



MCO (Suing as mother and next friend) v DOO (Children's Case E065 of 2023) [2024] KEMC 81 (KLR) (23 December 2024) (Judgment)

Neutral citation: [2024] KEMC 81 (KLR)

**REPUBLIC OF KENYA
IN THE NAIROBI CHILDREN'S COURT
CHILDREN'S CASE E065 OF 2023
JC KIBOSIA, PM
DECEMBER 23, 2024**

BETWEEN

MCO (SUING AS MOTHER AND NEXT FRIEND) PLAINTIFF

AND

DOO DEFENDANT

Best interests of the child include emotional security and social development.

The case involved a custody and maintenance dispute between the plaintiff (mother of the children) and the defendant (their father). Though legally married, the parties were separated due to a toxic relationship. Each party accused the other of behavior detrimental to the children's welfare. The court interviewed the children, who expressed a preference to continue living with their father. The father was found to be the primary caregiver. The court considered whether the "tender years doctrine" applied and held that it was subordinate to the overarching principle of the best interests of the child under article 53 of the Constitution.

Reported by Moses Rotich

Family Law - custody - principle of best interests of the child - conflict between parents - whether best interests of child included emotional security and social development - to what extent should courts consider the emotional and psychological effects of family conflict on a child's holistic development when determining the child's best interests - Constitution, article 53; Children Act, cap 141, sections 8, 31, 103, and 110.

Brief facts

The plaintiff brought proceedings against the defendant seeking joint legal custody of their three children, with actual custody to herself and structured access for the father. She also sought orders that the children remain in their current home and that the defendant contribute to school fees and related expenses. The defendant counterclaimed for actual custody, supervised access for the mother, and protective orders to shield the children from inappropriate exposure and interference.

Both parties agreed that their relationship had become toxic, with allegations of emotional abuse, and that they were separated though still legally married. Evidence, including video recordings, showed the children were



often exposed to parental conflict. The youngest child was seen intervening in an argument; another instance showed a child dangerously walking off during a verbal exchange.

Issues

- i. Whether the plaintiff was entitled to actual custody of the minors in light of the tender years doctrine and the best interests of the child principle.
- ii. Whether best interests of child included emotional security and social development.
- iii. To what extent should courts consider the emotional and psychological effects of family conflict on a child's holistic development when determining the child's best interests under article 53 of the Constitution?

Held

1. For a court of law to depart from the general rule on custody of children of tender years, there ought to be exceptional circumstances which would warrant the mother to be denied custody of children of tender age. Such factors should be ones which affected the welfare and best interests of the child and could include, but not limited to;
 - a. the mother's mental instability or insanity;
 - b. disgraceful conduct, say her immoral behavior, drunken habit, abandoning the children;
 - c. cruelty to children; and
 - d. the company she kept.
2. Although the tender years doctrine suggested that young children should ordinarily remain with the mother, the principle was no longer rigid. The children in the instant matter preferred living with their father, and evidence demonstrated that they had developed social and educational roots living with their father.
3. Further, the father had been the primary caregiver and the children still lived with him. The relationship between the parents was extremely toxic. There had been incidences of emotional abuse on the children by one of the parties.
4. Children who experienced significant conflict within their family would often have trouble with their social and emotional development and well-being. That was true for children who regularly heard their parents fighting - a phenomenon that had been referred to as 'background noise' in a child's upbringing. Even though the anger and conflict was not being directed right at the child, children could easily develop problems with their emotional security and regulation as a result. That often occurred because from the earliest ages, children emulate what they saw, often copying the behavior of their parents with other social relations.
5. If children were used to witnessing conflict and poor emotional regulation on a regular basis, that would be their understanding of social relationships as their social network expanded later in life.
6. It was therefore imperative that the courts safeguard the holistic well-being of the child, as envisioned in article 53 of the Constitution. Best interest of the child went beyond provision of basic needs. Family matters, therefore, were best resolved *ad minimum conflictus* (with little conflict).

Allowed in part.

Orders

- I. *Both parties were ordered to have joint legal custody of the minors, with the father retaining actual custody, care, and control.*
- II. *The mother was granted access under the following terms:*
 - a. *Alternate weekends from Friday at 6:00 p.m. to Sunday at 5:30 p.m.*
 - b. *Pick-up and drop-off at the current home*
 - c. *Equal sharing of school holidays, alternating Christmas and Easter*
 - d. *Each party to have the children for two weeks during holiday access for ease of planning*
 - e. *Audio-visual contact to be unlimited but reasonable*



- III. *Both parties were directed to undergo co-parenting coaching within 14 days, pursuant to section 135(1)(e) of the Children Act. They were to jointly select a counsellor and share the costs equally.*
- IV. *In the event the parties failed to agree on a therapist, they were to move the court for an appointment.*
- V. *As this was a family matter, there was no order as to costs.*
- VI. *The parties were granted liberty to apply.*
- VII. *Parental responsibilities were apportioned as follows:*
 - a. *Father: Responsible for school fees (tuition) and comprehensive medical cover.*
 - b. *Mother: Responsible for school-related expenses (books, uniforms, extracurricular activities) and clothing.*
 - c. *Both parties ordered to share the cost of shelter, utilities, and food equally, depending on which parent had the children at the time.*

