



**TOK v MWM (Civil Appeal E130 of 2023)
[2025] KEHC 15987 (KLR) (Family) (7 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 15987 (KLR)

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

**FAMILY
CIVIL APPEAL E130 OF 2023**

**H NAMISI, J
NOVEMBER 7, 2025**

BETWEEN

TOK APPELLANT

AND

MWM RESPONDENT

(Being an appeal against the Judgement of Hon. G. N. Opakasi, Senior Resident Magistrate, delivered on 19 October 2023 in MCCHCC No. E424 OF 2023 Milimani)

JUDGMENT

1. In the delicate and often fraught jurisdiction of family law, the Court is perpetually guided by a single, unwavering lodestar: the best interests of the child. This principle, enshrined in our Constitution and the *Children Act*, is not merely a factor for consideration by the paramount objective in every matter concerning a child. It requires the Court to look beyond the grievances of warring parents and focus instead on the welfare, happiness and holistic development of the young lives caught in the crossfire.
2. This appeal presents a classic, yet deeply personal, conflict that tests the application of this principle. It pits a formal Parental Responsibility Agreement (PRA), which had granted the Appellant custody for several years, against the Respondent’s recent and unilateral assumption of care, an action she claims was a necessary intervention to address her children’s alleged neglect in matters of health and education. The matter comes before this Court as an appeal from the Children Court. The dispute concerns the custody, care, control and maintenance of two minor children, born in April 2012 and July 2015, respectively. The parties herein are their biological parents.



Background of the Dispute

3. The Appellant and Respondent cohabited for a period of time before separating in 2016. The circumstances of their separation and the subsequent arrangements for the children form the crux of their dispute. The Appellant's case is that the Respondent left him with the children in 2016, and he assumed their full care and custody from that point. The Respondent's version is that the Appellant abandoned her and the children, leaving her with no means of support, which compelled her to seek refuge with the Appellant's aunt and later with his mother in Kisumu, with whom she left the children upon securing employment in Nairobi. It is common ground that the Appellant subsequently took the children from his mother's home and had their actual custody for a significant period.
4. On 11 March 2019, the parties formalized their arrangement by executing a Parental Responsibility Agreement. The terms of the PRA were heavily weighted in the Appellant's favour, granting him full custody and providing the Respondent with limited access, specified as Sundays during school days, and two sleepover weekends per month.
5. The period following the PRA was characterized by acrimony and mutual accusations of breach. The Appellant formally complained to the National Legal Aid & Awareness Programme (NALEAP), now National Legal Aid Service (NLAS), about the Respondent's alleged failure to adhere to access schedules, such as returning the children late or keeping them for extended periods after school holidays commenced.
6. The status quo was disrupted in late 2022. The Respondent's evidence, which the trial court appears to have accepted, was that she took custody of the daughter, in October 2022 after discovering the child was suffering from a liver ailment that was not being adequately addressed by the Appellant. The Respondent did not return the child to the Appellant's custody. The son subsequently joined the Respondent in November 2022, expressing a desire to live with her. This shift in actual custody prompted the Appellant to file the suit in the Children's Court.
7. A further point of contention was the children's education. The evidence on record shows a history of educational disruption due to non-payment of school fees at private institutions, namely [Particulars Withheld] School and [Particulars Withheld] School, while the children were in the Appellant's custody. This culminated in the Respondent unilaterally transferring the children to [Particulars Withheld] School, a public institution, after she assumed their care.
8. After considering the evidence and submissions from both parties, the trial court made several orders. Key among them were that the parties shall have joint legal custody of the minors; the Respondent shall have actual custody, care and control; the Appellant shall have access to the minors on alternate weekends; and the parties shall share custody equally during school holidays. On maintenance, the trial court ordered, inter alia, that the Appellant shall cater for the minors' school fees and related expenses, share medical expenses equally with the Respondent, and provide Kshs 20,000/= per month towards the minors' food, with the amount being halved during school holidays.
9. Aggrieved by the judgement, the Appellant lodged this appeal on the following grounds:
 - i. The Learned Magistrate erred in law and in fact in entering judgment in favor of the respondent without having due regard to the pleadings and the evidence before the court.
 - ii. The Learned Magistrate erred in law and fact in failing to consider the Appellant's evidence that respondent was in contempt and violation of the Parental Responsibility Agreement when granting custody to Respondent.



