



**IMA v SA (Civil Appeal E008 of 2024)
[2024] KEHC 16030 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16030 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL APPEAL E008 OF 2024
JN ONYIEGO, J
DECEMBER 18, 2024**

BETWEEN

IMA APPELLANT

AND

SA RESPONDENT

(Being an appeal against the judgment of Hon. R. Aganyo P.M. delivered on 30.05.2024 in Children’s Case No. E031 of 2023 in PM’s Court at Wajir)

JUDGMENT

1. By a plaint dated 20.08.2023, the respondent moved Wajir Children’s Court averring that sometime in the year 2007, she got married to the respondent and out of their relationship, three children were born to wit: S , A and AI. That due to irreconcilable differences, they separated in the year 2015 and consequently their marriage was dissolved.
2. She averred that she lived in a makeshift house together with her children and the burden of providing and taking care of the children has since weighed heavily on her. It was her case that the appellant had failed and ignored his responsibilities towards the said minors. The foregoing notwithstanding, she conceded that the appellant had been providing Kes. 5,000/- per month as maintenance expenses. That due to inflation, the said amount is no longer sufficient to sustain the two young children she is staying with.
3. It was further averred that the appellant had denied her access to her minor son A thus denying the said minor, motherly love. She thus prayed that:
 - i. An order that the legal custody, care and control of the minors S , A and AI be granted to her.
 - ii. The appellant be compelled to provide medical cover for the children.



- iii. The appellant be compelled to provide for the minors' duqsi education, formal education and other related expenses.
 - iv. The appellant to provide rent, shelter, food and clothing for the minors.
 - v. Costs of the suit and interests thereon at court rates.
 - vi. Any other relief that the Honourable Court deemed fit to grant.
4. The respondent entered defence and further filed his witness statement all dated 21.09.2023. He averred that at the time of separation, it was mutually agreed that the respondent was to relocate to her family's home where he could construct her a house. That the same was done and the respondent has been living in the said house to date. It was his case that he has been contributing Kes. 5000/- towards the wellbeing of his children. He contended that he has since remarried and blessed with three children who are also wholly dependent on his meagre salary as a duqsi teacher.
5. He further averred that the respondent is a business lady and therefore, a woman of means. That the respondent has never been denied the right of access to her son and therefore, the allegations are unfounded. On the other hand, he averred that the respondent has been denying him unlimited access to his children thereby denying them a healthy upbringing. He thus prayed that:
- i. The respondent's case be dismissed.
 - ii. That the court grants him custody of the children of the marriage.
 - iii. Costs of the cause.
 - iv. Any other relief that the Honourable Court deemed fit to grant.
6. The appellant further filed an affidavit of means sworn on 08.04.2024 deponing that he is the father of the minors herein and as a duqsi teacher, he has been providing Kes. 5,000/- to the respondent towards the maintenance of the minors. He further reiterated that the said Kes. 5,000/- is what he is capable of providing towards the maintenance of the said minors as he has since remarried and endowed with children.
7. The trial court heard both parties and via a judgment delivered on 30.05.2024, the hon. magistrate held as follows:
- i. Accordingly, in consideration of the prevailing circumstances, A be under the custody of the appellant noting that he was preparing to sit for his examinations.
 - ii. Legal custody of A and AI is hereby granted to the respondent.
 - iii. Legal custody of A is hereby granted to the appellant.
 - iv. Both parents are granted supervised access and visitation rights of the respective children at their respective residences at reasonable times, most preferably during the weekends and school holiday, on condition that the said access does not interfere with the children's wellbeing (with support and proper supervision and monitoring by the children's office).
 - v. The appellant to remit Kes. 8,000/- as maintenance to be paid by 5th date of every month.
 - vi. The appellant to provide school fees, duqsi, clothing and medical cover for the minors S and AI.
 - vii. No order as to costs.



8. Aggrieved by the said judgment, the appellant preferred the instant appeal vide a memorandum of appeal dated 06.06.2024 citing 11 grounds of appeal summarized as hereunder;
 - i. The learned trial magistrate erred in law and fact by failing to consider that children's responsibility is a shared responsibility.
 - ii. The learned magistrate erred in law and fact by failing to consider the financial strengths of the parties in arriving at her finding.
 - iii. The learned trial magistrate erred in law and fact by failing to award legal and physical custody of the minors.
 - iv. The learned magistrate erred in law and fact by failing to take cognizance of the appellant's evidence in arriving at the impugned determination.
9. The appellant sought for orders that:
 - i. The appeal be allowed.
 - ii. This Honourable Court grants the appellant the physical and legal custody of the children who have been under the respondent's custody.
 - iii. The appellant be awarded costs of this appeal.
10. The court directed that the appeal be canvassed by way of written submissions but the parties chose to submit orally. The appellant submitted that the trial court ordered him to pay for duqsi classes, formal education and school related expenses and medical expenses without having regard to his financial strength. It was his contention that being a duqsi teacher, his earnings cannot support the children in the manner described. It was his argument that the situation has since been made worse by the fact that he has since remarried and the new family wholly depends upon him. In urging this court to reconsider the orders issued by the trial court, he prayed that he be granted custody of the other two children.
11. The respondent in opposing the appeal submitted that the appellant had failed to support his children as what he gives is not enough. That she was suffering with the children despite the fact that the appellant was not only a teacher of a madrasa school but also an owner of a madrasa school. In conclusion, the respondent urged this court to uphold the finding of the trial court.
12. This being the first appellate court, it is thus bound to reconsider, re-evaluate and re-assess the evidence tendered before the trial court and arrive at an independent determination and or conclusion without losing sight of the fact that the trial court had the advantage of seeing and listening to the witnesses to be able to assess their demeanour. In *Abok James Odera T/A AJ Odera & Associates v John Patrick Machira T/A Machira & Co Advocates* [2013] eKLR, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
13. I have considered the record of appeal, grounds of appeal and the submissions by both parties. The only issues for determination are: Custody of the minors and their maintenance.



