REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CIVIL APPEAL NO. **E315** OF 2024

ELVIS AMBOKA……..……..…….APPELLANT

-VERSUS-

GRACE NJERI MUTHONI.....RESPONDENT

(Being an appeal from judgment and decree of the Chief Magistrate's Court at Thika (Hon Yusuf Barasa Mukhula) in children case number E162 of 2023 dated 7th November 2024)

JUDGMENT

The respondent filed cause before the trial court against the appellant in which she prayed through plaint dated 19th December 2023 that she be granted full actual and legal custody of LPA (hereafter referred to as 'the child'), costs of the suit and any other relief or remedy the Honourable Court may deem appropriate. Her claim was based on the fact that the child was biological child of the parties and that the child's best interest would be served with him living with the respondent.

In his defence dated 7th May 2024, the appellant averred that the respondent was the one who walked out of their union and dumped the child with his relative at the tender age of eight months. The appellant averred that from the time the respondent abandoned the child, he had been taking care of the child and in his own words the respondent was a stranger to the child. He pleaded further that the respondent had abandoned and neglected her parental responsibilities to the child

and in the circumstances, the best interest of the child would be served in him living with the appellant.

The matter was heard through viva voce evidence where only the respondent testified on her side with the appellant calling one witness in addition to himself. Upon the conclusion of the hearing, the trial court in the impugned judgment ordered that the respondent shall have custody of the minor, the appellant shall be granted unlimited access and that the child shall undergo counselling at a children's office near him for a period of one month before being handed over to the respondent.

The appellant was aggrieved by the judgment and preferred this appeal raising 13 grounds of appeal which in my opinion can be collapsed to one which is that, the court erred in granting custody to the respondent which was not in the best interest of the child. This appeal was ordered to be heard by way of written submissions. The appellant filed his submissions dated 9th June 2025 while the respondent gave the appeal a wide berth despite having been served.

This being a first appeal, this court is under an obligation of re-evaluating the evidence so far produced in the trial court and come to its own independent conclusion but give allowance to the fact that it did not have the benefit of taking the evidence first hand and observing the demeanour of the witnesses. In doing so, I will reproduce the evidence of the parties as narrated and produced in the lower court.

The respondent's case.

The respondent, a nurse working with Avenue Health Care confirmed that the two parties were the biological parents of the child and told the court that the appellant walked out of their residence taking the child with him only to dump him with a relative who was not disclosed to her. She added that the psychological and emotional wellbeing and interest of the minor was jeopardized on account of reckless and wanting actions of the appellant.

The respondent stated further that she had a good shelter and there was no reason why the child should be under the custody of strangers and that the appellant had demonstrated that he could not properly take care of the needs of the child and that her efforts to get custody through the children's department were in vain. She produced a letter dated 23-11-2023 from the Thika West Sub County Children's Officer which was basically a summons to the appellant to attend the offices to discuss the welfare of the child.

In cross-examination, the respondent told the court that she cohabited with the appellant between 2015 and 2018 while the child was born in 2015. She maintained that the child was taken upcountry in 2020 and that she did not know the appellant's sister. She stated that she started living in Nyeri in 2016 and according to her, the child had been living with the grandmother since 2017. She claimed further that the child told her that he had been mentally and physically tortured. She concluded that she had another child born in 2018.

Appellant's case

The appellant testified by adopting his statement in which he stated that when they separated, the respondent had the custody of the child but in January 2016 when the child was barely eight months, she dumped and left him with his sister one

Emma Amoni at Railways in Nairobi after he had complained of the respondent leaving the child at a day care for long despite his tender age.
The appellant added that the minor was taken to their home in Kitengela where he resided until 2020 when they relocated to their upcountry in Kakamega where he resided with his parents. He added that he had single handedly taken care of the child from that age with proper vaccinations and diet since the respondent denied him breast milk at very early age. He wondered why the respondent waited for 8 years before she came to claim custody at the moment the child barely recognized her.

