



IVN (Suing as next of friend & father to the Minors) v PWN (Children's Appeal Case E061 of 2024) [2025] KEHC 12387 (KLR) (3 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12387 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CHILDREN'S APPEAL CASE E061 OF 2024
EM MURIITHI, J
SEPTEMBER 3, 2025**

BETWEEN

IVN (SUING AS NEXT OF FRIEND & FATHER TO THE MINORS) APPELLANT

AND

PWN RESPONDENT

(Being an Appeal from the Judgment/Decree of Honourable G.W Kirugumi (P.M) delivered on 6/5/2024 at Kerugoya CMCHC No. E018 of 2022)

JUDGMENT

1. By a plaint dated 15/6/2022, the Appellant sued the Respondent seeking unlimited access to the minors, shared actual custody of the minors, joint legal custody, care and control of the minors and contribution in respect of the children maintenance. The Appellant pleaded his marriage to the Respondent was blessed with 2 issues, namely PKN aged 6 years and JEK aged 2 years. On 7/10/2021, without any misunderstanding, the Respondent left the matrimonial home at Kiricop Flats Kerugoya where he had been paying rent and moved to an undisclosed location with the minors. Upon leaving, the Respondent denied him access to his children, but he continued to pay school fees for his daughter at [particulars withheld] Road Academy, notwithstanding the denial of access. He has medically insured the minors and has been remitting money via Mpesa to the Respondent for their upkeep, which money the Respondent spitefully sent back to him. He sought intervention from the Children welfare and his then advocate to bring the Respondent to a forum for negotiations, to no avail. The Respondent illegally transferred PKN from [particulars withheld] Road Academy to [particulars withheld] Angel Academy without his knowledge and/or consent and contrary to the Competency Based Curriculum rules, and the Respondent has blocked him, making it impossible to talk to the minors.



2. The Respondent denied the claim vide her statement of defence dated 29/6/2022 and counterclaimed for actual custody, care and control of the minors and an order compelling the Appellant to contribute for their upkeep.

3. Upon full hearing of the case, the trial court ruled that:

“The Defendant has demonstrated through oral evidence, corroborated by witnesses and documentary evidence that she didn’t leave the home voluntarily but that the plaintiff assaulted her and evicted her and the minors from the matrimonial home. The Plaintiff’s testimony that the Defendant left her home without any provocation is not supported by evidence. The court having taken into consideration the entire testimonies of the witnesses it would not be in the best interest of the minors to grant access to the minors. The Court makes the following orders. The plaintiff and defendant are jointly granted legal custody of the minors. The Defendant is granted actual custody of the minors, care and control. The taking into account that the minors are of tender age, the plaintiff is denied access to the minors at home or at School until they each attain the age of twelve years and above where the Plaintiff will be at liberty to move the Court on the issue of access. The Court has also noted the extreme hostility between the plaintiff and Defendant. The Plaintiff is ordered to send to the Defendant ksh 10,000 every month towards upkeep of the said minors starting from 5th June 2024 until the minors attain the age of majority.”

The appeal

4. On appeal, the Appellant vide his memorandum of appeal dated 31/5/2024 set out 8 grounds as follows:

1. The Learned Magistrate erred in law by failing to appreciate that both the Appellant and Respondent have equal parental responsibility and rights.
2. The Learned Magistrate erred in law and fact by failing to determine what would constitute the best interests of the minors having not had occasion to hear from the minors and relying on unsupported, unsubstantiated and erroneous information to reach the conclusion to what constitutes the best interests of the minors.
3. The Learned Magistrate erred in law by failing to appreciate that parental rights of a Parent are innate and cannot be taken away in the manner that she purported to hold.
4. The Learned magistrate erred in law and fact by exercising her discretion in an injudicious manner by denying the Appellant access to the minors at home or at school until they reach the age of 12 years and above after which the Plaintiff will be required to move the Court on the issue of access. The Magistrate failed to take into account that the minors are of different ages and the circumstances of one sibling will affect the other.
5. The Learned magistrate erred in law and fact by denying parties the chance to file final submissions and thereafter wholly relying on the Defendant’s evidence while totally disregarding the Plaintiff’s evidence thereby erroneously arriving at a wrong decision, which has occasioned a great injustice.
6. The learned Magistrate erred in law and fact by placing more weight on Respondent’s witnesses who were her relatives and workmate which led to her making outright prejudicial conclusions, applying selective justice and disregarding the evidence tendered by the Appellant.



