



REPUBLIC OF KENYA



**KENYA LAW**  
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**JKT v AK & another (Suing through Guardian ad Litem PJ) (Civil Appeal  
167 of 2021) [2023] KEHC 18120 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18120 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL 167 OF 2021**

**SM MOHOCHI, J**

**MAY 26, 2023**

**BETWEEN**

**JKT ..... APPELLANT**

**AND**

**TK ..... 1<sup>ST</sup> RESPONDENT**

**AK ..... 2<sup>ND</sup> RESPONDENT**

**SUING THROUGH GUARDIAN AD LITEM PJ**

*(Being an appeal from the Ruling of the Hon. R. K. Onkoba (RM) delivered on  
3rd December, 2021, in Eldoret CM's Court Children Case No. 148 of 2016)*

**JUDGMENT**

1. The appeal is mainly on extension of parental responsibility beyond the eighteenth birthday.
2. The Respondent-PJ, had moved the Court under certificate of urgency in the Children's Case Number 148 of 2016 against the Appellant- JKT, on March 30, 2021.
3. In the Notice of Motion under section(s) 4, 6, 9, 24 (3) 28 (1) & (2), 90, 91 (b), 93, 94, 97 and 98 of the [Children's Act](#), the Respondent had sought the following orders: -
  - i. The Honorable Court be pleased to make an Order to extend the Defendant/ Respondent's parental responsibility over the child TK beyond their 18th birthday.
  - ii. That the Honorable Court, be pleased to make an Order, allowing PJ, to continue with the suit as the next friend and mother of the child TK and AK.
  - iii. That the Defendant/ Respondent, be compelled to provide KShs 50,000/- towards agent payment of school fees and school fees expenses of all the children pending the hearing and determination of this application and suit.



- iv. That the Defendant/ Respondent, be compelled to provide maintenance of Kenya Shillings 8,000 per month for the side children pending the hearing and determination of this application and suit.
    - v. The cost of this application be provided for.
  4. The Appellant initially raised a notice of Preliminary Objection that was dismissed, with an order for the application to be determined on merits. Parties filed written submissions the basis of which, the Court determined the application.
  5. This application was allowed on merits on December 3, 2021 and the Appellant being dissatisfied with the ruling and orders of the trial magistrate, preferred this instant appeal on the following six (6) grounds: -
    - i. That, the learned magistrate, erred in law and in fact, by allowing the Applicant's application dated March 30, 2022 without considering the defence raised by the Appellant in his replying affidavit to the application and without any grounds in law.
    - ii. That, the learned magistrate, erred in law and in fact, by failing to exercise his discretion judiciously in extending the Appellant's parental responsibility over TK who is now 23 years old, cleared form four in the year 2017 and who is now working in Eldoret, to fend for himself as an adult.
    - iii. That, the learned magistrate, erred in law and in fact, by failing to consider the weighty evidence and submission on record, exhibiting open bias hence arriving at the wrong and unconsidered decision.
    - iv. That, the learned magistrate, erred in law and in fact, by ordering for payment of Kenya Shillings 8,000/- per month, by the Appellant towards the maintenance of the minors who are now adults and yet there was no such order, prior to them attaining the age of majority.
    - v. That, the learned magistrate, erred in law and in fact, by ordering the Appellant to cater for the minor's college fees and maintenance when the Appellant had four other school-going children to support by paying school fees and maintaining them.
    - vi. That, the learned magistrate, erred in law and in fact, by failing to act fairly therefore occasioning miscarriage of Justice.
  6. As a first appellate Court, the Court has reviewed the entire trial Court record with a view to coming to its own independent findings. The parties filed their respective submissions which the Court has carefully considered.
  7. The 1<sup>st</sup> ground of appeal was, that learned magistrate, erred in law and in fact, by allowing the Applicant's application dated 3rd March without considering the defence raised by the Appellant in his replying affidavit to the application and without any grounds in law.
  8. It was submitted by the Appellant, that in his replying affidavit to the Respondent's application dated 30th March 2021, he maintained that the minors are now adults who are fending for themselves and the 1<sup>st</sup> minor was then 23 years employed as an attendant at the [Particulars Withheld] Supermarket in Eldoret, that the Appellant was the one who paid for their primary and secondary school education and that nothing was provided to the Court to prove that the minor is already admitted to the Eldoret Polytechnic as alleged.



