



**KF v NB (Civil Appeal 15 of 2021) [2024] KEHC 14587 (KLR)  
(Family) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14587 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL APPEAL 15 OF 2021  
PM NYAUNDI, J  
NOVEMBER 14, 2024**

**BETWEEN**

**KF ..... APPELLANT**

**AND**

**NB ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon M.W.Kibe(M/S), Resident Magistrate at Nairobi Children’s Case No.365 of 2019 delivered on 13th August 2021)*

**JUDGMENT**

1. Before this court for determination is the Appeal filed by Khamis Fadhil (the Appellant) through a Memorandum of Appeal dated 10<sup>th</sup> September 2021. The Appeal is against the Judgment delivered on 13<sup>th</sup> August by Hon. M.W. Kibe(M/S), Resident Magistrate in Nairobi Children’s Case No.365 of 2019.
2. The Appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated 7<sup>th</sup> December 2023. The Respondent’s submissions are dated 20<sup>th</sup> May 2024.

**Background**

3. The Respondent herein filed a suit (as Plaintiff) in the Children’s Court in Nairobi being Suit No.365 of 2019 seeking the following orders against the Appellant and Fatma Omar (the Appellant’s mother).
  - a. That the Honourable Court be pleased to compel the 1<sup>st</sup> and 2<sup>nd</sup> Defendant to produce the minor children herein in court for assessment and determination of their future fate.
  - b. That the Plaintiff is better placed at the moment , and I urge the court to grant her legal custody of the minors herein for the same betterment future.



- c. The cost of this application be provided for.
  - d. Such other orders as this Honourable Court shall deem fit to grant herein.
4. The Appellant and the Respondent were in a relationship from 2005 till 2010 when they formalised their marriage. Their union was blessed with three subjects; MK born on 21/1/2006, RN born on 20/2/2011 and GAK born on 1/2/2014.
  5. The 1<sup>st</sup> Defendant filed a defence dated 12<sup>th</sup> August 2021 denying the contents of the plaint. He sought the following orders against the Plaintiff in his defence;
    - i. That the Honourable Court be pleased to compel the plaintiff to yield actual custody unto the 1<sup>st</sup> defendant.
    - ii. That the Defendant equally a parent is equally placed to take care of the minors as opposed to the plaintiff who is in dire need of rehabilitation.
    - iii. The cost of the suit.
    - iv. Any other order/s that this Honourable Court deems fit.
  6. The Respondent then filed an application dated 15<sup>th</sup> March 2019 seeking orders that the defendants be compelled to produce the minors for assessment and determination of their future fate and that the she be granted custody of the minors. On 11<sup>th</sup> June 2019, the court granted the Appellant actual custody, care and control of the eldest child MK who was a class eight candidate in Mombasa; the Respondent was to have access to MK during school holidays and on weekends. Actual custody, care and control of RNK and GAK was granted to the Respondent; the Appellant was to have access to the minors during school holidays and during weekends. Both parties were granted joint legal custody of all the minors.
  7. The matter went for full hearing culminating in delivery of a judgment on 13<sup>th</sup> August 2021. The Court decreed as follows:
    1. That both parties shall have joint legal custody of the subject minors.
    2. That both parties shall safeguard the interest and welfare of the subject minors and desist from any activities/actions not in the best interest of the subject minors.
    3. That both parties shall share actual custody of the subject minors. Both parties shall not delegate the responsibility of taking care of the subject minors to third parties or take the minors to live with their relatives in their absence as this affects the subject minor negatively. The parties however are at liberty to allow the subject minor visit the relatives.
    4. That the plaintiff/mother shall have actual custody of the subject minors RN and GA during the school term from Monday to Friday while the Defendant shall have actual custody of the subject minors RN and GA from Friday after school to Monday morning.
    5. That during the school midterms, both parties shall agree mutually on which parents will live with the minor MK who has since joined secondary school.
    6. That both parties are hereby allowed access to subject minors in school within school rules.
    7. That both parties shall share the school holidays on 50/50 basis. The Plaintiff shall have the subject minors for the 1<sup>st</sup> half of the school holidays while the 1<sup>st</sup> Defendant shall have custody for the 2<sup>nd</sup> half of the school holidays.



