EMK alias A v SSS (Family Appeal 49 of 2018) [2022] KEHC 154 (KLR) (31 January 2022) (Judgment)

EMK v SSS [2022] eKLR

Neutral citation: [2022] KEHC 154 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

FAMILY APPEAL 49 OF 2018

JN ONYIEGO, J

JANUARY 31, 2022

BETWEEN

EMK ALIAS A .... APPELLANT

AND

SSS .... RESPONDENT

(Being an appeal from the Judgment of Hon.Yator (Srm) delivered on 24th October 2018 at Tononoka Children Court Case no. 137 of2015)

Extension of parental responsibility to pay school fees for a child above 18 years should not be stopped due to poor performance and indiscipline.

The High Court made determinations with respect to parental responsibility and its extension to a child that had attained tha age of majority and also the legality of the variation of an interlocutory maintenance order in the final judgment. The court held that parental responsibility, for one minor, MSS, had been extended mainly for the purpose of enabling her to complete her college education and that extension could not be terminated on account of poor performance or indiscipline. The court explained that the persons who could apply for an extension of parental responsibility included the parent or relative of a child, any person who had parental responsibility for the child, the Director or the child, as provided for under section 28(2) of the Children Act, 2001, (repealed.) Furthermore, the court also held that a change in circumstances, such as retirement and reduced income, could mean that a maintenance order could be varied and there was justification to vary the maintenance order. Such variation did not amount to a court sitting on an appeal against its decision.

Reported by Kakai Toili

Constitutional Law *– fundamental rights and freedoms – rights of children – right to parental protection and care – extension of parental responsibility of a child beyond the age of 18 years – termination of extension of parental responsibility – who were the people entitled to apply for an extension of parental responsibility of a child – whether the extension of parental responsibility to pay school fees for a child above 18 years could be terminated on account of poor performance and indiscipline of the child – whether the requirement to pay maintenance in a*

talak document could be subjected to change if circumstances required it – Constitution of Kenya, 2010, article 53; Children Act, 2001, section 28(2).

Civil Practice and Procedure *– orders – interlocutory orders – nature of interlocutory orders – variation of interlocutory orders – whether a variation of interlocutory maintenance orders amounted to a court sitting as an appellate court in its own judgment.*

Brief facts

The appellant instituted a suit against her husband, the respondent, at the trial court seeking among other orders; an extension of parental responsibility against the respondent in respect of MSS aged 20 years; a custody order requiring that legal custody, care and control of the issues of their marriage namely; MSS, NSS and ISS be awarded to the appellant; a maintenance order requiring the respondent to make periodic financial payments as the court deemed fit to the appellant in respect of the maintenance of the issues. During the pendency of the main suit, several applications were filed culminating in a number of rulings giving rise to various interlocutory orders.

The trial court held that parental responsibility of NSS remained extended as per the orders of March 19, 2018 and further to the orders, the same orders would end upon her attaining the age of 23 years unless the respondent extended them; parental responsibility against the respondent with regards to MSS was to stop upon delivery of the judgment; the respondent was to make a monthly contribution of KES 40,000 for the upkeep of ISS and NSS, deductible directly from the respondent's pension account; and that the amount of KES 120, 000 being received by the appellant from the respondent's pension account was to be stopped. Dissatisfied with the trial court's judgment, the appellant filed the instant appeal.

Issues

i. Whether an extension of parental responsibility to pay school fees for a child above 18 years could be terminated on account of poor performance and indiscipline of the child.
ii. Who qualified to apply for an extension of parental responsibility for a child?
iii. Whether the requirement to pay maintenance in a *talak* document could be subjected to change where necessary.
iv. What was the nature of interlocutory orders?
v. Whether variation of interlocutory maintenance orders amounted to a court sitting as an appellate court in its own judgment.

Relevant provisions of the Law

Children Act, 2001

Section 28 - Extension of responsibility beyond eighteenth birthday

(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:

Provided that the order may be applied for after the child's eighteenth birthday.

(2) An application under this section may be made by—

(a) the parent or relative of a child;

(b) any person who has parental responsibility for the child;

(c) the Director;

(d) the child.

Section 91 - Power to make maintenance order

Any parent, guardian or custodian, of the child, may apply to the court to determine any matter relating to the maintenance of the child and to make an order that a specified person make such periodical or lump sum payment for the maintenance of a child, in this Act referred to as a "maintenance order," as the court may see fit:

Provided that—

(a) on the making, varying, or discharging of a residence, guardianship or custody order, the court may make a maintenance order for a child even though no application has been made by any person;

(b) a person who has attained the age of eighteen years may, with the leave of the court, apply to the court for a maintenance order to be made in his favour in the following circumstances—

(i) The person is or will be involved in education and training which will extend beyond the person's eighteenth birthday; or

(ii) the person is disabled and requires specialised care which will extend beyond the person's eighteenth birthday; or

(iii) the person is suffering from an illness or ailment and will require medical care which will extend beyond the person's eighteenth birthday; or

(iv) other special circumstances exist which would warrant the making of the order.

