GBM (A Minor Suing Through the Next Friend and Mother LNG) v HNW (Civil Appeal E017 of 2024) [2025] KEHC 14085 (KLR) (9 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14085 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E017 OF 2024

DKN MAGARE, J

OCTOBER 9, 2025

BETWEEN

GBM (A MINOR SUING THROUGH THE NEXT FRIEND AND MOTHER LNG) ..... APPELLANT

AND

HNW ..... RESPONDENT

(appeal Against the Judgment and decree of the lower court delivered on 09.08.2024 by Hon. Dennis Matutu in Mûkûrwe'inî Children's Case Number E007 of 2022.)

JUDGMENT

1. This appeal arises from the Judgment and decree of the lower court delivered on 09.08.2024 by Hon. Dennis Matutu in Mûkûrwe'inî Children's Case Number E007 of 2022. In that case both parties were given legal custody, with the father having physical/actual custody of the minor.

2. The appellant filed a memorandum of appeal and set forth the following grounds of appeal.

    a. That the learned magistrate erred in law and in fact in his orders/directions delivered on the 9th day of August, 2024 by taking into consideration the Children's Report filed by one Mr. David Muniu, a corrupt and greedy children's officer, who solicited money from the Plaintiff in view of issuing a favorable report to her.

    b. That the learned magistrate erred in law and in fact by referencing the Children's Report filed by Mr. David Muniu when a letter dated the 8th day of April, 2024 was written to the Honourable Court bringing to the court's attention the corrupt actions of Mr. Munia and seeking orders for the said report to be disregarded and expunged.

    c. That the Honourable Court erred in fact and law by finding in favour of the Respondent when the subject minor is in the custody of his grandmother and not the Respondent himself. The

best interest of a minor would ordinarily dictate that the minor be in the custody of either parents rather than the extended family. That since the mother and father of the subject minor are both alive and well, it would only be fair and just, for the minor to grow up in the hands of either parent.

d. That the Honourable Court erred in law and fact by granting the Respondent physical/actual custody of the minor and only access rights to the Appellant when the Respondent has not been living with the subject minor. The Appellant if granted legal and actual custody, care and control of the minor as prayed in her Plaint dated the l3th day of December, 2022 would be living with the minor herself. The grandmother who currently has physical custody of the minor is elderly and therefore, it would be a task for her to comprehensively take care of the subject minor.

e. That the learned magistrate erred in law and in fact by taking into consideration the Respondent's final Submissions when the same were never served upon the Appellant's counsel and neither were they uploaded on the Judiciary E-filling system. The Appellant is a stranger to the details and contents of the said Submissions.

3. The appellant sought orders in the appeal as follows:

a. The Appellant prays that the appeal be allowed, and that the judgment and orders of the trial court made on 9th August 2024 be set aside. The Appellant further seeks that this Honourable Court do set aside the judgment and decree of the trial court and grant the Appellant legal and actual custody, care, and control of the minor.

b. Additionally, the Appellant prays that the Court orders the Respondent to pay Kenya Shillings 38,910/= per month as child support, and that the Respondent be condemned to bear the costs of this appeal.

Pleadings

4. The Appellant initiated the Children's Court suit by way of a Plaint dated 13.12.2022 by which she sought reliefs materially as follow:

a. Legal and actual/physical custody for the child to vest in the Plaintiff.

b. Defendant to return the child to the Plaintiff.

c. The defendant to pay Ksh. 38,910/= per month for maintenance, Ksh. 7,500/= per term for school fees, Ksh. 3,600/= per term for lunch, Ksh. 4,500/= per term for CBC, Ksh. 16,310/= for food, Ksh. 2,070/= for non-food items, Ksh. 8,000/= for clothing and Ksh. 6,000/= for rent, electricity and water.

5. The Respondent opposed the suit vide his Defence and Counterclaim dated 9.1.2023. It was averred that the plaintiff abandoned the minor to the defendant who took up care and custody solely and the suit was an afterthought. The defendant also counterclaimed for joint legal custody with the plaintiff having reasonable access but with the defendant having actual custody.

