



REPUBLIC OF KENYA



**AON v OA (Civil Appeal E125 of 2023)
[2025] KEHC 11023 (KLR) (Family) (25 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11023 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY
CIVIL APPEAL E125 OF 2023**

PM NYAUNDI, J

JULY 25, 2025

BETWEEN

AON APPELLANT

AND

OA RESPONDENT

(Being an appeal from the Ruling of Hon E. M Muiru , Principal Magistrate delivered on 11th October 2023 in Nairobi Children’s Case No.969 of 2019)

JUDGMENT

1. Before this court for determination is the Appeal filed by AON (the Appellant) through a Memorandum of Appeal dated 10th November 2023. The Appeal arises out of a ruling delivered on 11th October 2023 by Hon.E.M Muiru, Principal Magistrate in Nairobi Children’s Case No.969 of 2019.
2. The Appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated 28th February 2025. The Respondent filed written submissions dated 25th June 2025.

Background

3. The Respondent herein filed a suit (as Plaintiff) in the Children’s Court in Nairobi being Suit No.969 of 2019 seeking the following orders;
 - a. Legal custody, care and control of the minor AON to be vested in the Plaintiff.
 - b. The defendant be ordered to pay school fees for the minor AON till university level.
 - c. The defendant be ordered to pay Kenya Shillings thirty thousand (Kshs. 30,000)/= being monthly expenses.



- d. That the defendant pays the costs of this suit.
 - e. Any other further relief that this Honourable Court may deem fit and just to grant.
4. The Appellant and the Respondent lived together as husband and wife but due to marital issues, they divorced. They were blessed with a child AON who was born on 27th October 2011.
5. The Defendant (Appellant) filed a defence and counterclaim dated 16th September 2019 seeking the following orders;
- a. Legal custody, care and control of the minor AON do remain with the Defendant as has been the cas since 2017.
 - b. Both the plaintiff and the defendant contribute equally towards the school fees for the minor AON until university level.
 - c. Both parties do share the monthly related expenses related to the minor.
 - d. Costs of this suit be provided for by the plaintiff.
 - e. Any other relief this honourable court may deem fit to grant.
6. The suit was fully heard and on 19th May 2022, Hon. H.M.Mbati, Senior Resident Magistrate delivered a judgment in which she made the following orders regarding custody and maintenance of the minor;
1. Both parties shall jointly legal custody of the minor.
 2. The Plaintiff shall have actual custody of the minor at the end of the current school term. However, in the event she decided to remarry, the Defendant is at liberty to move the court for areversal of the custody order; as per the minor's wishes.
 3. The parties shall discuss and agree on the school that the minor shall transfer to in the 2nd term of this year. It should be a school of similar status or better than the minor's current school. The parties shall provide school fees and related expenses for the minor at the chosen school, equally.
 4. The defendant is granted access to the minor on alternate weekends during the school term. School holidays shall be shared equally and the first half shall be alternated. Similarly, half terms and public holidays shall be alternated. However, due to the transition in 2nd term 2022, the plaintiff shall have the 2nd half of the next school holiday.
 5. The defendant shall provide 50% of the minor's monthly expenses quantified at Kshs. 30,000/- per month. accordingly, he shall remit Kshs. 15,000/- to the plaintiff by the 5th of every month, with effect from 5th July 2022. These monthly expenses amount to Kshs. 500/- per day. During school holidays, the defendant may deduct the expenses for the number of days when he has access to the minor and remit the difference.
 6. Each party shall bear its own costs and shall be at liberty to apply.
 7. The Respondent then filed a Notice of Motion dated 20th April 2023 seeking the following orders;
 1. That service of this application be dispensed with in the first instance.



2. That the court be pleased to review the judgment by Hon. H.M Mbatia dated 19th May 2022 to accommodate the fact that the Plaintiff/Applicant's circumstances have changed since she lost her employment.
 3. That under the circumstances, the judgment be reviewed to include: That the Defendant shall continue to cater for school fees and related expenses for the minor in full. That the plaintiff provides Kshs. 5,000 every month towards the minor's expenses.
 4. That the costs of this application be provided for.
8. The application was heard and vide a ruling delivered on 11th October 2023, the trial court issued the following orders;
1. The order of maintenance entered vide judgment delivered on 19/5/2022 is hereby reviewed.
 2. The defendant shall provide education, school related expenses and minor's other expenses.
 3. The plaintiff shall make a monthly contribution of Kshs. 10,000/= towards the minor's upkeep. The amount shall be payable to the defendant by the 10th day of every month.
 4. There shall be no orders as to costs.
9. Dissatisfied with the ruling of 11th October 2023, the Appellant filed a Memorandum of Appeal dated 10th November 2023 in which he listed five (5) grounds of appeal as follows:
1. The learned trial magistrate misapprehended the law on review of maintenance orders in reviewing the respondent's contribution downwards and added the appellant obligations without calling for affidavit of means of the parties to ascertain their true financial ability.
 2. The learned magistrate erred in law and in fact in reducing the respondent's responsibilities to the minor despite the appellant having demonstrated that the respondent had concealed her true financial status with a view to hoodwink the Honourable Court to review the maintenance orders in her favour.
 3. The learned magistrate erred in her ruling in ignoring the provisions of Article 53 of *the Constitution* in respect to equal parental responsibilities of parents to their children and in this case overburdened the appellant.
 4. The learned magistrate erred in failing to consider all the issues raised by the appellant in both the written submissions and affidavit filed in court.
 5. The learned magistrate misdirected herself in law in ruling the way that she did.
10. He asked the court to allow the appeal on the following terms;
- a. The appeal be allowed with costs.
 - b. The ruling of the lower court made on the 11th October 2023 be set aside and be substituted with an application dismissing the Plaintiff's application for review dated 20th April 2023.
 - c. The court grants any orders upon such terms as this court deems fair and just.
11. The Respondent opposed the Memorandum of Appeal vide a Replying Affidavit dated 6th May 2024. She averred that an affidavit of means is meant to enable the court make a determination on the financial situation of someone. In her case, she filed a termination letter which is sufficient proof that she no longer works and therefore, is unable to make her contributions as per the judgment. She argued that