8. That the children officer Embakasi or where the subject minors reside shall supervise both parents for atleast 3 years and ensure that both parents are taking care of the subject minors and safeguard the interest and welfare of the subject minors.
  9. That the Plaintiff shall identify a licensed rehabilitation/treatment centre of her choice and look for a psychiatrist to advice her on the best treatment centre/ best treatment for her alcoholism condition. In the event that the Plaintiff/mother is admitted in a rehabilitation centre for treatment, the Defendant shall have actual custody of the subject minors pending discharge of the Plaintiff/mother from rehabilitation centre.
  10. That the treatment centre/ rehabilitation centre for treating the Plaintiff shall file a yearly evaluation report for at least 3 years on the treatment progress of the Plaintiff.
  11. That this case shall be mentioned at least once per year to monitor progress of the Plaintiff.
  12. That in the event, the Plaintiff fails to go for treatment or lapses/goes back to alcoholism and is unable to take care of the subject minors, the issue shall be reported to the children officer Embakasi who will assess the situation and rescue the subject minors in the custody of the Plaintiff and bring them before court for directions on alternative care and custody. The 1<sup>st</sup> Defendant is also at liberty to apply for court for rescue of the subject minors in possession of the Plaintiff.
  13. That both parties shall take care of the subject minors shelter and food when the subject minors are in their custody. The 1<sup>st</sup> Defendant shall cater for the subject minors school fees, school related expenses and medical cover. The Plaintiff shall cater for the subject minors clothing.
  14. That being a children case, I make no orders as to costs. Each party is at liberty to apply.
8. Dissatisfied with this Judgment of 13<sup>th</sup> August 2021, the Appellant(Defendant) filed a Memorandum of Appeal dated 10<sup>th</sup> September 2021 in which he listed five (5) grounds of appeal as follows:
1. The Learned Magistrate erred in law in failing to hold that the Respondent has challenges in alcoholism, that was sufficient to warrant a finding of exceptional circumstances to grant the Appellant the custody of the children.
  2. The Learned Magistrate erred in law in failing to find that,all the circumstances of the case taken into account the custody of the children should have been granted to the Appellant.
  3. The Learned Magistrate’s judgment went against the weight of evidence which was in favour of the Appellant.
  4. The Leraned Magistrate failed to apply the principle that the best interests of the children should be taken into account when arriving at the finding as to whom between the Appellant and the Respondent should be granted custody.
  5. The Learned Magistrate erred in law and in fact in granting custody of the children to the Respondent.
9. The Appellant prayed that the appeal be allowed; this court do order that the Appellant be granted custody of the cubject children and the Appellant be awarded the costs of this Appeal.



### **Appellant's Submissions.**

10. The Appellant submitted that the Respondent admitted that she was battling depression and alcoholism. The minors also told the court that the Respondent would come home drunk with male friends and drink in their presence. That the older child, MK was almost raped by the male friends of the Respondent. He submitted that the character of the Respondent was not considered by the court while granting her custody of the minor. He relied on the decisions of *In re A B O Child*[2018] eKLR and *AKHIV & another v FNK*[2022] eKLR, where the court in both cases found that the characters of the mothers was questionable and granted custody to the father.
11. It was further submitted that the minors are no longer children of tender years as defined in Section 2 of the Act. That it is in the best interest of the children that custody be granted to the Appellant.
12. Lastly, the Appellant submitted that no evidence had been presented before this court to prove that he was unfit to take care of the minors.

### **Respondent's Submissions.**

13. The Respondent stated that the Appellant abandoned his responsibilities as the father of the minors and her mother was terminally ill which drove her to depression and alcoholism. She submitted that she has been going for therapy since 2018 and is therefore fit to have custody of the minors. The evidence on record, including reports from Amani Counselling Center, clearly indicates that the Respondent is still undergoing therapy, which continues to benefit her mental and emotional health. Most importantly, despite the challenges she faced during that period, the Respondent continued to provide for her children and ensure their well-being to the best of her ability that has since overcome her alcoholism albeit with instances of relapse.
14. She relied on the decision in *H v A* [2015]eKLR where the court held that recovery from a past condition, such as addiction, should not automatically disqualify a parent from being granted custody, especially when it is in the best interests of the children. She argued that she was on the way to recovery from alcoholism and has not taken alcohol since 2018.
15. She further submitted that the minors ascertainable wishes were considered before custody was given to her. The children officer recommended that she be given custody. The minors were also interviewed by the court and they all expressed their wish to stay with her. She relied on the decision of *A.B v. J.B* [2019] eKLR where the court in granting custody to the mother considered the wishes of the children.
16. It was her submission that the court should look into the actions of the Appellant in the past. He abandoned her and the children, abandoned his parental responsibility and subjected her to emotional and physical abuse in front of the children. The Appellant then took the children and abandoned them with his mother . She submitted that the Appellant is not interested in the well being of the minors. She submitted that the Appellant should not be given custody of the children.

### **Analysis And Determination.**

17. I have considered the evidence of the parties and also the submissions made by the two learned counsel for the parties.



18. 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).

19. 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.
20. 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.

