



**KKI & another (Suing through FCK) v DMN (Civil Appeal  
84 of 2016) [2023] KEHC 1817 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1817 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL 84 OF 2016  
JWW MONG'ARE, J  
MARCH 2, 2023**

**BETWEEN**

**KKI ..... 1<sup>ST</sup> APPELLANT**

**DAA ..... 2<sup>ND</sup> APPELLANT**

**SUING THROUGH FCK**

**AND**

**DMN ..... RESPONDENT**

*(Being an appeal against the judgment and decree of Hon. T Olando in  
Eldoret Children's case no. 206 of 2015 delivered on 26th May 2016)*

**JUDGMENT**

1. The appellant instituted a suit against the respondent in the trial court vide a plaint dated September 28, 2015 seeking the following orders;
  1. Custody of the minors herein
  2. That the defendant be compelled to pay the school fees and other related expenses with respect to the minor plaintiffs.
  3. That the defendant to pay for maintenance of the minors.
  4. That the defendant to pay medical care when need arises.
  5. Costs of the suit be borne by the defendant.
  6. Any other relief that the court may deem fit.



2. The matter proceeded to full hearing and upon considering the testimonies of the witnesses, submissions of the parties and the evidence tendered the trial court issued the following orders;
  1. That custody of the children be granted to both the mother and father.
  2. That the children shall live with the father over school days and the mother shall have visitation rights with the arrangement with the father. The mother shall live with the children for at least two weeks during the school holidays.
  3. That the guardian ad litem to buy clothes and other basic needs.
  4. That the defendant to pay school fees and other education needs for the children.
  5. That the parties to equally pay for the medical expenses for the children
  6. Each party to bear their own costs.
3. Being aggrieved with the judgment and decree of the trial court, the appellant instituted the present appeal dated May 27, 2016. The appeal is premised on the following grounds;
  1. That the learned trial magistrate erred in law and in fact by arriving at a judgement that was not supported by the evidence presented.
  2. That the learned trial magistrate erred in law and in fact by failing to take into consideration the weighty evidence presented by the appellant.
  3. That the learned trial magistrate erred in law and in fact by taking into account matters that were not in evidence and not actually produced by the respondent.
  4. That the learned trial magistrate erred in law and in fact by holding that the appellant was emotionally unstable without any supporting evidence.
  5. That the learned trial magistrate erred in law and in fact by failing to consider the respondents' violent nature and tendencies.
  6. That the learned trial magistrate erred in law and in fact by relying on the evidence of a witness who was not credible (defence witness 2) and holding that the evidence of defence witness 2 was unchallenged.
  7. That the learned trial magistrate erred in law and in fact by failing to take into consideration the special needs of the minors who are young girls by awarding their actual custody to the 2<sup>nd</sup> respondent.
  8. That the learned trial magistrate erred in law and in fact by arriving at the fact that the appellant was an irresponsible mother without any evidence to that effect.
  9. That the learned trial magistrate erred in law and in fact by holding that the appellant has no fixed abode contrary to the evidence presented and the definition in law of the same.
  10. That the learned trial magistrate erred in law and in fact by finding that exceptional circumstances exist in denying the appellant custody of the minors who are young girls without any evidence.



11. That the learned trial magistrate erred in law and in fact by arriving at the fact that the Respondent lived with the minors alone in the absence of the Appellant during their tender age.
12. That the learned trial magistrate erred in law and in fact in failing to consider the appellants' submissions.
13. That the learned trial magistrate misdirected himself on the applicable section of the Children Act No 11 of 2001 in awarding actual custody of the minors who are young girls to the Respondent in contravention of the established legal principles.
14. That the learned trial magistrate erred in law and in fact in arriving at a judgement that is against the legal provisions of the Constitution, Children's Act No 11 of 2001 and the best interests of the minors.

The parties filed submissions on the appeal.

### **Appellant's Case**

4. The appellant submitted that the trial court disregarded the evidence brought before it and chose to make adverse decisions based on no evidence at all. Learned counsel urged that no proof was provided when denying the Appellant custody of the children. Further, that the social inquiry report revealed that she lived in a 2-bedroom house in pioneer estate therefore it was untrue that she did not have a fixed abode.
5. Learned counsel submitted that the trial court erred in granting custody of girls to a male living alone. Further, that the social inquiry report and the judgement only considered the views of the Respondent. Counsel maintained that the decision was not in the interests of the child and cited the cases of Mombasa Civil Appeal No 32 of 2017 – MAA v ABS, Kakamega High Court Civil Appeal No 30 of 2016 – NMM v JOW among others in support of the submission that custody of children should be awarded to the mother. The Appellant urged the court to allow the appeal.