- iii. The Learned Magistrate erred by failing to consider that the Appellant had actual custody of the children for over 6 years and the Respondent only obtained actual custody of the children after breaching the Parental Responsibility Agreement.
 - iv. The Learned Magistrate erred in granting custody to Respondent based on her assessment of the children when the children were produced in court whereas the children had not been allowed by the Respondent to speak or see the Appellant for over 6 months at the time of assessment.
 - v. The Learned Magistrate erred by only relying on the assessment of the children when the children were produced in court and ignored the recommendations in the Children Officer report when awarding custody to the Respondent.
 - vi. The Learned Magistrate erred in law and in fact in failing to appreciate that the Appellant and Respondent bear half the responsibility as it relates to the upkeep of the children.
 - vii. The Learned Magistrate erred in law and fact in awarding the Respondent Ksh. 20,000/= per month as upkeep for food without assessing the net earnings of the Appellant and the Respondent.
 - viii. The Learned Magistrate erred in awarding the Respondent Ksh. 20,000/= per month as upkeep for food whereas the two children are provided two meals in school of which the Appellant is catering for and as such the amount is excessive and amounts to unjust enrichment.
10. The appeal was canvassed by way of written submissions.
 11. The Appellant submits that the Respondent unlawfully seized the children in flagrant breach of a valid PRA and that the trial court failed to give sufficient weight to the stability the children enjoyed during his six years of uninterrupted custody. He faults the trial court for ignoring the Children's Officer's report, which he implies was favorable to him, and for relying on a flawed interview with the children, whom he claims were coached. On maintenance, the Appellant argues that the orders were punitive, arbitrary and made without a proper inquiry into the parties' financial means.
 12. In response, the Respondent submits that the appeal lacks merit and that the trial court's decision was well founded in law and fact. The Respondent argues that the Appellant's custody was neglectful, particularly regarding the children's health and educational stability. The Respondent contends that the PRA was used by the Appellant as an instrument of control rather than a tool for co-parenting and that the Respondent's actions in 2022 were necessary to protect the children's welfare. She maintains that the trial court correctly applied the best interest principle, fairly apportioned the parental responsibilities, and that that the maintenance award of Kshs 20,000/- was not only reasonable but modest given the current cost of living.

Analysis & Determination

13. This being a first appeal, the duty of the Court is well settled. It is to re-evaluate and re-examine the evidence adduced in the trial court and arrive at its own independent conclusion, bearing in mind that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle was



authoritatively laid down in the case of *Selle & another vs Associated Motor Boat Co. Ltd and others* EA 123, where the Court stated:

“...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...”

14. It is with this duty in mind that this Court now proceeds to analyse the grounds of appeal. Two broad issues lend themselves for determination:
 - i. the propriety of the orders on custody, care and control;
 - ii. (ii) the reasonableness of the orders on maintenance.

Custody

15. As earlier stated, the lodestar in all matters concerning a child is the principle of the best interests of the child. In the case of *M.A.K vs R.M.A.A & 4 others* [2023] KESC 21 (KLR), the Supreme Court emphasized that parental rights, while constitutionally protected, are not absolute and must be weighted against, and may be curtailed by, the child's best interests. The Court set out a non-exhaustive list of factors to consider, including the past performance of each parent, the child's ascertainable wishes, and the need to preserve direct contact with both parents unless it is not in the child's best interests.
16. The Appellant's primary argument is that the Respondent breached the 2019 PRA by failing to return the children. While a PRA is a significant agreement reflecting the parties' intentions, it is not immutable. It cannot oust the jurisdiction of the court to make orders that serve the child's welfare. The evidence shows a high-conflict dynamic where the PRA, with its imbalanced terms granting the mother limited access only, may have been used more as an instrument of control than a framework for cooperative co-parenting. The Appellant's own letters to NALEAP complain of relatively minor infractions like late drop-offs, suggesting a rigid enforcement of terms. The Respondent's eventual breach, while procedurally improper, was precipitated by a genuine and serious health concern for the younger minor, who was diagnosed with a liver problem that the Appellant appeared to have been downplaying. A parent acting decisively to secure medical care for a child in the face of perceived neglect, even if it contravenes a prior agreement, cannot be said to be acting against that child's best interests. The trial court was, therefore, correct to look beyond the mere fact of the breach and examine the underlying circumstances through the lens of the child's welfare.
17. The trial Court correctly identified that the minors, aged 11 and 8 years at the time, fell within the category of children of tender years. The established legal principle, the tender years doctrine, holds that custody of such children should presumptively be granted to the mother, unless exceptional circumstances are proven to exist. This was articulated in *Githunguri vs Githunguri* KLR 598 and reaffirmed by the Court of Appeal in *J.O v S.A.O* [2016] KECA 55 (KLR) where "exceptional circumstances" were held to include instances where the mother is unsettled, has remarried into an unstable environment, or lives in deplorable conditions. The Appellant's case rested on the argument that his 6 years of uninterrupted custody constituted such an exception circumstance, demonstrating a stable environment that should not have been disturbed. While continuity and stability are, indeed, crucial factors, the quality of that stability must be interrogated. The evidence on record paints a



mixed picture. The Appellant provided for the children, but his financial management led to chronic school fees arrears, causing significant disruption and embarrassment of the children. More critically, his handling of his daughter's illness suggests a lapse in the primary caregiving duty of safeguarding a child's health.