Held

1. Being a first appeal, the court had a duty to analyse and re-examine the evidence adduced in the trial court and reach its own conclusion while always bearing in mind that it neither saw nor heard the witnesses testify and make allowance for that fact.
2. Parental responsibility was defined under Part III, section 23(1) of the Children Act as all the duties, rights, powers, responsibilities and authority that by law a parent of a child had in relation to the child. Under section 2 of the Children Act, a child was referred to as any human being under the age of 18 years. Parents were under obligation to provide for their children and ensure that their rights under article 53 of the Constitution of Kenya, 2010 (Constitution) and the Children Act were provided for.
3. Article 53(1)(e) of the Constitution provided that, a child had the right to parental care and protection, which included equal responsibility of the mother and father to provide for the child, whether they were married to each other or not. As a general principle but in theory, when a child attained the age of 18 years, he or she was deemed to be independent and capable of doing his or her things and therefore no longer entitled to be provided for by the parents. Nevertheless, that was not the true position in real life as that was the age when such a child needed educational support.
4. There were exceptions to the general rule to the extent that, parental responsibility in respect of a child who had attained the age of majority could be extended if the court was satisfied that special circumstances existed with regard to the welfare of the child. The special circumstances were provided under section 28(1) of the Children Act. Section 91(b) of the Children Act provided for exceptional circumstances when a person who was not a child could apply to the court for a maintenance order.
5. The court should not make orders in vain. Any and all interlocutory orders lapsed upon delivery of judgment after the full and final determination of a suit. The first order for the extension of parental responsibilities was an interlocutory order which was subject to change upon making orders in the final judgment. The trial court did not sit like an appellate court overturning its own decision when reviewing the orders in its final judgment. Interlocutory orders were by their very nature not final orders unless adopted as such by consent or arrived at by the court in its judgment.
6. Since the court had already extended parental responsibility for MSS for purposes of finishing her studies, the trial court acted improperly and indeed in error by stopping further parental responsibility in terms of stopping payment of school fees by the respondent while fully aware that the respondent had partly contributed to non-completion of her studies in good time by withdrawing payment of school fees on account of the child's indiscipline.
7. In the circumstances, it was not in the best interests of the child to terminate her studies at the final stage. To that extent, the trial court wrongly exercised its discretion by stopping parental responsibility at the critical stage of a child's career and future based on poor performance and indiscipline of the child. The benefits of completing her education far outweighed any other factor bearing in mind the money and time already spent *vis a vis* the outstanding amount and time remaining to complete her

education. The good news however was, MSS had finished her studies and if there were any outstanding fees (arrears) or expenses, then, the respondent was under obligation to clear the same.

8. If MSS had indeed finished college which was the main reason for the extension of parental responsibility in her favour, there would be nothing binding the respondent from further taking full parental responsibility against her unless a fresh application was made with sufficient reasons or grounds.
9. The discretion to impose conditions attendant to the extension of parental responsibility purely lay with the trial court. In the instant case, the court considered the duration a degree course was likely to take to complete. To that extent, there was no irregularity or abuse of discretion in fixing time as a condition for extension of parental responsibility.
10. Further extension of parental responsibilities should NSS for whatever reason including sickness fail to complete her education in time would only be done by the respondent. Under section 28(2) of the Children Act, any application for extension of parental responsibility could be made by the parent or relative of a child, any person who had parental responsibility for the child, the Director or the child.
11. Under section 28(2) of the Children Act, the choice as to who was supposed to apply for an extension of parental responsibility was wide. By limiting those powers to the respondent alone, the trial court applied wrong principles in law by blocking any other person entitled in law not to apply for an extension of parental responsibility. Nevertheless, imposing time frames was meant to instil discipline and hard work in children while in school.
12. It was not proper to give an open cheque for children to stay in school as long as they wanted yet after the age of 18 years, what a parent did for a child was a privilege that even the court could on its own motion grant or withdraw for good reason.
13. The respondent was retired and of advanced age. The respondent received a monthly pension of KES. 120,000 from the Kenya Power and Lighting Company (KPLC) and Kengen and had two other wives plus other children. All the companies to which the appellant used to be a director and/or partner were no longer operational hence there was no income that was derived from the companies. It was clear from the proceedings that there was a maintenance order made against the respondent to be paying a sum of KES. 120,000 out of his pension. That amount was based on the promise made under *talak* document in divorce proceedings that the respondent was to maintain the children.
14. Upon the children attaining the age of majority and subsequent extension of parental responsibility, and upon them proceeding abroad for further studies, the cost of their maintenance shifted from home to their place of stay that was in college. It, therefore, meant that the cost of maintaining them was no longer required or applicable at home but in college which the respondent was incurring through payment of school fees and the attendant maintenance expenses.
15. Pursuant to section 99 of the Children Act, a court had powers to impose conditions and to vary orders as it found appropriate. There was no parental responsibility agreement between the appellant and the respondent, and the *talak* document being relied on by the appellant was based on the respondent's capability to provide for his children, which capability had substantially reduced unlike at the time he was giving the appellant *talak*. That was because he was retired and did not engage in any kind of gainful employment because of his advanced age.
16. The respondent was under a duty to maintain children. In the absence of children, the appellant would not be entitled to anything. Therefore, the demand for a full amount of maintenance as it used to be when she was staying with the children full time was not tenable. Besides, the *talak* document had no specific monthly maintenance expenses.
17. The *talak* document was dependent on the unmeasured and unspecified financial ability of the respondent. That did not stop the respondent from making his contribution to her children. The respondent was a human being with limited financial resources. He could not stretch beyond the limit. If he had been straining when paying school fees for three children and meeting other obligations, he

could not continue doing so even when two of the children were out of Kenya a cost that was not envisaged in the calculation of maintenance.

18. Under the Constitution, the maintenance of children was an equal parental responsibility. The fact that the respondent was to pay maintenance under the *talak* document, was subject to change if circumstances dictated. The change of circumstances included children insisting on studying abroad instead of in Kenya where the father was comfortable paying college fees. The appellant could not sit and watch her former husband perform every duty. The direction that the appellant had to meet some support obligations was not unlawful but constitutional.
19. The appellant being a healthy person who was physically fit had to prove that she was doing her best to support her children when the father was overwhelmed. There was every justification for the trial court to vary the interlocutory maintenance order in her final judgment and that variation did not amount to sitting as an appellate court in its own judgment. Parents needed to enjoy good health during their old age and not to live miserable lives on account of their children's unlimited demands. One could not be a permanent child simply because there was a parent to provide forever. Children had to know that extension of parental responsibility was not absolute but a privilege accorded and sanctioned through the court and could be withdrawn any time by the court even *suo motu*.
20. In every decision made by the court or any other person, the best interests of the child had to be taken into consideration. Parental care and protection were equally shared responsibilities of both parents. Shared responsibility presupposed ability. Section 94(1) of the Children Act stipulated the considerations by which the court would be guided when making an order for financial provision for the maintenance of a child.
21. It was incumbent upon the appellant to prove or demonstrate to the court that in arriving at its decision, the court exhibited bias or violated her rights. Although the appellant had alleged discrimination on account of her sex, her role as a mother, financial status, and medical and educational status, no evidence was led to support such an inference. Section 108 of the Evidence Act provided that the burden of proof in a suit or procedure lay on that person who would fail if no evidence at all were given on either side. Section 109 of the Evidence Act further provided that the burden of proof as to any particular fact lay on the person who wished the court to believe in its existence unless it was provided by any law that the proof of that fact should lay on any particular person.
22. The appellant was duty-bound to prove the specific constitutional violations. It was not enough to state that the appellant's constitutional rights were violated through discrimination. There was no violation of any constitutional right/s of the appellant nor discrimination by being told to wake up from the dependency bed to a more robust and supportive lifestyle. The burden to prove denial of her constitutional right purely lay in the hands of the appellant.
23. An appellate court should be slow in interfering with the exercise of the discretion of a trial court. An appellate court could only tinker with a decision if it was satisfied that the discretion of that court was not exercised judiciously.

