



**JKM v JKM (Civil Appeal 8 of 2019)  
[2023] KEHC 18341 (KLR) (Family) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 18341 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL APPEAL 8 OF 2019  
PM NYAUNDI, J  
APRIL 28, 2023**

**BETWEEN**

**JKM ..... APPELLANT**

**AND**

**JKM ..... RESPONDENT**

*(Being an appeal from the Judgment delivered by Senior Principal  
Magistrate Hon. T.B Nyangena on 7th December 2018 in the  
Children's Court Children's Case no. 596 of 2013 at Milimani Nairobi)*

**JUDGMENT**

**Background**

1. The appellant and the respondent were married under Kisii customary law, and their union was blessed with three children. The parties separated sometime in 2012.
2. The respondent instituted proceedings seeking custody, a structured right of access for the appellant, a declaration that the appellant has parental responsibilities for the three children, orders of maintenance, an order to restrain the appellant from interfering with the children's schooling, and an order retaining the children in their current school vide Children's Court Children's Case No. 596 of 2013, Milimani Nairobi
3. In response, the appellant filed a defence and counterclaim where he prayed for full custody of the children and the right to access for the respondent or in the alternative joint custody of the children.
4. In the judgment delivered on 7<sup>th</sup> December 2018, Hon. T B Nyangena granted the parties joint legal custody. The respondent to have actual care and control, whilst the appellant was to have access during half of the school holidays. The appellant was also ordered to meet the school fees for the two children



in High School and other related expenses, to take out medical cover for the children, and pay Kshs. 20,000/= to the respondent as upkeep. The respondent was ordered to cater for the rent, food, home utilities, and school needs of the child in primary school. Finally, the Appellant to take out medical cover for the Children.

5. Aggrieved with the judgment of the Court, the appellant proffered this appeal on the following grounds: -
  - a. That the learned magistrate erred in law and fact when she ordered that the defendant (now appellant) should contribute Kshs. 20,000/= to the plaintiff (now respondent).
  - b. The learned magistrate erred in law and fact in failing to appreciate that both parties are in gainful employment living separately and both capable of taking care of their respective needs in terms of maintenance.
  - c. The learned magistrate erred in law and fact in failing to consider the Appellant's affidavit of means in arriving at the maintenance figure of Kshs. 20,000/=.
  - d. The learned magistrate erred and fact in failing to appreciate that the children have since grown and only one is a minor and in fact about to reach majority age.
  - e. The learned magistrate erred in law and fact in basing her judgment on the fact that the High School fees is higher than the primary fees.
  - f. The learned magistrate erred in law and fact in failing to appreciate that the respondent does not pay school fees for any of their children and that she did not produce any evidence of her salary to show that she indeed needs maintenance.
  - g. The learned magistrate erred in law and fact in resting actual care and central[sic] to the respondent.
6. The appeal was canvassed by way of written submissions.

### **Appellant's submissions**

7. Ms. Nguu learned counsel for the appellant submitted on two issues that are pertinent to the case. The first dealt with grounds a, b, c, e, and f. This was on whether there is justification for the appellant to pay Kshs. 20,000/= as maintenance to the Respondent. Counsel submitted that the appellant has faithfully and diligently ensured that the children's school fees are paid. The argument is that the parties are both gainfully employed and further to this, the trial magistrate did not explain the parameters used to come up with Kshs. 20,000/= as maintenance. Counsel argued that Kshs. 20,000/= that was ordered to be paid did not fall within the ambit of Section 98 of the Children's Act. Further to this, counsel cited the case of *S.O. vs. L.A.M (2009)* eKLR and submitted that maintenance is awarded only where the party in actual care of the children is unemployed or unemployable.
8. The second issue was whether the appellant can be compelled to provide for the children that have since come of age. This question addressed grounds d, f, and g. Counsel submitted that the two older children are in university and are government-sponsored however, the appellant chips in for their maintenance. Counsel added that the last child is now in high school, and the appellant takes care of



the school fees and school-related expenses. The last child being in boarding school, it is the appellant's case that there is no need for sending Kshs. 20,000/= to the Respondent for maintenance.

9. On ground 7, counsel argued that the respondent did not present any tangible evidence that the appellant had been physically abusive to her. Counsel submitted that the learned magistrate erred in fact and law when he failed to consider the strict rules of evidence that she who alleges must prove.

