



**ISM (Suing as the father of N, NF and A) v AAA (Civil Appeal
E003 of 2024) [2024] KEHC 11133 (KLR) (23 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11133 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL APPEAL E003 OF 2024
JN ONYIEGO, J
SEPTEMBER 23, 2024**

BETWEEN

ISM (SUING AS THE FATHER OF N, NF AND A) APPELLANT

AND

AAA RESPONDENT

*(Being an appeal against the judgment of Hon. R. Aganyo P.M. delivered on
17.01.2024 in Children's Case No. 0E023 of 2023 in PM's Court at Wajir)*

JUDGMENT

1. The appellant who was the plaintiff before the trial court contracted an Islamic law marriage with the respondent (defendant before the lower court) sometime the year 2003. Their marriage was blessed with four children namely; N aged 19 years; N 19 years; F 14 years and; A aged 11years. However, their marriage hit a rock leading to the dissolution of the same the year 2012.
2. Consequently, by a plaint dated 26-07-2023 and amended on 03.10.2023, the appellant moved Wajir Children's Court seeking orders as follows;
 - a. That the plaintiff be granted custody of the children but the defendant be accorded the right of reasonable access and that he should not interfere with the children's wellbeing and education.
 - b. The defendant be compelled to stop abducting the children without the father's knowledge.
 - c. Any other relief/relieves which this honourable court deems fit and proper in the interest of justice to be granted.
3. It was the appellant's/ plaintiff's case that immediately after their divorce, they by consent agreed to share their children with him taking N and A and the respondent the remaining two. That around 2013, the respondent handed back to him the other two children on grounds that she was unable to look after them as she had gotten married to another man with whom she got more children.



4. He further stated that despite allowing the respondent to occasionally pick the children to stay with her during school holidays, she failed on many occasions to return them thus causing them to miss school classes when schools reopened. The appellant averred that the respondent's frequent interference with the physical custody of the children in retaining them hence the continual missing of school was not in the best interest of the children hence the call upon the court to grant him physical custody of the said minors.
5. It was further urged that the appellant was the suitable parent as he had adequate finance and/or income to guarantee the children a good life as opposed to the respondent. The foregoing notwithstanding, he averred that the children had continuously lived with him for a period of eleven years and were doing well. That prior to filing the suit herein, the respondent forcefully took A into her custody and efforts to take the minor back were met with violence. The appellant thus stated that he was apprehensive that the minor's education may be badly affected in the obtaining circumstances hence the prayers sought.
6. As a response, the respondent filed a statement of defence dated 07.08.2023 opposing the allegations by the appellant by stating that all that she desired was for her children to get good education so that they can prosper in life. She contended that the appellant had insisted that A repeat his previous class but upon the child refusing he resorted to physically assault him.
7. That her daughter who was in class eight had also been threatened of being married off and further, that she would not proceed to secondary school and as such, the same, according to her infringed the rights of the children.
8. She urged that the appellant was in the habit of leaving the children alone as he travelled to his rural home hence subjecting them to danger. That despite reporting the matter to the Children's Office, the appellant declined the summons to go discuss the wellbeing of the children herein.
9. In her prayers, she urged that:
 - i. The suit herein be dismissed.
 - ii. She be granted custody of A and the appellant pays a monthly maintenance.
 - iii. The appellant be restrained from threatening the respondent and her new husband.
10. The trial court heard both parties and via a judgment delivered on 17.01.2024, held as follows:
 - i. Accordingly, in consideration of the prevailing circumstances herein, I grant temporary legal custody of the three older children namely: N, N and F to the plaintiff, their father.
 - ii. The plaintiff and the defendant being the parents of the children in the matter, are each granted unlimited access and visitation rights of the said children as named in the matter at their first place of residence at reasonable times on condition that the said access does not interfere with their well-being.
 - iii. The plaintiff shall pay a monthly maintenance with respect to the child A herein at Kes. 5,000/- only which I find reasonable in the circumstances of this case, to be paid by the 5th date of every month henceforth by the plaintiff.
 - iv. The monthly maintenance monies of Kes. 5,000/- only shall be deposited into the account of the defendant, in an account that she will provide to the defendant, to serve this purpose.



