KBH v HMI (Civil Appeal E109 of 2022)
[2024] KECA 172 (KLR) (23 February 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E109 OF 2022

SG KAIRU, JW LESSIT & GV ODUNGA, JJA

FEBRUARY 23, 2024

BETWEEN

KBH ..... APPELLANT

AND

HMI ..... RESPONDENT

(An appeal against the Judgment and order of the High Court of Kenya at Mombasa (Onyiego, J.) dated 21st October 2022 in Family Appeal No. E010 of 2022)

JUDGMENT

1. This is an appeal against the decision of Onyiego, J. dated 21st October 2022 in Family Appeal No. E010 of 2022. The appellant appeals against such part of the judgment that decides that: "Actual custody of the minor herein is awarded to the appellant with unlimited access to the respondent. And that the respondent shall have the child during alternate weekends starting from 4:00 p.m. on Friday and return the child on Sunday at 4:30 p.m. same weekend."

2. The background of this appeal is that the appellant of British nationality and the respondent a Kenyan citizen residing in Mtwapa were in a relationship having met in 2015. Their relationship was blessed with one issue; JRH, born on 12th November 2017, hereinafter the minor.

3. The respondent claimed that the appellant was likely to leave the country thus abandoning his parental responsibility over the minor. It is for this reasons that the respondent filed a suit via plaint dated 30th December 2019 in Tononoka Children's Court at Mombasa; Children Case No. 435 of 2019 against the appellant for actual custody and maintenance of the minor and prayed for judgment against the appellant for:

    a. A declaration that both the respondent and the appellant have equal parental responsibility for the issue herein namely JRH and an order giving that effect.

b. A maintenance order requiring the appellant to make periodic financial payment of Kshs.180,000/= to the respondent in respect of the subsistence, maintenance and utility needs of the child herein.

c. The appellant do pay school fees in respect of his child.

d. The appellant do take a medical cover for the child.

e. An exclusion order do issue against the appellant.

f. The appellant do meet the additional educational and medical needs of the child herein as and when the same may arise.

g. Actual/physical custody of the child do vest in the respondent.

h. Costs of this suit and interest therein at court rates.

i. Any other relief that this Honorable court may deem fit."

4. In reply, the appellant filed his statement of defence and counter-claim dated 23rd November 2020. The paternity of the child is not disputed. The appellant admitted he was in a relationship with the respondent since 2015 and that in 2017 they were blessed with the minor, the subject of the suit before the trial court.

5. The appellant stated that he visited Kenya regularly to see his child but the respondent had frustrated his attempts to see the child in the recent years. That she had gone to the extent of removing the child from the jurisdiction of the court, in an attempt to deny him access to the minor.

6. The appellant further averred that for a long time he provided for his son and in addition, sent large amounts of monies to the respondent in order to fund businesses to provide for long- term security of the child. However, the respondent squandered the same by purchasing two cars, foreign travel and unnecessary extravagances. The appellant averred that he sent funds to the respondent sometimes even more than she sought from him meant to benefit the child but the respondent misappropriated the same.

7. In his counter-claim, the appellant accused the respondent of being in multiple relationships with other people. That the respondent deliberately failed to disclose to him that she was in a legal marriage with another German man whom they had officially wedded and the same was in subsistence. That the respondent was also maintaining another relationship with another Swiss man with whom they have a daughter and who regularly sent funds for support of his child and who had rented an apartment for the respondent.

8. The appellant averred that during the subsistence of his relationship with the respondent, he has gone through untold verbal and emotional abuse by the respondent. In addition, he witnessed the minor undergo cruelty in the hands of the respondent. The appellant averred that he loves his child and that he will do anything to make him happy.

9. In addition, that he acquired property in Mtwapa, Kilifi/Mtwapa/xxxx, whose value was ten million (Kshs.10,000,000/=) in early 2018 and the same was placed in the name of the respondent in trust for the child. That this was done in good faith and with the intention of benefiting his son.

10. The appellant averred that to him, the respondent displays psychopathic behaviors; is extremely violent; a repeated liar; reckless risk taker; lacks empathy, compassion or care for the feeling of others.

He averred that she slept with various men: was disobedient to the law and had no consideration of consequences. He averred that such conduct was detrimental to the welfare of the minor.

11. The appellant expressed that he was the best placed to ensure the safety, medical care, proper moral upbringing, social development and education of the minor. He therefore sought the vesting of actual and physical custody of the minor in him. He averred that should he find it necessary to relocate the minor to the United Kingdom, he undertook to return him regularly to Kenya for holidays. He promised regular contact on WhatsApp with the respondent.