Appeal partly allowed.

Orders

i. *Order No. (b) of the judgment dated October 15, 2018 was substituted with an order to read that; parental responsibility of the issue called NSS remained extended to as per the orders of March 19, 2018, and further to the orders, the same would to come to an end upon her attaining the age of 23 years unless extended by any other legally recognized person pursuant to section 28 of the Children Act.*
ii. *Order No. (e) of the judgment dated October 15, 2018 was substituted to read that; the defendant would make a monthly contribution of Kshs 60,000 for the upkeep of ISS and NSS deductible directly from the defendant's pension account upon the defendant making a standing order to that effect commencing November 2018. The appellant to meet any other expenses on upkeep.*
iii. *The rest of the orders in the impugned judgment were to remain in force.*

Citations

Cases

Kenya

1. *Abok t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* Civil Appeal 161 of 1999; [2013] KECA 208 (KLR); [2013] 3 KLR 637 - (Explained)
2. *Anarita Karimi Njeru v Republic* Miscellaneous Criminal Application 4 of 1979; [1979] KEHC 30 (KLR); [1979] KLR 154; [1976- 80] 1 KLR 1272 - (Explained)
3. *CIN v JNN* Civil Appeal No 85 of 2013; [2014] eKLR - (Applied)
4. *GO & 2 others (suing through their mother and next friend) EMM v MOO* Civil Appeal 53 of 2015; [2016] eKLR - (Applied)
5. *MOA v HAO* Civil Appeal 139 of 2019; [2021] KEHC 12577 (KLR) - (Explained)
6. *Mugenda, Olive Mwihaki & another v Okiya Omtata Okoiti & 4 others* Civil Appeal 3 & 11 of 2016; [2016] KECA 663 (KLR) - (Explained)
7. *Mugo, George & another v AKM (minor suing through next friend and mother of AMK)* Civil Appeal 198 of 2013; [2018] KEHC 5871 (KLR) - (Explained)
8. *Odinga v Independent Electoral and Boundaries Commission & 3 others* Petition 5 of 2013; [2013] KESC 2 (KLR) - (Explained)

Regional Court

*Mbogo v Shah & anothe*r [1968] EA 93 — (Explained)

Statutes

Kenya

1. Children Act (cap 141) sections 2, 4(2)-(4); 23(1); 24(i); 28(1)(2); 91(b); 94(1); 98; 99; part III- (Interpreted)
2. Civil Procedure Act (cap 21) In general- (Cited)
3. Civil Procedure Rules, 2010 (cap 21 Sub-Leg) In general- (Cited)
4. Constitution of Kenyaarticles 27, 53(1)(e)(2); 159(2)(a) - (Interpreted)
5. Evidence Act (cap 80) sections 108, 109- (Interpreted)

Instruments

African Charter on the Rights and Welfare of the Child, 1990 articles 2, 3

Advocates

M/s Osino for the appellant

AA Mazrui & Company Advocates for the respondent

JUDGMENT

1. Through a plaint dated April 2, 2015, the appellant herein instituted a suit against her husband (the respondent) in Tononoka children court seeking orders as follows; extension of parental responsibility against the defendant in respect of MSS aged 20 years; a custody order requiring that legal custody, care and control of the issues of their marriage namely; MSS, NSS and ISS to be awarded to the plaintiff; a maintenance order requiring the defendant to make periodic financial payment as the court shall deem fit to the plaintiff in respect of the maintenance of the aforesaid issues; any other order or any relief that the honourable court deems just and fit to grant.

2. The respondent filed a statement of defence dated May 18, 2015basically challenging the prayers sought. As to the custody of M, he stated that the child was an adult hence fully to choose whom to stay with.

3. During the pendency of the main suit, several applications were filed culminating to a number of rulings giving rise to various interlocutory orders among them; the ruling of October 13, 2015which provided for; extension of parental responsibility beyond 18th Birthday of M who was by then studying abroad; defendant to pay school fees for M while studying in university abroad and Maintenance of the children as per the Talak pronounced in the divorce case.

4. The second ruling dated March 19, 2018relates to the court's refusal to commit the defendant(respondent) to civil jail for failing to honour his parental responsibility obligations among them non-remittance of children maintenance expenses. The court found that the sum of kshs120,000 the plaintiff was receiving from the defendant's pension account was sufficient considering that he was paying school fees for the children. The court also extended parental responsibility in respect of N beyond her 18th birth day for purposes of university education but with a caveat that her proposed education in Turkey would only be catered for by both parents with the defendant paying school fees equivalent to what was payable for a similar course in a parallel degree program in Kenya and the plaintiff to pay the balance.

5. After canvassing the main hearing, the court delivered its judgment on October 24, 2018thus holding that;

   a) Joint legal custody in respect of baby ISS be awarded to the plaintiff and defendant and actual physical custody to the plaintiff with unlimited access to the father.

   b) Parental responsibility of the issue called N remains extended to as per the orders of 19/3/2018 and further to the orders, the same to come to an end upon her attaining the age of 23 years unless the defendant extends

   c) Parental responsibility against the defendant with regards to MSS to stop upon delivery of this judgment.

   d) The defendant to continue paying school fees, transport, lunch and school related expenses like uniform, school books and other expenses.

   e) The defendant shall make a monthly contribution of Kshs 40,000 for the upkeep of ISS and NSS, deductible directly from the defendant's pension account, the defendant to make a standing order to that effect. Deductions to begin the month of November 2018. The plaintiff to cater for any other expenses on upkeep.

   f) The amount of kshs120, 000 currently being received by the plaintiff from the defendant's pension account to be stopped forthwith upon delivery of this judgment save for the amount in (e) above

   g) This being a matter brought on behalf of children each party shall bear own costs.

