



REPUBLIC OF KENYA



**FMN v MNM (Sued as the Mother and Next of Friend of DWM and IMM) (Civil Appeal E069 of 2023) [2026] KEHC 3403 (KLR) (20 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 3403 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL E069 OF 2023  
EM MURIITHI, J  
FEBRUARY 20, 2026**

**BETWEEN**

**FMN ..... APPELLANT**

**AND**

**MNM (SUED AS THE MOTHER AND NEXT OF FRIEND OF DWM AND IMM) ..... RESPONDENT**

*(Being an Appeal from the Judgment/Decree of Honourable Martha Opanga (P.M) delivered on 25/7/2023 at Wang'uru Children Case No. E008 of 2023)*

**JUDGMENT**

1. By a Plaintiff dated 6/4/2023, the Respondent (the Plaintiff in the trial court) sued the Appellant (the Defendant in the trial court) seeking legal and actual custody of the minors, and the Appellant be ordered to pay maintenance together with costs of the suit. The Respondent pleaded that her marriage to the Appellant was blessed with 2 issues, namely D.W.M born on 4/1/2003 and I.M.M born on 26/8/2010. In 2017, the Appellant chased her and the minors away and abdicated on his parental responsibility to provide, subsequent to which he remarried in the neighbouring village. She unsuccessfully tried to resolve the matter at the Children's Office to no avail, necessitating this matter.
2. The Appellant, in his statement of defence dated 5/5/2023, averred that he would continue catering for the minors' school fees, school related utilities and medical cover.
3. Upon full hearing of the case, the trial court rendered thus;
  - “ a) The plaintiff will cater for the daily upkeep and maintenance of the two children.
  - b) The plaintiff will cater for rent/accommodation expenses and all related expenses.



- c) The defendant will cater for all educational and school related expenses.
- d) The defendant will take out comprehensive medical cover for the two children.
- e) The defendant will pay kshs. 5,000/= per month for child support reviewable from time to time as need arises.
- f) Defendant shall have limited access to the two children under the supervision of the children officer sub county.
- g) Each party will bear their own cost of the suit.”

### **The appeal**

4. On appeal, the Appellant vide his memorandum of appeal dated 16/8/2023 set out 11 grounds as follows:
  1. The Learned Principal Magistrate erred in law and fact when she failed/refused to hear or consider the evidence of the Appellant in the case as the case was rated for hearing on 27<sup>th</sup> July, 2023 but judgment was delivered on 25<sup>th</sup> July, 2023 in the absence of both parties.
  2. The appeal raises serious issues of law and fact as to the manner in which the trial magistrate made the impugned decision.
  3. The decision of the magistrate court was flawed in every aspect.
  4. The orders for school fees and monthly child support reviewable from time to time were made without an informed basis and not taking into account the respondent’s income.
  5. The learned magistrate erred in law and in fact by ordering that the Appellant shall have limited access to the two children under the supervision of the children officer sub-county.
  6. The court failed to appreciate the parties have equal right and duty to care for the children under article 53 of the Constitution. QUOTE
  7. The court failed to accord both parties equal treatment contrary to articles 27 and 45 of the Constitution.
  8. The findings of the Learned Principal Magistrate are against the rule of natural justice as the parties were denied an opportunity to be heard and adduce evidence.
  9. The trial in its entirety was a mistrial and occasioned a miscarriage of justice.
  10. The appellant craves leave to add to omit, combine and/or amend any of the grounds listed here above.
  11. The findings and the judgment of the learned principal magistrate has no support of the evidence.

### **Duty of the Court**

5. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123).



## Evidence

6. PW1 Mary Nyambura Maina, the Respondent herein, testified that, “I do casual jobs in Karaba. I earn about Kshs. 400/= per day. Francis Maina Njogu is my husband. We don’t live together since 2019. He married another wife. He left me with two children aged 18 years and 12 years. They are in school form 4 and grade 7. Defendant is a farmer. He grows rice. He gets about 100,000/= per year. I pray that he be compelled to take care of the children and to be ordered not to take his other wife on the land we bought with him.”
7. The Appellant did not testify.

## Submissions

8. The Appellant faulted the trial court for placing a heavier responsibility on him without factoring in his income and his other family. He further faulted the trial court for allowing him limited access to the two children under the supervision of the children officer sub county, despite the absence of any adverse conduct on his part, and cited *SMW v EWM (2019) eKLR*.
9. The Respondent did not file any submissions.

