



JKN v HWN (Civil Appeal 40 of 2014) [2019] KEHC 6737 (KLR) (13 June 2019) (Judgment)

JKN v HWN [2019] eKLR

Neutral citation: [2019] KEHC 6737 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 40 OF 2014**

JM NGUGI, J

JUNE 13, 2019

BETWEEN

JKN APPELLANT

AND

HWN RESPONDENT

*(Being an appeal from judgement delivered on the 19th of March 2014 by the
Hon. Otindo M. A. (RM) in the Nakuru Children’s Case No. 145 of 2013)*

The stereotype that a man is incapable of caregiving when compared to women should be inapplicable when determining child custody.

The appellant, aggrieved by the trial court’s order denying him custody of his two children and awarding it to their mother (respondent), filed the instant appeal. The trial court denied the appellant actual custody of the children on grounds that he was a man involved in breadwinning duties and would likely leave the children under the care of house helps. The court held that telying on the stereotypes to reach a verdict on an individual and specific case was unfair to the parties concerned. That strand of reasoning was dangerous because it somewhat implied that women who relied on paid help to supplement their care-giving work as they pursued their careers or business opportunities were somewhat giving less optimal form of caregiving than women who had chosen to be stay-at-home mothers. That was a strand of judicial reasoning that could easily send a message that “good” mothers stayed home with their children while “good” fathers go out and “win bread” for the family. The court replaced the order of the trial court with an order of joint custody.

Reported by Robai Nasike and Moses Rotich

Constitutional Law - fundamental rights and freedoms - rights of the child – best interests of the child - claim that a court of law eered in awarding custody to a mother of a child - whether the best interests of the children were considered by the trial court when it awarded sole custody to the mother - what amounted to exceptional circumstances that could disqualify a mother from being awarded custody of children of tender years - whether the appellant had proved exceptional circumstances necessary to disqualify a mother from being awarded custody of children of tender years - Constitution of Kenya, 2010, article 53(2); Children Act, sections 4(2),(3)(b) and 83.



Family Law - custody of children - actual custody vis-à-vis legal custody - what were the principles applicable when determining custody of children - whether there was need for a court to consider the wishes of children before making a custody award - whether the trial court erred when it relied on stereotypes to reach a custody verdict - whether section 83 of Children Act prohibited awarding joint custody to both parents - Constitution of Kenya, 2010, article 53(2); Children Act, sections 4(2) & (3)(b) & 83.

Brief facts

The appellant, aggrieved by the trial court's order denying him custody of his two children and awarding it to their mother (respondent), filed the instant appeal. The trial court denied the appellant actual custody of the children on grounds that he was a man involved in breadwinning duties and would likely leave the children under the care of house helps. The trial court concluded that it was in the best interests of the children to be placed in their mother's custody as awarding custody to their father would be equivalent to leaving them in the care of house helps.

Issues

- i. What were the principles to consider when determining custody of children?
- ii. What were the exceptional circumstances under which custody of children of tender years would not be awarded to the mother?
- iii. What was the difference between actual and legal custody?
- iv. Whether there was need for a court to consider the wishes of children before making a custody award.
- v. Whether the trial court erred when it relied on stereotypes regarding the role of men and women with regard to caregiving to reach a custody verdict.
- vi. Whether section 83 of Children Act prohibited a court to award joint custody to both parents.

Relevant provisions of the Law

The Constitution of Kenya, 2010

Article 53(2)

A child's best interests are of paramount importance in every matter concerning the child.

The Children Act, 2001

Section 83

(1) 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 foster 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) whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;

(i) the circumstances of any sibling of the child concerned, and of any other children of the home, if any;

(j) the best interest of the child.

(2) Where a custody order is made giving custody of a child to one party to a marriage, or in the case of joint guardians to one guardian, or in the case of a child born out of wedlock to one of the parents, the court may order that the person not awarded custody shall nevertheless have all or any rights and duties in relation to a child, other than the right of possession, jointly with the person who is given custody of the child.



Held

1. Article 53(2) of the Constitution and section 4(2) and (3)(b) of the Children Act provided that in making any decisions concerning children, the paramount consideration should always be the best interests of the child. When determining child custody, the general principle that custody of young children should be awarded to the mother unless special circumstances and peculiar circumstances existed to disqualify her from being awarded custody. What amounted to the exceptional circumstances depended on each case and would include; if the mother was unsettled, had taken a new husband, her quarters were in a deplorable conditions, disgraceful conduct, immoral behaviour, drunken habit, or bad company. The trial court applied the two principles governing the award of custody and came to the conclusion that custody should be awarded to the respondent.
2. The principle of best interests of the child required the court to take into consideration the immediate status of the two children including relevant events that had occurred since the Trial Court rendered its judgment. The two minors were no longer considered children of tender years. Section 2 of the Children Act provided that children of tender years were those children aged ten years and below. The two minors had turned twelve and eleven years old. After the trial court's judgement was rendered, two reports were filed by Children Officers. The reports disclosed no reason sufficient to deny custody of the children to either of the parents.
3. The trial court gave actual and legal custody of the minors to the respondent. Actual custody was defined as the actual possession of the person of the child. Legal custody, as respects a child, meant so much of the parental rights and duties as relates to the person of the child including the place and manner in which time was spent. In the circumstances of the instant case, even given the duelling accounts of who was fit or unfit to have primary custody of the children, there were no grounds whatsoever for denying both parents the legal custody of the children. The trial court did not give any reason why it gave the respondent the sole custody of the children. There was no basis for denying the appellant legal custody of the minors.
4. Section 83 of the Children Act listed the factors to be considered when a court was making a custody award. For the appellant to succeed, he had to displace the *prima facie* rule requiring custody of young children to be awarded to the mother. Proof of extra-marital affairs on the part of the mother, on its own would, not be sufficient to automatically deny her custody of the children of tender years. The rule was that where no harm had been occasioned, sexual indiscretion or extra-marital sexual behaviour, even if proved, was not *per se* evidence of parental unfitness. The old common law rule tying a parent's sexual behaviour to parental fitness was no longer applicable in Kenya and in most of the other common law jurisdictions. The rule had been abandoned as a result of change in social attitudes and a realization that the presumption of harm to deny custody to a parent accused of adultery was mainly used against women to deny them custody of children. The rule, as applied, was sexist.
5. Sexual indiscretion or extra-marital sexual behaviour would only be a factor in a custody award if it rose to the level where it was harmful to the children; for example, when the parent in question had behaved so dishonorably that it affected the children through trauma. If there was no showing of harm, sexual indiscretion alone, without more, was not an inexorable rule excluding a court from awarding custody to a parent where other favourable factors were present. In the instant case, even if the appellant had established adultery on the part of the respondent, he had not shown actual harm to the children.
6. The wishes of the children especially when of tender age were not dispositive of who should be awarded custody. However, under section 83 of the Children Act as well as international best practices, it was a reasonable and equitable norm to take the wishes of the children, where clearly expressed, into account in making a custody determination. In the instant matter, it was established that the children wished to be with their father rather than with their mother. Further, the report of the Children Officer dated November 16, 2005, was categorical that the children preferred to live with their father. That should be contra-distinguished with the Children Officer's report dated December 13, 2018, where the Officer