   h) Either party shall be at liberty to apply

6. Dissatisfied with the said judgment, the appellant filed this appeal and listed 23 grounds as follows:

   a. That the learned trial magistrate erred in law and in fact by failing to grant all the prayers sought in the suit despite gravity of the evidence adduced during trial.

   b. That the learned magistrate erred in both law and fact in ordering the immediate stoppage of attachment of the pension contrary to the children court ruling and the decision of the high court on appeal against the said ruling and the principles as enshrined in the provisions of the Kenyan *Constitution*, the *Children's Act* No 8 of 2001 the *Civil Procedure Act* and Rules.

c. That the learned magistrate erred in both law and fact in failing to consider the principles of granting maintenance orders as enshrined in the provisions of the Kenyan Constitution, the Children's Act No. 8 of 2001 the Civil Procedure Act and Rules.

d. That the learned magistrate erred in both law and fact in failing to consider that the family had had other sources of income being solely managed by the respondent and failing to apply the principles of granting maintenance orders as enshrined in the provisions of the Kenyan Constitution, the Children's Act No 8of 2001 the Civil Procedure Act and Rules.

e. That the learned magistrate erred in both law and fact in stopping the parental responsibility forthwith for the maintenance for MSS without any basis and failing to consider the principles of granting maintenance orders as enshrined in the…

f. That the learned magistrate erred in both law and fact in stopping the parental responsibility forthwith for the maintenance of MSS without any basis and failing to consider the circumstances that caused the child to fail in her exams caused by failure by the respondent to remit university fees on time and the child being kept out classes on numerous occasions.

g. That the learned trial magistrate erred in law, and in fact by, fixing for a limited period of time the period of extension of parental responsibility for the maintenance due to the minor NSS and not in the best interest of the minor

h. That the learned trial magistrate erred in law, and in fact by reviewing downwards the maintenance due to the minors and not in the best interest of the minors and contrary to existing orders in place on extension of parental responsibility and maintenance orders.

i. That the learned trial magistrate erred in law and in fact by abdicating from her responsibility of giving orders in the best interest of the minors and granting orders in favour of the respondent.

j. That the learned trial magistrate erred in law and fact and misdirected herself by ordering the appellant to provide for the minors beyond her financial capacity and against the weight of evidence thus reviewing downwards the maintenance and not in the best interest of the children.

k. That the learned trial magistrate erred in law by reviewing the issue of maintenance, which was not in the best interest of the children in the circumstances.

l. That the learned trial magistrate erred in law, and in fact, in failing to analyse the evidence and documents presented in support or the suit

m. That the learned trial magistrate erred in law, and in fact by failing to consider that the amounts withdrawn front pension account related to current expenses as ordered by the high court during the hearing of the appeal and the expenses in the notice to show cause for the period up to August 2016, and not monthly expenses deducted from the time that the initial order was made.

n. That the learned trial magistrate erred in law and in fact by considering amounts withdrawn from pension account relating to expenses before august 2010 as ordered by the children court during the hearing of a previous garnishee proceedings which had nothing to do with the general monthly expenses

o. That the learned trial magistrate erred in law and fact in putting the interests of the respondent first before those of the minors contrary, to the provisions of the Children Act No. 8 of 2001 and the Kenyan Constitution.

p. That the learned trial magistrate's judgement was harsh, punitive and biased against the appellant and the children and was against the weight of evidence and law.

q. That the learned trial magistrate erred in law and fact in finding that the amounts were exaggerated and required receipts without any basis yet the same amounts had previously been approved by the court and most were still outstanding for payments.

r. That the learned trial magistrate erred in law and fact in arriving at the entire judgement based on wrong principles of law.

s. That the learned magistrate erred in both law and fact by failing to consider the appellant's evidence and submissions.

t. That the learned magistrate erred in both law and fact by failing to consider and apply the law appropriately.

u. That the learned magistrate erred in law by misapprehending the law.

v. That the learned magistrate erred in both law and fact in considering extraneous matters which had not been tendered in evidence or submissions.

w. That the learned magistrate erred in fact and in law in failing to adhere to the constitution by denying the appellant a fair trial and discriminating her and the children by virtue of her status by being biased against the appellant and the minors consistently in her ruling.

7. The appellant's prayer is for this court to allow the appeal and substitute the impugned judgment with its own judgment by dismissing the respondent's claim in its entirety in such terms as the court may deem fit and just in the best interest of the children.

8. The appeal herein was canvassed by way of written submissions. On March 5, 2021, the law firm of PA Osino & Co advocates filed written submissions on behalf of the appellant. Submissions by the respondent's counsel were filed on March 19, 2021by the law firm of AA Mazrui & CompanyAdvocates.

Appellant's Submissions

9. M/s Osino learned counsel for the appellant identified three issues for determination as follows; whether the trial court properly applied the principles of law relating to extension of parental responsibility beyond the 18th birthday. Counsel submitted that the issue of parental responsibility for MSS had already been canvassed during the hearing of an application dated April 2, 2015 and the court held that parental responsibility could be extended beyond the 18th birthday. As regards payment of school fees, it was counsel's contention that the defendant should continue catering for the same. Learned counsel asserted that the trial magistrate unilaterally stopped payment of school fees for MSS a child in university without jurisdiction hence sitting as an appellate court over its own decision.

10. As regards NSS, it was submitted that she had been admitted to a university in Turkey but the defendant refused to cater for the fees yet the trial court had already dealt with the issue of extension of parental responsibility vide its ruling delivered on March 19, 2018and ordered the defendant to pay for a university in Kenya and that the said orders had not been set aside. Counsel contended that the

trial court erred in fixing a date when parental responsibility would end when in fact the child had not even joined university at the time of judgment.

11. On the second issue regarding whether the trial court had considered the principle of law relating to maintenance, counsel submitted that the learned Magistrate ignored the fact that the defendant was already retired during talak proceedings yet he undertook to pay for all the needs of the children as he had always done. That the trial court erred in fixing a monthly maintenance amount of kshs 40,000/= without considering the lifestyle of the children and their needs a fact that was not disputed in the defendant's defence.