### **Respondent's Case**

6. Learned counsel for the Respondent submitted that there was no report from the guardian ad litem that the children were uncomfortable with the father. From the social inquiry report, it was observed that the children were sleeping on the floor for close to six months. He stated that the respondent lives in a 3-bedroom house fully furnished in an own compound.
7. The Respondent submitted that section 83 does not dictate custody must be given to one parent and it envisages that same can be shared or joint. Further, citing the case of JO v SAO [2016] eKLR, the Respondent submitted that in the present case there existed exceptional circumstances to warrant departure from the general rule. It is his case that the evidence on record shows that the Appellant used to come home drunk and would leave the children unattended. He urged the court to dismiss the appeal.



## Analysis & Determination

8. In *Abok James Odera T/A AJ Odera & Associates v John Patrick Machira T/A Machira & Co Advocates* [2013] eKLR, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

Upon considering the memorandum of appeal, record of appeal and submissions of the parties, the following issue arise for determination, to wit; Whether the trial court erred in its determination on custody and maintenance.

### Whether the trial court erred in its determination on custody and maintenance

9. I have considered the testimony of the witnesses that was tendered in the trial court, together with the social inquiry that was conducted and it is pertinent that at the time of the decision the Appellant was unable to provide a conducive environment for children of tender years. Section 83 of the *Children Act* sets out the principles to be considered in granting custody of children as follows;

- 1) In determining whether or not a custody order should be made in favour of the 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 any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;
  - (d) the ascertainable wishes of the child;
  - (e) whether the child has suffered any harm or is likely to suffer any harm if the order is not made;
  - (f) the customs of the community to which the child belongs;
  - (g) the religious persuasion of the child;
  - (h) whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;
  - (i) the circumstances of any sibling of the child concerned, and of any other children of the home, if any;
  - (j) the best interest of the child.



10. The general rule when granting custody of minors who are female is that the same should be granted to the mother unless there exist exceptional circumstances. The Court of Appeal in *JO v SAO* [2016] eKLR stated:

There is a plethora of decisions by this court as well as the High Court that in determining matters of custody of children and especially of tender age, except where exceptional circumstances exist, the custody of such children should be awarded to the mother because mothers are best suitable to exercise care and control of the children. Exceptional circumstances include: the mother being unsettled; where the mother has taken a new husband; where she is living in quarters that are in deplorable state; or where her conduct is disgraceful and/or immoral.

11. The recent Supreme Court decision in *Petition No E003 of 2022; Mutheu Agatha Khimulu v Raheem Mehdi Aziz Azad and 4 others* [2023] eKLR has reiterated the principles that a court ought to follow when determining what is the best interest of the child in custody matters. The court stated in paragraph 86 of its decision that

“This is because the concept of the child’s best interests is aimed at ensuring both the full and effective enjoyment of all the children’s rights recognized in the *Constitution*, the *Children Act*, the CRC, and the African Charter on The Rights and Welfare of The Child. These are all geared towards the holistic development of the child”

12. The court went further to restate the said principles in its decision in paragraph 87 of its decision where it states that

“Courts, therefore, while making a decision that will impact the child are mandated to consider all circumstances affecting the child. As such, we are of the view that the following guidelines are necessary and ought to be considered when balancing a child’s best interests and parental rights and responsibility:

1. The existence of a PRA between the parties.
2. The past performance of each parent. 33 *Petition No 2 (E003) of 2022*
3. Each parent’s presence including his or her ability to guide the child and provide for the child’s overall well-being.
4. The ascertainable wishes of a child who is capable of giving /expressing his / her opinion.
5. The financial status of each parent.
6. The individual needs of each child.
7. The quality of the available home environment.
8. Need to preserve personal relations and direct contact with the child by both parents unless it is not in the best interests of the child in which case supervised access to the child must be granted.
9. Need to ensure that children are not placed in alternative care unnecessarily.
10. The mental health of the parents and