12. In conclusion, he prayed that the respondent's suit be dismissed with costs and judgment entered in his favor for orders that:

    a. Legal custody be joint between the parties herein.

    b. Actual/physical custody for the child JRH do vest in the appellant.

    c. The respondent do have supervised access to the child and further be at liberty to talk to the child regularly on Whatsapp or video calls.

    d. A permanent injunction do issue restraining respondent either by herself, her agents, servants and/or assigns from selling of and/or causing a change of ownership to the matrimonial home Mtwapa Title Number Kilifi/Mtwapa/xxxx.

    e. This Honorable Court be pleased to put the said Mtwapa Title Number Kilifi/Mtwapa/xxxx in Trust for the minor (JRH) and the defendant being the child's father do act as the Trustee and the same be at liberty to appoint whoever he wishes to act on his behalf in respect of his son.

    f. The Court be pleased to garnish the plaintiff's three bank accounts she controls at the Family Bank Mtwapa, in her name, the child JRH's name and her daughter's name as well as her accounts at the Equity Bank and KCB Mtwapa, a total of five accounts and the funds therein be transferred to a new account set-up in the child's name and the signatory be the defendant.

    g. The plaintiff to give account of every shilling she has ever received from the defendant on behalf of the child herein within the five above accounts.

    h. The plaintiff be compelled to visit a medical mental psychiatrist for her own benefit and that of the child.

        i. The plaintiff be permanently restrained from bringing in other men and sleeping with the same in the family home and to be discreet in order to protect the moral wellbeing of the minor herein and other children.

    j. The plaintiff be permanently restrained from harassing and/or abusing the defendant either by sending him offensive text messages, trying to damage his livelihood by contacting his colleagues and family in the UK with abusive messages, posting damaging materials on social media, threatening to burn the defendant or wishing that he dies of cancer etc.

    k. The plaintiff be permanently restrained from removing the child JRH from Kenya without the agreement and full knowledge of the defendant as to the child's whereabouts.

    l. Costs of the suit.

    m. Any other relief that this Honorable Court may deem fit to grant.

        1. At the hearing before the trial court, the respondent denied living with the appellant as husband and wife but maintained that the appellant used to visit her home. The

appellant contended that the law in Kenya says that she is supposed to have custody of the minor being 4 years old. It was her testimony that the appellant was not the father of the child

2. The respondent claimed that the appellant only took care and supported the child until he was one year old and thereafter he stopped. She further stated that since she started sharing custody with the appellant, she did not know where he lived. According to her testimony, the appellant was a tourist and he only visited Kenya therefore, the minor could not be placed in his custody.

3. The respondent argued that the appellant denied her access to the minor and told her that she can only access him through video calls. That in one such occasion when she called the minor she saw that he had injury on his face which she contended was not from a fall but a burn injury. That on another occasion the minor had pinching like injuries and a razor blade cut injury on his shoulder, and a burn injury on the buttock.

4. She further testified that she did not want anything from the appellant for the minor's needs but that he could assist if he so wished. That if he wished to pay school fees for the minor, he could pay directly to the school. That the appellant could shop and buy clothes for the minor. That in regards to medical provisions, the appellant could take out NHIF card.

5. On cross examination, the respondent denied demanding Kshs.180,000/= from the appellant as the child's upkeep and categorically stated that she did not want the appellant to participate in the minor's life. The respondent confirmed that

   they live with the child in a house in Mtwapa, which she claimed she bought together with the appellant for Kshs.10 million. She further confirmed that the house was registered under her name but was for the minor. In the middle of cross examination the respondent refused to answer any further question posed to her for reason that she wanted to see her child who she believed was being tortured by the appellant. The court, noting that the respondent refused to proceed with her case and having warned her of her conduct in Court, proceeded to close her case on application by counsel for the appellant; Mr. Obonyo.

18. On his part, the appellant testified that he is a British citizen, was 68 years old and in very good physical state. That he spent 40 years in government service, 30 years of which were at Scotland Yard in London as an International Detective. That he also worked in Afghanistan and Iraq advising the government in anti-corruption, anti-terrorism and community policy. The appellant adopted the content in his witness statement together with documentary evidence exhibits, which is a replica of his counter claim.

19. The appellant challenged the capability of the respondent to provide for the child. He testified that the respondent had no property generating rental income nor was she doing any business since she had long closed her business.

20. The appellant testified that he filed a counterclaim in Court, to which the respondent had not responded. That in his counterclaim he prayed for legal custody be joint; that he was no longer sure if joint legal custody was safe for their minor and therefore requested for actual physical custody of the minor with him.

