



**DCT v JWK (Civil Appeal E113 of 2022)  
[2025] KEHC 11065 (KLR) (Family) (25 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11065 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL APPEAL E113 OF 2022  
PM NYAUNDI, J  
JULY 25, 2025**

**BETWEEN**

**DCT ..... APPELLANT**

**AND**

**JWK ..... RESPONDENT**

*(Being an appeal from the Judgment and decree of Hon. M.W. Kibe, Senior Resident Magistrate at Nairobi Children’s Case No. E1151 of 2021 delivered on 25th October, 2022)*

**JUDGMENT**

1. This appeal arises from a judgment delivered in Milimani Children’s Case No. E1151 of 2021. The Appellant is aggrieved by the decision of the Honourable M.W. Kibe Senior Resident Magistrate, and has preferred this Appeal. In the suit before the Lower Court, the Respondent had sought the following orders via a Complaint dated 31<sup>st</sup> August, 2021:
  - a. Custody of the minors be given to the Plaintiff.
  - b. A declaration that the Defendant is duty bound to take, exercise and/or discharge his parental responsibility over the minors.
  - c. An order for maintenance of the minors by the Defendant in the following terms:
    - a. Food and toiletries.....Kshs. 41,020.00
    - b. School fees.....as per fee structure
    - c. Medical.
  - d. Costs of the suit.



- e. Interest on (c) at court rates until payment in full.
  - f. Any other relief the Honourable Court may deem fit and expedient to grant.
2. The Appellant entered appearance and filed a Statement of Defence dated 24<sup>th</sup> February, 2022. In his Defence, he prayed for the following orders:
- a. An order granting him unlimited access to the minors.
  - b. Joint Custody of the minors.
  - c. Access of the minors from Friday evening to Monday morning where he would pick and drop them from school after preparing them on alternative weekends as well as half of the holidays where during major holidays it would be alternating custody between the Plaintiff and the Defendant such as Christmas and Easter holidays among others.
  - d. Shared responsibilities of the maintenance of the minors where the Plaintiff would cater for education and related expenses (including meals at school), medical expenses and clothes for the minors while the Defendant would cater for food and shelter for the minors.
  - e. Costs of the suit.
3. In its Judgment, the Trial Court identified the main issues for determination as those relating to custody, access, maintenance, parental responsibility and costs of the suit. The Court found that both parties were biological parents of the subject minor and were thereby granted joint legal custody of the subject minors. The Plaintiff was granted actual custody of the subjected minors due to her being the one to stay with the minors since the parties separated on or about the year 2020. The Trial Court determined the issue of access to the minors and maintenance as follows:
- a. That the Defendant shall have access to the subject minors' as follows:
    - i. Alternate weekends starting Friday after school to Sunday 5.00pm.
    - ii. 1st half of the school holidays.
    - iii. That the Defendant shall ensure that he cultivates a healthy relationship with the subject minors.
    - iv. Both parties are at liberty to agree on other access arrangements other than those set out by this Court
  - b. The Defendant shall cater for the following minor's needs:
    - i. School fees.
    - ii. School related expenses including but not limited to the minors' lunch in school and school uniforms.
    - iii. Minors' medical cover.
    - iv. Minors' clothing at least 3 times per year.
    - v. Minors' extracurricular activities within his means.
  - c. The Plaintiff shall cater for the following minors' needs;
    - i. Minors' shelter.



- ii. Minors' clothing
    - iii. Minors' toiletries.
  - d. The Plaintiff and Defendant were directed to each contribute Kshs. 10,740/= per month as food expenses for the minors'.
4. The Appellant being dissatisfied with the Trial court's decision, preferred an Appeal. In the Memorandum of Appeal dated 7<sup>th</sup> November, 2022, the Appellant listed six grounds of Appeal as follows:
- 1. The learned Trial Magistrate erred in Law and fact by overburdening the Appellant with parental responsibilities despite the Appellant not having a stable source of income and the Respondent having a source of income.
  - 2. The learned Trial Magistrate erred in Law and fact by holding that the Appellant should cater for the school fees and related expenses, medical expenses, clothing expenses, monthly food expenses of Kshs. 10,740/= and co-curricular activities of the minors while the Respondent only caters for food expenses of Kshs. 10,740/= monthly.
  - 3. The learned Trial Magistrate erred in law and fact by failing to appreciate that the older minor is in a boarding school hence the Appellant cannot provide for her monthly food expenses as she eats in school while the younger minors have lunch in school hence the Appellant cannot provide their lunch yet he is to cater for school fees and related expenses at the same time.
  - 4. That the learned Trial Magistrate erred in law and fact by failing to scrutinize the evidence on record of the bad relation between the Appellant and the Respondent that would warrant the Appellant picking the minors from school on Friday and staying with them on alternate weekends and drop them in school on Monday to avoid interactions and inconveniences caused by having to drop the minors at the Respondent's place.
  - 5. That the learned Trial Magistrate erred in Law and fact by failing to scrutinize the evidence on record that supported the fact that the Appellant and the Respondent need to equally share the parental responsibilities of the minors due to their current financial capabilities.
5. The Appellant sought the following prayers in the Appeal:
- a. This Appeal be allowed.
  - b. The Judgment of the Trial Court be set aside and the parental responsibilities of the minors be shared equally.
  - c. Costs be awarded to the Appellant.
6. The Appeal was canvassed by way of written submissions. The Appellant filed his submissions dated 16<sup>th</sup> February, 2025. The Respondent did not file her submission despite having entered appearance.

