REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO 53 OF 2018

LK.....1ST APPELLANT

KMI.....2ND APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR/1ST RESPONDENT

AN alias WM.....2ND RESPONDENT

JN.....3RD RESPONDENT

DIRECTOR OF CHILDREN SERVICES.....4TH RESPONDENT

(Being an appeal against the Ruling and orders of Musyoka SPM in **Kikuyu C.N. No. 7 of 2018** dated 5th April 2018.)

JUDGMENT

1. The child at the centre of these proceedings is **RK,** who was born on or about 12th July 2011 at [particulars witheld] Location, Marsabit County, to one **MK** and her husband **LK** (the 1st Appellant). **MK** unfortunately passed away about a week later owing to complications associated with childbirth. At the time, **MK**'s husband **LK** was far from home taking care of his herds, as is wont to be the case among the semi-nomadic pastoralist **Rendille** ethnic group to which the family belongs. In the material period, **AN** and **JN** (the 2nd and 3rd Respondents respectively) were serving as Christian missionaries with [particulars withheld] and were based at [particulars withheld].

2. The circumstances under which the said Respondents received the infant **RK** into their care are now surrounded by controversy but it is common ground that immediately after the death of **MK** , the 1st Appellant's brother, one **JTK,** in concert with the Chief [particulars withheld] Location, one **DTW** together with clan elders made a decision to hand over the infant **RK** into the care of 2nd and 3rd Respondents. The said Respondents readily took up the responsibility to take into their care and to nurture the infant.

3. About three weeks later, the 1st Appellant returned home and learned of the death of his wife and the care arrangements made in respect of the infant **RK**. Evidently satisfied with the arrangements he occasionally visited the missionaries' home at [particulars withheld]. This arrangement continued for a period of four years. However, in 2015 the 2nd and 3rd Respondents relocated to Kabete, Kiambu County upon the end of their missionary sojourn at [particulars withheld]. They brought the infant **RK** with them and continued to live with her. It appears that during this latter period, **KMI** (the 2nd Appellant) who is a sister to the deceased **MK** and therefore maternal aunt to the subject **RK,** had been able to establish contacts with the 2nd and 3rd Respondents who allowed her access to **RK** and therefore she became known to the minor.

4. The 2nd Appellant resides at [particulars withheld] Estate, Embakasi and has in her custody **RK's** two older siblings, namely **ESK** and **S. SK** whom **RK** had met and spent time with during visits to the 2nd Appellant's home . For her part, the 2nd Appellant remained the contact point between the two families in this time.

5. In December 2017, the 2nd and 3rd Respondents visited [particulars withheld] in the company of **RK.** It appears that by that time, the 1st Appellant had made up his mind to take **RK** away from the 2nd and 3rd Respondents. A meeting of the said Appellant's extended family was called, but the matter could not be resolved as the 1st Appellant, his extended family, the 2nd and 3rd Respondents could not agree on the custody of **RK**. While the family of the 1st Appellant favoured the Respondents, **RK's** maternal family supported the 1st Appellant. The child was eventually handed over to and remained in the 1st Appellant's care for several days. However, the 2nd and 3rd Respondents, believing the turn of events not in the child's interest, made a report to the County Coordinator Children Services Marsabit and police, the latter who

intervened and took the child from the 1st Appellant. They handed **RK** back to the 2nd and 3rd Respondents who travelled with her to Nairobi.

6. From then on, relations between the two families were strained. Starting January 2018, the 2nd Appellant on her own behalf and on behalf of the 1st Appellant, made reports to various Children Offices in Nairobi. The Children Office at Westlands, Nairobi having summoned the 2nd and 3rd Respondents pursuant to the 2nd Appellant's complaint referred the case to the Children Office Marsabit.