7. The Learned Magistrate erred in Law and Fact by failing to evaluate the totality of all of the Plaintiff's evidence on record and disregarding the Kirinyaga Sub-County Children's Officer's recommendations without giving any valid reasons for that decision.
8. The learned Magistrate's decision albeit, a discretionary one was heavily prejudicial and biased against the Appellant.

Duty of the Court

5. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123).

Evidence

6. PW1 Ian VN, the Appellant herein adopted his statement dated 15/6/2022 as his evidence in chief and produced the list of documents dated 14/6/2022 as exhibits. He testified that, "I seek shared actual custody joint legal custody unlimited access to the minors. I seek maintenance be fair. I am ready to meet all the needs of the children when they are in my custody. When the mother has them what the court will rule. The children are P.K.W 8 years and J.E.N aged 4 years."
7. On cross examination, he stated that, "We have two children. They are my children. P is their mother. PWN is my ex-wife. We have not formally divorced. I have remarried. P.K.N pays fees of Kshs. 11,000/= per term. I don't know I was served with the structure for fees. J.E.K pays 8,500/= according to the fee structure served. It is term one. I was served with the fee structure that is how I know. I got to know on 9.11.2023. That is last week. I only knew last week. I stopped living with P in October 2021. I don't know who has been paying fees. I don't know if the children are in school. I am not sure. I have been to the school. Children must dress and eat. I filed an affidavit of means. I have given a break down of how I spend my money. In paragraph 3E there is an item DSTV Kshs. 2,000/=. I get entertained. My children also have such a right. I don't have any documents that I provide entertainment. I have provided food and clothes between October 2021 to date. There Mpesa message where I sent money. She reversed. It is my exhibit 4). There is a refund of 2,000/=. I have provided an Mpesa of sending the money. I sent 2,000/=. I sent 2,030/= the second time. I sent 2,030 on 25.12.2021. It was Christmas day. The mother was to get them something for Christmas. They were direct instructions. It is for food and clothing. My answer is not absurd. I also sent Kshs. 2,000/=. It was on 18.3.2022. I never called the defendant's uncle after I sent. I don't know if she had lost a relative. The defendant's uncle can testify I never called him. I saw her eulogy attached for her grandmother's burial. It was attached in her reply. I can't tell when it is dated. It is filed I would need to refer. This is the eulogy in the file. Her grandmother died on 13.3.2022. I sent the money five days later. KCY 926 X was reposted. I don't know where it is. She last had it. The bank reposted it. She had it when it was reposted. She had knowledge it was being repossessed. She contributed 500,000/= to buy the vehicle. I released the belongings on 12.10.2021. The defendant and the children left on 7.10.2021. I released their belongings five days later. I never provided money for their use during the five days. I was not heartless. The defendant resides at Kerugoya. I have been to where she lives I know the place. In paragraph 5 of the plaint I wrote on 7.10.2021 the defendant left the matrimonial home and moved to undisclosed location. What I have said is not what I wrote in the plaint. J.E.K.N was not going to school then. He is now in school. I don't know for how long he has been in school. I seek custody. I don't know so much about them. I have four children. I live with two currently. They are my children with my wife WG. I live at Sagana. They have never been sickly or neglected the ones with the defendant. I don't know their status now. I have sent money



which was reversed. The 4,000/= I spoke about. Since October, 2021 I have never paid rent or medical care. I require a court order to take care of my children. I don't require any other permission to assist the children other than court order. I have never assaulted her. I have gone to the police station with the defendant. Their bicycle are in my store at Kagio. I took them on 30th October, 2021. I have their play items in my store. The chief never wrote to me that I refused to release their belongings in the defendants list number 8 there is a chief's letter from Kimuri. In paragraph 2 reads, the mother had an argument...and she was chased away. The uniform was at home and the father has refused access. There was a letter written in my affidavit of means. I remain with 25,000/=. I was working from November 2021. I have not been having a surplus of 25,000/= from November, 2021. I was earning 70,000/= in November, 2021. I had a loan. I did not have any surplus. I got a surplus from May 2022. It was about Kshs.15,000/=. I have had a surplus from May 2022 to date. I have not supported my children. My other children one of them goes to school. They eat and dress. In total I have four children. I care about the other two. I don't know about them. I am not discriminating them. I have not treated them equally. I want custody."

