



**JNM v LGM (Appeal E107 of 2024) [2025] KEHC 18158 (KLR)  
(Family) (5 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18158 (KLR)

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

**FAMILY  
APPEAL E107 OF 2024**

**H NAMISI, J  
DECEMBER 5, 2025**

**BETWEEN**

**JNM ..... APPELLANT**

**AND**

**LGM ..... RESPONDENT**

*(Being an Appeal from the Judgement of Hon. Andrew Munene, Principal Magistrate delivered on 11 August 2024 in Nairobi Children’s Case No. E116 of 2022)*

**JUDGMENT**

1. The Appellant and Respondent are the biological parents of two minors, EKN (female aged 6 years) and AKN (male, aged 5 years).
2. The genesis of the appeal lies in the judgement delivered by the trial court on 11 August 2024 and the subsequent final orders on 15 October 2024. The trial court, seized of the dispute following a contentious separation in November 2021, attempted to balance the competing rights and interests of the parties through orders granting joint legal custody, primary physical custody to the mother and specific maintenance obligations upon the father.
3. However, as is characteristic of high-conflict family litigation involving professionals of comparable standing, the trial court’s attempt at an equitable distribution of responsibility has left both parties feeling dissatisfied. The Appellant is aggrieved by the financial mechanics of the maintenance orders – specifically regarding school transport and clothing – and the perceived inequity in the apportionment of shared responsibility. On the other hand, the Respondent, through a Cross-Appeal, seeks to overturn the shared custody arrangement in favour of full custody, invoking the ‘tender years doctrine’ and alleging unsuitability on the part of the Appellant.



4. The Appellant and Respondent contracted a Christian marriage on 1 May 2018 in Nairobi. Following the marriage, the parties established their matrimonial home in Kilimani, Nairobi. Their union was blessed with 2 children. Both parties are distinguished medical professionals.
5. The cohabitation of the parties ceased on 10 November 2021. The circumstances surrounding their separation form the bedrock of animosity that has characterized this litigation. The Appellant contends that the Respondent took off with the minors, without his consent or knowledge, while he was at work. He characterizes this as an abduction, noting that the Respondent withdrew the minor, EKN, from her school and cut off all communication. This compelled him to file a missing person report at the police station and relied on CCTV footage to trace their departure. The Respondent, on the other hand, paints a picture of a flight for safety. She avers that she left the matrimonial home to evade violence, mental and psychological trauma inflicted by the Appellant.
6. This divergence in narratives – abduction versus escape – set the stage for the contentious litigation that followed. The Appellant viewed the move to Ongata Rongai by the Respondent as a unilateral, punitive measure that distanced him from his children and increased logistical hurdles. The Respondent viewed it as a necessary protective measure.
7. On 27 January 2022, the Appellant moved the Children’s Court seeking immediate return of the minors to Kilimani and restoration of the status quo. The history of the matter reveals a pattern of high conflict. The Appellant filed multiple applications citing the Respondent for contempt, alleging denial of access despite court orders granting him visitation on Saturdays. He cited instances where he was forced to seek police assistance to enforce access orders. The Appellant was ordered to pay school fees and transport. He initially paid transport but later stopped, arguing that the Respondent should cover it or that the method of payment was untenable. This led to execution proceedings against the Appellant.
8. The trial court delivered its judgement in 2 phases. On 9th August 2024, the court delivered a partial judgement which addressed the core issues of maintenance and shared responsibility but reserved the final determination on custody pending a further Children’s Officer’s Report. It ordered the Appellant to pay fees and remit transport costs to the Respondent.
9. Following the receipt of the Children’s Officer’s Report, the court confirmed the custody arrangements. Joint legal custody, actual custody to the mother and access to the father on alternate weekends.
10. Aggrieved, the Appellant lodged this appeal on the following grounds:
  - i. That the Learned Magistrate erred in law and in fact by not taking into consideration that parental responsibility is shared and the same should not be used to punish one parent and favour the other;
  - ii. That the Learned Magistrate misdirected himself both in law and in fact by compelling the Appellant to remit the minors’ school transport charges to the Respondent while totally disregarding the Appellant’s prayer that money should not change hands;
  - iii. That the Learned Magistrate erred in law and in fact by not determining that the Respondent caters for the minors’ school transport costs as her only contribution towards the minors’ education;
  - iv. The Learned Trial Magistrate misdirected himself both in law and in fact by failing to consider the evidence of the affidavit of means when apportioning maintenance of the minors;



