



**Iravo v Abisai & 5 others (Civil Appeal E098 of 2022)
[2025] KEHC 3792 (KLR) (Family) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3792 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

CIVIL APPEAL E098 OF 2022

HK CHEMITEI, J

MARCH 27, 2025

BETWEEN

PNI APPELLANT

AND

NLA 1ST RESPONDENT

PL 2ND RESPONDENT

DL 3RD RESPONDENT

FL 4TH RESPONDENT

ML 5TH RESPONDENT

PL 6TH RESPONDENT

(Being an appeal against the judgment and orders of the Senior Resident Magistrate's Children's Court, at Nairobi (Honourable H.M. Mbatia) SRM on 6th September, 2022)

JUDGMENT

1. This judgment relates to the memorandum of appeal dated 3rd September, 2022 filed by the Appellant, PNI, against the judgment and orders entered on 6th September, 2022 by Honorable H. M. Mbatia (SRM) in Nairobi Children's Court Case No. 1585 No. 2016: T. I. N., H. M. N. & E. N. K. P. Suing Through The Father/next Friend PNI Versus NLA, PL, DL, FL, ML & PL.

Background

2. The Appellant is the biological father and only remaining parent of the minors herein, their mother (FL) having died on 12th August, 2016 from medical complications. The 1st – 6th Respondents are FL's



siblings, with the 1st Respondent having actual/physical custody of the minors from 11th December, 2016 to date.

3. The minors testified that their father had subjected them and their mother to domestic violence, physical and emotional abuse. They unanimously expressed their wishes not to live with their father due to the trauma and pain occasioned on them by him. Their maternal aunt has been exercising parental responsibility over the minors, including clearing school fees arrears and paying the same and other bills up to date. Their father has not done anything in terms of parental responsibility and support towards them. He refused to attend therapy sessions as recommended and also brought in another woman that he was having an affair with, to live with them when his wife died. He wishes to be granted custody of the minors on account of his being their biological father and sole remaining parent.
4. The judgment being appealed from Ordered as follows:-

“...The upshot is the Plaint is dismissed and I grant custody of the minors to the 1st Defendant. However, the Plaint shall be granted access to the minors once he implements the recommendations in the Joint Progress Report submitted by Margaret Njihia – Mbuti and Bernice N. Nderitu. Furthermore, in the event the Plaintiff takes up his parental responsibility and pays the minors’ school fees and related expenses consistently for one academic year, then access granted on 18th September, 2017 shall apply and the Plaintiff shall be at liberty to apply for a review of this Judgement. This being a family matter, each party shall bear its own costs.”

5. The Appellant has appealed on the Grounds That The Learned Magistrate Erred In Law And In Fact:-
 - 1) By failing to weigh the evidence by applying the standard applicable to all civil cases.
 - 2) By failing to reasonably analyze the evidence and make conclusions on the same as set out on record.
 - 3) In accepting the narrations given to her by the children without weighing the same against other evidence on record and without taking into account the probability that the children had been suborned by the Respondents and without bearing in mind that the children were not subjected to cross examination.
4. By accepting and relying on prejudicial “expert” reports which were not subjected to interrogation by counsel.
5. Contradicting her own orders with respect to status quo during trial and laying blame on the Appellant for not paying school fees.
6. Failing to hold the Appellant’s constitutional right to have custody of the children.
7. Failing to take cognizance of the fact that the Appellant had faithfully attended sessions at the child psychologist clinic while the Respondents had caused the children to skip the sessions.
8. By completely ignoring undisputed facts on record which goes to show that the Appellant was a responsible, caring and loving father.
9. By putting the Appellant on a divorce – like trial and judging him for unsubstantiated allegations of cruelty against his deceased spouse and drawing a conclusion to the effect that the Appellant was not suitable to have custody.
10. In denying the Appellant custody when there were no circumstances militating against his suitability.



