



REPUBLIC OF KENYA



**KENYA LAW**  
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**HAN v PNC (Civil Appeal E067 of 2024)  
[2025] KEHC 14239 (KLR) (30 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 14239 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E067 OF 2024  
MS SHARIFF, J  
SEPTEMBER 30, 2025**

**BETWEEN**

**HAN ..... APPELLANT**

**AND**

**PNC ..... RESPONDENT**

*(Being an appeal filed against the Ruling of Honourable T.M.  
Olando (P.M) in the Chief Magistrate's Court at Bungoma  
Guardianship cause No. 15 of 2023 delivered on 17th April 2024)*

**JUDGMENT**

**Background**

1. Vide a Motion application dated 22<sup>nd</sup> May 2023 and filed in Court on an even date, the Respondent herein (Applicant then) sought orders as follows: that the Applicant be authorized to be the guardian of the minor herein JMA (11 years) and that the Honourable Court be pleased to make and order directing the Registrar General to make an entry in the Guardianship Children's Register recording the Guardianship herein.
2. The trial Court under the stewardship of Honourable Tom Mark Olando issued orders on 7<sup>th</sup> June 2023, stating that the Respondent be authorized to be the guardian of the minor herein JMA (11 years) and further directed the Registrar General to make an entry in the Guardianship Children's Register recording the guardianship herein.
3. Vide a Motion application date 2<sup>nd</sup> January 2024, the Appellant herein (Applicant then) sought the following orders: that the Guardianship Orders issued on 7<sup>th</sup> June 2023, be revoked, set aside and/or terminated; that the Applicant herein HAN be and is hereby vested with the legal custody of the minor herein JMA; that the Registrar General be compelled to expunge and/or strike off the recorded entry of guardianship of PNC in the Guardianship Children's Register for the minor JMA.



4. Vide a ruling delivered by the trial Court on 17<sup>th</sup> April 2024, Honourable Tom Mark Oland in the best interest of the minor herein, proceeded to hold that the guardian, PNC, to remain with the custody of the minor herein, JMA, and that the Appellant be granted visitation rights as and when in the country. He found no compelling reasons to warrant him to vacate his earlier issued orders and proceeded to dismiss the Appellant's application dated 2<sup>nd</sup> January 2024.

### **Appeal**

5. Aggrieved by the said decision, the Appellant moved to this Court through a memorandum of appeal dated 30<sup>th</sup> April 2024, citing 11 grounds of appeal seeking the following prayers: that the ruling of Honourable T.M. Olando (P.M) in the Chief Magistrate's Court at Bungoma Guardianship No. 15 of 2023 delivered on 17<sup>th</sup> April 2024 be set aside; that the Guardianship Order issued by Honourable T.M. Olando (P.M) in the Chief Magistrate's Court at Bungoma Guardianship No. 15 of 2023 on 7<sup>th</sup> June 2023 be revoked, set aside and/or terminated; that the Appellant herein Howard Andrew Nyerere be vested with the legal custody of the minor herein JMA; that the Registrar General be compelled to expunge and/or strike off the recorded entry of guardianship of PNC in the Guardianship Children Register for the minor JMA.
6. Vide directions issued by this Honourable Court on 6<sup>th</sup> November 2024, the parties herein were ordered to canvass this appeal by way of written submissions and both parties complied.