He further testified that the minor was surrounded by love and care from him and his family and that he was capable of taking care of the child as he had been doing which was evident in his excellent performance in school. He maintained that he was more suited to have custody as the respondent did not know the child's condition, his preferences, routine, grooming and school performance and she had contributed nothing towards maintenance of the child.

The appellant testified further that he had no problem with the respondent being granted visitation rights during weekends and school holidays to start building a relationship and bond with the child. He produced the child's birth certificate, photographs taken with relatives, school report cards, certificate for best manners, receipt for school fees and receipts for medical bills.

In cross-examination, the appellant told the court that the respondent had not been denied access to the child and that she had visited the child. He added that they were not in talking terms.

The appellant's second witness was one Emma Amoni Mboga, the appellant's sister who confirmed that she came to know the respondent on 28th April 2015 when she went to discharge her from Kenyatta National Hospital after she gave birth to the child. After the discharge, she escorted the respondent to her mother's place at Marurui. She saw her again in August 2015 at Kitengela home during preparation for her wedding. In January 2016 when the child was barely 8 months, the appellant called her and asked to meet her at Railways bus station in Nairobi to pick the minor and take him to his grandmother. She went as requested and the respondent handed the minor after which she took him to their home in Kitengela. The next time she saw the respondent was in 2022 when she visited the minor. She concluded her evidence in chief by stating that the minor has since been taken care of by their father and the entire family in a loving environment.

When she was cross-examined, the witness stated that the child was given to her by the respondent to take to her mother. She was firm that the respondent was never chased by the appellant.

The child

Upon close of the parties' testimonies, the court held the view that the child should be interviewed by the court for his wishes to be ascertained. When he was interviewed, the child stated that he was schooling in grade 4 at Mbare Shalom Academy and that he was living in Kakamega with his father, grandfather and grandmother. He confirmed that his both parents were in court and that he wanted to continue staying with his father. He added that the last time he saw his mother was back in August 2023.

Children officer's report

A children's report dated 2-07-2024 which was filed through an order of the court shows that the child lived with grandparents in Kwhisero Sub County in a three bedroomed semi-permanent house where the father visited every weekend. The child told the officer that his mother stayed in Thika with his other sister and that he did not want to stay with his mother because she broke his sister's leg while his father bought him crisps and soda every weekend and he liked him. It is indicated that the child stated that the mother abandoned him at the age of 7 months and that he preferred staying with his father and grandparents. He also liked his current school and added that even after being picked by the mother, he wanted to be back to his father and grandparents.

The report shows that after interviewing the child, parents, grandparents, aunt and area Chief, the officer concluded that the boy was scared about the mother and he preferred staying with his grandparents and father. The report states further that the child's mother gave conflicting statements about her separation with the boy. The children's officer recommendation is as follows in verbatim;

> *'Since the minor has negative views and opinion about the mother, he may require some counselling before the Honorable Court can make any decision or access/custody by the mother. The minor is very intelligent, mature and confident. The Honourable Court may also get his opinion in camera before any order is given otherwise the boy prefers and wishes staying with his paternal family. The Honourable Court can make any decision in the best for the child.'*

Analysis and determination

I have considered the proceedings, evidence of the parties, the submissions of the appellant as well as the judgment of the trial court. All said and done, the main and

paramount point of consideration while making a decision in this matter is the best interest of the child. That is a constitutional and statutory edict which the court cannot deviate from. Article 53 of the Constitution so dictate. Whereas the parents have the right to be and bond with their children, every court, institution, body or person making a decision on issues or matters touching on custody of and access to a child must weigh the circumstances surrounding the dispute and establish where the interest and welfare of the child is likely to be served best.