### **Respondent's submissions**

10. Ms. Machio learned counsel for the respondent submitted that the Kshs. 20,000/= awarded as cost for maintenance was fair considering that the appellant lied that his NET salary was Kshs.71,618/= instead of Kshs. 208,887/=. Counsel argued that the appellant produced his bank statement covering a period of three months that showed he received a total credit of Kshs. 312,257/= averaging Kshs. 104,085.66/= per month as opposed to the amount disclosed to the Court.
11. Counsel submitted that the respondent has been taking care of the children's needs such as rent, food, clothing, Wi-Fi, electricity, entertainment, and medical.
12. Further to this, counsel submitted it is unfair for the appellant to subject the two children to undertake HELB loans yet he is responsible for the payment of their school fees and related expenses. Counsel argued that the appellant has a transport business that he has failed to disclose its income. She added that the appellant no longer works as a teacher but is in the Public service earning an income of Kshs. 160,000/=.
13. Counsel added that the appellant has also ignored or refused to pay hostel fees for the children in university, that the appellant is not consistent in paying the school fees and other related expenses for the children.

### **Determination**

14. I have considered the entire record of appeal, the grounds of appeal, and the submission of counsel and legal authorities cited. It is common ground that, this being a first appeal from the trial court, this court should reconsider all the evidence on record, evaluate it and draw its own conclusions while bearing in mind that it did not have the benefit of seeing and hearing witnesses as they testified (*Kenya Ports Authority –v- Kusthon (Kenya) Limited* [2009] 2 EA 212). Secondly, it was held in *Richard Kaitany Chemagong –V- R. [1984]* eKLR that,  

“A court on appeal will not normally interfere with a finding of fact by the trial court whether in a civil or criminal case unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”
15. It is not disputed that the Appellant and Respondent were married, and the 3 children subject of this case were issues of the marriage. It was further not disputed that the Children are all undertaking education at various levels. With the elder 2 currently in university. This dispute revolves around the access and maintenance of the three children. This being a progressive case that was instituted in 2019, it must be appreciated that two of the children are now of majority age, whilst one is still a minor.
16. Evidence was adduced before the lower court demonstrating that both parents were under considerable financial strain and meeting the needs of the 3 children singlehandedly was an impossible feat.
17. The appellant challenges the order to pay the respondent Kshs. 20,000/= monthly for maintenance. The trial court ordered the appellant to provide for the education and education-related needs of



the two elder children, the children's medical needs and to provide Kshs.20,000/= monthly for their upkeep. The Respondent on the other hand, was to cater for their other needs (enumerated as rent, utility bills, food). The respondent in her plaint quoted the children's monthly expenses as follows:- Shelter-Kshs. 20,000/=, Food. Kshs. 20,000/=, Clothing-Kshs. 5,000/=, Utilities (water, electricity, gas)-Kshs. 6,300/=).

18. During the hearing, the respondent testified that she earns a NET salary of Kshs. 44,000/=. She admitted that before instituting the case at the trial court and even after their separation, the appellant paid the school fees and school-related expenses for the two older children while the younger child's school fees were first catered by her employer, but the employer started to deduct the tuition fees from her salary. In short, she paid the school fees of the youngest child.
19. On the other hand, the appellant in his Affidavit of means deposed that he earns a NET salary of Kshs. 71,618/=. In the record of appeal, the appellant annexed his pay slip dated March 2019. His gross pay being Kshs. 208,887/=. It showed deductions that included inter alia, a company loan, PAYE, NSSF, NHIF, HELB, pension and a Sacco. These totaled to Kshs. 130,291/=. giving him a NET pay of Kshs. 78,596/=. Looking at the bank statements attached, what has been deposited in his account as salary has been ranging from Kshs. 85,000-Kshs.71,618/=.
20. He deposed that he caters for the school fees and related needs of the two older children and services a loan with monthly deductions of Kshs. 23,449.35/=. Being separated from the respondent, the appellant also deposed that he pays a rent of Kshs. 16,000/= exclusive of utility bills.
21. Maintenance is an aspect of parental care, and it is the responsibility of both parents of a child. Section 94(1) of the *Children Act* stipulates the considerations by which the Court shall be guided when making an order for financial provision for the maintenance of a child. These considerations include inter alia:
  - a. The income or earning capacity, property and other financial resources which the parties or any other person in whose favour the court proposes to make an order, have or are likely to have in the foreseeable future;
  - b. the financial needs, obligations, or responsibilities which each party has or is likely to have in the foreseeable future;
  - c. the financial needs of the child and the child's current circumstances;
22. Under Article 53(2) of *the Constitution* and Section 8(1) and (2) of the *Children Act*, this court is obligated to give first and paramount consideration to the best interests of the child.
23. Safeguarding the best interests of a child in the context of child support and maintenance requires that the arrangements be made by the parents to ensure that the children do not bear the weight of the consequences of the changed circumstances of the relationship between the parents.
24. While considering the order for financial provision for the maintenance of children, the Court will as the trial court did, take into account the income or earning capacity, property and financial resources of the parties both then and in the foreseeable future. The Court has also to consider the parties' financial needs, obligations, or responsibilities. As regards the children, the Court was required to bear in mind their financial needs and circumstances.
25. As stated above, the appellant earns a salary of approximately Kshs. 71,618/=. He services a loan at Kshs. 23,449/= per month. His rent is Kshs. 16,000/=. He used to pay school fees for the two older children. Presently, he pays for the upkeep of the two children in university and the school fees of