21. The appellant further testified on the respondent's psychotic behavior and reiterated what he had alluded in his counterclaim and witness statement. That the respondent has no fear of the law and/

or order and did not care about any other persons' feelings. That he had a video recording where the respondent tells the minor that the appellant is a kidnapper, a killer and that he will kill her.

22. The appellant testified on the minor's medical status and told the Court that the child was diagnosed with serious gastro internal infection, which was caused by the respondent feeding him hot porridge. That the doctor, Dr. Abuto, advised that the same be stopped. Further, that sometime in 2021 when he recovered the child after the respondent had ran off with him, he noticed that the child was coughing and was unwell. That upon taking him to the hospital and chest x-ray done on him, he was suffering from untreated bronchus pneumonia and fungal infection on the skin.

23. The appellant testified that he wanted the custody of the child as the respondent is not fit for the reason that she was incapable of giving him the correct moral guidance, or tell right from wrong, was dishonest, was sexually immoral and was exposing the child to her promiscuous conduct, and was violent to the child among others.

24. The appellant testified that he had retired, that he had built a substantial house in which to raise the minor; that he had health insurance for him and would take care of the child with the assistance of two of his aunties who have looked after him in the past; and that he had no intention of removing the minor from Kenya.

25. Mr. Maina, a Children's Officer based in Nyali, made a clarification on his report dated 27th January 2021. He indicated that he did a physical examination of the minor but he did not see any cut or burn marks. That at his home, there was a day worker who helped with house chores. That the minor was attending school; that he appeared happy and confident with his environment and himself. He said that the minor showed close bond with the appellant and occasionally would invite him to join in his play. It was his opinion that on the minor's critical stage in development, he needed a stable environment. That the minor had started forming his social networks and that therefore, his stability was important. The Children's officer said that the respondent refused to talk with him as the court ordered.

26. After hearing the case of the parties and considering their respective written submissions, together with the relevant authorities relied upon, Hon. Lucy Sindani entered judgment in favour of the appellant and gave reasons for the decision. The learned trial Magistrate considered the legal provisions applicable of Article 53(1) of *the Constitution* and section 4 and 83 of *Children Act* and the principle of best interest of the child especially of tender years and concluded that both parents of such child had equal parental rights and responsibility over the child.

27. Citing several cases for instance Githunguri vs. Githunguri [1979] eKLR; Mulwa vs. Mulwa [2002] eKLR and JO vs. SAO [2016] eKLR she found that the custody of a child of tender age should be given to the mother unless exceptional circumstances exists. It was her conviction that there were exceptional circumstances why custody of the minor should not vest in the respondent. The respondent's aggressive behavior in court throughout the trial process, which included walking out of court in protest, being abusive to all in court including the Magistrate; disobeying orders and directions of the court, showing no respect for authority.

28. The Court considered the report from Dr. Obuto, who treated the minor after the respondent ran away with him and hid him for four months found that the child had severe infection of the chest due to neglect to access treatment in time, fungal infection and weight loss. To the mind of the learned trial Magistrate, the respondent was so determined to deny the appellant access to the minor even if it was detrimental to the welfare of the child, and that as a result the health of the minor was severely affected. The minor also missed education.

29. The learned Magistrate considered the report by the Children Officer, Mr. Maina Kennedy Kuria who made a report on the Court's request. His observations were that the minor was confident, happy, and displayed strong bond with the appellant; and that for his general well being, the mental, physiological and psychological development, the minor should not be disturbed or removed from that environment.

30. Upon that considerations, in her judgment dated 21st February 2022 the learned trial Magistrate ordered as follows:

    a. "This Court is not bound by the doctrine of res judicata thus not barred to determine the issue on custody on merit.

    b. Legal custody of the child to be joint between the plaintiff and the defendant.

    c. The defendant to have physical/ actual custody of the child while the plaintiff to have physical supervised access to the child on alternate weekends at Mtwapa Police Station the gender desk from 11:00a.m. to 3:00p.m. During this period the plaintiff is warned against causing any kind of drama and commotion in the presence of the child. The plaintiff to access the child peacefully as a mother without abusing and talking to the defendant in any manner.

    d. The plaintiff is also allowed to continue with virtual access to the child on the day that she doesn't have physical access but is restrained from using abusive language to the defendant in the presence of the child while having the said access. The plaintiff to talk to the child in a peaceful manner and in the event that there is any damaging information being passed by the plaintiff to the child then the call to be disconnected.

    e. The above access to go on for a period of one year from the date of this judgment and in the event that the plaintiff has been maintaining peace, order and decorum during these moments of access then either party can apply for review of access.

    f. This Court allows the defendant to provide for the child fully and the plaintiff be at liberty to chip in at any time.

    g. This Court lacks jurisdiction to deal with the prayer by the defendant in respect of property named Mtwapa Title Number Kilifi/Mtwapa/xxxx. The defendant to approach a Court with proper jurisdiction to handle,

    h. Prayer f, g, h and i of the defendant's counterclaim is dismissed.

        i. Neither the plaintiff nor the defendant is allowed to leave the jurisdiction of Kenya with the child without the consent of the other or order of the Court until the child is 12 years old and able to understand better what is going on. Any party who wishes to leave the country with the child when he attains the age of twelve should also do so with the consent of the other party or by court's order.

    j. The defendant's passport deposited in Court to be released to him.

    k. This being a case brought on behalf of the child the costs to be borne by each party."

