

**IN THE COURT OF APPEAL
AT NYERI**

(CORAM: KANTAI, LESIIT & ALI-ARONI,

JJ.A.) CIVIL APPEAL NO. E025 OF 2023

BETWEEN

FAITH GITHONGO.....1ST APPELLANT

PETER GITHONGO MBURUGA.....2ND APPELLANT

AND

OSCAR GITHANJI MBURU.....RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at
Kerugoya (Gitari, J.) delivered on 18th May 2020*

in

HCCA No. 40 of 2017)

JUDGMENT OF THE COURT

1. To provide context for the dispute, a brief history is necessary. The respondent filed a plaint dated 5th April 2017 at the Children’s Court in Kerugoya, seeking physical, legal, and actual custody of K.G.W. He also sought an order directing the appellants to deliver up and surrender the minor to the respondent, to restrain the appellants from denying the respondent access to the minor, and to allow him to reside with the minor at his home. In response, the appellants filed a

defence and a counterclaim seeking full legal custody of the minor.

2. At the hearing of the matter in the Children's Court, the respondent, **Oscar Githanji Mburu PW1**, testified that he is the biological father of the minor. He explained that the child's mother passed away during childbirth, and when the appellants, who are the minor's maternal grandparents went to the hospital, he gave them the minor, as he organised to settle the hospital bill and make burial arrangements. Thereafter, it was agreed that, as he settled down, the appellants would stay with the child. He sent financial assistance, provided food and other necessities, and employed a maid to care for the child. He also testified that he had been seeing the minor regularly and attending her birthdays. Having married and having a family with one other child, he sought to get the minor to live with them, but the appellants refused, seeking to be paid dowry for their deceased daughter, and even though the respondent paid an agreed sum, they refused to release the minor. The respondent expressed his desire to raise the child alongside his son and expressed his intention for her to start school at Happy Land Primary School.
3. **Grace Wanjiku, PW2**, informed the court that she is married to the respondent. She confirmed she knew and had met the minor.
4. The 1st appellant, **Faith Githongo, DW1**, is the minor's

maternal grandmother. She testified that her daughter died
on

8th July 2014 while giving birth to the minor. She testified that she was not present when her daughter gave birth, but was called by the hospital, which released the child to her, as the deceased had named her as the next of kin. She denied that the respondent and his sister were at the hospital that day. She further stated that the respondent used to send her money from the shop her deceased daughter rented to support the child, but that the last time he sent money was in July 2014. The respondent did not continue to send money to support the child and only provided a card for medical coverage. Further, she testified that the maid provided by the respondent refused to follow her instructions. Ultimately, she left the appellants' and attempted to steal the child. She further claimed that the respondent no longer visited the minor.

5. The 2nd appellant, **Peter Githongo Mburuga, DW2**, the minor's grandfather, testified that the respondent did not demonstrate love for the child and stated he would have no objection to him having a relationship with her if he had shown affection. During cross-examination, he confirmed that he met the respondent at his daughter's funeral. He also stated that the housemaid attempted to steal the minor in July. He further claimed that dowry needed to be paid first, followed by the introduction of the respondent's parents to the child. He asserted that the respondent's parents visited them, but they did not complete all the necessary requirements. He asserted that, even if all requirements had been fulfilled, they could not give up the child, as she was

not an object.

6. In the end, the trial court made a determination on custody of the minor in favour of the appellants until the minor reached the age of 11 years, when the order would be reviewed or extended as per the child's wishes and prevailing circumstances. The respondent was granted unlimited access and full parental responsibility.
7. Aggrieved by the decision of the trial court, the respondent filed the first appeal at the High Court, which inter alia found that the trial magistrate erred in holding that the judgment could be reviewed after 11 years, as the court became *functus officio* after entering a final judgment on the contentious issue of custody; and that the magistrate fell into error by failing to consider that the Constitution and the Children Act placed parental responsibility on the biological parents irrespective of whether they were married or not.
8. In its determination, the High Court set aside the trial court's decision and substituted it with an order dismissing the counterclaim with no order as to costs. Judgment was entered for the respondent as prayed in the plaint dated 5th April 2017.
9. Dissatisfied with the judgment of the High Court, the appellants preferred an appeal to this Court, raising 10 grounds of appeal in their memorandum of appeal dated 11th August 2021. The grounds of appeal are summarized as follows: that the learned Judge erred in law and fact by arriving at a judgment against the weight of evidence; by

erroneously making a finding that Children's Court became *functus officio* after issuing final

orders, despite sections 99 and 100 of the Children Act, allowing the court to revisit and vary its orders; by failing to recognize that the minor had lived uninterrupted for six years with the appellants, and was accustomed to certain characteristics, traits and norms; by disregarding the minors emotional and mental well-being; and by granting custody of a young girl of tender age to the respondent instead of the appellants, particularly the grandmother.