18. The Appellant's role appears to have been primarily that of a financial provider, albeit an inconsistent one. The Respondent, upon re-entering the children's daily lives, demonstrated a focus on the fundamental aspect of caregiving: attending to health needs and ensuring educational continuity, even if it meant enrolling them in a public school she could afford. The evidence before the trial court did not establish that the mother was unfit. Instead, it revealed significant deficiencies in the father's caregiving, thereby failing to meet the high threshold of exceptional circumstances required to rebut the presumption in favor of the mother for children of tender years.
19. The Appellant contends that the trial court erred in ignoring the Children's Officer's report and relying solely on her own interview with the children. This raises questions on the evidentiary weight to be accorded to these two distinct sources of information.
20. A Children's Officer's report is an important tool that provides the court with a social inquiry into the family's circumstances. However, its legal status is that of an expert opinion prepared to assist the court; it is advisory and not binding. The court retains the ultimate discretion to weigh the report's contents against all other evidence.
21. Conversely, the ascertainable wishes of a child of sufficient age and understanding are a mandatory consideration. Section 103 (1)(b) of the *Children Act* requires the Court to have regard to the ascertainable wishes of the child concerned considered in the light of the child's age and understanding. In the instant case, the trial court conducted an in-camera assessment of the children and recorded their sentiments directly. Both children expressed clear and unequivocal desire to continue living with their mother while visiting their father.
22. The Appellant alleges a discrepancy between the report and the children's testimony and claims the children were coached. The trial record shows the Magistrate was alive to this possibility, noting she wished to speak to them "when they are not under duress". Having conducted the interview herself, the learned Magistrate was in a unique and privileged position to assess the children's demeanour, maturity and the authenticity of their expressed wishes. An appellate court, working from a cold record, must be slow to interfere with such a finding of fact, which is heavily dependent on the trial court's direct observation. The trial court did not err in preferring the direct evidence obtained from the children over the recommendations in the report. The trial court correctly weighed two competing pieces of evidence and gave precedence to the direct, ascertainable wishes of the children.
23. For the foregoing reasons, the appeal against the orders on custody must fail.

Maintenance

24. Parental responsibility is a joint and equal duty. Article 53(1)(e) of *The Constitution* provides for equal responsibility of the mother and father to provide for the child. This principle is echoed throughout the *Children Act*. However, case law has clarified that "equal" does not mean a 50/50 split of expenses. It means that the responsibility is shared equitably and apportioned according to each parent's ability and means. As was held in *G. O. & 2 others (Suing thru' their mother and next friend) E. M. M. v M. O. O.* [2016] KEHC 2325 (KLR), equal responsibility does not mean equal and similar contribution as the income of each parent, other non-monetary contribution must be borne in mind. The parent with actual custody provides significant non-monetary contributions, including daily care, guidance



and supervision, as well as bear the direct costs of shelter and utilities. These contributions must be given due weight when apportioning financial obligations.

25. The Appellant claims the award of Kshs 20,000/= for maintenance was made without an assessment of the parties' means. The trial record does not support this assertion. The Appellant testified that he is a businessman, a supplier and a consultant, and that he was able to provide comfortably. He further expressed his readiness to pay school fees of approximately KSh. 300,000/= per child per year at a private school. The Respondent testified she is a business operations manager. While no payslips or Affidavits of Means were filed, this evidence provided the trial court with a sufficient basis to conclude that both parents have a source of income and that the Appellant was in a financially stronger position.
26. The Appellant's argument that the amount was excessive because the children have two meals at school is unpersuasive. The Court takes judicial notice of the high cost of living in Nairobi. An amount of KSh. 20,000 per month, which translates to approximately KSh. 333/= per day per child, to cover breakfast, dinner, snacks, all weekend meals, and all meals during school holidays, is not only reasonable but arguably modest. The trial court's order further demonstrates a careful and tailored approach by directing that this amount be halved during school holidays when the Appellant shares in the direct provision of meals. This is not the action of a court making an arbitrary order; it is the hallmark of a considered and proportionate decision.
27. Furthermore, the Appellant's history of financial inconsistency, which directly led to the children's educational instability, underscore the need for clear and enforceable maintenance orders. Ensuring the Respondent has a predictable monthly contribution towards food allows her to better manage the household budget and provide the very stability that the Appellant claims to champion. The maintenance order is, therefore, not only reasonable, but necessary for the children's welfare.
28. This Court, having undertaken a fresh evaluation of the entire evidence on record, finds no reason to interfere with the findings of the trial court. This appeal is, therefore, devoid of merit.
29. The appeal is hereby dismissed. Each party shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 7 DAY OF NOVEMBER 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For Appellant: N/A

For Respondent: N/A

Court Assistant: Lucy Mwangi

