SKN v FNM (Civil Appeal E142 of 2023) [2024] KEHC 16816 (KLR) (Family) (19 September 2024) (Judgment)

Neutral citation: [2024] KEHC 16816 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL APPEAL E142 OF 2023

BM MUSYOKI, J

SEPTEMBER 19, 2024

BETWEEN

SKN ..... APPELLANT

AND

FNM ..... RESPONDENT

(Being an appeal from judgment and decree of Honourable Jackie Kibosia (PM) in Chief Magistrate's Court at Milimani Children Cause number E525 of 2020 dated 24-11-2023)

JUDGMENT

1. The appellant has brought this appeal against the judgement and decree of the lower court dated 24-11-2023 in which the Honourable Magistrate decreed as follows;

    1. Both parties shall have joint legal custody of the minors with the plaintiff/father retaining actual custody, care and control.

    2. The children to undergo transition counselling and a report filed in Court.

    3. Once the report is filed, actual custody will revert to the defendant/mother.

    4. Each party to bear its costs.

    5. Parental responsibilities be apportioned as below;

        Plaintiff
        School fees.School related expences.Comprehensive medical cover.

        Defendant (once custody reverts)
        FoodClothingShelter.

Access to the defendant in the intervening period
Alternating weekends; Saturday 10 am to Sunday 5 pm.Pick up/drop off; nearest recreational facility.Half holidays, alternating Christmas and Easter.To spent this Christmas with the defendant/mother.

2. The appellant who was the plaintiff in the lower court was dissatisfied with the said judgment and filed this appeal in which he has raised six grounds viz;

    1. That the learned Principal Magistrate erred in law and fact by disregarding that the tender year doctrine is no longer a binding rule of law.

    2. The learned Principal Magistrate erred in law and in fact by disregarding provisions of Article 53(2) of *the Constitution* of Kenya, 2010 on the explicit provisions of the best interest of the minors herein being paramount.

    3. That the learned Principal Magistrate erred in law and in fact in disregarding the explicit provisions of the *Children Act* section 103(1)(h) as pertains the circumstances of the minors' half sibling.

    4. That the learned Principal Magistrate erred in law and in fact by disregarding the Children's Officer's Report which recommended that custody of the minors remains with one party, preferably where the children have known to be home for a long time.

    5. That the learned Principal Magistrate erred in law and in fact by reverting actual custody of the minors to the Defendant with undue regard to the fact that the Respondent neglected the minors.

    6. That the learned Principal Magistrate erred in law and in fact in finding that the Respondent was suitable for custody of the minors in total disregard of the evidence adduced before the Honourable court abrogating provisions of sections 107 and 109 of the *Evidence Act*, Cap 80.

3. This is a first appeal and as required of me, I will conduct it in a manner of re-hearing. The position in law is that the first appellate court must re-evaluate, re-analyse and re-consider the evidence produced in the lower court and reach its own independent conclusion but always keeping in mind that it did not have the advantage of taking the evidence first hand or observing the demeanour of the witnesses. I will in doing so, consider each ground of appeal as against the evidence and the submissions of the parties and the relevant provisions of the law.

4. It is common ground that, the parties herein are the biological parents of JVK, a girl now aged 10 years and CM, a boy now aged 9 years. It is also common ground that the parties were living together from 2013 to 2018 during which period they were blessed with the said minors. The only point of departure as far as the parties' relationship is concerned is whether the parties were married or not. However, that is not a material issue of consideration in the appeal as the matter concerns custody and maintenance of the minors who are entitled to parental love, care and guidance whether or not the parents are married. That is the purport of Section 32(1) of the Children's Act which provides that;

> '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 responsibility whether or not the child is born within or outside wedlock.'

5. The appellant had filed the matter asking for actual custody and control, the respondent's monthly contribution of Kshs 20,000.00 as maintenance of the children and that the respondent be allowed

supervised visitations. The respondent counterclaimed for return of the children to her custody, sole and exclusive custody of the minors, an injunction restraining the appellant from taking the children from her and maintenance. The matter went to full trial where only the parties to the suit testified.