8. In re-examination, he stated that, "I was denied access in the ruling. I kept away from the children. So I did not go to the school. I sent the 4,000/= to support but it was reversed. I sent 2,030/= to get something for them. She was to decide what to buy. She reversed it. I wasn't aware she lost a relative until I was served with eulogy. When I sent the money it was not burial support. It was support for the children. We bought the car at 880,000/=. She paid 500,000/= as deposit. It was on hire purchase. I was to pay the balance in installment within one year. I lost my job. I did not continue paying. We agreed him to pay. I asked her to pay in two months. She wasn't ready. I had a company car. The car was in her possession at work when it was reposted at Kerugoya Level four hospital. I didn't support them when they left. They were under care of the aunt. I wish to support the children. I don't support them now. I went to the police station. It was during the theft case at our joint business premises. The defendant left behind the bicycles at Kiricop. They left mid month. I had paid rent. I collected them at the end of the month. The chief's letter is to the children officer not to me. It was never served to me. My affidavit shows I have a surplus. What the court rules I am ready to take up. I have kept away from them due to the ruling on access. I close the plaintiff's case."
9. DW1 PWN adopted her statement dated 8/11/2023 as her evidence in chief and produced the documents in her list of documents dated 8/11/2023 as exhibits. She testified that, "I know the plaintiff. I was married to him. He is my ex-husband. We have two children. They are P.K.N and J.E.K.N. We have never formally divorced. I work at Kerugoya Level 5 hospital. I am a nurse. We started living together in 2015. In 2019 dowry was paid. In October 2021 I stopped living with him. The plaintiff chased us away. On 2.10.2021 the previous day he came very drunk and violent. He beat me up. He chased me away. He said he had a new family which was secret and they needed to join him in our house. On 7.10.2021 he said I don't come back. He said he doesn't want to find us in the house. I left the house. I left because he said he should not find us. I was afraid. He was very violent even before then. I talked to my parents. His mother at a point came to solve the issue. He sent me away some time after a thorough beating. I went to my aunt's house at 2.00am. I stayed for 3 days. He came for me. He would come home drunk and beat and insult me in their presence. The eldest child was traumatized. The house help would witness. My children have needs. I have listed them down. The needs as listed across the children. They are in paragraph 21 of my statement shared expenses are sent. I pay rent, wifi, house help, utility bills. I pay for both children their expenses that is why I call them shared since 2021 October. I have been supporting them with my relatives and close friends. It has not been easy. I do it only alone without his support. The plaintiff has never participated. He has never done anything. He sent money twice. On 25.12.2021 the plaintiff sent money. He sent a text that I buy Christmas gift. He sent money on 18.3.2022. It was for funeral support. He called my uncle to say he heard about his



