



**Akello v Eguchi (Civil Appeal E139 of 2023)
[2025] KEHC 4826 (KLR) (Family) (28 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4826 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E139 OF 2023
PM NYAUNDI, J
MARCH 28, 2025**

BETWEEN

GEORGE BRIAN AKELLO APPELLANT

AND

WINNIE EGUCHI RESPONDENT

(Being an appeal from the Judgment & Decree of Hon Festus Korir (Senior Resident Magistrate), made on 10th November 2023 and his subsequent Ruling and Orders made on 24th January 2024 in Nairobi Children's Case No. E12226 of 2022)

JUDGMENT

1. Vide Amended Memorandum of Appeal dated 29th January 2024, the Appellant herein challenges the judgment of the Court delivered on 10th November 2023 and 24th January 2024.
2. In Judgment delivered on 10th November 2023 the Court ordered as follows-
 - a. That the legal custody of the minor XFS to jointly vest in the Plaintiff and the Defendant
 - b. The Defendant to have his actual custody, care and control
 - c. That the plaintiff to have access as follows:
 - a. From November- December 2023 as per existing Orders made on 15th September 2022
 - b. From January 2023 on alternate Saturdays from 9am -4pm
 - c. At school (when he begins school) subject to school rules and regulations
 - d. Parental responsibility is apportioned as follows:



Plaintiff

- a. School fees and school related expenses
- b. Medical

Defendant

- a. Shelter
- b. Clothing
- c. Food

- e. Each party is at the liberty to apply

3. Subsequent to the Judgment the Appellant herein filed application dated 10th November, seeking that the Court directs that the minor be enrolled at Consolata Nursery School (PP1) in January 2024. On 24th January 2024 the Court in its ruling dismissed the Application and directed that the parties select a school within the vicinity of the defendant's residence and approach court on a date to be mutually agreed upon.
4. The Appellant has lodged an Appeal and enumerated 24 grounds upon which he challenges the Judgment and the subsequent ruling and seeks the following orders-
 - a. Legal and actual custody of the minor jointly vest in the appellant and the respondent
 - b. The appellant and respondent alternate having actual custody of the minor every fortnight
 - c. The Appellant and respondent to have unrestricted access to the minor when he is in the custody of one of them or the other
 - d. The Appellant and the Respondent to contribute equally towards the minor's schooling and school related expenses.
 - e. The Appellant and respondent to be equally responsible for the minor's medical expenses
 - f. The appellant and the Respondent to bear individual responsibility for the minor's food, shelter and clothing when he is in their respective custody
 - g. The ruling and orders made on 24th January 2024 be set aside
 - h. Any other or further relief this honourable court will deem fit to grant.
5. The Appeal was canvassed via written submissions. The Appellant's Submissions are dated 13th August 2024, while those of the Respondent are dated 13th November 2024. The Appellant highlighted his submissions on the 14th November 2024
6. This being a first appeal the appellate Court, as stated in the decision of *Mzee v Muli (Suing as the Legal Representative of Daniel Muli - Deceased) (Civil Appeal E160 of 2023)* [2024] KEHC 8581 (KLR) (11 July 2024) (Judgment) has a duty -
 - (14) to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
7. Further in the case of *Mbogo and Another v Shah* [1968] EA 93 the Court stated:



...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

8. Vide Plaintiff dated 4th December 2023 in Nairobi Children's Case No. E1226 of 2022, the Appellant sought the following orders-
 - a. Equal legal and actual custody over baby Xayn Faraji Shitakha
 - b. Equal access to baby Xayn Faraji Shitakha
 - c. Costs of the Suit
 - d. Interest on (c) at Court rates from the date of filing suit until payment in full.
 - e. Any other or further prayers or reliefs which this court shall deem fit and just to grant
9. In defence and Counterclaim dated 10th November 2022, the Respondent sought the following orders-
 - a. The defendant be granted actual and legal custody of the minor.
 - b. Any access order in favour of the plaintiff be pegged on him providing for the minor and be limited to intervals of a single day on alternating weekends.
 - c. The plaintiff be ordered to provide maintenance and upkeep for the minor as per paragraph 13 above, till the minor attains the age of majority
 - d. The Court do order the plaintiff to refund the defendant in lump sum half of the expense incurred by the defendant for the maintenance and upkeep of the minor from conception, being June 2019 till when the court makes an order for maintenance against the plaintiff. OR in the alternative the maintenance / upkeep order that the Court shall make against the plaintiff be back dated to when the minor was conceived in June 2019.
 - e. The defendant be awarded costs of the suit for the premature filing of the suit.
10. The Appellant filed reply to defence and defence to counter claim dated 27th March in which he prayed inter alia that-
 - a. Both parties ought to be ordered to take individual responsibility for the minor's food clothing, shelter, medical expenses and entertainment whenever he is in either of their custody and that they share his education expenses equally.
11. He further stated that he had prepared a parental responsibility agreement along those lines but the defendant declined to sign the same.
12. After an avalanche of interlocutory applications seeking interim access, citing of the Respondent for contempt and enrolment of the minor in school the Court in ruling delivered on the 10th March 2023 that it would be best use of the Court's time to have the matter proceed to full hearing and declined to hear the interlocutory applications.
13. The matter then proceeded to hearing and the Appellant testified alongside his father, while the Respondent testified as her sole witness.
14. Summary of the Plaintiff's Testimony. He relied on his witness statement and bundle of documents dated 27th March 2023, both of which were admitted as his evidence in Chief. He is the biological



