



**JG v GB (Civil Appeal E051 of 2024)  
[2025] KEHC 18183 (KLR) (Civ) (3 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18183 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ISIOLO  
CIVIL  
CIVIL APPEAL E051 OF 2024  
SC CHIRCHIR, J  
DECEMBER 3, 2025**

**BETWEEN**

**JG ..... APPELLANT**

**AND**

**GB ..... RESPONDENT**

*(An Appeal from the Judgment and Decree of the Chief Magistrate’s Court at Isiolo by Hon. M.A Odhiambo in Children Case No. E003 OF 2024 delivered on the 8th day of November 2024)*

**JUDGMENT**

1. The parties herein are biological parents of RWG (8 years), ,EHG (14 years), SBG(18 years), and ATG( 21 years.) . By way of a plaint dated 28<sup>th</sup> February 2024 the Appellant herein sought for, interalia permanent legal custody of the minor children .
2. Following a full trial the trial court found that the Respondent Father ( Respondent ) was better suited to retain actual / physical custody of the children legal custody was shared. The Appellant was also granted unlimited access during weekends and school holidays and unlimited telephone or other technological communication.
3. The Appellant, was dissatisfied with the order on custody and moved to this court through the present Appeal. The grounds of Appeal are as follows:
  - a) That the Trial Court erred in fact and law in granting legal custody of the minors, to the Respondent despite overwhelming evidence that the best interests of the minors would be served by granting legal custody to the Appellant.



- b) That the Trial Court failed to consider the psychological and emotional needs of the minors, who are in their adolescent stage, which the Appellant, as their mother, is better suited to address and guide them through.
  - c) That the Court misdirected itself by disregarding credible evidence showing that the Respondent was coercing the minors to convert to Islam against their wishes, which amounted to cruelty and subjected the minors to mental anguish and emotional distress.
  - d) That the Trial court failed to consider and/or take into account the testimonies of the minors that was done in camera on whom they would wish to live with.
  - e) That the honourable court erred in law and fact by failing to take into account the principles governing the welfare and best interests of children as provided under Article 53(2) of *the Constitution* of Kenya 2010 and the *Children Act*, 2022.
4. The Appeal proceeded by way of written submissions.

### **Appellant's Submissions**

- 5. It was the Appellant submission that the trial court ignored the principle of the tender age doctrine, which dictates that the custody of children of tender years should generally be granted to the mother unless exceptional circumstances disqualify her. It is stated that both minors are at the adolescents stage and the Appellant as the mother, is better suited to address their psychological and emotional needs and to guide them through that particular stage of human development.
- 6. The Appellant submits that the trial court disregarded the testimonies of the minors taken in camera, where they stated that they wished to live with the mother.
- 7. The Respondent did not file a response or submissions in this Appeal.

### **Analysis and determination**

- 8. I have considered the Memorandum of Appeal and the Appellant's submissions. The only issue for consideration is whether the trial court's finding on custody should be varied or vacated.
- 9. The *Children Act* provides principles to be applied when making a custody order. These include: the conduct and wishes of the parent, the ascertainable wishes of the child; whether the child has suffered or is likely to suffer harm and the stability of any proposed living arrangements. Section 8(2) provides that judicial and administrative institutions must treat the interests of the child as the first and paramount consideration to safeguard and promote the child's welfare. The above section is a replication of Article 53(2) of *the constitution*.
- 10. Further it is trite law that the determination of custody is inherently a matter of discretion guided by the foundational principle that the child's best interests are of paramount importance in every matter concerning the child.
- 11. The Appellant's main contention is that the trial court disregarded the wishes of the children and the fact that being females, who are going through adolescents, they require the guidance of the mother. It is also submitted that the court went against the long standing principle that a mother is well placed to take care of children of tender years.
- 12. I have perused the judgment of the trial court. In arriving at the decision to grant custody of the minors to the father, the trial court took into account the fact that the father had been the primary care-giver



of the children for a period of 6 years prior to the filing of suit by the Appellant, and that disturbing the child's living environment is not in the best interest of the children

13. Generally, the facts of the case are not contested. The children are both female aged 14 and 8 at the time of the hearing, and now should be 15 and 9 years respectively. The fact that the father has been the primary care-giver is not also contested. The court also observed, correctly that the children wishes may not necessarily be in the best interest of the children.
14. What is the best interest of a child is not defined anywhere in law. The courts are left with the duty to consider the circumstances of each case and based on those circumstances determine what the best interest of the child is. This was aptly explained in the case of *M A v R O O* [2013] KEHC 1203 (KLR) where the Judge stated:

“ ....What is the best interest of the child has not been defined by the law. This is as it should be because the best interest of each particular child will depend on the circumstances of each particular case at any one particular time. What is not in dispute, however, is that there are certain minimum requirements that have universally been accepted to constitute the best interest of the child. This includes the right of a child to be provided with shelter, food, clothing and education. The child is entitled to medical care. The child's welfare should be taken care of under the best possible circumstances. The child is also entitled to parental guidance. This guidance shall where possible, be provided by both parents. The child is further entitled to be given a suitable, conducive and loving environment in which to grow up in. ‘... This court agrees with the Respondent that his right as the biological father of the child should not in the circumstances be ignored. However, such right shall be subject to what constitutes the best interest of the child. As an adult, the right of the respondent as the father of the child cannot be considered to be of paramount importance to that of the best interest of the child ...’
15. I agree with the trial Magistrate that the stability of the children which has been in place for last six years should not be disturbed. Of all the other considerations, their stability is what is in their best interest in the circumstances of this case.
16. I have considered the Appellant's concerns, namely the need to guide the girls through the Adolescence period. The older girl is now 15 years. She is old enough to manage bodily occurrences like the menses, and her hygiene. I have further observed that the trial court gave unlimited access to the mother on weekends and during school holidays. She was also given the liberty to communicate with them by whichever technological gadgets she wishes, without any limitations. In other words the Appellant can still guide the minors even through the attendant adolescents issues if she is committed, to without having to be physically present all the time.
17. The Appellant has also argued that the trial court went against the laid down principle that children of tender years should be placed in a mother's custody, save in exceptional circumstances. The 15-year old has passed the bracket of “tender years” as per the definition given in the various past decisions of the court on who is a child of tender years. However, the consideration of the aforementioned principle, is not a paramount one. What is of paramount consideration is the best interest of the child as aforesaid.
18. In view of the foregoing, this court finds no reason to interfere with the findings of the trial court. The Appeal is dismissed and the judgment of the trial court upheld.
19. This being a dispute involving family members. Each party to meet their own costs.

**DATED, SIGNED AND DELIVERED AT ISIOLO THIS 3<sup>RD</sup> DAY OF DECEMBER 2025.**



**S. CHIRCHIR**

**JUDGE .**

Roba Katelo – Court Assistant

