**NNS v FMK (Civil Appeal 140 of 2024) [2025] KEHC 16243 (KLR) (Family) (10 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16243 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY**

**CIVIL APPEAL 140 OF 2024**

**CJ KENDAGOR, J**

**NOVEMBER 10, 2025**

**BETWEEN**

**NNS .......................................................................................................... APPELLANT**

**AND**

**FMK ...................................................................................................... RESPONDENT**

***(Being an Appeal from the Judgment of the Children's Court at Nairobi delivered on 20th September, 2024 by Hon. F. Terer (SRM in Children's Court E1223 of 2023)***

## JUDGMENT

1. The parties herein are the biological parents of CSN (the Minor). They were initially cohabiting, but they separated, and the Appellant retained actual custody of the Minor. The Respondent sued the Appellant at the Children Court where she sought actual custody of the minor and monthly child maintenance from the Appellant. The lower Court delivered a Judgment on 20th September, 2024 wherein it gave the Respondent actual custody of the Minor while the Appellant was to have access during alternate weekends and holidays. It also apportioned parental responsibilities between the parties and directed the Appellant to cede actual custody of the Minor to the Respondent.

2. The Appellant was dissatisfied with the judgment and appealed to this Court vide a Memorandum of Appeal dated 24th October, 2024. He listed the following grounds of Appeal:

    1. The learned Trial Magistrate erred in law and in fact by denying the Appellant actual custody, care, and control of the minor who previously the Appellant has a home to for close to three years in accordance with section 104 of the Children's Act 2022.

    2. The Learned Trial Magistrate erred in law and in fact by directing the Appellant to cede custody of the child by 1st November 2024 failing to act in the best interest of the child.

3. The Learned Trial Magistrate erred in law and in fact by failing to consider that the Respondent has not been in the Minor's life for close to three years after she abandoned the child when he was a toddler.

4. The Learned Trial Magistrate erred in fact in failing to take into consideration that the Minors had been under the custody of the Appellant up until Respondent reappeared after three years of being absent in the Minor's life.

5. The Learned Trial Magistrate erred in fact in failing to take into account the conduct of the Respondent in abandoning the child at less than one year of age to reappear after three years claiming custody.

6. The Learned Trial Magistrate erred in law by failing to recognize that the children officer's report did recommend the Minor to be given to the Appellant after interviewing and getting the wishes of the Minor.

3. He asked this Court to set aside the Trial Magistrate's judgment and give him actual custody, care, and control of the Minor. He also asked the Court to give the Respondent access on alternating Saturdays.

4. The Appeal was canvassed through written submissions.

**Appellant's written Submissions**

5. The Appellant submitted that the lower Court was wrong to award actual custody to the Respondent. He argued that the award was unjustified because the Respondent was absent and neglectful, and she did not demonstrate that the Minor would suffer any harm or disadvantage if he retained the custody. In a nutshell, he argued that the Respondent failed to show compelling reasons to remove the child from his care, where he had been raised for over three years. He argued that the trial Court improperly relied on unsubstantiated allegations of past violence to justify the Respondent's abandonment of the child.

**Respondent's written Submissions**

6. The Respondent submitted that the trial Court was correct in giving her the actual custody of the Minor. She argued that she provided compelling reasons backed with evidence on why she should be given actual custody. She argued that she left the Minor behind out of necessity due to the Appellant's violence towards her. She stated that her temporary departure was therefore for her safety and that at all times she maintained efforts to remain involved in the Minor's life despite the Appellant's frustrations in her attempts to access the Minor. Thus, she argued that she was not absent for three years as alleged by the Appellant.

**Issues for determination**

7. After reviewing the grounds of appeal and the written submissions from both parties, I conclude that the only issue to resolve is whether the trial Court correctly granted actual custody of the Minor to the Respondent.

8. The role of this Court as the first appellate Court is well-settled. It is trite law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate Court both on points of law and facts and come up with its findings and conclusions. As the Court is re-evaluating the evidence, it must bear

in mind that it has neither seen nor heard the witnesses. This principle was set out in Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123:

> "…this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence …"

9. The said principle was restated in Okeno vs. Republic (1972) EA 32, where the East Africa Court of Appeal stated as follows;

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

10. Based on these authorities, this Court shall undertake a wholesome review of the evidence with a view to reaching its own conclusion.

