



**MMG (Suing as the Mother and Next Friend of P.M.K, T.A, F.B, D.K & E.M v To
(Children's Appeal Case 5 of 2021) [2023] KEHC 506 (KLR) (6 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 506 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CHILDREN'S APPEAL CASE 5 OF 2021
TM MATHEKA, J
FEBRUARY 6, 2023**

BETWEEN

**MMG (SUING AS THE MOTHER AND NEXT FRIEND OF P.M.K, T.A, F.B, D.K
AND E.M APPELLANT**

AND

TO RESPONDENT

*(Being an Appeal arising from the Judgment of the Honourable Y.I.Khathambi
(S.R.M) delivered on 24th June, 2021 in Nakuru CMCC Children's Case No. E002
OF 2021 P.M.K, T.A, F.B and D.K (Suing through their father and next friend
TO) vs MMG (Suing as mother and next friend of P.M.K, T.A, F.B, D.K and E.M)*

JUDGMENT

1. The appeal arises out of the Judgment delivered on June 24, 2021 in the Nakuru CM Children's Case No E002 OF 2021 at Nakuru.
2. In the case the Plaintiff (the father) who is now the Respondent in this appeal sought orders: compelling the Defendant to forthwith release the subjects to the school they were in prior to Covid-19 Pandemic; full legal, physical and actual custody of the children; structured and supervised access of the defendant appellant to the children until they attain the age of the majority.
3. The Defendant who is now the Appellant (the mother) filed a defence and counter claim seeking orders: actual and legal custody of the minors TA, MK, FB, DK and EM; extension of parental responsibility for BN beyond the 18th birthday; maintenance of all the children (i.e payment of school fees and all school related expenditure; shelter; food of Kshs 20,00 per month; clothing; two(2)house helps Kshs 10,000/=; utilities and medical cover); an order that the defendant be compelled to allow the plaintiff and the minors herein back to their matrimonial home situated on LR No Njoro/ngata Block 1/538.



4. The learned children Magistrate heard both parties. She found that each claim had succeeded partially and made the following orders:
 1. The Plaintiff and the defendant are granted joint custody of PK, TA and F.B.
 2. During school holidays the defendant now plaintiff will be the first to have custody of the subjects 70% of the holiday while the plaintiff now the defendant will have custody of the minors at 30% of the period before schools open.
 3. Actual Custody, Care and Control of DK and EM is granted to the defendant now plaintiff in the counterclaim. Since the school term is almost coming to an end, in the minor's best interest DK will be handed over to the defendant now plaintiff on the 2nd day upon closure of the schools.
 4. The plaintiff now defendant will have access to EM and DK on Saturday and Sunday every fortnight from 9 am to 5 pm.
 5. Parties to agree on the pick-up and drop off point. Failure to which the subject will be picked and dropped off at Midlands hotel.
 6. The plaintiff now the defendant in the counterclaim to cater for the minor's school fees, school related expenses and medical expenses.
 7. Each parent will cater for all the children's needs while the children are in their custody. This include shelter, food, clothing, utility bill, entertainment etc.
 8. Plaintiff now defendant to ensure that the children go through counseling in order to understand the situation and heal from the wounds caused by the parents' separation.
 9. I hereby extend the parental responsibility beyond eighteenth birthday for BN.
 10. Each party to bear their own costs.
5. The appellant was aggrieved and filed this appeal on the following grounds:-
 1. That the trial Court erred in law and in fact, in failing to distinguish and/or specify the type of joint custody granted to the Appellant and the Respondent of the Minors PMK,TA and FB.
 2. That the trial court erred in law and in fact in granting 30% custody to the minors PMK, TA & FB to the Respondent and in disregarding the Appellants genuine concerns raised of the Respondent's changed marital status, his unavailability to the minors, their general welfare and security thereof in the hands of third parties.
 3. That the trial court erred in law and in fact in totally disregarding the Appellant's prayer of reinstatement of the minors herein to their matrimonial home situated on LR No Njoro/ Ngata Block 1/538 registered in the Respondent's name
 4. That the trial court misdirected herself on Children's Law and Principle applicable in considering the Appellants prayers in three (3) above vis a vis the Matrimonial Property's Act hence arriving at a very erroneous finding.
 5. That the trial court erred in failing to apportion parental responsibility needs to the parties equitably.
 6. That the trial court erred in apportioning a lion share of the parental responsibilities to the appellant herein.



