



**MAO v DOO (Children's Appeal Case E039 of 2022)
[2024] KEHC 15406 (KLR) (Family) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 15406 (KLR)

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

FAMILY

CHILDREN'S APPEAL CASE E039 OF 2022

EKO OGOLA, J

JUNE 26, 2024

BETWEEN

MAO APPELLANT

AND

DOO RESPONDENT

((Being an appeal from the judgment and decree of the Children's Court at Nairobi delivered by Hon. M. Kibe on 23rd March 2022 in Children Case No. 1540 of 2019))

JUDGMENT

1. The parties got married sometime in 2014 and their union was blessed with three issues. The respondent filed a plaint dated 26th April 2019 in Ruiru Children's Court. The appellant also filed a plaint dated 4th September 2019 in Lamu Children's Court. The two matters were consolidated and heard in Nairobi Children's Court.
2. The respondent's case related to custody, access, and maintenance of the children. He stated that the appellant unilaterally took away the children from their matrimonial home to her sister's place in Lamu. The respondent averred that despite persistent requests he was denied access to the children who require fatherly love, care and attention.
3. The appellant on the other hand vide her plaint, defence and counterclaim sought legal and actual custody of the minors as well as monthly upkeep of Kshs. 300,000. She did not indicate the particular needs of the children that would amount to Kshs. 300,000.
4. During the hearing, the respondent testified about the experience of the children living away from the home and the children's expenses that he has been paying. On the issue of his earnings, he testified that he is a director at an international organization and he earns a gross of Kshs. 1,400,000. This is



before statutory deductions He added that he has a son who attends USIU university and he caters for his school fees.

5. The appellant testified that the Kshs. 300,000 that she prays is broken down as follows: - Kshs. 150,000 for food; Kshs. 100,000 for medical insurance; Kshs. 20,000 for entertainment and saloon costs for the two girls; and Kshs. 30,000 as miscellaneous. She testified that she is a secondary school teacher at Kabete Mary Leaky earning more than Kshs. 24,000 that she used to earn as a primary school teacher. The appellant did not provide a recent pay slip.
6. The trial court delivered its judgement on 23rd March 2022. On the issue of legal custody, the court granted joint legal custody. On the issue of actual custody, care and control of the children, the court held that the appellant shall have physical custody, care and control of the children. On the issue of access, the court respondent was granted access to the children on the 3rd and 4th weekends during the school term, the first half of the school holidays, access in schools with school rules, and any days mutually agreed upon by the parties. On the issue of maintenance, the respondent was ordered to cater for the children's school fees, school-related expenses, the children's medical cover, and the children's clothing. The appellant was ordered to take care of the children's shelter. Both parties cater for the children's food when the children are in their physical custody. In addition, the respondent was ordered to send Kshs. 20,000 to the appellant to cater for the children's food expenses during the school term.
7. Aggrieved with the judgment of the court the appellant filed a Memorandum of Appeal dated 22nd April 2022. Her grounds of appeal are as follows:-
 - a. The learned Trial Magistrate misdirected herself in failing to make a finding against the Plaintiff in the Counterclaim.
 - b. The learned Trial Magistrate erred both in law and fact when they made a finding that failed — to appreciate the evidence tendered with regard to the maintenance of the minors.
 - c. The learned Trial Magistrate misdirected herself in totally disregarding the evidence provided by the Appellant in the maintenance requirements of the minors.
 - d. The learned Trial Magistrate misdirected herself and fell into error by making reference to the fact that the maintenance of the Minors should be on a 50-50 basis by giving total disregard to the financial earnings and capabilities of each of the parties.
 - e. The learned Trial Magistrate misdirected herself and fell into error by ignoring the fact that the Appellant had filed her affidavit of means indicating the maintenance expectations together with her pay slip indicating her monthly gross salary, while the Respondent never filed an affidavit of means nor did he attach his pay slip despite admitting at the hearing that he earns Kenya Shillings One Million, Four Hundred Thousand (Kshs. 1,400,000.00).
 - f. The Learned Trial Magistrate erred in law and fact by not considering the Respondent's own admission in court that the Kshs. 20,000 subject to the interim orders he was ordered by the court to pay was not sufficient to cater for all the three minors and he had to supplement such amount.
 - g. The learned Trial Magistrate erred both in law and fact in that she failed to consider at all — and/or adequately the Appellant's evidence and as a result it arrived at a wrong decision.
 - h. The learned Trial Magistrate fell into error and misdirected herself when she failed to consider important aspects which are relevant to the welfare and maintenance of the minors before the court and as a result, arrived at a wrong decision/conclusion.



- i. The learned Trial Magistrate erred both in law and fact and this fell into error by failing to consider that a child's needs are not limited to only the basic needs.
 - j. The learned Trial Magistrate demonstrated in her judgement outright bias against the Appellant by making a finding that failed to consider the relevant factors and circumstances of the Appellant.
8. The parties were directed to canvass the appeal by way of submissions. The parties have complied.