21. The Respondent herein testified alongside her sister Sylvia Moraa Amati. The totality of their evidence is that the Appellant was violent towards the Respondent during the subsistence of the marriage and that he had abandoned the Respondent and the Children before he came and forcefully took them from her custody.
22. Whereas it was acknowledged that the Respondent had suffered from alcoholism, drug addiction and depression, she had since undergone rehabilitation and she was on the path of recovery. They submitted that this was supported by the reports of the Children's officer who confirmed that the Children were comfortable with their mum.
23. The Appellant testified and called an expert witness to testify on the deleterious impact of alcoholism, substance abuse and depression. It was the Appellants testimony that the Respondent's abuse of alcohol made her unsuitable to have custody of the minor.
24. The Court interviewed the 3 minors then and obtained the children's views on both parents and what their wishes were.
25. At the conclusion of the trial in a detailed judgment the Court decided to grant the parents joint custody. The Appellant is aggrieved by this decision.
26. This issue for determination therefore is whether this Court should vary the decision of the lower court and grant sole custody of the minors to the Appellant. The Children are now aged 18 years, 13 years and 10 years.



27. Both *the Constitution* of Kenya and the Children's Act gives clear directions on what ought to be considered in matters that relate to children. Article 53 of *the Constitution* of Kenya declares the rights of children in Kenya as including:-

- i. Right to a name and nationality from birth.
- ii. Free and compulsory basic education.
- iii. Basic nutrition, shelter and health care.
- iv. Protection from abuse, neglect, harmful cultural practices any form of violence,inhuman treatment, and punishment, and hazardous or exploitative labour.
- v. Parental care and protection.
- vi. Not to be detained.....

And at sub-article (2) thereof, "A child's best interests are of paramount importance in every matter concerning the child.

28. The Children's Act, also gives a very elaborate declaration on what to consider while dealing with any matter that involves children. At Section 4 (2) of the Act, it is provided:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies the best interest of the child shall be a primary consideration.

29. The same statute at sub-section (3) goes on to provide;

All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to:-

- a. Safeguard and promote the right and welfare of the child;
- b. Conserve and promote the welfare of the child,
- c. Secure for the child such guidance and correction as is necessary for the welfare of the child and in public interest.

30. The common thread that runs through both the constitutional and legislative directions regarding matters that deal with children is that the main consideration in matters of children is the best interests of the child. The interests of the parents must be subservient to those of the Child.

31. Section 83 of the *Children Act*, further gives direction on principles to be applied in making custody orders the same states:-

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 forstar 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. ...
  - i. ...
  - j. The best interest of the child.
32. In this particular case, the consideration that I must place at the fore in determining this appeal is whether it is in the Children’s best interest to deny their mother shared custody as directed by the trial court. It is not debatable that it is always in the child’s best interests to have the care and provision by both parents. In instances as in the present case, the Court must examine whether the actions of a parent are so inimical to the interests of the Child that it would be in the child’s interests to place restrictions on the parent.
33. The Court of Appeal in *J.O. v S.A.O.* [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 suited 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.
34. In *KMM Vs JIL* (2016) eKLR, Hon. Lady Justice M.W Muigai also emphasized this principal and stated that;
- ..... a child of tender years best interest and welfare are where legal custody is awarded to the mother barring extenuating circumstances that would prevent the mother from protection and care of the child. Case law lends credence to the proposition that cases of child of tender years less than 10 years old as defined under section 2(1) of the children’s Act 2001, custody is granted to the mother.
35. It is submitted that the children are no longer of tender years and therefore the tender years principle is necessarily outweighed by the best interest principle. I agree.
36. The Respondent has a history of abusing alcohol and suffering from depression. The Appellant on the other hand is accused of being violent, abandoning the children with his mother in Mombasa. I have considered the judgment of the Court in the trial court and it is evident that the Magistrate considered all these factors before arriving at her decision. I am also minded that the trial court had the advantage of seeing the parties and observing them. I am



particularly persuaded by the reports of Susan Ouma, Sub County Children's Officer dated 16<sup>th</sup> April 2019 and 12<sup>th</sup> April 2020.

37. In both the reports the Officer undertook home visits, interviewed the parties and the Children and arrived at the conclusion that custody should be shared between the parents. In my view the safeguards put in place by the Court requiring that the Respondent continue with treatment for a minimum period of 3 years with reports submitted to Court are sufficient to monitor and ensure the Children are not exposed to harm.
38. Based on the foregoing, the Appeal is dismissed in its entirety and I uphold the judgement of the trial Court. The lower court file should be returned to the trial Court so as to ensure that the Respondent complies with the requirement to submit annual evaluation reports.
39. This being a family matter each party will bear their own costs.

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

**PM NYAUNDI**

**JUDGE**

In the Presence of

Fardosa Court Assistant