7. That the trial court erred in ignoring and or failing to consider the Appellant's counterclaim on distribution and or apportionment of parental responsibility over the minors herein.
 8. That the trial court considered extraneous factors that vitiated her good judgment in apportionment of the parental needs.
6. The Respondent was equally aggrieved and filed a cross appeal raising four (4) grounds namely:-
1. That the learned magistrate erred in law and fact in apportioning custody of PK, TA, and FB at 70:30 percentage in complete disregard of the minor's wishes as well as uncontroverted evidence.
 2. That the trial court erred in both law and fact by failing to appreciate the best interest of the minors as well as the appellants' incapability of providing for the minors by wrongfully granting the Appellant actual custody care and control of the minors DK.
 3. That the learned trial magistrate erred in law and fact in separating DK from the other minors by granting the Appellant full custody.
 4. That the trial court misdirected itself both in fact and law, by extending parental responsibility of BN beyond her eighteenth birthday, in complete disregard that the purported extension was not applied for by BN who is now an adult.
7. The respondent's prayer was that the findings of the learned Children Magistrate be upheld save that :-
1. This Honourable Court be pleased to grant legal, physical and actual custody of the minors in full to the respondent.
 2. This Honourable Court be pleased to issue an order allowing the defendant structured and supervised access to the subjects until they attain the age of majority.
 3. The Honourable court to quash the extension of parental responsibility beyond the 18th birthday of BN.
8. He also prayed for costs of this Cross Appeal.
9. When this matter came up for directions, the parties agreed to argue the appeal by way of Written Submissions. For the Appellant submissions were filed by Elizabeth Wangari & Co Advocates, while those of the respondent were filed by Mirugi Kariuki & Co Advocates.
10. It is important to note that before the appeal was heard there were interlocutory applications with respect to DK and the court issued appropriate directions.

Appellant's Submissions

11. The Appellant filed her submissions on December 15, 2022.
12. On the first ground counsel for the Appellant submitted that the trial court erred in failing to distinguish and or specify the type of joint custody granted over the subject minors.
13. Counsel relied on section 2 of the *Children Act* on definition of custody and the case of *JO vs RMM Nakuru DC No 4/2004(2005) KLR*, where Musinga J defined Actual custody to mean the actual possession of the person of the child as opposed to legal custody which means as respects a child, so much of the parental rights and duties as relates to the person of the child including the place and manner in which time is spent.



14. She submitted that it should not be lost that the respondent sought legal, physical and actual custody of the subjects herein to be vested in full to him while the appellant sought for actual and legal custody of the minors TA, MK, FB, DK and EM.
15. She referred this court to the case of [*AOA vs SFA \(Family Appeal E022 of 2021\) \[2022\] KEHC 10746 \(KLR\) \(27 May 2022\) \(Judgment\)*](#) where the court held that where there are no extenuating circumstances the actual custody of a child of tender age in the interest of justice pursuant to Article 53 (2) of the [*Constitution*](#) and Section 4 (2) and (3) of the [*Children Act*](#) should be with the mother as she has a natural unique body and biological chemistry to a child of tender age which guarantees a child's emotional and psychological development besides physical attention like cleaning soiled clothes, special attention and closeness when sick.
16. Counsel beseeched this court to be persuaded by the above finding and grant legal and actual custody to the appellant with structured access to the respondent.
17. On the second ground, counsel submitted that the trial court erred in granting 30 % custody of the subject minors to the respondent considering the appellant's concerns regarding respondent's change of marital status and his unavailability to the minors, to their general welfare and security thereof in the hands of a third party.
18. The counsel while relying on Article 53(2) of the [*Constitution*](#) 2010, Section 8(1) and (2) of the [*Children Act*](#) No 29 of 2022 submitted that the best interest of the minors herein was of paramount consideration when determining the issue of custody.
19. She submitted that the principles to be applied in making custody orders are set out under Section 103(1) (a) (c) and (j) of the [*Children Act*](#) No 29 of 2022 which provides that in determining whether or not a custody order should be made in favour of an applicant, the court shall have regard to the conduct of the parent or guardian of the child; the ascertainable wishes of the child taking into account the child's evolving capacity; and the best interest of the child.
20. Reliance was placed on the case of [*JO vs SAO \[2016\] eKLR*](#) where the court stated that:-'Section 83 (1) of the [*Children Act*](#) outlines the principles to be applied in making custody orders. They include the ascertainable wishes of the child. But as Njagi, J held in [*BK versus EJH \[2012\] eKLR*](#), 'the test for the best interest of a child is not subjectively dictated by the selfish whims of a child. There has to be an element of objectivity a child's wish to stay with a particular parent might not be in his best interest. In such a situation, his own preference may not be automatically allowed. The wishes and feelings of a child must therefore be treated with a lot of caution.'
21. The appellant urged this court to be persuaded by the holding in the above case.
22. She submitted that trial court in making orders did not apply correctly the principles set out above for the following reasons:The trial court not only disregarded the best interest principle and wishes of the minors herein but also the fact that the respondent has since remarried and working in Embu County and therefore spends most of his time away from the children. To buttress this position she urged this court to be persuaded by the holding of [*Ramadhan Ali Athman vs Peter Mwingo Chirima \[2020\] eKLR*](#) where the court stated that the ascertainable wishes of the children is a key consideration in making a custody order but a court must however caution itself on the need to be objective bearing in mind both the short and long term interests of the children.The trial court failed to consider the children were of tender years within the meaning of section 2 of the [*Children Act*](#) and thus custody ought to be with their mother. They relied on the cases of *JO vs SAO* (supra)where the court held that custody of children of tender age should be awarded to the mother except where there are exceptional circumstances; [*Githunguri vs Githunguri \[1979\] eKLR*](#) where the court held that the custody of very



young female children should be granted to their mother in The absence of exceptional circumstances and the court of appeal in *Sospeter Ojaamong vs Lynette Amondi Otieno Civil Appeal 176 of 2006* where the court held that exceptional circumstances would include if the mother is unsettled, has taken a new husband or her living quarters are in a deplorable state.