- father of the minor. Following his ejection from the matrimonial home at Uthiru by the Respondent he is now living at his family home with his father. The house can comfortably accommodate him, the minor and his father with each having a separate room.
15. He denied abusing drugs and stated that the messages presented by the respondent where they were talking about marijuana, were posted way back in 2019 and were taken out of context. He stated that he provided for the child and has the support of his father, and larger family in raising the minor. He stated it was in the minor's best interests to be connected to his paternal relatives and the house in Ngara provided that.
 16. He was categorical that the minor needed him in his life. On cross examination he stated that on account of the breakdown in communication he had not provided for the child. He stated that after their marriage he moved into a house that the respondent was paying a mortgage for. The mortgage is in her name. He drafted and prepared a pre nuptial agreement which she declined to sign. Efforts to construct a matrimonial home fell apart and so did efforts to purchase a residential flat jointly. He stated that there was a period where he was not earning and also when he was unemployed.
 17. After the purchase fell through he refunded to the Respondent the money she had contributed to the purchase. He admitted that he was charged with assaulting the other child of the respondent (his step son) but that they had reconciled with the respondent and the charges were withdrawn.
 18. PW2 is Mathew Shitakha, he is the father of the Appellant. He confirmed that after leaving the house of the respondent the appellant moved in with him. The house in Ngara is his house that has been passed down the generations beginning with his parents. The siblings of the appellant are welcome to visit. They have prepared a room in the house suitable for the minors accommodation. He stated that the appellant and the minor have a strong bond and that the appellant is capable of performing his paternal responsibilities. He and other members of the family are available to support the appellant in this regard. He denied that the appellant abuses drugs and other intoxicating substances. He was aware that there was a criminal case of assault which was later withdrawn.
 19. DW1- Winnie Eguchi. She confirmed that she and the appellant were married but later separated. The union had one child. She has a child from a previous union. The appellant was not responsible, did not lift his end of the financial obligations in terms of running the home. He was violent towards her and her older son. He took alcohol and abused marijuana. She evicted him from the home as she had evidence of infidelity. She was prepared to pay the entire school fees for the minor. The implementation of the interim orders had been tumultuous and therefore should be reviewed.
 20. In its judgment having summarised the evidence adduced by both the appellant and the respondent, the court framed the following as the issues for determination
 - a. Whether the Plaintiff should be granted the actual custody, care and control of the minors (sic), and
 - b. How should the Party's responsibility the minors be apportioned? (sic)
 21. On Custody the Court made reference to Section 102 of the *Children Act* and the principles set out thereat to guide courts when making an order of custody. Further the Court referenced Article 53 (2) of *the Constitution* of Kenya and Section 8 of the *Children Act* on the obligation of the Court to give primacy to the best interests of the minor.
 22. The Court considered the age of the minor (child of tender years); that the arrangement of custody proposed by the Appellant involved shuttling the child from one house to another, the need to provide



