



**AKC v TWM (Civil Appeal E150 of 2023)
[2025] KEHC 4810 (KLR) (Family) (28 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4810 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E150 OF 2023
PM NYAUNDI, J
MARCH 28, 2025**

BETWEEN

AKC APPELLANT

AND

TWM RESPONDENT

(eing an appeal from the Judgment and Decree of Hon C.C.Oluoch (MRS), Chief Magistrate at Nairobi Children’s Case No.148 of 2020 delivered on 1st December 2023)

JUDGMENT

1. Before this court for determination is the Appeal filed by AKC (the Appellant) through a Memorandum of Appeal dated 22nd December 2023. The Appeal arises out of a Judgment delivered on 1st December 2023 by Hon. C.C Oluoch (MRS), Chief Magistrate in Nairobi Children’s Case No.148 of 2020.
2. The Appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated 17th February 2025. The Respondent’s submissions are dated 12th March 2025.

Background

3. The Respondent herein filed a suit (as Plaintiff) in the Children’s Court in Nairobi being Suit No. 148 of 2020 seeking the following orders against the Respondent;
 - a. Custody of the minor issue be vested with the Plaintiff.
 - b. Maintenance of the child by the Defendant as prayed in paragraph 9 of the plaint.
 - c. Costs of the suit.



- d. Any other or further relief as the Honourable Court may deem fit to grant.
4. The Appellant and the Respondent solemnized their marriage in 2013. They were blessed with a child CCC born on 22nd September 2019. Due to marital issues, they separated in 2018.
 5. The defendant (Appellant) filed a defence dated 20th January 2021.
 6. The suit was fully heard and on 1st December 2023, Hon. C.C. Oluoch, Chief Magistrate delivered a judgement in which she made the following orders regarding custody and maintenance of the minor.
 1. That the parties shall have joint legal custody of the minor.
 2. That there shall be a residence order that the minor resides with the maternal grandmother until the mother comes back to the country.
 3. That the Defendant shall continue to access the minor on alternate weekends and a week of school holidays.
 4. That the Defendant shall cater for all educational and medical needs of the minor.
 5. That either party shall be at liberty to move the court for review as and when there is need.
 6. That each party shall bear its own costs.
 7. Dissatisfied with the Judgment of 1st December 2023, the Appellant filed a Memorandum of Appeal dated 22nd December 2023 in which he listed twenty nine (29) grounds of appeal as follows:
 1. That the Learned Magistrate erred in Law and in fact by misdirecting herself and granting a Residence order that the minor resides with the maternal grandparents until the mother comes back to the country while she made notice in the Judgment that the minor's mother who is the Respondent has been out of the country for over two years and it is not clear when she is coming back.
 2. That the Learned Magistrate erred in Law and in fact by denying the Appellant actual and physical custody of his own biological child against the weight of the evidence and in non consideration of the legal principles and laws governing custody to minors as per the Children's Act.
 3. That the Learned Magistrate erred in both Law and fact in failing to take into account the incontrovertible fact that the Respondent had neglected and/or abandoned the minor and left the country for over two years since June 2021 and had only come back to the country once since then in September, 2023.
 4. That the Learned Magistrate erred in Law and in fact in dismissing the Appellant's Amended Defence and Counterclaim dated 20th July, 2023 when there was overwhelming evidence in support of the Appellant's counterclaim-
 5. That the Learned Magistrate erred in law and fact by not addressing on the issue of restraining the Respondent from leaving the court's jurisdiction with the minor without leave of court or the father's consent despite granting interim orders on March, 2022 and the same being sought in the Appellant's Amended Defendant's Defence and Counterclaim dated 20th July, 2023.



