



**HKS v HG (Children's Appeal Case E030 of 2022)
[2024] KEHC 15453 (KLR) (Family) (17 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 15453 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CHILDREN'S APPEAL CASE E030 OF 2022
EKO OGOLA, J
SEPTEMBER 17, 2024**

BETWEEN

HKS APPELLANT

AND

HG RESPONDENT

*(Being an appeal against the Ruling of Hon. R.O. Mbogo in Milimani
Children's Court, Case No. E.985 of 2021 delivered on 23rd December 2021)*

JUDGMENT

1. The parties are a married couple. From their union, they sired a daughter by the name CAKG who was born on 24th June 2019. The respondent is a medical doctor while the appellant is unemployed. Sometime in the year March 2021, the appellant left her matrimonial home. The child was left in the respondent's care. The parties then entered into an access agreement after a mediation session. The parties agreed that the respondent would have sole and actual custody of the child, whilst the appellant would have access to the said child.
2. Despite the agreement, the appellant on 9th August 2021 went to the matrimonial home and left with the child. On 11th August 2021, the respondent filed a Chamber Summon application praying for the following orders:-
 - a. Spent;
 - b. The defendant immediately discloses the location of the child, CAKG and return her to the plaintiff's custody pending the hearing and determination of this application.
 - c. The honourable court be pleased to grant actual and legal custody of the child CAKG to the plaintiff pending the hearing and determination of this application.



- d. The honourable court be pleased to grant actual and legal custody of the child CAKG to the plaintiff pending the hearing and determination of the suit.
 - e. Costs of and incidental to this application be borne by the respondent.
3. The respondent, in his Supporting affidavit and supplementary affidavits, deposed that the appellant lacked the emotional, mental, psychological and financial capacity to take care of the child. He added that the appellant had demonstrated a severe lack of interest in the child's welfare since her birth since she abandoned the child at their matrimonial home without explanation. The respondent further claimed that the appellant is an alcoholic and a chain smoker, and this substance abuse has, on many occasions, put the child's life at risk. At the time of filing this application, the respondent stated that the appellant was living with her parents who were ill and in need of critical care. Therefore, they are unable to help in the raising of the child. The respondent stated that it would be in the best interest of the child that she is returned to him.
 4. In response to the application, the appellant filed a replying affidavit dated 16th August 2021 and supplementary affidavits. She stated that she indeed picked up the child from her matrimonial home, and at that time, she was with the child in Kisumu. The appellant deposed that after their wedding, the respondent opposed the idea of the appellant getting any form of employment or leaving the house without being accompanied by his or her mother-in-law. She denied being an excessive and habitual substance user. She stated that she is a social drinker. She added that the respondent was aware of this before they were married. The appellant further stated that the respondent is also a social drinker. She added that the pictures of her sleeping while holding the child and a glass of beer in front of her did not depict the true nature of what was happening. She deposed that the respondent had taken her and the child out to a restaurant on Sunday afternoon. She deposed that she dosed off while the respondent was playing a game of pool. She added that the glass of beer belonged to the respondent.
 5. The appellant stated that during their marriage, the respondent emotionally, psychologically and economically abused her. She added that the respondent also made her disassociate herself from her parents, who were ailing. She further deposed that sometime in March 2021, she had requested the plaintiff to allow her to visit her parents in Kisumu, but the respondent refused. The appellant deposed that the respondent has always disrespected her by referring to her as an idiot, stupid and uneducated, causing the child to refer to her as 'silly mum'. The appellant deposed that she is continuously worried about the environment that the child is growing up in.
 6. The appellant deposed that since the respondent had refused her and the child to visit her parents in Kisumu, she had to leave by herself. She deposed that the entire time she was away, she begged the respondent to allow her to have the child, but the respondent refused. This caused her to approach FIDA to assist in the issue of custody. The appellant stated that the respondent enrolled the child who at that time was two years into a school and summer program without her knowledge.
 7. The appellant further deposed that she went through a mediation session with the respondent, and she only agreed to the said terms because she wanted to see her child. Part of the agreed terms was that the parties have a session with a counsellor. The appellant deposed that the respondent promised to change, and this was the reason she moved back to the matrimonial home. According to the appellant, the respondent became more cruel and monitored her through 12 CCTV cameras around the house. The appellant deposed that these were the reasons that caused her to leave her matrimonial home with the child and travel to Kisumu with her parents. She deposed that the respondent has always known of her whereabouts and at the time of filing the application, the respondent was aware that she was in Kisumu.