23. Counsel submitted that no evidence was placed before the trial court to merit its departure from this general rule thus awarding custody in the ratio of 70:30.
24. On the third and fourth grounds, Counsel submitted that the trial magistrate erred totally in disregarding the Appellant's prayer of reinstatement of the minors herein to their matrimonial home situated on LR NONJORO/NGATA BLOCK 1/538 that is registered in the respondent's name. She referred this court to provisions of Article 53(2) of the [Constitution](#) 2010 and the case of [Bhutt vs Bhutt, Mombasa HCCC NO 8 of 2014 \(OS\)](#) where the court held that the best interests of a child are superior to rights and wishes of parents and they incorporate not just the physical comfort of the child but the welfare of the child in its widest sense.
25. The appellant further referred this court to the provisions of section 31(1) and (2) of the [Children Act](#) No 29 of 2022 on the duties of the parents and submitted that in this case the appellant and respondent were living with the minors in their matrimonial home situated in the aforesaid parcel of land and therefore the court ought to have given primary consideration to the best interest of the children by allowing them to reside in their matrimonial home that they were used to. To bolster their argument reliance was placed on section 8(2) of the [Children Act](#) No 29 of 2022 which mandates the court to consider the best interest of the child in their decision and the cases of [HR vs NJAC \[2021\] eKLR](#) where the court stated the court has inherent powers and discretion to make orders that take into account the best interest of the child and should not shy away from taking that extra mile to ensure that the same is achieved and [NHB v RRF \[2021\] eKLR](#) where parties therein agreed the house to be registered in trust for the child.
26. Counsel submitted that in the instant case the appellant did not seek for declaration of rights over and or distribution of matrimonial property as set out in section 7 and section 17 of the Matrimonial Act but her prayers were intended to serve the best interest of the minors herein and therefore were well within the jurisdiction of the trial court.
27. On the fifth, sixth, seventh and eighth grounds, Counsel submitted that the trial magistrate erred in failing to apportion parental responsibility needs to the parties equitably. The appellant cited the Article 53(1)(e) of the [Constitution](#) and the cases below:-
 1. [ZAK & Another v MA & another \[2013\] eKLR](#) where the court held that in line with provisions of section 7 of the Children's Act, the [Children Act](#) must be read as imposing parental responsibility for children on both of their biological parents, whether they were married to each other or not at the time of the child's birth.
 2. [EMM vs MOO \[2016\] eKLR](#) where the court held that equal responsibility does not mean equal and similar contribution as the income of each parent and other non-monetary contribution must be borne in mind.
 3. [MOA vs HAO \[2021\] eKLR](#) where the court took cognizance that parents may not have equal financial ability for the court to demand equal contribution but one must at least exhibit some sense of seriousness in making some contribution as a sign of good will that he or she is not geared towards overburdening the other parent for the sole purpose of punishing him or her using the best interest of a child principle or as a ground to settle scores out of matrimonial differences.



4. [*RWM vs PMM \[2021\] eKLR*](#) where the court held that Parental responsibility is a shared responsibility between the parents of a child. The court stated:- 'The learned Magistrate directed the Appellant to take care of school fees and school related expenses and in addition a monthly sum of Kshs 13,000/=. The Respondent on the other hand was directed to take care of shelter and clothing. It would appear to me that the learned Magistrate placed a heavier responsibility on the Appellant without knowing just how much each of the parties brought in by way of income. My view is that in the interest of fairness and given that the income or earning capacity of the parties is unknown, the amount awarded for food and grooming for the child ought to be shared equally.'
 5. [*DS \(Minor Suing through her Mother\) JWM v CKK \[2021\] eKLR*](#) where the court held that when apportioning parental responsibility the court must take into account the financial capabilities of each parent.
28. In view of the above precedents, the Counsel argued that the trial court gave the appellant heavier burden in terms of parental responsibility of catering for the minors food, shelter, utilities, clothing, house girl and entertainment compared to respondent who was only directed to cater for minors' school fees, school related expenses and medical expenses and need while children are in his custody.