Determination

9. I have considered the Memorandum of Appeal, the rival submissions, and the trial court record. From the Memorandum of Appeal, the appellant is only aggrieved with the trial court's judgment on maintenance. Her main contention is that the Kshs. 20,000 that the respondent was ordered to send to her for the children's food expenses is not enough for three children. The appellant stated that the financial capabilities of the parties greatly differ. Therefore, the parties cannot equally share the financial responsibilities of the children. The appellant stated that with the harsh economic environment, Kshs. 20,000 is not sufficient to cater for the three children. The appellant deposed that she earns Kshs. 22,185 per month compared to the appellant's monthly income of Kshs. 1,400,000.
10. On the other hand, the respondent stated in his submissions that the Kshs. 1,400,000 is his gross income and that after the statutory deduction, he receives a NET pay of Kshs. 600,000. Furthermore, he has an older son and he pays for his university education. The respondent stated that his job is contractual and can be terminated without notice. The respondent averred that the appellant has taken out life assurance cover that has since matured. Hence, the appellant receives monthly payments to supplement her income.
11. Section 4(2)(3) of the *Children Act* states the principle that ought to guide the courts in determining matters where the welfare of children is concerned by providing as follows:-
 - 4(2). In all actions concerning children whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.
 - (3) All judicial and administrative institutions and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act, 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."
12. In the issue of maintenance, the best interest of the child is of paramount importance. In assessing the contribution to be made by the parties, it is my view that the factors which the court ought to take into account include the present and future income, if determinable, and earning potential of the parties, taking into account their ages and professional qualification, the financial needs and obligations of the parties, their standard of living, the contributions or obligations of the parties to others for whom they are obliged to provide and the paramountcy of such obligations, and the conduct, where relevant, of each party.
13. In this case, it is not in doubt that apart from the three children, the respondent is also obliged to cater for his older son. Furthermore, the respondent is a Director at an International organization



earning a monthly NET amount of approximately Kshs 600,000-Kshs. 800,000. On the other hand, the appellant is a secondary school teacher earning approximately Kshs. 25,000.

14. In the East African Court of Appeal in *Tolley v Tolley* [1977] KLR 116; [1976-80] 1 KLR 549 set out the circumstances under which an appellate court can interfere with a maintenance order:

“...in the case of maintenance orders is quite different, and an appellate court will substitute the figure which it considers right, even if only a very small variation is involved. It is to be remembered that in this class of case, the court may arrive at a figure, which is not greatly in excess of the figure, which the court below has ordered, and yet which might make a material difference to a woman who has to support herself and three infant children.

... When one comes to the question of living expenses, however, one is moving into a field where it is possible for much greater accuracy in the estimate. Accordingly, the rule whereby the court does not interfere unless the figure given below is greatly out of scale ought to be applied in this type of case with some caution.”

15. Furthermore, I associate myself with the decision in *A M Kimweri v Yusufu Athumani Dar-Es-Salaam* HCCA No. 107 of 1969 that before a court can determine a figure for maintenance, it must first ascertain the means of the respondent before deciding how much he can afford to and should pay. Similarly, in the case of *Crispus Maghanga Mzae v Mary Mukhwana Kwanusu* Mombasa HCDC No. 58 of 2004, the court held that when fixing the amount for maintenance the Court must ensure that the sum fixed, is in all circumstances fair, reasonable and that the figure does not depress the husband below the subsistence level.
16. The trial court had directed that the respondent caters for the children’s school fees and school-related expenses, medical cover, and clothing while the appellant was to cater for the children’s shelter. In addition to this, food expenses are to be paid by the respondent during school terms. The trial court directed that the respondent send to the appellant Kshs. 20,000 per month during the school term. Since the parties were to share the school holidays on a 50:50 basis, each party is to cater for the food expenses when the children are in their physical custody.
17. So, is Kshs. 20,000 per month enough to cater for the food expenses of three children? The reality of the matter is that apart from food, these children still require certain things that might not be termed as basic needs under Section 23(1) of the *Children’s Act* but are part of daily life. Such expenses include hygiene products eg soap, beddings, saloon and barber expenses, electricity, water, house help services, entertainment etc. These expenses are silently going to be taken care of by the appellant when the children are in her custody.
18. Taking into consideration the parties earning capacity and the harsh economic times in Kenya, Ksh. 20,000 cannot be enough to cater for the food of three children for an entire month. Moreover, these children are growing and their food needs are going to increase. The respondent in his testimony stated that he lives alone. He stated that he has a son who he pays his university school fees. If you compare the house needs of the appellant and the respondent, the appellant with the three children incurs more food expenses. It is for this reason that I will vary the trial court’s order of Kshs. 20,000.
19. From the foregoing, the appeal is allowed. The judgment of the trial court orders on maintenance shall subsist save for the amount the respondent is to send to the appellant for food expenses. The respondent is hereby directed to send to the appellant Kshs. 60,000 per month during the school term to cater for the children’s food expenses.
20. This being a children’s case, there will be no orders as to costs.



Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JUNE 2024

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E.K. OGOLA

JUDGE

In the presence of:

Vuchocho for the Appellant

N/A for the Respondent

Gisiele Muthoni Court Assistant

