



**JM v MN & another (Civil Appeal E022 of 2021)  
[2023] KEHC 23832 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23832 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E022 OF 2021  
SC CHIRCHIR, J  
OCTOBER 12, 2023**

**BETWEEN**

**JM ..... APPELLANT**

**AND**

**MN ..... 1<sup>ST</sup> RESPONDENT**

**WK ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Background:**

1. This is a custody dispute between the father of the child herein (The Appellant) and the child’s relatives (The Respondents)
2. The Appellant and the child’s mother, one EK ( deceased) had a relationship from the year 2011 that culminated in a marriage sometimes in the year 2015. A girl child, GM (child), was born to them. The couple separated in 2018.
3. The Respondents are a married couple and niece of the child’s mother. They were the custodians of the child’s mother until she got married to the Appellant. The child’s mother went back to the Respondent’s home, with the child, when her marriage to Appellant ended.
4. The child’s mother later died in the month of June 2020 and the Respondents continued living with the child under circumstances that are now under contest.
5. It is alleged that the Appellant abducted the child while under the custody of the Respondents forcing the Respondent to move to the trial court to seek for the return of the child, and custody
6. At the conclusion of the hearing the trial court gave legal custody to the Respondents. Aggrieved by the outcome, the Appellant filed the present Appeal.



## **Memorandum of Appeal.**

7. The Appellant has filed several grounds of Appeal, which are hereby summarized and paraphrased as follows:
  1. That the entire judgment was entirely and wholly ambiguous and uncertain over the possession (sic) (custody?) of the minor.
  2. That the trial court erred in denying custody the only surviving parent of the child without any explanation, basis or justifiable reason.
  3. That by using the word possession as opposed to custody the trial magistrate indignified the minor by equating her to some chattel.
  4. That the trial court erred in making a finding in favour of the Respondents on issues not pleaded for and hence failed to act as an impartial arbiter in an adversarial system.
  5. That trial court went against the findings and recommendations of two different Children Officer's report.
  6. That the trial court's finding went against principles international instruments and precedents on the custody issues and the rights of the child.
  7. That the Respondents had no right of possession of, parental rights, or responsibilities or guardianship of the child.
  8. That the trial court erred in ordering for the change of school for the child, contrary to the Appellant's right to property, economic rights and freedom of choice.
  9. That the trial court was deliberating selective and limited in the interpretation of the laws relating to custody.
  10. That the judgment was based on a single report by a children's officer who failed to consider the suitability of the Appellant to be the custodian of the child.
  11. That the lower court's judgment was informed by extrinsic factors, unrelated considerations, purely adventurous and detrimental to the interest of the child.
  12. That the judgment against the weight of evidence.
  13. That the judgment was discriminative and biased against the Appellant an account of his marital status.
  14. That the trial magistrate erred in snatching away the Appellant naturally alienable right to parental hood without any justifiable reason.
  15. That the Respondent's suit was bad in law as they had no locus standi.

## **Summary of evidence**

8. PW1 was the 1<sup>st</sup> Respondent herein. She adopted her statement dated 26/10/2020. It was her testimony that the child herein was her niece as the Deceased was her biological sister. She informed the court that the deceased died on 26/6/2020. She further stated that she and her co-respondent lived with the child's mother from 2011 until 2015 when she got married to the Appellant; that the Appellant and the deceased separated in 2018 or thereabouts when the marriage ended and the deceased went



back with the child to stay with the Respondents. They enrolled the child in [Particulars Withheld] school in 2019. The Respondents provided for all the child's needs.