11. The totality of the circumstances.”
13. The court record reveal certain factors that we must take into consideration in determine the appeal before me. I note that this Appeal was filed in the year 2016 after an order for joint custody by both the Appellant was made by the court at the time. At that time the children subject matter of the suit were aged 6 and 4 respectively. Since then seven years have lapsed as the appellant has sought in vain to overturn the said decision. The record further reveals that the appellant has made numerous attempts through the courts and has been unsuccessful.
14. In the *locus classicus* case of *Githunguri v Githunguri* CA No 30 of 1978 [1979] eKLR the court found that where the issue of custody touches on children of tender years who are girls, the best interest of such children is best served if custody is awarded to the mother. Similar the same was the view of the court in the *SO v LAM* [2009] eKLR.
15. I have noted that in making its determination the children’s court relied on adverse evidence of DW2 who testified to the fact that the appellant would sometimes come home in a drunken state and in the company of different men who were unrelated to her of the children. I have also noted that the trial court had its doubts as to the veracity of the said evidence in the court noted that
- “the witness appeared coached”,
- but went ahead to find the mother an unfit parent nevertheless. I note that other than that evidence which the children’s court had doubts with, no other evidence on the capacity of the Appellant was ever produced to support the said allegation.
16. On the flip side, there appears from the record evidence to suggest that the Respondent is of violent disposition n and the house help testified to this and even produced Police OB records to confirm that she had at one time reported the matter to the Police. The Appellant also testified that she had moved back to her parents’ home to avoid the Respondent who kept threatening her. I also note that there is a matter pending before the courts where the Respondent has been accused of sexually molesting one of the children. The record did not reveal whether these allegations were controverted or denied by the respondent.
17. The children are now of an age where they are able to speak and indicate their wishes. None of the reports on record indicate that their wishes have been put into consideration in this matter. What appears to be happening is the two parents flexing their muscles through the court to settle scores and in the process using the children to that effect. In the decision of the Supreme Court in Petition No E003 of 2022 cited above the court has clearly emphasised that where the best interest of the children is concerned it is important to also involve them. The court stated as follows;
4. The ascertainable wishes of a child who is capable of giving /expressing his / her opinion.
18. Further, section 103 of the *Children Act, 2022* also enjoins decision makers in arriving at decisions on the issue of custody of children of tender years to take into consideration
- (c) “The ascertainable wishes of the child taking into account the child’s evolving capacity;”
19. Having taken into consideration the decisions of superior court and noting that these are young girls who are almost in their teens and most definitely in puberty where their physical bodies will start to



change in preparation for adulthood, I find that unless otherwise established the role of their mother is key to help them manage that difficult period in their lives.

20. I have also found no good reason as to why the children cannot stay with the appellant, their biological mother, with the respondent having access and visiting rights periodically especially during school breaks. The argument that the father lived with children when they were young while the appellant attended college is not a reason to deny her the right to parent and mould her daughter to proper and responsible young women in the future. In any event, having taken time to further her education the mother should be in a better position to also contribute financially to the wellbeing and upkeep of her children given the opportunity. I find that the prolonged absence of the girls from their mother will deny both children key milestones when they grow up with prolonged absence of their mother.

21. I have considered the record of appeal, the submissions of the parties and the authorities cited in support of the same and it is my considered view that the trial magistrate was wrong in ordering that the children spend a longer period of time with their father and only spent two weeks of their holiday with their mother. I find that the reverse would have better suited these children, having considered all the available evidence on record, the fact of their tender age and general existing circumstance and The best interest principle as per the tenets of article 53(2) of the Constitution which directs courts to ensure that;

“(2) A child’s best interests are of paramount importance in every matter concerning the child”

22. I have therefore considered the decision of the children’s court and will substitute order 2 of the same and direct as follows;

“That the children shall live with the mother over school days and the father shall have visitation rights with the arrangement with the mother. The father shall live with the children for at least two weeks during the school holidays.”

23. The upshot of my findings is that the Appeal has merit and I shall allow it. The judgement of the children’s court in Eldoret Children Case No 206 of 2015 is hereby vacated. In its place the court substitutes the said decision with its own decisions as follows;

- i. That custody of the children be granted to both the mother and father.
- ii. That the children shall live with the mother over school days and the father shall have visitation rights with the arrangement with the mother. The father shall live with the children for at least two weeks during the school holidays.
- iii. That the guardian ad litem to buy clothes and other basic needs.
- iv. That the defendant to pay school fees and other education needs for the children.
- v. That the parties to equally pay for the medical expenses for the children
- vi. Each party to bear their own costs.

24. The above orders will supersede any other orders issued by the lower court in the children’s court in relation to the care and custody of the two minor children.

**DELIVERED, DATED AND SIGNED VIRTUALLY ON THIS 2<sup>ND</sup> DAY OF MARCH, 2023**

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**JWW MONGARE**

**JUDGE**

1. N/A for the Appellant
2. N/A for the Respondent
3. **Brian Kimathi- Court Assistant.**

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**J.W.W.MONGARE**

**JUDGE**