        1. Aggrieved and dissatisfied with the said judgment the respondent preferred an appeal to the High Court of Kenya at Mombasa Family Appeal No. E010 of 2022. The respondent cited eight (8) grounds of appeal.

1. "THAT the learned magistrate erred in law and in fact in holding that the respondent was better placed to take care of the child disregarding the evidence that the respondent is an unsettled foreigner in the country, temporarily visiting as a tourist and in the circumstances not suitable to have permanent orders of actual custody of the minor.

2. That the learned trial magistrate erred in law and in fact in proceedings on wrong principles and facts thereby awarding custody of child to the respondent.

3. That the learned magistrate erred in law and in fact in holding that the custody order that she made should stay until the child gets to twelve (12) years.

4. That the learned trial magistrate erred both in law and in fact in failing to uphold the doctrine of precedent with regards to children of tender years when she gave custody of the four year old JRH to the father without sufficient evidence on record to dispel the assumption that the mother is the most suited to have custody of a minor of tender years.

5. That the learned trial magistrate erred in law and in fact in holding that the judgment would be subject to review by the trial court after one year and thereby failed to consider that having issued the judgment, the trail court has become functus officio and therefore cannot review and or extend its own judgment.

6. That the learned magistrate erred in law by proceeding to make a judgment in the case without having the appellant cross-examined by the respondent and children officer, thereby offending the tenets of natural justice and fair hearing.

7. That the learned trial magistrate erred in both law and in fact in considering issues not pleaded and proven by the respondent thereby arriving at a wrong decision.

8. That the learned magistrate erred in law and in fact in giving weight to irrelevant issues telling the acrimonious relationship between the parties and thereby ended up making a biased determination to secure the interests of the respondent before those of the minor contrary to the Children's Act No. 8 of 2001."

32. The appeal at the High Court proceeded by way of written submissions. Upon considering the record of appeal, grounds of appeal and submissions by both counsels, Onyiego, J. in his judgment dated 22nd October, 2022 found merit in the appeal. The learned judge thus proceeded to allow the respondent's appeal with orders that:

"a) The order of the trial court awarding actual custody of the minor herein to the respondent be and hereby substituted with the order that; actual custody of the minor herein be and is hereby awarded to the appellant with unlimited access to the respondent.

b. That the respondent shall have the child during alternate weekends starting from 4:00 p.m. on Friday and return the child on Sunday at 4:30 p.m. same weekend.

b. That the respondent shall pick and drop the child at a place to be agreed upon by parties as shall be convenient to them.

c. The rest of the orders made by the lower court shall remain in force.

d. The respondent shall deliver the minor to the appellant on 30th October 2022 at 4:00 p.m. at a place to be agreed by parties and thereafter pick the baby the second Friday from that day.

e. Regarding costs each to bear his or her costs."

33. Aggrieved and dissatisfied with the said decision of Onyiego, J. the appellant preferred an appeal to this court. The appellant faults the learned judge on the following five (5) grounds:

1. The Learned Honorable Judge erred in law in relying on reasons not founded in fact and/or misapprehension of the facts on record to come to his decision that the appellant was not a suitable parent to have custody of the suit minors.

2. The Learned Honorable Judge erred in law in not considering the evidence adduced on behalf of the appellant.

3. The Learned Honorable Judge erred in law in relying on extraneous testimony and/or evidence that is not on record.

4. The Learned Honorable Judge erred in his evaluation and analysis of the evidence adduced and in not appreciating it properly, equitably, judiciously and sufficiently or at all and further erred in drawing the inference it did to the appellant's evidence.

5. The Learned Honorable Judge's decision was contrary to the weight of evidence placed before him in the record of appeal.

34. The appellant prays for orders that this appeal be allowed as prayed, with costs of the appeal awarded to him.

35. We heard this appeal through this Court's virtual platform on 27th June 2023. At the hearing, learned counsels Mr. Lawrence Obonyo appeared for the appellant whereas Mr. Geoffrey Were appeared for the respondent. The Counsels indicated that they were relying on their written submissions dated 12th June 2023 and 22nd June, 2023 respectively, with oral highlights, which we recorded.