9. In 2020, the deceased got engaged to another man and in the month of June of the same year, when she was due to deliver another child, the deceased brought back the child herein to stay with the Respondents. Unfortunately, the deceased never made it back from the hospital, as she died at child birth.
10. She further stated that the Appellant had always remained detached from the child, save for a letter from his advocate demanding to have the child, upon the demise of the child's mother.
11. It was her testimony that on 18/10/2020, while attending a church service with the child and her other children, the Appellant abducted the child while she was playing outside with another child, an act which she found as inhumane.
12. She further asserted that the child was more comfortable with them as they had been staying with them for a while. She had no objection to right access by the Appellant. She produced receipts evidencing the fact that they have been paying school fees for the child.
13. At cross-examination, she stated that she was a great aunt to the child – a sister to the minor's grandmother. She admitted that the child's maternal grandparents have not sought for custody.
14. She stated that there was no agreement on custody issues and that the Appellant had abdicated his responsibilities towards the child. She admitted that she had never obtained any guardianship order in respect of the minor.
15. On re-examination she insisted that she and her husband are the ones who had always had the child. They had had her from the time the deceased handed her over to them, at the time she was heading to the hospital. She also stated that they had stayed with the minor since 2018. She denied the suggestion that the Appellant had sought permission to go with the minor, on the day he took her away.
16. PW2 was the 2<sup>nd</sup> Respondent herein. The witness adopted his statement which he recorded on 26/10/2020. In his recorded statement he states that they had been living with the child for the past 3 years and had been with the mother since 2011, save for the period between 2015 – 2017 when the Appellant was engaged to the child's mother.
17. He further states that whereas he recognizes the Appellant as the child's father, the abduction was an inhumane and a cruel act on the child: that since the child is familiar to them, she should stay with them until she is 14 years, when she can be handed over to the father. That the sudden shift of the environment will affect her mentally, and psychologically. Her education will also be affected. He had no objection to rights of access by the Appellant.
18. At cross-examination he told the court that, he took issue with the way the Appellant abducted and kidnapped the minor. He did not have evidence showing the Appellant was not fit as a father. That he has tried to inquire of the welfare of the child from the Appellant but he doesn't answer calls. He denied that he ever denied access to the Appellant. He insisted that the Appellant has never taken interest on the child.
19. DW1 was the Appellant herein. He adopted his statement recorded on 13/11/2020 as his evidence-in-chief. In his recorded statement, he stated that he was the biological father of the child and that the child was born on 11/10/2016; that the child's mother eloped with another man to Mombasa together with the child and later returned to Kakamega in 2018. That after separation he had entered into an arrangement with the child's mother wherein he was to stay with the child over the weekend.



20. That, after the child's mother died, the maternal grandparents had agreed to release the child to him but later refused to release the child; that the respondent blocked him for seeing the minor or from paying for her upkeep.
21. He stated that while at church, the child came to him while crying; that he noticed that she had a bad tooth and decided to take the child to a Doctor in Makueni. He asserted that there was absolutely no reason as to why his parental rights and responsibilities should be taken away from him.
22. On cross-examination, he admitted that he took the child at church without the knowledge of the 1<sup>st</sup> respondent. He further testified that after he took the child, he reported to the police. He did not have an Occurrence Book extract to prove that he made such a report. He admitted that as he entered the police station he met with the 2<sup>nd</sup> Respondent, who had already made a report about the abduction. He admitted that he was not staying with the child, but with his elder sister. He didn't see anything wrong with the child staying with his sister
23. On re-examination, he asserted that his parental rights to the child are automatic; that he has a right to choose where the child lives. He stated that the child currently goes to school at St. Francis Assisi Academy (The court then makes a note that the witness refers to a receipt before he gives the name). That he chose to take away the child from Kakamega to avoid confrontation with the plaintiff.

### **Appellant's submissions**

24. It is the Appellant's submission that the trial court failed to clearly interpret what the term "possession" of the child meant. That the reference did not respect the indignified the child; that it was unknown whether the term was the same as "custody" and the term is unknown in law in any event. The Appellant further submits that ambiguity was also worsened by the fact that the length of the "possession" was not stated.
25. The Appellant further submits that the Respondent had not adopted the minor and therefore had no locus standi to seek for custody.
26. It is contented that the grant of custody to the Respondent was against the naturally, inalienable and automatic right of the Appellant to parenting. That there was no evidence showing that the Appellant was an improper and unqualified person to be entrusted with the custody of his own child.
27. The Appellant goes ahead to cite various international instruments, several provisions of *the constitution* and children's Act which emphasize the child's right to protection and care by the parents; the right of the parents to custody of the children; the right of custody by the surviving parent in the event of a demise of one parent; the priority given to the parent of the child on determination of custody; and the "interest of the child" principle. It suffices to state here that I have perused the above stated Authorities and considered the same.
28. The Appellant points out that the law leans generally towards a child being raised by a parent.
29. The Appellant further argues that as it can be seen from the child officer's report that the environment in the Respondent's home was not conducive to the child as it reflected a case of inadequacy in basic provisions.
30. The Appellant argues that the lower court order requiring the child to be removed from the current school to Green Mount school was erroneous as the Appellant's financial ability to pay school fees in the said school was not considered.



31. The Appellant finally submits that whereas the law recognizes certain instances when custody of the child may be given to a person other than the parent, there has to be exceptional circumstances to warrant that it. In this case, it is argued, none of such circumstances do exist.