Citations

Cases

Kenya

1. *CIN v JNN* [2014] eKLR - (Explained)
2. *HGG v YP* Civil Appeal 46 of 2016; [2017] KEHC 2711 (KLR) - (Applied)
3. *Ojaamong', Sospeter v Linet Amondi Ajaamog' Otieno* Divorce Case 1 of 2003; [2003] KEHC 184 (KLR) - (Applied)
4. *SKM v MWI* Civil Appeal 21 of 2014; [2015] KEHC 2078 (KLR) - (Explained)
5. *SMM v ANK* [2022] KEHC 1043 (KLR) - (Explained)

Statutes

Kenya

1. Children Act (cap 141) sections 8(1); 31; 95(2)(a); 102 (3); 110; 135(1)(e) — (Interpreted)
2. Constitution of Kenya article 53(2) — (Interpreted)

Advocates

None mentioned

JUDGMENT

1. The plaintiff's claim against the defendant is for the following orders:
 - a. Joint and legal custody with structured access to the father
 - b. School fees and related expenses
 - c. The children to continue living in the current home
 - d. Costs
 - e. Any other relief
2. The defendant's counter-claim
 - a. Actual custody
 - b. Supervised access to the plaintiff
 - c. Children to be picked from their home during access
 - d. Protection order for the children against interference in school and church activities



- e. Protection order against exposing the children to explicit content and discussing the merits and demerits of the case

Plaintiff's Case

3. The plaintiff's case is that the defendant is the biological father of her three children. That although they are legally married, they have since separated due to irreconcilable differences. That she was assaulted by the defendant and the same affected the wellbeing of the children. She prays for actual custody and access to the defendant

Defendant's Case

3. It is the defence case that the relationship was toxic, the reason they separated. That there was verbal and emotional abuse in the marriage to the detriment of the children. He prays that the plaintiff is restrained from interfering with the children's day to day living
4. As I consider this the matter, I am mindful of the constitutional and statutory imperative that the best interest of the children is paramount. Article 53(2) of the *Constitution of Kenya, 2010* provides:

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

And section 8(1) of the *Children Act 2022* states as follows:

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;

(b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.

(2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child; and

(c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.

5. Having considered the matter before me – I do find the issues for determination to be as follows:
 - a. Whether or not the plaintiff is entitled to the orders sought
 - b. Costs



i. Actual Custody

6. Section 102(3) of the *Children Act*:

Any of the following persons may be granted custody of a child—

- (a) a parent;
- (b)

In this case the applicant is the children's mother

Section 103 on the other hand provides the principles to be applied when making such an order:

- (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.

Section 103

- (2): Where a custody order is made giving custody of a child to one parent, or in the case of joint guardians, to one guardian, 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 to actual possession, jointly with the person who is given custody of the child.
- (3) The rights specified in subsection (2) include the right of access to the child on such terms as the court may direct.



7. In the case of *HGG v YP* [2017] eKLR, the court pronounced itself as follows on matters custody:

“Borrowing from the judicial authorities, the focus is to attain the best interest of the child in accordance with the principle of the *Constitution* in article 53(2) that:

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

The above phrase is therefore not a mere cliché or worn-out notion that do not call up any legal delight; it is a real facet in the administration of justice in matters involving children. Therefore, for a court of law to depart from the general rule on custody of children of tender years, there must be exceptional circumstances which warrant the mother to be denied custody of children of tender age. Such factors should be ones which affect the welfare and best interests of the child and may include but not limited to; the mother’s mental instability or insanity; disgraceful conduct, say her immoral behavior, drunken habit, abandoning the children; cruelty to children; and the company she keeps etc.”

8. Further, in *Sospeter Ojaamong v Lynette Amondi Otieno* Civil Appeal 176 of 2006, the Court of Appeal held;

The general principle of law is that custody of such children should be awarded to the mother unless special and peculiar circumstances exist to disqualify her from being awarded custody. The case of *Martha Olela & another v Jackson Obiera* Civil Application No Nairobi 16 of 1979 was cited as one authority for such principle. The mother’s disgraceful conduct, say her immoral behavior, drunken habit, bad company are some of the factors which would disqualify her from being awarded custody of a child of tender age.”

9. The tender year principle was subjected to the paramouncy test in *SMM v ANK* [2022] eKLR the Court of Appeal stated follows:

“However, it is apparent that while the Tender Years Doctrine is persuasive in considering custody of children, it can no longer be considered as an inflexible rule of law. This is not to say that the substance of the rule has dissipated completely; it is to say that its inflexibility has been eroded by the evolving standards of decency reflected in article 53 of the *Constitution*. Differently put, the Tender Years Doctrine must now be explicitly subjected to the Best Interests of the Child Principle in determining custody cases. Differently put, the welfare of the children is the primary factor of consideration when deciding custody cases.”

Psychological Abuse on the Children

The father has been the primary caregiver, noting that the children still live with him. The relationship between the parents is extremely toxic. There has been incidences of emotional abuse on the children by one of the parties.