### **Appellant's Submissions**

7. In a nutshell, the Appellant submits that the orders issued on 7<sup>th</sup> June 2023, be varied on grounds that the said orders were made on non-disclosure of material facts and the failure by the Children Department Officer to interview him and the minor herein. According to him, the minor herein resides with daughter of the Respondent herein as per the Affidavit sworn by Everlyne Andako Chapya on 25<sup>th</sup> March 2024, and annexed to his Supplementary Affidavit sworn on 4<sup>th</sup> April 2024, which Everlyne avers that she has the physical custody of the minor herein.
8. The Appellant submits that he has been denied access of the minor and according to the dints of Section 34 of the Children Act he was supposed to have the parental responsibility of the minor with a testamentary guardian but in his case no testamentary guardian was appointed. He argues that he pays for the minor's upkeep and school fees and he ought not to be denied access to the minor.
9. The Appellant submits that the minor herein was never interviewed by the Children Officer and that the Children Officer's report lacked the input of both the minor and the appellant herein. He argues that the minor is a boy who needs the guidance of his father, the Appellant, and as he is approaching the adolescent age the presence of his father is vital.
10. Placing reliance of the cases of MJC vs LAC & AN (2020) eKLR, MAA VS ABS (2018) eKLR, MA vs ROO (2013) eKLR, DMM vs FKK (2018) and AOA vs EDO the Appellant argues that he has been taking care of the minor herein and as his surviving father who never abandoned him, he should be allowed to appoint a guardian for the minor himself and wished that this Court considers EACa as the suitable guardian of the minor. He insists that if his appeal is allowed then the best interest of the minor will be duly considered.

### **Respondent's Submissions**

11. In a nutshell, the Respondent submits on the Appellant's eleven (11) grounds of appeal. She argues that the Appellant has not been providing for all the needs of the minor herein and if he does the



same is sporadic and the Appellant did admit to irregularly supporting the minor in his own Affidavit, thus failing in his parental obligations and even maintenance of a robust parental relationship with the minor. She submits that the allegations of fraud and concealment of material facts has not been proved and the Respondent insists that her core aim is to ensure that the minor is brought up in a harmonious environment with all the financial, emotional and educational needs duly provided for consistently and sufficiently. She submits that the minor herein has never resided with the Appellant and that the Appellant has not been consistently present and that he has failed to consistently meet his responsibilities as a father. She argues that the same was evident since the moment her deceased daughter approached the Children Department for assistance raising the same concerns regarding the Appellant herein. She argues that this issued were raised but no resolution ever materialized as her daughter met her demise shortly after filing her complaint with the Children Department.

12. The Respondent submits that at no point did she bar the Appellant from providing for the minor and she noted no change as the Appellant consistently never provided for the minor and his contributions have not been sufficient to fully sustain the minor's needs and welfare.
13. The Respondent argues that the Children Department Officer interviewed the minor while he was still a student at Lotus School, Bungoma including the School Principal and the Officer also contacted Everlyn Chapya via phone regarding the minor, thus it was erroneous for the Appellant to allege the minor was never interviewed by the Children Department Officers.
14. The Respondent submits that it is in the best interest of the minor for him to remain in her custody as she has been the guardian present in the minor's life, consistently providing for his needs and welfare. She insists that her key concern is not the custody issue but what is the best interest of the minor herein and who wishes to protect the said interests. She argues that she is the best choice as the minor's guardian and that this Court should not interfere with the decision of the trial Court.
15. The Respondent submits that the trial Court did not label the Appellant an unfit parent rather with the best interest of the minor in mind, chose to place him under her guardianship and granted the Appellant unlimited access to the minor when he was in the country. She argues that with regards to Section 34 of the Children's Act, the Appellant was approached to provide for the minor prior to the demise of the minor's mother and that his input is always welcomed. She insisted that it takes a village to raise a minor and that the Appellant herein was never denied an opportunity to keep providing for his minor son as he now does, although inconsistently, insufficiently and unreliably.
16. Lastly, the Respondent submitted that the trial Court saw it best to leave the minor under the guardianship of a familiar person, in this case the Respondent, who has been living with him instead of another secondary party who did not even come to Court, but only swore an Affidavit. It is clear the Appellant does not reside in Kenya and to protect the minor the Court preferred him to remain in the custody of the Respondent. She submits that the Appellant has once been reprimanded by the Children Department to provide for the minor, while the minor's mother was alive and it is only after the demise of her daughter, the minor's mother, that the Appellant wishes to claim his rights over him. She argues that the Appellant cannot come to court seeking guardianship over the matter then donate the same to EAC who had sworn an Affidavit towards the same. She insisted that it was the Appellant seeking the guardianship not the Everlyn and the Court's decision was proper.
17. Placing reliance on the cases of *MJC vs LAC & AN (2020) eKLR*, *MAA VS ABS (2018) eKLR* and *DMM vs FKK (2018) eKLR* the Respondent urged this Court to dismiss the Appellant's appeal and that she be allowed to maintain, provide and give the minor herein the best that his deceased mother wished.