10. Learned counsel for the appellants filed submissions dated 28th April 2025. Counsel cited **Article 53(2)** of the Constitution and argues that a child's best interests are of paramount importance in every matter concerning the child. Counsel also relies on **section 4(2)** of the Children Act, which stipulates that 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.
11. It was contended that the child does not know the respondent well; the child is a girl, and this raises the question of the respondent's ability to care of her. It was contended further that at the time of her death, the child's mother was unmarried, and no dowry had been paid prior to her death.
12. Counsel further submitted that the child's interests are best served in the care of the appellants. Further, the respondent

has never been denied access to the minor, though he rarely visited the child. The child is now 11 years old; the trial court

indicated that at this age, the order might be reviewed or extended based on the child's wishes and prevailing circumstances. Counsel urged this Court to order a report on the child's current emotional, social, and psychological situation before rendering a judgment.

13. In opposition to the appeal, learned counsel for the respondent has filed submissions and a case digest, both dated 22nd January 2025. Regarding the competence of the appeal, counsel referenced the case of **Bashir Haji Abdullahi vs. Adan Mohammed Nooru & 3 Others [2014] KECA 707 (KLR)**, arguing that the grounds of appeal outlined in the memorandum of appeal dated 11th August 2021, do not raise any legal issues but merely express disagreement with factual findings, making the appeal incompetent.
14. Regarding custody and the minor's right to live with her father, counsel submits that despite several attempts, including engaging elders, the appellants made it clear they would never allow the minor to live with the respondent, whilst periodically demanding and receiving money under the guise of dowry and/or cultural requirements.
15. Counsel contends that there is no evidence or presumption demonstrating the respondent's unsuitability as a father or his inability to care for his daughter. In support counsel referred to **Noordin vs. Karim Miscellaneous, Civil Case No. 58 of 1985 (OS)**, where the court (Githinji J.) affirmed

that; -

“The children’s father is alive and it is morally wrong to take over the place of their father... The respondent is a suitable parent. He has sufficient income to guarantee the children a good life, better education and a sense of belonging.”

16. Counsel further submitted that the respondent has another child, a sibling to the minor herein, which means if reunited with her father, she will be welcomed into a nuclear family complete with a mother’s love and a sibling to play and grow up with, which are key components of a child's development.
- 17.** On the matter of granting custody of a female child to her father, counsel maintains that the child's mother is deceased, making the respondent the only surviving parent. Further there is no evidence suggesting that the respondent is violent or incapable of caring for his daughter, nor is there any proof that the grandparents are better suited to care for the minor than her father. Counsel cited **Article 9(3)** of the United Nations Convention on the Rights of the Child, which states that: ***“States shall respect the right of the child separated from one or both parents to maintain personal relations and direct contact with both parents regularly.”***
18. Counsel further submitted that the respondent’s wife testified that she had on several occasions visited the minor at her grandparents' house, hence was known to her, and no adverse evidence or complaint was adduced against her.

19. Regarding whether the respondent's marriage disqualifies him from having custody of his daughter, counsel argued that there is no evidence that the respondent's wife is not suitable to reside with the minor. The allegation that she is a stranger is absurd and unfortunate. **Article 27(4)(5)** of the Constitution protects the respondent from discrimination on account of his marriage and remarriage.
20. Counsel emphasised that the child's rights to parental care and to live with her father are innate and cannot be nullified by the appellants' alleged disapproval of the respondent's marriage.
21. In regard to the prioritisation of the appellants' interests over the child's welfare, the respondent's counsel asserts that it is evident in this case that the appellants' primary concern has never been the well-being of the child but rather the fulfilment of certain customary norms. He argued that it is a fundamental legal principle that in all matters concerning children, their welfare must be the paramount consideration. In this case, the appellants' refusal to grant custody to the respondent is based on outdated customs that are inconsistent with, and contravene, the Constitution, particularly **Article 53** and the provisions of the Children Act.
- 22.** Counsel asserted that customary law has no place in the rights of the child. He relied on **Joachim Ndaire Macharia vs. Mary Wangare Ndaire & Another, [2008] KEHC**

3244 (KLR).

23. On the principle of *functus officio*, counsel relied on **Telkom Kenya Limited vs. John Ochanda & Others Civil Appeal No. 60 of 2013**, where this Court stated that *functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon, and since the trial court had granted custody to the appellants after hearing the parties in a contested case, the court became **functus officio** and could not review or vary the decree that had been issued.

24. We have considered the record, the grounds in support of the appeal, the rival submissions, and the law. We are conscious of our limited jurisdiction when dealing with a second appeal. Our reading of **Section 72(1)** of the Civil Procedure Act, which provides for the circumstances when a second appeal shall lie from the appellate decrees of the High Court, indicates that the appeal must be on matters of law. In **Kenya Breweries Limited vs. Godfrey Odoyo [2010] eKLR**, this Court put it succinctly in the following words:

“In a second appeal, however, such as this one before us, we have to resist the temptation of delving into matters of fact. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

25. We discern the issues for consideration to be: whether the High Court erred by setting aside the judgment of the trial court and

placing the parental responsibility of the child upon the surviving parent, and whether this was in the best interest of the child. As seen above, we are bound by the findings of fact by the two courts below. In passing, and to appreciate our mandate, we note that the facts are largely undisputed, and we briefly summarise them. The appellants have taken care of the child physically as the mother of the minor, who is their daughter, died during childbirth. The respondent, the biological father of the minor, a fact not in dispute, has been in the minor's life by providing for her upkeep and medical care and occasionally visiting the minor with his wife. What comes out is that the appellants demanded that the dowry for their deceased daughter be paid and that customary rites be performed when the respondent sought to take the minor. This issue of customary practice caused a division, leading the matter to come before the court.