9. The appellant submitted, that the learned magistrate, did not consider his contention that the Minors in question were adults, who were already out to fend for themselves upon the completion of their secondary education.
10. That Section 35 (1) of the Children's Act, provides for the extension of parental responsibility beyond their 18th birthday, presupposes special circumstances that necessitate the extension and it was their submission that, in this particular instance, the Respondent did not provide for or any proof that the minors were admitted to the college and there was no rebuttal of the Appellant's contention that the 1<sup>st</sup> minor was working in Eldoret.
11. Reliance was placed on the High Court Civil Appeal No. 81 of 2018 *MNB versus GNM & anor* which held: -
 

“ Even in the side paternity is not in dispute to ask the second respondent to assume parental responsibility for an adult aged 26 years old would amount to setting a dangerous precedent the whole purpose of providing an extension of parental responsibilities to provide for special circumstances where the attainment of the age of majority would Prejudice the welfare of the child already enjoying parental responsibility. it was never meant to apply to a situation where the applicant has long attained the age of majority”
12. It was submitted, that there was no special circumstance, to warrant the extension of parental responsibility upon the attainment age of majority and that the minor's welfare would not have been prejudiced in any way, since they were not enrolled in any educational institution today.
13. On the 5<sup>th</sup> ground of appeal, the Appellant submitted that, he is the one that was responsible for paying school fees for the minors till they clear their 4<sup>th</sup> form and that the 1<sup>st</sup> minor, TK cleared form 4, in the year 2017, while A cleared in the year 2020, that the learned magistrate, failed to consider these issues, while rendering the impugned ruling thereby failing to appreciate the fact that the Appellant, had four (4) other children of lesser ages, who have more need and care than the minors herein.
14. On her part the Respondent majorly submitted on the child's best interests' principles under Article 53 of the constitution that it would be in the best interest of the minors that are order for monthly maintenance of Kenya Shillings 15,000/- as reasonable amount owing to the current inflation and she relied on the case of *FO Vs LAM* 2019.
15. The Court notes, that the Respondent was acting in person and as such her submissions veered away from the Appeal at hand, introducing issues and reliefs not dealt with or sought or granted in prior proceedings and only the relevant submissions shall be relied upon herein.
16. The Court has refined the Appeal to one main Issue namely; -Was the Learned Magistrate in error to extend Parental Responsibility as sought?
17. The Court has considered the issue and finds that, the trial magistrate was at fault in allowing to extend the parental responsibility and that no special circumstances did exist to warrant the extension.
18. Judgment had been entered on November 24, 2020 and the impugned Application inviting the Court to alter the judgment was made on March 30, 2022. The Court views the Application and the reliefs sought therein as irregular.
19. The Judgment pronounced on November 24, 2020 was final and the trial court was in error to entertain the motion to extend parental obligation that it has declined a few months earlier.



