



REPUBLIC OF KENYA



**KENYA LAW**  
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**NBO v SRO (Civil Appeal E109 of 2023)  
[2025] KEHC 1045 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1045 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL E109 OF 2023  
DKN MAGARE, J  
FEBRUARY 27, 2025**

**BETWEEN**

**NBO ..... APPELLANT**

**AND**

**SRO ..... RESPONDENT**

**JUDGMENT**

1. This appeal arises from the Judgement and decree of trial court delivered on 16<sup>th</sup> August 2023 by Hon. Biwott (Senior Principal Magistrate) in Ogembo Children Case No. EXXX of 2023.
2. The lower court entered judgment and granted the following reliefs:
  - a. Legal custody to the Respondent.
  - b. The Appellant shall have visiting rights limited to hours at the Chief’s office because of previous contentious conduct.
  - c. The Children’s Officer, Kisii central sub-county and the OCS Kisii Central Police Station to execute the order and give the Respondent custody of the child back to the matrimonial home at Itumbe.
3. The Appellant, being aggrieved, preferred three grounds in the memorandum of appeal dated 18.9.2023 as follows:
  - a. The learned trial magistrate erred in law and fact in failing to appreciate the law pertaining to children of tender years based on which the Appellant was the fit parent to have custody of the children.
  - b. The learned trial magistrate erred in law and fact in failing to uphold the Appellant’s right to a fair hearing under Article 50 of *the Constitution*.



- c. The learned trial magistrate erred in law and fact in failing to appreciate that one of the minors is already enrolled in school and shifting her was not in her best interest as it would distract learning.

### **Pleadings**

4. The Respondent instituted the Children Case vide the Complaint dated 7.2.2023, seeking the following reliefs against the Appellant:
  - a. The physical actual custody of the minors be granted to the Respondent.
  - b. Costs of the suit.
5. The Respondent then averred in the complaint that the Appellant had deserted the matrimonial home and left behind the minors for one year since 2021. Subsequently, the Appellant took away one minor, EN and left behind MRT. The Respondent stated that he was capable of taking care of the children and had always allowed full access to the Appellant, who had no fixed place of abode. The parties were summoned to the Children's Office, where they agreed that the Respondent would have custody of the minors.
6. The Appellant, as Defendant, filed a defence dated 20.2.2023. She denied the averments in the complaint. She stated that she was also willing and able to provide for the children. She also averred that the minors were too young to be taken away from her, as their welfare and best interest supported them staying with their mother.

### **Evidence**

7. The parties had signed a parental responsibility agreement, in which the mother signed off on the children to the Respondent on 5.9.2022. The orders were pending the hearing and determination of the case. The case was determined on 7.11.2023.
8. The orders appealed from were those given on 16.8.2023. These were to the effect that the application dated 6.7.2023 was dismissed with costs. The temporary custody was left with the Respondent pending the hearing of the main suit. The application that was dismissed was for review of temporary custody orders given earlier.

### **The Appellant's Submissions**

9. The Appellant filed submissions dated 9.12.2024. It was submitted that the ruling dated 16.8.2023 was improper as it did not consider that the children were already with the Appellant.
10. On custody, it was submitted that under Section 4(4) of the *Children Act*, the children's opinion was crucial in determining matters affecting them. The children's court did not take into account the minors' opinions or views.
11. It was further submitted that the custody of the child of tender years ought to go to the mother. Reliance was placed on the case of DK v JKN [2011] eKLR.
12. On fair hearing, it was submitted that the children's court erred in declining to set aside the ex parte orders on custody to the Respondent. No fair hearing was accorded to the Appellant and the minors. Reliance was placed on Article 50 of *the Constitution*.



13. The Appellant submitted that the decision of the children court was as such contrary to the welfare and best interest of the minors under Section 4(3) of the Children’s Act which was a paramount consideration in matters of children.

### **Respondent’s Submissions**

14. The Respondent also filed submissions dated 10.10.2024. It was submitted that the Children’s Court applied the correct legal principles on the welfare and the best interest of the minors in arriving at its decision. He cited Section 4(2) and (3)b of the Children’s Act.
15. It was Respondent’s submission that the learned magistrate was properly guided and decided the matter as required under Section 83 of the Children’s Act by considering the necessary factors before making an award of custody.

### **Analysis**

16. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of *Selle and another v Associated Motor Board Company and Others* [1968] EA 123, where the judges in their usual gusto, held as follows:-

“ .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

17. The matter was temporary, pending the decision on the suit. That decision has been made. The interlocutory proceedings are thus of no use at this stage. The appeal is academic, having been subsumed in the judgment. This is what we call a classic case of moot decision. In *Natural World Mombasa Safaris Ltd v Karuri (Civil Appeal E045 of 2022)* [2022] KEHC 9979 (KLR) (Civ) (7 July 2022) (Ruling), Justice Mulwa posited as follows:

The issue of “mootness” of a ruling, order or judgment has been discussed in several decisions relied upon by both parties to this application. Black’s Law Dictionary 10th Edition defines the term “moot” to mean – having no practical significance, hypothetical or academic, and a “moot case” is a matter in which a controversy no longer exists, a case that presents only an abstract question that does not arise from existing facts or rights”.

15.The Court of Appeal in *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* [2020] at paragraph 65, while citing the case of *Daniel Kaminja & 3 others (suing as Westland Environment Caretaker Group) v County Government of Nairobi* [2019] e KLR, Mativo J stated that: “A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case and any ruling by the court would have no actual practical impact”.

16.And that: “No court of law will knowingly act in vain ... a Suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity.



17. The doctrine of mootness was further discussed in the case *National Assembly of Kenya & another vs Institute of Social Accountability & 6 others* [2017] eKLR when the court rendered that: “...it is clear that the mootness doctrine is not an abstract doctrine. Rather, it is a functional doctrine founded mainly on principles of Judicial economy and functional competence of the courts and the integrity of the Judicial System... the court will inevitably consider the extent to which the doctrine advances the underlying principles, the certainty and development of the law particularly *the constitution* law and public interest.”
18. As an interlocutory appeal, the appeal has been overtaken by events, and caught up with the mootness doctrine as it ceases to present a justifiable dispute by the events. The event, in this case, is the delivery of the judgment upon which it was predicated. The impugned decision ceased to be of any practical value or use.
19. Before I pen off, I urge the respective advocates in this appeal to be studious with the developing law governing children. They did little to assist the court and their clients in this case, as their submissions were based on the repealed Children’s Act.
20. Given the mootness, it is not practical to continue to rule. Any questions on the propriety of the proceedings, which are not idle, should be deferred to any appeal challenging the main judgment. Consequently, the appeal is dismissed.
21. Award of costs in this court are governed by Section 27 of the *Civil Procedure Act*. They are discretionally. The Supreme Court has set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -
- “(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– those costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.
22. The matter arises out of a broken marriage and custody of children. The order that commends itself is that parties bear their own costs.

### **Determination**

23. The upshot of the foregoing is that I make the following orders: -
- a. The appeal herein is dismissed for being moot.
  - b. Each party to bear its own costs.



c. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27TH DAY OF FEBRUARY, 2025.**

**Judgment delivered through Microsoft Teams Online Platform.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

No appearance for the Appellant

Ms. Oncheweri for the Respondent

Court Assistant – Muriuki

**M. D. KIZITO, J.**