The Cross Appeal

29. On ground one, two and three of the cross appeal, the appellant's Counsel submitted that the court did not err in granting the appellant actual custody, care and control of the Minor DK since it is not disputed that she is a child of tender years and has medical condition which requires constant attention.
30. It was also argued that it was the child's wish to stay with her mother since her step mother usually beat her and that there was no cogent evidence adduced by the Respondent to demonstrate that the Appellant was either incapable and/or unfit to have custody of the minor herein. To buttress this position she placed reliance on the case of [*EKM vs EBO \[2020\] eKLR*](#) where the court held that the fact that a mother does not have financial resources did not amount to exceptional circumstances to deny her right to custody of a child of barely three years.
31. On the last ground, the Counsel submitted that the court rightly extended parental responsibility of BN beyond her 18th birthday. That in light of Section 35 of the [*Children Act*](#) No 29 of 2022 and Section 28 of the [*Children Act*](#) 2001(repealed) it is not mandatory that the application for extension of parental responsibility be made by the child herself. For this proposition reliance was placed on the case of [*C M G vs M M M \[2014\] eKLR*](#) in which the court while determining similar issue, held that it is not necessary that an application to be made by an applicant for the children's court to extend parental responsibility in respect of the welfare of a child if the Court forms an opinion that it would be in the best interest of a child ,on its own motion it can grant such extension of parental responsibility beyond the 18th Birthday and proceed to issue an appropriate maintenance order.
32. Counsel further argued that during hearing the Respondent expressed his willingness to support BN beyond her 18th birthday and that no prejudice will befall him if the extension order is granted.
33. On costs, it was urged that the same is discretionary and ordinarily follows the event under Section 27 of the [*Civil Procedure Act*](#).

Respondent's Submissions

34. The respondent filed his submissions on December 16, 2022.



35. His counsel framed four issues for determination. Namely:-
1. Whether the trial court erred in law and in fact by disregarding the wishes of the minor as well as the evidence on record in apportioning custody of the subjects at 70% and 30%.
 2. Whether the learned magistrate erred in law and in fact in granting actual custody of the minor DK to the Appellant herein and separating her with other minors
 3. Whether the trial court erred in fact and in law by extending parental responsibility for Bervaline.
 4. Whether a children's court has jurisdiction to deal with matrimonial property issues.
 5. Whether the court apportioned parental responsibility needs to the parties equitably as per evidence adduced during trial.
36. On the first issue, the respondent's Counsel referred this court to the provisions of Section 8(3) of the *Children Act* echoed in section 4(4) of the *Children Act, 2001* which requires the opinion of a child in any matter concerning him to be taken into account while having regard to child's age and degree of maturity and submitted that the record herein shows that PK and TA clearly stated that they wished to stay with their father and during holiday, with their mother but the court ignored the same.
37. He argued that the court further failed to consider evidence of exposure of the minors to harmful practices contrary to the provisions of Article 53(1) (d) of the *Constitution* of Kenya.
38. The Counsel referred this court to provisions of section 8(1) of the Children's Act and paragraph 18 of the Children's Act 2022 and submitted that whereas it has been practice that a mother should be granted custody of the minors where there is no exceptional circumstances, witchcraft is a very serious allegation to be brushed off. He argued that the appellant waived her custody right when she visited a witchdoctor alongside her children. He associated himself with the decision of the court in *AKHIV & Anor vs FNK [2022] eKLR* where the court stated that custody will not be granted where a mother will not contribute to the child's welfare. That welfare is not only the ability to provide but must mean consideration of whether the child is likely to suffer harm whether physical or emotional.
39. Counsel submitted that the court disregarded the letter produced by the respondent to show the appellant had visited the witchdoctor with her children that was corroborated by his witness BC. He contended that the appellant's assertion that she wrote the letter under duress was not backed by any evidence as she did not report the same to the Police station.
40. The respondent cited the case of *MA vs R O O [2013] eKLR* where the court stated that the best interest of a child includes the right of a child to be provided with shelter, food, clothing, education and medical care, and Parental guidance where possible by both parents and further a suitable, conducive and loving environment in which to grow up in.
41. In light of the above case, it was argued that the Appellant cannot safeguard, promote and conserve the rights of the children herein as she exposed the children to sorcery and unilaterally transferred the children to low performing school.
42. Counsel further submitted that the subjects herein have been raised together since birth and have grown together even after the appellant left them with the respondent in 2016 until June 24, 2021 when the trial court delivered its judgment. That the children have been living together with the respondent without any issue yet the trial court without any iota of evidence separated her from her



siblings. He cited the case of *JO vs SAO [2016] eKLR* where it was held that 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.' Counsel submitted that exceptional circumstances in this case include the emotional and psychological torture of the children by the appellant through subjecting them to witchcraft and associated rituals and leaving them for over five years.

43. He submitted that the court failed to honor its duty to protect the minor DK bestowed upon it under Section 4(2) (3) and (4) of the repealed *Children Act* 2001. He argued that despite the minor DK being a child of tender years, she needs to be brought up in the same environment as the other minors and that under Sections 24 & 83(1) (i) of the repealed *Children Act* 2001 preference for a mother as the custodial parent is not absolute. Counsel referred this court to the case of *THJ vs SMO [2014] eKLR* where the court held that the best interest of the child dictates that he be raised together with all his siblings and not apart from them in a different home.