- recommended custody be given to the respondent. In the earlier report, the officer was reporting what the children desired while in the latter report, the Officer was making a professional recommendation.
7. There was no evidence that either parent was an unfit parent for purposes of custody. There was no evidence that respondent behaved dishonourably or had a mental illness sufficient to disentitle her from having custody of her children. There was also no evidence that either parent was unable to give the children a reasonable upbringing by virtue of living in deplorable conditions or being financially destitute. There was, however, evidence that the children preferred to live with the appellant. The existing custodial arrangements had not worked out in the best interests of JNK whose developmental challenges had continued unabated. The custodial arrangements, as issued by the trial court, had not been optimal in maintaining relationships between the two minors and both parents. There was no proper basis for giving sole legal custody to the respondent instead of having it shared between the two parents.
 8. There was a serious misdirection regarding the trial court's reasoning in awarding custody to the respondent. The trial court's reasoning was steeped in a dangerous fallacy born of stereotypes. The trial court reasoned that it was not possible for a man to be the primary care giver because he would from time to time be required to attend to his bread winning duties and would soon leave the care of the children to the house helps. According to the trial court, it was difficult for a man to take the role of caregiving and it was safer for the respondent to take custody of the children. The problem with that reasoning was that it assumed that;
 - a. there was a clear and natural bifurcation between "care giving" and "bread winning" and that men do the latter while women do the former; and
 - b. mothers should be given custody because they were not involved in "bread winning" (especially if they were living with a man) and that, therefore, they took care of the children themselves rather than rely on paid help.
 9. The strand of reasoning was dangerous because it somewhat implied that women who relied on paid help to supplement their care-giving work as they pursued their careers or business opportunities were somewhat giving less optimal form of care-giving than women who had chosen to be stay-at-home mothers. That was a strand of judicial reasoning that could easily send a message that "good" mothers stayed home with their children while "good" fathers go out and "win bread" for the family.
 10. Relying on the stereotypes to reach a verdict on an individual and specific case was unfair to the parties concerned. At that point in the judgment, the trial court did not apply the scalpel of the *prima facie* rule and its exceptions to the facts and context at hand. Instead, the trial court used the hammer of stereotypes to reach a conclusion. Accordingly, the custody orders issued could not stand as given. The best interests of the child dictated a revision. The analysis of the evidence on record did not point to the need or superiority of either parents getting sole actual or legal custody of the children.
 11. Section 83 of the Children Act did not dictate that custody (whether actual or legal) ought to be given to only one parent or person. The section envisaged that custody could be shared or joint. The complexity of the situation in the instant case warranted the unusual response of granting a shared custody order. Both the appellant and respondent should equally share both the actual and legal custody of both children.

Appeal partly allowed.

Orders

- i. *Both parents had a right to participate and make inputs in the major decisions concerning the children including but not limited to the educational, religious, and medical decisions.*
- ii. *The physical custody of the children would be shared as equally as was practical given the educational decisions made by both parents.*
- iii. *While the children were in the custody or care of one party, the other should have reasonably liberal visitation rights to the children.*



- iv. *The appellant and respondent were ordered to appear before the Nakuru County Children's Officer or his designate to work out, through mediation, the details of the Joint Custody Agreement.*
- v. *Both the appellant and respondent were directed to mediate the Joint Custody Agreement in good faith; and that the failure by either to do so would result in adverse orders being made against the intransigent party.*
- vi. *each party was to bear their own costs.*

Citations

Cases

Kenya

1. *Africa Management Communication international Ltd v Joseph Mathenge Mugo & another* Civil Case 242 of 2013; [2014] eKLR - (Mentioned)
2. *Githunguri v Githunguri* Civil Appeal 30 of 1978; [1979] KECA 2 (KLR) - (Explained)
3. *JO v RMM* Divorce Cause 4 of 2004; [2005] eKLR - (Explained)
4. *JWN v MN* Children's Case 38 of 2017; [2019] KEHC 8527 (KLR) - (Explained)
5. *MAA v ABS* Civil Appeal 32 of 2017; [2018] eKLR - (Explained)
6. *Ojaaamong, Sospeter v Lynette Amondi Otieno* No 175 of 2006; [2007] eKLR - (Explained)
7. *Olela, Martha & another v Jackson Obiera* Civil Appeal 16 of 1979; [1980] eKLR - (Explained)
8. *Teachers Service Commission v Kenya National Union of Teacher & 2 others* Petition 23 of 2013; [2014] eKLR - (Mentioned)

United Kingdom

1. *In re L (infants)* [1962] 3 All ER 1 - (Explained)
2. *In re S (An infant)* [1958] 1 All ER 783 - (Explained)

Regional Court

Wambwa v Okumu [1970] EA 578 - (Explained)

Statutes

Kenya

1. Children Act, 2001 (Act No 8 of 2001) section 3(b); 4(2); 83- (Interpreted)
2. Constitution of Kenya articles 1, 27, 45, 53(2)- (Interpreted)
3. Judicature Act (cap 8) section 6- (Interpreted)
4. Marriage Act (cap 150) In general - (Cited)

Advocates

None mentioned

JUDGMENT

1. This appeal arises from a judgment delivered in Nakuru Children's Case No 145 of 2013. The appellant is aggrieved by the decision of the Honourable Otindo MA, and has preferred this appeal. In the suit before the lower court, the appellant was the plaintiff. He sought an order for custody of the two subjects who are issues in his now dissolved marriage with the respondent. The two subjects are: JNK – a boy born on 09/05/2007 and AWN – a girl born on 15/08/2008.
2. The orders that were extracted from the impugned lower court's judgment read:
 - a. That it is therefore ordered that the legal and actual custody of the minors be and is hereby given to the defendant [respondent].