12. Further, counsel submitted that the court erred in ordering the appellant to cater for all the needs of the children when she had physical custody yet she had no source of income. Counsel relied on the finding in the case of *SB v AAL* [2010] eKLR, to buttress the point that the duties of a mother do not cease and cannot be compared to a monthly maintenance cheque as doing so would amount to discrimination against the role of a mother and a woman. Further reference was made in respect to the case of *GO & 2 others (suing through their mother and next friend) EMM v MOO* [2016] eKLR where the court held that parental responsibility does not mean equal responsibility and similar contribution as the income of each parent and other non-monetary contribution should be borne in mind.

13. It was contended that the trial court erred in stopping further contribution from the respondent's pension contrary to its earlier ruling and that of the high court which actually upheld the said deduction on appeal.

14. On the 3rd issue regarding whether the decision by the trial court was unconstitutional and not in the best interests of the child, counsel submitted that the act of the trial court in reducing the obligations expressly admitted to by the defendant was contrary to article 53(1)(e) and 159 (2)(a) of the *Constitution* and section 24 (i) of the *Children Act*. That the said judgment discriminated against the appellant by virtue of her sex, her role as a mother and financial status.

15. It was further contended that the court's finding also discriminated against children on account of their medical and educational status by allowing the defendant to frustrate the children and limiting their financial needs during the limited fixed extension of parental responsibility. Counsel submitted that the court failed to uphold the principles enshrined under article 2 & 3 of the *African Charter on the Rights and Welfare of the Child* which prohibits all forms of discrimination against children.

Respondent's Submissions

16. Learned counsel for the respondent submitted that in considering extension of parental responsibility in respect of Mariam Salim Swaleh, the trial court took into account the fact that she had taken long than was required to complete her degree which was detrimental to the defendant since she had spent eight years in a four years course. Further, counsel submitted that it was noteworthy that the said Mariam had already completed her studies in Malaysia and as such, arguments on her studies are moot and the court ought not to delve further into the issue.

17. Concerning the issue of NSS, counsel contended that under section 28 of the *Children Act*, the court is not prevented on its own motion from making appropriate orders with respect to the extension of parental responsibility. Further, it was urged that a judgment by the trial court is an opportunity by the court to pronounce itself in finality in respect to issues raised during the trial as opposed to a ruling. Learned counsel opined that limiting the period of parental responsibility was clearly meant to ensure that the same was not abused by the appellant.

18. However, counsel was quick to add that the respondent was initially willing to educate NSS in a local university in Kenya but she failed her exams hence was not eligible to study in Kenyan universities. Nevertheless, Counsel confirmed that currently, N is in her last year in a university in Cyprus.

19. On whether the trial court erred in applying the principle of maintenance, counsel submitted that the trial court applied the evidence presented before it and appreciated the change in various circumstances. Further, on the issue of the talak document, counsel argued that the said document could not be termed as a parental care agreement. Counsel opined that the amount demanded by the appellant was ridiculous and that the court did clearly note that the appellant was confusing her needs as a divorced wife and those of her children. Further, that the appellant having been awarded movable and immovable properties in HC (OS) No 3 of 2015, she cannot purport not to have any source of income.

20. Regarding the question whether the trial court violated the principles of the Constitution on the best interests of the child, counsel submitted that the decision by the trial court was arrived at based on facts and the law. That the trial court acted in compliance with articles 53(1)(e) and 159(2) (a) of the *Constitution* which makes parental responsibility equal and the decision was in the best interests of the children.

21. learned counsel contended that parents have equal parental responsibility and that the appellanthas a duty to make at least some contribution and not just sit and push every responsibility to one parent. To buttress this fact, reliance was placed in the case of *MOA v HAO* [2021] eKLR. On the allegation that the appellant was being discriminated on account of her financial status, counsel submitted that it was the respondent who was being discriminated against by being overburdened in carrying full responsibility even when the appellant has both movable and immovable property awarded from their Matrimonial property dispute.

Analysis and Determination

22. Having considered the grounds of appeal together with the record of appeal and further, having taken into consideration parties' rival submissions, issues that emerge for consideration are;

    a) Whether the trial court properly applied the principles of law relating to extension of parental responsibility beyond the 18th birthday.

    b) Whether the trial court ignored the maintenance agreement contained in the talak document

    c) Whether the decision by the trial court was unconstitutional and not in the best interests of the children.

23. This being a first appeal, this court has a duty to analyse and re-examine the evidence adduced in the trial court and reach its own conclusion but always bearing in mind that it neither saw nor heard the witnesses testify and make allowance for the said fact. In *Abok James Odera 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 reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial judgeare to stand or not and give reasons either way."

Whether the trial court applied the principles of law relating to extension of parental responsibility beyond the 18th birthday.

24. Parental responsibility is defined under partIII, section 23(1) of the *Children Act* as all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child. Under section 2 of the said Act, a child is referred to as any human being under the age of 18 years. It is trite law that parents are under obligation to provide for their children and ensure that their rights under article 53 of the *Constitution* and the Children Act are provided for.

25. Article 53(1)(e) of the *Constitution* emphatically provides that, a child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not. As a general principle but in theory, when a child attains the age of 18 years, he or she is deemed to be independent capable of doing his or her things and therefore no longer entitled to be provided for by the parents. Nevertheless, this is not the through position in real life as that is the age that such child needs educational support.

26. However, there are exceptions to the general rule to the extent that, parental responsibility in respect of a child who has attained the age of majority can be extended if the court is satisfied that special circumstances exist with regard to the welfare of the child. The special circumstances are provided under section 28(1) of the *Children Act*, which stipulates thus:

> " 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:
>
> Provided that the order may be applied for after the child's eighteenth birthday."

27. Section 91(b) of the *Children Act* further provides for exceptional circumstances when a person who is not a child can apply to the court for a maintenance order. The section states thus:

> " Any parent, guardian or custodian, of the child, may apply to the court to determine any matter relating to the maintenance of the child and to make an order that a specified person make such periodical or lump sum payment for the maintenance of a child, in this Act referred to as a "maintenance order," as the court may see fit;
>
> Provided that-
>
> (a) ...
>
> (b) a person who has attained the age of eighteen years may, with the leave of the court, apply to the court for maintenance order to be made in his favor in the following circumstances-
>
> i. the person is or will be involved in education and training which will extend beyond the person's eighteenth birthday; or
>
> ii. the person is disabled and requires specialized care which will extend beyond the person's eighteenth birthday; or
>
> iii. the person is suffering from an illness or ailment and will require medical care which will extend beyond the person's eighteenth birthday; or
>
> iv. other special circumstances exist which would warrant the making of the order."