44. To buttress the point of split custody, counsel placed reliance on *T AWK vs JS [2021] eKLR* where the court stated as follows: -

' Second, as a general rule, Courts disfavor split custody awards especially where young children are concerned unless there are exceptional circumstances to warrant them. This is because separating siblings especially when they are of tender years is likely to be traumatic on them. Most siblings develop strong and loving bonds with each other that last a lifetime and Courts have an obligation to, as much as possible, make decisions that facilitate this. There are, also, many practical logistics involved with raising children that make it more logical to keep children together where there are no exceptional circumstances. It is in the best interests of the children to keep them together.'

45. On the third issue, it was submitted for the respondent that the order of extension of parental responsibility ought to have been applied for by Bervaline and that by extending her maintenance despite her not being a party to the suit amounted to trial by ambush .

46. On the fourth issue, it was argued that the trial court lacked jurisdiction to make an order on matrimonial property and that the Appellant ought to have instituted a matrimonial property cause under Section 17 of the Matrimonial Property Act 2013 in order to claim the house.

47. On the fifth issue, the respondent submitted that during trial each party gave their proposal on apportionment of responsibilities which the trial court rightly considered. He contended that the Appellant's dissatisfaction on the same is contrary to her evidence before the lower court and depicts a selfish person who is out to enrich herself. The respondent submitted that the contention that the appellant was directed to shoulder a heavier burden is erroneous and expressed his willingness to interchange the roles as currently apportioned.

Analysis And Determination

48. This being the first appeal, this court is obligated to consider all the evidence tendered before the subordinate court and arrive at an independent conclusion. This duty was set out by the Court of



Appeal in the case of Kenya Ports Authority vs Kusthon (Kenya) Limited (2009) 2EA 212 wherein it was held inter alia, that: -

' On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly, the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence'.

49. Having perused the Memorandum of Appeal and Cross Appeal, the Record of Appeal as well as the submissions filed by both parties, the issues that fall for determination are :-
1. Whether the appellant is incapacitated from taking care of the children.
 2. Whether the Learned Magistrate erred in apportioning custody for PMK, TA and FB at 70 % to the Appellant and 30% to the Respondent.
 3. Whether the learned magistrate erred in granting full custody of DK to the Appellant.
 4. Whether the trial court failed to specify the type of Joint Custody granted to the Parties herein of Minors PMK, TA and FB.
 5. Whether the trial court erred in failing to reinstate the subject minors to their matrimonial home situated on LR NO.NJORO/NGATA BLOCK 1/1538 registered in the Respondent's name
 6. Whether the trial magistrate erred in the manner she apportioned parental responsibility over the children between the appellant and respondent
 7. Whether the trial court erred by extending parental responsibility of BN beyond her 18th birthday.
 8. Whether the appellant is incapacitated from taking care of the children.
50. To declare a mother an unsuitable parent to her children and deny her access must be the last resort in such proceedings. Evidence must be led that demonstrates the depravity upon which such an order must lie. The respondent has laboured the point that the learned children magistrate ought to have found the appellant to be an unsuitable mother and to deny her actual custody of the children on the basis of the allegations of belief in witchcraft. It was also alleged that she visited a witch doctor with the children. From the record no evidence was led to support the alleged visit to the witch doctor save for the disputed letter of confession by the appellant and an affidavit sworn by a former house to the effect that one of the children told her about the alleged visit. However none of the children spoke about any visit to a witch doctor even when interviewed by the Magistrate. In fact the children expressed the strong view that they would like to be with their mother over the school holidays.
51. The children also expressed their views on the manner their step mother was treating them since their father works away from home.
52. The adults in this family have the responsibility to create a harmonious system that works for the children without causing them further trauma. This cannot be done through cutting ties when there is no proven grounds for that. The allegations and counter allegations must be dealt with in the appropriate manner without creating a toxic environment for the children. The court cannot live with the families to see and direct what happens hence the moral duty of the parents to do the right thing.



53. The magistrate made the correct finding on this issue.

Whether the Learned Magistrate erred in apportioning custody for PMK, TA and FB at 70 % to the Appellant and 30% to the Respondent.

54. Article 53 (2) of the Constitution and Section 8 of the Children Act obligate this court to give primacy to the best interest of children in all matters dealing with the child. It is also the duty of a court in determining issues of custody of children to ensure that the provisions of Section 103 of the Children Act are taken into account. This Section provides that:

' 103. Principles to be applied in making custody order

- (1) In determining whether or not a custody order should be made in favour of an applicant, the Court shall have regard to— (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 the child taking into account the child's evolving capacity;
- (d) Whether the child has suffered any harm or is likely to suffer any harm if the order is not made;
- (e) The customs of the community to which the child belongs;
- (f) The religious persuasion of the child;
- (g) Whether a care order, supervision order, personal protection order or an exclusion order has been made in relation to the child concerned, and whether those orders remain in force;
- (h) The circumstances of any sibling of the child concerned, and of any other children of the home, if any;
- (i) Any of the matters specified in section 95(2) where the court considers such matters to be relevant in the making of an order under this section; and
- (j) the best interest of the child.'