36. In the written submissions, appellant submitted that this being a child matter, the ultimate law of the land was *the Constitution* of Kenya, and in particular Article 53(2) together with section 8(1) & (2) of the Children's Act No. 29 of 2022. The appellant argued that the minor has been through vicissitude borne by the suit, and it is in his best interest that he gets a healthy and stable childhood unlike the one marred by trauma and psychological and physical harm that he has had at the hands of the respondent during the subsistence of the trial and several appeals.

37. Mr. Obonyo urged this Court to be guided by the learned magistrate's observation regarding the conducts of the parties, which was accepted by the learned judge, in determining the best interest of the minor. It is submitted that the trial court observed that the respondent had not been responsible whenever granted actual custody of the suit minor and this had led, many times before, to the deterioration of his health, his education in school and overall, his wellbeing including his psychological wellbeing. On the other hand, the appellant submitted, the Superior Court noted that the appellant had behaved with distinction as a responsible person, caring and loving to the minor.

38. He relied on the Superior Court's observation of the character and demeanour of both the appellant and respondent, and urged that having made scathing remarks concerning the respondent, it was a contradiction to give physical custody of the minor to her. He relied on section 95(2) of the Children's Act No. 29 of 2022.

39. On the assumption made by the respondent that the appellant did not have sufficient time for the child implying that the child would be left in the hands of third party, the appellant submitted that this assumption is false and not based on fact. The appellant submitted that he is a holder of Class K permit (ordinary resident) based on his retired status and independent pension scheme and he had, in fact, built a house in which he currently stays with the minor. That he is currently a resident of Kenya and is a holder of a Foreign Certificate allowing his stay in Kenya based on the Class K permit.

40. Relying on the Supreme Court case in MAK vs. RMAA & 4 Others (Petition 2 (E003) of (2022) (2023) KESC 21 (KLR) (Civ) (2 March 2023) (judgment) the appellant submitted that it is the mandate of the Court to ensure that a child's best interests are served in all children matters.

41. On his part, Mr. Were for the respondent opposed the appeal and submitted that the learned judge considered the demeanor of the parties; had the opportunity to observe the minor during all the sessions held by the Court in the matter. He urged that the judge noted that it was important for the Court to realize that the minor was barely five (5) years old and therefore the learned judge's decision of 21st October 2022 to hand custody to the respondent, was sound in law and ought not to be interfered with.

42. On the issue that the learned judge altered the decision of Hon. Sindani, Mr. Were submitted that the learned Judge had the record of the proceedings of the Tononoka Court before him. Thus, he properly evaluated the evidence therein.

43. The respondent emphasized that the appellant was a foreigner holding two passports, an Irish passport and a diplomatic passport; hence, he was not ordinarily a resident of Kenya. The respondent urged that by virtue of being a foreigner, the appellant did not have any fixed asset or house in Kenya and the respondent believes that while in Kenya, the appellant always stays with his girlfriends which is not a healthy environment for their minor son.

44. In conclusion, Mr. Were pointed out that the minor was still in the custody of the appellant and prayed that the custody of the minor should revert to the biological mother as ordered by the first appellate Court.

45. This being a second appeal from the decision of the trial Court in Tononoka Children Case (TCC) No. 433 of 2019, we are restricted to determining points of law and not of fact as set out in section 72(1) of the *Civil Procedure Act*, and explained by this Court (Waki, Karanja & Kiage JJ.A.) in the case of Stanley N. Muriithi & Another vs. Bernard Munene Ithiga [2016] eKLR as follows:

> "...In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. 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.
>
> We hasten to observe, however, that failure on the part of the first appellate court to re-evaluate the evidence tendered before the trial court and as a result, arriving at the wrong conclusion is a point of law."
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> See also Maina vs. Mugiria [1983] KLR 78, Kenya Breweries Ltd vs. Godfrey Odongo, Civil Appeal No. 127 of 2007 and Stanley N. Muriithi & Another vs. Bernard Munene Ithiga [2016] eKLR.

46. We are also guided by the English case of Martin vs. Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 wherein it was held, inter alia, that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.

47. We have considered the submissions by counsel both oral and written, the cases relied on and the proceedings and judgments of both courts below. A cursory look at the grounds of appeal reveals that the appellant challenges the Superior Court on two grounds. The first one is a challenge that the Superior Court relied on un-pleaded facts, misapprehended the evidence and facts of the case in his evaluation and analysis of the entire case, thus arriving at the wrong decision. Going by the case of Stanley N. Muriithi & Another vs. Bernard Munene Ithiga, supra, the issue falls for our determination.