#### **Appellant's submissions**

7. On grounds number 1 and 2, the Appellant submitted that the Trial Court erred by overburdening him with parental responsibilities despite him not having a stable source of income while the Respondent had a stable source of income. He averred that parental Responsibility is a shared responsibility and hence should be shared between the parents. He relied on Section 114 (2) of the [Children's Act](#) the considerations to be taken by Court when apportioning parental responsibility. He



also relied on the case of *RJM v CK* [2019] eKLR which also stated the factors to be considered in assessing contribution to be made. He averred that parental responsibility is not relegated to one parent alone but requires joint effort although no the same. He contended that it was not enough for one party to claim that his or her income is too small or little hence insufficient to support the child. He claimed that he had been made to bear almost the entire parental responsibilities of the minors despite the Respondent confirming to Court that she is working hence earning an income.

8. On grounds 3 and 4, the Appellant submitted that the Trial Court failed to appreciate that he and the Respondent were living separately hence each should cater for their own shelter and house helps and the same could not be solely the preserve of the Respondent. He stated that the responsibilities that ought to be shared by the Appellant and the Respondent should be food, education, medical expenses and clothing expenses of the minors. He averred that the older minor was in boarding school hence her food expenses are fully catered for.
9. On ground 5, the Appellant submitted that the Trial Court failed to scrutinize the evidence on record of the bad relations between him and the Respondent that would lead to inconveniences when picking the minors at the Respondent's place. He averred that picking the minors from the custody of the Respondent would be strenuous as the relationship between himself and the Respondent had irretrievably broken down hence the need to reduce contact between the them. He averred that the same could be achieved by having the Appellant pick the minors from school on Friday and take them back to school on Monday on alternate weekends. He also stated that the minors should stay with him for half of the holidays and the other half with the Respondent hence sharing the school holidays equally. He claimed that the Respondent had in the past four years denied him access to the minors.
10. On ground 6, the Appellant submitted that the Trial Court failed to scrutinize the evidence on record supporting the fact that the Appellant and Respondent need to equally share the parental responsibilities of the minors due to their current financial capabilities. He claimed that he was currently unemployed and struggling in the hotel industry which was hit badly by the COVID-19 pandemic and had since not recovered. He claimed to have been auctioned due to the debts incurred as a result of the losses that his business faced during the pandemic and had not recovered. As a result, he made local arrangements with the school of the minors hence ensuring that the minors were in school despite him lacking money to pay for school fees. He claimed to have loans that he was servicing currently together with medication that he needs hence he was constrained financially. He contended that he should cater for the minors' education and medical expenses while the Respondent caters for food and clothing of the minors.

### **Analysis and determination**

11. This is a first Appeal. The duty of a first Appellate Court is to re-evaluate the evidence in the subordinate court on both points of law and fact. The duty of a first appellate Court was succinctly stated by Justice Wendoh 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.”

12. The same was buttressed in the case of *Omar v Ngowa & another (Both suing as Administrators of the Estate of the Late Hamisi Ndoro Chaka)* (Civil Appeal E225 of 2023) [2024] KEHC 8750 (KLR) (15



July 2024) (Judgment), where the Court stated that the duty of the first Appellate Court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 which is as follows:

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.”

13. Based on the above, the Court has the duty to delve into the factual details and revisit the facts as they had been presented in the Trial Court, analyze and evaluate the same and subsequently arrive at its own independent conclusions. This is done while also bearing in mind that the Trial Court had the advantage of hearing the parties.
14. I have read the evidence tendered in the Trial Court and analyzed the same. There is no dispute that the parties are indeed the biological parents of the minors.
15. Having considered the facts, pleadings and submissions filed herein, I find the following to be the issues for determination:
  - a. Whether the Learned Magistrate erred in law and fact in apportioning parental responsibility?
  - b. Who should pay the costs for the Appeal?
16. On the first issue, I find that the best interest of the child is the primary consideration in considering this Appeal. The *Constitution of Kenya, 2010* in article 53 (2) provides that a child’s best interests are of paramount importance in every matter concerning the child. The same is buttressed in Section 8 (1) and (2) of the *Children’s Act, 2022*. The *United Nations Convention on the Rights of the Child* establishes the same principle in Article 3. In the Case of *HOO v MGO* [2021] eKLR, Justice M. Thande stated that:

“As the Court considers the matter and makes its decision that will impact the child herein all circumstances affecting the child must be taken into account. The overriding focus must be a solution that will be in the child’s best interests.”
17. Parental responsibility is defined in Section 31 (1) of the *Children’s Act, 2022* as 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.
18. Section 32 of the *Children’s Act, 2022* provides for equal parental responsibility with subsection 1 stating that the parents of a child shall have parental responsibility over the child on an equal basis, 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 whether or not the child is born within or outside wedlock. This provision speaks to the key contention in this Appeal as the Appellant feels that he is overburdened with parental responsibilities compared to the Respondent. He avers that parental responsibility is a share responsibility and ought to be shared between the parents.



19. In the case of *MNM v SNK* (Civil Appeal E008 of 2022) [2023] KEHC 3915 (KLR) (Family) (24 March 2023) (Judgment) the court stated that:

“Maintenance of a child is a joint responsibility of both parents, therefore each parent is required to provide for the upkeep of the child. Though parental responsibility is to be shared, it may not always be equal. The court has to take into account the financial capability of each parent.”

20. Similarly, in the case of *M.O.A. v H.A.O* [2021] eKLR the court held that:

“Although parents may not have equal financial ability for the court to demand equal contribution, one must at least exhibit some sense of seriousness in making some contribution as a sign of good will that he or she is not geared towards overburdening the other parent for the sole purpose of punishing him or her using the best interest of a child principle or as a ground to settle scores out of marital differences.”

21. The factors to be considered by the Court when making a maintenance order are provided in Section 114 (2) of the *Children’s Act*. They are:

- 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. At the Trial, the Respondent contended that she was willing to provide shelter, clothing and part of food. The Appellant on the other hand, had contended that he was willing to cater for the subject minors’ education, related expenses, medical expenses and clothes for the minors. The Appellant had also stated that he was willing to cater for the subject minors’ extracurricular needs at the Public Service Club. The Appellant submitted that he was facing financial constraints as his business suffered due to the COVID-19 pandemic and was yet to recover. He claimed to have been auctioned due to the debts incurred as a result of the losses. He also claimed to have made local arrangements with the school of the minors as to the payment of the school fees which he was lacking the funds to pay.



23. The Appellant submitted that the parental responsibilities of the minors should be shared equally with the Appellant catering for education and medical expenses while the Respondent caters for food and clothing of the minors. He also avers that each of the parties should cater for their own shelter. He also wishes to have access to the minors from Friday evening by picking them up from school and dropping them to school on Monday on alternative weekends.
24. On the issue of parental responsibilities, specifically on maintenance of the minors, I shall rely on Section 31 (2) (a) of the *Children's Act* which provides for the duties towards maintenance of the children. It states that:
- “(2) The duties referred to in subsection (1) include, but are not limited to—
- a. the duty to maintain the child and, in particular, to provide the child with—
- (i) basic nutrition;
- (ii) shelter;
- (iii) water and sanitation facilities;
- (iv) clothing;
- (v) medical care, including immunization;
- (vi) basic education; and
- (vii) general guidance, social conduct and moral values.”
25. Having considered all the relevant documents adduced in Court as well as the proposal of the Appellant on the sharing of parental responsibilities, I find that it would be in the best interest of the minors for the parental responsibilities to be shared as follows:
- a. The Appellant shall cater for the minors' school fees and related expenses, medical expenses, minors' extracurricular activities as per his means and food contribution as had been determined in the Trial Court.
- b. The Respondent on the other hand shall cater for the minors' clothing, toiletries and food contribution as had been determined in the Trial court.
- c. Each of the parties shall cater for the minors' shelter as well as the minors' food expenses during school holidays when the minors are under their care.
26. On the issue of contribution towards food expenses by the Appellant amounting to Kshs. 10,740/=, in my view, the amount is not unreasonable nor exorbitant given the current economic situation. Consequently, the same should be maintained. On the issue of picking up the minors' from school so as to avoid interactions and inconveniences caused by dropping the minors' at the Respondent's place, I find that the same has more to do with the poor relationship between the Appellant and the Respondent rather than the interest of the minors. The Trial Court had provided lee way to the parties to agree on other access arrangements other than those set out by the Court. Guided by the above, I find that it would be in the best interest of the minors for the current access arrangements to continue pending agreement between the Appellant and the Respondent on the most suitable means of accessing the children. I would emphasize that the Judgment of the Court does not relieve



the parents of the responsibility to engage directly so as to make the best decision for the children as circumstances evolve.

27. Consequently, the appeal is dismissed and judgment of the trial court upheld.

28. Each party shall bear their own costs. It is so ordered.

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

**P. M. NYAUNDI**

**JUDGE**

In the Presence of:

Nabende for Appellant

Fardosa Court Assistant