Of course, bonding with both parents will be in the interest of a child but the bonding must be allowed in such a way that it will not be counterproductive or compromise the welfare of the child. Whereas to be a biological parent may be one of the considerations, it is not enough to afford one a right of custody. The court or the decision maker must go further and examine the character and antecedent of the parent and establish whether there is a likelihood of the order for custody or access affecting the child in a negative way. In ***EKM v EBO [2020] KEHC 6747 (KLR),*** it was held that;

> *'What would constitute exceptional circumstances as was observed in the **Ojaamong case** would include matters such as the mother's disgraceful conduct, her immoral behaviour, drunken habit and bad company, which would disqualify her from being awarded custody of a child of tender age.'*

In this matter, it is not disputed that the respondent separated with the child in 2016 when he was about eight months old and they never reunited for about seven or eight years. It is reported in children officer's report that the respondent confirmed that she left the child at the said early age and argued that the child did not need to breastfeed him beyond six months although the ministry of health recommends a period of two years for breastfeeding.

I take judicial notice that health experts particularly the World Health Organisation recommends exclusive breastfeeding for a period of six months followed by weaning by introduction of complementary food for a period of one year. This has its own benefits to both the child and the lactating mother and in my view a very if not the most crucial stage of the child's development. A mother who willingly abandons a child at this stage cannot be said to have their best interest at heart although that reason only should not be used to deny her the right to reconnect with the child when she resurfaces as the same would also serve the best interest of the child.

The respondent described herself as a nurse and she should know more than the court that breastfeeding is not the only aspect of growth of such a young soul. It is a matter of common sense that a child needs to be progressively guided, observed and given special care as they approach life's milestones including the first words they utter in recognition of those around them not to mention being taken through vaccinations and immunization. These are responsibilities of the parents or primary caregivers which the respondent did not want to be associated with.

Having said the above, it does not matter to me, whether the child was taken away by the appellant or abandoned by the respondent. All that matters and is of concern to me is, after the separation of the parties, why did the respondent take a period of seven years or so to make up a follow up if she indeed cared for his welfare. There is no evidence that the respondent sought any intervention of the relevant authorities or the court after the appellant allegedly left with the child despite her knowing the delicate age of the child. Going by the evidence on record, the first time the respondent demonstrated interest in the child was on 23-11-2023 when

she visited the children's office to summon the appellant if her only exhibit is anything to go by. In my judgment, the reasons she gave that she did not have enough resources as she was not working does not make sense.

As rightly observed by the children officer in her report, the respondent could have secured a house help to take care of the child as she worked in Nyeri in 2016 instead of commuting to Kitengela as she alleged. Again, and as rightly observed by the same children officer, the respondent had another child in 2018 who she has lived with and did not lament about lack of resources or facilities. In my view, the respondent comes out as an untruthful and inconsistent person.

Absence of a parent may be remedied by subsequent reconnection as the respondent intended when she sought the children's officer assistance. However, before that is done, the court or the institution seeking to help in reconnection must ensure that it is gradual, smooth, progressive and coordinated in a manner that does not disrupt the life or growth of the child whether psychologically, emotionally or physically.

In this case, the respondent showed up when the child had already settled in Kakamega where he was obviously used to the environment, had joined school and already reached grade four and had no doubt made friends and integrated with the community and most likely learned the local language and means of communication. This is evident in the children officer's report where it stated that the child was comfortable with and settled in the environment. It is also evident from the interview conducted by the court where he expressed his desire to continue living with his father.

In his judgment, the court observed that the wishes of the child must be taken with caution and cited the case of ***B.K. v E.J.H. [2012] eKLR***. In my view, where the court finds it fit to take a decision contrary to clear wishes of the child, it should give reasons for going against the wishes especially where the separation of the child from the other parent has been for a considerable period of time. The trial court did not give any reason for its opinion that the wishes of the child would not be in his best interest.

The trial court did not call for children's officer's report in respect of the environment where the child would be relocated to upon execution of its judgment. The child would be living with the respondent if the court's judgment were executed and I think a report on the intended new environment was as important if not more as the report on the appellant's home. The change which was to be occasioned by the orders of custody would definitely affect the wellbeing and welfare of the child because his home, friends, school and daily routine would abruptly change. This, I believe was the reason the children's officer recommended counselling before the court made a decision which I find was very sound.