**Evidence on Record**

11. I have seen the Respondent's written statement (The Court proceedings do not show whether she adopted it in her examination in chief) in which she gave a chronological narration of her relationship with the Respondent and the issue at hand. She stated that she left the child under the Appellant's care in March, 2022 for fear of her safety and that she planned to return back for the Minor once she had established herself. She stated that she secured a job some months later, but the Appellant refused to hand over the Minor to him. She told the Court that instead, the Appellant suggested that she should have access under the supervision of the Appellant's cousin.

12. In cross-examination, she stated that, on the day she left the Appellant's house in March, 2022, she left the Minor under the care of the Appellant's cousin. The Respondent also claimed that one day she secretly collected the Minor from the daycare and took him to the hospital because the Appellant had refused to take him to the hospital. However, she admitted that she did not have documents to show that the child was sick on the said day, and she did not have a prognosis from a doctor. In addition, she stated that she resides in Ruaraka but admitted she did not provide a lease agreement indicating her address. Lastly, she acknowledged that she did not offer her letter of employment or bank or Mpesa statements to show that she has been receiving a salary and thus able to take care of the Minor.

13. I have also seen the Appellant's witness statement that he adopted as part of his evidence. He stated that the Respondent left the minor under the care of his cousin in March, 2021, while he was away at work. The cousin was then residing with the Appellant in the same house. He stated that he has singlehandedly raised the minor without any support from the Respondent. He stated that he never denied the Respondent access to the Minor and that he was concerned because he did not know

where she resided. Instead, he stated that he had proposed that she could access the Minor under the supervision of his cousin.

14. In examination in chief, he stated that he was not aware that the Respondent picked the child from the daycare and took him to the hospital. He stated that the child was not sickly and that it was a typical case of chickenpox, which was not serious. He told the Court that he was applying a gel to the Minor's skin for treatment. He stated that he has been the constant caregiver since the Respondent left him. He told the lower Court that the Respondent was never concerned with the Minor's welfare because at some point she took the Minor from Nairobi and left him with his grandparents in upcountry.

**Evidence analysis**

15. As I consider the matter, I am mindful of the Constitutional and Statutory imperative that the child's best interests are 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".

Section 4 (2) and (3) of the Children's Act ("the Act") provides: -

> "(2) 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.
>
> (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 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; (c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest."

16. I also appreciate recent authorities that have held that both parents have an equal right towards the custody of a child of tender years. One such case was in SMM vs ANK (2022) eKLR where Honourable Justice Joel Ngugi held that;

> "It is apparent that while the tender years doctrine is persuasive its inflexibility has been eroded by the evolving standards of decency reflected in Article 53 of *the Constitution* of Kenya. The welfare of children is primary factor of consideration when deciding custody cases. The modern rule begins with the principle that the mother and father of a child both have an equal right towards the custody of a child."

17. This Court is being invited to analyze the above evidence and determine whether the Respondent had set sufficient reasons for the lower Court to divest the Appellant actual custody and give it to her. The Respondent gave several reasons why she thought the Appellant should not be allowed to have the actual custody of the Minor. I shall relook at each of the reasons to see whether they are sufficient to sanction the transfer of actual custody from the Appellant to the Respondent.

18. The Respondent's primary reason, as it appears in her plaint, is that the Appellant is a violent man because he had issued death threats and attacked her on several occasions. However, this court could not verify the authenticity of these claims because there was no evidence to support the same.

19. The Respondent's other reason was that the Appellant had denied her access to the Minor. From the evidence, the Appellant stated that he did not know where she resided and, for that reason, he was afraid she would take the Minor away. The Appellant suggested that the Respondent should have access to the Minor under the supervision of the Appellant's cousin. The Respondent herself admitted that the same offer was made to her and that she declined the same on grounds of her safety.

20. In my analysis, the Appellant had reasons to be apprehensive because he was not aware of where she was residing. During her examination-in-chief, she stated that she resides in Ruaraka, but during cross-examination, the Respondent admitted that she did not provide any evidence to show where she was staying. She also told the court that, during her secret visits to the daycare, she did not have a place to stay and that she was being hosted by other persons. For these reasons, the Appellant had reasons to allow restricted access to her.

