KNM v SSB (Appeal E169 of 2024) [2025] KEHC 18597 (KLR) (Family) (18 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18597 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

APPEAL E169 OF 2024

H NAMISI, J

DECEMBER 18, 2025

BETWEEN

KNM ..... APPELLANT

AND

SSB ..... RESPONDENT

(Being an Appeal from the Judgement of the Kadhi's Court at Nairobi delivered on 23 October 2024 by Hon. Kadhi Suqyan Hassan Omar in Divorce Cause No. E174 of 2022)

JUDGMENT

1. This appeal concerns the emotive and legally complex issues of child custody, care and control and the proposed international relocation of a minor. The crux of the dispute lies in the determination of the best interests of the minor in a scenario where both biological parents are currently resident in the United States of America, while the minor resides in Kenya under the physical care of his maternal grandparents. The Appellant seeks to overturn the decision of the Kadhi's court which granted actual physical custody to the Respondent (exercised through her parents in Kenya) and denied his request to relocate the minor to the United States.

2. The Appellant and Respondent contracted a marriage under Islamic law on 11 May 2018. Their union was blessed with one child, TKM, born on 27 November 2018. At the time of the marriage and the birth of the child, both parties were resident in Nairobi.

3. The marriage, however, faced significant turbulence. According to the record, the Respondent claims to have moved out of their matrimonial home on 10 February 2020, citing irreconcilable differences. Upon separation, the Respondent moved with the minor, who was an infant at the time, to her parents' home in Utawala, Nairobi. This marked the beginning of the minor's residence with his maternal grandparents, a fact that is central to the Respondent's case regarding stability and continuity of care.

4. The Appellant initiated divorce proceedings via Divorce Case No. E174 of 2022, filed at the Kadhi's Court, Nairobi. The record indicates that the divorce was largely uncontested, and the marriage was dissolved by consent. The decree of divorce was issued, leaving the ancillary issues of child custody, maintenance and access for judicial determination.

5. It is noteworthy that the parties attempted to resolve the issues of parental responsibility through a Parental Responsibility Agreement (PRA) in 2023. The draft agreement proposed joint legal custody with actual physical custody vested in the Respondent. However, this agreement was never executed or adopted as an order of the court due to subsequent disagreements and the relocation of the parties, rendering the draft nugatory except as evidence or prior intent.

6. The Respondent relocated to the USA in August 2021 for employment purposes. She testified that she moved in order to secure better financial prospects to support the minor, given the Appellant's alleged lack of support at the time. The Respondent left the minor in the physical care of her parents, the maternal grandparents, in Kenya but assets that she maintains daily contact and provides full financial support.

7. The Appellant relocated to the USA in September 2022, where he is currently a student and also works. He testified that he is on a visa that allows him to work and study.

8. The minor has thus resided in Kenya with his maternal grandparents for the vast majority of his life, specifically since the separation of the parties in early 2020. He is enrolled at St. Bakhita Elite School in Utawala and attends local Madrassa classes.

9. Upon hearing the Petition on the issues of custody and maintenance, the Hon. Kadhi delivered his judgement and made findings of fact and law. On custody, the court awarded actual physical custody to the Respondent, acknowledging the arrangement where the child resides with the grandparents. The court found that the Appellant had failed to adduce evidence that the Respondent or the grandparents were unfit to care for the child.

10. On the issue of maintenance, the court noted that the Appellant had only recently begun paying school fees and medical cover, from 2023, whereas the Respondent had borne the burden of maintenance for a significant period. The court found that the Appellant was not fully prepared to shoulder the financial responsibilities of the minor based on text message evidence adduced at the hearing.

11. On relocation, the court effectively denied the Appellant's request to take the child to USA, reasoning that the Appellant, being a student and working over 40 hours a week, had not provided a structured care plan for the minor. the court prioritized the stability of the child's current environment in Kenya over the uncertainty of relocation.