48. The second challenge contests the Superior Court's judgment for applying the 'tender age principle' above the 'constitutional principle of the best interest of the child', thus arriving at a wrong decision. We shall consider both grounds simultaneously as they are inter-linked.

49. As we noted earlier, the appellant basis his appeal on five grounds of appeal. Considering the submissions of both counsel, we are of the view that the gravamen of this appeal is twofold. One, whether the Superior Court correctly applied the principles of the 'best interest of the child', and the 'tender age' principle. Two, whether the first appellate Court considered matters it should not have considered or failed to consider matters it should have considered or looking at the entire decision, it is perverse.

50. The best interest of the child is a constitutional principle and right of the child as spelt out under Article 53(2) of *the Constitution*. That provision requires, inter alia, courts to treat the best interests of the child as of paramount importance in every matter concerning the child. Section 4(3) of the *Children Act* requires "all judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any power conferred by this act to treat the interest of the child as of first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to safeguard and promote the rights and welfare of the child, conserve and promote the welfare of the child, and secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest."

51. The Supreme Court made pronouncements on what constitutes best interest of the child and the principles applicable to aid in making a sound determination of the same. That was in the case of MAK vs. RMAA & 4 Others (Petition 2 (E003 of (2022) KESC 21 where the Court held:

> "6. The children's rights legal regime (*the Constitution*, *Children Act* (repealed), CRC, and the African Charter on the Rights and Welfare of the Child) emphasized the centrality of the best interest of the child. The best interest of the child was determined by the circumstances of the case as they specifically related to the child. That comprised the principles that prime the child's right to survival, protection, participation, and development above other considerations and included the rights contemplated under article 53 1 of *the Constitution*. The focus had to be on the child and what was best for the child.
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> 7. There was no hierarchy in the children's rights provided for under the law. All the rights provided under article 53 were in the child's best interest. The 'best interests' concept was further strengthened by being the paramount

consideration. The best interests of the child were to be the determining factor when making a decision on the child. It was against that aspect that parental rights ought to be balanced. No right should be compromised by a negative interpretation of a child's best interest. The record did not provide any cogent evidence of the English Court balancing between parental rights and the best interest of the child.

52. The Supreme Court continued to set the principles applicable in determining what is in the best interest of the child thus:

> " 17. Courts while making a decision that would impact the child were mandated to consider all circumstances affecting the child. The following guidelines ought to be considered when balancing a child's best interests and parental rights and responsibilities:
>
> 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 was 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 was not in the best interests of the child in which case supervised access to the child was to be granted.
> 9. Need to ensure that children were not placed in alternative care unnecessarily.
> 10. The mental health of the parents.
> 11. The totality of the circumstances."

53. The dispute between the appellant and the respondent essentially revolve around the question who has the right to have actual custody of the minor. It is not disputed that the respondent has had custody of the minor since the child was born in 2017 until the order of the Hon. Sindani on 2nd February 2022 when she granted both parties joint custody of the minor, with the appellant having physical custody of the minor and the respondent having supervised access to the minor. The order was to remain in force for a year. However, when the learned Magistrate concluded the case on 30th November 2020, she confirmed the earlier order, subject to review. That order was reversed by the Superior Court.

54. The question is whether the applicable principles, as set out under Article 53 (2) of *the Constitution*, section 4(3) of the *Children Act* and in the Supreme Court decision of MAK vs. RMAA & 4 Others,

(supra). In other words, was there a consideration of any of the factors spelt out under the Supreme Court case?

55. The basis of the Superior Court's determination was spelt out in the judgment. Regarding the appellant, what disqualified him from getting custody of the minor according to the Judge was the finding at paragraph 47 of the judgment where he stated:

> " There is no dispute that the respondent [appellant herein] is a British citizen who is enjoying visitation in the country on a tourist visa. There is no dispute he has no permanent residence by virtue of his status. Further, it is also on record in both the respondent's counter claim and his testimony that he is an international detective working for Scotland Yard and deployed in Iraq and Afghanistan. That he visited the country three or four times a year.'

56. As regards the respondent, the Superior Judge noted her character and past conduct in the following summation:

> " The appellant [read respondent] herein is a vexatious and difficult litigant who believes that anybody who does not dance to her tune is biased and generally against her. As the trial court correctly put it, the appellant has no respect for court orders nor court officers including magistrates and even children officers. To her, no court order is good unless it is in her favour. From her testimony, she exhibited a high degree of dishonesty. She could deny certain information only to change the story the next minute...
>
> Besides, there was sufficient evidence demonstrated by the respondent and confirmed in cross examination by the appellant that whenever actual custody of the child was given to her she could disappear with the child and deny the respondent access... the child has lost a lot in school due to unnecessary interruptions...Her immoral behaviour taking different men to the house was not building the moral character of the child. In my view these are exceptional circumstances warranting denial of actual custody of the child to the appellant."

