



**HDO v SKM (Family Appeal E005 of 2025)
[2025] KEHC 17226 (KLR) (20 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17226 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
FAMILY APPEAL E005 OF 2025
JN ONYIEGO, J
NOVEMBER 20, 2025**

BETWEEN

HDO APPELLANT

AND

SKM RESPONDENT

(Being an appeal from the Ruling delivered on 20-08-2025 by Hon. Jackson Omwange(PM) in Children Case No.E023 OF 2025 at Garissa CM's court)

JUDGMENT

1. The plaintiff/respondent moved Garissa CM's court via a plaint dated 29.05.2025 seeking for orders that:
 - i. The defendant is incapable of taking good care of the children the plaintiff is requesting their custody namely; FHD 5 years and HD, 4 years old.
 - ii. The plaintiff prays that the defendant do pay monthly maintenance bills for the minors.
 - iii. The defendant to pay duqsi/school fees for the minors.
 - iv. The Defendant to be compelled to provide medical cover in respect of the minors.
 - v. The defendant should cater for the educational needs of the minors when the child attains the appropriate age.
 - vi. The defendant should cater for the educational needs of the minors.
 - vii. Any other relief the court may deem fit and just to grant.
2. Subsequently, the plaintiff/respondent through a certificate of urgency filed a notice of motion dated 14.07.2025 seeking orders that:



- i. Spent.
 - ii. Pending the inter partes hearing and determination of this application, a production order to issue compelling the defendant or any person having custody of the minors to forthwith produce the following minors before the Honourable Court on a date and time to be directed by the court: FHDO, 5 years; HHDO, 4 years and DHO, 1 year and 7 months.
 - iii. Pending the hearing and determination of this application, this Honourable Court be pleased to order that the defendant/respondent returns the children namely FHDO, HHDO and DHO to the plaintiff/respondent with immediate effect.
 - iv. Pending the hearing and determination of the main suit, the defendant/appellant, his agents, servants and/or any other person acting under his instructions be restrained from removing the said minors from the jurisdiction of this Honourable Court.
 - v. The officer commanding station, Garissa Police station, do assist in the enforcement and execution of the production order and any other consequential orders herein.
 - vi. The Honourable court do grant the plaintiff/respondent any other order as it deems fit and just.
 - vii. Costs of this application be in the cause.
3. The application was canvassed by way of written submissions and by a ruling delivered on 20.08.2025, the trial court ordered that:
- i. Custody of the children is granted to the plaintiff/applicant, SKM pending full hearing and determination of the suit.
 - ii. The defendant/respondent, HDO shall have reasonable access to the children on weekends and during school holidays, subject to further directions of the court.
 - iii. Both parties are restrained from removing the children from the jurisdiction of the court or registering them under any new name or status without prior leave of the court.
 - iv. The matter shall be fixed for hearing on priority basis to conclusively determine custody, maintenance and related issues.
 - v. That there is no order as to costs.
4. Being dissatisfied with the determination of the trial court, the defendant/appellant moved this court via a memorandum of appeal dated 09.09.2025 citing the following grounds:
- i. The learned trial magistrate erred both in law and in fact in failing to appreciate the principle of child's best interest and disregarding the fact that the respondent has already registered children as refugees and changed their names without the father's consent.
 - ii. The learned trial magistrate erred both in law and fact by issuing final injunctive orders in favour of the respondent, yet in his order number 4 of his ruling recognized that this is a matter that needs a full trial before such orders can be granted and therefore making the trial otiose.
 - iii. The learned trial magistrate erred both in law and in fact in allowing the respondent's application without considering the appellant's comprehensive response and erudite submissions in opposition to the said application.