- v. For avoidance of doubt, the plaintiff shall also provide for the school fees, duqsi, clothing and medical cover for all the children herein, including A without fail. He shall include the said children herein in his medical cover.
 - vi. The parties are hereby ordered to respect and co-operate with the children's office towards compliance of these orders, as they shall attend guidance and counselling sessions therefrom, and for psychosocial support services to facilitate family reconciliation and mediation, to enhance better and peaceful co-existence between the family members herein, promoting safeguards and welfare of the minors in the best interest of the said children.
 - vii. No order as to costs.
11. Aggrieved by the said judgment, the appellant proffered a memorandum of appeal dated 08.03.2024 citing 10 grounds of appeal summarized as hereunder;
- i. The learned magistrate erred in law and fact by awarding physical custody of A to the respondent.
 - ii. The learned magistrate erred in law and fact by failing to take cognizance of the fact that given that the respondent has since remarried, she was not fit to take care of the minor.
 - iii. The learned magistrate erred in law and fact by failing to grant him unlimited access of the said minor during the school holidays.
 - iv. The learned magistrate erred in law and fact by failing to consider the financial strengths of the parties in arriving the impugned decision.
12. The appellant sought for orders that:
- i. The appeal be allowed.
 - ii. This Honourable Court grants the appellant the physical custody of the children.
 - iii. This Honourable Court do compel the respondent to reinstate the minor back to school.
 - iv. The appellant be awarded costs of this cause.
13. The court directed that the appeal be canvassed by way of written submissions which directions parties complied with.
14. The appellant submitted that the trial court erred by failing to note that the orders that it issued were detrimental to the children's wellbeing as the same led to the children being separated from one another despite the fact that they had been growing together. That the said order went contra the provisions of the principle of best interest of the minors. It was submitted that despite several courts holding that children of tender years ought to be under the custody of their mother, there exist exceptional circumstances where the mother can be denied custody of the said minors as was rightly held in the case of J.O. vs S.A.O (2016) eKLR. That the finding in the foregoing case was further reiterated by the Court of Appeal in the case of Sospeter Ojaamong vs Lynette Amondi Otieno Appeal No. 175 of 2006.
15. The appellant contended that the Court of Appeal was emphatic that the exceptional circumstances include if the mother is unsettled, has taken a new husband or her living quarters are in deplorable state. That due to the fact that the respondent has since taken a new husband, she was therefore, disqualified to have custody of the minor in question.



16. That in as much as the minor expressed his wishes to be with the respondent, the court ought to have taken the same with a lot of caution as clearly the respondent had already deceptively taken the custody of the said minor. Thus there was a high probability that the minor was coached. The appellant further blamed the trial court for having failed to not only recognize but also uphold the verbal parental agreement entered by the parties herein. At the conclusion, the appellant urged this court to grant the prayers sought.
17. In opposing the appeal, the respondent filed submissions dated 21.05.2024 wherein it was submitted that for the period of time that the appellant had the minors in his custody, she did not abrogate her parental duties as she kept having contact with the minors herein. It was her case that despite being divorced and having remarried, the appellant equally had married again and was blessed with eleven children and therefore, there was no offence caused as their religion allowed the same.
18. It was argued that the alleged parental agreement being referred by the appellant was nonexistent as none was presented before the court. That the alleged exceptional circumstances do not exist nor was it capable of denying the respondent custody of A and as such, the appeal be dismissed for want of merit.
19. This being the first appellate court, it is thus bound to reconsider, re-evaluate and re-assess the evidence tendered before the trial court and arrive at an independent determination and or conclusion without losing sight of the fact that the trial court had the advantage of seeing and listening to the witnesses to be able to assess their demeanour. In *Abok James Odera T/A AJ Odera & Associates v John Patrick Machira T/A Machira & Co Advocates* [2013] eKLR, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
20. I have considered the record of appeal, grounds of appeal and the submissions by both parties. From the pleadings and grounds of appeal, this court is being called upon to determine who between the parties herein should be awarded custody of A the minor subject of these proceedings.
21. It is trite law that in every dispute concerning a child, courts are bound to take into consideration the best interests of a child. This is a constitutional imperative clearly captured under Article 53(2) of *the constitution* which provides that; a child’s best interests are of paramount importance in every matter concerning the child. This position was further amplified under Section 8(2) and (3) of the *children Act* 2022.
22. The Convention on the Rights of the Child and the African Charter on the Rights of the Child have also emphasized the centrality of the best interests of a child.
23. From the onset, it follows that what matters to this court is the best interests of the minor as was well pronounced in the case of *MAA v ABS* [2018] eKLR.
24. In the same breadth, it is trite law that parental responsibility is an equal joint responsibility of the parents to a child and no parent shall be treated specially as having a superior right over the child than



the other. See Section 32(1) of the *Children Act* and the holding in the case of PKM vs ANM (2020) eKLR where Aroni J stated that;

“in my view therefore one need not go further to look at what parents need to do for a child and to what extent. In this instance the parties have joint responsibility towards their son and no one is superior to the other...”