- the child with stability and determined that the defendant was providing the better environment, and granted her actual custody.
23. On access, the Court considered that the access arrangement that allowed the appellant to have access to the minor on Mondays, Wednesdays and Fridays and alternative Saturdays was disruptive to the Child's schedule. The court weighed this against the appellant's contention that he was the biological father of the minor and need to nurture the bond with the minor.
 24. The Court determined that it was in the interest of the minor to frame an access structure that considers the daily routine of the child. On overnight stay of the minor at the appellants, the following factors appeared to weight against the appellant, that the house he lived in had other occupants and there was evidence that he was smoking bhanghi in the house and the Court was obligated to exercise caution to avoid him exposing the child to the same. The court also was of the view that the evidence showed that the appellant was an individual of ungovernable temper.
 25. On parental responsibility, the Court relied on Section 53 (1) of the Constitution of Kenya; Sections 31, 32 and 110 of the *Children Act* to find that both parents have a shared responsibility to provide for the child. The Court then shared the responsibility as per paragraph 4 of the judgment.
 26. In ruling dated 24th January 2024, the Court in dismissing the application, that sought to have the child enrolled at Consolata primary, opined that it was in the best interest of the child given his age to attend a school within close proximity of where he is residing. Further the Court determined that the respondent's presence in the same compound with the minor would be disruptive and therefore not in the child's interests.

Summary Of Applicants Submissions

27. The Appellant submits that it is in the child's best interest that he have equal actual custody of the minor and that the trial court erred in failing to grant him equal custody on the basis that the equal actual custody would deprive the minor of stability; that he abuses cocaine and marijuana; that he had a ungovernable temper and that his access to the minor had occasioned a delay in the minor's development and the minor was falling ill after every visit with him.
28. He further takes issue with the ruling when the Court observed that the minor would be distracted by his proximity to him at school. He challenges the distance from school to the home of the Respondent and contends that there are other children from that same compound who attend the school he has suggested.
29. He relies on Article 53(1)(e) of *the Constitution* and Section 32 (1) of the *Children Act* for his assertion that the Court should have granted joint equal custody. Reference is also made to the Supreme Court decision in MAK v RMAA & 4 Others Petition No.3 (E003) OF 2022 and decision in PNN v BMK (2021) eKLR
30. The Appellant further submits that it is not in the interest of the minor for him to be denied access to his father and reference made to the decisions in Noordin v Karim [1990] eKLR and MAK v SNMM & Another [2019] eKLR.
31. The Appellant further submits that the tender years doctrine is not an inflexible rule as it must be weighted against the best interest of the Child principle, reference is made to the decision in SMM v ANK [2022] eKLR. The Appellant relies on the decision in JKN v HWN and urges that the decision on custody was premised on the stereotypes as to the respective roles of men and women within the family. It is urged that since the parents are separated the shuttling of the child from one house to the other is inevitable.



32. It is submitted that the respondent has been continuous contempt of the orders of the Court and this ought to have been considered in the court's decision.

Summary Of Respondent's Submissions

33. The Respondent urges that the court was right in arriving at its decision as the judgment was informed by the best interests of the Child and reference made to the decision of the Supreme Court in MAK v RMAA (Supra), which decision underscored that the interests of the child will always trump those of the parents. This principle was also underscored in Bhutt v Bhutt Mombasa HCCC No. 8 of 2014 (OS) and MA v ROO [2013] eKLR .
34. Reference is made to an Australian decision in U v U [2002-2003] CLR 238 at page 257 on principles to be considered in determining the best interests of the child.
35. The respondent urges that the Court was right in finding that the Consolata School given the distance from the home of the respondent and the age of the minor was not a viable option in the current circumstances.
36. It is submitted that a children's matter cannot be the arena for the battle between the parents as stated by Onyiego J in [*MOA v HAO Civil Appeal No. 139 of 2019*](#).
37. On the tender year principle it is contended that this is well entrenched by judicial precedent tracing back to the decision in Re S an infant) [1958 1All ER 783; Wambwa v Okumu [1970] EA 578; Midwa v Midwa [2002] 2 EA 453; J.O. v S.A.O [2016] eKLR; J.K.W v M.A.A [2015] eKLR; N.M.M v J.O.W Civil Appeal No. 30 of 2016; CIN v J.N.N [2014] Eklr; AOA v SFA (Family Appeal EO22 of 2021) [2022] KEHC 10746 (KLR).
38. It is urged that the circumstances in the instant case must be distinguished from those in J.K.N v HWN (Supra) as the children in that matter were not children of tender years and reference made to the decision in FOA v EA Civil Appeal No. E001 of 2023 (Kakamega high Court).
39. It is submitted further that the accommodation arrangements made by the respondent are preferable to those by the appellant. On allegations of violence reference is made to the decision in Civil Appeal No 40 of 2016 TL and IL versus SL, whose facts are almost similar to the instant case.