all the issues had been determined and therefore, the allegation that the court did not consider his submissions and affidavit is mischievous and is brought in bad faith. She averred that the appellant makes decisions without involving her in matters concerning the minor. He chose the school for the minor without involving her.

12. She averred that she is willing to abide by the court ruling which ordered her to pay Kshs. 10,000 per month. She urged the court to dismiss the appeal.

Appellant's Submissions.

13. The Appellant submitted that the trial magistrate erred by reviewing the amount that the Respondent was supposed to pay without ordering her to file an affidavit of means. That the trial court did not state what material it relied on to arrive at that figure without an affidavit of means.
14. The appellant further submitted that despite stating to the court that the Respondent had an air b n b and that the bank statement was in relation to one bank account, the court did not investigate the allegations and seek to find out the true financial position of the respondent who had another account at Absa. Also, that the court did not consider the evidence that the Respondent was working in a real estate company earning an income.
15. Lastly, the appellant submitted that the trial court ignored the provisions of Article 53 of *the Constitution* which states that parental responsibility is an equal joint responsibility. He sought to rely on the decision of PKM v ANM [2020]eKLR. Relying on the decision of CIN v JNN [2014]eKLR, it was the appellant's submission that the respondent stating that she did not have any income was not enough reason to review the amount she was required to pay. He argued that the court fell into error by apportioning 90% of the responsibilities to the appellant who lives with the minor.

Respondent's Submissions.

16. The Respondent submitted that the application for review was canvassed by all the parties in the lower court and the appellant or his advocate did not make an application that she files an affidavit of means. That the appellant cannot raise the issue of affidavit of means at this stage. She argued that the trial court made a determination based on the evidence and pleadings placed before it.
17. She further submitted that the allegation that she concealed her financial has not been proved beyond the standard proof under Section 107 and Section 109 of the *Evidence Act*. She relied on the decision of Mbuthia Macharia v Annah Mutua Ndwiga & another [2017] eKLR.
18. Lastly, she submitted that Section 119 of the *Children Act, 2022* authorizes the court to amend an existing maintenance order if there is a substantial change in one parent's financial situation. In this case, her employment was terminated during the Covid pandemic and she did not stop providing for her son, rather she continued making payments despite being unemployed. She argued that the review was made in the best interest of the minor. She urged the court to dismiss the appeal with costs.

Analysis And Determination.

19. This is a first appeal. The duty of a first appellate Court was succinctly stated by Wendoh J in JWN v MN [2019] eKLR in the following words:

It is settled law that the duty of the first appellate court is to re-evaluate the evidence tendered in the subordinate court, both on points of law and facts and come up with its findings and conclusions.



20. The Court of Appeal in the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR stated: -

“This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

21. As this is a matter concerning children, the Court must consider and be guided by the principle of best interest of a child as provided for in Article 53(2) of *the Constitution* and Section 8(1) of the Children’s Act 2022.

Article 53 (2) of *the Constitution* provides:

“A child’s best interests is of paramount importance in every matter concerning the child.”

Section 8 (1) of the Children’s Act 2022 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;
 - b. the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.”

22. Article 53(2) of *the Constitution* provides for the right of every child 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. There is common ground from the parties, and the courts below did take this position into account in arriving at its decision. Having perused the arguments and decision on record, I do not see any error in the trial court’s assessment of the facts and the conclusion emanating therefrom.

23. The Court in exercise of its power may impose conditions, vary, modify or even discharge a maintenance order for the making of a financial provision. The Court may also increase or decrease or change the times of payments of the amount payable under a maintenance order. Additionally, the Court has the power and discretion to temporarily suspend the whole or any part of the maintenance amount and subsequently revive it wholly or in part as it deems fit. For a party to be deserving of an order of variation of a maintenance order, it must be demonstrated that such variation is in the best interests of the child.

24. The Respondent sought to make adjustments to the order for maintenance which was duly considered. The trial court, acknowledged its power to make adjustments to the order for maintenance and was not persuaded in favour of the appellant. The trial court, on the application for review, was persuaded by the respondent.

25. In the end, the appeal is unmerited. Owing to the nature of the matter as involving maintenance of a child, I see no reason to burden any of the parties with costs. I therefore make no order as to costs.



**DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS AT NAIROBI
THIS 25TH DAY OF JULY, 2025.**

P.M. NYAUNDI

JUDGE

In the Presence of:

Ongeri for Appellant

Ms. Amani for Respondent

Fardosa Court Assistant

