



**CS v NK (Civil Appeal E045 of 2022) [2024] KEHC 12896 (KLR)
(Family) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12896 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E045 OF 2022
PM NYAUNDI, J
OCTOBER 24, 2024**

BETWEEN

CS APPELLANT

AND

NK RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon G.N. Opakasi, in
Milimani Children’s Case No. E504 of 2021 delivered on 11th April 2022)*

JUDGMENT

1. This Appeal arises from a judgment delivered in Milimani Children’s Case No. E504 of 2021. The Appellant is aggrieved by the decision of the Honourable G.N. Opakasi, and has preferred this Appeal. The impugned judgment was delivered on 11th April 2022 and the Court ordered as follows;
 - a. The Parties shall have just custody
 - b. The defendant shall have actual custody, care and control of the minor
 - c. The Parties shall share the custody of the minor equally during the school holidays
 - d. The Plaintiff shall have the custody of the minor every weekend from Saturday at 10.00 am to Sunday at 3.00pm
 - e. Whenever the Plaintiff is not available to access the minor, he shall notify the defendant prior to the day of access.
 - f. Parties shall agree on pick up and drop off point.
 - g. The plaintiff shall cater for the minor’s school fees and school related expenses.



- h. The Plaintiff shall cater for the minor's food at the rate of Kshs 15000/- per month
 - i. The parties shall share the minor's medical expenses equally
 - j. The defendant shall cater for the minor's shelter, remaining part of the food, clothing, nanny, household utilities and any other need arising thereto
 - k. The parties shall travel with the minor out of the Court's jurisdiction subject to consultation with each other and with the consent of either party depending on who is travelling with the minor.
 - l. The parties at liberty to apply with during school holidays and in accordance to the Canadian educational system. He shall pay for the flight tickets for the child.
 - m. Parties are at liberty to apply.
2. The Memorandum of Appeal is dated 25th April 2022 and is grounded as follows: -
- i. That the learned magistrate erred in law in failing to satisfactorily appreciate and correctly apply the principle of the 'best interest of the child' while conferring the actual custody of the minor to the Respondent
 - ii. That the learned magistrate erred in law and in fact by failing to appreciate that it is the appellant who has the actual custody of the minor and that the same should have been sufficient as final orders of the court.
 - iii. That the learned magistrate erred in law in fact by not recognizing the considerations that constitute a determination of the best interest principle in custody disputes between a mother and father and erroneously placed heavy reliance on case law arising from parent's custodial disputes.
 - iv. That the learned magistrate erred in law and in fact by delivering the judgment not in the best interests of the minor.
 - v. That the learned magistrate erred in law and in fact by failing to find that the Respondent had voluntarily relinquished custody of the child and in turn handed over the child to the Appellant when she abandoned the minor in February 2021.
 - vi. That the learned magistrate erred in law by granting exclusive custody of the child to the respondent which amounts to divesting parental rights and responsibilities contrary to Article 53,1(e) of *the Constitution*
 - vii. That the learned magistrate erred in law and in fact by failing to find that the proper care of the minor can only be given by the Appellant considering the he has been providing for the minor single handedly since birth.
 - viii. That the learned magistrate erred in applying the principles of law relating to maintenance
3. The Appellant seeks the following orders
- a. That this appeal be allowed
 - b. That the judgment in favour of the Respondent be set aside
 - c. That the Appellant be granted immediate actual custody of the child
 - d. That the costs of the appeal be borne by the respondent.



4. This appeal was canvassed by way of written submissions. The Appellant’s submissions are dated 4th April 2024 and those of the Respondent are dated 26th August 2024.

Summary of the Appellant’s Submissions.

5. The Appellant framed the following as the issue for determination;
- i. Whether the principle of the best interest of the child was considered
6. The appellant hinges his appeal on Article 53 (2) of *the Constitution* of Kenya which states that ‘A Child’s best interests are of paramount importance in every matter concerning the child’ and refers to Section 83 of the *Children Act* on the principles to guide when deciding of custody in relation to a child. The Appellant submits that since the respondent abandoned the child for a period exceeding 8 months she is not fit to have custody of the minor. It is his submission that it is his suit that cause her to resurface.
7. The Appellant relies on the Court of Appeal decision in *Githunguri v Githunguri* [1979] eKLR and the Australian decision in the case of *U Vu* (2002-2003) CLR 238 where the Court gave direction on factors to consider in determining the best interests of the child.
8. It is submitted that the Applicant does not have the financial means to cater for the minor’s needs and for this reason the Appellant should be granted custody. It is urged that in deciding on custody of the child, the court should be guided by both the tender years doctrine and the Best interests of the child principle.

Summary of the Respondent’s Submissions

9. The respondent frames the following as the issue for determination-
- a. Whether the Appellant deserves the orders sought
10. The respondent relies on Article 53 (2) of *the Constitution* and recites the factors outlines in the 1st Schedule of the Children’s Act on factors to be considered when determining what the best interests of the child are. It is submitted that the trial court properly guided itself on these principles and that therefore the judgment should not be dislodged.
11. Reliance is placed on the decisions in *Keriko v Ndeke* (no citation provided) and *SKM v MWI* [2015] eKLR.