- iv. The learned trial magistrate erred both in law and in fact in ordering the appellant to surrender the minors to the respondent herein and yet the defendant is a suitable parent and possessed of sufficient means to guarantee the children a good life, better education and a sense of belonging unlike the respondent who is likely to take the children to Somalia to a different man, Jama Noor.
 - v. The learned trial magistrate erred both in law and in fact in making a finding that the respondent's notice of motion application dated 14.07.2025 has merit despite abundant reasons and/or grounds to the contrary presented before him by the appellant in the replying affidavit.
5. He thus prayed that the appeal be allowed with costs and the ruling delivered by the Principal Magistrate on 20.08.2025 be set aside.
 6. The appeal was canvassed by way of written submissions.
 7. The appellant submitted that the lower court's decision regarding custody of the minors was one with exceptional circumstances warranting the grant of custody to the appellant. He placed reliance in the case of *Sospeter Ojaamong vs Lynette Amondi Otieno* [2019] eKLR, where the court held that while custody of young children is generally awarded to the mother, this rule does not apply where she is deemed unfit or where special circumstances exist.
 8. That the respondent has already registered the children as refugees and changed their names without his consent, despite their Kenyan nationality. It was contended that during viva voce testimony, the respondent admitted to lacking a permanent residence for the children. The Appellant asserted that the lower court failed to properly evaluate this evidence thus ended up issuing a convoluted ruling.
 9. While relying on the case of *Selle & Another vs Associated Motor Boat Co. Ltd* [1968] EA 123, the appellant urged this court to reassess and reevaluate the evidence herein afresh thus maintaining that the respondent's actions and circumstances demonstrated her unsuitability for custody. He argued that the lower court overlooked critical facts of the case and therefore, the appeal should be allowed. In conclusion, the appellant decried the misuse of the general custody rule by mothers for personal gain and urged this court to grant him custody and direct the respondent to deregister the children as refugees and restore their original names.
 10. The respondent in her submissions dated 15.10.2025 distilled issues for determination as follows:
 - i. Whether the magistrate erred in granting interim custody to the respondent.
 - ii. Whether the applicant's contempt of court orders affects his appeal.
 - iii. Whether the children's particulars require rectification.
 - iv. Who should have custody pending the hearing and determination of the main suit.
 11. On the first issue, the respondent urged that the impugned orders did not render the suit moot as claimed by the appellant. It was submitted that the orders were clearly interim, issued under Section 113 of the *Children Act* to safeguard the children's best interest pending the hearing of the main suit. Counsel contended that the magistrate's decision was grounded in Article 53(2) of *the Constitution* and Sections 4(2) and 4(3) of the *Children Act*, which emphasized the best interests of the child and the preservation of the family unit in the absence of abuse or neglect. It was urged that given the tender ages of the children—five, four, and two—and the respondent's role as their primary caregiver since birth,



- the magistrate properly found her to be the more suitable custodian, ensuring emotional stability and sibling unity.
12. It was further submitted that the appellant's averment that his submissions were ignored were far from the truth as the record showed that both parties' pleadings were considered, and he was granted reasonable access to the children, satisfying Article 9(2) of the CRC. That his dissatisfaction with the outcome did not amount to judicial error.
 13. On the second issue, this court was urged that the appellant's contempt of court orders undermined his appeal. That his failure to personally discharge parental responsibilities and his delegation of caregiving to third parties violated the principle of equity, which demands clean hands. That to the contrary, the respondent demonstrated consistent, hands-on care, aligning with Section 35 of the Children Act and further in consonance to the holding of the case of CKM vs EMM [2025] KEHC 7844(KLR).
 14. Regarding the children's particulars being changed without the consent of the appellant, the respondent conceded that registering them under refugee status was a procedural error made out of necessity and with the appellant's prior approval. That the foregoing did not reflect parental unfitness. In that regard, the court was urged to consider the case of In re Rectification of Particulars in the Birth Certificate of CC [2025] KEHC 14141 (KLR).
 15. On the issue as to who should retain custody pending the main suit, the respondent urged that she is a fit and proper parent. She argued that as the primary care giver, she provided a stable home in Dagahaley, outside the refugee camp, with access to education and healthcare. That the appellant's claim that his financial superiority guaranteed a better life was unfounded as custody decisions prioritize emotional care and parental bonding over financial means. It was argued that the allegation that she might relocate to Somalia was speculative and unsupported. It was further submitted that the appellant had admitted that the children were under the care of his siblings, not himself, which risked emotional neglect and contravened Section 32(4) of the Children Act.
 16. I have considered the appeal and rival submissions by both parties. It is now my duty to re-analyze the grounds, the court's record below, and the parties' written submissions in order to decide whether the reliefs sought should be granted. To that extent, there is only one issue which manifests itself for determination i.e. whether the appeal has merit and ought to be allowed.
 17. The crux of the matter herein is the right to physical custody to the minors herein who are all children of tender age. There is no dispute that the parties herein are husband and wife and therefore the biological parents to the minors. It is also not contested that the respondent is a Somali citizen recognized as a refugee but married to the appellant a Kenyan citizen. Further, parties are in agreement that after their marriage, the respondent moved out of the refugee camp and joined her husband at his home as a wife. That owing to domestic differences, the respondent left her matrimonial home and relocated to the refugee camp at dagahaley where she registered the children as refugees and subsequently changed their father's name to somebody else.
 18. The trial court found that the children who are the subject of this suit are children of tender age hence as a general rule entitled to be under the custody of their mother unless there are exceptional circumstances. On that basis, the hon. court issued interim orders by granting custody of the children to their mother.
 19. According to the respondent, the two minors aged 5 and 4 years old are staying with the father's uncle and not the appellant. Who then is suitable to stay with the children. It is trite law that in every decision made by any individual, institution or organization, the best interest of a child must be taken



into account. This a constitutional imperative under Article 53(2) of the Constitution of Kenya which provides;