- b. That the plaintiff shall have unlimited access to the minors during days which they are not in school.
 - c. That parties are at liberty to agree on maintenance. If they fail, each party shall be at liberty to apply.
3. The appellant seems to have filed two sets of memoranda of appeal. in his memorandum of appeal filed on the March 28, 2014, the appellant listed thirteen grounds of appeal as follows:
- a. That the learned trial magistrate erred in law and in fact in giving the custody to a mother who run away after she was caught red handed in the matrimonial bed with a house boy, a father of 2 children with whom they eloped and got married as a second wife thereby neglected her children at very fragile ages over 20 months ago and she has confessed in her testimony that she is of unstable mind...schizophrenic
 - b. That the learned trial magistrate erred in law and in fact in by not considering that the respondent had neglected the subject children while they were of very fragile ages, and it's the appellant who brought them up single handed to the current status of responsible school going children
 - c. That the learned trial Magistrate erred in law and in fact by failing to appreciate that the children know their father for the past 6 and 7 years and cannot call another man their father least the man they knew as their former servant
 - d. That the learned trial magistrate erred in law and in fact in not honouring the wishes of the children despite the intense persuasion during the examination. In fact they referred to themselves as Daddy's children
 - e. That the learned trial magistrate erred in law and in fact in not appreciating the uniqueness of this case
 - f. That the learned trial magistrate erred in law and fact by not considering the respondent's own admission in court that she is seeking custody because she wants provision. She has reiterated that men are only meant to provide and not to bring up the children.
 - g. That the learned trial magistrate erred in law and in fact by reasoning that the appellant is bringing the children up with the help of the house help who can leave any time. She did not consider that since they were neglected 20 months ago he had brought them up with the help of the house help.
 - h. That the learned trial magistrate erred in law and fact by not considering the defence witness DW 3, who testified that she was actually the one who was responsible for bringing up the children because their mother (respondent) was busy at work and would return home at 10.00 pm when the children are already asleep.
 - i. That the learned trial magistrate erred in law and fact by not considering the plaintiff's Witness PW 3 who testified that as a young mother, she is yet to meet a man like Mr Ndegwa (appellant) who is never late but home by 6.30 pm daily, never slept out, never brought a woman at home and can do all the



house chores duties when she is indisposed for over one year she looked after the children as their house help

- j. That the learned trial magistrate erred in law and in fact in not considering that the respondent is employed and will also definitely employ a house help if she has to keep her job. In the circumstances therefore, where is the rationale?
- k. That the learned trial magistrate also missed the whole point by arguing that the plaintiff did not produce evidence that the defendant was married, while it was crystal clear that she did not file a defence to our plaint statement, thereby admitting every single claim therein. DW2 who happened to be the defendant's father told the court that the defendant was within her right to marry again because the plaintiff had not paid the dowry anyway.
- l. That the learned trial magistrate erred in law and fact by showing outright bias by locking out 31 lined up witnesses just because the plaintiff was late for a few hours
- m. That the learned trial magistrate erred in law and fact by signing an irregularly and mischievously drawn court order that the respondent used to cause chaos within the school. The issues attend and further tried to enforce it using hired goons thus causing fear and tremor, not only to the subject children but to the entire student fraternity whereas the subject children have since missed to attend the said school for 2 days as they recovered from the tremor.

4. The memorandum of appeal dated August 18, 2015 had the following as the grounds of appeal:

- a) That the learned trial magistrate erred in law and in fact in giving the custody to a mother who ran away after she was caught red handed in the matrimonial bed with a house boy, a father of 2 children with whom they eloped and got married as a second wife thereby neglected her children at very fragile ages over 20 months ago and she has confessed in her testimony that she is of unstable mind...schizophrenic
- b) That the learned trial magistrate erred in law and in fact in by issuing an irregular and illegal ruling on the March 19, 2014 notwithstanding that, the respondent had not filed a replying affidavit to the main suit, Children Case No 145 of 2013 (therefore the custody should have been awarded to the applicant and not the respondent). Instead she filed a certificate of urgency claiming the children were dying because of emacipation and sickness dated 29 of May 2013.
- c) That the learned trial magistrate erred in law and fact in her ruling on the March 19, 2014 that disregarded to uphold that, the marriage is still subsisting *vide* Certificate of Marriage No [particulars withheld] which has not been dissolved by any competent court of law and is thus a double jeopardy that offend, abuse, deny, deprive, infringe, suppress and/or violate the freedoms and rights of this applicant if at all and consequently null and void *ab initio*.
- d) That the learned trial magistrate erred in law and fact by missing the whole point arriving at and delivering a ruling which in spirit and character is an adoption award and/ or celebration of an illegal marriage (bigamy) by arguing



that the plaintiff did not produce evidence that the defendant was married, while it was crystal clear that, the defendant did not file a defence to our plaint statement, thereby admitting every single claim therein. DW2 who happened to be her father told court that, the defendant was within her right to marry again because the plaintiff had not paid the dowry anyway. She is already married to her former house boy one, PM whom they cohabit together in Nyahururu.

- e) That the learned trial magistrate erred in law and in fact by failing to appreciate that the subject children have a full blown mind and they know their father for the past 6 and 7 years now and cannot embrace any other man their father least the man they knew as their former servant, as came out clearly during the court examination. Thus the honourable trial Magistrate abused the spirit of section 6 (acted in bad faith) of the Judicature Act cap 8, the entire Children Protection Act, the Marriage Act and article 1, 27 and 45 of the Constitution of Kenya, rendering the entire ruling illegal and unconstitutional, hence null and void.
- f) That the learned trial magistrate erred in law and in fact by showing outright bias by locking out 31 lined up witnesses just because the plaintiff counsel was late for a few hours. Their testimonies would have demonstrated to court how my children are already recovering from stigma of cruelty in their mother's new marriage in her own hands of motherly care during the visitations and now after full custody. The separation between me and my children, occasioned by the ruling of RM (MA Otindo) on 19th of March 2014, affected my seriously leading to a mysterious disease that caused him to lose memory and is passing stool and urine unaware anywhere during the day and night. It has also affected his education and he has remained in one class-nursery to date, instead of being in class 3 while his follower sister Angel is in class 2. His doctor has attributed this fact to a savior strenuous stress and referred him to a psychologist in Gertrude Children Hospital in Nairobi.
- g) That the learned trial magistrate erred in law and fact by not considering that the respondent had neglected the subject children while they were of very fragile ages, and it's the appellant who has brought them up single handledly to the current status of responsible school going students. DW 3 who happened to be the ward's house help told the court how careless the defendant handled my children while they were under her care, and that at one point, at a certain stage, I would have lost both my children at one go, while she was in bed having a nice time with another man. She further testified that she was actually the one who was responsible for bringing up the children because their mother (respondent) was very busy at work and would return home at 10.00 pm at night when the children are already asleep
- h) That the learned trial magistrate erred in law and in fact by reasoning that the appellant is bringing the children up with the help of house help who can leave at any time. She did not consider that since they were neglected at very fragile ages, he brought them up with the help of the house help
- i) That the learned trial Magistrate erred in not considering that the respondent is employed and will also definitely employ a house help if she has to keep her job, in the circumstances where is the rationale