7. It appears that the complainants were reluctant to follow through with the referral and eventually, the matter ended up with the sub-County Children Officer Kikuyu, one **Harriet Kihara** to whom a report was made by the 2nd Respondent concerning the minor. Apparently, a sitting was arranged between the parties by the Children Office, but no solution was found. Hence, a decision was made by the Children Office to present the matter to court as a care and protection case. Thus, on 25th January 2018 Harriet Kihara filed a Care and Protection Case No. 7 in respect of **RK** by lodging a social enquiry report under section 119(1)(h) of the Children Act at the SPM's Court Kikuyu. In the said social enquiry report of even date, the officer referred to the 2nd Respondent as the child's guardian.

8. The report stated *inter alia* that:

> **"She (child) was rescued by [particulars withheld] Missionaries in Samburu after birth. Her mother passed away while giving birth to her and according to Samburu traditions, a child born under these circumstances is a bad omen and should be killed. She was rescued before the killing was arranged and placed with the family of GN who were [particulars withheld] Missionaries there".** (sic)

9. The report also made reference to the Christmas incident of 2017, the complaints lodged by the 2nd Appellant in January 2018 and outcome, namely, that:

> **"After listening to both parties and consulting with our office, it was agreed that the matter was sensitive since the subject had been termed a bad omen due to the circumstances of her birth and there is no evidence that this has changed, they were referred to Laisamis to the Children's Department there but the maternal aunt is unwilling to go there."**

10. The report ended with the recommendation to the court to find the subject to be a child in need of care and protection as per the provisions of Section 119(1) (h) of the Children Act, to grant temporary custody of **RK** to **GN** (this must be erroneous reference to **AN**) and that the 2nd Appellant be summoned *"to court to explain what they want with the subject."(sic)*

11. On the same day the report was filed, the court having heard submissions by the Children Officer made a finding that the child **RK** was a child in need of care and protection. The court also granted temporary custody of **RK** to **AN** (2nd Respondent) and called for a report from the Laisamis Children Office. The matter was stood over to 5th April 2018 but before then, on 29th March 2018 an application was filed in court by the 2nd Appellant seeking leave to be enjoined as an interested party.

12. In addition, she sought an order for the subject child to remain in the court's jurisdiction "*pending the hearing and determination of her custodial and guardianship fate and of this application"* and an order to stay the temporary custody order to the 2nd Respondent pending the hearing and determination of her application. Leave was granted to the 2nd Appellant to appear as an interested party. Although the 5th April 2018 had been slated as a mention of the matter, it appears that the parties made arguments in respect of the application by the interested party which were centered on the custody of **RK** The subject who was also present was interviewed by the court. In a ruling delivered on the same date, the court granted legal and actual custody of **RK** to *"**AN**. and her family"*, until the child turned 12 years of age. This is the ruling that provoked this appeal by the two Appellants against the Director of Public Prosecutions (1st Respondent), the 2nd and 3rd Respondents and the Director of Children Services as the 4th Respondent.

13. The Appellants are dissatisfied with the lower Court's ruling and have preferred the present appeal based on the following grounds: -

> (a). **The Learned Magistrate erred in Law by rendering a Judgment which contravenes Section 6(1), 82, 83, 84, 85 & 119 of the Children's Act, 2001, Article 18 of UNCRC, Article 4 & 19 of African Charter on Rights and Welfare of the Child (ACRWC), Article 27 & 53(2) of the Constitution of Kenya.**
>
> **(b) The learned Magistrate erred in law and fact by making substantive orders divesting the biological father custody of his child thereof without his consent, nor input in the matter contrary to Section 123 of the Children's Act.**
>
> **(c) The Learned Magistrate erred in law in dealing with the matter as one of protection and care case wherein the matter did not meet the threshold under Section 119 of the Children's Act for the matter to be determined as such the child was not one in need of care of protection.**
>
> **(d) The learned Magistrate erred in law and fact in failing to interrogate the customs alluded to by the Children's Officer, Kikuyu and failing to get any evidence as to the existence of the alluded customs.**
>
> **(e) The learned Magistrate erred in law and fact in failing to interrogate and evaluate the purported custody conferred to the 2nd and 3rd Respondents, the legal ramifications thereto and the terms of understanding between the Appellants and the 2nd and 3rd Respondents for the care of the subject child.**

(f) The learned Magistrate erred in law and fact in relying on the reports of the Kikuyu Children's Officer and Sub-County Children's Officer Laisamis which reports were done without ever interviewing the biological father, maternal aunt, the subject child, the community elders or family members.