Videos Presented in Court

I had an opportunity to watch some of the videos presented by the plaintiff and got a bit concerned. There was prolonged argument between the parties in the presence of the children and in one instance, the youngest child intervened. I could hear him say something to the effect: “let me decide this case”.



In another video, one of the parties was recording the older child walk out in protest on the road. The two were having a bitter verbal exchange. This compromised the safety of the child who was about to cross the road.

The court had to issue a “no recording” order so as to protect the children’s peace. Parenting has broken down

Interview with the Children

I had a chance to interview the children to ascertain their wishes (section 95(2) (a). They expressed the wish to live with their father. Further, the children attend school from the matrimonial home, their social milieu has been crafted around that place. It is therefore imperative that the status quo is retained. I will give directions of how the mother will participate going forward.

ii. Maintenance

10. Section 110 of the [Children Act](#) provides as follows on maintenance:

Unless the court otherwise directs, and subject to any financial contribution ordered by the court to be made by any other person, the following presumptions shall apply with regard to the maintenance of a child—

- a. it shall be the joint duty and responsibility of both parents to maintain the child whether or not the parents are married to each other;
- b.

11. Maintenance orders are to be made in the best interest of the children and ought not to be oppressive or punitive to any party. This was the holding in [SKM v MWI](#) [2015] eKLR, where Musyoka, J expressed himself thus:

“Maintenance orders are not meant to punish or oppress any party. They should be designed to provide for the needs of the child or children in question, while at the same time respecting the financial status of the parent. A child can only be maintained within the means of the parent in question.”

12. The constitutional principle of equal parental responsibility of both parents of a child was further restated in the case of [CIN v JNN](#) [2014] eKLR. Kimaru, J opined as follows:

“It will not do for the respondent to say that she has an uncertain source of income and therefore the responsibility of maintaining the children should only be borne by the appellant. The respondent must establish, to the satisfaction of the court, that she has also made effort to provide for the upkeep of the children. The above constitutional requirement is a game changer. Parties seeking the intervention of the Children’s Court to secure maintenance for the upkeep of the child or children must also indicate what contribution they are making towards the support of the child or children. This is because both the mother and the father of the child have equal responsibility towards the upbringing of the child or children.

The above holding justifies article 53 on the Equal Contribution Doctrine. That contribution should be made towards the children as a matter of right and equally by both parties.



I will go ahead to apportion parental responsibility in my final orders.

Disposition

13. Children who experience significant conflict within their family will often have trouble with their social and emotional development and well-being. This is true for children who regularly hear their parents fighting—a phenomenon that has been referred to as ‘background noise’ in a child’s upbringing (Moges and Weber, 2014). Even though the anger and conflict is not being directed right at the child, children can easily develop problems with their emotional security and regulation as a result. This often occurs because from the earliest ages, children emulate what they see, often copying the behavior of their parents with other social relations. If children are used to witnessing conflict and poor emotional regulation on a regular basis, this will be their understanding of social relationships as their social network expands later in life¹

It is therefore imperative that the courts safeguard the holistic wellbeing of the child, as envisioned in article 53 of the *Constitution*. Best interest of the child goes beyond provision of basic needs.

Family matters therefore, are best resolved ad minimum conflictus (with little conflict).

14. Finally, section 31 on parental responsibility:

- (2) The duties referred to in subsection (1) include, but are not limited to—
- (a) the duty to maintain the child and, in particular, to provide the child with —
- (i) basic nutrition;
 - (ii) shelter;
 - (iii) water and sanitation facilities;
 - (iv) clothing;
 - (v) medical care, including immunization;
 - (vi) basic education; and
 - (vii) general guidance, social conduct and moral values;

Final Orders:

- i. That both parties shall have joint legal custody of the minors herein with the father retaining actual custody, care and control
- ii. Access to the mother will be achieved in the following terms: Alternate weekends: Fridays 6pm to Sunday 5.30pm Pick up/drop off: current home Half school holidays alternating Christmas and Easter Each party to have the children two weeks each during holiday access as opposed to prolonged access or weekly access. For ease of planning Audio visual contact: unlimited but reasonable
- iii. That parties to undergo co-parenting coaching (under section 135 (1) (e) of the *Children Act*) 14 days from today’s date. To jointly pick a counsellor and share costs on 50:50 basis
- iv. That in case the parties cannot settle on a therapist, to move the court for appointment

¹ <https://medcraveonline.com/JPCPY/psychology-ndash-child-emotions-the-link-between-inter-parental-conflict-and-health-emotional-development-of-children.html>



v. That this being a family matter, no order as to costs

vi. Parties at liberty to apply

Apportionment of Parental Responsibility:

Father

School fees (tuition)Comprehensive medical cover

Mother

School related expenses including books, uniforms and extra curricula activitiesClothingShelter & utilities and food will be shared equally depending on which party has the children

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 23RD DAY OF DECEMBER, 2024

JACKIE KIBOSIA

PRINCIPAL MAGISTRATE

In the presence of:

Counsel for the Plaintiff

Counsel for the Defendant

Mr. Mohammed, CA