- j) That the learned trial magistrate erred in not considering that the respondent is employed and will also definitely employ a house help if she has to keep her job, in the circumstances where is the rationale
 - k) That the learned trial Magistrate erred in law and fact by not considering the respondent's own admission to court that she is seeking custody not because of love but the provisions. She reiterated that, men are only meant to provide and not bring up children.
 - l) That the learned trial magistrate also erred in not honouring the wishes of the children who denounced their mother in a full packed court despite intense persuasion during the examination by court to go with their mother. In fact they referred to themselves as daddy's children. She also failed to appreciate the uniqueness of this case, having acknowledged during the hearing that, this is the 1st case she has come across where the man comes forward voluntarily to maintain his children singularly without any coercion
 - m) That the learned trial magistrate erred in law and in fact by not considering the plaintiff Witness PW 2 who testified that, as a young mother, she is yet to meet a man like Mr Ndegwa (appellant) who is never late but at home and can do all the house core duties when she was indisposed for over one year she looked after the children as their house help.
 - n) That the learned trial magistrate erred in law and fact by signing an irregular drawn orders against her own orders that were used by the respondent to polarize the whole school from learning when she tried to enforce it using hired goons thereby causing fear and tremor not only to the subject children but to the entire students fraternity. The subject children have missed the school for 2 days while recovering
5. The appeal is opposed by the respondent. For most of this litigation, both the appellant and the respondent acted *pro se*. However, in the latter part of this appeal, the respondent was represented by counsel, Mongeri & Co Advocates Ms Moenga orally argued the appeal on her behalf.
6. The appellant *vide* submission dated February 25, 2019, submitted as follows:
- a. The children have not accessed their father for 4 years now. That following a lower court order the respondent has denied the appellant access to the minors for the whole of 2015. Hence committing a criminal offence as a result [JNK's) life has been totally ruined. That the children continue to suffer from stigma of cruelty in the hands of their mother.
 - b. The appellant relied on the following authorities:
 - i. *Africa Management Communication international ltd v Joseph Mathenge Mugo & anor* [2013] eKLR
 - ii. *Teachers Service Commission v Kenya National Union of Teacher & 2 others* [2013] eKLR
 - c. The appellant insisted that the magistrate in the lower court erred by failing to consider the acts of the mother/ respondent when she made her custody order. In particular, the appellant says that the learned Magistrate ought to have considered the following:



- i. That the respondent dishonoured her children by having sex in the marital bed with the house boy in the full knowledge of the children and house help.
 - ii. The respondent neglected the children at the most tender age.
 - iii. The respondent confessed in court to suffer from schizophrenia.
 - iv. The mother's behaviour in and outside the court was so wanting.
 - d. The mother/respondent not mentally fit to handle custody of the children.
 - e. The mother/ respondent cannot be trusted with the motherly care of her own children.
 - f. The mother/respondent from her own deeds and extraneous acts has demonstrated she cannot be trusted with the care and custody of her own children.
7. The respondent vide submissions dated March 18, 2019, raised the following issues for determination:
- a. Whether the trial court erred in law and fact by ordering that the respondent to be the custodian of the children: The respondent submits that trial court did not err in granting custody of the minors.
 - b. Whether the appellant is a suitable parent to be the custodian of the children: The respondent states that the reports show that she is suitable to take care of the minors
 - c. Whether the welfare of the children will be served if custody of the children is with the appellant or the respondent.
8. The respondent draws courts attention to the decision in MAA v ABS Civil Appeal No 32 of 2017. The holding of that decision was that the interest of the children is first and paramount and everything must be done to safeguard, conserve and promote the rights and welfare of the children. She urges the court to dismiss the appeal
9. This is a first appeal. The duty of a first appellate court was succinctly stated by Wendoh J in JWN v MN [2019] eKLR in the following words:
- It is settled law that the duty of the first appellate court is to re-evaluate the evidence tendered in the subordinate court, both on points of law and facts and come up with its findings and conclusions
10. This is the standard of review upon which it is incumbent upon the court to utilize in determining this appeal.
11. It is fair to say that this case has been quite heated – both in the lower court and here. The parties have filed numerous applications and voluminous affidavits and other documents. Many allegations have been made – including against judicial officers who have handled this matter. At the end of the day, though, the court's task is simple enough: it is to determine, on the basis of the law and available facts – constitutional; statutory; and decisional – who should have custody of the two minors JNK and AWN.
12. It is imperative to begin with the facts. The appellant brought the case to court. At the hearing, he testified and called two witnesses. In his testimony, he told the court that he should have the custody of the two minors because his former wife was not a responsible mother. He claimed that when they were living together, he often found the children in a bad state: unkempt and, often, unfed. He further stated that the respondent dishonoured the children by bringing a “boyfriend” who was a “house-help” to the house and slept with him in the couple's marital bed. The appellant testified that it was when



he discovered that his wife was unfaithful that he staged a confrontation where he caught the two red-handed at night in the couple's matrimonial bed. The appellant's narrative is that at the confrontation he gave the respondent a choice to either remain with him and the children or to go with the "boy-friend". He claimed that the respondent chose to go away with the "boy-friend" hence abandoning the children who were only 5 and 4 years old at the time.