12. Aggrieved by these finding, the Appellant lodged this appeal on the following grounds:

    i. The learned Kadhi erred in law and fact by awarding the Respondent sole actual custody care and control of the minors without any compelling reasons or evidence;

    ii. The learned Kadhi erred in law and fact by awarding the respondent sole actual custody care and control of the minors contrary to the best interest's principle;

    iii. The learned Kadhi erred in law in fact failing to adequately consider the best interests of the minor as required under Article 53(2) of *the Constitution* of Kenya and Section 8 of the *Children Act*, 2022, which prioritize the right of the child to parental care over alternative custody arrangements;

iv. The learned Kadhi erred in law in fact failing to properly evaluate the evidence presented by the Appellant, which demonstrated the Appellant's capacity to provide a stable, safe, and nurturing environment for the minor;

v. The learned Kadhi erred in law and in fact by failing to give due regard to the Appellant's constitutional rights as a parent, guaranteed under Article 45(1) of *the Constitution* of Kenya.

13. The appeal was canvassed by way of submissions.

14. The Appellant argued that the Respondent has abdicated her parental responsibility by leaving the child with grandparents while she resides in the USA. He relied on section 32(4) of the *Children Act*, which states that a person with parental responsibility may not relinquish or assign such responsibility to another person. He contends that the Respondent's arrangement with her parents amounts to an illegal assignment of rights, rendering her unfit.

15. Citing Article 53(1)(e) of *The Constitution*, the Appellant asserted that the minor has a right to parental care, which is superior to care by grandparents. He relied on the case of J-NGNJA v DO & another (Family Appeal E002 of 2024) KEHC 7599 (KLR), arguing that courts should not allow parents to give away their children to relatives when a biological parent (the Appellant) is available and willing to assume custody. He argued that he is ready to take the child to the US and provide direct parental care, restoring the child's right to live with a parent.

16. The Appellant posited that he has demonstrated capacity to care for the child, citing his financial stability and ability to provide a home in the US. He argued that the trial court failed to evaluate his evidence regarding his ability to provide a stable environment and instead placed undue weight on his past conduct. He further argued that the Respondent is motivated by malice to lock him out of the child's life, citing RA v JNO KEHC 2557 (KLR).

17. Conversely, the Respondent argued that the best interests principle is the paramount consideration, superior to the biological rights of a parent. She submitted that the child has known stability with her and her parents since infancy. Uprooting a 6-year-old child from a familiar environment, school, and community to a foreign country with a parent who has been largely absent would be detrimental to the child's psychological well-being. She cited MAA v ABS eKLR to support the paramountcy of the child's welfare over parental rights.

18. The Respondent challenged the Appellant's suitability, describing him as having a history of abandonment. She pointed to the trial court's finding that he was unaware of the child's schooling or dietary needs until recently. She argued that his schedule in the US (working 40+ hours plus studying) precludes effective monitoring of the child, and he has failed to provide a structured plan for childcare in his absence.

19. The Respondent denied abdicating responsibility. She contended that she is the primary provider, ensuring the child's needs are met financially and emotionally (via daily communication) while delegating physical care to trusted grandparents. She argued this is a necessary arrangement for the child's economic welfare, not an abandonment.

Analysis & Determination

20. This Court is seized of jurisdiction pursuant to Article 165(3)(a) of *The Constitution* which confers upon the High Court unlimited original jurisdiction in civil and criminal matters, and appellate jurisdiction over decisions of subordinate courts, including the Kadhi's Courts on matters of law and

fact not limited to questions of Islamic personal law when they intersect with constitutional rights under the Bill of Rights.

21. As a first appellate court, the mandate of this Court is well-settled. It is the duty of this Court to revisit the evidence tendered before the trial court, evaluate it afresh, and arrive at its own independent conclusion. However, this Court must always bear in mind that it did not have the distinct advantage of seeing or hearing the witnesses as they testified, and thus should be slow to overturn findings of fact unless they are based on no evidence or are based on a misapprehension of the evidence. This principle was famously enunciated in the locus classicus case of Selle & Another vs. Associated Motor Boat Company Ltd & Others EA 123, where the Court of Appeal for East Africa held:

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that 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 or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

22. This position was reaffirmed by the Court of Appeal in Abok James Odera & Associates vs. John Patrick Machira & Another eKLR. Furthermore, in matters concerning children, this appellate jurisdiction is exercised with a specific lens: the best interests of the child principle enshrined in Article 53(2) of *The Constitution* and Section 8 of the *Children Act*. This Court is not merely adjudicating a dispute between two adults but is acting as the ultimate guardian of the minor's welfare. Consequently, technicalities of procedure must yield to the substantive justice required to protect the vulnerable subject of the suit.