The Appellant's Evidence

6. During trial, PW1, the Appellant testified that she left the minor with the Respondent's mother. They were married for 8 years. She stayed and paid rent in Kagumo and the child used to school in Ngong.

7. DW1 was the Respondent. According to him, the Appellant took the child to his (the respondent's) mother. He took the child to Muhito School. The child was in Grade 4 and he maintained him. They lived in Ngong Town. The child was 9 years old. The Respondent earned Ksh. 12,000/= per month as a truck driver. The Appellant abandoned the child and his mother took the child to Mûkûrwe'inî while himself took up the responsibility.

8. The Respondent testified as DW1 that the Appellant took the child to the Respondent's mother. Thereafter, the Respondent enrolled the child at [his current] School, where he was in Grade 4, and paid fees and upkeep. He stated that they resided in Ngong Town and that the child was nine years old. The Respondent further testified that he earned Kshs. 12,000 per month as a truck driver. He contended that the Appellant abandoned the child, prompting his mother to take the child to Mûkûrwe'inî, after which he assumed full responsibility for the child's upkeep

9. DW2 was Ruth Wairimu Nthuku. She was the mother to the Respondent. She testified that the Appellant and the Respondent separated on 7.1.2022. She came home one day and found the child alone and the Appellant had run away. On cross examination, it was her case that she was 52 years old. She objected to the Appellant having actual custody as the Appellant had dumped the minor.

Analysis

10. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In the case of Mbogo and Another vs. Shah [1968] EA 93 the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

11. The duty of the first appellate court was settled by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the Judges in their usual gusto, held by as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

12. The court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

13. Further, in the case of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction

to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...

14. The learned magistrate had a simple task to consider, as required under article 53 of *the constitution*, the best interests of the minor. The learned magistrate considered all the relevant factors including the age of the child and in particular his education requirements and the need to maintain the quality education but without breaking the available means of the Respondent.

15. The Appellant did actually admit that she gave away the child to the Respondent who has been raising the child. It is not the defendant who gave away the child. The act of abandoning the minor was rather cavalier and does not reflect well with the mother. She may then have realized that she could make money out of the child and then make rather exaggerated claims against the Respondent. The evidence portrays a person who does not have the best interests of the child at heart. The report is not favourable to the Appellant. She then went into a tirade making allegations against a children's officer.

16. The allegations were not raised with the court. They cannot be raised at appeal level. I will dismiss them with the contempt they deserve. The officer who wrote the report is not part of the appeal and had no chance to interrogate what is raised at appeal level. There was no prayer to adduce any evidence of corruption. It appears the appellant has not realized the folly of her own action.

17. This case reminds me of the maxim nullus commodum capere potest de injuria sua propria. This basically means that no one can take advantage of his or her own wrong or benefit from their wrong doing. Through this, a person is prevented from seeking a remedy on the basis of their own actions, otherwise reflected another maxim, ex turpi causa non oritur actio. In Republic vs Ministry of Roads & Another Ex part Vipingo Ridge Limited & Another (2016) eKLR it was held as follows:

> "In Standard Chartered Bank Limited Vs. Intercom Services Limited & 4 Others (Civil Appeal No. 37 of 2003), unreported, the Court of Appeal referred to the English case of Holman Vs. Johnson (1775-1802) All ER 98 at page 99, where Lord Mansfield C.J. said-""The principle of public policy is this, Ex dolo malo, non oritur actio. No court will lend its aid to a man who found his cause of action on immoral or on illegal act. If from the Plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such Plaintiff."

18. This was further expounded in Scott vs Brown, Denning & Mcnab Company (3) [1892] 2QB 724 at page 728 as quoted in Michael Mwaura Njoroge vs Peter Kamau Munene; Beatrice Kori (Interested Party) [2019] eKLR:

> "Ex turpi causa non oritur actio. This old and well known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has paraded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the court ought not to assist him."