13. The appellant's case was that the respondent had shown such little care for the children that the only proper order was for him to be given sole custody of the children. He testified that he had stayed with the children for about two years by the time the trial was being held – and that he had managed very well: the children were thriving unlike when their mother was present in their lives. He pressed that it was in the best interests of the children that he should have their custody.
14. The appellant's witness - MWO – testified that she was employed as the nanny for the two minors at the appellant's house. She gave glowing praise to the appellant's capacity as a father stating that he was hands-on and took great care to ensure that the children were always catered for. She said while she was, at the time of the trial, on maternity leave, she had recommended another woman to take care of the children. She intended to resume the task of caring for the children after her maternity leave. She narrated how she was responsible to caring for the children including washing their clothes and preparing their food.
15. The appellant's third witness was ANK. He testified that he witnessed the incident on 07/09/2012 when the allegedly, the appellant came home unexpectedly on a weekday to find a man in his house. The witness, who used to live as a tenant in a house in the same compound, testified that the man used to come frequently when the appellant was not at home. He corroborated the appellant's story that the man found in the house was naked and that the respondent had only a night dress on. He also corroborated the appellant's version that the respondent left that same night.
16. The respondent's story is, naturally, dramatically different. Testifying on her own behalf, the respondent spoke of the terror, humiliation and suffering she went through in the hands of the appellant. Her story was that the appellant abandoned her and the children to fend for themselves. The appellant, the respondent claimed, often away for long spells in Nairobi and he did not bother to give them enough money. Then, the appellant was sent to civil jail for refusing or failing to pay child support for children from a previous marriage.
17. The respondent testified that in the six months the appellant was in prison, she had to find an alternative source of funds. So, with the help of her parents and siblings, she bought a *boda boda* and employed a man who used it commercially. However, the respondent testified that when the appellant got out of prison and discovered that she was carrying on this business, he was furious: that is when he attacked the man the respondent had employed to run the *boda boda* and her – and then threw her out of the house. She claims that the appellant and some men he had come with proceeded to burn the *boda boda*. The respondent insisted that she was not having an affair with the man although she conceded that he was found in the house. She said that he used to sleep in the house so as to carry on the business.
18. Responding to the claim that she had abandoned the children, the respondent said that she had to flee after the appellant became violent towards her and injured her badly; that she needed time to heal. She said that as soon as she was okay, she tried to get the children but the appellant barred her from even accessing the children. The respondent testified that due to the trauma she suffered – the violence by the appellant as well as being denied access to her children – she had suffered an episode of schizophrenia. She stated that she needed therapy and treatment but that she was okay by the time the trial was held.
19. The respondent's witnesses were her parents. They each testified that the appellant was not a responsible husband; and that they had to come to the rescue of their daughter to raise funds for her



to buy a boda boda so that she could take care of her children. They both denied that the respondent was carrying out an affair with the man who operated the boda boda. They claimed that the appellant was not sincere when he claimed that the respondent was not a fit mother.

20. The learned trial magistrate weighed the duelling claims and accounts. The learned Magistrate conceded that it was “not a simple case to decide”. She continued thus:

I have noted throughout the vigour at which both parties have fought to put their best facts forward. I must admit that the plaintiff [appellant] has shown himself to be a man of great affluence and a man who loves the institution called home of his children, he [sic] certainly appeared to be a man of means. He clearly demonstrated to the court that he is ready to go an extra mile to be the care giver including perform[ing] house duties for the children with the help of house-helpers. It is clear from the respondent [appellant?] one of the reasons of the difficulties between the parties is the defendant’s alleged association with another man.

21. So, how did the learned magistrate resolve the difficult case? The learned Magistrate reasoned thus:

This court had an opportunity to interview the children. They looked well and did not have any preference as to who to stay with. My own observation of the parties herein is that I did not think the defendant does not care for her children as portrayed by the plaintiff and vice versa of the plaintiff.

The question therefore is would the children best interests be served by in the actual custody of the father (plaintiff) and be cared for house help or being with the mother who allegedly stays with a different man (sic). Although, the plaintiff was categorical that he will personally supervise the house girls, I find that this may work for a short while as a man, he shall from time to time be required to attend to his bread-winning duties and will soon leave the duties to the house girls. The other question I ask is and which question is the reality, if the said house girls walk out on the plaintiff in the middle of his bread winning duties, what will happen? If I am to call a spade a spade, it is difficult for a man to take the role of care giving. The only reason I find the plaintiff has put forward as to why the defendant is not suited to have custody is that she is not morally upright. No evidence was given to this court in this regard and be as it may, if she has another man she stays with, it would be much safe for her to take custody of the children than they be in the care of house helps.

22. I have quoted from the judgment at length to set out the reasoning of the learned trial Magistrate since it is that reasoning which must be tested on this appeal.

23. In my view, the learned trial magistrate began by correctly stating the two framing considerations a court must have in mind in deciding the custody question. The two are the following.

24. First, our Constitution and statutory law are clear in making any decisions concerning children, the paramount consideration must, always, be the best interests of the child.

25. The *Constitution of Kenya*, 2010 in article 53(2) provides as follows:

A child’s best interests are of paramount importance in every matter concerning the child.

26. Section 4(2) and 3(b) of the *Children’s Act* echos the Constitutional imperative:

- (2) In all actions concerning children, whether undertaken by Public or Private Welfare Institution, Courts of Law, Administrative Authorities or Legislative bodies, the best interest of the child shall be the primary consideration.



- (3) 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 the adopting a course of action calculated to –
- a. Safeguarding and promoting the rights and welfare of the child;
 - b. and promote the welfare of the child.

27. The second prime principle taken into consideration in deciding custody questions is honed out of case law: it is that there is a *prima facie* rule that absent exceptional circumstances, the custody of children of tender years should be awarded to the mother.

28. This is a rule of esteemed judicial ancestry and pedigree tracing its history in Kenya to long before the passage of the *Children Act* and the promulgation of the *Constitution of Kenya*, 2010. For example, in *Wambwa v Okumu* [1970] EA 578, Mosdell J had this to say:

I do not think it can be controverted that in the absence of exceptional circumstances, the welfare of a female infant aged four years ... demands that the infant be looked after by its mother rather than its putative father.

29. Similarly, the Judges of Appeal in *Githubunguri v Githubunguri* [1979] eKLR stated as follows:

...the custody of very young female children should be granted to their mother, in the absence of exceptional circumstances which do not in my opinion exist in this case. The learned judge correctly directed himself that in cases of this nature, the paramount consideration was the welfare of the children. He rejected the proposition, advanced before him by the mother's advocate, that there was a 'rule' in favour of the mother. With respect, this was a misdirection. When dealing with the paramount consideration of welfare, especially where young female children are concerned, there is a rule that the mother is normally the person who should have custody.