28. The trial court observed that the defendant/respondent had not refused to take care of his children and that the plaintiff's/appellant's demands were beyond the respondent's financial capability since he had now retired and unable to work. However, the trial court held MSS had overstayed university in Malaysia having taken over 7 years to finish her 4 year undergraduate studies. In the court's opinion, the child did not work hard as expected. The court having taken into account the expensive nature of universities abroad and the fact that the child had failed to do her part as required, parental responsibility with regard to her was stopped.

29. Counsel for the appellant argued that the trial court in the judgment delivered on October 15, 2018, fell in error when it vacated an order of extension of parental responsibility it had already made in the application dated April 2, 2015hence sitting as an appellate court on its own decision. On the other hand, the respondent argued that, the trial court properly exercised its jurisdiction in its judgment by reviewing its interlocutory orders made or issued during interlocutory application stage.

30. In the case of *Olive Mwihaki Mugenda & another v Okiya Omtata Okoiti & 4 others* [2016] eKLR the court of appeal when dealing with the issues of an interlocutory Appeal where Judgment had already been delivered in the suit held as follows:

> " We agree that this court should not make orders in vain. We reiterate that this appeal arises from an interlocutory ruling and it is trite law that any and all interlocutory orders lapse upon delivery of judgment after the full and final determination of a suit."

31. Guided by the wisdom enunciated in the above quoted decision, I find that the first order for the extension of parental responsibilities was an interlocutory order which was subject to change upon making orders in the final judgment. I therefore do not agree with M/s Osino that the trial court sat like an appellate court thus overturning its own decision by reviewing the same in its final judgment. It is trite that interlocutory orders are by their very nature not final orders unless adopted as such by consent or arrived at by the court in its judgment.

32. The trial court having gone through the evidence presented before it stopped the extended parental responsibility because MSS had taken over 7 years to finish her degree course yet the court had been informed that she was to clear her studies by July 2018. During cross-examination of the defendant/Respondent, he confirmed that he had stopped paying fees for MSS and as a result, his accounts were attached and the school fees was later paid.

33. Further, the respondent also confirmed that M had at first gone to another university which she refused and insisted to change and as a result wasted a whole year and had the Respondent lose US$ 7,300. The respondent also stated that in August 2015, while he was paying M's school fees, she shouted at him, calling him a liar whom she was not proud of calling her dad.

34. From his own admission, the respondent confirmed that he was annoyed and offended by the actions of M hence stopped the payment of her school fees. I do agree therefore with M/s Osino that, part of the reasons for delayed completion of studies by M is attributable to the respondent's conduct by withdrawing payment of school fees.

35. Consequently, from the foregoing, I find that the trial court erred in stopping the extended parental responsibility when the prolonged stay of MSS in university was partly contributed by the defendant's failure to pay school fees. I nevertheless agree with the position taken by the court that children must respect and appreciate their parents' effort in taking caring of them before they expect goodies from them. However, in his oral submissions, Mr. Salim appearing for the respondent told the court that Mariam has since completed her studies hence the matter is moot.

36. In her rejoinder during her oral submissions, M/s Osino confirmed that Mariam has finished her studies but there was some fees arrears or debts due and owing to the university. Since the court had already extended parental responsibility for Mariam for purposes of finishing her studies, the learned magistrate acted improperly and indeed in error by stopping further parental responsibility in terms of stopping payment of school fees by the respondent while fully aware that the respondent had partly contributed to non-completion of her studies in good time by withdrawing payment of school fees on account of the child's indiscipline.

37. In the circumstances, it was not in the best interests of the child to terminate her studies at the final stage. To that extent, the trial court did wrongly exercise its discretion by stopping parental responsibility at the critical stage of a child's career and future based on poor performance and indiscipline of the child. The benefits of completing her education far outweighs any other factor bearing in mind the money and time already spent vis a vis the outstanding amount and time remaining to complete her education. The good news however is, M has finished her studies and if there is any outstanding fees (arrears) or expenses, then, the respondent is under obligation to clear the same.

38. If M has indeed finished college which was the main reason for extension of parental responsibility in her favour, there will be nothing binding the respondentfrom further taking full parental responsibility against her unless a fresh application is made with sufficient reasons or grounds.

39. Regarding N, the court extended its orders extending parental responsibility made on March 19, 2018but put a caveat by imposing a time limit not beyond 23 years. It is this time limit subject to extension by the respondent that the appellant is opposed to as improper. It is trite that the discretion to impose conditions attendant to extension of parental responsibility purely lies with the trial court. In this case, the court considered the duration a degree course was likely to take to complete. To that extent, I do not find any irregularity or abuse of discretion in fixing time as a condition for extension of parental responsibility.

40. However, there is the question of who will be entitled to apply for further extension should N for whatever reason including sickness fail to complete her education in time. According to the court, such further extension will only be done by the defendant(respondent). Under section 28(2) of the *Children Act*, any application for extension of parental responsibility can be made by the parent or relative of a child, any person who has parental responsibility for the child, the Director or the child.

41. Under the afore said provision, the choice as to who is supposed to apply for extension of parental responsibility is wide. By limiting those powers to the respondent alone, the learned magistrate applied wrong principles in law by bl ocking any other person entitled in law not to apply for extension of parental responsibility. Nevertheless, I do agree with the learned magistrate that imposing time frames is meant to instill discipline and hard work by children while in school.

42. It is not proper to give an open cheque for children to stay in school as long as they want yet after age 18 years what a parent does for a child is a privilege which even the court can on its own motion grant or withdraw for good reason. Accordingly, the order that further extension of parental responsibility in respect of N after attainment of 23yrs be done through the respondent alone is hereby set aside and therefore substituted with the order that upon N attaining the age of 23yrs, further extension shall be subject to application by any other legally recognized person N herself pursuant to the conditions set out under section 28 of the *Children Act*. This can be done before the trial court which will examine reasons for further extension and make necessary orders.