(g) The learned Magistrate erred in law and fact in failing to direct the Director of Children Services to evaluate the suitability of the said AN when he conferred legal and actual custody of the child to her and her family.

(h) The learned Magistrate erred in law and fact in failing to take into cognizance that the matter was filed after the Appellants had already reported the 2nd and 3rd Respondents of abducting the child forcefully and had already been summoned by the Children Officer.

(i) The learned Magistrate erred in law and fact in failing to interview and assess the biological father of the child, the 1st Appellant herein and most importantly in failing to give the biological father and maternal aunt (the Appellants) an opportunity to be heard.

(j) The learned Magistrate erred in law and fact in disregarding the 2nd Appellants submissions.

(k) **In view of the circumstances set out herein above, the learned Magistrate totally misdirected himself in delivering judgment in favour of the 2nd and 3rd Respondents by failing to consider and appreciate the law."**

14. The Appellants propose that the appeal be allowed and the "judgment" of 5.4.18 in the lower court be set aside. And further that the Appellants be granted legal and actual custody of the child **RK.** A motion filed contemporaneously with the memorandum of appeal, seeking *inter alia* to stay execution of the orders of the lower court and that **RK** be made a ward of the court was subsequently compromised, in terms that, the Appellants were to be granted access to the subject child on every other weekend and that Children Officers in Marsabit, Nairobi and Kiambu Counties were to file reports, based *inter alia* on home assessment visits, and finally, that the Director Children Services was to condense these reports and issue a final report with recommendations to this Court. The appeal was canvassed by way of submissions.

15. The submissions made by the two Appellants, the 1st and 4th Respondents are similar, raising three questions for determination. The submissions however make no direct reference to the grounds of appeal, but the issues raised for determination can be paraphrased as follows:

a) Whether **RK** was a child in need of care and protection as envisaged in Section 119 (1) (h) of the Children Act.

b) Whether the 2nd and 3rd Respondents had acquired any legal rights under the law over the minor **RK**.

c) In whom should the custody of the subject vest?

16. On the first question the Appellants, 1st and 4th Respondents submit that there was no material placed before the lower court to bring this case within the provisions of Sections 119(1)h) of the Children Act; that the social enquiry report initiating the care and protection case in the lower court did not reveal the sources of information therein ; that there was no material basis for the initiation of such case ; and that the Children Officer responsible failed to comply with the provisions of Section 120 of the Children Act. These submissions appear to cover grounds a (in part), c, d, and f, of the grounds of appeal, though not explicitly mentioned.

17. On the second issue, it was submitted that the 2nd and 3rd Respondents had not legally acquired any recognized rights under the Children Act by way of foster care placement, adoption or care and protection orders to justify their possession of the subject minor; and that the alleged 'adoption' facilitated by **JTK** , the brother to the 1st Appellant and endorsed by the Chief Kargi, did not confer legal custody of **RK** upon the 2nd and 3rd Respondents. More so, as the father's consent was not sought. That under Section 27 of the Children Act, upon the death of **RK**'s mother, parental responsibility was transmitted to the 1st Appellant; and that by dint of Section 83 of the Children Act the court in determining a custody order in favour of an applicant ought to consider the wishes of the parent and relatives among others.

18. It was argued further, that the 2nd and 3rd Respondents not having acquired legal custody of RK , the Appellants being the immediate biological relatives of the subject were the persons entitled to have custody of **RK**, and that it is in the best interest of **RK** to be reunited with her biological family. These submissions were not expressly linked to any of the grounds of appeal and the court can only presume them to refer to grounds a (in part), b, e, f, and h.