26. Despite the differences, the scenario in this case, in our view, places the child in a privileged situation where both his maternal grandparents and the biological father are alive and, to some extent, competing against each other to take care of the minor. The competing interests of the two sides may be a show of love and care, but not necessarily for the child's good. The child needs both the father and the grandparents in her life, this show of interest should always be complementary and of paramount importance is 'the best interest of the child'. In situations where the competing interests are not harmonious, as is the case, the law kicks in.

Article 53 of the Constitution

sets the guiding principles relating to children. Specific to the issue at hand, it provides that:

53. (1) Every child has the right—

(a) ...

.....

(d) **to be protected from abuse, neglect, harmful Cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;**

(e) **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; an**

(2) A child's best interests are of paramount importance in every matter concerning the child.
(Emphasis added)

27. The Children Act (2022) ('the Act'), enacted after the coming into force of the Constitution in 2010 and guided by the principles set out in the Constitution, makes elaborate provisions to protect the interests of a child. The provisions include; -

Section 4(2) which states that:

(2) 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.

Section 6 on Right to parental care states that:

- (1) A child shall have a right to live with and to be cared for by his parents.**
- (2) Subject to subsection (1), where the court or the Director determines in accordance with the law that it is in the best interests of the child to separate him from his parent, the best alternative care available shall be provided for the child.**

Section 24 places parental responsibility of the child in the situation of this case as follows:

- (3) Where a child's father and mother were not married to each other at the time of the child's birth and have not subsequently married each other—**
 - (a) The mother shall have parental responsibility at the first instance;**
 - (b) The father shall subsequently acquire parental responsibility for the child in accordance with the provisions of section 25.**

Section 23 provides that:

- (1) In this Act, "parental responsibility" means all the duties, rights, powers, responsibilities, and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.**
- (2) The duties referred to in subsection (1) include, in particular—**

(a) the duty to maintain the child and in particular to provide him with—

(i) adequate diet;

(ii) shelter;

(iii) clothing;

(iv) medical care, including immunisation; and

(v) education and guidance;

28. As seen, the primary responsibility of a child is squarely placed on the mother and father of a child, irrespective of whether they are married or not, and this is devoid of any custom or customary rites inasmuch as observing them is commendable, customs cannot override the interest of the child.

In ***LAC & Another vs. MJC (Civil Appeal E119 of 2021) [2022] KECA 68***, a case similar to the one before us, where maternal grandparents were pitted against the father (divorced from the deceased mother), this Court held *inter alia*:

“Upon our own consideration, we agree with conclusions reached by the Judge in that appeal. The respondent was able to show in evidence that he had secured employment, he had extended family in the UK who lived with him in the same neighborhood, he would secure free or near free education of the minor in the UK and he was best suited to take care of the best interests of his daughter, then and in the long term. He was the remaining parent, his wife having died. He had shown through the visits to the minor

in Kenya, the holidays he spent with her and the time he spent with her that he loved the minor and was committed to her wellbeing. There were no exceptional circumstances for the

child to be taken away from the surviving parent. The High Court was right to find that the best interests of the child were with the surviving parent, the respondent.”

29. The evidence placed before the court in this case did not place any doubt as to the character of the respondent, the surviving natural parent of the child, nor his spouse, who knew and had previously interacted with the child. The respondent has a good job and was ready to take full parental responsibility of his child. The Judge, in arriving at his decision, stated inter alia:

“I find that the appellant, being the undisputed father of the minor, is the right person to have the legal and actual custody of the minor. It is not only morally wrong but unlawful to deny the father of the child who is alive and readily willing to take care of the child. He is not only suitable but has demonstrated that he has a stable job and income, which will ensure the minor enjoys a good life where her basic rights are provided, and most of all parental love, which she can only get from the respondent...there is absolutely no reason why she should be denied parental love and care ...”

30. We could not agree more with the finding of the Judge. We, too, find that the best interest of the child requires that she be placed in the custody of her natural parent. Nothing untoward was placed before the court to deny the minor the love and care of the only other parent alive, who has the ability and means to love, nurture, and care for her well-

being in a conducive family setting. Consequently, we find no merit in this appeal, which we hereby dismiss in its entirety.

31. This being a family matter, we shall require each party to meet their own costs.

Dated and delivered at Nyeri this 25th day of March, 2026.

S. ole KANTAI

.....
JUDGE OF APPEAL

J. LESIIT

.....
**JUDGE OF
APPEAL ALI-**

ARONI

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original*

Signed

DEPUTY REGISTRAR