### **Respondent's submissions**

32. While relying on Section 2 of the Children's Act, the Respondents point out that the term "parent" goes beyond the father and mother of a child.
33. The Respondent urges the court to consider the report of the Children's officer at Kakamega who noted that the child who at 5 years, had formed identity and attachment to the Respondents and any change of environment might affect her growth and development.
34. The Respondent further submits that the Appellant, had in any case, handed the child to a stranger and had thus abandoned his parental responsibility.
35. The Appellant finally submits that in any case, by giving custody to the Respondents, the trial court did not take away parental responsibility of the Appellant towards his child.

### **Determination**

36. I have considered the Memorandum of Appeal, the record of proceedings and the parties' submissions. I propose to cluster the grounds of appeal as hereafter.

### **Whether there was any ambiguity on the judgment of the trial court ( Grounds 1 and 3)**

37. In this regard, the Appellant took issue with word "possession" where the trial court held: "I therefore find that plaintiffs as best suited in the circumstances to have actual possession of the child". The word possession when used in relation to custody and maintenance of a child is found in section 81 of the *Children's Act* 2001, (Now repealed and hereafter referred to as the repealed statute), but being the applicable statute during trial. The word possession was not defined in the said Act, but the word was used to define "actual custody". Section 81(d) of the repealed statute defined "actual custody to mean "the actual possession of a child whether or not that possession is shared with one or more persons" ( Emphasis added). The term possession also appears on the definition of "care and control" (Section 81(1) (b) ), of the repealed statute defined "care and control" to mean "actual possession of a child whether or not that possession is shared with one or more persons".
38. Contrary to the Appellant's assertion therefore the term possession is not alien to law and in particular the *Children's Act*. It is a terminology that features quite prominently in the children's Act in relation to custody. I disagree with Appellant's assertion that the use of the word indignified the child. In other words, the trial magistrate was simply saying the "actual custody, care and control of the child" had been granted to the plaintiffs.
39. Another alleged ambiguity referred to by the Appellant is the question of the duration of the custody. The Appellant in this regard is splitting hairs, because, custody orders, unless otherwise specified by the court, ceases on the child's 18<sup>th</sup> Birthday. That is when a person ceases to be a child, under the Kenyan law, and no longer under anyone's custody. This complain in this regard is purely academic and is without merit.



**Whether the trial court erred in granting custody to the Respondents (Grounds 2,4 5, 6, 7,8,9,10,11, 12, 13 and 14)**

40. Section 103 of the Act sets out the considerations that the court needs to take into account when making a custody order. The section provides as follows:

“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.”

41. The persons legible for custody are listed under section 102 of the current Children’s Act . The section provides as follows:

- (3) Any of the following persons may be granted custody of a child-
  - a. A parent
  - b. A guardian
  - c. ....
  - d. Any person, who, while not falling within paragraphs (a), (b) and (c) can show cause, having regard to Section 101, why an order should be made awarding the person custody of the child”.

42. This contest is between the surviving parent of the child and the child’s relatives. In deciding who should be given priority the following provisions of the law provide a guide:

- (a). Section 11(1) of the Act (Then as section 6(1) in the repealed statute) provides that “ Every child has a right to parental care and protection”



- (b). Article 53(e) of *the constitution* states that every child has a right to : “ to parental care and protection ..... “
- (c). Article 19 of the African Charter on the Rights and Welfare of a child states “Every child is entitled to parental care and protections and shall whenever possible reside with his or her parents .
- (d). Article 7 of the 89 convention on the rights of the child echoes the same principle.
43. Thus , am in agreement with the Appellant that, the general rule , as can be gauged from the various international instruments on the Rights of the child ,*the Constitution*, the children’s Act and the many past decisions favours the child being under the care of his or her parents.
44. What happens in the event of death of one parent? Section 34(1) (section 27(1) of the repealed statute sets out the Rights of surviving parent as to parental responsibility over of the child. It provides as follows:
- “ 1. On the death of the mother of the child, the father if still living, shall have parental responsibility for the child either alone or with the testamentary guardian ( if any) appointed by the mother.”
45. In the case of *NKP -VS- KKP & DKKP* (2022) KEHC 3034 (KLR) the scenario was the same as the present case. The contest for custody was between the child’s father and his late wife’s relatives. The court (Odero J) held: “where the father is alive and is capable of providing for the child, then custody ought to be accorded to the father alone.”
- And “parental responsibility” is defined in the Act to mean “ 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”.
46. Also in the case of *DMM -VS- PM* (2020) eKLR it was held : “unless circumstances warrant otherwise, then the surviving parent, in that case the father should be given custody so as to carry out parental responsibility.”
47. From a foregoing it is evident that the general rule is that unless there are exceptional circumstances, the surviving parent should have custody of the child.
48. There are exceptions to this general Rule. There are instances where the parent is unfit to take care of his own, his “natural right” , as the Appellant’s counsel puts it, notwithstanding.
49. In *MAK Vs RMAA & others*(2023) KESC21(KLR) Petition N0. 2 (E003) of 2022) , The supreme court held “It is evident from the a foregoing provisions that the child has a right to parental care and it in the best interest of the child that he is brought up and care for by his or her parent. This right can only be denied if it is proved with cogent evidence and valid grounds that a parent is not suitable or is incapable of taking care of the child.”
50. Who is an unfit parent? In *JO vs - SAO* (2016) eKLR the court in reference to the mother stated “...exceptional circumstances include the mother being unsettled; where the mother has taken a new husband, where she is living in quarters that are deplorable state or where her conduct is disgraceful of immoral”
51. The same circumstances would ordinarily apply to the case of a father.