## Analysis & Determination

18. I have considered the record of appeal, grounds of appeal herein and submissions by both parties. This is a first appeal. It is the duty of this Court to re-evaluate, re-analyze and re-consider afresh the evidence tendered before the trial court without losing sight of the fact that the trial court had the advantage of listening to, seeing and assessing the demeanor of the witnesses. See *Selle and Another Vs Associated Motor Boat Company Limited and Another* (1968) EL123 where the Court held that;
- “An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must consider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect...”
19. The only issue for determination is whether the Appellant is entitled to guardianship of the minor herein against the respondent’s claim for custody of the minor.
20. There is no dispute that the Appellant herein is the biological father to the minor. There is no dispute also that the Respondent is the maternal grandmother to the minor.
21. The Appellant concedes the Shared parental responsibility envisaged under Article 53 (1) (e) of *the Constitution* entails equal responsibility for both parents in terms of maintenance of their children, in the following terms:
1.
    - (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not....From the record, the minor’s mother is deceased and since her death, the child has been staying with the Respondent. According to the birth certificate of the minor, the minor was born on 17<sup>th</sup> April 2012, hence aged 12 years and 13 days at the date of the Memorandum of Appeal was prepared.
22. The issue in contention therefore is the determination of the right of the minor’s grandmother guardianship over the minor against the competing interest of the biological father who wants to appoint himself the actual guardian of his minor son.
23. Section 122 of the Children’s Act No. 29 of 2022 provides for guardianship as such:
- “(1) Guardianship means a person appointed by will or deed by a parent of a child or by an order of court to assume parental responsibility over a child on the death of the parent either alone or jointly with the surviving parent of the child in accordance with the provisions of the Act.”
24. Therefore, the conditions precedent for guardianship is appointment by a parent or by an order of the Court, to assume parental responsibility of that child upon the death of a parent. However, Section 125 of the Children’s Act provides that:
- “a. In addition to the powers of the court to appoint a guardian under section 122, the court may appoint a guardian on application by any person in the prescribed forms in any of the following circumstances-



- i. Where the child's parents are deceased or cannot be found and this child has no guardian or other person having parental responsibility over the child or
- ii. Where the child is one to whom section 121 applies.”

25. The Children Department Officer report dated 6<sup>th</sup> June 2023, clearly stated that the Appellant here works and resides in Dubai and upon the demise of the minor's mother, in 2018, EAC took custody of the child and enrolled him in school in Nairobi prior to the arrival of the Appellant from Dubai who proceeded to transfer him to Kakamega Hill Academy wherein he got very ill to a point the teachers suggested that the child be released on school closure to seek medical help. In June 2022, the Respondent herein took the child under her care and ensured the he got the requisite treatment and enrolled him to Lotus of Highway School where she was paying the child's school levies and provisions. The report highlighted that in the beginning of 2019, the minor's deceased mother had brought it to the attention of the Children Department that the Appellant was not upholding his parental responsibilities and when summoned the Appellant declines to show up for a discussion on the welfare of the minor, but Evelyn on been interviewed noted that the Apellant despite not staying in Kenya used to remit some amount of upkeep, but he was not consistent. The Report recommended that the minor being a partial orphan was under the custody of the Respondent and she took proper care of him and that she ought to be granted guardianship of the minor.

26. The law envisages a scenario where both parents are responsible persons or totally irresponsible and cannot be found or are dead. In the instant appeal, we have a scenario where one parent is deceased and the remaining parent resides in a different country and is alleged to be irresponsible. The second limb of the conjunctive in Section 125 also provides that:

“and the child has no guardian or other person having parental responsibility over the child.”

