



**In re YAA, AAA and MAA (Minors) (Civil Appeal 082 of 2022)
[2024] KEHC 1730 (KLR) (Family) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1730 (KLR)

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

FAMILY

CIVIL APPEAL 082 OF 2022

HK CHEMITEI, J

FEBRUARY 22, 2024

IN THE MATTER OF YAA, AAA AND MAA (MINORS)

NMA.....APPELLANT

VERSES

NAORESPONDENT

***(BEING AN APPEAL FROM THE JUDGEMENT OF HON. C.O. OLUOCH DATED 29TH
JULY 2022 IN CHILDRENS CASE NO E079 OF 2021 AT MILIMANI CHILDRENS COURT)***

JUDGMENT

1. The appellant and the respondent are biological parents of the minors namely AAA and YAA. Prior to having the two minors the appellant had another child namely MAA.
2. The two did not formalise their marriage despite staying together as husband and wife for some period. They had some differences and they separated. The minors remained with the appellant, their mother.
3. In the cause of time they entered into a parental responsibility agreement dated 3rd September 2020. That agreement for some reasons known to the parties held sway for some time until the appellant filed suit at the lower court seeking various reliefs including among others challenging the said parental agreement.
4. The matter proceeded to full trial where the parties rendered their evidence and called various witnesses. After the close of their case the trial court delivered its judgement granting among others equal parental responsibilities to them as per the parental agreement agreed before the filing of the suit.
5. The appellant being dissatisfied with the said judgement has approached this court vide the Memorandum of Appeal dated 22nd August 2022. The grounds raised therein can be summarised under one heading, namely, the issues surrounding the minor MAA.



6. The appellant's grounds gravitate around this minor arguing that the trial court was wrong in lumping her with the other two children as the respondent was not her biological father. In other words, not being her biological father the respondent ought to have been denied parental responsibility and access to the minor.
7. The court when the matter came up for directions ordered the appeal to be heard by way of written submissions. The parties have complied and the same can be summarised as hereunder.

Appellants submissions

8. It is the appellants case that the trial court did not factor in the evidence of the psychologist/counsellor one Patrick Mandanda who found that the said minor was not associating well with the respondent as per the conclusion in his report. For that reason, it was necessary that the appellant be granted sole custody of the minor and the respondent denied any access to her.
9. She went on to state that the respondent was not the biological father to the minor and that they do not share cordial relationship. Further that he has never applied for formal adoption of the minor.
10. The appellant relied on Section 8(1) and (2) of the [Children's Act](#) 2022 among others. She relied on the case of [JKN VS HWN](#) (2019) eKLR.
11. In summary the appellant prayed that the trials court's judgement be varied to the extent that she be allowed to take care of the minor as in any case she was capable of doing so.

Respondent's submissions

12. The respondent vehemently opposed the appeal arguing that the issue of the said minor was well dealt with by the trial court as she was able to hear and see the witnesses.
13. The respondent poked holes on the report by the psychologist arguing that the same was done unilaterally as he was never consulted. He submitted that the report was biased against his relationship and the child noting that what the child allegedly told the witness has never been complained of.
14. The respondent for example stated that if the child had been physically abused then the same ought to have been reported especially by the appellant.
15. It was his case therefore that the minor could not be isolated from the other two since he had all along taken them as his children and that for her interest it was necessary that he continues accessing all the three.

Analysis and determination.

16. Being a first appeal this court is enjoined to re-evaluate the issues afresh with full knowledge that it did not have the benefit of hearing or seeing the parties and their witnesses during trial like the trial court. See *Peters v. Sunday Post Ltd* (1958) EA 424
17. The issue as rightly captured by the parties is clear and straight forward, namely, whether the appellant should be granted sole custody of the minor MAA.
18. There is no doubt that the respondent is not the biological father. Nonetheless when their relationship was in good form the appellant did not raise the same. It was only when they went through the trial at the lower court that it came up.



19. The parental responsibility agreement dated 3rd September 2020 which was produced in court clearly indicated that the respondent who was referred to as the father will take up responsibilities for all the minors including M. This was an agreement reached outside the court without any evidence of coercion or undue influence.
20. The same further spelt out other responsibilities including unlimited access to the children.
21. I have perused the evidence tendered by the said psychologist Mr Patrick Matanda. I agree with the submissions by the respondent that the same was unilateral. He was not involved nor was he notified that the children will be interviewed.
22. When cross examined the said witness stated as follows;

“... Separation of the minors can affect them. Either M goes with the father or the mother. I did not do counselling. I also listened to them and came up with underlying issues. They will have to get counselling sessions in future...”
23. It is imperative to note that one of the issues observed by the trial court is the fact that the minor may need to go for counselling in future. I believe this was based on the above professional evidence.
24. What then is the way forward and is the plea by the appellant to vary the judgement meritorious?
25. What is salient in this matter as found above is that save for the professional report relied on by the appellant, there is no evidence of any rift between the respondent and the minor. The minor was not called to testify against her step father. This would have shed light and buttressed the evidence of Patrick Matanda.
26. At any rate if the respondent had been abusive towards the child a report would have been made at the children’s court or police station or any other authorities for that matter. Needless to state that her name would not have featured in the parental agreement before the local provincial administration office.
27. Although the appellant has stated that she was in a position to support the minor single handedly, this does not mean that they should be separated from her step sisters. It is also noted that the respondent has been granted scheduled access to the children and thus the appellant has all the time with the minor.
28. The respondent made a meal out of the evidence by Mr Matanda. I think the said evidence was persuasive to the court. The court relied on it when it directed that further counselling may be necessary.
29. From the above quotation I do not find the same adverse to the parties in any way. Neither do I find anything to show that the trial court wholly relied on it when arriving at its conclusion. There were other factors which the court took into consideration to ensure that the best interest of the minors was taken care of.
30. For now, I agree with the views of Patrick Matanda on cross examination that separating the children will be prejudicial to her in particular. There is no evidence that the respondent segregated M over the other two in any way. He provided for them equally including paying for her home schooling.
31. In the premises I think it shall be unfair at this juncture to deny the respondent access to the said child whose input was not considered as she was not called to testify. In as much as the appellant is capable of materially supporting her, she should not deny the respondent his rights of accessing her as well as the other children.



32. Psychologically it becomes difficult in my view for M to be isolated from her siblings for instance when the respondent makes his scheduled visits. The saving grace is that she is growing and maturing fast like any other child and soon she will be able to make her independent decisions.
33. It is necessary for the parties herein to keep the three children knitted together for the sake of their upbringing and their future their differences notwithstanding.
34. Consequently, I do not find any reason to disturb the trials courts findings especially on the issues surrounding the minor herein and the appeal is hereby dismissed with no order as to costs.

DATED SIGNED AND DELIVERED VIA VIDEO LINK THIS 22ND DAY OF FEBRUARY 2024.

H K CHEMITEI

JUDGE