52. In denying the Appellant custody, the trial magistrate stated that he observed that the Appellant appeared prone to making irrational decisions which may not work for the interest of the child.
53. I agree with the trial magistrate in his observations. It emerged from the evidence of PW1, and admitted to by the Appellant, that he abducted the child at church. The child then had been under the care of the Respondents since her mother's death in June 2020. It is not known how much interaction the Appellant had had with the child considering that he had been separated with the child's mother from 2017 or 2018. A parent who is concerned with the welfare of his child would consider the repercussions of an abduction and sudden change of environment on a 5 year- old child.
52. Secondly, as pointed out by the trial magistrate, upon forcefully taking away the child he immediately took her to a completely new environment, in Makueni county, and leaves her in the custody of people, who for all practical purposes were strangers to her. As at the time of trial, the child was with the Appellant's sister in Mlolongo. It raises the question: is the Appellant's motive the best interest of his child or is he being blinded by the pursuit of his "parental rights"?
55. The Appellant's repeated disobedience of the court orders during trial also reflects a defiance not just to the law but general order. Rules run or manage society, including social relationships. A perusal of the record shows a disturbing repeated defiance of court orders by the Appellant at the Trial court. For instance, following an interim application, the trial court had issued interim orders directing the Appellant to return the child to Respondents. The Appellant never complied with that order. There was a follow up on these orders, where the court kept on insisting on compliance, to no avail. The Appellant finally produced the child in court only after securing an order of stay of the said orders from the High court.
56. The act of abduction also shows that the Appellant has no regard for the rule of law. Legal redress was readily available, if he was desirous of having custody of his child, but he chose the unlawful path. It is apparent that the Appellant only resorts to the protection of the law, when it suits him and has no regard for it, when it is not working in his favour. He who seeks the protection of the law must abide by the law.
57. But does the past disobedience of orderliness and irrationality make him unfit parent? Does the Appellant's conduct constitute exceptional circumstances that should deny him custody of his child? I think not.
58. It is unsafe to conclude that the two instances of irrational decisions are sufficient to project how the Appellant will always handle his parental authorities. The general defiance to good order does not make him an unfit parent either.
59. In any event, the best interest of the child principle focuses on the child and not the rights of a parent, and the conduct of the parent is only relevant if it adversely affect the best interest of the child. The Appellant has the means to fully take care of the child. It has not also been demonstrated that he is grossly immoral, grossly negligent or is capable of harming the child.
60. However, giving away the child to stay with relatives, hundreds of kilometers away is a negation of his parental responsibility and defeats the whole purpose of having custody. The Appellant must have actual custody, care and control of the child. The orders that I will make shortly hereafter is conditional upon the Appellant being fully compliant with this directive.
61. In view of the totality of the foregoing, it is my finding that the best interest of the child requires that the child remains with the Appellant.
62. In conclusion I make the following orders: -



1. The Judgment of the trial court is hereby set aside.
2. The custody, actual care and control of the child is given to the Appellant .
3. The Respondents will have visitation Rights for one week, during every school holiday, during which period the Respondents will have possession of the child.
4. The Appellant will undertake full parental responsibility of the child.
5. Each party will meet their own costs in this Appeal.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 12<sup>TH</sup> DAY OF OCTOBER 2023.**

**S. CHIRCHIR .**

**JUDGE**

**In the presence of:**

E. Zalo- Court Assistant

No appearance by the parties

