



REPUBLIC OF KENYA



**KENYA LAW**  
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**AB v HRJDP (Civil Appeal E037 of 2020)  
[2023] KEHC 21056 (KLR) (Family) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21056 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY**

**CIVIL APPEAL E037 OF 2020**

**MA ODERO, J**

**JULY 21, 2023**

**BETWEEN**

**AB ..... APPELLANT**

**AND**

**HRJDP ..... RESPONDENT**

*(Being an Appeal against the Ruling of Hon. Mary A. Otindo, SRM given in the Children Court at Nairobi, Children Case No. 299 of 2018 on 10th September, 2020)*

**JUDGMENT**

1. Before this Court is the Memorandum of Appeal dated September 21, 2020 by which the Appellant AB seeks the following orders:-
  - “1. That this Appeal be allowed.
  2. That this Honourable court do make its own findings on the law and facts.
  3. That the Respondent do pay the costs of this Appeal.
  4. That Any other relief deemed appropriate in the circumstances.”
2. The Respondent HRJDP opposed the appeal. The appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated September 9, 2022 whilst the Respondent relied upon his written submissions dated November 11, 2022.



## Background

3. The Appellant and the Respondent herein got married to each in India under Hindu Customary Law on December 6, 2004. The Appellant is an Indian National whilst the Respondent holds British citizenship. Their union was blessed with two (2) children.
  - AP born on January 23, 2006,
  - AP born on March 27, 2012.
4. The marriage later ran into problems and the Respondent filed in the Milimani Chief Magistrates Court Divorce Cause No 1989 of 2018. The Respondent also filed in the Nairobi Children's Court Civil Suit No 299 of 2018 seeking to be granted sole custody of the two (2) minors. The Respondent also sought orders to restrain the Appellant from leaving the country with the two (2) minors without his consent.
5. That suit was heard inter parties and the learned trial Magistrate Hon Mary Otindo delivered a judgement on July 6, 2020 in which she made the following orders:-
  - “ 1. That the legal custody of the children shall be exercised jointly.
  2. That the actual custody shall remain with the Defendant/Mother.
  3. That the Plaintiff/Father is granted access on every school holiday and he shall cater for all travel costs. He is also granted unlimited virtual access with prior arrangements with the Defendant/Mother.
  4. That the Plaintiff is at liberty to source for another better school where the children are resident and cater for their school fees.
  5. That this being a family dispute, each party will bear its own costs of the suit.
  6. That each party shall be at liberty to apply.”
6. Thereafter the Respondent filed an application dated July 23, 2020 seeking to have the orders and Decree of July 6, 2020 reviewed. The Application for review was heard by the same Magistrate who on September 10, 2020 allowed the same and reviewed her judgement in the following terms:-
  - “ 1. The parties shall exercise joint legal and actual custody.
  2. The Plaintiff/Applicant shall be the resident parent during the school days.
  3. The Respondent/mother shall have unlimited access during school days and half of the school holidays within the jurisdiction of the court with liberty to travel with the minors outside the court's jurisdiction at the cost of the Applicant.
  4. There shall be no orders to costs.
  5. Each party is at liberty to apply.



7. Being dissatisfied with the Ruling of September 10, 2020, the Appellant (Defendant) filed the Memorandum of Appeal dated September 21, 2020 in which she listed grounds of appeal as follows:-

- “ 1. The Learned Magistrate erred in law and in fact by granting orders conferring the Respondent actual custody of minors who are not Kenyan citizens and are neither under the jurisdiction of the Kenyan Courts.
2. The Learned Magistrate erred in law and in fact by going beyond the parameters of review and sat on appeal in her own matter.
3. The Learned Magistrate erred in law and in fact in her determination of the financial capability of the parties.
4. The Learned Magistrate erred in law and in fact by failing to take into account that the Appellant being of Indian descent, it is in order and part of their culture for her to be living under the same roof with her parents.
5. The Learned Magistrate erred in law and in fact by failing to take into account that the Appellant had single handedly been providing for the minors maintenance and education needs since their return to India in August 2018.
6. The Learned Magistrate erred in law and in fact by applying the wrong principles in determining the issues raised.
7. The Learned Magistrate erred in law and in fact by issuing final orders making a clear departure of her initial judgement by basing her ruling on a Children Officer’s report.
8. The Learned Magistrate erred in law and fact by ignoring the law and the best interest of the child principle.
8. I have carefully considered the appeal filed before this court, the record of Appeal as well as the written submissions filed by both parties.

