



**CK v KA (Civil Appeal E039 of 2023) [2024] KEHC 14584 (KLR)
(Family) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14584 (KLR)

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

FAMILY

CIVIL APPEAL E039 OF 2023

PM NYAUNDI, J

NOVEMBER 14, 2024

IN THE MATTER OF LKA (MINOR)

BETWEEN

CK APPELLANT

AND

KA RESPONDENT

(Being an appeal from the Judgment of Hon C.C Oluoch, Chief Magistrate at Nairobi Children's Case No. E946 of 2020 delivered on 27th April 2023)

JUDGMENT

1. Before this court for determination is the Appeal filed by Catherine Kiburu (the Appellant). Through an Amended Memorandum of Appeal dated 27th April 2023, the Appellant filed the following grounds of appeal;
 1. That the Learned Magistrate erred in facts and in law by granting the Respondent Sole Legal and Actual Custody in utter disregard to the facts that the minor has been in custody of the Appellant since birth.
 2. That the learned Magistrate erred in facts and in law by allowing the Respondent to travel out of the Country with the minor and on the same breath indicated that if parties cannot agree on access they can go back to court.
 3. That the learned Magistrate erred in law and in facts by granting the Respondent leave to travel out of the country with the minor without due consideration of the occupational therapy and speech therapy that the minor is undergoing in Karen Hospital.



4. That the learned Magistrate erred in facts and in law by granting sole legal and actual custody to the Respondent who is a foreigner without establishing the arrangements put in place so as not to disrupt the minor's education at the Banda School and the bonds that he has established here in Kenya.
 5. That the learned Magistrate erred in facts and in law by granting sole legal and actual custody of the minor to the Respondent without considering the wishes of the appellant and the wishes of the maternal relatives.
 6. That the learned Magistrate erred in fact and in law by not considering the best interest of the minor and the effects of an abrupt change of environment for an autistic child without proper transition.
 7. That the learned magistrate erred in law and fact by allowing the Respondent to travel out of the country without satisfying herself that the Respondent shall not expose the minor to dangerous and harmful Applied Behavior Analysis (ABA) Therapy which the court had declined to grant on the application of the Respondent.
 8. That the learned Magistrate erred in facts and in law by ignoring the wishes of the minor's late mother and the wishes of the minor's maternal relatives on the issue of custody.
 9. That the learned Magistrate erred in fact and in law by disregarding the guardianship provisions Section 124 of the *Children Act* 2022 on the status of children of separated parents when one parent dies as read together with the First Schedule *Children Act* 2022.
 10. That the Learned Magistrate erred in fact and in law by ignoring to apply the concept of the testamentary guardian even when it was clear that the minor's late mother had made some nomination as to who was her next of kin.
2. The matter was canvassed by way of written submissions. The Appellant filed his written submissions dated 9th July 2024 whilst the Respondent relied upon their submissions dated 24th September 2024.

Background

3. The Respondent and LKA's (the minor's) mother were in a relationship. Out of the relationship, the minor herein was born on 17th January 2019. The mother of the minor died during child birth owing to delivery complications. The Appellant who is the maternal aunt took in the minor and lived with him. The Respondent is a Ghananian. The minor is said to be autistic. The Respondent has been remitting finances for the upkeep of the minor.
4. The Appellant moved the trial court vide a Complaint dated 21st December 2020 seeking legal and actual custody of the minor: an order to restrain the defendant, his agent(s) or servant(s) from removing the minor from the jurisdiction of this court and/or territorial boundary of the Republic of Kenya; an order to permanently restrain the defendant, his agents or servants from in any manner interfering with the Plaintiff and/or the minor and costs of the suit and interest be provided for.
5. The Respondent (Defendant) filed a statement of Defence and Counter-claim dated 4th February 2021 seeking the following orders: the plaintiff's suit be dismissed with costs; sole legal custody, care and control of the minor with reasonable access by the plaintiff; leave to take the child to Ghana; the Department of Immigration Services to provide the child with a passport; such further orders as may be necessary to facilitate the best interests of the child and; costs of the suit.
6. The Children's Court in its judgement of 27th April 2023 made the following orders;



- a. The Defendant/father shall have legal and actual custody, care and control of the child.
 - b. The Defendant is granted leave to travel out of the Republic of Kenya to Ghana with the child.
 - c. The parties shall agree on access to the minor by the maternal relatives through the advocates on record or move the court for directions.
 - d. Each party shall bear its own costs.
7. The Appellant was aggrieved by the orders of the trial court and appealed against the same.

Appellant's Submissions.