8. On 23rd December 2021, the trial court delivered the impugned Ruling. The trial Court gave the following orders:-
 - a. The plaintiff will have actual custody, care and control of the minor.
 - b. The defendant shall have access on the following terms:
 - i. She shall access the child during school term on either the 1st or last weekend as parties may agree. She shall pick the child on Fridays after school at 1,500hrs and drop her on Sunday at 1600hrs. The parties to agree on dropping and picking point.
 - ii. She shall also be accessing her on alternative Sundays as from 1000hrs to 1600hrs.
 - iii. During school holidays, she shall access the child for a week. Parties to agree on which week she shall have the access.
 - iv. During this festive season, the father shall have access during Christmas and the mother shall have access during New Year.
 - c. Since the plaintiff has actual custody of the minor he shall cater for all her needs.
 - d. Each party is at liberty to apply.
 - e. Costs shall be borne by each party for this application
9. Aggrieved with the Ruling of the trial court, the appellant filed this appeal vide a Memorandum of Appeal dated 9th March 2022. The grounds of appeal are as follows:-
 - a. The Learned Trial Magistrate grossly misdirected himself in treating the documentary evidence tendered by the Appellant and the law pertaining thereto before him superficially and consequently came to a wrong conclusion on the same.
 - b. The Learned Trial Magistrate misdirected himself in ignoring the written submissions presented and filed by the Appellant in their entirety.
 - c. The Learned Trial Magistrate erred in not considering or adequately directing his mind to the fact that the child C.A.K.G is a female minor of tender age who needs her mother at all times when growing up as they have their own natural needs that are well taken care of by the Appellant.
 - d. The Learned Trial Magistrate erred when he placed reliance on unproven allegations that the Appellant was either alcoholic or chain smoker who was unable to take good care of the minor.
 - e. The Learned Trial Magistrate erred when he deliberately failed to find that the Respondent admitted in his own affidavits that he is a social drinker and only found that the Appellant was unable to take good care of the minor yet she is equally a social drinker like the Respondent.
 - f. The Learned Trial Magistrate erred when he found that the Respondent had demonstrated exceptional circumstances to grant the custody of the female minor of tender age to the Respondent.
 - g. The Learned Trial Magistrate erred by failing to consider the relevant provisions of *the Constitution* of Kenya on the rights of children, section 76(3) of the Children's Act and the principles governing custody of children of tender years and thereby arrived at a wrong decision.



- h. The Learned Trial Magistrate erred by failing to find that the Appellant is a person of means and able to take good care of the female minor of tender age.
 - i. The Learned Trial Magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the Appellant.
 - j. The Learned Trial Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.
10. The parties were directed to canvass the application by way of written submissions. Parties complied.

Determination

11. I have read and considered the trial court record and the rival submissions filed.
12. This is a first appeal. A first appellate Court must re-evaluate the evidence tendered in the trial court, both on points of law and facts, and arrive at its own finding based on such law and facts. I have recited the essential facts of the case above. What stood out was that, according to the respondent, the appellant is an alcoholic and a chain smoker, and this substance abuse has, on many occasions, put the child's life at risk. Furthermore, the appellant lacked the emotional, mental, psychological and financial capacity to take care of the child. On the part of the appellant, she stated that the respondent was emotionally, psychologically and economically abusive therefore creating a toxic environment to raise a child.
13. Before addressing the issue at hand, it must be noted that no evidence from either party would lead to the conclusion that either of them is an unsuitable parent. There is no evidence that the respondent is abusive in any way, putting CCTVs around the house cannot be termed as abusive to the point of infringing on the best interest of the child. Also, the question of addiction, that is, being an alcoholic or a chain smoker, is an issue that can be proved by a medical report. Drinking alcohol and smoking does not make one an unfit parent. The ratio in a case of substance abuse only becomes a factor in custody decisions where it can be demonstrated that the alleged substance abuse has risen to the level of causing actual harm to the child. The pictures adduced by the respondent showing the appellant sleeping while holding the child and a glass of beer in front of her is circumstantial and cannot be evidence enough to conclude that she is an unsuitable parent.
14. Consequently, this decision will not turn on the unsuitability of either parent to have custody of the child in question. It will turn, instead, to the question of who would be best placed to advance the best interests of the child if awarded interim custody pending the determination of the suit in the trial court.
15. Back to the substantive issue. The appellant argued that a female child of tender years should be with the mother. The trial court agreed. However, the court found that the respondent's case was more convincing and that was an exceptional circumstance as to why the custody should be with the father instead of the mother.
16. Historically, under common law, the custody of children was given to their fathers as part of their property rights. This was until the introduction of the doctrine of a child of tender years. Some historians attribute this to the specification of gender roles during the Industrial Revolution. Over time, the doctrine has continued to evolve with many Courts in various jurisdictions moving away from the doctrine to the more inclusive 'best interest of the child' principle. The Kenyan jurisdiction has further codified the principle of 'best interest of a child'.