30. The Judges of Appeal in the *Githubunguri* case approvingly quoted Roxburgh J *In re S (an infant)* [1958] 1 All ER 783, at 786 and 787:

I only say this; the *prima facie* rule (which is now quite clearly settled) is that, other things being equal, children of this tender age should be with their mother, and where a court gives the custody of a child of this tender age to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the *prima facie* rule.

31. The Judges of Appeal also cited Lord Denning MR *In re L (infants)* [1962] 3 All ER 1:

I realise that as a general rule it is better for little girls to be brought up by their mother.

32. Finally, more recently, the Court of Appeal in *JO v SAO* (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 suitable 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.

33. And what amounts to exceptional circumstances? The decision in *Sospeter Ojaaamong v Lynette Amondi Otieno*, Court of Appeal Number 175 of 2006 had this to say about exception circumstances:

The exceptional circumstances would include if the mother is unsettled, has taken a new husband or her living quarters are in a deplorable state.

34. On the other hand, *Martha Olela & another v Jackson Obiera* CA 16 of 1979 explained the general principle that custody of young children should be awarded to the mother unless special circumstances and peculiar circumstances exist to disqualify her for being awarded custody. As per the judges, the exceptional circumstances would include “disgraceful conduct, immoral behavior, drunken habit, or bad company.”

35. The learned trial Magistrate applied these two prime principles governing the award of custody cases and came to the conclusion that custody should be awarded to the respondent. The appellant believes that this was a misdirection; that he marshalled sufficient evidence to displace the *prima facie* rule that custody should be awarded to the mother. He complains that in the present case, the mother was demonstrably unfit and custody should not have been given to her.

36. On my part, I wish to begin my analysis by pointing out two things that have changed after the lower court judgment which must be considerations in my judgment if we are to take seriously the admonition that the best interests of the child must drive the decision on who should be granted custody of minors.

37. First, the two minors are no longer considered children of “tender years”. By virtue of section 2 of the [Children Act](#), children of tender years are those ten years and below. JNK and AWN are now twelve and eleven years respectively.

38. Second, in the period subsequent to the Judgment by the lower court, at the instance of the court, two separate reports by Children Officers have been filed in the case. It is incumbent upon the court to take the reports into consideration.

39. The first report is dated 16/11/2015 pursuant to a court order dated 04/11/2015. The report states as follows:

.....After having a very healthy discussion, parents agreed unanimously that there is need to put the best interest of the children first without jeopardizing their growth and development. They agreed that the first child who indeed requires special education to be enrolled in January, 2016 in a special school in Nairobi.

During the child friendly interview with the minors in our office, we made the following observations:

- 1) That, they were very happy to have seen their father.
- 2) That, they were in a jovial mood while in our office.
- 3) That, they honestly wished that they would be allowed to be residing with the father.



Taken into account of the above foregoing (sic), the office established that the children wished to reside with the father and/or be visiting him whenever there is an opportunity. They never denied the surmountable love they have for their father.

40. Then again at the instance of the court, another Children Officer filed a report dated 13/12/2018. The report made the following observations:

appellant

- a) The appellant had a fiancé who came after the respondent left the marital home.
- b) He had no problem with the respondent getting custody of the children and getting unlimited access to the children during the weekends and holiday. He wants the OCS Nyahururu to be involved in the handing over and taking over of the children
- c) The appellant wants the 2nd child to go boarding school.

respondent.

- 1) The respondent remarried in 2013 to a businessman who had 2 children. The children recognize him as their father.
- 2) The respondent stated that she did not have any problem with the appellant's access to the children.
- 3) She did not want the children to go to boarding school especially the child with special needs. She wished that the appellant would take care the education of the children. Her job was flexible enough to be able get a house help who comes during the day.

41. Further, the Children Officer made the following other observations:

1. The children are aware of what was going on, mum was remarried but they were not aware of the father having a fiancé.
2. There was animosity between the parties. Both had moved on in their lives. They both care about their children.
3. The children were well taken care of by their mother. The environment in both houses were conducive for the children.
4. The first subject needs special attention.

42. Finally, the Children Officer made the following recommendations:

- 1) Custody of the children should be given to the mother who should ensure that she exercises proper parenting.
- 2) The appellant should have unlimited access especially when the children are out of school. One weekend every month and half of the holiday and during mid-terms.
- 3) The handing over and taking over to be supervised by the Sub County Children Officer at the first instance until a time that the parties will have an amicable solution. Police involvement would traumatize the children.



- 4) The first subject should not be ignored and a special report from Curriculum Support Officer /Sub County Director of Education should be prepared. They can give a comprehensive report and recommendation.
- 5) Both parties to take care of their parental responsibilities as the court will order
- 6) The court should issue orders in the best interest of the children.

43. These two reports were both made subsequent to the judgment of the lower court. However, during the hearing of the case in the lower court, the learned trial Magistrate had occasion to interview the two minors. She recorded her findings in the court record as follows:

The court, after examining the minors find no evidence of suffering. The children were joyful, very bubbly, seemed to prefer going home with their dad as opposed to their mum. The girl, however, expressed desire to have the mother come. The boy did not express any preference to have the other come back home and live with them. I find no evidence of torture. However, the children are of tender age and seem to miss the presence of a mother in their lives.

44. To return to the orders given by the lower court after hearing the case, the learned magistrate gave “actual and legal custody” of the minors to the respondent. In *JO v RMM Nakuru DC No 4/2004(2005) KLR*, Musinga J stated as follows in regard to actual and legal custody:

Actual custody is defined to mean the actual possession of the person of the child as opposed to legal custody which means as respects a child, so much of the parental rights and duties as relates to the person of the child including the place and manner in which time is spent.

45. I should begin by pointing out that in the circumstances of this case even given the duelling accounts of who was fit or unfit to have primary custody of the children, there appears to be no grounds whatsoever for denying both parents the legal custody of the children. In her order, the Learned Magistrate does not say why the sole legal custody was given to the respondent only even after she had explained how it was a “difficult” decision. I find no basis at all for denying the appellant legal custody of the minors. Indeed, the reasoning of the Learned Magistrate quoted at length above seems to be confined to the issue of physical (actual) custody and not legal custody. I will return to this shortly.