6. The appellant adopted his witness statement dated 11-11-2020. He told the court that the respondent left their home on 27th April 2018 after they disagreed leaving the children. He added that the respondent switched off her phone and only showed up in 2019 and started claiming custody through the children's officer in Makueni. After the respondent left, the appellant transferred the children to Syokimau and later back to his home in Makueni where they were under the care of his mother and a nanny. He told the court that he was taking good care of the children and that the respondent was not in a position to take care of the children because she was not working and had no income to do so. He alleged that the respondent had mistreated his daughter from his previous marriage.

7. According to the appellant, the respondent was not suitable to live with the children because she had abandoned them and she had no sufficient means of doing so. As at the time he recorded the statement, the children were studying at Top Performance Academy in Nairobi but when he testified on 31-05-2022, he told the court that his mother was taking care of the children in Makueni. He told the court that he was an engineer and had worked in South Sudan and Sierra Leone but was at the time of trial doing farming business. He produced his transactions statement to prove that he was earning enough to take care of the children.

8. In cross examination, the appellant maintained that the respondent left home and switched off her phone. He added that he filed the suit because the children officer had pre-determined the matter. He stated that the children were then in Makueni because it was not safe for them to be in Syokimau. He stated without specific details that, he had income generating activities in 2014 which the respondent ran down. He also told the court that the respondent may not raise the children well. He said in re-examination that the children's school was 150m away from the defendant's place.

9. In her witness statement dated 16-10-2020 which she adopted in her testimony, the respondent stated that she married the appellant on 27-04-2013 and from the union, they were blessed with the children in the cause. According to her, the appellant travelled out of the country barely two weeks into their marriage to South Sudan leaving her to care for his daughter from his previous marriage. The children in this matter were born on 10-04-2014 and 5-07-2015. She took primary responsibility of caring for the children until 26th April 2018 when the appellant kicked her out of their matrimonial home on 26-04-2018.

10. According to the respondent, after she was kicked out of the matrimonial home, she was prevented from accessing the children in Makueni and also after he moved them to Nairobi. She was later to seek help from the children officer who summoned the appellant. They held two meetings after which the appellant moved to court. She stated that she had now secured employment and was capable of living with the children. The respondent maintained that she was more suitable to have the actual custody of the children as they were of tender years and the appellant was always away from home leaving the children under the care of the nanny and his mother. She added in her oral testimony that the appellant was a good father but there was a problem of his time as his job was too demanding. She alleged that the appellant's mother was not able to communicate in english and could therefore not guide the children in doing their homework.

11. In cross examination, the respondent told the court that she was working at Sikizana Trust and was able to take care of the children. She maintained that the children needed their mother and she was not interested in separating the children from their elder sibling who was her step daughter. As at the time

she was testifying, she alleged that the appellant had not been home for two weeks. She was desirous of living with the children so that she could guide them spiritually.

12. On 30-06-2023, the trial court made an order that a current children welfare report be filed before she could write her judgment. Pursuant to the court order, a report dated 24-07-2023 from the Directorate of Children Services Makueni Sub-County was filed. This report left the final decision to the court without any recommendation. When the matter came for mention on 15-08-2023, the court was not satisfied with the report as the children officer had not interviewed the respondent. She ordered for a complete report pursuant to which another report dated 25-08-2023 was filed. The latter report made the following recommendations which I quite verbatim;

    1. In the best interest of the child, I recommend custody remains with one party preferably where the children have originally known to be home for a long time. However, I take cognizance of the fact that sometimes the father might be away from the children for a time due to the nature of his job.

    2. The mother may be granted access to the children during school holidays with specific periods being guided by the honourable court.