23. Having keenly read the record of appeal and the submissions, the following issues lend themselves for determination:

    i. Whether the trial court erred in assessing the Best Interests of the Child by prioritizing stability with grandparents over the biological father's request for custody;

    ii. Whether the Respondent's arrangement constitutes a violation of Section 32(4) of the *Children Act* regarding the assignment of parental responsibility;

    iii. Whether the Appellant met the legal threshold for granting an international relocation order.

24. Article 53(2) provides that "A child's best interests are of paramount importance in every matter concerning the child." This is the Grund norm of child law in Kenya. It is echoed in Section 8 of the *Children Act* which mandates that in all actions concerning children, the best interests of the child shall be the primary consideration.

25. The Supreme Court, in the landmark decision of MAK v RMAA & 4 others (Petition 2 (E003) of 2022) KESC 21 (KLR), provided authoritative guidance on this principle. The Court held that the concept of "best interests" is flexible and adaptable to the specific circumstances of the child. The Supreme Court expressly stated:

> " Parental rights do not trump the best interests of the child. However, parental rights cannot be ignored if they are in the best interests of the child."

26. This holding is crucial. It establishes that while a father has a right to parental care under Article 53(1)(e), this right is not absolute. It acts as a servant to the master principle: the child's welfare. If exercising the father's right to custody would destabilize or harm the child, the right must yield.

27. Section 103 of the *Children Act* provides a welfare checklist that courts must consider. This checklist includes:

    i. The ascertainable wishes and feelings of the child (considered in light of age and understanding).

    ii. The child's physical, emotional, and educational needs.

    iii. The likely effect of any change in the child's circumstances.

    iv. The child's age, sex, and background.

    v. The capability of the parents.

28. The trial court's decision must be weighed against this checklist.

29. The Appellant relies on SMM v ANK (2022) Children Appeal No. E011 of 2021 to argue that the modern rule begins with the principle that mother and father have an equal right to custody. While true, SMM v ANK also contains a profound warning about stability. In that case, Hon. Justice Ngugi (as he then was) declined to allow a mother to relocate children to the US because they were settled in Kenya. He stated:

> " To yank them out of this environment would no doubt cause psychological trauma... The modern rule begins with the principle that the mother and father of a child both have an equal right towards the custody of the child. However... [w]hat is material is that the Appellant voluntarily left both minors in the actual custody and care of the Respondent."

30. This precedent cuts against the Appellant. Just as the court in SMM case prioritized the stability of the children with the father in Kenya over the mother's desire to move them to the US, this Court must consider the stability of the minor with the grandparents in Kenya. The fact that the care is provided by grandparents (as agents of the mother) rather than the mother directly does not diminish the value of that stability, especially when the alternative is an untested environment.

31. The Appellant's argument regarding Section 32(4) of the *Children Act* requires careful statutory interpretation. The section prohibits a person with parental responsibility from relinquishing or assigning it. The Appellant interprets the Respondent's move to the US as such a relinquishment.

32. However, the courts have consistently distinguished between abandonment/relinquishment and delegation of care. In the African context, and indeed under Kenyan customary law which informs the application of family law (where not inconsistent with *the Constitution*), the extended family plays a vital role in child-rearing. Stability in the life of a child is paramount. Biological parenthood does not automatically override the psychological parenthood established by grandparents who have provided long-term care.

33. Furthermore, Section 24 of the *Children Act* anticipates that parental responsibility can be shared or exercised by others. The Respondent has not assigned her responsibility in the legal sense of transferring her rights permanently to the grandparents. She retains legal custody, makes decisions, and provides maintenance. The grandparents are merely exercising actual custody on her behalf. This is a common and necessary arrangement for many Kenyans in the diaspora who work abroad to support families

back home. To classify this as abdication would be to ignore the economic realities of globalization and penalize parents for seeking economic betterment for their children.

34. The Appellant's reliance on J-NGNJA v DO & another (Family Appeal E002 of 2024) KEHC 7599 (KLR) is distinguishable. In that case, the paternal aunt sought custody while the parents were alive and present but allegedly struggling. The Court rightly emphasized the parents' rights. Here, the parent (Respondent) is exercising her right by designating the residence of the child. She opposes the Appellant's application not to abdicate, but to protect the child from an unstable alternative.