57. In the above observation of the Superior Judge, one notes that the Judge considered the past performance of the respondent as a parent and her presence, including her ability to guide the child and provide for the child's overall well-being. The learned Judge of the Superior Court spoke plainly in his description of her, and was clearly not impressed with her performance as a parent.

58. The Judge noted regarding the appellant that he had behaved with distinction as a responsible person who was loving and caring to the minor. He commended him for taking care of the minor as a result of which he was performing with excellence in school, was healthy, happy and confident.

59. The learned Judge found that it was not in dispute that the appellant was an International detective working in Iraq and Afghanistan, and that he came to Kenya four times a year on a tourist visa. He then found that due to the status of the appellant being on tourist visa, and being employed full time in Afghanistan and Iraq, he did not have sufficient time to care for the minor and that the minor would be left in the hands of third parties when away. We shall get to this later.

60. The consideration of the appellant's suitability covered the appellant's presence including his ability to guide the child and provide for the child's overall well-being, noting his caring nature, in consonance with MAK vs. RMAA, (supra).

61. We note that the Judge made conclusions that contradicted the evidence adduced before the court, which was critical to the final determination on the suitability of the appellant. The Judge found that

the appellant was an International detective working in Iraq and Afghanistan, and that he came to Kenya four times a year on a tourist visa, thus unavailable to take care of the minor.

62. It is on record in the evidence of the appellant that he had since retired from service as an International detective. He also averred and testified that his status had since changed to a Class K status, which gave him residence in Kenya. He also said that he had constructed a home in Mtwapa where he now lived with the minor and that he had no intentions of leaving Kenya, or of taking the minor out of jurisdiction. He produced documentary evidence to establish ad prove his allegations. He also testified and adduced documentary proof and witness evidence that the respondent ran off with the minor on several occasions and that he not only tracked them down, but rescued the minor in time for medical intervention which he met.

63. What the appellant stated in evidence and in his defence and various affidavits, all, which he adopted as his evidence, demonstrated; one, the financial status of the appellant, was stable and could meet the needs of the minor. Two, that the appellant understood the individual needs of the minor; had provided good quality home with suitable environment for the minor.

64. The appellant adduced evidence of a doctor whose report was an indictment of the respondent that she had endangered the minor by taking him away and failing to feed him properly and failing to take him for treatment for a prolonged time causing him severe health issues. We noted pictures of the minor taken in hospital on an oxygen mask, among the exhibits produced by the appellant. This evidence answers to the other considerations the court should have in mind as set out under section 95(2) of the *Children Act* No. 29 of 2022, especially subsections (1) (2) (b), (c), (e), (f) and (h).

65. Section 95(2) of the *Children Act* No. 29 of 2022 stipulates:

> " 95. (1) Subject to subsection (4), where the Court is considering whether or not to make an order under this Act with respect to a child, the Court shall not make any order unless it considers that doing so is in the best interest of the child.
>
> 2. Where the Court is considering whether or not to make an order under subsection (1), it shall have particular regard to-
>
> a. the ascertainable feelings and wishes of the child concerned having regard to the child's age and understanding;
>
> b. the child's physical, emotional and educational needs and, in particular, where the child has a disability or chronic illness or where the child is intersex, the ability of any person or institution to provide any special care or medical attention which may be required for the wellbeing of the child;
>
> c. the likely effect on the child of any change in circumstances;
>
> d. the child's age, sex, religious persuasion and cultural background;
>
> e. any harm the child may have suffered or is at the risk of suffering;
>
> f. the ability of the parent, or any other person in relation to whom the Court considers the question to be relevant, to provide for and care for the child;

g. the customs and practices of the community to which the child belongs and the need to ensure that the child easily integrates while not subjected to harmful cultural practices;

h. the child's exposure to, or use of, drugs or other psychotropic substances and, in particular, whether the child is addicted to the same, and the ability of any person or institution to provide any special care or medical attention which may be required for the child; and

i. the powers which the Court has under this Act or any other written law. [Emphasis added]

66. On our consideration of this appeal, it is apparent to us that, on the evidence, the learned Superior Court failed to consider critical evidence and facts presented before the Court, in particular, the changed status of the appellant, thus arriving at a wrong conclusion that he was not suitable for a vesting order of custody of the minor. There was incomplete consideration of all the circumstances that aid in reaching a reasonable balanced verdict of under whose hands the custody of the child should vest that will meet his best interest.