- v. That the Learned Trial Magistrate erred in law and in fact by directing that the Appellant provides for clothing on a quarterly basis upon being provided with a list by the Respondent hence placing him under the control of the Respondent whereas the issue of clothing had not been raised;
  - vi. That the Learned Magistrate erred in law and fact by not considering the Appellant's submissions and authorities cited herein;
  - vii. That the Learned Magistrate erred in law and in fact by failing to uphold precedent and the Constitutional Provisions regarding equal parental responsibility hence leaving the Appellant to shoulder much responsibility;
  - viii. That the Learned Magistrate erred in law and in fact by failing to exercise its discretion correctly in granting orders of maintenance pending the filing of a children's officer's report whereas interim orders were in place;
  - ix. That the Judgment did not meet the mandatory requirements of Order 21 Rules 4 and 5 of the Civil Procedure Rules and therefore a nullity.
11. The Respondent cross -appealed on the following grounds:
- i. The learned trial Magistrate erred in law and fact in giving partial custody of the very young minors to the Appellant;
  - ii. That the learned trial Magistrate erred in law and fact in failing to consider the evidence of the Respondent in its totality, her submissions together with the authorities which clearly favoured custody of the minor children to be with their mother, the Respondent herein and not the Appellant;
  - iii. That the learned trial Magistrate erred in law and fact in relying on the biased Children's Officer's Report dated 15 November 2023 wherein the Respondent was not interviewed to give custody of the minor children to the Appellant;
  - iv. The learned trial Magistrate erred in law and fact in failing to appreciate from the evidence tendered that the Applicant was more experienced and had worked longer and held private practice in several hospitals and was therefore in a position to shoulder more maintenance responsibilities of the minors than the Respondent;
  - v. The learned trial Magistrate erred in law and fact by failing to appreciate from the Applicant's own evidence that his house was inhabited by several persons who were strangers, unknown to the minors and could therefore not provide a suitable environment for the minors.
  - vi. The learned trial Magistrate erred in law and fact by allowing the Applicant to litigate in instalments and asking for more evidence in favour of the Applicant after delivery of judgement;
  - vii. The judgement delivered by the trial court failed to meet the mandatory provisions of the law and is therefore null and void.
12. The appeal and cross appeal were canvassed by way of written submissions.

### **Analysis & Determination**

13. This Court is seized of this matter pursuant to Section 78 of the *Civil Procedure Act*, and Section 26 of the *Children Act*, 2022. As a first appellate court, the mandate of this Court is well-settled in



Kenyan jurisprudence. This Court is tasked not merely with a review of the legal technicalities but with a comprehensive re-evaluation of the evidence tendered before the subordinate court.

14. I am guided by the celebrated decision in *Selle & Another vs. Associated Motor Boat Company Ltd & Others* EA 123, where the Court of Appeal for East Africa established that an appellate court must reconsider the evidence, evaluate it, and draw its own conclusions, while always bearing in mind that it has neither seen nor heard the witnesses and must make due allowance for this fact.
15. In family proceedings, this duty is elevated by the constitutional imperative under Article 53(2) of *the Constitution* of Kenya which dictates that in every matter concerning the child, the best interest of the child is of paramount importance. This Court, therefore, approaches this appeal not merely as an arbiter of a dispute between two adults, but as the upper guardian of the minors E.K.N and A.K.N. Any strict application of procedural technicalities must yield to the substantive justice required to secure the welfare of these minors.
16. Having carefully reviewed the Record of Appeal and submissions of both parties, this Court distils the following as the issues for determination:
  - i. Custody and access
  - ii. Maintenance

### **Custody and Access**

17. The Respondent's Cross Appeal is anchored heavily on the proposition that children of tender years belong essentially with the mother. She argues that the trial court's decision to allow the Appellant access on alternate weekends and half the holidays is erroneous.
18. It is imperative to clarify the legal standing of the Tender Years Doctrine. Historically, common law presumed that children of tender age (usually under 10) were best cared for by their mother. However, the legal landscape in Kenya shifted radically with the promulgation of *the Constitution*. Article 53(1) (e) states unequivocally:

“Every child has the right to parental care and protection, which includes the equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.”
19. Section 32 of the *Children Act* reinforces this by stating that parental responsibility is shared.
20. The Appellant properly cited the decision of Hon Joel Ngugi, J. (as he then was) in *SMM v ANK* KEHC 1043 (KLR). In that watershed judgment, the High Court held that the Tender Years Doctrine is not an inflexible rule of law. It must yield to the best interests of the child. The learned Judge cited the Canadian Supreme Court case of *Young vs Young* 4 S.C.R., noting that society has moved away from the assumption that women possess inherent characteristics that make them better custodial parents solely by virtue of gender.
21. This Court aligns itself with the reasoning in *SMM v ANK*. To apply the Tender Years Doctrine mechanically is to violate the constitutional tenet of equality and the child's right to the care of both parents. The doctrine is merely a rebuttable presumption that can be displaced by evidence that the father is willing, capable, and that it is in the child's best interest to have significant contact with him.
22. The Respondent argue that the Appellant is unsuitable because he leaves the minors in the care of strangers. The record reveals that these strangers are the Appellant's niece (a student at Daystar University) and a sister to his brother's wife.