14. It is trite that, before a court makes any decision affecting children, it must be guided by the best interest of a child. See *MAA v ABS* [2018] eKLR, where it was held as follows:-
- “While considering this matter, this Court is alert to the welfare of the children herein who are of tender years. The matter is not about the applicant/appellant and the respondent; and their interests are secondary to those of the child. The foregoing provisions require this Court to treat the interests of the child as the first and paramount consideration and must do everything to inter alia safeguard, conserve and promote the rights and welfare of the child herein. Acting in the best interest of the children in question”
15. In the same breadth, it is trite law that parental responsibility is an equal joint responsibility of the parents to a child and no parent shall be treated specially as having a superior right over the child than the other. See Section 32(1) of the *Children Act* and *P.K.M vs A.N.M* (2020) eKLR where Aroni J stated that;
- “in my view therefore one need not go further to look at what parents need to do for a child and to what extent. In this instance the parties have joint responsibility towards their son and no one is superior to the other...”
16. As to what constitutes parental responsibility, Section 31 of the Children’s Act defines parental responsibility to mean all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child.
17. Nyaundi J. in the case of *MWN (Suing as Mother & Next Friend of JEO Minor) v JOO (Civil Appeal 9 of 2022)* was of the view that to determine issues of maintenance, the court is thus required to satisfy itself that the following conditions are met.
- i. That the basic needs of the child would be met to ensure that the child enjoyed emotional and physical well being.
 - ii. That this responsibility was shared between the parents and dictated by their means.
 - iii. That the maintenance would not be viewed as a punishment or burden by either parent.
18. In challenging the award, the appellant urged that he was simply a duqsi teacher with meagre earnings and therefore, the court erred in its determination as the financial strength of the parties was not considered. He urged that, he has another family that wholly depends on him hence this court ought to reconsider and vary the orders by the trial court.
19. From the record, it is clear that only the appellant submitted an affidavit of means although the same did not indicate how much he earned save for reiterations of his defence statement. As observed, the court in reaching its quantum on maintenance used an estimation of what would be a reasonable provision for children of the ages herein factoring in the contribution of the appellant.
20. In the case of *Mbogo vs Shah* (1968) 93, *De Lestang VP* (as he then was) observed at page 94. “I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion”.
21. This court is well aware that it has been called upon to consider the best interest of the minors herein. The foregoing notwithstanding, all the parties herein must play an equal role to ensure that the children



are provided for. Considering the inflation rate currently experienced, it is my view that under the circumstances herein, an amount of Kes. 8,000/- is enough for maintenance of the two children under the custody of the respondent. For the given reasons, I am inclined not to disturb the finding of the learned magistrate on the appellant's contribution towards the minors save for the clothing of the children in the custody of the respondent which the respondent must cater for.

22. On custody, I am guided by the holding in the case of *Githunguri vs Githunguri* [1979] eKLR; *Mulwa vs Mulwa* [2002] eKLR and *JO vs SAO* [2016] eKLR where the respective courts found that as a general rule, custody of a child of tender age should be given to the mother unless exceptional circumstances exist.
23. The above notwithstanding and as already noted, any decision involving a minor must be considered in terms of article 53 of *the constitution*. It therefore follows that in the current dispensation, the rule begins with the principle that the mother and father of a child both have an equal right towards the custody of the child.
24. In the present case, it is important to note that the respondent was not found to be a bad mother incapable of taking care of the children of tender age. Additionally, the social report dated 12.04.2024 stated that the respondent showed love to all her children despite the fact that her relationship with the appellant was broken. In the same breadth, the appellant was also described to be loving to all his children despite the parties' situation.
25. The trial magistrate awarded "actual and legal custody" of the minors to the parties in recognition to how they have been sharing the minors herein. In the case of *J.O. vs R.M.M. Nakuru DC No.4/2004(2005) KLR*, Musinga J. stated as follows in regard to actual and legal custody:

Actual custody is defined to mean the actual possession of the person of the child as opposed to legal custody which means as respects a child, so much of the parental rights and duties as relates to the person of the child including the place and manner in which time is spent.
26. In the present case, given that there was no evidence that either parent was unfit or unsuitable to have custody, it was unnecessary to grant actual custody to one parent only. I do not think it is necessary to interrupt the current arrangement of sharing custody rights over the subjects herein. I hesitate to interfere.
27. From the foregoing, the judgment of the trial court dated 30.05.2024 is upheld with orders as follows:
 - i. That the legal custody of the children will be shared jointly between the appellant and the respondent.
 - ii. That the respondent shall have actual/physical custody of the minors namely S and AI.
 - iii. That the appellant shall have actual/physical custody of AI.
 - iv. That the appellant shall have unlimited access to the minors - S and AI.
 - v. That the respondent shall have unlimited access to the minor – AI.
 - vi. That the access for both parties shall be in the following terms:
 - a. Unlimited access during school holidays.
 - b. Unlimited access on Saturdays when schools are in session.
 - vii. That the appellant remit to the respondent to an account provided by the respondent Kes. 8,000/- as maintenance on 5th of every month.



- viii. That the appellant to provide a medical cover and cater for the education and school related expenses of the minors herein at a school agreeable by both parties.
- ix. That the respondent shall take care of the clothing expenses of the children in her custody.
- x. This being a family matter each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF DECEMBER 2024

J. N. ONYIEGO

JUDGE