35. The most significant hurdle for the Appellant is the legal threshold for international relocation. The courts have adopted a cautious approach, often referencing the principles in the English case of Payne v Payne EWCA Civ 166, where it was stated:

> " In summary a review of the decisions of this Court over the course of the last thirty years demonstrates that relocation cases have been consistently decided upon the application of the following two propositions:
>
> (a) The welfare of the child is the paramount consideration; and
>
> (b) Refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children".

36. The same has been modified by the courts to strictly adhere to *the Constitution*'s best interests test as seen in MAA v ABS [2018] KEHC 8340 (KLR).

37. In MAK v RMAA & 4 others [2023] KESC 21 (KLR) the Supreme Court affirmed that a parent seeking to relocate a child must demonstrate that the move is in the child's best interest. The Court looks at:

    i. Is the application genuine? (Not motivated by a desire to exclude the other parent).

    ii. Is the plan realistic and founded on practical proposals?

    iii. What is the impact on the child's relationship with the left-behind parent/family?

    iv. What is the impact on the child's welfare (education, health, social)?

38. Applying these to the Appellant, the Appellant is a student working 40 hours a week. He has not provided a structured plan for who will watch the 6-year-old child when he is at work or class. Where care is shared or disputed, the burden on the relocating parent to show a robust plan is high. The Appellant failed to show how he would transition the child from a communal home in Kenya to a potentially isolated life in the USA.

39. The child is settled in St. Bakhita Elite School. Relocation disrupts this education. Further, the Respondent argues the Appellant is motivated by a desire to cut her and her parents off, rather than genuine care, citing his past neglect.

40. Therefore, applying the test from MAK v RMAA (supra), the Appellant has not discharged the burden of proving that relocation is in the child's best interest. The uncertainty of his proposal cannot displace the certainty of the current arrangement.

41. The Appellant contends the Kadhi erred in awarding custody to the Respondent contrary to the best interests principle. This Court finds that the Kadhi correctly applied the principle. The best interest

of a child of tender years (6 years old) is fundamentally tied to stability and primary attachment. The evidence on record shows the Respondent and her parents have been the primary caregivers. The Appellant's involvement has been peripheral until recently. The Kadhi's decision to maintain the status quo was legally sound and factually supported.

42. The Appellant argues his rights under Article 53(1)(e) and Article 45(1) were ignored. This Court reiterates the holding in MAK v RMAA (supra) that parental rights are subservient to the child's welfare. Equal responsibility does not mean equal custody or automatic custody. It means equal duty to provide and protect. The Appellant can exercise this responsibility through maintenance and access, which the court must ensure is robust, without necessarily having physical custody if such custody would disrupt the child's life. The Kadhi did not strip the Appellant of his rights; he merely regulated the physical custody arrangement to suit the child's needs.

43. The Appellant claims the Kadhi failed to evaluate his evidence regarding his capacity. This Court has reviewed the Record. The Appellant's evidence appears to be largely aspirational—he intends to provide, he is capable. However, the Respondent provided concrete evidence of actual provision over years (school receipts, medical cover, text messages regarding arrears).

44. In MA v ROO [2013] eKLR, the Court held that unless it is established that changed circumstances have impacted negatively on the child, the status quo should generally remain. The Appellant failed to prove that the grandparents' care was negatively impacting the child. On the contrary, the child was found to be thriving. Thus, the Kadhi's evaluation of the evidence was proper.

45. While the Kadhi's Court has jurisdiction over questions of Muslim law, the Appellant raised an issue regarding his alleged denunciation of Islam and the Respondent's use of this to deny access. The High Court, as a secular court, determines this appeal on the basis of the *Children Act* and Constitution. Whether the Appellant is a practicing Muslim or not is secondary to his capacity to parent. However, the consistency of religious upbringing (Madrassa) provided by the Respondent is a factor in maintaining the child's stability under Section 24 of the *Children Act* (duty to provide religious guidance). The Appellant's ambiguous stance on religion, contrasted with the child's established routine, further supports leaving custody with the Respondent to ensure continuity.

46. Accordingly, for the reasons set out above, the Appeal is dismissed. Each party shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 18 DAY OF DECEMBER 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For Appellant: Ms Wanjau h/b Mr. Hassan

For Respondent: Ms Said

Court Assistant Lucy Mwangi