Analysis And Determination.

40. Having considered the pleadings herein and submissions filed and authorities cited and the relevant law, I frame the following as the issues for determination;
- a. Whether it is in the best interests of the Child to vary the orders of the trial court
 - b. Who should pay the costs of the Suit
41. It is trite law that in every decision undertaken concerning a child, the best interest of a child should be taken into account. This position is clearly captured in the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The same has also been captured under Article 53 (2) of [*the Constitution*](#) of Kenya as follows: 'a child's best interests are of paramount importance in every matter concerning the child'.
42. From the onset, it follows that what matters to this court is the best interest of the minors and the same was well pronounced in the case of MAA v ABS [2018] eKLR, where it was held as follows:-



.... While considering this matter, this Court is alert to the welfare of the children herein who are of tender years. The matter is not about the applicant/appellant and the respondent; and their interests are secondary to those of the child. The foregoing provisions require this Court to treat the interests of the child as the first and paramount consideration and must do everything to inter alia safeguard, conserve and promote the rights and welfare of the child herein. Acting in the best interest of the children in question.

43. The issue is whether the custody orders as granted by the Court are detrimental to the interests of the minor and whether the decision was arrived at a misapprehension of the facts and applicable law by the parties.
44. The Appellant faults the Court for giving weight to the ‘child of tender years principle’ at the expense of the ‘best interests of the Child principle’. The Respondent on the other hand contends that certain traits of the Appellant disqualify him from having custody and that it is in the best interests of the child that actual custody be given to the respondent.
45. Section 11 of the *Children Act*, favours a situation where the child is able to live with both parents
Except as is otherwise provided for under this Act, every child has the right to live with his or her parents
46. The exceptions to the ideal are when the parents of the child are not living together and the Court is then required to make a decision on actual custody of the minor that prioritises the best interest of the child. In the case of Custody, the Court is required to make an order that ensures that the Child has access to both parents that ensures that there is sufficient opportunity for bonding that allows for the nurturing of the parent – child bond.
47. Ideally parents should be able to rise above their differences and agree on an arrangement that has the interests of the minor at the forefront, when the parents are unable to forge such an agreement then the Court is called upon to do so. In making this decision the Court does not do so on an independent limb or based on a subjective analysis but rather is guided by Section 103 of the *Children Act* which sets out the principles to guide a court.
Section 103 Principles to be applied in making a custody order.
48. 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 relativ of the child
 - c. the ascertainable wishes of eh 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 o an exclusion order has been made in reation 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.
49. Section 95 (2) referred to above provides as follows
- Where the Court is considering whether or not to make an order under Sub section (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 inter sex, 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 pschotropic 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
50. From the foregoing it is evident that the Court is required to inquire into the circumstances of each case guided by the above principles and arrive at a decision that safeguards the best interests of the child. It is unfortunate that, where as in the instant case, the contest is acrimonious the parties may not be of much assistance as they are bound to either exaggerate or downplay certain factors dependent on how these assist their individual cases.
51. In arriving at the decision on custody, the Court having determined that the minor was a child of tender years placed custody of the minor with the respondent and then proceed to make orders on access by the appellant. In determining access, the Court factored in that the appellant was of a person of ungovernable temper and further that his use of intoxicating substances posed a danger to the minor.
52. The decision in JKN v HWN [2019] eKLR signals a departure from the inflexible approach of the tender years doctrine to an approach that weights that doctrine against the best interests of the child principle. This brings the jurisprudence in Kenya in tandem with the global practice as evidenced in the decision of the Canadian Supreme Court in Young v Young [1993] 4 S.C.R. 3 where the Court stated-
it has been widely observed by those studying the nature and sources of changes in family institutions, popular notions of parenthood and parenting roles have undergone a profound evolution both in Canada and elsewhere in the world in recent years. One of the central tenets of this new vision is that child care is no longer and should no longer be exclusively or primarily the preserve of women