6. That the Learned Magistrate in law in holding that the trial court would review the Judgment when there is need and thereby failed to consider that having issued the Judgment, the Trial court had become functus officio and therefore cannot review its own Judgment
7. That the Learned Magistrate erred in Law in failing to appreciate that having delivered its Judgment it had exercised its jurisdiction fully and in finality.
8. That Learned Magistrate in Law and in fact and made a biased determination by holding that actual and physical custody could not be granted to the Appellant when there was no evidence at all questioning his suitability and capacity to take care of the minor.
9. That the Learned Magistrate erred in law and fact in showing outright bias and discriminating against the subject minors surviving paternal grandparents by putting the Minor's maternal grandparents in equal footing as the Appellant where she granted them a residential order to stay with the minor.
10. That the Learned Magistrate erred in Law and fact in putting the interest of the Respondent before those of the minor contrary to the Children's Act.
11. That the Learned Magistrate failed to consider that the appellant had been providing and caring for the minor and had continued to be in the life of the minor and therefore could not be said to be unable to care for the minor if granted physical or actual custody.
12. That the Learned Magistrate erred in both Law and in fact in failing to give due regard to the material contradictions, discrepancies and inconsistencies in the Respondent's case thereby arriving at a wrong decision resulting into a miscarriage of justice and basing his judgment on speculation and conjecture.
13. That the Learned Magistrate erred in law and fact in failing to appreciate that the oral evidence adduced by the Respondent and her witnesses in trial court confirmed suitability of the appellant to be granted custody of the minor.
14. That the Learned magistrate erred in Law and fact in upholding the Report of the Children Officer from Makadara and which report challenged by the appellant's defence for being biased and discriminative with a clear motive to purge the Appellant and also portray him as a bad father to the minor.
15. That the Learned Magistrate misinterpreted and misconstrued the reports provided by the Children Officer from Makadara and misapprehended the law and procedure applicable thereto and hence caused injustice to the Appellant by denying him his right over his own child.
16. That the Learned magistrate erred in law and fact in placing over reliance on a children officer's Report in reaching her decision when in fact the minor's best interest and wishes were not captured and put into consideration and which actions of the Children Officer were in express violation of the children rights.
17. That the Learned Magistrate erred in both law and fact and failed to consider the undisputed facts that the Appellant has been actively providing for the minor, even



the Respondent categorically stated she was not looking for maintenance despite filing a suit seeking for maintenance.

18. That the Learned Magistrate erred in law and fact in finding that the relative's interests are more paramount as compared to the best interest of the minor herein and which is a violation of the children rights.
 19. That the Learned Magistrate erred in law and fact in making outright prejudicial substantive conclusions, applying elective justice disregarding the evidence tendered by the Appellant.
 20. That the Learned Magistrate misdirected herself and misinterpreted the constitution and the children act thereby arriving at an erroneous decision.
 21. That the Learned Magistrate erred in Law and fact wholly believing the Respondents submissions and disregarding the submissions of the Appellant.
 22. That the Learned Magistrate erred in Law and fact in proceeding on wrong principles and thereby arriving at a wrong decision.
 23. That the Learned Magistrate's decision is inconsistent with, and in contravention of, the constitution and the Children's Act.
 24. That the Learned Magistrate erred in law in failing to scrutinize/evaluate the submissions, documents and testimony of the Appellant and his witness and to correctly relate them to the case and thereby failed to arrive at a fair judgment.
 25. That the Learned Magistrate completely failed to consider the minor's right to live with and bond with her father.
 26. That the Learned Magistrate erred both in Law and Fact by not finding that the child's best interests and welfare were well served if her custody is bestowed upon the Appellant as opposed to the minor's maternal grandparents.
 27. That the Learned Magistrate erred in law and fact by not finding that no evidence was tendered in court to prove that the Appellant was not fit or capable to assure full custody of own child and hence made a wrong finding.
 28. That the Learned Magistrate erred in both law and fact in basing her decision on issues not pleaded and proven by the Respondent.
 29. That the Learned Magistrate failed to exercise her judicial powers and discretion judiciously and failed to consider all relevant facts.
8. He asked the court to allow the appeal on the following terms;
- i. That the Appeal is hereby allowed.
 - ii. That part of the Judgment of Honourable Chief Magistrate C.C. Oluoch be set aside in the terms of the orders granting a residence order that the minor resides with the maternal grandparents until the mother (The Respondent) comes back to the country and orders granting the Appellant access to the minor on alternate weekends and a week on school holidays.
 - iii. That this Honourable Court be pleased to hold that the minors maternal grandparents not entitled to the said residential orders until the minors mother comes back to the country while



first there was no evidence at all questioning the appellant's suitability and capacity to take care of the minor. Secondly, court in its own judgment had stated that the Respondent who is the minor's mother has been out of the country for over two years and it is not clear when she is coming back.