## Analysis and determination

10. From the grounds of appeal as framed, the issue for determination is whether the trial court’s decision was grounded in law and supported by the evidence adduced.
11. The court wishes to preliminarily address the issue whether the Appellant was condemned unheard.
12. On 6/6/2023, the parties appeared in court when the hearing date of 27/6/2023 was fixed by consent. Come that day, the Appellant was absent and the matter proceeded for hearing in his absence. The Appellant cannot now allege that he was condemned unheard when he was accorded an opportunity to ventilate his defence, but he opted not to appear.
13. On the merits, the Respondent testified that, “I do casual jobs in Karaba. I earn about Kshs. 400/= per day. Francis Maina Njogu is my husband. He married another wife. He left me with two children aged 18 years and 12 years. They are in school form 4 and grade 7. Defendant is a farmer. He grows rice. He gets about 100,000/= per year.”
14. Article 53 (1) (e) of *the Constitution* provides that, “Every child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.”
15. Section 110 of the *Children Act* provides that, “Unless the Court otherwise directs, and subject to any financial contribution ordered by the Court to be made by any other person, the following presumptions shall apply with regard to the maintenance of a child — (a) it shall be the joint duty and responsibility of both parents to maintain the child whether or not the parents are married to each other.”
16. This court is satisfied that the trial court properly apportioned parental responsibility proportionately between the parties herein, and the monthly sum of Ksh. 5,000 for 2 school-going children, was reasonable.
17. On access, Section 11 (6) of the *Children Act* provides that, “Subject to subsection (3), every child who is separated from one or both parents shall have the right to maintain personal relations and direct



contact with the parent or parents on a regular basis, unless it is shown to the satisfaction of the Court that such contact is not in the best interest of the child.”

18. It is clear that the Appellant, as the father to the minors herein, has a right to visit and see them on agreed-upon times unless it is shown on the evidence that such access would expose them to harm, abuse, neglect or would otherwise not be in their best interests.
19. This court concurs with the Appellant that the unnecessary limitations imposed on his access to the minors by the trial court are tantamount to a denial of access altogether. In *K.M.N v Children’s Court, Tononoka & E.G* (Constitutional Petition 71 of 2014) [2015] KEHC 6905 (KLR) (26 January 2015) (Judgment), this court expressed profound displeasure with hindered access to minors, as follows:

“ 42. I further consider that access to a child should not be granted with such fluctuations in the daily life of the child as to make a stable development of the child – especially one at the very early stages of mental growth – difficult. Reasonable access in the circumstances of this case, allowing for the need for stable development in association with one environment, is in my view met by an order that the petitioner father do have unhindered access to the child for a period of seven (7) days every 30 days of the month, subject to a Children Officer’s Report.”

20. In *MAK v RMAA & 4 others* (Petition 2 (E003) of 2022) [2023] KESC 21 (KLR) (2 March 2023) (Judgment), cited by the Appellant, the Supreme Court enunciated that:

“It is a known fact that the society in which children grow up shapes who they are. Having both a mother and father involved in a child’s life can provide significant social, psychological, and health benefits. In addition, the stability of having a relationship with both parents can provide security and greater opportunities for children to find their own paths to success. Accordingly, even if circumstances may warrant limited access to a parent, a court should order supervised access. This court has the constitutional obligation to ensure that the child has access to parental care and protection as enshrined in *the Constitution*.”

21. Consequently, this court finds that, in limiting the Appellant’s access to his children under the supervision of a children officer, the trial court erred.
22. This court considers that the minors herein are entitled to the love, guidance and presence of both parents, their separation and the Appellant’s subsequent remarriage, notwithstanding.

### Orders

23. Accordingly, for the reasons set out above, this court finds the appeal to be partly merited and it is hereby allowed in the following terms:
  1. The order granting the Appellant limited access to the minors under the supervision of the Children Officer sub county, is set aside.
  2. The Appellant is granted reasonable and unhindered access to the minors on alternate weekends at a public place to be agreed upon by the parties and/or their counsel.
  3. The Appellant is granted unrestricted access to the minors through telephone and electronic communication.
  4. The other orders by the trial court remained unchanged.



5. Liberty to apply.

Order accordingly.

**DATED AND DELIVERED THIS 20<sup>TH</sup> DAY OF FEBRUARY 2026.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Mr. Francis Maina Njogu the Appellant.

Ms. Mary Nyambura Maina the Respondent.