8. It is the Appellant's submission that the trial court while awarding sole custody to the Respondent did not consider the best interest of the child as enshrined in Article 53 of *the Constitution*. That the trial court prioritized the Respondent's wishes without considering the effect it would have on the child who was already attending school in Kenya, Speech Therapy and Occupational Therapy at Karen Hospital.
9. The Appellant further submits that she took care of the minor since birth and she treated him as her own child. She paid therapy for the minor. That the trial magistrate did not consider her wishes as the guardian of the minor before granting custody to the Respondent. She asked the court that the minor be allowed to bond with his maternal relatives and she be given access to the minor.
10. The Appellant cited various international instruments, several provisions of *the constitution* and children's Act which emphasize on the best interest of the child. She also submitted that under Kikuyu custom, the child should stay with his maternal relatives and the parents were not married. She asked the court to allow the minor to bond with his Kenyan relatives as no prejudice will be suffered by the Respondent. She relied on the decision of *Ramadhan Ali Athman v Peter Mwingo Chirima* [2020] eKLR where the court in granting custody to the grandparents of the minors considered ascertainable wishes of the children.

Respondent's Submissions.

11. While relying on Section 34 of the Children's Act, the Respondent points that upon the death of one parent, the surviving parent shall have parental responsibility over the child either alone or with a testamentary guardian. That the Appellant was not an appointed guardian of the minor at the time the judgment was delivered.
12. It was his submission that the court acted in the best interest of the child in awarding sole custody to him. The trial court considered the fact that the Appellant had stayed with the minor for over two years. Reference was made to the decision in *re DNK Civil Appeal No. 138 of 2019* [2022] KEHC 3034 (KLR) where the court faulted the trial court for denying the father of the minor full custody after the death of his mother and the proceeded to give the father full custody.
13. It was further submitted that the parties in the judgment were given an opportunity to agree on the modalities of the child because he was leaving the country. That instead of having a conversation with the Respondent, the Appellant filed an appeal on the same day .
14. The Respondent submits that he has demonstrated that he is a competent father as he was the first one to notice that the minor may be autistic.



15. The Respondent further submitted that it is discriminatory for the Appellant to argue that he is a foreigner and the minor should have continued with education in Kenya. The Respondent argues that the schools in Ghana, which the minor will be attending, have a British curriculum.
16. The Respondent finally submits that the trial court took into consideration the ascertainable wishes of the Appellant and her sister as well as Section 103 (1) of the Children’s Act before granting him sole custody. That the allegation that the deceased wished minor to be brought up by her family was not documented.

Analysis And Determination.

17. 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. This principle was well articulated by the Court of Appeal in *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] 1EA 123 that:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v. Ali Mohamed Sholan*, (1955), 22 E.A.C.A. 270).”

18. It was also held in *Mwangi v Wambugu* (1984) KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.
19. Dealing with the same point, the Court of Appeal in *Kiruga v Kiruga & Another* (1988) KLR 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.”

20. Having considered the Amended Memorandum of Appeal, the record of proceedings and the parties’ submissions, the only issue for determination is whether the trial court erred in granting custody to the Respondent.
21. The rights of a child contained in Article 53 (1) (e) of *the Constitution* include right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not. On that right to parental care, Section 6(1) of the *Children Act*, provides as follows:-

“A child has a right to live with and to be cared for by his (or her) parents.”



22. Similarly, Article 7 of the 1989 UN Convention on the Rights of the Child states that a child shall have a right to live with and be cared for by his or her parents. This is also echoed at Article 19 of the African Charter on Rights and Welfare of the Child, which states that-

“Every child is entitled to parental care and protection and shall whenever possible reside with his or her parents”.

23. 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.”

24. The persons legible for custody are listed under section 102 of the 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”.

25. This contest is between the surviving parent of the child and the child’s maternal aunt. 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.
26. In this case, there are no reasons given, other than that the child lived with the Appellant after her mother died, to deny the Respondent the right to exercise his parental duty. I am not persuaded that there was a testamentary appointment of the Appellant as the guardian of the minor by the deceased mother.
27. 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”.
28. 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.”
29. 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.”
30. And so it boils down to the interests of the minor herein. It is definitely in the minors interests that he grow up wih an identity. His father is alive and willing to take care of him. The scales will tilt in favour of the Respondent. Absent the approval of the biological parent, 3rd parties except where the biological parent is derelict in the discharge of his parental responsibilities and other special circumstances on a case by case basis, do not enjoy enforceable rights that are in competition with those of the biological parents.
31. 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 Respondent.
32. The Appeal is hereby dismissed . Each party to bear their own costs.



**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14TH DAY OF
NOVEMBER, 2024.**

P M NYAUNDI

JUDGE

In the Presence of

Fardosa Court Assistant