46. Turning to the main question: can it be said that in the present case the appellant mounted sufficient grounds to surmount the prima facie rule that the custody of young children should be awarded to the mother? Differently put, do the best interests of the children in the circumstances of this case militate against the award of the custody of the children to the respondent as the appellant claims?

47. In addition to the two post-judgment facts I pointed out above, in reaching a verdict that is in the best interests of the child, it is important to begin with section 83 of the *Children Act*. That is the section that lists down the factors to be considered in making a custody award. It reads as follows:

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 foster 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. whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;
- i. the circumstances of any sibling of the child concerned, and of any other children of the home, if any;
- j. The best interest of the child.

Where a custody order is made giving custody of a child to one party to a marriage, or in the case of joint guardians to one guardian, or in the case of a child born out of wedlock to one of the parents, the court may order that the person not awarded custody shall nevertheless have all or any rights and duties in relation to a child, other than the right of possession, jointly with the person who is given custody of the child.

48. In the present case, the appellant insists that the following factors point ineluctably to the conclusion that only he, and not the respondent, should have been awarded custody:
- a. He claims that there was ample evidence to show that the respondent behaved dishonourably in front of the children and is not a woman of upright moral character.
 - b. He further claims that the respondent is not fit to be awarded custody because she abandoned the minors when they were young and stayed away from them for a period of more than one year. During this time, the appellant had sole de facto custody of the children.
 - c. The appellant also claims that custody should not have been given to the respondent because she disclosed in her own testimony that she was suffering from mental illness. She was, therefore, argues the appellant, unfit to have custody of the children.
 - d. The appellant also argues that the respondent should be disentitled from being awarded custody of the minors because she has kept the children away from the appellant for the four years since the lower court order was given.
 - e. Further, the appellant argues that the children have continued to suffer since the lower court order was given. JWK, in particular, has experienced a further downturn in his symptoms which evince signs of developmental challenges. The appellant is persuaded that the challenges JWK faces are due to the trauma he suffered in the hands of the respondent. The appellant argues that JWK was thriving when he was under his care.
 - f. Finally, the appellant argues that the wishes of the children should have been taken into account. The children, he says



49. Are these sufficient reasons to displace the prima facie rule that custody of young children should be with the mother? First, it is important to contextualize the arguments by the appellant thus:

- a. Even if we assumed, *arguendo*, that it was established on a balance of probabilities that the respondent had engaged in an extra-marital affair in the manner reported by the appellant, this would not be sufficient to automatically deny her custody of the children of tender years.

First, the rule of law is that absent specific showing of harm sexual indiscretion or extra-marital sexual behaviour, even if proved is not per se evidence of parental unfitness. There used to be a rule in the Common Law world which tied a parent's sexual behaviour to parental fitness. That rule came in the form of a presumption that spousal infidelity was harmful to the child, and the adulterer was deemed, *prima facie*, unfit to raise a child. This is no longer the rule in Kenya (and most of the Common Law world). In part, this change in judicial policy came as a result in social attitudes but also as a realization that the presumption of harm to deny a parent accused of adultery to custody was mainly used against women to deny them custody of children. The rule was, therefore, as applied sexist. Examples in the Common Law world abound but two contrasting examples would illustrate the point: In a case from Mississippi in the United States, the State's highest court, in *Winfield v Winfield*, 35 So 2d 443, 444 (Miss 1948) (en banc) ruled that when a divorce has been granted because of a wife's adultery, she is not entitled to custody of children. Similarly, in *Hanby v Hanby*, 158 So 727, 728 (Ala 1935) the Alabama highest court stated that a wife's adultery was conclusive of her unfitness to have custody of the child. On the other hand, in *The King v Greenhill*, 111 Eng Rep 922 (KB 1836) the court found that the father receives legal custody of the child if the child is too young to exercise discretion even if the father has committed adultery, as long as he never brought the adulteress into the house.

As I read our case law now, sexual indiscretion or extra-marital sexual behaviour will only be a factor in a custody award if it rises to the level where it harms the children as for example is assumed to happen when the parent in question has behaved so dishonourably that it affects the children through trauma. If there is no showing of harm, sexual indiscretion alone, without more, is not an inexorable rule excluding a court from awarding custody to a parent where other favourable factors are present.

In the present case, even assuming adultery was established on a balance of probabilities (which is the correct standard to use), there was no showing of actual harm to the children.

- b. On the question of whether the respondent abandoned the children when they were young, the evidence on record does not show that the respondent abandoned the children. This was the finding of the lower court and I have found no good reason to depart from it. The lower court believed the narrative of the respondent that the appellant did not allow her to access the children after she left the matrimonial home. Her evidence was credibly corroborated by the respondent's parents about the efforts they made to get the children back. This evidence remained undisputed and unshaken in cross-examination. Further, the appellant's own witness – PW2 – confirmed that she had instructions not to allow the respondents to access the children.
- c. What about the respondent's own evidence that at some point she suffered from an episode of Schizophrenia? Was this sufficient to disentitle her from an award of the custody of the children? With respect, I do not think so. It is not every whiff of mental illness which leads to a determination that a parent is unfit for custody. A court faced with the question of mental illness of a parent will have to assess whether the mental illness in question is a continuing one



and whether it impacts the parent's fitness as a parent. It is only if the mental illness interferes with the parent's ability to parent or provide a safe home environment for the child that a court is entitled to conclude that it is not in the child's best interests to award custody to that child.

In the present case, the respondent merely reported that she suffered an episode of schizophrenia due to the stress of missing her children. This issue was not pressed any further during the trial. The respondent reported that she underwent therapy and she has not suffered further episodes. This is not enough to lead to the conclusion that she is an unfit mother on account of the mental illness.