25. As to what constitutes parental responsibility, Section 31 of the Children’s Act 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.
26. On the 1st and 2nd grounds, the learned magistrate was accused of ignoring the appellant’s evidence and bestowed custody of one A on the respondent who has since remarried while failing to consider the biological father of the minor who was still alive.
27. It is not disputed that the minor subject of these proceedings herein is a biological baby to the parties. In the same breadth, my consideration of the evidence adduced before the trial court showed that the mother unilaterally surrendered to the appellant custody of all the children who as at the time of filing this matter were aged as follows:
 - i. NIS – 19 years.
 - ii. NIS – 19 years.
 - iii. FIS – 14 years.
 - iv. AIS – 11 years
28. Save for A, custody of the rest of the children is not in issue nor challenged. My focus therefore is on baby A and who deserves his custody. It is not denied that both parties are the biological parents to the baby hence equal parental responsibility.
29. It is also not in dispute that the two parents herein divorced and have since remarried. The appellant relied on the holding of the court of appeal decision in the case of J.O. v S.A.O(supra) where the court held that as a general rule custody of a child of tender age should be awarded to the mother unless there are exceptional circumstances like the mother having remarried.
30. In this case, both parties have remarried and the child was not of tender age when the orders of custody were made. I agree with Judge Thande’s reasoning in MAA vs ABS (Supra) that not every remarriage of a mother to a disputed child will disentitle her the right to physical custody of a child. If the best interest of a child in a mother’s new marriage serves her or him well than staying with the biological father, there is no justification to deny the biological mother the right to actual custody to her biological child on account of remarriage.
31. In this case, the respondent has since remarried. She had relinquished custody of all the children to their father but the younger one kept escaping thus joining the mother. There were allegations of the child having been subjected to assault and other severe disciplinary punishment leading to his escape to join the mother.
32. It is trite that before making a decision affecting a child, the court must seek a child’s opinion. In this case, the court took the trouble of interviewing the child in detail. The child was categorical that he wanted to stay with the mother. From the answers given to the trial court, he did not appear to have been couched. He was not made a ware of the possible questions he was to face from the court prior



to the interview. I am convinced that the answers given were not influenced by anyone. In any event, the mother had released all the children to the father only for the young one to retreat.

33. I have no reason to blame the respondent for the desire of A to stay with the mother.
34. On the allegation that the respondent was not fit to be granted custody for the reason that she was on her third marriage since divorcing the appellant, it was urged that the same was an exceptional circumstance warranting not to be granted custody. The Court of Appeal in J.O. vs S.A.O. [supra] eKLR stated:

“There is a plethora of decisions by this Court as well as the High Court that in determining matters of custody of children, and especially of tender age, except where exceptional circumstances exist, the custody of such children should be awarded to the mother, because mothers are best suited to exercise care and control of the children. Exceptional circumstances include: the mother being unsettled; where the mother has taken a new husband; where she is living in quarters that are in deplorable state; or where her conduct is disgraceful and/or immoral.”
35. In as much as the Court of Appeal listed the taking on a new husband by the mother of children of tender age as an exceptional circumstance, it is my humble view that the Court did not intend that remarriage per se is sufficient reason to disqualify a mother from being awarded custody. It therefore follows that it must be shown that the remarriage is incompatible with the welfare of the child. In this case, apart from the appellant urging that the respondent has since remarried, no evidence was presented before this court to show that the remarriage of the respondent had or would have an adverse effect on the welfare of the child.
36. It is not lost to this court that the appellant has also since remarried and therefore, in the spirit of article 27 of *the constitution*, it is my humble view that discrimination more so in such a case as before this court would not be the best way to go. It is against that backdrop that I am persuaded that there are no exceptional circumstances to justify depriving the respondent her natural right to have her child with her. [Also see M A A v A B S [supra].
37. On the ground that the appellant has and has had all the financial strength to provide for the minors as opposed to the respondent, this court wishes to reiterate the finding of the High Court in HGG v YP [2017] eKLR where it was stated that “...the ability of the father to provide a better life to a child in material sense does not give such parent priority over the mother or unrivalled chance to get custody of children of tender age...”
38. It therefore follows that having the ability to provide for the minors in a particular case should be considered alongside other factors hence not as the single determinant in granting and /or reaching a determination on granting physical custody to a parent.
39. In view of the above holding, I will not interfere with the trial court’s finding on custody of baby A to the respondent. However, I do not find any logic in the appellant continuing to maintain a baby who is already with a mother and a step father who has assumed parental responsibility over the same child. In any event, the appellant is taking care of three other children hence the respondent should take care of A the only child in her custody.
40. Parenting being a game of equal responsibility, the order for the appellant to pay 5000/= monthly maintenance and buy clothes is set aside. However, the order for the appellant to pay school fees and provide medical cover is retained.



41. The upshot of the above finding is that, the appeal herein partly succeeds and partly fails with orders that;
- a. The appeal herein fails to the extent that actual Custody of Baby A be and is hereby given to the respondent
 - b. That both parents shall have joint legal custody of Baby A.
 - c. That the order directing the appellant to pay 5000/= monthly maintenance of baby A and buy clothes is hereby set aside.
 - d. That the appellant shall pay school fees and provide medical cover for baby A until he attains the age of majority.
 - e. That the rest of the orders made by the trial court regarding the rest of the children shall remain in force.
 - f. Each party to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF SEPTEMBER 2024

J. N. ONYIEGO

JUDGE