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

20. Similarly Section 8 (1) of the Children Act 2022 provides:-

“(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;” (own emphasis).

21. The appellant in his appeal is asking this court to grant him custody while the respondent is granted reasonable access. The respondent is equally seeking similar orders.

22. This court is mindful of the provisions of Section 11(2) of the Children Act, which provides as follows:-

‘A child has a right to live with and to be cared for by his (or her) parents.

23. Parental responsibility attaches to the parent of the child as it is the parent who has the responsibility to ensure that the needs of the child are catered for. The law provides that it is the parent of a child who has parental responsibility while a child has a right to parental care and it is in the best interest of the child that he is brought up and cared for by his or her parent. This right can only be denied if it is proved with cogent evidence and valid grounds that the parent is not suitable or is incapable of taking care of the child.

24. As stated herein above and as a general rule, custody of a child of tender age is given to the mother unless there are exceptional circumstances. See *Midiwa –vs- Midiwa* [2002]2 EA 453, where the Court of Appeal re stated the principle thus;

“It is trite law that, prima facie, other things being equal, children of tender age should be with their mother, and where a court gives the custody of a child of tender age to the father, it is incumbent on it to make sure that there really are sufficient reasons to exclude the prima facie rule. (See *Re S (an infant)* [1958], ALL ER 783 at 786 and 787 and *Karanu –vs- Karanu* [1975] EA 18]. The learned judge in our view did not correctly direct herself on the principle that in cases of custody of the children the paramount consideration is their welfare. Moreover, as the record shows, there were no exceptional circumstances shown to justify depriving the mother of her natural right to have her children with her.”

25. Similarly, in the case of *EKM V EBO* (2020)KEHC 6747(KLR) the court had this to say;

“The long line of decisions above speak to one fundamental theme, that unless there are exceptional circumstances, custody of a child of tender age should be given to the mother. What would constitute exceptional circumstances as was observed in the *Ojaamong* case would include matters such as the mother’s disgraceful conduct, her immoral behaviour, drunken habit and bad company, which would disqualify her from being awarded custody of a child of tender age.”

26. In the instant case, the appellant is of the view that the children being Kenyan citizens are entitled to stay outside a refugee camp. The question is whether a child who is a Kenyan by virtue of Article 14 (1) of the constitution can be relocated to a refugee camp and stay like a refugee yet he or she is not a refugee? Is it in the best interest of a Kenyan child to be brought up in a refugee camp as a refugee yet he or she is a Kenyan citizen? Does the change of the children’s name to another parent (step-father)



amount to an exceptional circumstance to waive the general rule? These are some of the issues that needs interrogation during a full trial and not at the interlocutory stage to make an informed final decision.

27. In the circumstances of this case which are unique, the trial court ought to have maintained the status quo with the appellant staying with the two older children while the respondent stays with the youngest child pending the hearing and determination of the suit.
28. In my view and given the circumstances highlighted herein above, the appeal herein is merited and the same is hereby allowed with orders that;
 - a. Legal custody of the children herein in the interim is awarded jointly to both parents pending hearing and determination of the main suit
 - b. Physical custody of FHDi and HHDO in the interim is granted to the father while that of DHD is awarded to the mother pending hearing and determination of the main suit.
 - c. Each parent shall have reasonable access to any of the children during weekends or school holidays subject to the parent's mutual agreement on the visitation time which shall in any event be convenient to the children and in the event of a disagreement, the children officer under whose jurisdiction they fall shall intervene to fix time and place of visitation.
 - d. Both parents are restrained from removing the children out of the trial court's jurisdiction.
 - e. No parent shall change children's names without court's authorization.
 - f. The trial court shall expedite the hearing of this case on priority basis.
 - g. The orders of this court shall supersede those of the trial court.
 - h. Each party to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF NOVEMBER 2025

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J.N.ONYIEGO

JUDGE