53. What this means is that under the current dispensation the Court is obligated to consider the tender year doctrine under the light cast by the best interest of the child principle in making a decision on who has actual custody of the child. In his paper 'Rethinking the Substantive rules for Custody Dispute in Divorce.' Mich. L. Rev 83 [1984]; 477-569; David L. Chambers suggests that the best interests of preschool children will be fostered by placing them with the parent who has provided a substantial majority of the day to day care of the Child.
54. I agree, and as pronounced by King Solomon in I Kings 3:16-28, it would do harm to the child to split the child, which is what is bound to happen if at this time when the rift between the parents is so acrimonious and raw an order of joint actual custody were to be made. The record is clear that the Child is of tender years. Since birth he has been residing at Uthuru. The father of the child does not challenge the parental care that the mother provides. There is on record the report of the Children Officer dated 22nd October 2022 that also recommends that the Respondent be granted custody of the minor. In the circumstances albeit on different grounds, I find that the Court did not err in granting actual custody of the minor to the respondent.
55. On access, as stated above, the law recognises that it is in the interest of a child to be provided for and nurture a relationship with both parents. A parent can only jeopardise this right that they enjoy if it is demonstrated that their conduct and actions pose a real risk of harm to the minor. In other words the conduct complained of must meet the threshold of evidence of actual risk or harm to the minor for it to result in the curtailment of parental rights towards the minor.
56. The Court considered this very issue in the decision of JKN v HWN [2019] eKLR and stated as follows-
- As I read our case law now, sexual indiscretion or marital indiscretion or extra marital sexual behaviour will only be a factor in a custody award if it rises to the level where it harms the children as for example is assumed to happen when the parent in question has behaved so dishonestly that it affects the children through trauma. If there is no showing of harm, sexual indiscretion alone, without more, is not an invariable rule excluding a Court from awarding custody to a parent where other favourable factors are present.
57. In other words Courts will not step in to be the moral police of parents but will only step in to curtail access where it is demonstrated that the action complained of is likely to harm the minor. In the instant case, I do not find that the conduct complained of met the muster to sanction the appellant. Finding so, is not condoning his behaviour but simply acknowledging that the skill set required to be a good spouse is not necessarily the same required to be a good parent. The report of the Children officer demonstrated that the child has a healthy relationship with the appellant. The issue therefore, is whether the access order made by the trial court is detrimental to the child's best interest. I agree with the Court that the stability of the child is the pivotal consideration. The appellant suggests that on account of the separation of the parents, it is inevitable that the child will be shuttled from one home to another. That may be true, but the child cannot be placed on a roller coaster. There must be structure and predictability and routine to foster stability for the child.
58. The proposal by the Appellant is that fortnightly access as ordered and school visits is limiting and will not allow for the nurturing of the parent child bond. At the moment the child is of school going age, any arrangements on access have to factor in the school programmes and the need to ensure the child is not in constant motion. This renders impractical the continued access three times a week in the afternoon. I however, fully appreciate the need for the child to nurture the relationship with his parent.
59. In the circumstances, I will vary the orders on access as follows-



- a. The Appellant will have access to the minor on every Saturday from 9am to 4pm
 - b. On other days of the week, the Appellant will have daily virtual access to the minor for upto 1 hour at a time to be agreed upon with the Respondent. The appellant will provide the minor with the gadget to be used for the call.
60. On the issue of enrolment of the minor at Consolata Primary School, I see no reason to disturb the decision of the trial court. The Application as framed is intended to allow the appellant easy access to the minor. This cannot out weigh the fact that it is in the best interests of the minor to reduce the commute time to school, especially if the schools suggested will offer the same quality of education. The appellant’s concern is that the tuition is above his budget and yet he is required to meet the school fees and school related expenses of he minor.
61. The concern of the appellant in that regard is legitimate. Accordingly it is directed that the respondent will register the minor at a school near her residence but the appellant will pay fees equal to that payable at Consolata Primary and the respondent will meet the difference.
62. In conclusion the appeal partially succeeds. These are the final orders.
- a. The legal custody of the minor XFS to jointly vest in the Appellant and the Respondent.
 - b. The Respondent to have actual custody, care and control of the minor.
 - c. On access-
 - a. The Appellant will have access to the minor on every Saturday from 9am to 4pm
 - b. On other days of the week, the Appellant will have daily virtual access to the minor for upto 1 hour at a time to be agreed upon with the Respondent.
 - c. The Appellant will provide the minor with the gadget that they will use for the virtual call.
 - d. The Respondent will register the child at a school near her residence and the appellant will pay fees equivalent of the amount payable at Consolata primary School and the respondent will pay the difference. The fee is payable direct to the school in compliance with the school rules on payment of fees.
 - e. The other orders of the Court in its judgment of 10th November 2023 are upheld.
 - f. Each party will bear their own costs.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF MARCH 2025

P M NYAUNDI

JUDGE

In the presence of:

Kanja Court Assistant