55. The appellant is the biological mother to the children PMK, TA and FB whereas the respondent is the father.

56. The respondent before the lower court prayed for full custody of the subjects herein on grounds that he had been living with them and solely taking care of their needs i.e their education, shelter, food and upkeep since the year 2016 when he separated with the Appellant until on or around June, 2020 when the Appellant took them away for holiday.

57. The respondent contended that the Appellant is unsuited to take care of the minors as she believes in witchcraft and had visited the witchdoctor in Kitui alongside her children. That this act exposed the minors to harmful and immoral practices. The Respondent in his affidavit sworn on July 17, 2018



attached a letter by the Appellant marked as TO1. In this letter the Appellant confessed to having gone to Kitui and apologized for it. The relevant part of the letter regarding this issue states as follows:

' Trip to kitui- my sickness, trabling nyakar, strong mapenzi between me and my husband, I was tempted to go to Kitui through Racheal I managed to go to Kitui.'

58. This letter is not proof that the Appellant had travelled to Kitui to seek services of a witch doctor either alone or with the children.
59. The affidavit of BCC who was the house help of the parties sworn on August 25, 2018 is not supported by any direct information from the said child.
60. There is no evidence that the respondent's changed status has affected the welfare of the children. Even if they were living together and duty called, the respondent would still have to live away from home. That does not mean that he does not care about the welfare of the children.
61. The trial court privately interviewed the minors herein. PK stated that she lived a good and comfortable life with both parents and was categorical that she wished to stay with their father who pays school fees and caters for her needs and was ready to visit the mother during holidays. She was comfortable in the current school and was not ready to move schools. It was her statement that their stepmother cared for them and proposed that she be allowed to stay with each parent equally during the holidays. TA stated that he wanted his parents to reconcile and live in the same house. He wished things would remain as they were on the issue of custody. FB stated that she wanted to remain in the current school and to stay with her mother for the better part of the holiday.
62. From the above evidence it was clear that the children wished to stay with their father and visit with their mother during the school holidays. There is no evidence that the father will not take care of their welfare and that his new marital status will prejudice their welfare.
63. The court considered the best interest of the child while determining this issue. The court also considered the evidence adduced by each party. Regarding the Respondents contention that the appellant is not suited to take care of the minors as she might expose them to harmful practices by dint of her belief in witchcraft the trial magistrate held that there was no evidence to demonstrate that the alleged visit to the witchdoctor in the year 2016 continues to affect the appellant's capacity to take care of the subject; no evidence was presented to prove that the appellant's currently practices witchcraft; no evidence was produced to show that the appellant harmed the children during the time the children stayed with her in the year 2020 when schools closed and when the court examined the children herein all confirmed that they were well cared for by the appellant.
64. Regarding the Appellants contention on non-suitability of the Respondent to take care of the minors welfare, the trial court found that the children had been in custody of the Respondent since 2016 and that they were happy with the current living arrangement, happy with their current school and wished not to be moved. The trial court also took into consideration that the children love their mother but wished to visit her during school holidays. The court considered the importance of certainty and consistency in the children's lives.
65. It is evident therefore that the learned children's court magistrate dealt with this issue substantively, took into account the evidence of both parties, of the children regarding their ages and their wishes and ultimately made orders which were in the best interest of the children.

Whether the learned magistrate erred in granting full custody of DK to the Appellant.

66. At the time of hearing DK was 8 years old and a child of tender years.



67. It is now settled law that in the determination of any matter where the welfare of a child is concerned, the child's best interest should be of paramount consideration. Where the custody of a child of tender years is in issue, such custody should be with the mother of the child unless there are extenuating circumstances. In that regard, in *KMM vs JIL [2016] eKLR* Mungai J held thus:

' A child of tender years' best interest and welfare are where the legal custody is awarded to the mother barring extenuating circumstances that would prevent the mother from providing protection and care of the child. Case law lends credence to the proposition that in cases of a child of tender years of less than 10 years as defined under Section 2(1) of the *Children Act* 2001, custody is granted to the mother'.

68. In *Mebrunnisga vs Parves [1981] KLR 547*, the court of Appeal stated:

' [T]he custody of a child of tender years should always be a mother's right except where she has through her own misconduct, divested herself of that right.'

69. Through directions given on the March 31, 2022 this court reviewed the subordinate court's order with respect to DK so that the same order with respect to custody of her siblings would apply to her. This court took into account the finding of fact by the magistrate that the child DK and her siblings had lived together with their father for five (5) years prior to these legal proceedings and there had been no problem. I am not persuaded that there were any reasonable grounds to create a different separate custodial order for DK. It is the view of this court that the separation of children who are siblings should be the last resort. Outside of extenuating circumstances each is entitled to equal time with the other siblings and with each parent. In this case DK the order of the learned trial magistrate denied DK this and went against her own finding about consistency and certainty. The order giving the appellant full custody of DK alone is set aside.