43. Despite the above directions, I note from Mr Salim's oral submissions that N is in her final year and that the respondent has been paying school fees. With that confirmation, it appears like the respondent is

ready and willing to meet his parental obligations. I wish to advise the respondent and also the children that the sooner they discharge their responsibilities and duties the better.

Whether the trial Court ignored the maintenance agreement contained in the *talak* document

44. The point of contention here is that, the court did review the monthly maintenance expenses from Kshs120,000 to Kshs40,000 per month. The appellant during trial while giving her testimony testified and stated that when the respondent divorced her, he promised to take care of the children the same way he did when they were still together, pay workers, pay electricity, transport for the children and everything all which he has not done. On cross-examination, the appellant confirmed that the respondent is above 70 years old with a first family living in Tudor. She also stated that she was not sure whether the respondent was working or not.

45. Regarding the financial status of the respondent, the appellant confirmed that she did not know if Mvita Cable Ltd their joint company to which she was a director was still in existence, and that the last time she checked whether Mvita Cable Ltd was still operational was on April 2, 2015. The appellant also confirmed that she was not aware whether [Particulars Withheld] family business was operational and that vide email dated April 28, 2014, she requested for the closure of accounts in the name of [Particulars Withheld]. She further confirmed that she was a Partner in First Prince Ltd but she did not know whether it still existed.

46. The respondent on his part during the trial testified that he no longer works, having retired from Kengen in the year 2003 and later the Kenya Power and Lighting Company's Board in the year 2006 to join politics. The Respondent stated that he last worked as a Site Construction Manager in October 2015. He further stated that his company Mvita Cable Ltd stopped operations in December 2009 and there was an audit report to that effect. Concerning [Particulars Withheld], the respondent stated that the company was for getting tenders at Kengen and that the appellant closed the company.

47. The respondent further stated that he received a monthly pension of Kshs 120,000/= and an interest of 3% from KPLC and Kengen, and that he gets assistance from his son, his two wives and relatives, and that it is even his son who helped him to pay US$ 7500 towards M's nursing studies in Nairobi.

48. On parental responsibility being shared by both parents, the respondent stated that last holiday; the appellant went to Dubai and left the children at her sister's place in Nairobi. Further, it was stated that the appellant sells clothes, manages a kiosk hence she can support the children. According to the respondent, the appellant can take care of Mariam while he can provide for NSS and I.

49. On cross-examination, the respondent confirmed that he voluntarily agreed to maintain his children although there was no agreement on maintenance. Further, the respondent stated that the High Court ordered him to continue providing for the children by paying a sum of Kshs 50,000/= outside the other bills. However, after his accounts were frozen after garnishee proceedings, he has not received any demand.

50. It is common ground that the respondent is retired and of an advanced aged. It is also uncontroverted evidence that the respondent receives a monthly pension of Kshs 120,000/= as pension from KPLC and Kengen and that he has two other wives plus other children. Further, it has not been controverted that all the companies to which the appellant used to be a director and/or partner are no longer operational hence there is no income that is derived from the aforementioned companies.

51. According to M/s Osino, the maintenance order of kshs 120,000 against the respondent ought to have remained as his financial status as a retiree has not changed from the time when the order was made. That varying the order was discriminatory against the appellant on account of sex and financial

status and that the order is against the Talak order on maintenance of children made during divorce proceedings.

52. The trial court found that the only verifiable source of income in relation to the respondent was his monthly pension and that there was no proof or evidence of other sources of income earned by the respondent tendered.

53. According to the trial court's finding, the needs envisaged by the appellantwere exaggerated, unrealistic, and untenable considering that the court had extended parental responsibility with regard to the two older children, in respect of whom the respondent has been paying exorbitant fees for his two daughters a broad and therefore always away from home to warrant an expenditure of the claimed amounts. In the trial court's view, the Appellant was confusing her needs as a divorced wife with those of the Children.

54. I have looked and carefully gone through the talak document dated October 11, 2014, in which the respondent stated that he would provide for his children's needs. It is clear from the proceedings that there was a maintenance order made against the respondent to be paying a sum of kshs120,000 out of his pension. This amount was based on the promise made under talak document in divorce proceedings that the respondent was to maintain the children.

55. However, upon the children attaining age of majority and subsequent extension of parental responsibility, and upon them proceeding abroad for further studies, the cost of their maintenance shifted from home to their place of stay that is in college. It therefore means that the cost of maintaining them was no longer required or applicable at home but in college which the respondent is incurring through payment of school fees and the attendant maintenance expenses.

56. Pursuant to section 99 of the *Children's Act*, a court has powers to impose conditions and to vary orders as it may find appropriate. It thus stipulates:

> " The court shall have power to impose such conditions as it thinks fit to an order made under this section and shall have power to vary, modify or discharge any order made under section 98 with respect to the making of any financial provision, by altering the times of payments or by increasing or diminishing the amount payable or may temporarily suspend the order as the whole or any part of the money paid and subsequently review it wholly or in part as the court thinks fit."

57. Section 98 of the *Children's Act* provides:

> " Other maintenance provisions-
>
> > "A court shall have power to make an order and to give directions regarding any aspect of the maintenance of a child, including but not limited to, matters relating to the provision of education, medical care, housing and clothing for the child; and in this behalf may make an order for financial provisions for the child".

58. From the foregoing, and after careful consideration of the evidence tendered before the trial court, I find and hold that there was no parental responsibility agreement between the appellant and the respondent, and that the talak document being relied on by the appellant was based on the respondent's capability to provide for his children, which capability he now says has substantially reduced unlike at the time he was giving the appellant talak. This is because he is retired and does not engage in any kind of gainful employment because of his advanced age.

59. It is not in dispute that the respondent is a retired man aged over 70 years with a huge family comprising two other wives. His only proven source of income is his pension. Although no disclosure was made on what sources of income the other wives and children are surviving, the respondent is under duty to maintain children. In the absence of children, the appellant will not be entitled to anything. Therefore, the demand for a full amount of maintenance as it used to be when she was staying with the children full time is not tenable.