### **Analysis and Determination**

9. This being a first appeal, it is the duty of the court to review the evidence adduced before the lower court and draw its own conclusions. In *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123 it was held that:

“An appeal to this court from 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 through 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 facts 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 demeanour of a witness is inconsistent with the evidence in the case generally...”



10. Similarly, the Court of Appeal in *Kiruga v Kiruga & Another* [1988] eKLR 348, observed that:-
- “An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”
11. This court cannot lose sight of the fact that this matter relates to the custody, and welfare of minors. It is trite law that in matters concerning the welfare of children courts are required to give priority to the best interest of the child.
12. The *Constitution of Kenya 2010* provides at Article 53 (2) that:-
- “(2) A child’s best interest are of paramount importance in every matter concerning the child.”
13. Likewise *Children Act 2022* at Section 8(1) provides as follows:-
- “(8)(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies-
- (a) The best interests of the child shall be the primary consideration;” [own emphasis]
14. The Appellant is mainly aggrieved by the orders made by the trial court granting actual custody of the two (2) minors to the Respondent whereas by the initial orders of July 6, 2020 the court had granted actual custody to the Appellant.
15. The Appellant states that the orders reviewing actual custody of the children are not capable of enforcement as the children now reside with her in India and are no longer within the jurisdiction of this court having left the country in August 2018 pursuant to an interim order made by the court pending the hearing of the main suit.
16. The Respondent on the other hand asserts that the learned trial Magistrate correctly reviewed her decision when the report of the children’s officer was availed. That the orders made on September 10, 2020 were made in the best interests of the children.
17. I have perused the initial judgement delivered by the trial court on July 6, 2020. In that judgement the learned trial Magistrate found as follows:-
- “My considered findings is that there are no sufficient grounds demonstrated by the plaintiff that the Defendant is unfit to exercise custody. Her financial inability can be cured with a maintenance order. I am thus persuaded for the foregoing reasons that the Defendant should maintain custody...”
18. It is not clear how or why the views of the trial court changed since the children’s officer did not find the Appellant to be an unsuitable custodial parent.
19. The minors currently reside outside of Kenya. They attend school and have undoubtedly formed relationships and friendships where they currently reside. The review orders made on September 10, 2010 effectively amounted to an order directing that the children be returned to Kenya from India where they reside with their mother. I do not find that there exist any special circumstances warranting



the uprooting of the minors from the home they currently enjoy to a different country where they will have to adjust to new schools form new friendship and relationships. This cannot be in the best interests of the children who like all other children require stability and predictability in their lives.

20. In my view the orders made by the trial court on July 6, 2020 were appropriate given the circumstances of the two (2) children. The Respondent (father) was accorded reasonable access to the minors. There has been no allegations much less evidence to show that the Appellant is an unfit mother.
21. I find that reviewing the judgement of July 6, 2020 and granting actual custody to the father was not in the best interests of the children.
22. Finally, I do find merit in this appeal and the same is allowed. The orders made by the Hon MA Otindo in her ruling of September 10, 2020 are hereby set aside. For avoidance of doubt the orders in the judgement of July 6, 2020 regarding custody maintenance and access of the two (2) minors are hereby reinstated. This being a family matter each side will bear its own costs.

**DATED IN NAIROBI THIS 21ST DAY OF JULY, 2023.**

.....

**MAUREEN A. ODERO**

**JUDGE**