20. The Court notes and finds that there were no special circumstances to warrant the extension of the parental responsibility after the age of 18 years of TK who is now 23 years old, cleared form four in the year 2017 and is not enrolled in any institution of higher learning.
21. Section 95 of the *Children's Act* provides that; where the Court is considering whether or not to make an order under this Act with respect to a child, the Court shall not make any order unless it considers that doing so is in the best interest of the child: -
- (2) Where the Court is considering whether or not to make an order under subsection (1), it shall have particular regard to—
- a. the ascertainable feelings and wishes of the child concerned having regard to the child's age and understanding;
  - b. the child's physical, emotional and educational needs and, in particular, where the child has a disability or chronic illness or where the child is intersex, the ability of any person or institution to provide any special care or medical attention which may be required for the wellbeing of the child;
  - c. the likely effect on the child of any change in circumstances;
  - d. the child's age, sex, religious persuasion and cultural background;
  - e. any harm the child may have suffered or is at the risk of suffering;
  - f. the ability of the parent, or any other person in relation to whom the Court considers the question to be relevant, to provide for and care for the child;
  - g. the customs and practices of the community to which the child belongs and the need to ensure that the child easily integrates while not subjected to harmful cultural practices;
  - h. the child's exposure to, or use of, drugs or other psychotropic substances and, in particular, whether the child is addicted to the same, and the ability of any person or institution to provide any special care or medical attention which may be required for the child; and
  - i. the powers which the Court has under this Act or any other written law.
- (3) In any proceedings in which an issue arises as to the upbringing of a child, the Court shall have regard to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child.
22. It was the Appellant's submission that the provisions of Sections 35 and 91 of the *Children's Act* presume a situation where a party has assumed parental responsibility when the child is still a minor. If no such responsibility had been assumed or imposed on a party when the child is a minor, there is no responsibility to extend. The cases of *CM v SWA* [2019] eKLR and *Allan Njau Waiyaki v Eddie Waiyaki Hinga* [2019] eKLR were cited in support of that submission.
23. Section 35 of the Children's Act gives the Court a wide discretion in the extension of parental responsibility in respect of a child beyond the age of eighteen if the Court is satisfied that special circumstances exist with regard to the welfare of the child. The section provides: -



- (1) Parental responsibility in respect of a child may be extended by the court beyond the date of the child's eighteenth birthday if the court is satisfied upon application or of its own motion that special circumstances exist with regard to the welfare of the child that would necessitate such extension being made."

24. Section 91(b) on its part provides the circumstances when a person who is not a child can apply to the Court for a maintenance order.

25. In *JNT v JWO & Another* [2019] eKLR, a Respondent aged 23 had been granted an extension of parental responsibility by a trial court. Muchelule J reversed the decision on the ground that there was no evidence that the Appellant had catered for the Respondent's education prior to becoming an adult. There was also no evidence that the Respondent had commenced his university education.

26. In *Allan Njau Waiyaki v Eddie Waiyaki Hinga* [2019] Eklr, the court 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.

In this case, the appellant was provided for by the respondent up-to the completion of his undergraduate studies. The respondent did this without compulsion of an order of extension of parental responsibility. The appellant went for extended parental responsibility long after he was 18, and when there was no continuing programme that the respondent was providing, or was responsible for. The respondent may be a rich father. However, in the circumstances of this case, he had no obligation to pay for the appellant's Master's programme ..."

27. In *MNB v JNM & another* [2019] eKLR, the Court held: -

"For the parental responsibility to be extended it must have existed in the first place and that is not the case here.

The appellant had an opportunity to move to Court prior to his attainment of the age of majority. This application is being made 7 years after the Appellant attained the age of majority and I find that the same is belated.

The reasons the Appellant advanced for not making the application earlier is that he did not know his father and further that he was ignorant as what he should do.

I find that there is evidence that in the year 2003, the Appellant was already made aware by the 1st Respondent that the 2nd Respondent was his father. I further find that the said issue was disputed by the 2nd respondent and it needs to be proved by the person alleging the same.

Even if the said paternity is not in dispute, to ask the 2nd Respondent to assume parental responsibility for an adult aged 26 years old would amount to setting a dangerous precedent."



28. In the present case, the Respondent contends that the Appellant is the father and that it is in the best interest of the minors that the parental responsibility should be extended and further that the two sons intend to pursue post-secondary education.
  29. The Parental Responsibility in relation to TK lapsed upon his attainment of eighteen years and at the point of the Application dated March 30, 2022 no such responsibility existed for consideration for an extension.
  30. The Respondent herein had an option to Appeal against the judgment or seek review of the same which did not happen in this instance.
  31. In this regard, the Court finds that the appeal is meritorious and is hereby allowed.
  32. The Ruling dated December 3, 2021 is hereby set aside.
  33. In the circumstances of this case the parties shall bear own cost both in the trial Court and this appeal.
- It is so ordered.

**SIGNED, DATED AND VIRTUALLY DELIVERED AT NAKURU THIS 26<sup>TH</sup> DAY OF MAY, 2023.**

.....

**Mohochi S.M**

**Judge**

