would be left under the custody of third parties who may not be in a position to take care of the minor. That considering the issues raised pertaining to his character it was imperative that she should have legal custody of the minor and the Respondent granted limited rights.
7. The Appellant on the other hand was a mother and working from home and that she was best suited to take care of the child.
8. The Respondent in his submissions agreed with the trial court. He said that he was in a position to take care of his child and that he had the means to do so. He said that the exceptional circumstances principle was in his favour.

#### **Analysis and determination.**

9. I have anxiously perused the voluminous record herein, the trial courts proceedings, the submissions on board and the many cited authorities by the parties.
10. This court as the rule is will always interfere with the trial courts decisions if what was considered was unlawful or arrived at on a wrong principle of law and any other persuasive circumstance. This is for the simple fact that the said court had all the time to see and hear the parties as opposed to the appellate court.
11. The running thread in this matter is the matrimonial dispute between the two parents which has spilled over to their precious child. There is no doubt in my mind that both parents mean well for the child based on the evidence on record and the extent each one of them has gone to ensure that the minor was comfortable.
12. On the same vein I think that based on the prima facie evidence on record both parents are generally able to provide the basic needs of the minor. The only issue is who should have the actual custody of the minor.
13. The trial court whose decree is being challenged directed the mother to have the child for weekdays and the father on weekends. This has been opposed by the Appellant hence this appeal.
14. The basic reason by the Appellant is the fact that the child was of tender years and thus she should have full custody.
15. Section 83 (1) of the *Children Act* provides factors to be considered before granting custody of a minor in favour of an applicant as follows;
  - “(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.”

16. I have read the evidence at the trial court and the only inference of danger to the minor was some unproven incidence of attempted poisoning. This was not established by any evidence and I think the trial court was right in rejecting the same.
17. The incident of striping the child naked was explained and I think in my view being a single incident cannot be a ground to deny either of the parents’ custody.
18. There was also the issue of the child being left with strangers and relatives. There was no evidence tendered to show that the child was harmed or mistreated while with strangers. In any case in all homes whether the appellants or the Respondent’s there are the usual family members and other visitors or relatives. People live with others. The parties herein and by extension the minor do not live in an island.
19. Both parents are of Hindu religion and I think this was not an issue during trial. Probably the child will determine his faith when he is of age. For now, it never featured anywhere.
20. On the same note being a child of tender years does not enable him to make any rational wishes as cited above and thus the need to allow the parents who as of right have equal share so to speak in the minor.
21. The elephant in the room nonetheless is the issue of the tender years of the minor. The rule has all along been that the mother ordinarily shall have full custody till the time the child is able to make some informed decisions. This however with the passage of time has been challenged and the courts in various decisions have had to make some findings.
22. A good case in point is *SMM.V.ANK* (2022) eKLR where Prof. Justice Ngugi (as he then was) rendered himself 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.”

23. Taking cue from the above decision I think the questions before this court is similar. The trial court in my view balanced as much as it could this principle. The Appellant was granted five days of the week and the Respondent two days, that is weekends. She had three quarters of the time with the child.
24. As found above both parents have the best interest of the minor. I think that the trials courts findings cannot be faulted. There was no sufficient evidence to suggest that the Respondent was not in a position to take care of the minor at the period he will have.
25. Even for argument sake, psychologically, it becomes easier for the minor to know and appreciate the love for both parents. In any event being with the mother for five days will ensure that the child has the basic care in terms of daily routine of school and the related chores which sometimes are best provided by the mother in the tender years.
26. On the other hand, the Respondent whom I presumed was working outside home will have time with the child during weekends and thus be able to bond with him.
27. The saving grace however is that being a children’s matter the parties are allowed to make further and necessary applications as the situation progresses. In essence the door is not shut to either of them.
28. This applies to the issue of actual maintenance of the child. With the varying circumstances the parties are at liberty to make proper application before the trial court. I think the same ought contrary to the prayers by the appellant, to be well litigated upon at the trial court taking into account the varying circumstances from the date of the trials court’s decision.
29. I think I have indicated much to show that I do not find any reasons to fault the impugned decision. The Appellant has not demonstrated how she will suffer should she share the custody of the minor with the Respondent who in any case is the father. It must be noted that none of the two parents has overriding rights over the other as far as the child is concerned.
30. Clearly this is a case where the trial court rightfully applied the exceptional rule as elucidated by Justice Ngugi above. In other words, it squarely considered the best interest of the child and shied away from the issues bedevilling the parents.

PARAGRAPH 31.

The appeal is otherwise dismissed with no order as to costs.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS

11<sup>TH</sup> DAY OF JULY 2024.

H K CHEMITEI

JUDGE

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