mother and said he won't attend but sent support. He never sent money from then. He knew where I went. He sent us away. He followed us. He hang around for two hours. He was coming when I was at work. He has visited three times. He was talking to my househelp. He would go to the house when I was at work. The house help would tell me. He lied. He know where I live. He came to see the children three times after he chased us away. He lied I never denied access. He never sought my permission. He would come uninvited. He would talk to the house help. The boutique is my business. It is registered under my name. He refused to assist me stock the shop. When he lost his job I asked him to work there. He refused. I started the business alone. I still have the business but I closed it. Now I have been unable to run it as I have expenses on the children. We had key. I took a loan for 600,000/=. We were to pay in instalments. He was to pay. I didn't know that it was to be reposted. We had finished paying as per what I knew. After we left I did not see the car. I called the company. I was told he was given the log book with a lady. I called KRA. The vehicle was sold to someone. He sold the car. He never gave me any cash from the proceeds. I reported the assault. I filed an affidavit of means. I am struggling. I have loans. The children are doing okay. I have been providing alone. On 7th he told me he had married. I have been suspicious. He was an irresponsible father. He never provided. He was paying rent only. I would buy clothes, food, outings. He was never in the house. He would lie he was at work. He would go on Monday and come back on Saturday. I came to realize the absence was to the other family. He left no provisions when he was away. The house would be locked several times. We even left with 80,000/= unpaid. He would pay rent late at Kiricop until the water or electricity would be cut. He would pay very late. He never had time for the children. The eldest child would ask I call him to live. He said he was with his wife. He said I would bother him. He never took responsibility during birth. I went alone to hospital to give birth to the younger child. He refused to buy clothes. He only came to me during discharge. My mother helped buy clothes for the eldest child. I purchased the bicycle and toys. I bought one of the bicycles. He disrespected me. He insulted me. He took my children to my aunt. He is incapable of taking care of them. He can't take the children to that lady. I don't have confidence he can take care of them. He disrespected me. He chased me away with them. I stayed with the children without anything. I borrowed clothes. He has taken the toys. He never took care of them. The wife despises me. He is very irresponsible. I am willing and capable of taking care of them. He chased us away in 2021. He should provide for them. It is his responsibility.”

10. On cross examination, she stated that, “I am a nurse at Kerugoya general hospital. I prepare notes for patients. You paid downy. It was Kikuyu customary law. In paragraph 6 I wrote you chased me away. You brought the family to that house. You lived with them at Sagana. I don't know if you lived with them at Kiricop after we left. At paragraph 14 of the statement I stayed you followed me to my new house. You were alone in your car. I was with K present. He was in the car I was in. I carried a TV. You carried it. K was in the lorry I was. At the gate you gave the TV to K. He was not in your car he was in the lorry. In paragraph 11 of the statement I said I was forced to take shelter in Embu at my aunt's home. You took my children by force to my aunt's place. You took them from their home to that place. I reported the assault at Kerugoya police station. I did not write in my statement of 7th. In paragraph 11 I wrote you would assault me in the presence of the children. You assaulted me the prior night to 7th. I was treated. The P3 was issued after. In my statement I have not written I reported at the police station. I have attached a pay slip. The gross is Kshs. 80,000/=. The net is 20,000/=. I can live in debt. He sold the car I took a loan. I support the children alone. I do everything. The pay slip is evidence of loans. This is a government payslip. Your mother came to solve the problems. It is not in my statement. You told me your mother supported your family secret. I went to my aunt's place in 2018 when you chased me away. You have been violent. My aunt will testify. The money you said was for Christmas gift. The message is there. What can you buy with Kshs. 2,000/=. It was mockery. You had sent us away for two months. You sent 2,000/=. You sold the car. It was Christmas time. You sold the car. I had taken the loan. You only sent 2,000/=. It was one and a half month after you sent me away. The



message is in your application. It is in the amended list of documents by the plaintiff dated 12.7.2022. It is a whatsapp message marked (4) for Saturday 25.12.2021 at 8.46am. You called my uncle and told him the 2,000/= was for my grandmother's burial. My uncle is not in court. You worked for Delight when we lived together. You were a Sales Manager. You would travel. You would go on Monday and come on Friday. You would be away working. The boutique my own business. I requested you to work there after you were fired. I asked you as a husband. You refused. You paid the car loan and took the log book. The balance was to be paid in a year. The year had lapsed. You finished paying and took the log book. It is not in my statement that I called that company. You sold the car to Njue. I said I will sue in another proceedings. I wrote I took a loan and you sold. I have not attached evidence. When we moved from Embu you had rent arrears. You have not paid to date. I did not want to call him to come here. It was Kshs.80,000/=. I don't have evidence of the arrears of 80,000/=. In Kiricop you paid rent late. You paid rent in arrears. You were stopped at work. I was not aware of your issue. You were barely in the house only on weekends only. I was not aware if you had issues of payment. There was no bill of 18,000/= paid from my NHIF. It was true. It was in 2015. The second child was born at Tenri. It was paid through my NHIF and your insurance at Delight. The bill was 135,000/=. My NHIF paid half you paid half. 135,000/= was paid after my aunt and the hospital called you. Your cover paid some money when he was born. You didn't fully assist me. I had said you didn't assist. We never discussed about other men. Gerald Wachira was my friend. He would come to our house. You had friends who visited us. Your friends would visit us like Denis Mwangi. They were not mutual friends. When I was away at Embu your current wife would come to sleep in Kiricop. I don't have witnesses. I don't have any evidence. At paragraph 11 I wrote about the assault. I can know when the children are not okay. I could not take them for a mental hospital. I would talk to the eldest child. You wrote yourself in a text. That the child records not okay. I would handle the situation. I would take them out. The text was sent on 19/10. I had left with the children. It is in the amended list of exhibits (5). You stated you were to do a birthday party for her. It is as per the message."

