



**PAO v JKM (Suing on Behalf of the Minors: ES, DK, AN and EAO as a Mother and Next of Friend) (Civil Appeal E002 of 2024) [2025] KEHC 1932 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1932 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL APPEAL E002 OF 2024  
WA OKWANY, J  
FEBRUARY 13, 2025**

**BETWEEN**

**PAO ..... APPELLANT**

**AND**

**JKM (SUING ON BEHALF OF THE MINORS: ES, DK, AN AND EAO AS A MOTHER AND NEXT OF FRIEND) ..... RESPONDENT**

*(Being an Appeal from the Judgment and Order at the Chief Magistrate’s Court in Nyamira, Children Case No. E011 of 2023 delivered by Hon. B.O. Okong’o, Resident Magistrate on 14th December 2023)*

**JUDGMENT**

1. The Appellant herein was the Defendant before the trial court where the Respondent/Plaintiff sued him seeking the following orders: -
  - a. Custody of the minors herein be vested on the Plaintiff.
  - b. The Defendant be compelled to pay the Plaintiff a sum for the maintenance/school fees for the issues herein at Kshs. 30,000/=
  - c. Costs and interests of the suit.
  - d. Any other relief the honourable court may deem fit to grant.
2. The Plaintiff’s/Respondent’s case was that she got married to the Defendant (Appellant) on 30<sup>th</sup> November 2003 and that there are four issues of the said marriage. The couple lived peacefully but trouble started when the Appellant married a second wife thereby causing the marriage to irretrievably break down. The Respondent’s claim was that the issues had suffered mental anguish and material deprivation following the Appellant’s refusal to provide for them despite the fact that he was in gainful employment.



3. The Appellant's response was that they were happily married until 2016 when the Respondent secured employment with the County Government of [particulars withheld] as a nursery school teacher. He claimed that no sooner had the Respondent secured the job than she started filing a series of cases against him including a divorce cause No. 9 of 2022. He contested the Respondent's prayer for custody of the children on the basis that he had taken the sole responsibility for his children.
4. The trial court heard the case in which both parties testified and at the close of the case, the trial court delivered judgment as follows: -
  - a. That the Plaintiff is granted actual custody of the minors while the Defendant is awarded unlimited visitation rights upon making prior arrangements with the Plaintiff.
  - b. The Plaintiff shall cater for the minor's shelter and pay for the minor's rent.
  - c. The Defendant shall cater for the minors' food and clothing needs. The Court sets the amount to be contributed by the Defendant at Kshs. 13,000/= which shall be paid directly to the Plaintiff on a monthly basis.
  - d. The minor's school fees shall be contributed by both the Plaintiff and the Defendant in that, the Plaintiff shall contribute one third of the minor's school fees while the Defendant shall pay two thirds.
  - e. The Defendant shall continue to include the minors and the Plaintiff in his NHIF cover or any other medical cover.
5. Aggrieved by the trial court's decision, the Appellant filed the present Appeal through the Memorandum of Appeal dated 23<sup>rd</sup> April 2024 wherein he listed the following grounds: -
  1. That the trial magistrate erred in law and in fact in abdicating his mandate as an impartial and passive arbiter by ignoring to adopt the Mediation Report, a settlement by the consent of the two parties.
  2. The trial magistrate erred in law and fact by ignoring the Appellant's defence with all absolute facts.
  3. That the trial magistrate erred in law and fact by giving directions as to the payment of Kshs. 13,000 per month to the Respondent without considering that the Appellant had demonstrated his financial inability having been dismissed from his duty as a security officer which amount was excessive and unsustainable.
  4. That the trial magistrate erred in law and fact by giving an order in favour of the Respondent to be the custodian of the children without considering the outcome of the divorce case where the Respondent had asked to dissolve the marriage relationship to be remarried and that it was her prayer.
  5. That the trial magistrate erred in law and in fact by directing that the Respondent contributes only one third towards the payment of school fees and failed to consider the fact that the Respondent had an employment opportunity, permanent and pensionable was a pre-primary school teacher out of the utmost efforts of the Appellant, who had paid for her school fees for the full course.
  6. That the trial magistrate erred in law and fact by denying the Appellant the opportunity of enjoying parental love even after establishing a fact that the Appellant was the biological father and that the children will equally suffer that parental love while at the hands of a different



man as suggested by the Respondent in her prayers in the divorce case that had already been determined by the same court.