19. On the question as to the rightful person entitled to custody of **RK**, the Appellants and 1st and 4th Respondents cited a host of legal provisions including Article 53 of the Constitution, Sections 6, 23, 81, 120, 125 of the Children Act to assert that the biological parent of a child takes priority where the custody of his child is concerned and that the 1st Appellant, as **RK'**s biological parent, ought to be accorded priority, there being no evidence that he had ever put the minor's life at risk. The court was urged to be guided by the various reports filed pursuant to the consent order herein and to find that pursuant to the provisions of Section 4(3) of the Children Act, it is in the best interests of **RK** that her custody be awarded to the Appellants. I suppose these submissions would be covered under grounds a, b, f, g, h and (i) of the appeal.

20. The initial date set for judgment was the 6th February 2020, but the court discovered while preparing to write the judgment, that the 2nd and 3rd Respondents' submissions were not on record. These were filed on 18th February 2020 and a new judgment date set. For their part, the 2nd and 3rd Respondents submitted under two issues framed as follows:

(a) Whether the subject child was a child in need of care and protection pursuant to the provisions of Section 119 of the Children Act;

(b) The custody of the subject child**.**

21. On the first issue, the said Respondents reiterated the contents of the report by the Children Officer Kikuyu as to the circumstances obtaining at the time the child was placed in their care; that the Appellants' customs and traditions are prejudicial to the welfare of **RK,** hence the application of Section 119(1) (h) of the Children Act to this case. The said Respondents therefore defend the decision of the lower court. The 2nd and 3rd Respondents emphasized the paramountcy of the child's best interests, citing *inter alia* the provisions of Article 53 of the Constitution, Sections 4(2), and 187(1) of the Children Act. Pointing out that **RK** has since infancy been in the care of the 2nd and 3rd Respondents who have provided well for her basic needs, counsel asserts that separating **RK** from them would be prejudicial to **RK's** welfare, in addition to causing her disorientation.

22. As to what constitutes best interests of a child, reliance was placed on the decisions of the High Court in of **MA v ROO [2013] e KLR, AOO v Attorney General & Another [2017] eKLR** and **Bhutt V Bhutt MSA HCCC No. 8 of 2014 (OS).** Asserting that the best interests of **RK** should not be trumped by the wishes of relatives and parents, it was stated that in the present circumstances, it is in **RK'**s best interest to allow her remain in the custody of the 2nd and 3rd Respondents, rather than removing her therefrom and thereby causing her irreparable harm.

23. On the final issue, it was submitted that the custody order made in the lower court was consistent with the provisions of Section 82(1) and 83(1) of the Children Act. And that it complied with the general rule that the custody of a child of tender years ought to be with the mother in the absence of exceptional circumstances, as stated in **Wambua v Okumu (1970) EA 578** and **D. K. v J. K. N [2011]e KLR**. The court was therefore urged to dismiss the appeal and uphold the decision of the lower court.

24. The court has considered the submissions on this appeal and the record of the proceedings in the lower court. Two related issues stand up for determination namely :

(a) Whether the child **RK** was a child in need of care and protection in terms of the provisions of Section 119(1) (h) of the Children Act;

(b) Whether the legal and actual custody of **RK** should remain with the 2nd and 3rd Respondents or revert to or be conferred upon the 1st Appellant and/or the 2nd Appellant, respectively.

Whether RK was a child in need of care and protection in terms of the provisions of Section 119(1) (h) of the Children Act.