the youngest child who is in high school. In addition to his salary, the Appellant is running a school transport business.

26. As determined in the case of *PKM V ANM (2020)* eKLR parties have a joint responsibility towards their children and none is superior or inferior to the other. In determining the responsibility of each parent, the court endeavours to share the responsibility equally but not necessarily with mathematical precision.
27. Indeed, in the decision of *DS (Minor Suing through her Mother) JWM v CKK [2021]* eKLR the court rightfully observed that though parental responsibility is to be shared, it can never be equal. The court must take into account the financial capability of each parent. This position was stated in *M.K. vs C.K.K HCA. 51/2015* where the court held: -

“Parental responsibility is shared and not equal based on the financial position of each parent. The mother as the resident parent has a nurturing role to the children and the father to provide maintenance and upkeep of the children.”

28. Prior to the separation of the parents the Appellant was a hands-on father shouldering the lion’s share of the responsibility for the children. The consequences of the souring of the relationship between the parents should not be borne by the children.
29. In Cross examination the Appellant indicated that in addition to paying fees and school related issues, he will buy clothes, pay for mother tongue learning, soccer training and shopping for personal items. I consider the sum of Kshs 20000/= as ordered by the trial court reasonable to meet these needs. I observe that the trial magistrate failed to provide a time frame within which the maintenance should be paid.
30. Ground (f) of the grounds of appeal is framed in a manner that suggests that the maintenance was to be received by the Respondent. It is clear from the judgment of the trial court that the maintenance is for the upkeep of the children and not the respondent.
31. The Respondent has challenged the continued support of the Children who are now above 18 years of age. Section 35 of the *Children Act, 2022* allows for the extension of parental responsibility in respect of a child who has attained 18 years where the court is satisfied on its own motion or on application by any person that special circumstances exist with regard to the welfare of the child that would necessitate the making of such extension.
32. In the instant case the children are midway through their undergraduate programmes at the University, it is only right that parental responsibility be extended to when they complete their university education.
33. I refer to the decision in *Allan Njau Waiyaki v Eddie Waiyaki Hinga [2019]* eKLR, where the court in interpreting Section 28 of the Repealed *Children Act, 2001* that is similar to Section 35 of the *Children Act* No. 29 of 2022 held: -

“My reading of sections 28 and 91(b)(i) of the Act is this. A child is in school or training at the expense of his parents. He attains the age of 18, and the programme he had enrolled for has not ended. At that point, the parents stop paying or threaten to stop paying. He will go to the Children’s Court to seek an order for extension of parental responsibility to force the parents to see him through the completion of that programme. At the conclusion of that programme, parental responsibility will cease. His parents will now be dealing with an adult who is supposed to fend for himself.”



34. On custody it was on record that the Court factored in the wishes of the Children and rightly so for Section 8 (3) of the *Children Act* provides that  
In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases having regard to the child's age and degree of maturity.
35. The Court was therefore right in giving prominence to the wishes of the children in making its determination on custody.
36. Having evaluated the evidence and the law, I find no reason to interfere with the order of the learned Magistrate in so far as it relates to the custody and maintenance of the children save to provide for the time frame within which the maintenance should be paid.
37. In the final analysis it is ordered that
- a. The Judgment of the trial court is upheld.
  - b. The Sum of Kshs 20,000 monthly maintenance to be paid by the Appellant on or before the 10<sup>th</sup> day of each successive month.
  - c. Each party will bear their own costs.
38. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL, 2023.**

**P. NYAUNDI**

**JUDGE**

**In the presence of:**

.....for the Appellant

.....for the Respondent

....Karani.....Court Assistant