23. This Court takes judicial notice of the African social context, where the extended family plays a crucial role in child-rearing. Referencing the principle of Ubuntu and the African Charter on the Rights and Welfare of the Child, the involvement of close relatives like aunts and nieces in caregiving cannot, in isolation, be deemed exposing children to strangers. Labelling blood relatives as strangers to deny a father custody is a mischaracterization that this Court rejects.
24. Regarding the allegations of physical harm, the Respondent attempts to introduce photographs to suggest that the Appellant is negligent. The Appellant rebuts this by providing evidence of a school-wide epidemic of rashes at the material time.
25. The standard of proof in alleging physical abuse or negligence in custody matters is the balance of probabilities, but the allegations must be substantiated by independent medical professional evidence. A rash on a child, while concerning, does not automatically equate to parental negligence, especially where a school outbreak has been cited.
26. The Children's Officer's Report, which the Respondent attacks, actually assessed the children while with the Appellant and found them happy and jovial. The trial court, having the benefit of this Report and the oral testimony, found no compelling reason to deny the Appellant access. This ground of the cross appeal fails.

### **Maintenance**

27. The core of the Appellant's dissatisfaction lies in the financial orders. The trial court ordered him to pay school fees, school related expenses, medical cover and clothing.
28. The Appellant is a consultant Ophthalmologist and Lecturer at the University of Nairobi. His monthly income is Kshs 258,646/-. The Respondent is a consultant Anaesthesiologist working for the Nairobi City County. Her monthly income is Kshs 265,560. The income disparity is negligible. Both are high – earning professionals.
29. Shared responsibility does not imply a 50:50 mathematical split, but a contribution proportionate to means. Under the trial court's order, the Appellant bears almost the entire direct monetary cost of the minors, while the Respondent provides shelter and food when the minors are with her. The Respondent currently resides in Nkoroi, in her parents' home.
30. Further, the Appellant was ordered to remit transport charges to the Respondent at the school rate. The record shows the transport cost is approximately Kshs 90,000/= per term or Kshs 45,000/= per child. The Appellant raises a critical point regarding logistics of relocation. The matrimonial home was in Kilimani. The Respondent unilaterally moved the children to Nkoroi (Ongata Rongai), a significant distance from the school, La Salle. While the Respondent had the right to move, the consequential cost of that move—specifically the increased transport burden—cannot be wholly shifted to the Appellant, especially when he opposed the move and the change of circumstances.
31. Furthermore, if the children are transported by private means (the Respondent's car), ordering the Appellant to pay the school bus rate is arbitrary. It acts as a wealth transfer rather than a reimbursement of actual costs. If the Respondent chooses to drive them, she incurs fuel costs, not school bus fees.
32. Therefore, given that the parties have comparable incomes, the Appellant is already burdened with the substantial cost of school fees and the Respondent chose the residential location which necessitated the transport logistics, it is the finding of this Court that the Respondent should bear the cost of transport to and from school as her contribution to the education of the minors. This aligns with the principle of equitable sharing.



### **Procedural Irregularity**

33. The Appellant challenged the judgement under Order 21 Rules 4 & 5, Civil Procedure Rules, arguing that it lacked necessary ingredients. The Respondent challenged the “litigation in instalments”.
34. In matters relating to children, flexibility is often required. Section 22 of the *Children Act* empowers the court to make such orders as necessary to protect the child. The issuance of a partial judgement to secure school fees, which were urgent, while awaiting a report on custody, which required investigation, was a pragmatic case management decision by the learned Magistrate. It does not vitiate the proceedings.
35. Regarding the Children’s Officer’s Report, the court is not bound by it but uses it as a guide. The fact that the Respondent disagrees with it does not render the judgement void, especially since the trial court actually granted her primary custody, partially deviating from the shared recommendation in her favour
36. Accordingly, the appeal is allowed in part, and the cross appeal is dismissed. The judgement and decree of the trial court issued by Hon. Andrew Munene, Principal Magistrate on 11 August 2024 in Nairobi Children’s Case No E116 of 2022 are hereby varied as follows:

### **Custody and Access**

- i. The parties shall continue to have joint legal custody of the minors, EKN and AKN;
- ii. The Respondent shall have actual physical custody of the minors;
- iii. The Appellant shall have access to the minors on alternate weekends from Friday after school or at 4pm to Sunday at 4pm.
- iv. The school holidays shall be shared equally (50:50) on a rotational basis. The parties shall agree on the specific dates 7 days before the closing of schools.
- v. The Appellant shall have unlimited telephone/video access to the minors between 6pm and 7pm on weekdays.

### **Education and Maintenance**

- i. The Appellant shall pay the full school fees and school related expenses, including lunch, activity fees and book fund, directly to the school or service providers.
  - ii. The Respondent shall pay for and organise the school transport for the minors to and from school on a daily basis. The Appellant shall bear the transport costs during his access period (picking and dropping the minors for the weekends)
  - iii. Both parties shall maintain the minors on their respective medical covers.
  - iv. The Appellant shall pay for school uniform directly to the school/supplier.
  - v. The order requiring a quarterly list is set aside. Each party shall provide adequate clothing for the minors to be used while the minors are in their respective custody.
37. Parties shall bear their own costs of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 5 DAY OF DECEMBER 2025**

**HELENE R. NAMISI**



**JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

For Appellant: N/A

For Respondent: Ms. Marucha h/b Mrs Owino

Court Assistant Lucy Mwangi