11. In re-examination, she stated that, "His absence was not about work alone. He would switch off his phone. There were other he would go to his wife. I asked him to stand in the business. He had no job then I wanted us to have incomes. He refused. He said the money was for gifts. I have provided the message. It was specific. He was not present when the children were born. He only came when I was about to be discharged to bring the cards. My NHIF and his insurance were utilized. Wachira came to the house the day the defendant sent me away. Wachira called me on 7th. Wachira was my friend. He even visited him at Kimunye. He knew him well. He knew Wachira well. The children had trauma. He beat me in their presence. The eldest child was present. She cried. The children were fearful and kept crying. I am a nurse. I could tell they were lonely. He sent them away to my aunt's place. Then he went to school to organize a party. That is not care. The best place was home at Kiricop. He took them to my aunt a new place where they did not used to live. We never sat down to plan how to pay for the car. I was working. He told me some people were to take the vehicle for repair at Thika. I was at the hospital. He said I give the two men the keys. The car was to be taken to the garage. I gave the keys. I did not know about the bank or anything. I kept asking when he will get the car from Sagana. My statement is clear about the issue of assault. He never let me know whether he was declared redundant. There was when I went to report to take my items. The theft at the boutique was three months after separation. He came to our house uninvited to see the children three times. He even went to the school. The message shows he went to the old school. I sought treatment after assault."
12. DW2 EIN, adopted his statement dated 8/11/2023 as his evidence in chief. He testified that, "I know P. She is my daughter. She is my biological child. I know the plaintiff. He had married my daughter."
13. On cross examination, he stated that, "I am father. No dowry was paid. I wasn't there. She told me you assaulted her. In paragraph 9 if is about assault. I visited you. I didn't witness any assault. In paragraph