    3. Having given my opinion as a children officer in this matter, the final decision lies with the honourable court.

13. Although the reports were not included in the record of appeal, I have accessed the same from the lower court file.

14. The parties filed their respective submissions. The respondent's submissions were dated 24-06-2024 while the appellant's were dated 27th May 2024. I have read the parties submissions, the proceedings taken in the lower court and evidence produced by the parties as well as the two children officer's reports mentioned above. Having done so, it is clear to me that the main issue in the appeal is whether the trial court erred in making an order that the children should undergo transitional counselling and thereafter the actual custody and control be reverted to the respondent. From the memorandum of appeal, it is clear to me that the appellant does not challenge the other parts of the court's decree. I will address the grounds of appeal raised by the appellant as follows.

15. The appellant has faulted the Honourable Magistrate for having failed to appreciate that the doctrine of tender years is no longer a binding rule of law. According to the appellant's submissions, the doctrine is not applicable as it is not provided for in the *Children Act* and has been eroded by *the Constitution* of Kenya 2010 by the principle of the best interest of the child. The appellant has made reference to the case of Young vs Young (1993) SCR by citing the following extract from the said authority;

> '...child care is no longer and should no longer be exclusively or primarily the preserve of women. Society had largely moved away from the assumption embodied in the tender year doctrine that women are inherently imbued with characteristics which render them better custodial parents.'

16. The appellant has also cited a closer home authority of SMM vs ANK (2022) eKLR where Honourable Justice Joel Ngugi held that;

> 'It is apparent that while the tender years doctrine is persuasive its inflexibility has been eroded by the evolving standards of decency reflected in Article 53 of *the Constitution* of Kenya. The welfare of children is primary factor of consideration when deciding custody

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 a child.'

17. Whereas I agree with the above cited holding and position of the Judge, I must state that each case must be decided on its own merits. Of course, with the best interest of the child being the central and core point of consideration. The circumstances in the SMM case were different from this matter in many ways. The parents were living in different countries and there would have been difficulties in the children adopting to the new environment including the education system. The mother wanted the children to relocate with her to the USA. That is different from this case. Again, the children in the cited case had been placed in the custody of the father by mutual agreement unlike in the instant matter where the mother was sent away from home.

18. I do agree that the doctrine of tender years has been eroded but the age of the children is a point of consideration while any decision on custody of a child is being made. The doctrine may have been eroded but not abolished. Even in the case cited above, the Honourable Judge acknowledged that the doctrine must merge with the constitutional imperative that the best interest of the child should be the paramount point of consideration in matters concerning a child. This is engrained in section 95(2)(d) as read together with section 103(1)(i) of the *Children Act*.

19. It is my considered view that the trial court did state that the doctrine of tender years is binding as the appellant seems to suggest. What the court did was to make the age of the children a point of consideration as required by sections of the *Children Act* referred to above. The court's portion of judgement that made reference to the tender age is paragraph 2 of page 5 of her judgement where she stated;

> 'The children in this case are of tender years. It is clear that they have been living with their father since the last orders were granted. I have had a chance to peruse the children officer's report. The issue of the father being away for work is glaring. The same issue came up in the proceedings. Who stays with the children while he is away? Both children are of tender years. There are plethora of decisions that point towards the mother being the primary care giver. The mother indicates that she now has a stable job and lives in the institution where she works in.'

20. What I make of the above analysis is that the court made consideration of all the relevant factors including the age of the children and the parents' availability. That did not mean that the magistrate was purely guided by the doctrine of tender years. She considered the best interest of the children. I find this line of argument lacking merit and I dismiss it.

21. The appellant has contended that the magistrate disregarded the provisions of Article 53(2) of *the Constitution*. That Article dictates that in all matters concerning a child, the best interest of the child shall be the paramount point of consideration. He claims that the best interest of the children would be served by the actual custody being granted to him instead of the respondent.