21. I also opine that the Respondent was not sincere in raising safety concerns about the proposed supervised access. Her claim was that she felt unsafe in accessing the child under the supervision of the Appellant's cousin. This Court presumes that this same cousin is the same cousin who was residing with the Appellant when the Respondent left the minor behind in March, 2022. On the day that she left the Appellant's house, the Respondent left the Minor in the care of the said cousin because the Appellant was away at work.

22. In addition, according to the Respondent's statement, it was the same cousin who pleaded with the Appellant and stopped him from allegedly ejecting the Respondent out of the house at 1.00 AM, on the eve of the day that she left the house. In my analysis, the said cousin appears to have had good relations with the Respondent on these two occasions. The Respondent did not explain to the Court why she now feels unsafe to access the Minor under the supervision of a person she at some point entrusted with the safety of her child and who sided with her even when the parties had differences.

23. The Respondent's other reason was that the Appellant was ignorant and had failed to take the minor to the hospital when he was unwell. However, this Court finds that the Respondent did not prove the said claims. During her cross-examination, she admitted that she did not adduce any evidence to show that the child was sickly during the said time. She admitted that she did not provide a progress report from the doctor. In addition, she did not call evidence from the daycare, which she alleged had informed her that the Minor was unwell, to support her claim.

24. The Respondent's other reason was that the Appellant was ignorant, for he had failed to take the Minor for vaccination for Vitamin A and Measles. However, the Respondent did not prove this claim. This is because, during cross-examination, she told the Court that the measles vaccination is administered at 9 months and that Vitamin A is administered between 6-11 months. In her testimony, she admitted that the Minor was 1 year and 7 months when she left him behind. It occurs to this Court that the Minor ought to have received the said vaccinations at a time when the two were still cohabiting, and thus, both should take responsibility for the delayed or late vaccination.

25. I have seen a report from the Children Office dated 11th October, 2023. The office interviewed the Minor pursuant to a request by the lower Court. The report stated that the Minor seemed well taken care of and happy under the care of the Appellant and his wife. It also showed that the Minor was relating to and bonding well with the Appellant and his wife; he wished to spend time with the Appellant; he was attending school; and he generally seemed to be doing well. The Children's Department recommended that the Appellant maintain the actual custody of the Minor.

26. I appreciate the well-held position that a children officer's report is meant to guide the court in making a decision, and its recommendations are not intended to be binding on the Court. This principle was restated by the Court in BNK vs EMM (2013) eKLR, where the Court held as follows;

> " The report of the Children's Officer is not binding to the court and the court always retains the final say in deciding cases by applying legal principles."

27. I have carefully considered this case on its own merit as outlined in the analysis of the evidence in the previous paragraphs. For the above reasons and based on the authorities cited, I find that the Respondent did not provide sufficient reasons on why the lower Court should divest the Appellant of actual custody and give it to her. Thus, I find that the Respondent's Plaint dated 26th July, 2023 and the prayers sought therein are unmerited and the same is dismissed.

28. I now turn to the Appellant's Counterclaim dated 7th November, 2023 wherein he sought actual custody of the minor herein. For the same reasons outlined above in the previous paragraphs, the Counterclaim is hereby allowed.

29. In the end, the Appeal succeeds.

**Disposition**

30. The Appeal is allowed, and the Lower Court Judgment is set aside.

31. The Appellant shall have the actual custody of the Minor, while the Respondent shall have access as follows:

    a. During school term, on weekends from Friday evening to Sunday evening.

    b. During school holidays on a 50:50 of the holidays.

    c. During public holidays, on an alternating basis.

32. Further to the orders above, the Respondent is directed to forthwith cede actual custody of the Minor to the Appellant. Parties are directed to make arrangements for psychological support for the Minor to ensure that he receives the necessary assistance needed to cope effectively.

33. Parties shall have joint legal custody of the Minor.

34. Parental Responsibility is apportioned as follows: The Appellant will shoulder Food, Shelter, Medical, School fees and school-related expenses while the Respondent will cater for Clothing and Food when the Minor is in her custody.

35. This being a children's matter, each party will bear its own costs.

36. It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 10TH DAY OF NOVEMBER, 2025.**

**.........................**

**C. KENDAGOR**

**JUDGE**

In the presence of:

Cc Beryl

Ms. Gicheha, Advocate for the Appellant

Appellant – Nelson Nzuki Sila

Respondent – Fridah Mwende Kavutha