- iv. That further this Honourable Court be pleased to hold that the Appellant be granted physical and actual custody of the subject minor and not the limited access on alternate weekends and a week on school holidays while he is the only present parent in Kenya who has not neglected and/or abandoned the minor.
- v. That this Honourable Court pleased to grant orders restraining the Respondent from leaving the court's jurisdiction with the minor without leave of court or consent of the Appellant.
- vi. That this Honourable Court be pleased to set aside the Respondent's Complaint dated 31st January, 2020, and allow and grant the orders prayed in the Appellants Amended Defendant's Defence and Counterclaim dated 20th July 2023.
- vii. That this Honourable court be pleased to make any other orders that it may deem fit and just in the best interest of the subject minor herein.
- viii. That costs of this Appeal be borne by the Respondent.

Appellant's Submissions.

9. The Appellant submitted that the trial magistrate did not consider the best interest of the child when she granted residence orders to the maternal grandparent of the minor instead of the Appellant who is in the country. Also, that the trial magistrate fully relied on the report of the children's officer which was discriminative and portrayed him as a bad father. The trial magistrate did not capture well the wishes of the minor. He submitted that the court should have been cautious when relying on the wishes of the child as was held in the case of *J.O v S.A.O* [2016] eKLR.
10. Relying on the decisions in *DMM v PMN & another* [2020] eKLR and *In re DNK (Minor)* (Civil Appeal 138 of 2019) [2022] KEHC 3034 (KLR) (Family) (1 April 2022) (Judgment), he submitted that grandparents have no right to assume parental responsibility over a child when her parents are alive and have the means and are willing to take up parental responsibility voluntarily. He argued that no sufficient reasons had been given by the Respondent on why he should not be given custody of the minor. That he is able to provide for the minor and being the only parent in the country and he should have been given residence custody of the minor.
11. He also faulted the trial magistrate for not issuing an order against the Respondent taking the minor out of the jurisdiction. He argued that the Respondent has been out of the country since 2021 and has no intention of coming back. That in the event she comes back, she will take the minor out of this court's jurisdiction without obtaining consent from him. The Respondent took out a passport without informing him.
12. The Appellant's submissions restate her pleadings and evidence at the trial, I will therefore not repeat them here save that she urges that the court be guided by the decision of the Court in *Githunguri versus Githunguri* [1979] eKLR on the undesirability of separating the minor with her step sister.



ANalysis and Determination.

13. This is a first appeal. The duty of a first appellate Court was succinctly stated by Wendoh J in *JWN v MN* [2019] eKLR in the following words:

It is settled law that the duty of the first appellate court is to re-evaluate the evidence tendered in the subordinate court, both on points of law and facts and come up with its findings and conclusions.

14. The appellant challenges the decision of the trial court to the effect that the Court awarded residence to the maternal grandmother of the minor and alternate weekends a week of school holidays to the appellant, whereas he is the biological father and sole parent present in the Country.
15. It is not in dispute that Article 53 (e) of *the Constitution* recognises a child’s right to parental care and protection. Section 11 of the *Children Act* provides:-(1)Every child has the right to parental care and protection.
- (2)Except as is otherwise provided under this Act, every child has the right to live with his or her parents.
16. The primacy of parental rights is well settled by judicial precedent including in the case of *LAC & another v MJC* (Civil Appeal E119 of 2021) [2022] KECA 68 (KLR) (4 February 2022) (Judgment), where the Court of Appeal asserted that parental rights are unassailable except in instances where it is demonstrated that the parent is unfit.
17. It is for good reason that the law only recognises parents as having enforceable rights and accommodates members of the extended family only in instances where the biological parents consent to it or are adjudged to be unfit.
18. In arriving at its decision, the court opined that the child was not comfortable being around the appellant and not in her best interests to be given to ‘irresponsible parents’. The court proceeded to consider the recommendation of the Children’s Officer that custody be granted to the maternal grandmother.
19. Section 103 of the Children’s Act provides for considerations to be had in making a custody order; it states;