60. Besides, the *Talak* document had no specific monthly maintenance expenses. It was actually dependent on unmeasured and unspecified financial ability of the respondent. That does not stop the respondent from making his contribution towards her children. The respondent is a human being with limited financial resources. He cann.t stretch beyond the limit. If he has been straining when paying school fees for three children and meeting other obligations, he cannot continue doing so even when two of the children are out of the country a cost that was not envisaged in calculation of maintenance.

61. Under the Constitution, Maintenance of Children is an equal parental responsibility. The fact that the respondent was to pay maintenance under the talak document, it was subject to change if circumstances dictated. The change of circumstances includes, children insisting in studying abroad instead of kenya where the father was comfortable paying college fees. The appellantcannot sit and watch her former husband perform every duty. The direction that the Appellant meets some support obligations is not unlawful but Constitutional.

62. The appellant being a health person who is physically fit must prove that she is doing her best to support her children when the father is overwhelmed. See *CIN v JNN* [2014] eKLR where the court observed that the respondent was under obligation to establish to the satisfaction of the court that she had made some effort to provide for the upkeep of her children.

63. In my view, there was every justification for the trial court to vary the interlocutory maintenance order in her final judgment and that the variation did not amount to sitting as an appellate court in its own judgment. Parents need to enjoy good health during their old age and not to live miserable life on account of their children's unlimited demands. One cannot be a permanent child simply because there is a parent to provide forever. Children must know that extension of parental responsibility is not absolute but a privilege accorded and sanctioned through the court and can be withdrawn any time by the court even *suo motto*.

64. However, having taken into consideration the rate of inflation and the fact that I is still under 18yrs, I will substitute with and enhance the sum of kshs 40,000 awarded to kshs Kshs60,000 as maintenance expenses per month. The substituted sum will effectively replace the original sum of Kshs 120,000.

Whether the decision by the trial court was unconstitutional and not in the best interests of the children.

65. The appellant submitted that the judgment violated the provisions of article 27 of the *Constitution*. It was contended that the trial magistrate in her decision discriminated against the appellant by virtue of her sex, her role as a mother, financial status and the medical status of the children.

66. Counsel for the respondent on the other hand submitted that; the appellant made extravagant and unreasonable demands as she failed to demonstrate her contribution to the maintenance of the children and, that she failed to pin point any provisions of the Constitution that were violated by the trial magistrate.

67. I am a live to the fact that in every decision made by the court or any other person, the best interests of the child must be taken into consideration. Section 4(2)(3) and (4) of the *Children Act* espouses the said principle by proving that:

> "(2) In all actions concerning children, whether undertaken by public or private social welfare institution, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a 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 the welfare of the child;
>
> c. secure for the child such guidance and correction as necessary for the welfare of the child and in the public interest;
>
> (4) In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity."

68. Section 24 of the *Children Act* further provides:

(1) Where a child's father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility.

69. Article 53(2) of the *Constitution* requires that in all matters concerning children, the best interests of the child shall be of paramount importance. It states:

> " 53(2) a child's best interests are of paramount importance in every matter concerning the child."

70. Parental care and protection is an equally shared responsibility of both parents. Shared responsibility presupposes ability. Section 94(1) of the Act stipulates the considerations by which the courtshall 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...

71. From the evidence, the respondent has undertaken the above duties as the sole breadwinner. The appellant averred that she was an unemployed housewife. However, according to the respondent, the appellant sells clothes and runs a kiosk which activity brings her income. The appellant never

controverted the said allegations by the respondent. Currently, the respondent is a retiree, whose ascertainable income is his pension from KPLC and Kengen. The trial magistrate in her judgment found that the appellant had made extravagant and unreasonable demands and she did not offer anything at all towards the maintenance of the children. I do not find these remarks unconstitutional.

72. It is incumbent upon the appellant to prove or demonstrate to this court that in arriving at its decision, the court exhibited bias or violated her rights. Although the appellant has alleged discrimination on account of her sex, her role as a mother, financial status, medical and educational status, no evidence was led to support such an inference. Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;"

73. Section 109 of the *Evidence Act* further provides that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

74. The appellant is duty bound to prove the specific constitutional violations as held in the case of *Anarita karimi Njeru (No 1)*[1979] 1 KLR 154 , that;

> " we would, however, again stress that if a person is seeking redress from the high court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to this case) that he should set out with a reasonable degree of precision that, that of which he complains, the provisions said to be infringed, and the manner which they are alleged to be infringed"

75. It is not enough to state that the appellant's constitutional rights were violated through discrimination. I do not find nor see violation of any constitutional right/s of the appellant nor discrimination by being told to wake up from the dependency bed to a more robust and supportive lifestyle.

76. In my view, the burden to prove denial of her constitutional right purely lies in the hands of the appellant. See the Supreme Court holding in *Raila Odinga & others v. Independent Electoral & Boundaries Commission & others*, Petition No 5 of 2013, where the court restated the basic rule on the shifting of the evidential burden, in these terms:

> " ...a petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden...."

77. In the end, I am not persuaded that the appellant has clearly articulated how the trial magistrate's judgment violated her rights as guaranteed by article 27 of the *Constitution*. It is trite law that an appellate court should be slow in interfering with the exercise of the discretion of a trial court. An appellate court may only tinker with a decision, if it is satisfied that the discretion of that court was not exercised judiciously. In *Mbogo & another v Shah* [1968] EA 93, it was held at page 96 that:

> " An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judgein exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice."

78. Having held as above, it is my finding that the appeal herein partly succeeds and partly fails and therefore make the following orders.

a) That order No (b) of the judgment dated October 15, 2018 is substituted with an order to read that; Parental responsibility of the issue called N remains extended to as per the orders of 19th/3/2018, and further to the orders, the same to come to an end upon her attaining the age of 23yrs unless extended by any other legally recognized person pursuant to section 28 of the *Children Act*

b) That order No (e) of the judgment dated October 15, 2018 is substituted to read that; the defendant shall make a monthly contribution of Kshs 60,000 for the upkeep of ISS and NSS deductible directly from the defendant's pension account upon the defendant making a standing order to that effect commencing November 2018. That the plaintiff (appellant) to meet any other expenses on upkeep.

c) That the rest of the orders in the impugned judgment shall remain in force.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MOMBASA THIS 31ST DAY OF JANUARY, 2022

....

J.N. ONYIEGO

JUDGE