- 10 it is you asked her to leave. In paragraph 12 I sent her money to rent and move items. I don't have receipts. I have been helping her. I even gave you a goat. You were my children I didn't keep records. I didn't see you beat her. I didn't expect to have a court case.”
14. In re-examination, he stated that, “They differed. I talked to her. I gave her money. I gave her money. I gave her transport money to move and get a house. I have been giving her money. I have visited her several times with food. I don't have receipts. I wasn't present. I live at Embu. She called me and told me things were not good and that she was told to vacate. She looked for a vehicle. In the evening the plaintiff came and told the driver to leave. He had come for the belongings.”
15. DW3 Nancy Wanjira Mwaniki, a farmer and a businesswoman adopted her statement dated 8/11/2023 as her evidence in chief. She testified that, “I know P Wangari. She is the daughter to my late sister. She is like my daughter.”
16. On cross examination, she stated that, “In paragraph 9 she said she was afraid and packed. She didn't plan to escape. In paragraph 10 I sent my son K. I sent K to assist P to pack. P called at 12.00 noon. She told me she was told not to be found at the house. He went to assist P. K went to assist. K told me. He said you came at six. You told P you brought the children to my place. K saw what you did. K helped her to pack. I sent K to help her pack. K saw and he assisted her. At paragraph 11. I sent a rider at 1.00 am after you beat her. I don't have evidence but I sent the rider to bring her to my home at 1.00 am. At paragraph 14. You brought the children. It was safe because you brought them. I am their grandmother. You brought them to my home. It is a safe place. At paragraph 16. The police had to be involved for you to release the belongings. You brought them. They stayed for three days. The child was late to go to school. I don't have evidence about the police. At paragraph 20. I have been supporting her. I don't have evidence but I was supporting.”
17. In re-examination, she stated that, “I don't have evidence. She is my child. I was supporting her. She was desperate. She had loans. I chipped in with the other family. I gave foodstuff. Paying rent. She had nothing when she left. He bought the children to me. I fed them. I sent a rider to take her at 1.00 am. P called. She said he beat her and threw her out. I told her to come to my home. I sent a rider. She was brought to my house. She came at 1.00 am. She was beaten up. She didn't even eat. I sent K. Her mother died. I am a mother. I asked K to go and assist her. He called me. He said Ian refused they take the clothes. Ian took the children and brought them to my house. K and the defendant took a matatu to my home. I sent K. K knew Ian. I asked K to assist P as she was afraid and the children were minor. P was not escaping. Ian brought the children in a car to me. The police were involved. I don't have evidence. P told me. I was living with the children. When the police intervened he gave out the clothes including the uniform. P.K.N was late to go to school. She had no uniform. He had detained it. The children should have been living with both of them not me.”
18. DW4 Abraham Mwandime Mwai, the Assistant chief Kimuri sub location Kerugoya Location, testified that, “I know PWN. She resides within the sub location. On October, 2021. In the defendant's list of documents dated 8.11.2023 filed on 9.11.2023. The document is a chief's letter dated 12.10.2021. On 12.10.2021 I was at Kerugoya. I was at work. I attended to members of public. I attended PWN. She told me they disputed with her husband. She informed me that their child who was in PP2 had not gone to school. The uniform was in the house. She could not retrieve it. She had been chased away. She sought my assistance. I wrote this letter to the children department asking them to assist her collect clothes and other items. This is the letter. The schools had been opened. She said the child was at home without uniform. She said she had been beaten. I produced the letter as exhibit (8) in our list dated 8.11.2023. I wrote the letter to the children department. I gave her to take it she didn't tell me if she took it I can tell if it was taken. I don't know if there was a response. I was not given your phone number. I didn't summon you.”



19. DW5 Mr. Hezron Macharia Maina, testified that, “I am a registered Clinical officer. I specialized in E.N.T and audiology. My Reg. No. is 4XXX. My current station of work is Kerugoya county referral hospital. I have 20 years’ experience in the field of practice, I graduated from K.M.T.C Nairobi campus. I hold a diploma in Clinical medicine and surgery. I hold a higher national diploma in E.N.T and certificate of audiology. On 8.10.2022 I examined a patient PWN She was then aged 30 years. She alleged to have been assaulted by one known to her. It was reported at Kerugoya police station on 9.10.2022 10.48 am. The reference number was 4XXX. That is out patient treatment note number. She reported she was assaulted by one well known to her on 7.10.2021 at about 11.00pm. Upon physical examination, the state of clothes she had a change of clothes. She was in fair general condition. Head and neck examination revealed tenderness of the forehead, swollen upper lip, abrasion on upper lip, next to vermillion the line or the upper lips she had tenderness on the front part of the neck. There was no abnormality in the thorax and abdomen. The upper limbs were okay. There was tenderness on the right chin. Age of injuries were consistent with 11 hrs old. The type of weapon was blunt object or objects. She had not received treatment prior to the examination that I did. I accorded her analgesics. The degree of injury was harm. I signed this P3 form and completed it on 12.10.2021. I referenced out patient treatment notes for PWN dated 8.10.2021. They originated from Kerugoya County referral hospital. I also authored the treatment notes. I produce these two documents as exhibits. P3 form exhibit 1 (a) dated 9.10.2021. Medical notes exhibit 2. They are in the list dated 8.11.2023.”
20. On cross examination, he stated that, “She comes at Kerugoya County referral hospital. In 2021 I do not know the office but she was at the hospital. There are a lot of stations and rotations. I knew she was a nursing officer at the hospital. Nurses give reports. I treated her personally. A patient is registered, they are referred to relevant department. Patients pay. They pay when registering 50. If it is special clinic 100. If it is an emergency we treat before payment. She alleged she knew the assailant. I didn’t ask the details of the name. I didn’t record the name of the assailant.”
21. In re-examination, he stated that, “I treated the patient. I completed the P3 form before court. The patient had medical officer’s reference number 4XXXX. The patient from the physical examination was assaulted.”