Whether the trial court failed to specify the type of Joint Custody granted to the Parties herein of Minors PMK, TA and FB.

70. The Appellant submitted that the trial court ought to have granted legal and actual custody Minors PMK, TA and FB to the appellant with structured access to the respondent. According to the *Children Act* 2022,

' Custody' means lawful custody, whether by operation of law, written agreement or order of a Court of competent jurisdiction;

'Actual custody' means the physical possession, care and control over a child, whether or not such custody is exercised independently or jointly with another person;

'Legal custody' means the conferment, to a person, of parental rights and responsibilities of a person having lawful custody over a child for a defined period of time under an order of a Court of competent jurisdiction;

71. On access the Act specifies under Section 103 (2) and (3);

(2) Where a custody order is made giving custody of a child to one parent, the Court may order that the person not awarded custody shall nevertheless have all or any rights and duties in relation to a child, other than the right to actual possession, jointly with the person who is given custody of the child.



- (3) The rights specified in subsection (2) include the right of access to the child on such terms as the Court may direct.
72. From the judgment the subordinate court gave both parents legal custody of the children. None lost their parental responsibilities over the children. The court demarcated the time each would have the actual custody of the children. In my view that was well defined despite the current contest over the period of time each was granted with the children.
73. Our law has no definition of structured access. What we have is a supervision order as provided for under Section 136 of the *Children Act* which states (1) The Court may, either of its own motion or on application by any person for any order directing the care and protection of a child, make an order, in this Act referred to as a supervision order, placing the child under the supervision of a children's officer or an authorized officer. The court which finds that access requires supervision has the power to make a supervision order and direct that any such access is supervised by a children officer. This power is found under Section 150 which states Power of Court in respect of children in need of care and protection. At Section 150(2)(k) the court may make any other order which the Court may think fit, and in the best interest of the child. Children who are subjects of such proceedings as these are recognized by the law to be in need of care and protection because of the psychological and emotional trauma they are exposed to when their parents break up and begin to haggle over them and their upbringing. While the children herein remain to be children in need of care and protection, no concerns were raised to warrant a supervision order during access.
74. That said, it is noteworthy that the father of the children remarried. He works away from home and the children remain in the care and control of their step mother. They are in boarding school hence the time they spend with their parents is the school holidays. It is this time that the parents must share equitably so that the children get equal time with each parent.
75. My view would be that it would be in the best interests of the children to spend 50% of the school holiday with each parent.
76. Hence the father will have the custody of the children during the school term where they will be in school. The school holiday will be shared equally.

Whether the trial magistrate erred in the manner she apportioned parental responsibility over the children between the appellant and respondent

77. The Children's Act sets out parental responsibilities of each parent of a child. Section 31 the Definition of parental responsibility as follows; -
- In this Act, 'parental responsibility' means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child'
78. It then sets out the specific duties.
79. Section 32 provides for equal responsibilities;
- ' Equal parental responsibility
- (1) 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 parental responsibility whether or not the child is born within or outside wedlock.

- (2) A person who has parental responsibility over a child shall at all times have the duties, powers and responsibilities as are prescribed in this Act or any other written law.'

80. The Court of Appeal in *Atwal vs Amrit (2011) eKLR* stated that:-

' Article 53(1) (e) and section 24(1) *Children Act* allow both parties to have equal parental responsibility for the child. Neither has a superior right to the other. The court held that the rights and wishes of parents and the fact of parenthood, although relevant and important, are subordinate to the best interest of the child.'

81. There's not a time that a parent can drop his or her responsibilities over their child.

82. The appellant proposed that the respondent do pay school fees and all related expenses and medical while she caters for clothing bills, entertainment and house girl. The Respondent on his part stated that he was ready to cater for all needs of the children if granted custody.

83. The Appellant also was categorical that when the children were in her custody she would take full care of their needs.

84. The court adopted the appellant's proposal in its judgment and directed each parent to cater for all other needs while the children are in their custody. The appellant in this appeal has not denied her proposal on this issue. The trial court therefore did not err in holding as such.

Whether the trial court erred in failing to reinstate the subject minors to their matrimonial home situated on LR NO NJORO/NGATA BLOCK 1/1538 registered in the Respondent's name

85. Throughout the submissions counsel for the appellant made reference to the matrimonial home. Children do not have a matrimonial home. They simply have a home. By making reference to the matrimonial home it is the appellant who brought the issue of matrimonial property into the matter hence creating the situation that led the learned children magistrate to recant jurisdiction quite rightly. The appellant in her testimony indicated that if the matrimonial home was not available she could have alternative shelter.