17. In matters concerning a child, it is a constitutional imperative that is of paramount importance in the best interests of the child. To that extent, Article 53(1) of *the Constitution* of Kenya provides that a child's best interests are of paramount importance in every matter concerning the child.
18. Since this suit was instituted in the year 2021, the applicable law was the Children's Act 2001 (repealed). The position of Article 53(1) is enshrined in Section 4 of the Children's Act which provides for the welfare of the child. Section 4(2) and (3) of the Children's Act provides as follows:-
- “(2) 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.
- (3) 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 adopting a course of action calculated to-
- a) Safeguard and promote the rights and welfare of the child;
- b) Conserve and promote the welfare of the child;
- c) Secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.
19. Furthermore, parental responsibility for both financial and physical care is on both parties. Sections 23 and 24 of the Children's Act and Article 53(1)(e) of *the Constitution* of Kenya both provide that each parent has a duty to provide the child with the necessities of life.
20. The appellant argued that the respondent has a demanding job and is not able to be present enough to be with the child. On the other hand, the respondent contended that the appellant is unemployed and cannot be able to financially provide for herself and the child. The appellant stated that she is a woman of means. There is no evidence of the same. When the appellant took the child from her matrimonial home, she went to live with her parents in Kisumu. She agreed that her parents were ill. The respondent had contended that due to the appellant's parent's situation, they were not in a position to help take care of the child.
21. In the case of MA vs ROO [2013] eKLR Hon Justice Kimaru stated as follows:
- “What is the best interest of the child has not been defined by the law. This is as it should be because the best interest of each particular child will depend on the circumstances of each particular case at any one particular time. What is not in dispute, however, is that there are certain minimum requirements that have universally been accepted to constitute the best interest of the child. This includes the right of a child to be provided with shelter, food, clothing and education. The child is entitled to medical care. The child's welfare should be taken care of under the best possible circumstances”.
22. The ability to provide financially for a child does not give one priority in determining custody. A child's psychological growth and happiness is important and it is not based on material things alone. The



child's best interest is to have a relationship with her mother as well as her father. All in equal measure. This court is mindful of the provisions of Section 6(1) of the *Children Act*, which provides as follows:-

“ A child has a right to live with and to be cared for by his (or her) parents.”

23. Before the filing of this appeal, the child had lived most of her life in Nairobi in the parties' matrimonial house. That's home for the child. Moving the child to Kisumu was unfair to the respondent since he could not have easy and continued access to the child.
24. Furthermore, before litigation, the appellant had agreed in the 'Mediation Settlement Agreement' that the respondent would have custody of the child. The parties agreed to abide by the terms of the said agreement without resorting to unilateral deviation or variation of the terms. The appellant taking the child from the respondent's guidance was a breach of the agreement, and it was evidence that she did not consider the best interest of the child. The terms of the agreement were that if the parties wished to deviate from the terms, they were to consult with the mediator. If at all the appellant was of the view that the child was endangered or that the living environment was toxic to the child, there were better ways of addressing this than taking the child to Kisumu without the respondent's knowledge and consultation.
25. The upshot is that the appeal fails and is dismissed. The Orders of the trial court dated 23rd December 2021 shall subsist and shall be fully operational in terms of the access to the minor by the appellant. There will be no orders as to costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF SEPTEMBER 2024

E.K. OGOLA

JUDGE

In the presence of:

Mr. Kiarie for the Appellant

Ms. Ndoigo for the Respondent

Ms Gisiele M court Assistant