Submissions

22. The Appellant faults the trial court for being overzealous by denying him total access to the minors without granting him even the option of supervised visits, and cites MAK v RMAA & 4 others (Petition 2 (E003 of 2022) [2023] KESC 21 (KLR) (2 March 2023)). He urges that the unnecessary restrictions placed by the trial court concerning the access of the minors were cruel and unjustified, and cites K.M.N v Children’s Court, Tononoka & Another (2015) eKLR and BM v GKM (Suing as Next Friend and Guardian of LR) (Civil Appeal E005 of 2023) [2024] KEHC 818 (KLR). He faults the trial court for arbitrarily extinguishing his rights, thereby not acting in the best interest of the minors. He urges that the trial court’s orders were retrogressive, untenable and outdated, and prays for the appeal to be allowed.
23. The Respondent did not file any submissions.

Analysis and determination

24. From the grounds of appeal as framed, the issues for determination are whether the trial court erred in denying the Appellant access to the minors, and whether the trial court erred in denying the parties the opportunity to file their submissions.



Access

25. The Appellant testified that, “I seek shared actual custody joint legal custody unlimited access to the minors. I seek maintenance be fair. I am ready to meet all the needs of the children when they are in my custody. The children are P.K.W 8 years and J.E.N aged 4 years.”
26. The Respondent testified that, “I know the plaintiff. He is my ex-husband. We have two children. They are P.K.N and J.E.K.N. In October 2021 I stopped living with him. The plaintiff chased us away. On 2.10.2021 the previous day he came very drunk and violent. He beat me up. He chased me away. I left because he said he should not find us. I was afraid. He was very violent even before then. I talked to my parents. He would come home drunk and beat and insult me in their presence. The eldest child was traumatized. I pay for both children their expenses that is why I call them shared since 2021 October. I do it only alone without his support. The plaintiff has never participated. He has never done anything. He sent money twice. He was an irresponsible father. He never provided. He was paying rent only. He took my children to my aunt. He is incapable of taking care of them. He can’t take the children to that lady. I don’t have confidence he can take care of them. He disrespected me. He chased me away with them.” On cross examination, she stated that, “You took my children by force to my aunt’s place. You took them from their home to that place. I reported the assault at Kerugoya police station. I went to my aunt’s place in 2018 when you chased me away. You have been violent.” In re-examination, she stated that, “His absence was not about work alone. He would switch off his phone. There were other he would go to his wife. He was not present when the children were born. He only came when The children had trauma. He beat me in their presence. The eldest child was present. She cried. The children were fearful and kept crying. I sought treatment after assault.”
27. DW3 stated on cross examination that, “You brought the children. It was safe because you brought them. I am their grandmother. You brought them to my home. It is a safe place.”
28. DW4, the Assistant chief assisted the Respondent retrieve her items from the matrimonial house.
29. The assaults and the violence meted out on the Respondent were affirmed by DW2, DW3 and DW5 in their respective testimonies.
30. When DW5 examined the Respondent on 8/10/2021, he noted that she had tenderness of the forehead, swollen upper lip, abrasion on upper lip, next to vermillion the line or the upper lips she had tenderness on the front part of the neck and on the right chin. In re-examination, he stated that, “I treated the patient. The patient from the physical examination was assaulted.”
31. Given the Appellant’s admission that he has since remarried and has other issues from that union, the minors herein cannot be reasonably expected to live with him in an environment of peace and tranquility.
32. This court thus finds that the trial court properly exercised its discretion in granting actual custody of the minors to the Respondent.
33. Article 53 (1) (e) of *the Constitution* provides that, “Every child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.”
34. Section 11 (6) of the *Children Act* provides that, “Subject to subsection (3), every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with the parent or parents on a regular basis, unless it is shown to the satisfaction of the Court that such contact is not in the best interest of the child.”