Instead of the court ordering counselling first before making the decision as recommended by the children's officer, it made the custody order then directed counselling to be undertaken before the order was implemented. The right thing the court should have done was to start with counseling then make a decision after receiving report from the counselor. What would happen if the counselling does not succeed in helping the child accept or integrate into living with the mother? The court put the cart before the horse which would likely affect the child negatively. As much as the children's officer's report is not binding on the court, it forms an integral part of the evidence and the court is obligated to give reasons if it

has to disagree with it. Otherwise, it will not make sense for the court to call for the same.

It is true that a child of tender age should be allowed to stay with their mother but this applies only where the mother is responsible, available and has bonded with the child. The mother in this matter abandoned him and has not bonded with the child and the child is living in a family set up and environment where he is properly settled and happy. I have seen reports in the child's behaviour, character and performance in school which were produced by the appellant and I find them consistent with a child who is living a well guided life. In my analysis, the circumstances in this case are so exceptional that the court must trend with caution in granting custody to the mother who the child was scared of.

The court in reaching its decision noted that the appellant had not counterclaimed for custody. That fact should not have been a matter of consideration. The respondent had filed the cause and had the duty to prove it on a balance of probabilities. I hold that, this being a children matter, the court should not have been influenced by that fact. The appellant had filed a defence denying the respondent's claim and his failure to plead counterclaim did not mean that the respondent's claim must succeed.

Having said the above, I have not lost sight of the fact that the respondent as the mother has a right and should be given a second chance to reconnect with her child regardless of her antecedents. Further, the child has a right to know and bond with his both parents and it will be in his interest that this court allows a latitude which will enable the reconnection.

I have considered the guidelines given by the Supreme Court of Kenya in ***MAK v RMAA & 4 others [2023] KESC 21 (KLR)*** where it held as follows;

> *'The 1st respondent contended that parental rights do not trump the best interests of the child. That is correct. However, parental rights cannot be ignored if they are in the best interests of the child. This is because the concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the children's rights recognized in the Constitution, the Children Act, the CRC, and the African Charter on the Rights and Welfare of the Child. These are all geared towards the holistic development of the child.*
>
> *Courts, therefore, while making a decision that will impact the child are mandated to consider all circumstances affecting the child. As such, we are of the view that the following guidelines are necessary and ought to be considered when balancing a child's best interests and parental rights and responsibility:*
>
> 1. *The existence of a PRA between the parties.*
> 2. *The past performance of each parent.*
> 3. *Each parent's presence including his or her ability to guide the child and provide for the child's overall well-being.*
> 4. *The ascertainable wishes of a child who is capable of giving/expressing his/her opinion.*
> 5. *The financial status of each parent.*
> 6. *The individual needs of each child.*
> 7. *The quality of the available home environment.*

8. *Need to preserve personal relations and direct contact with the child by both parents unless it is not in the best interests of the child in which case supervised access to the child must be granted.*
9. *Need to ensure that children are not placed in alternative care unnecessarily.*
10. *The mental health of the parents and*
11. *The totality of the circumstances.'*

Considering the above holding and the circumstances of this case, I hold that the respondent shall be granted limited, progressive and supervised visitations.

In conclusion, this appeal is merited and I proceed to set aside the judgment and decree of the trial court and substitute it for the following orders;

1. The appellant shall have exclusive actual custody of the child for the time being pending execution of orders (3) and (4) below.

2. The parties shall share the legal custody of the child.

3. The parties shall make arrangements for the child to go through counselling by a child psychologist with appropriate steps of reconnecting the child with the respondent.

4. The respondent shall upon and simultaneous with the counselling as ordered (3) above have limited and supervised visitations as the child psychologist shall recommend.

5. Upon completion of the counselling sessions, the parties shall be at liberty to apply for variation of the visitations and access before the trial court.

6. I make no orders as to costs.

Dated, signed and delivered at Nairobi this **17th** day of **April** 2026.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of the respondent in person and in absence of the appellant.