25. Section 119(1)(h) of the Children Act, under which the Children Officer Kikuyu approached the court on 25th January, 2018 states:

"For the purpose of the Act, a child is in need of care and protection –

a. ….

h. who, being female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child's life, education and health; or ----"

26. The social enquiry report having stated the circumstances in which **RK** ended up in the custody of the 2nd and 3rd Respondents, the relevant events of Christmas 2017 and the complaints by the 2nd Appellant to the Children Office, Westlands stated that:

"After listening to both the parties (2nd Appellant and 2nd and 3rd Respondents) and consulting with our office, it was agreed that the matter was sensitive since the subject had been termed a bad omen due to circumstances of her birth and there is no evidence that this has changed. They were referred to Laisamis to the Children's Department there, but the maternal aunt is unwilling to go there. (illegible) --- subject and therefore seek legal protection until her welfare is secured as she is endangered due to her community traditions."

27. Evidently invoking the powers of the court under Section 125 of the Children Act, (hereafter the Act) the Children Officer requested that the court to;

"1. Find the subject to be in need of care and protection.

2. Grant temporally custody to GN (sic) **of ID No. 1xxxxx until the matter is resolved.**

3. Summon the aunt, MK, to court to explain what they want with the subject.

However, this is subject to the court's final ruling."

28. The Children Officer initiating the matter has been attacked by the Appellants for not complying with Section 120 of the Act. Without considering the merits of the decision to approach the court under Section 125 of the Act, there was no reason in the admitted circumstances

of this case at the time, for the Children Officer to take **RK** to a place of safety prior to bringing the matter before the court. **RK** was in the custody of the 2nd and 3rd Respondents as she had been since 2011.

29. Nevertheless, in lieu of the provisions of Sections 120 (5) of the Act, the officer sought temporary custody be granted to the 2nd Respondent. It appears that on the basis of the initiating report and submissions made before it, the court proceeded to find that the subject was indeed one in need of care and protection, and committed **RK** into the temporary custody of the 2nd Respondent. The Appellants are irked by this finding, terming it baseless as there was no proof of the alleged cultural practice of infanticide where a mother died during childbirth among the Rendille. There was only a brief social enquiry report before the court, and seemingly the court invoked the provisions of Section 125(1) to call for a report by the Children Officer at Laisamis, for the obvious reason that the bulk of the relatives of **RK** and significant events were located there.

30. In my considered view, the circumstances of the case and the gravity of the allegations as regards Rendille tradition and custom of killing infants if the mother died during childbirth, required that such report be received first, so that the court could satisfy itself as required in subsection (2) of Section 125 of the Act, that indeed **RK** was a child in need of care and protection. Secondly, the court ought to have invoked section 78 of the Act to call for a report by an expert on the Rendille customs referred to in the initial report .In my reading, Section 125 of the Act envisages an enquiry or fact finding on the part of the court, prior to making the conclusion that a child is one in need of care and protection, rather than a perfunctory approach. The lower court was clearly alive to the need to obtain a report from the Children Office at Laisamis in order to establish the full circumstances of the child before it, but by making the finding that **RK** was a child in need of care and protection before receiving such or other expert report, the court appeared to put the cart before the horse. More importantly, under Section 123 of the Act the court was obligated to hear the child's parent, in this case the father of **RK** in connection with the care and protection application. The Appellants did not address that limb of the appeal, however.

31. In the lower court, the 2nd Appellant upon being allowed to participate as an interested party did not seek to avail herself of the provisions of Section 125(4) of the Act by applying for the review, variation or revocation of the finding that **RK** was a child in need of care and protection. Her application filed and dated 28th March 2018 in addition to other prayers sought to stay the order of temporary custody "**pending the determination of this application**".

32. Be that as it may, when the report from the Children Office Laisamis was eventually filed, it confirmed some of the matters contained in first report but made no reference to **RK** being rescued from a ritual killing, based on Rendille traditions. Instead the report indicated that **RK** whose "life was at risk" following the death of her mother at birth, and in the absence of the father, was handed over to the 2nd and 3rd Respondents by **JTK** a paternal uncle; and that the said uncle had approached the 2nd and 3rd Respondents, with the blessings of the entire extended family **"as no one within the family was in a position to care for the minor".** The report also highlights the conflict which occurred in December 2017 when the 1st Appellant decided to take the child **RK** from the 2nd and 3rd Respondents and the intervention by police, to restore the child to the 2nd and 3rd Respondents.