27. Section 102 (3) of the Children's Act Provides that:

- (1) A Court may, on the application of one or More persons qualified under subsection (3), make an order vesting the legal custody of a child in the applicant or applicants.
- (3) Any of the following persons may be granted custody of a child—
  - (a) a parent;
  - (b) a guardian;

28. Section 103 of the Act provides as follows:

- (1) In determining whether or not a custody order should be made in favour of an applicant, the Court shall have regard to—
  - (a) the conduct and wishes of the parent or guardian of the child;
  - (b) the ascertainable wishes of the relatives of the child;
  - (c) the ascertainable wishes of the child taking into account the child's evolving capacity;
  - (d) whether the child has suffered any harm or is likely to suffer any harm if the order is not made;
  - (e) the customs of the community to which the child belongs;



- (f) the religious persuasion of the child;
- (g) whether a care order, supervision order, personal protection order or an exclusion order has been made in relation to the child concerned, and whether those orders remain in force;
- (h) the circumstances of any sibling of the child concerned, and of any other children of the home, if any;
- (i) any of the matters specified in section 95(2) where the court considers such matters to be relevant in the making of an order under this section; and
- (j) the best interest of the child.

29. It is elaborate from my strict perusal of the lower Court record that the Appellant wishes to be allowed by this Court to appoint one EACa as his son's guardian. Further, I have established that the alleged E swore an Affidavit averring that she was the maternal aunt of the minor herein; that the Appellant organized for the minor to be placed under her custody and that the Appellant has been sending her the minor's upkeep and school fees; that she will continue to live with the minor and take him as her own son. I wish to rely on the decision of Gikonyo J. in Bungoma High Court Election Petition Number 2 of 2013 Moses Wanjala Lukoye vs. Bernard Alfred Wekesa Sambu and others, where it was held that the affidavit evidence of a witness who has not been called for cross-examination is worthless and remains on record as a dead appendage of the record of the trial, except where the parties by consent accept not to cross-examine the witnesses and to have the evidence admitted as presented in the affidavits.
30. From my perusal of the trial Court's ruling, the Appellant herein was not granted the custody of the minor as he does not reside in Kenya and it was a dilemma for this Court to comprehend who exactly will take care of the minor when he is not around, bearing in mind that the person he elected to be the minor's guardian failed to appear before the Court to be cross-examined rendering her sworn Affidavit as worthless and remains on record as a dead appendage of the record of the trial as there is no indication on record that the parties to her not been cross-examined and to have the evidence admitted as presented in the affidavits.
31. That being the case, the case before the trial Court and this Court falls under the provisions of Section 150 of the Children's Act, 2022 on cases of children in need of care and protection and it is elaborate that the minor has been residing with the Respondent even when his deceased mother was alive and the Respondent has been taking good care of him as per the Children Officer report dated 6<sup>th</sup> June 2023. From the ruling of the trial magistrate, it appears that he could have awarded the Appellant legal custody, but the fact that he does not reside in Kenya, the trial magistrate had to ensure that the child remained in the custody of the person that he is familiar and comfortable with, which in this case in the Respondent.
32. This Court has a duty to keep the child's best interests in every matter concerning the child in line with the provisions of Article 53 (2) of *the Constitution*.
33. Bearing in mind that guardianship is termed as alternative care, the objectives of alternative care includes, under Section 12(3) (b), of the Children's Act to place the child as close as possible to his or her usual place of residence among others. I urge the Appellant to focus on the best interest of his child and how he can foster a relationship with him. The Respondent has been very categorical that the Appellant is not in any manner of form barred from accessing the minor.



34. In addition, if it is a matter of emotional and psychological support, the child and his father need each other for that purpose during such moments, that is why the trial Court granted him unlimited access to the child, to bond with the child and spend time with him when he is in the country, as long as the child's school days routine is not interrupted,
35. Accordingly, it is my holding that the appeal herein is not merited and the same is dismissed with no order as to costs.
36. The lower court filed be returned to the trial Court for implementation of its orders.

Orders accordingly.

**DATED AND DELIVERED AT BUNGOMA THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**M.S.SHARIFF**

**JUDGE**

In the presence of:

Mutanda For Appellant

Respondent

Peter Machoni Court Assistant