7. That the trial magistrate erred in law and in fact by giving an order of financial support by the Appellant to the Respondent and failed to consider that the Respondent stays at an acquired plot by the Appellant thus ignoring a possibility that the Appellant could support a stranger in terms of a husband to the Respondent, a desire expressed in the divorce cause No. M CCD 9 of 2022 and the same was granted (sic).
6. The Appeal was canvassed by way of written submission which I have considered.
7. The duty of a first appellate court was explained in the case of *PIL Kenya Ltd v. Oppong* [2009] KLR 442 where the Court of Appeal held thus: -

“It is the duty of the Court of Appeal, as a first appellate court, to analyse and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that.”
8. At the hearing before the trial court, the Respondent produced their marriage certificate, the children’s birth certificates and a letter from the Children’s Officer (P.Exh1-6). She urged the court to grant her Kshs. 30,000 as monthly maintenance for the children. She testified that the Appellant earned earning Kshs. 30,000 as a security officer in Nairobi and that she was willing to contribute Kshs. 8,000 monthly for the children’s upkeep from her salary of Kshs. 11,000.
9. The Appellant testified that he had supported the Respondent over the years and had even paid her college fees. He added that the Respondent graduated as a nursery school teacher (ECDE) after which she secured a job with the County Government of [particulars withheld]. He stated that the Respondent had indicated that she had the intention of getting married to another man and had planned to abandon the children. He undertook to take care of the children despite the fact that he had lost his job.

### **Analysis and Determination**

10. I have carefully considered the Record of Appeal and the parties’ rival submission. I find that the main issue for my determination is whether the appeal is merited.
11. Since this is a children’s matter, I find that the overriding objective in such matters is anchored on Article 53(2) of the *Constitution of Kenya*, 2010 which provides that: -

53.

  - (2) A child’s best interests are of paramount importance in every matter concerning the child.
12. Section 8 (1) and (3) of the *Children Act* Cap 141 also provides:
  - (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—
    - (a) the best interests of the child shall be the primary consideration;
  - (2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law,



shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

- (a) safeguard and promote the rights and welfare of the child;
- (b) conserve and promote the welfare of the child; and
- (c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.

13. It is trite that parents share equal joint responsibility in respect to their children and that no one parent is superior to the other in as far as parental responsibility is concerned. In *PKM v. ANM* (2020) eKLR Aroni J. (as she then was) stated that;

“in my view therefore one need not go further to look at what parents need to do for a child and to what extent. In this instance the parties have joint responsibility towards their son and no one is superior to the other...”

14. Section 23 of the *Children Act* stipulates as follows on what constitutes parental responsibility: -

1. In this Act, parental responsibility “means all the duties , rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child’s property in a manner consistent with the evolving capacities of the child.
2. The duties referred to in Sub -section (1) include in particular-
  - (a) the duty to maintain the child and in particular to provide him with-
    - (i) Adequate diet
    - (ii) Shelter
    - (iii) Clothing
    - (iv) Medical care including immunization
    - (v) Education and guidance
  - (b) ...
  - (c) ...

15. The above provision is amplified by Article 53 (1) (e) of the *Constitution* which provides that every child has a right to parental care and protection, which includes equal parental responsibility of the mother and father to provide for the child, whether they are married to each other or not.

16. Section 94 (1) of the *children Act* provides for the factors that the court should consider when making an order for maintenance of a child as follows; -

- “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 need of the child and the child’s current circumstances



17. From the above cited provisions, it is clear that parental responsibility is not the duty of only one parent. It is a joint effort of both parents notwithstanding the fact that their respective contributions may not be exactly the same. In this regard, it is not expected that one party will claim that his or her income is too small or little to support the child. In C.I.N.v. J.N.N(2014) eKLR the court held thus: -

“it will not do for a party to say that she has an uncertain source of income and therefore the responsibly of maintaining the children should be borne by the adverse party. The (said) party must establish to the satisfaction of the court that she has also made an effort to provide for the upkeep of the children”.

18. The gist of this appeal is the Appellant’s claim that he was ordered to pay to the Respondent Kshs. 13,000 per month to cater for the minors’ food and clothing needs and to contribute two thirds of the children’s school fees without considering his financial constraints following his dismissal from employment. The Appellant also faulted the trial court for failing to consider all the evidence that was placed before it when determining the case.

19. Section 110 of the Children Act provides for joint maintenance of children as follows:-

110. Joint maintenance of children.

Unless the Court otherwise directs, and subject to any financial contribution ordered by the Court to be made by any other person, the following presumptions shall apply with regard to the maintenance of a child—

- (a) it shall be the joint duty and responsibility of both parents to maintain the child whether or not the parents are married to each other;
- (b) where two or more guardians of a child have been appointed, it shall be the duty of all the guardians to maintain the child whether jointly with the parents of the child or not;
- (c) where two or more custodians have been appointed in respect of a child, it shall be the joint responsibility of all custodians to maintain the child;
- (d) where a residence order is made in favour of more than one person, it shall be the duty of those persons to jointly maintain the child; or
- (e) where the mother and father of a child were not married to each other at the time of birth of the child, and have not subsequently married and where the father or mother of the child have acquired parental responsibility of the child, it shall be the joint responsibility of the mother and father of the child to maintain that child.

20. In the present case, it was not disputed that the parties herein are the biological parents of the minors, as shown in the birth certificates that were produced as P.Exh 2-5. I therefore find that it is the responsibility of the parties herein to care and provide for all the children, their marital status notwithstanding.