11. In promoting and perpetuating the illegality of the Respondents' actions, the Respondents having abducted the children from the Appellant.
6. The Appellant prays That:-
 - a. The appeal be allowed.
 - b. The Appellant be given the exclusive custody of the children.
 - c. The Respondents be permanently restrained from interfering with the Appellant's custody and care of the children.
7. The Appellant has filed written submissions dated 17th October, 2024 placing reliance on the following:-
 - a. B. K. v E. J/ H [2012] eKLR where the court held as follows: "the test for the best interest of a child is not subjectively dictated by the selfish whims of a child. There has to be an element of objectivity."
 - b. MAK v RMAA & others [2023] KESC21 (KLR) where the court held as follows: "It is evident from the foregoing provisions that the child has a right to parental care and it is in the best interest of the child that he is brought up and cared for his or her parent. This right can only be denied if it is proved with cogent evidence and valid grounds that a parent is not suitable or is incapable of taking care of the child."
 - c. JM v MN & Another(Civil Appeal E022 of 2021) where the court stated as follows: "In any event, the best interest of the child principle focusses on the child and not the rights of a parent and the conduct of the parent is only relevant if it adversely affects the best interest of the child. The Appellant has the means to fully take care of the child. It has not also been demonstrated that he is grossly immoral, grossly negligent or is capable of harming a child."
8. The Respondents have not filed responses and written submissions to the instant appeal.

Analysis And Determination

9. I have carefully considered the amended memorandum of appeal before the court and the written submissions filed by the parties and address them as below.
10. In ANM v FPA (suing as the father and next friend of the minor) [2021] eKLR, its submitted as follows:-

“...9. In the submissions filed on behalf of the Appellant, reliance was placed on MAA vs. ABS [2018] eKLR and it was contended that Article 53(2) of *the Constitution* specifically provides that a child's best interests are of paramount importance in every matter concerning the child. This principle is echoed in Section 4(2) and (3) (b) of the *Children Act* which provides for the paramountcy of the welfare of the child and binds Courts to safeguard and promote it. Based on MJC vs. LAC & Another [2020] eKLR, it was submitted that what constitutes the best interest of the child depends on the circumstances of each case...”



11. In, JKN v HWN (Civil Appeal 40 of 2014) [2019] KEHC 6737 (KLR) (13 June 2019) (Judgment), the court stated as follows:-

“...47. In addition to the two post-judgment facts I pointed out above, in reaching a verdict that is in the best interests of the child, it is important to begin with section 83 of the Children Act. That is the section that lists down the factors to be considered in making a custody award. It reads as follows: In determining whether or not a custody order should be made in favour of the 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 any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application; d. the ascertainable wishes of the child; e. whether the child has suffered any harm or is likely to suffer any harm if the order is not made; f. the customs of the community to which the child belongs; g. The religious persuasion of the child; h. whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force; i. the circumstances of any sibling of the child concerned, and of any other children of the home, if any; j. The best interest of the child. Where a custody order is made giving custody of a child to one party to a marriage, or in the case of joint guardians to one guardian, or in the case of a child born out of wedlock to one of the parents, the court may order that the person not awarded custody shall nevertheless have all or any rights and duties in relation to a child, other than the right of possession, jointly with the person who is given custody of the child...”

12. From the lower court proceedings, it is evident that the children have made it clear that they do not wish to live with their father, on account of physical and emotional abuse metted upon them and their deceased mother. Their father also refused to comply with the child psychologists’ recommendations in her report. He also does not pay for their education and life related bills – these are paid by their maternal aunt. He pegs his parental responsibility on the children living with him. The children’s maternal relatives have expressed their reservations about his mental capacity to raise the children and further that he has refused to seek professional assistance in this regard. There is no evidence on record on his change of conduct from when the lower court judgment was delivered to date neither is there any application for review of the judgment on account of the father taking up parental responsibility over his children.
13. Based on the above reasons I find the lower court’s decision reasonable in the circumstances. Nothing stops the Appellant from adhering to the directives contained in the judgement.
14. It is also worth noting that the Children’s Act is fluid and the Appellant can still approach the court at any moment in the event that there are changes or compliance which he feels the court ought to consider.
15. For the above reasons I do not find any reasons to disturb the trials court judgement and the appeal is hereby dismissed with no order as to costs.

DATED SIGNED AND DELIVERED VIA VIDEO LINK THIS 27TH DAY OF MARCH 2025.

H K CHEMITEI

JUDGE