22. In his submissions on this point, the appellant has claimed that the respondent will not offer the best interest of the children because she did a disgraceful thing of abandoning the children. The respondent on her part stated that she was kicked out of the matrimonial home and denied access to the children. I have gone through the record and there is nothing to suggest that the respondent abandoned the children on her own will. The two versions could be the appellant's word against the respondent's but what is clear is that the parties separated in April 2018 amid disagreements between them.

23. The respondent stated that after she learned that the appellant had taken the children to Nairobi and that he was not willing to give her access to the children, she involved children's officer to enable

her access and discuss custody. Instead of the appellant attending follow up meeting in the children's officer, he resorted to filing of the case in the lower court.

24. It is on record that the appellant transferred the children to Syokimau in 2020 or thereabout as the respondent made attempts to access the children. It is clear in some of the text messages exhibited by the parties that, the respondent was pleading to be given access to the children. It is not clear why the appellant moved the children back to Makueni safe that he alleged that it was due to security. He did not elaborate what insecurity was facing the children to justify their return to Makueni. Was it because he was not available for them throughout and that he needed some adult to be with the children?

25. The children officer's report dated 25-08-2023 states that the respondent has a two bedroomed house in the institution she works in which is enough to accommodate her and the children. Every child has a right to bond with both parents and unless there is proof that any of them or both are not suitable, it will be a violation of the right of the child to deny any of the parent custody or access to the child. Notwithstanding the circumstances in which the children parted ways with their parents, it is in their best interest that they be reunited with their parents as they grow up. In this matter, it has been shown that the children are living with a nanny and their grandmother while the appellant is busy and away working. It is alleged that the grandmother cannot assist the children in their homework.

26. The appellant did not prove the level of suitability of the nanny who is taking care of the children. In my opinion, the best interest of the children in this matter will be served in them living with the parents or any one of them unless there are exemptional circumstances. The magistrate was alive to the fact that the respondent may have been separated from the children for quite sometime and that is why she ordered that there be a transitional counselling before the custody reverts to the respondent. I find this to have been a reasonable and commendable process. I am convinced that the magistrate considered the best interest of the children when she was making the orders as she did.

27. The appellant claims that the magistrate disregarded the provisions of section 103(1)(h) of the *Children Act*. The appellant argues that the children have a half sister who is biological child of the appellant with whom they have formed an emotional attachment as they live together. The appellant argues that separating the minors from their half-sister will have a negative impact on their emotional growth. This in my view is not convincing. There is no evidence of the said emotional attachment. The appellant has not demonstrated the attachment neither is there anything to show that once custody of reverts to the respondents, there is likelihood of the children being affected. In the event there is likelihood of the same, it should be taken care of by the counselling the court ordered. In any event, I hold the view that, continued separation from their biological mother would have similar if not worse emotional, moral and spiritual negative impact.

28. Section 103(1)(h) is meant to protect children from being placed in a household where the siblings therein are not receptive or acceptable to their presence, hence creating a hostile home environment That is not the position in this matter. The respondent has not remarried and she does not have other children and as such the issue of the children not being accepted in the household does not arise.

29. In the fourth ground of appeal, the appellant has claimed that the magistrate disregarded the children officer's report which recommended that the custody of the minors remains with one party, preferably where the children have known to be home for a long time. A children officer's report is meant to guide the court in making decision. The recommendations are not meant to be binding on the court. In BNK vs EMM (2013) eKLR, the appellant raised the same complaint but the Judge held that;

> 'The report of the Children's Officer is not binding to the court and the court always retains the final say in deciding cases by applying legal principles.'

30. Even the report itself acknowledges that fact by stating that the final decision lies;

> 'The report of the Children's Officer is not binding to the court and the court always retains the final say in deciding cases by applying legal principles'

31. The court has the duty of considering the recommendation against the whole report, other evidence produced in the proceedings, circumstances of the case and the applicable laws. The trial court did not disregard the report but considered the same. The judgment of the trial court has made reference to the report and in my opinion, the magistrate's decision was sound on that aspect. The two reports have nothing negative about the respondent while at the same time indicate that the father is not always available. I dismiss this line of argument.