33. This report did not therefore confirm the fears in the first social enquiry report that the subject "**had been termed a bad omen due to the circumstances of her birth"** and that this had not changed. Nor did it confirm any mistreatment of the subject while in the brief custody of the 1st Appellant in December 2017. It however confirmed that the 1st Appellant had been keen then to have custody of **RK** as it indicated further, that there was a disagreement between **RK's** maternal and paternal extended family as to who should have custody of the subject:- the Appellants or the 2nd and 3rd Respondents.

34. Given the foregoing, this Court is of the view that the material placed before the lower court by way of reports did not justify the finding that **RK** was a child in need of care and protection at the material time. What appears to have immediately prompted the proceedings was the simmering conflict between the 2nd and 3rd Respondents on one hand, and the Appellants on the other, over the custody of **RK**, rather than the likelihood that **RK** could be subjected to female circumcision, early marriage or to customs and practices prejudicial to the child's life, education and health as anticipated in Section 119(1)(h) of the Act.

35. The 1st and 4th Respondents by their submissions and various reports filed pursuant to the consent order on this appeal, all but admit that it was a misdirection for the matter to be handled as one falling under Section 119(1)(h) of the Children Act, and for the court to find the subject a child in need of care and protection. What this Court finds remarkable is that all the authors of the reports filed on this appeal were well aware of or handled the conflict in respect of the custody of **RK** prior to the filing of the care and protection case, which under section 120 (10) of the Act could not be brought without notice to the 4th Respondents. However, on this appeal, they all vehemently opposed the action taken by the Children Office, Kikuyu.

36. On the second question, the custody order of the lower court flowed from the finding that **RK** was a child in need of care and protection, and although the court did not make reference to the section of the law under which it made its final order, the order was in the following terms:

> **"Until she reaches 12 years the child should be left in the hands of the foster mother and thereafter bonding with other siblings can start supervised by Children Officer nearest the foster parents and also the maternal Aunt. I therefore, for now give legal and actual custody of the child RK to AN and her family".**

37. The above order, temporary in nature, was in pursuance of the care and protection finding in respect of **RK** The scope of orders that a court may make upon being satisfied that a child is one in need of care and protection is stipulated in Section 125(2), (3), (5), and (6) of the Act. As crafted, the lower court's order above appears to fall under sub-section (5) above. This order cannot stand in view of the finding of this court on the first question; and secondly, because prior to making the order which effectively divested the 1st Appellant of his rights to custody of **RK,** the court did not give a hearing to the said 1st Appellant . Yet there is every indication that the 1st Appellant could be found and required to attend the court.

38. The reports filed by the Children Officers in Kikuyu and Laisamis indicate that the 1st Appellant was not interviewed and on the material before this court, it seems that the 1st Appellant had remained in the background. That notwithstanding, it was necessary to establish directly, rather than through interested intermediaries what the 1st Appellants' wishes were, prior to the order being made. This is a prime principle for consideration under sections 82 and 83(1) of the Act. The 1st Appellant being the only surviving parent of **RK** was entitled to exercise full parental responsibility over **RK**. (see Sections 23, 27 of the Act). On the other hand, **RK** as a child has the right to parental care and protection (see Article 53 (1) (e) and Section 6 of the Children Act). In my estimation, it was a serious misdirection for the trial court to fail to ensure the participation of the 1st Appellant as required under Section 123 of the Act. More so as the custody order eventually made essentially stripped the 1st Appellant of the legal custody of **RK.**

39. In the circumstances, the court allows the appeal in relation to the finding that **RK** was a child in need of care and protection and the order of custody flowing therefrom. The ruling of the lower court and orders dated 5th April 2018 are hereby set aside.

