



**AKM v SWM (Civil Appeal 131 of 2024)
[2026] KEHC 3303 (KLR) (Family) (13 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 3303 (KLR)

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

FAMILY

CIVIL APPEAL 131 OF 2024

PM NYAUNDI, J

MARCH 13, 2026

BETWEEN

AKM APPLICANT

AND

SWM RESPONDENT

*(An appeal from the Judgment and Decree of the Children’s Court at Nairobi.
Hon F. Terer on 20th September 2024 in MCC Children’s Case No. E1160 of 2023)*

JUDGMENT

1. By Memorandum of Appeal dated 4th October 2024, he seeks orders that the appeal be allowed and that the costs of the appeal be awarded to him. He raises 17 grounds on which he challenges the Judgment of the trial court. It is submitted that, due to errors of fact and law made by the trial court, the Court arrived at the wrong decision regarding the sharing of parental responsibility between the parties.
2. This is a first appeal. The duty of a first appellate Court was succinctly stated by Hon. M. Odero J in *Njoroge v Gakere & another* [2025] KEHC 4048 (KLR), in the following words:
 - (14) Therefore the appropriate standard of review in cases of appeal can be summarized in the following three principles:-
 - (1) On first appeal the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions.
 - (2) In reconsidering and re-evaluating the evidence of the first appeal court must bear in mind and give due allowance for the fact that the trial court had the advantage of seeing and hearing the witnesses.



- (3) It is not open to the first appellate court to review the findings of a trial court simply on the basis that it would have reached a different conclusion had it been hearing the matter for the first time.

Background

3. By a plaint dated 4th day of January 2023, the Appellant herein sought the following orders.
 1. Legal and actual custody of the Children AMK and MMK
 2. An order that the defendant does maintain and make sufficient material and financial provision to meet the needs of the children at 50% contribution to the maintenance of the minors, recurring expenses and shall be reviewed from time to time
 3. Costs of this suit.
4. The respondents' defence and counterclaim are dated 11th August 2023. In her counterclaim, she prays that the judgment be entered against the defendant for orders that-
 1. She has the legal, physical and actual custody of the minors and the status quo is to be maintained
 2. The appellant is granted conditional access to the minors.
 3. An order for the maintenance of the minors by the appellant on the following terms-
 - i. School fees and related expenses
 - ii. Medical expenses
 - iii. Utilities and entertainment
5. The matter proceeded to hearing, with both the appellant and the respondent giving evidence. The core of the appellant's case was that the respondent had denied him access to the minors and that she was exposing the children to a lifestyle beyond their means. It was not in the best interests of the minor to allow the respondent to continue subjecting the children to hardship.
6. The respondent's case was that the appellant had abdicated his responsibility to the minors. She was not willing to agree to a proposal that downgraded the children from a life they were used to. The children were entitled to the life she and the appellant had.
7. Evidence presented before the Court showed that the school attended by one of the minors had sent numerous reminders for outstanding fees. The respondent's evidence was that the appellant had the means to support the children but had chosen not to do so.
8. At the conclusion of the case, the Court delivered its judgment on 20th September 2024 and ordered as follows.
 1. The parties to jointly share legal custody of the minors AMK and MMK
 2. The defendant to have their actual custody and care and control
 3. The Plaintiff to have access on terms convenient to the minors
 4. The Plaintiff to provide 50% of school fees and school-related expenses for the minors in their current school.