Analysis and Determination

12. I remind myself that this court is sitting on a first appeal and as such I am under a duty to subject the evidence presented before the trial court to scrutiny in order to arrive at my own conclusions bearing in mind always that this court did not have the opportunity to observe the witnesses first hand. In *Selle & another –vs- Associated Motor Boat Co. Ltd.& others* (1968) EA 123, the Court had the following to say in respect of the duty of a court sitting on first appeal:

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular



this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.

13. I have read the entire record of proceedings from the lower court specifically the evidence by the Appellant and the Respondent on the issue of the custody of the child. The Appellant testified as PW1 it is his evidence that he has a steady income and that he and the Respondent were married in 2012.
14. He states that the Respondent abandoned the minor and him on 8th March 2021 and he made a report at Langata Police Station and reported the disappearance to his family and the Child Welfare Society. The Appellant resurfaced after 3 days and they agreed to resolve the matter out of Court.
15. It was his evidence that he had been the minor's sole care giver and that he had also supported the 2 sisters of the Respondent with whom he lived at some point in their marriage. After the departure of the Respondent he employed a nanny who supports him in taking care of the minor. He states that the child is well adjusted and that the respondent should chip in in supporting the minor.
16. He denied that his job required frequent travel and stated that when the child visits the respondent she returns with an infection. He denied that he holds parties in the house and that he abuses alcohol.
17. Roseline Busyeka the sister to the Appellant testified as his witness. She confirmed that the respondent abandoned the minor in March 2021. The respondent had not cooperated with her attempt to mediate between the two. It was her testimony that the Appellant's home at Madaraka is well secured and is spacious for the child to play. She reiterated that her brother has the financial means to provide for the minor.
18. The Respondent testified that she was beaten and chased out of the house and therefore it was not true that she abandoned the minor. She reported the incident to the police and when she tried to go to the house she found that the appellant had instructed the security not to allow her into the house. It was her evidence that the appellant is influencing the minor against her and was also intimidating the minor.
19. She confirmed that the Appellant has employed a nanny. She stated that she resides in Langata in a rental house. She works for liberty insurance on a commission and therefore her income fluctuates. She was not keen on the minor travelling to South Africa with the appellant as the appellant has another family based in South Africa. She contended that the appellant was not taking good care of the minor and this had been confirmed to her by the nanny. She had selected her place of residence deliberately so that it is not necessary to change the child's school.
20. Rita Muhoho testified as DW2. She is a sister to the defendant. It was her evidence that the night prior to the defendant leaving the house she heard her being beaten by the appellant. It was therefore not true that she had abandoned the minor. She was aware that the appellant reported the matter to the police the next day. She maintained contact with the respondent after she left the house she had shared with the appellant. She further alleged that the respondent-maintained contact when she left the house and therefore it was not true that she was a missing person.
21. Having reviewed the pleadings, rival submissions and the record of the trial court, it is clear to me that the central issue in this appeal is whether it is in the best interests of the child to vary the decision of the trial court in granting actual custody of the minor to the respondent.
22. It is trite law that in all matters touching on the child and in all decisions touching on the child, the best interest of the child is to be given paramountcy. Therefore, in determining this appeal this court is alive



to the fact that it is under an obligation as provided under Article 53(2) of *the Constitution* of Kenya 2010 and Section 4(3) of the *Children Act* to give primacy, while considering any disputed matters involving children, to the best interest of child. The law provides factors to consider when determining a child's best interests. In determining what constitutes the best interest of the child, each case is considered on its own peculiar circumstances. Further it is a settled legal principle that in determining matters of custody of children, especially of tender age, except where exceptional circumstances exist, the custody of such children should be awarded to the mother (see J.O v. S.A.O [2016] eKLR). This is what is referred to the Tender years doctrine.

23. The best interest principle was well articulated by Hon Ngugi J. (as he then was) SMM v ANK [2022] eKLR the court observed 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.

24. One is not the alternative to the other, rather the two principles should be considered together to ensure that a court arrives at a decision that safeguards the best interests of the child. The appellant contends that the appellant is not suited to be granted custody as she abandoned the child. I am persuaded as was the trial court that the appellant played a role in the respondent leaving the home. The Court was persuaded by the testimony of Ritah Muhoho that the appellant assaulted the respondent and chased her from the house. It is therefore not true that the appellant abandoned the minor.
25. The weak financial status of the respondent is not a factor that weighs against her in considering whether or not she should be granted custody. The minor herein was born on 14th July 2015, she is a female child. The tender year doctrine favours that a female child of tender years be in the custody of her mother. This was the decision in Githunguri v Githunguri (Supra).
26. When as in the current case there is a fall out between the parents of a child and it is left to the court to make a determination on arrangements to be made so as to safeguard the welfare of the minor, the court is obligated to give primacy to the best interests of the child and not the wishes of the parents which, as in the current case, are often at divergence. The best interest of the child means that the child is granted a stable environment in which she can thrive. The child has access to both parents and both parents honour their parental responsibility towards the minor.
27. It is with this lens that I consider the judgment of the trial court. I find that the trial court made orders that are in consonance with both the tender years doctrine and the best interests of The child. In the circumstances I find that the appeal must fail and uphold the decision of the trial court.
28. Owing to the relationship between the parties there shall be no order as to costs.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF OCTOBER, 2024.

PM NYAUNDI



JUDGE

In the Presence of

Fardosa Court Assistant