Whether the legal and actual custody of RK should remain with the 2nd and 3rd Respondents, or revert to or be conferred upon the 1st Appellant and/or the 2nd Appellant, respectively

40. **RK** has been in the actual custody of the 2nd and 3rd Respondents from her birth in 2011. Much has been said by the Appellants about the illegality by which they obtained or have retained this custody. There is no dispute however that **RK's** custody was given to the 2nd and 3rd Respondents by her paternal uncle **JTK** with the blessings of the local chief and clan elders. This was admittedly necessary to save the infant's life after her mother died soon after childbirth while her father the 1st Appellant was out grazing his herds. It appears that no relative at the time was ready or available to care for the infant, a task the 2nd and 3rd Respondents readily took up.

41. On material before the court, maternal deaths being fairly common in Laisamis or among the Appellants' community, it is a common practice for infants who have lost mothers at childbirth to be "fostered" by church organizations until weaned. Indeed when three weeks after he death of his wife, the 1st Appellant returned home, he did not interfere with the arrangements that had been made in respect of the infant ,and repeatedly visited with the said Respondents, no doubt to see to **RK**'s welfare. This status remained unchanged for 4 years, until 2015 when the 2nd and 3rd Respondent's tour of duty at [particulars withheld] ended.

42. Thus, while the alleged adoption letter written at the handing over of **RK** to the 2nd and 3rd Respondent did not amount to a conferment of legal rights upon the said Respondents, the 1st Appellant subsequently acquiesced to and honoured the 'fostering' arrangement. Unfortunately, it appears that the exact duration or terms of the arrangement have since 2017 or earlier been disputed. Despite this history, the Appellants together with the Coordinator Children Services Marsabit County in his report now depict the 2nd and 3rd Respondents as virtual ogres, child kidnappers and traffickers. Without casting aspersions, it is my view that the said coordinator ought to have been more measured in his approach.

43. The 2nd Appellant to whom the 2nd and 3rd Respondents reached out after relocating to Kabete has admittedly since 2015, had a working arrangement with the 2nd and 3rd Respondents, enabling her access to **RK,** and in the lower court had sought co-sharing of her custody. On this appeal the two Appellants prayed for the legal and actual custody of **RK** to be vested in them. However, in closing their submissions, the Appellants prayed that legal and actual custody of **RK** be vested in the 1st Appellant who will thereafter determine the relationship **RK** should have with the 2nd Appellant and the 2nd and 3rd Respondents. It is not clear to the court how that would practically work out, as **RK** being a female child of tender years ought ideally, to be in the custody of a mother or other close female relative. On his part, upon being interviewed by the Coordinator Children Services Marsabit, the 1st Appellant stated that he wished that **RK** be reunited with her sisters under the care of the 2nd Appellant. This Court is concerned that the 1st Appellant appears from the onset to have taken a retiring role in the life of **RK** and did not at all participate in the matter before the lower court. On this appeal he was represented by the 2nd Appellant.

44. It is evident that throughout, the 2nd and 3rd Respondents intended to keep **RK** as their own child, and though they erred by holding onto her for over six years without seeking any proper legal authority to do so, they have evidently taken good care of her as observed by the trial court. Notwithstanding their unexplained failure to formalize their possession of **RK** and taking her with them to Kabete in 2015 allegedly without the 1st Appellant's consent, it appears that they have cared for **RK** as their own child and she in turn views them as such. The trial court recorded this fact.

45. That said, neither these past acts of charity nor the undeniable life events make them **RK's** legal parents or give them superior rights. This court also frowns upon the persistent reluctance by the said Respondents to allow a home visit by Children Officers despite consent orders recorded herein. For all that, the single irreducible minimum here is that the best interests of **RK** are superior to those of the adults feuding over her custody and must be upheld in any event. On that score, this court associates itself fully with the sentiments of the court in **Bhutt v Bhutt Mombasa HCCC No. 8 of 2014(OS).**

46. On this appeal, the Court has been asked to award custody in respect of **RK.** The court is reluctant to do so. For several reasons. Firstly, going by the Record of Appeal filed herein , there was no application of the nature envisaged in section 82 of the Act for the grant of custody in respect of **RK** to any of parties before the lower court, and none of them had been vetted for suitability in the role. The reports filed subsequent to a consent on this appeal, and arguments now raised before this court on custody were not canvassed in the lower court. The contents of these latter reports *vis-a-vis* those filed in the lower court may need further interrogation and even verification by way of evidence adduced in the course of a full hearing.