5. The Defendant to meet all the other needs of the minors
6. Each party to bear their own costs.
9. The appeal was canvassed through written submissions. In submissions dated 14th January 2026, the appellant has framed the issues for determination as-
 1. What is the best interest of the minors
 2. Whether the Honourable Court in its judgment captured all that would be regarded as the best interest of the minors
 3. Whether the Honourable Court erred in law and fact in its judgment.
10. The appellant highlights that parental authority is shared and no parent possesses a superior right over the other. Additionally, the best interests of the minor encompass considerations beyond financial support, extending to the protection of the child's welfare, which includes holistic spiritual, physical, and emotional well-being.
11. He asserts that the children have suffered the most from the fallout between the parties, particularly because the respondent has failed to allow him access to the minors. Furthermore, he contends that the respondent is unfit to be the primary caregiver for the children, considering her poor judgment as evidenced by her decisions, such as leaving the matrimonial home and taking the children on holiday despite unpaid school fees.
12. He claims that moving back to his parents' home was his way of coping with the financial difficulties he faced. His current residence is adequate to accommodate him and the minors. The custody decision was made without consulting the children, even though they are old enough to have their opinions considered.
13. The Court reached an incorrect conclusion about his readiness to assume his fair share of parental responsibilities and his relationship with his children. He asserts that the record shows he is a responsible father, dedicated to doing his best for his children. I take note of the authorities cited by the appellant.

Analysis And Determination

14. In reaching my decision, I am guided by the judgment of the Court in *Mbogo & Another vs Shah*, [1968] EA, where the Court stated as follows: -

An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.
15. I am further guided by the Constitutional imperative under Article 53 (2) of the 2010 Constitution that requires,
 - (2) A child's best interests are of paramount importance in every matter concerning the child.Similarly, the *Children Act* at section 8(1) provides as follows:-



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. (Own emphasis)

16. The issue to be decided, therefore, is whether it is in the best interests of the minors to permit this appeal.
17. I have reviewed the record of the trial court and the judgment of the learned Magistrate. The Magistrate considered the pleadings of the parties. Notably, the appellant in his plaint sought that the respondent 'does maintain and make sufficient material and financial provision to meet the needs of the children at 50% contribution to the maintenance of the minors, recurring expenses and shall be reviewed from time to time.'
18. The principle that parties are bound by their pleadings is well established by legal precedent and was articulated thus by the Court of Appeal in the case of *David Sironga ole Tukai vs Francis Arap Muge & 2 Others* [2014] eKLR when it stated:

It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case as is pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.

19. Parties are bound by their pleadings. The only conclusion that can be drawn is that, with the respondent bearing 50% of the parental responsibility, the appellant would be responsible for the balance of 50%. Therefore, I uphold the trial court's decision to the extent that the appellant is responsible for 50% of the minor's tuition fees.
20. The appellant argues that the trial Court erred in deciding that the children should remain in their current school, as it was clear the parents lacked the financial capacity to bear that responsibility, which was causing stress to the children. In examining this point, I note that while the appellant was firm in his demand for the children to be moved from their current school, he did not propose an alternative for the Court to consider.
21. Since no alternative was offered, it was in the best interests of the children to remain in the school they were attending.
22. Regarding custody, when the Court directed that the appellant coordinate access directly with the Children on access issues, it recognised that children have agency and should be given an opportunity to express their opinions and preferences.
23. This is in line with Article 12 of the United Nations Convention on the Rights of the Child, which provides-
 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.



2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.
24. Section 222 of the *Children Act*, 2022, in turn, provides that-
 222.
 - (1) Every child shall be afforded an opportunity to be heard in proceedings affecting the child, either directly or through a representative.
25. The Supreme Court has ruled that the best interests of the child will take precedence over parental rights and provided guidelines for the Court's reference whenever it must decide in such matters; see decision in MAK v RMAA & 4 others (Petition 2 (E003) of 2022) [2023] KESC 21 (KLR)). For this reason, I agree with the trial court that, in this case, it was best for the appellant to communicate directly with the children regarding the mode and frequency of access.
26. In light of the above, I find that the trial Court's decision was consistent with the requirement that the interests of the Child be the foremost consideration. I therefore dismiss the appeal in its entirety.
27. Leave to appeal is granted, any party exercising their right of appeal to do so within 30 days.
28. Due to the relationship between the parties, each party will bear their own costs.

It is so ordered

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF MARCH 2026.

P. M NYAUNDI

JUDGE

In the Presence of

Ngalamoi Court Assistant

Onyatta for Appellant

Ms. Keter holding brief for Sonoiya for Respondent