- d. Next, I will address the appellant's argument that the respondent should be disentitled from having custody of the children because she has disobeyed court orders for four years to give access of the children to the appellant. It is true, based on an analysis of the court file and the numerous applications made before the court, that the appellant has not had regular access to the children despite the clear court orders emanating from the lower court. It is premature to reach a definitive conclusion whether this has been due to the deliberate efforts by the respondent to disobey the court orders. I say it is premature because I am aware that the appellant has already filed an application to commit the respondent to jail for contempt of court. A definitive finding on the question will await the hearing of that application. For the purposes of disposing the present appeal, it is enough to note that the fact that the appellant has not had access to the children for four years when they were in the custody of the respondent is an important factor to take into consideration. Our law takes the position that whether actual custody is awarded to one of the parents or not, it is important for children to maintain relationships with both parents. Whenever possible, courts bend over backwards to fashion custody orders such that no parent is cut off from their children. That the custody orders given here seem to have failed to have the optimal effect of ensuring that both parents have reasonable access to the children is a factor to be taken into account in deciding if the custody order granted in the lower court should remain unchanged in this situation.
- e. The appellant also says that the court must pay attention to the fact that JNK has continued to face serious developmental challenges. I think he is right that the court cannot and should not ignore that fact. The Children's Officer in her report dated 22/12/2018 said as much. She is seriously concerned about the development of JNK and recommends that "a special report from Curriculum Support Officer/Sub County Director of Education should be prepared. They can give a comprehensive report and recommendation."
- f. Finally, the appellant urges the court to take into account the wishes of the children. He boasts that the children, even under heavy questioning in the trial court described themselves as "daddy's children." He argues that it was an error for the trial court not to take into account the wishes of the children.

It is true that the wishes of the children especially when of tender age are not dispositive of who should be awarded custody. However, under section 83 of the Children's Act as well as international best practices, it is a reasonable and equitable norm to take the wishes of the children where clearly expressed into account in making a custody determination.

So, was it established in this case that the children wished to be with their father rather than their mother? On balance, I would say yes. I say so for two main reasons:

First, when the children were questioned by the court, they seemed to unmistakably say so – though the trial Magistrate seemed to add the commentary that they "missed the presence of their mother" in her judgment.



Second, the report of the Children Officer dated 16/11/2015 was categorical that the Children preferred to live with their father – the appellant. This should be contra-distinguished with the Children’s Officer’s report dated 13/12/2018 where the Officer recommended that custody be given to the respondent. In the report dated 16/11/2015, the Children Officer is reporting what the children desired; in the latter report, the officer is making a professional recommendation.

50. Where does that leave things? I will summarize thus:

- a. There is no evidence that either parents is an unfit parent for purposes of custody.
- b. There is no evidence that the respondent behaved dishonourably or has a mental illness sufficient to disentitle her from having custody of her children.
- c. There is no evidence that either parent is unable to give the children a reasonable upbringing by virtue of living in deplorable conditions or being financially destitute.
- d. There is evidence that, on balance, the minors would prefer to live with the appellant.
- e. As pointed out above, the children are no longer children of “tender years.” They are, however, still relatively young at twelve and eleven years old.
- f. There is evidence that the present custodial arrangement has not worked out to the best interests of JNK whose developmental challenges have continued un-abated.
- g. There is evidence that the present custodial arrangement has not been optimal as far as maintaining relationships between the two minors with the two parents is concerned.
- h. As said earlier in this judgment, there was no proper basis for giving sole legal custody to the respondent instead of having it shared between the two parents.
- i. Lastly, it is important to point out a serious misdirection regarding the lower court’s reasoning in awarding custody to the respondent. In my view, the lower court’s reasoning was steeped in a dangerous fallacy born of stereotypes. The Learned Trial Magistrate reasons that it is not possible for a man to be the primary care giver because “he shall from time to time be required to attend to his bread winning duties and will soon leave the duties to the house girls.....[therefore]If I am to call a spade a spade, it is difficult for a man to take the role of care giving.” The Learned Magistrate then proceeds to reason that “it would be much safer for the respondent to take custody of the children than they be in the care of house helps...”

The two biggest problems with the reasoning in this portion of the judgment is that it assumes that:

- i. There is a clear and natural bifurcation between “care giving” and “bread winning” and that men do the latter while women do the former; and
- ii. Mothers should be given custody because they are not involved in “bread winning” (especially if they are living with a man) and that, therefore, they take care of the children themselves rather than rely on paid help. This strand of reasoning is dangerous because it somewhat implies that women who rely on paid help to supplement their care-giving work as they pursue their careers or business opportunities are somewhat giving less optimal form of care-giving than women who have chosen to be stay-at-home mothers. This is a strand of judicial reasoning that



could easily send a message that “good” mothers stay home with their children while “good” fathers go out and “win bread” for the family.

With tremendous respect, I find this reasoning to be dangerously problematic. It does no favours to women to espouse these kinds of stereotypes. Moreover, relying on the stereotypes to reach a verdict on an individual and specific case is unfair to the parties concerned. At this point in the judgment, the Learned Trial Magistrate does not apply the scalpel of the prima facie rule and its exceptions to the facts and context at hand. Instead, she uses the hammer of stereotypes to reach a conclusion.

51. The upshot of this is that the custody orders in this case cannot stand as given. The best interests of the child dictate a revision. In my view, the conclusions above do not point to the need or superiority of either parents getting sole actual or legal custody of the children.
52. In my view section 83 of the *Children Act* does not dictate that custody – whether actual or legal – must be given to only one parent or person. The section envisages that custody can be shared or joint. I believe that the complexity of the situation in the present case warrant the unusual response of granting a shared custody order: Both the appellant and respondent must equally share both the actual and legal custody of both children.
53. To effectuate this order of joint actual and legal custody of the children, the court directs as follows:
 - a. That both parents have a right to participate and make inputs in the major decisions concerning the children including but not limited to the educational; religious; and medical decisions.
 - b. That the physical custody of the children will be shared as equally as is practical given the educational decisions made by both parents.
 - c. That while in the custody or care of one party, the other shall have reasonably liberal visitation rights to the children.
 - d. That the appellant and respondent are ordered to appear before the Nakuru County Children’s Officer or his designate to work out, through mediation, the details of the Joint Custody Agreement. The Joint Custody Agreement should cover the full gamut of potential areas of conflict including but not limited to when each party shall have primary custody (joint custody schedule); when and how the exchanges will happen; who will have primary custody during holidays, vacations and school breaks; child care arrangements; education and extra-curricular activities; religious issues; and health care issues.
 - e. That both the appellant and respondent are directed to mediate the Joint Custody Agreement in good faith; and further that the failure by either to do so will result in adverse orders being made against the intransigent party.
 - f. That both parties will be at liberty to apply for further orders to better effectuate the Joint Custody ordered herein.
54. While the appellant has succeeded in part in this appeal, this being a family matter, each party will bear its own costs.
55. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 13TH DAY OF JUNE, 2019

JOEL NGUGI

JUDGE