47. For instance, this court has found it remarkable that the Coordinator Children Services ,Marsabit to whom the 2nd Respondent made a report concerning the retaking of **RK** by the 1st Appellant in December 2017, had made no efforts subsequently to follow up with the police at Laisamis on the full facts. Now he claims that the 2nd Respondent hoodwinked him and that the said Respondent has been involved in

child trafficking in Laisamis. It seemed too that the Coordinator Children Services, Nairobi having received a report from the 2nd Appellant early in 2018, had dismissed her on allegations that the 2nd Respondent had already filed for custody. He did not give details thereof in his report, and it appeared that this statement was included in the report to justify the officer's previous inaction on the matter. His report, like that of his Marsabit counterpart throws a dim light against the 2nd and 3rd Respondents.

48. Equally, the 4th Respondent who, based on the material in the first social enquiry report, and the obligations under Section 120(10) ought to have had advance knowledge of the making of the application in the care and protection case in the lower court, on this appeal discredits the initial social enquiry report by his officer at Kikuyu. The less said on this the better. Suffice to state that, Section 78 and 125(1) place a high premium on reports by authorized officers and the need for candour, balance and professionalism cannot be over emphasized, as these are important aids to assisting the courts in arriving at just determinations.

49. What the parties are asking of this court as an appellate court, is to determine the question of **RK's** custody without the benefit of hearing the wishes of the 1st Appellant except by proxy, and without the benefit the trial court had, over two years ago, to interview or hear the wishes of the subject minor . The court would be handicapped, and in violation of Children Act, specifically sections 4 (4) and 83(1) , and especially subsection (a) and (d) thereof, and would certainly be liable to fall into the same error as the trial court, if it was to accept the parties' invitation.

50. True, it is vitally important for the fate of **RK** to be determined and settled once and for all. And perhaps, the parties are justifiably wary of the rigors of extended litigation. However, given the delicate circumstances of this case, nobody, and least of all the subject **RK,** will gain from a rushed decision. The court must feel assured before making a final determination that the core considerations in Section 83 of the Act have been addressed. Under Article 53(2) of the Constitution and Section 4(3) of the Act the best interests of **RK** are of paramount importance. She is still a child of tender years and would be traumatized and her welfare adversely impacted by a series of changes in her custody arrangements. The orders that this court proposes to make may not be ideal, but neither are the circumstances of this case.

51. In the circumstances, the court declines to make a determination on this appeal as to the rightful person entitled to **RK's** custody as sought by the parties. Instead, and in view of the history of this matter, the need to uphold the best interests of the subject herein , and the prevailing restrictions arising from the COVID-19 pandemic, this Court will make an interim order that, the status quo obtaining as of today, be maintained for a period of nine (9) months, with effect from the date of this judgment, during which period, the Appellants or the 2nd and 3rd Appellants are at liberty to make a proper application for the grant of the custody of **RK** in terms of Section 82 of the Act.

52. For the avoidance of doubt, this means that, **RK** will remain in the actual custody of the 2nd and 3rd Respondents for the above stated period, but with access being allowed to the Appellants as previously agreed before this Court. The application for custody may be made before any of the subordinate courts in Kiambu County falling under the jurisdiction of this Court, except the SPM's Court Kikuyu, or before the Magistrate's Court in Marsabit that is located closest to [particulars withheld] Location. In light of the nature of this dispute, the parties will bear their own costs.

SIGNED AND DELIVERED ELECTRONICALLY THIS 9TH DAY OF OCTOBER 2020.

C. MEOLI

JUDGE