19. It is not the wrong doing on part of the children's officer but the abandonment of the minor that brought the appellant to her misery. There is no presumption that one parent is better than another. Article 53 provides as follows:

> Every child has the right -
>
> (a) to a name and nationality from birth;
>
> (b) to free and compulsory basic education;
>
> (c) to basic nutrition, shelter and health care;
>
> (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
>
> (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; and
>
> (f) not to be detained, except as a measure of last resort, and when detained, to be held-
>
> (i) for the shortest appropriate period of time; and
>
> (ii) separate from adults and in conditions that take account of the child's sex and age.
>
> (2) A child's best interests are of paramount importance in every matter concerning the child.

20. The Appellant did not even attempt to show any contribution in the care of the child's life. The child was simply a means to an end. Article 53(1) of *the Constitution* of Kenya provides that a child's best interests are of paramount importance in every matter concerning the child. This position is enshrined in the Children's Act in section 4 which provides for the welfare of the child. Section 8(1) of the Children's Act of 2022 provides as follows:-

> " 8(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—(a)the best interests of the child shall be the primary consideration.

21. Looking at the evidence on record and the Appellant's testimony, there is no doubt that no reasonable court can place a child she abandoned under her care. The best interest of the child demands that the custody of the minor be with the Respondent. The care by the Respondent's mother, while he is on duty as a driver, is not by any means taking away the child from the Respondent's custody. In any case, it is the Appellant who chose to abandon the minor at the Respondent's mother's house, while the mother was away. I have noted from the record that the child's grandmother is still young, at the age of 53.

22. The conduct of the Appellant was deplorable, disgraceful and immoral. Reliable and unrebutted evidence was that she left the minor with the Respondent in January 2022. She admitted to having left the minor. The appellant took the minor to Respondent's mother DW2. The Respondent continued to take care of the child's needs. the child is doing well in school in spite of the abandonment.

23. Whereas both parties had the responsibility towards the minor, it is the Respondent who took up all the responsibility until the Appellant emerged, only taking the Respondent into circles through the Children Officers and subsequently the lower court.

24. This Court is at a loss as to why the Appellant would suddenly resurface in the life of a minor she had previously abandoned, only to seek full legal and actual custody to the exclusion of the Respondent. Such conduct, in the considered view of this Court, was actuated by bad faith. It is inconceivable that a genuinely caring parent, motivated by the welfare of the child, would act in the manner the Appellant did. Her actions cast doubt upon her true intentions and raise legitimate questions as to whether her renewed interest in the child was informed by the child's best interests or by considerations of personal gain under the pretext of parental concern.

25. This Court, sitting as a Children's Court on this appeal, bears the solemn duty to uphold and safeguard the welfare and best interests of the minor. In doing so, the Court must firmly reject and denounce conduct by any parent that is self-serving or calculated to advance personal interests at the expense of the child's well-being

26. The principles on custody and maintenance of minors are also well anchored in the Convention on the Rights of the Child to which Kenya is a party. Under the UN Convention on the Rights of the Child (CRC) that Kenya ratified on 30 July 1990, Article 3 provides that:

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

    2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

27. I therefore have no doubt that there are enough safeguards to guide this court in arriving at a finding founded on the welfare and best interest of the child in this case. To this court, the welfare and best interest of the child demands that he accesses quality education, health, nutrition, interaction, among other necessary child developmental parameters. The child, while in the custody of the Respondent is already sufficiently getting these necessities for his welfare and best interest.

28. On maintenance, in M.K. vs C.K.K HCA. 51/2015 the court held:-

> Parental responsibility is shared and not equal based on the financial position of each parent. The mother as the resident parent has a nurturing role to the children and the father to provide maintenance and upkeep of the children.

29. The responsibility given to parents is set out in Section 23 of the *Children Act* as follows:

    1. "in this Act, parental responsibility "means all the duties , rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.

    2. The duties referred to in Sub-section (1) include in particular-

        (a) the duty to maintain the child and in particular to provide him with-

            (i) Adequate diet

(ii) Shelter

(iii) Clothing

(iv) Medical care including immunization

(v) Education and guidance.