32. The appellant claims that the respondent did not deserve the orders for custody of the children because she had neglected them. According to the appellant, the minors herein have lived with him from 2018 and have become accustomed to his home and since the mother abandoned them in 2018, they should not be disturbed in changing their known home. I hold the view that even where a parent has neglected children, the court can make orders giving the custody if the circumstances allow and as long as it is in the best interest of the child. That said, there is no evidence that the respondent neglected the children. I have already stated the circumstances under which the parties parted ways. At the time they parted ways, the respondent was not working and had to go back to her mother's home. According to her which I believe, the respondent was living with the children in their matrimonial home from which she was kicked out. She had no job. She stated that, she could not go with the children because she did not want to subject the children to the obvious uncertainties owing to her situation. That cannot be termed as neglecting the children. Other than her living the home for a fault that has not been proved, no particulars of neglect have been shown or proved. I decline to disturb the Magistrate's finding based on the argument that the respondent neglected the children.

33. In BNK vs EMM (supra) the Honourable Judge was faced with similar circumstances where she proceeded to hold as follows;

> 'A general principle has always been that custody of young female child should be granted to the mother unless there be shown exceptional circumstances to justify depriving the mother her natural right to nurture the children. Evidence shows that the minor in this case was not under the care of the appellant but that of his parents in their rural home. I have not come across any evidence to show that there are circumstances that make the respondent be denied custody. She has told the court that she is in gainful employment and is capable of taking care of the minor. There is no evidence to the contrary.'

34. The last ground of appeal faults the Honourable Magistrate for finding that the respondent was suitable for custody in disregard of evidence adduced thereby abrogating provisions of sections 107 and 109 of the *Evidence Act*. These provisions deal with burden of proof. The appellant was the one alleging that the respondent was not suitable for custody and as such, burden of proof was on him to prove the respondent's unsuitability which he failed to discharge. In his submissions, the appellant states that the respondent did not prove her capability of taking care of the children. This line of argument is not tenable. The respondent is a biological parent of the children and there is a rebuttable assumption that she had capacity to take care of the children. It cannot be the position in law that the parent who has more financial muscles has a priority over the less fortunate one.

35. In R E RJ-LD (Minor) (2020) eKLR it was held that;

> 'In this case, the applicant is arguing that the mother of the baby has no job hence the reason why the child has been given to the grandmother. This is not an exceptional factor. The minor's father is saying that he is capable of taking care of the baby. I wish to state that, failure to have a steady job by one parent while the other parent is able and willing to provide for the baby while in the custody of either parent is no ground to run away from parental responsibility which is underscored under Article 53(1)(e) which bestows equal parental care and protection on a child from the parents on equal footing.'

36. The parties started living together when the respondent was not working. She bore the children at their then home and raised them until the parties parted ways. The appellant testified that the marriage did not materialize as envisaged because the respondent's relatives made many unreasonable demands. The appellant was fine and comfortable with the respondent staying at home with the children until the differences between them emerged. It would be unfair and travesty of justice to follow the proposition that the respondent has no financial means to take care of the children.

37. The trial court made apportionment of responsibilities in its judgment and none of the parties has appealed the same safe for the appellant's prayer that the respondent contributes Kshs 20,000.00 per month as her share of maintenance. A parent cannot be denied the right to bond and live with their children or the children their rights to bond and live with their parents because of the parents' economic status. The appellant can support the children even when they are in actual custody of the respondent. It is also illogical that the appellant made such allegations when in his suit and in this appeal, he was praying that the respondent be ordered to contribute Kshs 20,000.00 per month towards the upkeep of the children.

38. The totality of the above is that I find no merits in the appeal. The same is dismissed with no orders as to costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Wanjala for the respondent and Miss Wachira for the appellant.