



REPUBLIC OF KENYA



**KENYA LAW**  
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**PGM v PWK (Civil Appeal E102 of 2023)  
[2025] KEHC 17581 (KLR) (Family) (28 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17581 (KLR)

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

**FAMILY  
CIVIL APPEAL E102 OF 2023**

**PM NYAUNDI, J  
NOVEMBER 28, 2025**

**BETWEEN**

**PGM ..... APPELLANT**

**AND**

**PWK ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon. C.C Oluoch, Chief Magistrate in Nairobi Children’s Case No. E253 of 2023 delivered on 12th September 2023)*

**JUDGMENT**

1. Before this court for determination is the Appeal filed by P.G.M (the Appellant) through a Memorandum of Appeal dated 25<sup>th</sup> September 2023. The Appeal arises out of a Judgment delivered on 12<sup>th</sup> September 2023 by Hon. C.C Oluoch, Chief Magistrate in Nairobi Children’s Case No. E253 of 2023.
2. On 30<sup>th</sup> July 2025, the court issued directions that the appeal be canvassed by way of written submissions. As at the date of writing this judgment, none of the parties had filed written submissions.

**Background**

3. The Respondent herein filed a suit (as Plaintiff) in the Children’s Court in Nairobi being Suit No. E253 seeking the following orders;
  - a. A Permanent order restraining the Defendant from subjecting the minors and the Applicant to any form of physical, psychological or verbal assault.
  - b. Actual and legal custody of the issues be vested with the Plaintiff and the Defendant to have unlimited access to the minors.



- c. A maintenance order requiring the Defendant to pay Kshs. 150,000.00 per month towards the maintenance of the minors and all school related expenses.
  - d. Costs of this suit be borne by the Defendant.
  - e. Any other relief that this court seems just to grant.
4. The Appellant and the Respondent lived together as husband and wife but due to marital issues, they separated. Their union was blessed with three issues: NMG, and twins both named KKG who at the time of the hearing were 9 ½ years old and 8 ½ years old respectively.
  5. The Defendant (Appellant ) filed a defence and counterclaim dated 18<sup>th</sup> May 2023. He sought the following orders;
    - i. The Plaintiff's suit be dismissed with costs to the Defendant.
    - ii. An order for joint legal custody of the minors.
    - iii. An order for full physical custody of the minors to the Defendant.
    - iv. An order for the plaintiff's access to the minors an alternate weekends.
    - v. Each party to take care of the needs of the minors when they are with them.
    - vi. The children remain with the Defendant in the home they have grown to call home.
    - vii. An order that parental responsibility be shared equally.
  6. The suit was fully heard and on 12<sup>th</sup> September 2023, Hon. C.C Oluoch, Chief Magistrate delivered a judgement in which she made the following orders regarding custody and maintenance of the minors.
  7. The parties shall have joint legal custody of the minors.
    - a. The Plaintiff shall have actual custody, care and control of the minors.
    - b. The Defendant shall have access to the minors pn alternate weekends from 9:00 am on Saturday to 6:00 pm on Sunday and the first half of school holidays.
    - c. The Defendant shall pay school fees and cater for all school related expenses for the minors at schools to be mutually agreed on.
    - d. The Defendant shall cater for the medical needs of the minors through a medical cover.
    - e. The plaintiff shall cater for all the other needs.
    - f. Each party shall bear its own costs.
  8. Dissatisfied with the Judgment of 12<sup>th</sup> September 2023, the Appellant filed a Memorandum of Appeal dated 25<sup>th</sup> September 2023 in which he listed five (5) grounds of appeal as follows:
    1. The Learned Magistrate erred in law and fact by awarding the respondent sole actual custody care and control of the minors without any compelling reasons or evidence.
    2. The Learned Magistrate erred in law and fact by awarding the Respondent sole actual custody, care and control of the minors without considering all the requisite principles to be applied by the court in making a custody order.



3. The Learned Magistrate erred in law and fact by awarding the Respondent sole, actual custody, care and control of the minors contrary to the best interests principle.
  4. The Learned Magistrate erred in law and fact by denying the Appellant custody, care and control of the minors without any compelling reasons, evidence or challenge on his suitability to having custody of the minor.
  5. That the Learned Magistrate erred in law and fact by denying the Appellant custody, care and control of the minors in spite of the law providing for equal right of custody for both the mother and the father.
9. He asked the court to allow the appeal on the following terms;
- a. That the Ruling and order of the Chief Magistrate Children's Court at Nairobi Children's Case No. E253 of 2023 (Hon. C.C Oluoch CM) delivered on 12<sup>th</sup> September 2023 be and is hereby set aside in its entirety.
  - b. That the present appeal be and is hereby allowed in the following terms;
    - i. The court makes an order for joint legal custody of the minors.
    - ii. The Appellant be allowed unfettered access to the minors.
    - iii. The Appellant to have actual custody of the minors.
    - iv. The Respondent to produce evidence of her monthly income and salary for effective and efficient determination of maintenance orders.
    - v. The appeal herein be allowed with costs to the Appellant.
  - c. That the court grants any further orders in the interest of justice. Appeal be allowed.

### **Analysis And Determination.**

10. This is a first appeal. The duty of a first appellate Court was succinctly stated by Wendoh J in *JWN v MN* [2019] eKLR in the following words:

It is settled law that the duty of the first appellate court is to re-evaluate the evidence tendered in the subordinate court, both on points of law and facts and come up with its findings and conclusions.

11. As I consider this matter, I am mindful of the constitutional and statutory imperative that the best interests of the children 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.

And Section 8 of the *Children Act* (the Act) which provide:

- (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.

12. The Appellant argues that he was not given unlimited access of the children. Access is provided for under Children’s Act, Section 103 (2) and (3);
  - (2) Where a custody order is made giving custody of a child to one parent, 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.
13. From the judgment the subordinate court gave both parents legal custody of the children. None was denied their parental responsibilities over the children. The court demarcated the time each would have the actual custody of the children. In my view that is well defined despite the current contest over the period of time each was granted with the children.
14. The children of the marriage are aged between 10 and 11 years. They are children of tender age and it would be in their best interest that they remain with their mother who has always taken care of them. The appellant did not avail any evidence to prove that the respondent is an unfit mother to care for the children or that there were exceptional circumstances to cause the court to deny her custody and the best interest of the children dictated that the actual custody of the children do remain with their mother, the respondent.
15. Circumstances to deny the mother custody were considered in the case of – see *Githunguri v Githunguri* (1981) KLR and *Wambura v Okumu* (1970) EA 578.
16. The Court of Appeal in *J.O. v S.A.O* (2016) e KLR stated:

“There is a plethora of decisions by this court as well as the High Court that in determining matters of custody of children and especially of tender age, except where exceptional circumstances exist, the custody of such children should be awarded to the mother because mothers are best suitable to exercise care and control of the children. Exceptional circumstances include: the mother being unsettled; where the mother has taken a new husband; where she is living in quarters that are in deplorable state; or where her conduct is disgraceful and/or immoral.”
17. In the instant case, there were no disclosed exceptional circumstances that would disqualify the respondent from having actual custody of the children and this court would not interfere with the finding of the lower court on that issue.
18. In the circumstances, I find no reason to interfere with the judgment of the trial magistrate.
19. In conclusion, I find that the Appeal has no merit, it is therefore, dismissed. I make no orders as to costs.
20. Parties are at Liberty to exercise their right of appeal within 30 days



It is so ordered

**DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> NOVEMBER 2025.**

**P.M. NYAUNDI**

**JUDGE**

In the presence of:

Fardosa Court Assistant

Ms. Karongo for Respondent