86. From the evidence before the court on March 23, 2021 the appellant told the court that the respondent had custody for five (5) years that is from the time she separated with him in 2016. Hence from the time she left, she had not been living with the children in the matrimonial home. It would appear to me that the clearly there was no basis upon which the court would be persuaded to make the order sought. First, the appellant and the children had not been living there just before this matter came to court. This was not a case where the respondent had thrown out the respondent and the children out of their home. It is a case where the appellant had left the matrimonial home and the children only to come back and find that the family had moved out of that home. This scenario is not the same as the one where the respondent throws out the family and they have to be returned home. It appears that he simply made alternative arrangements for the family while the appellant was away, something that she seems aware of as noted from her prayer for alternative accommodation. The appellant appears alive to the fact that the issue of the matrimonial home is a dispute for another place.



Whether the court erred in extending parental responsibility for B N

87. Section 35 of the *Children Act* 2022 provides for Extension of responsibility beyond eighteenth birthday;

- ' (1) Parental responsibility in respect of a child may be extended by an order of the Court after the date on which the child attains the age of eighteen years if the Court is satisfied, either of its own motion or on application by any person, that special circumstances exist with regard to the welfare of the child that would necessitate the making of such extension.
- (2) The special circumstances referred to in subsection (1) include cases where the child is in need of extended parental responsibility by reason of special needs arising from severe disability or developmental disorder.
- (3) An application under this section may be made either before or after the child has attained the age of eighteen years by—
 - (a) The parent;
 - (b) Any person who has parental responsibility over the child or by a relative of a child;
 - (c) The Secretary; or
 - (d) The child.'

88. BN is the first born child of these two parties. It come out of their own evidence that she had discipline issues, relationship issues with the parents, the father accusing her of disrespect and insults hurled at him the mother saying that the father was responsible for the a the rape against their daughter because he entertained his relatives in the home. There is nothing to show that anyone listened to her to hear her side of the story and they have engaged in this blame game between them of the role each has played in 'spoiling' her. There is even a silent mention of her getting pregnant and there being a grandchild. I read in the father's testimony that according to him the grand child was not part of this. This court wonders how these two parents can be oblivious of the fact that their relationship could be the greatest contributor to her so-called disturbed life. She even had a child when she was not ready to do so. There was a need for that order extending that parental responsibility.

89. The only thing is that it appears to have been limited to paying school fees for her college et al. Let me remind the parties here that parental responsibility is the whole stretch set out under Section 31 of the *Children Act*.

- ' (2) The duties referred to in subsection (1) include, but are not limited to—
 - (a) The duty to maintain the child and, in particular, to provide the child with—
 - (i) Basic nutrition;
 - (ii) Shelter;
 - (iii) Water and sanitation facilities;
 - (iv) Clothing;



- (v) Medical care, including immunization;
 - (vi) Basic education; and
 - (vii) General guidance, social conduct and moral values;
- (b) The duty to protect the child from neglect, abuse, discrimination or other differential treatment.'
90. If it is true as stated by the appellant that this child was a victim of rape and they did nothing about it then they both need help together with their child. I emphasize that these circumstances call for extension of parental responsibility of both parents.
91. At the end of the day the issue is not about the appeal and cross appeal but about the interests of the six (6) children between these two.
92. Having read through evidence, the submissions by the counsel for the parties, the report on DK by the children Officer, the outcome of these two appeals must be that the children must be the winners in the end. I must lay emphasis on the fact that such disputes must never lose sight of the fact that they are and must always remain about the best interests of the child.
93. With that in mind the following orders issue;
- a. Pursuant to Section 135(1) (e) of the *Children Act* a family assistance order be and is hereby issued with respect to the whole family including the step mother and her children. The parents in consultation with the Children Officer to identify a counsellor to provide such advice, counselling and guidance to the children, their parents, their step mother.
 - b. Both parents will have legal custody of the Five (5) children who are still minors. The separate order for DK is set aside.
 - c. The parental Responsibility extension order for BN will remain in force upto the time she completes her diploma.
 - d. The parents be and are hereby directed to arrange for BN's and their counseling. This order be served on the Children Officer for compliance.
 - e. Other than EM the other children will be in the actual custody of their father as they attend school. To ensure accountability of the stepmother, the Children officer to avail a Social Inquiry Report on the step mother and her views on this shared parenting. This order be served on the Children Officer for compliance.
 - f. Since the children are in boarding school the parents will share the actual custody during school holidays at 50:50. They will be with the mother in the first half of the school holiday and with the father in the second half of the school holiday. The parents are at liberty to mutually revise this and if they do, to bring the same to the attention of the court.
 - g. The order on school fees and maintenance was based on the proposals made by the parents at the hearing. I find no reason to disturb the same. Each parent will take care of the children's needs while they are in their actual custody.
 - h. The mother will have full custody of EM but parental responsibility will be shared.



- i. The Children Officer to report on the progress of (a) (b) and (d) within 30 days hereof for purposes of further directions. For that matter the matter be mentioned for compliance on March 9, 2023
- j. The prayer related to the matrimonial home is untenable and is declined.
- k. Orders accordingly.

94. Each party has to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 6TH FEBRUARY 2023.

Mumbua T Matheka

Judge

CA Edna

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