30. Both parents have equal rights to custody. In the case of S M v J M & 2 others [2015] KEHC 337 (KLR), Thande J, while addressing the question of custody as set out in the repealed *Children Act* posited as follows:

> Both parents have equal rights to custody of a child. When it comes to deciding which one of them should be granted custody the court must consider:
> The welfare of the child.The conduct of parents.The wish of the child.
>
> These were children of tender years. (See Section 2 of the *Children Act*). Ordinarily children of tender years would be given to their mother, unless there are exceptional circumstances. (See Karanu v. Karanu (1975) EA 18). These were children who lived with their mother in Migwani Location all along as their father stayed away in Nairobi, his place of duty. The 3rd Respondent demonstrated by way of evidence that she is fit to continue taking care of the children as she had done previously. Even when the Appellant declined to support her and the children, she continued to fend for them. After she was forced into desertion, the Appellant did not care about the children. This was tantamount to abandoning the children to be taken care by someone else. This was lack of responsibility on the part of the Appellant as a parent. His conduct as a parent was questionable.

31. Further in the case of KBH v HMI [2024] KECA 172 (KLR), the court of appeal [SG Kairu, JW Lessit & GV Odunga, JJA] stated as follows in regard to parental responsibility while denying a mother custody as follows:

> That provision is given in mandatory terms that if a Court is in doubt whether an order it intends to make is in the best interest of the child, it ought not to make the order. We believe that his remark that "it was with a heavy heart' that he gave actual custody of the minor to the respondent was borne out of doubt that he was making an order that was in the best interest of the child.
>
> 72. We think that we have said enough to show that the decision made by the Superior Court was plainly wrong, having found the respondent of bad morals, violent and aggressive, one who did not regard authority or the feelings of others. That was not the kind of person to give custody of a child, especially one of tender years. The minor is 6 years old, a critical age for establishment of character, behavior development, social and psychological growth. It was important that at that age he should get better influence and stable environment, which his mother was incapable of providing.
>
> 73. We are aware that as a second appellate Court we should not interfere with the decisions of the trial and/or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law. We find that the decision was bad in law. We find merit in the appeal which we allow and make the following orders which we find commend themselves to us:

32. The court below made a finding of fact, which was sound that the appellant was unfit as a mother to have physical custody of the minor. I have no grounds to differ with the court. The court cannot without offending rules of natural justice condemn a hapless children's officer. The Respondent's evidence is in consonance with children officer's report.

33. Regarding the corruption allegation, which are unfounded, it is important to remember that no man should ever be condemned unheard, as expressed in the truism that audi alteram partem principle, I can do better than quote the decision in Rex vs Deferral 1937 AD 370 and 373, where the court posited as follows:

> The audi alteram partem principles literary means, "hear the other side'. This means that no ruling of any importance, either on the merits or on procedural points, should be made without giving both parties the opportunity to express their views. The audi alteram partem principle is followed in judicial proceedings, in our country, along with the rights such as legal representation, the right to adduce and challenge evidence in cross examination and the right to present ones evidence to the dispute or claim".

34. The issue cannot be even introduced by submissions since submissions are not evidence. Submissions are not, strictly speaking, part of the case, the absence of which may do no prejudice to a party. Their presence or absence does not in any way prejudice a case as held in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, that:

> "As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

35. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

> "Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

36. There were no proceedings on bribery of the officer. The evidence on record does not support that assertion. It is anathema to good conscience and good morals for a person to abandon her child and then blame everyone except herself. This is not only cavalier but engaging in skullduggery, machinations, and subterfuge in order to subvert the course of justice and affect the rights of the minor whose best interest this court must act in. It is high time that the appellant took time off and get help that she needs. She may also need to develop solid relationship with her child. This cannot be done by hiding from the truth.

37. The net effect is that the appeal is devoid of merit and is accordingly dismissed. The next question is costs which are governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

38. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

39. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> 18. It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.
>
> 22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

40. Being a children's matter, each party will bear their own costs.

Determination

41. In the upshot, I make the following orders:

a. The appeal is unmerited and is dismissed *in limine*.

b. Being a children's case, each party shall bear their own costs of the appeal.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 9TH DAY OF OCTOBER, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Mwangi for the Appellant

Mr. Kimani for the Respondent

Court Assistant – Michael