



**JMN v LWK (Family Appeal E103 of 2023)
[2025] KEHC 9241 (KLR) (Family) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9241 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
FAMILY APPEAL E103 OF 2023
HK CHEMITEI, J
JUNE 26, 2025**

BETWEEN

JMN APPELLANT

AND

LWK RESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT OF HON M W KIBE (SRM) DATED 1ST SEPTEMBER 2023 IN MILIMANI CHILDRENS COURT CASE NO E1270 OF 2022)

JUDGMENT

1. The Appellant and the Respondent are husband and wife and were blessed with two minors who at the time of the suit at the trial court were both aged below 10 years.
2. The Respondent sued the Appellant for custody and maintenance of the minors and the Appellant apart from filing his defence filed a counterclaim as well.
3. The matter proceeded to full trial where the trial court made orders awarding both parents joint legal custody and actual custody to the Respondent. The court also granted access to the Appellant on alternate weekends and school holidays and directed him to provide educational needs, medical, clothing, food and a monthly sum of Kshs.15,000 to be taken care of by the Appellant.
4. Aggrieved by the said judgement the Appellant filed this appeal citing several grounds: that the court failed to appreciate the exceptional circumstances which ought to have allowed the Appellant have actual custody of the children, the court failed to give reasons for awarding actual custody to the Respondent and that the court failed to take into consideration the children’s officers report.
5. The court directed the parties to file written submissions and they complied.



6. The Appellants submissions majorly centered on the issues raised in the grounds of appeal. He argued that the trial court failed to appreciate the Respondent's lifestyle which negatively affected the minors.
7. He submitted that there was sufficient evidence to show that the Respondent was involved in serious drinking and partying habits which did not permit her to take care of the minors.
8. That the Respondent had no known source of income and therefore granting her the custody of the minors was not in their best interest.
9. In essence the Appellant submitted that it was in the best interest of the minors to permit him have actual custody of the minors.
10. The Appellant equally submitted that the trial court did not give any cogent reason why the Respondent ought to have actual custody of the minors. He relied on ZNN.Vs. MWN (2015) eKLR to advance this ground.
11. In summary he submitted that the trial court failed to take the best interest of the child as provided under Section 8 of the *Children Act*. He prayed for the appeal to be allowed.
12. The Respondent on the other supported the findings by the trial court indicating among others that it was due to the best or primary interest of the children that the court gave the specific orders which the Appellant has appealed against them.
13. The Respondent relied on several authorities to argue that she was capable of taking care of the minors who were tender in age and therefore needed careful management. The Appellant was found incapable of taking good custody of the minors because of his work schedule and that he already had another partner.

Analysis and determination.

14. The duty of the court at this stage is not to introduce fresh evidence but to reevaluate what transpired at the trial court with a view of arriving at independent finding with caution however that it did not have the luxury of conducting the main trial hence seeing the witnesses or the parties and their demeanor.
15. I think what is before me was captured well by the parties namely, whether in light of the evidence before the trial court the Respondent was capable of taking care of the minors daily while under her custody. The main thrust of the Appellant's appeal centered on the character of the Appellant.
16. I have perused the record and it is not in doubt that the Appellant, Dw2 and Dw3 clearly explained that the Respondent was given to alcohol and a partying lifestyle and therefore may introduce the minors to negative behaviors early in their lives. They gave testimonies of how the minors were not taken care of severally as the Respondent was away in her frolics rendering them not to perform well in their academics.
17. This line of evidence was also discussed regarding the minor's eating habits which was affected by the Respondent's lack of due care and diligence.
18. I have looked at the report by the Children's Officer one Norah Ondieki dated 17th October 2022 which appeared to me comprehensive. She goes on to state that:-

“...The Applicant added that she loves to party and that's her life and the Respondent should not try to stop her because that is her life .”