“In determining whether or not a custody order should be made in favour of an applicant, the Court shall have regard to:

- a. the conduct and wishes of the parent or guardian of the child;
- b. the ascertainable wishes of the relatives of the child;
- c. the ascertainable wishes of the child taking into account the child’s evolving capacity;
- d. whether the child has suffered any harm or is likely to suffer any harm if the order is not made
- e. the customs of the community to which the child belongs;
- f. the religious persuasion of the child;
- g. whether a care order, supervision order, personal protection order or an exclusion order has been made in relation to the child concerned, and whether those orders remain in force;



- h. the circumstances of any sibling of the child concerned, and of any other children of the home, if any
 - i. any of the matters specified in section 95(2) where the court considers such matters to be relevant in the making of an order under this section; and
 - j. the best interest of the child.”
20. In considering whether the trial court erred I will gauge as to whether the trial court was guided by the above provision of law in considering what was best in the circumstances of the case. I also take note that a child’s growth mental and emotional capacity is continuous and her views are bound to evolve. The trial court in making its orders did seek and considered the views of the child as well as the Children Officer’s Report.
21. The trial magistrate however fell into error by failing to consider the Constitutional provision and the provisions of the Children Act which categorically provide that it is the biological parents who have parental responsibility.
22. The responsibility is not determined by the fact of the marriage. The determining factor is whether the person is the mother or the father of the child. This is well captured under Article 53 (1) e of the Constitution which states –
- “whether married to each other or not.”
23. The Trial Court in its judgment stated that it would not be in the best interest that the minor stays with the father who is not around when he has access of the minor. That being a girl, the child should be taken care by her grandmother until her mother comes back.
24. This finding was contrary to the Law which places parental responsibility on the parents of a child. Grandparents have no right to assume parental responsibility over a child when a parent is alive and has the means and is willing to take up parental responsibility voluntarily. The child has a right to parental care and denying the child that right cannot be in the child’s best interests. The Act provides that even where the father and mother were not married, the father shall acquire parental responsibility.
25. The law leans mostly towards a child being raised by a parent. The best interest of the child are determined depending on the circumstances of the case. Children are unique human beings who are known to adopt to their surroundings very fast. It would not take long for the minor to adopt to the new environment with the father who is her flesh and blood.
26. The minor will not be impacted negatively if she is in the custody of the father as he is not a stranger to her. Furthermore, there is no evidence to prove that the appellant is an irresponsible father. The mother is currently out of the Country and it is not known when she will return. It would be best that the father of the minor be granted actual custody of the minor.
27. The decision in JKN v HWN [2019] eKLR, cautions Courts against allowing themselves to be persuaded by stereotypes which assume that a father cannot be a primary care giver, in making decisions on custody. The fact that the mother is out of the Country should have weighed heavily in favour of Custody being granted to the Appellant. In the circumstances, I will allow the appeal and make the following orders-
- 1. The mother and father shall have joint legal custody
 - 2. The father shall have actual custody of the minor.



3. The grandparents of the minor shall have access to the minor on terms to be agreed upon with the appellant, especially to allow for bonding with her sibling who is staying with the maternal grandparents.
4. The father shall cater for all the educational and medical needs of the minor
5. Either party at liberty to apply
6. Each party will bear their own costs

It is so ordered

SIGNED, DATED AND DELIVERED VIRTUALLY IN NAIROBI ON 28TH DAY OF MARCH , 2025.

P M NYAUNDI

HIGH COURT JUDGE

In the presence of;

Kanja Court Assistant