21. Section 114 of the Children’s Act outlines the guidelines to be considered when making orders for child maintenance as follows: -

114. Financial provisions by step-parents and presumptive guardian.

- (1) The Court may make a maintenance order in respect of a child, including a child of the other parent who has been accepted as a child of the family notwithstanding the absence of an adoption order.



- (2) Without prejudice to the generality of subsection (1), the Court shall consider all the circumstances of the case and be guided by the following considerations—
- (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 immediate future;
  - (b) the financial needs, obligations, or responsibilities which each party has or is likely to have in the immediate future;
  - (c) the financial needs of the child and the child’s current circumstances;
  - (d) the income, if any, derived from the property of the child;
  - (e) any physical or mental disabilities, illness or medical condition of the child;
  - (f) the manner in which the child is being or was expected to be educated or trained;
  - (g) whether the respondent has assumed responsibility for the maintenance of the child and, if so, the extent to which, and the basis on which, he or she has assumed that responsibility, and the length of the period during which he has met that responsibility;
  - (h) whether the respondent assumed responsibility for the maintenance of the child knowing that the child was not his child;
  - (i) the liability of any other person to maintain the child;
  - (j) the liability of that person to maintain other children.

22. The Respondent stated, in her Affidavit of Means dated 17<sup>th</sup> April 2023, that she is a person of little means selling foodstuffs by the road side and making a meagre sum of Kshs. 2,500/= . She stated that she was unable to engage in heavy manual jobs because she is sickly.

23. A perusal of the Record of Appeal reveals a different picture from that presented by the Respondent as she produced her employment records which indicates that she makes monthly contributions towards her medical scheme. The said records also indicate that she is employed by the [particulars withheld] County Government under Employee No. [particulars withheld]. My finding on the Respondent’s shift in the position regarding her employment lends credence to the Appellant’s assertions that she was not honest about her financial status.

24. I further note that despite the fact that the Appellant is not employed he has continued to pay school fees for his children as shown in the receipts that he tendered in evidence. I find that not only was his evidence candid and believable, but that he also demonstrated his willingness to continue providing for his children according to his means. I therefore find that the trial court erred in apportioning more responsibility on the Appellant despite proof that he lacked the financial means since he was at the time not in any gainful employment.

25. I have considered the issue of custody and shelter. This Court is cognizant of the general practise that children of tender years are better off being left to the custody of their mothers unless circumstances dictate otherwise. I am not persuaded that the circumstances of this case would warrant an order that the children be taken away from their mother’s custody. I will therefore not make any orders that will



destabilize the children or cause them discomfort since the children stated, in court, that they would wish to live with their mother.

26. I further note that the Appellant and the Respondent had constructed a matrimonial home on their parcel of land. The Appellant did not seek orders to eject the Respondent from the said home and to my mind, this means that the issue of shelter has been settled. I therefore find that there was no need to make provision for shelter in terms of rent as the trial court did. I am of the view that since the Respondent and the children are already accommodated in the family home, the children's school fees should be shared equally by both parents.
27. Turning to the issue of school fees, food and clothing, I find that this are expenses that fall under the parents' joint responsibility. Consequently, I find that the expenses should be shared equally by the parties on the ratio of 50:50. As for clothing and food for the month, I direct that the Appellant shall pay, to the Respondent, Kshs. 13,000 per month for the upkeep and maintenance of the children as directed by the trial court.
28. Lastly on the issue of medical expenses, it is evident that the Respondent is in gainful employment where she receives medical benefits for herself and her dependants. At the same time, the Appellant has also enrolled into the National Hospital Insurance Fund (NHIF), now known as Social Health Insurance Fund (SHIF), medical scheme for himself and his dependants. In view of the fact that parties are now officially divorced and that the Respondent has her own medical cover from her employer, I find that the Appellant was justified in seeking to discharge the Respondent as his dependant on his NHIF/SHIF cover. I find it will only be fair for both parties to equally cater for the medical needs of their children through their individual medical schemes.
29. In the end, I find merit in the appeal and therefore allow it, albeit in part. I therefore set aside the judgment by the trial court and make final orders as follows: -
  1. The Appellant and the Respondent shall jointly pay for the school fees of the minors in the ratio of 50:50.
  2. The Appellant shall pay, directly to the Respondent, a monthly maintenance sum of Kshs. 13,000 for the upkeep of the children. This amount may be revised by the Court should the Appellant secure gainful employment.
  3. The Appellant and the Respondent shall both have joint and equal custody over their children and may make necessary arrangements to provide a peaceful home for their children. In this regard, the Respondent is granted actual custody of the minors while the Appellant is awarded unlimited visitation rights upon making prior arrangements with the Respondent.
  4. I make no orders on costs since this is a family dispute.
30. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 13<sup>TH</sup> DAY OF FEBRUARY 2025.**

**W. A. OKWANY**

**JUDGE**