35. It is undoubtedly clear that the Appellant, as the father to the minors herein, has a right to visit and see them on agreed-upon times unless it is shown on the evidence that such access would expose them to harm, abuse, neglect or would otherwise not be in their best interests. In his report dated 1/8/2022, the Sub-County Children’s Officer, Kirinyaga Central recommended that, “The mother acknowledged the right of the father to keep in touch with his children, but she did not feel comfortable to allow the children to visit their father at Sagana where he has the 2nd family...Both parents have equal rights and responsibilities...The father should also be granted access to children so that they can continue to bond from this early age. However, because they are of very tender age, he should start gradually by spending little time with them during weekends until they are old enough to visit his home in Sagana.”
36. This court concurs with the Appellant that the unnecessary restrictions imposed on his access to the minors by the trial court are tantamount to a denial of access altogether. In *K.M.N v Children’s Court, Tononoka & E.G* (Constitutional Petition 71 of 2014) [2015] KEHC 6905 (KLR) (26 January 2015) (Judgment), this court considered a similar case of hindered access to minors, as follows:
- “ 42. I further consider that access to a child should not be granted with such fluctuations in the daily life of the child as to make a stable development of the child – especially one at the very early stages of mental growth – difficult. Reasonable access in the circumstances of this case, allowing for the need for stable development in association with one environment, is in my view met by an order that the petitioner father do have unhindered access to the child for a period of seven (7) days every 30 days of the month, subject to a Children Officer’s Report.”
37. In *MAK v RMAA & 4 others* (Petition 2 (E003) of 2022) [2023] KESC 21 (KLR) (2 March 2023) (Judgment), cited by the Appellant, the Supreme Court observed that:
- “It is a known fact that the society in which children grow up shapes who they are. Having both a mother and father involved in a child’s life can provide significant social, psychological, and health benefits. In addition, the stability of having a relationship with both parents can provide security and greater opportunities for children to find their own paths to success. Accordingly, even if circumstances may warrant limited access to a parent, a court should order supervised access. This court has the constitutional obligation to ensure that the child has access to parental care and protection as enshrined in *the Constitution*.”
38. Consequently, this court finds that the trial court’s denial of the Appellant’s access to his children, was not only an affront to the dictates of Article 53 (1) (e) of *the Constitution* and section 11 (6) of the *Children Act*, but also inimical to the best interests of the minors who are entitled to the love, guidance and presence of both parents, their separation notwithstanding! It is clearly in the best interest of the child that the Court Grants the order sought herein.

Denial of the opportunity to file submissions

39. The trial court is faulted for failing to accord the parties herein an opportunity to file their respective submissions. However, the record shows that on 15/1/2024, the trial court duly granted the parties herein time to file and exchange their written submissions, when it directed that, “Plaintiff to file and serve his submissions within 20 days. Defendant to file and serve within 14 days after service.”



40. The submissions of denial of opportunity to make submissions is manifestly misconstrued and utterly misleading, even if not a cogent reason to set aside an order of the trial court unless it can be shown that such a default occasioned a denial of the parties' right to a fair hearing on the matter.

Orders

41. Accordingly, for the reasons set out above, this court finds the appeal is partly merited and it is allowed in the following terms:
1. The trial court's order denying the Appellant access to the minors is hereby set aside.
 2. The Appellant is granted reasonable and unhindered access to the minors on alternate weekends at a public place to be agreed upon by the parties and/or their counsel.
 3. The Appellant is granted unrestricted access to the minors through telephone and electronic communication.
 4. The other orders by the trial court remained unchanged.
 5. There shall be no orders as to costs in the appeal in view of the nature of the dispute as a family/ children matter.

Order accordingly.

DATED AND DELIVERED THIS 3RD DAY OF SEPTEMBER 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Ian Njeru the Appellant in person.

Ms. Gwaro for Mr. Otuke for the Respondent.