19. In her observation she found that the Applicant goes for drinking sprees as she has confirmed in the report "...she prefers her social life and fun of drinking spree; exposing the minors to indecent behaviour among others;"
20. The evidence of the nanny CN and LN Dw2 and Dw3 respectively pointed out a domestic situation where the Respondent in the absence of the Appellant abdicated her motherly responsibility to the nannies.
21. There are whats-up messages between the Appellant and the Respondent which shows the issue of free partying by the Respondent. She did not in her evidence counteract much of this issue. The argument that the Children's officer was bribed so as to make her report to suit the Appellant's perspective was not proved.
22. The court is aware of the usual practice of minors being taken care of by the mother in their formative tender ages. The court is also aware that it is only in exceptional situations where the father is granted actual custody of the minors.
23. The court was faced with almost similar circumstances in in the case of *Sospeter Ojaamong v Lynnette Amondi Otieno*, Civil Appeal No. 176 OF 2006, the court held:

"The general principle of law is that custody of such children should be awarded to the mother unless special and peculiar circumstances exist to disqualify her from being awarded custody...The mother's disgraceful conduct, say her immoral behaviour, drunkenness habit, bad company are some of the factors which would disqualify her being awarded custody of a child of tender age." (Underlining mine)
24. The behaviour of the Respondent in particular her drinking habits and partying in the house with her friends cannot be wished away in these proceedings. The trial court did not lay much emphasis on this and the reasons for granting the Respondent actual custody was simply because "she was granted actual custody from 24th November 2022."
25. That status quo was basically until the end of the case. I doubt whether it was to continue thereafter.
26. Moreover, I find the trial court did not give sufficient attention to the issues raised concerning the Appellant's moral behaviour in particular when with the minors as per the testimonies on record alluded above.
27. As a matter of fact, and despite the practice of permitting minors of tender years to be under the care of their mother, there is no law which indeed bars the fathers from taking care of their minor children. It is noted that circumstances have changed and the mothers have also found themselves in the rat race of life. Most modern-day mothers have to juggle with life's stresses of balancing work and homemaking.
28. It is not therefore trite practice to hold the traditional practice of thinking that fathers cannot balance work and taking care of the children. The caution here however is that every case ought to be managed distinctly, separately and independently.
29. The case at hand is a classic example where the Appellant in my view demonstrated that he was capable of having actual custody of the minors. He has an established source of income, a home and means to take care of them.
30. The Respondent on the other hand did not demonstrate her sources of income. She produced some tender documents and invoices but nothing substantive as such to show that other than relying on the Appellants provision she was capable of taking care of the daily and long term needs of the children.



31. This observation does not diminish the Respondent’s ability to take care of her children. She is able of course just like any other parent to hustle for her family and therefore provide for them regardless of her situation of not having a constant income.

32. In view of the above observations, I find that the best interest of the minors as stipulated under Section 8(1) and (2) of the Children’s Act shall be served by the Appellant having actual custody of them. He has stability in terms of home and income. The said section states as hereunder;

“ Best interests of the child

(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—

(a) the best interests of the child shall be the primary consideration;

(b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.

8(2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child; and

(c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.” (Underlining mine)

33. There is nothing lost by the Respondent who shall have arranged access to the minors. In any event the parties in the event of any changing circumstances can still approach the trial court for variation of the terms of the judgement. This is because children’s cases are dynamic. They are not cast on stone.

34. I think I have stated much to show that the appeal is meritorious and it is hereby allowed as follows:

(a) The trial courts judgement is hereby set aside and substituted with the following orders.

(i) Both the Appellant and the Respondent shall have legal custody of the minors.

(ii) The Appellant shall have actual custody care and control of the minors.

(iii) The Respondent shall have access to the minors on alternate weekends from Friday 6pm to Sunday 6pm, first half of school holidays and any other mutually arranged period as the case might be.

(iv) The Appellant and the Respondent shall take care of the minor’s school fees, medical charges and other related expenses and clothing’s.

(b) Costs in the cause.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 26TH DAY OF JUNE 2025.



H K CHEMITEI
JUDGE