67. Indeed, we find that the Superior Judge was conflicted on which order to make in the case, which is exemplified by the conclusions he made. He noted that both parties were unsuitable to obtain custody of the minor, stating that the finding was based on the analysis of the case.

68. The learned Judge on the issue of which parent should have custody of the minor concluded:

> " Given the tender age of the baby, the appellant (mother) would be better option after taking into account the short comings of each party. It is possible for the respondent to take care of his child when in the custody of his mother, while enjoying unlimited access to the baby whenever he is in the country."

69. In addition, the Judge stated:

> " I have with a heavy heart given actual custody of the minor to the appellant, on condition she does not frustrate the respondent's right of access to the baby as directed. The appellant is further warned from disregarding the orders of the court which she has made her daily bread in the past. Should she disobey the previously mentioned orders, the Court will not hesitate to revoke the custody order and make appropriate orders."

70. Given the two conflicting conclusions as above mentioned, we find that the learned Judge did not adhere to the statutory caution under section 95(1) of the *Children Act* which states:

> " 95. (1) Subject to subsection (4), where the Court is considering whether or not to make an order under this Act with respect to a child, the Court shall not make any order unless it considers that doing so is in the best interest of the child."

71. That provision is given in mandatory terms that if a Court is in doubt whether an order it intends to make is in the best interest of the child, it ought not to make the order. We believe that his remark that "it was with a heavy heart' that he gave actual custody of the minor to the respondent was borne out of doubt that he was making an order that was in the best interest of the child.

72. We think that we have said enough to show that the decision made by the Superior Court was plainly wrong, having found the respondent of bad morals, violent and aggressive, one who did not regard authority or the feelings of others. That was not the kind of person to give custody of a child, especially one of tender years. The minor is 6 years old, a critical age for establishment of character, behavior development, social and psychological growth. It was important that at that age he should get better influence and stable environment, which his mother was incapable of providing.

73. We are aware that as a second appellate Court we should not interfere with the decisions of the trial and/or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law. We find that the decision was bad in law. We find merit in the appeal which we allow and make the following orders which we find commend themselves to us:

    1. The judgment of the High Court delivered on the 21st October 2022 by Onyiego, J. in Msa Family Appeal No.E010 of 2022 and all its consequential orders be and is hereby set aside;

    2. The Judgment and orders of Hon. Lucy Sindani delivered at Mombasa Tononka Children Court Children Case No. 435 of 2019 delivered on 21st February 2022 be and is hereby re-instated. For avoidance of doubt:

        a. That this Court is not bound by the doctrine of res judicata thus not barred to determine the issue on custody on merit.

        b. That Legal custody of the child to be joint between the plaintiff (read respondent) and the defendant (read appellant).

        c. That the defendant (appellant) to have physical/actual custody of the child while the plaintiff (respondent) to have physical supervised access to the child on alternate weekends at Mtwapa police station at the gender desk from 11.00a.m. to 3.00p.m. During this period the plaintiff (respondent) is warned against causing any kind of drama and commotion in the presence of the child. The plaintiff to access the child peacefully as a mother without abusing and talking to the defendant (appellant) in any manner.

        d. That the plaintiff (respondent) is also allowed to continue with virtual access to the child on the days that she does not have physical access but is restrained from using abusive language to the defendant in the presence of the child while having the said access. The plaintiff (respondent) to talk to the child in a peaceful manner and in the event that there is any damaging information being passed by the plaintiff (respondent) to the child then the call to be disconnected.

        e. That the above access to go on for a period of one year from the date of this judgment and in the event that the plaintiff (respondent) has been maintaining peace, order and decorum during these moments of access then either party can apply for review of access.

        f. That this Court allows the defendant to provide for the child fully and the plaintiff (respondent) be a liberty to chip in at any time.

        g. That this Court lacks jurisdiction to deal with the prayer by the defendant in respect of property named Mtwapa Title number Kilifi/Mtwapa/2895. The defendant (appellant) to approach a court with proper jurisdiction to handle.

h. That prayers f, g, h and i of the defendant's (appellant) counter claim are dismissed.

i. That neither the plaintiff (respondent) nor the defendant (appellant) is allowed to leave the jurisdiction of Kenya with the child without the consent of the other or order of the court until the child is 12 years old and able to understand better what is going on. Any party who wishes to leave the county with the child when he attains the age of twelve should also do so with the consent of the other party or by court's order.

j. That the defendant's (appellant) passport deposited in court to be released to him.

k. That this being a case brought on behalf of the child then costs to be borne by each party.

1. This being a case brought on behalf of the child minor, each party do bear their own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

S. GATEMBU KAIRU, FCIArb.,

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR