



REPUBLIC OF KENYA



KENYA LAW
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**EOO v LAB (Civil Appeal E050 of 2023)
[2025] KEHC 10332 (KLR) (Family) (18 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10332 (KLR)

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

CIVIL APPEAL E050 OF 2023

PM NYAUNDI, J

JULY 18, 2025

BETWEEN

EOO APPELLANT

AND

LAB RESPONDENT

(Being an appeal from the Judgment and Decree of Hon R.O Mbogo (MR), Senior Resident Magistrate at Nairobi Children’s Case No. E877 of 2021 delivered on 31st May 2023)

JUDGMENT

1. Before this court for determination is the Appeal filed by EOO (the Appellant) through a Memorandum of Appeal dated 25th June 2023. The Appeal arises out of a Judgment delivered on 31st May 2023 by Hon. R.O Mbogo (MR), Senior Resident Magistrate in Nairobi Children’s Case No. E877 of 2021.
2. The Appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated 10th February 2025. The Respondent filed written submissions dated 28th April 2025.

Background

3. The Respondent herein filed a suit (as Plaintiff) in the Children’s Court in Nairobi being Suit No. E877 of 2021 seeking actual custody to her, maintenance and costs of the suit or any other relief the court may grant.
4. The Appellant and the Respondent had a relationship which resulted to the birth of a child named DIO who was born on 10th May 2017.



5. The Defendant (Appellant) filed a defence and counterclaim on 8th November 2021 seeking actual custody of the child.
6. The suit was fully heard and on 31st May 2023, Hon. R.O Mbogo, Senior Resident Magistrate delivered a judgement in which he made the following orders regarding custody and maintenance of the minor.
 1. That the parties shall jointly share legal custody of the minor.
 2. That the Plaintiff shall have actual custody, care and control of the minor.
 3. That the Defendant shall have reasonable and unlimited access to the child.
 4. That the Defendant shall pay school fees and related expenses for the child at the current school. Should they wish to change schools, they should engage and mutually agree. He shall pay till the child turns 18 years.
 5. That there shall be a gag order against any print or electronic mass media from printing or publishing the details of this case.
 6. That both parties shall maintain their medical cover for the child to use in case of sickness.
 7. That the Plaintiff shall provide accommodation, clothing and nanny's salary.
 8. That the Defendant shall pay Kshs. 40,000/- for food, shopping and utilities. The same must be paid by the 5th of every month beginning June 2023.
 9. That each party shall bear own costs.
 10. That each party is at liberty to apply.
 11. That each party shall bear its own costs.
7. Dissatisfied with the Judgment of 31st May 2023, the Appellant filed a Notice of Motion dated 30th June 2023 seeking stay of proceedings and execution pending hearing and determination of the appeal. Vide a ruling delivered by this court on 7th June 2024 the court granted stay pending appeal on the condition that the appellant remits Kshs. 20,000 to the Respondent on the 5th of every successive month among other orders.
8. He filed a Memorandum of Appeal dated 23rd June 2023 in which he listed seven (7) grounds of appeal as follows:
 1. That the Honourable Magistrate erred in Law and in fact in finding that the Appellant shall pay the sum of Kshs. 40,000/= for food, shopping and utilities and the same shall be paid by the 5th of every month beginning June 2023.
 2. The Learned Magistrate erred in Law and in fact in failing to consider the best interest of the minor who is wholesome, robust and adequately requires participation of both parents in his life.
 3. That the Learned Magistrate also failed to appreciate that the parties have equal right and duty to care of the child under Article 53 of *the Constitution* of Kenya.
 4. That the Learned Magistrate erred in Law and in fact by misapprehending the provision of the Children's Act 2022 and Article 53 of *the Constitution* of Kenya thereby coming to the wrong conclusion.



5. That the Learned Magistrate failed to accord both parties equal treatment contrary to Article 27 and Article 45 of *the Constitution* of Kenya.
6. That the Learned Magistrate misdirected himself in law and in fact by failing to consider the whole evidence and testimony of the appellant and to critically analyse and the same and come to the correct conclusion.
7. That the Learned Magistrate erred in Law and in fact by taking irrelevant facts into account when making his orders and failing to take account of all the evidence on record thereby coming to the wrong conclusion and in particular with regard to the best interest of the child.
9. He asked the court to allow the appeal on the following terms;
 - i. The Judgment given by the Honourable R.O Mbogo on 31st May 2023 be set aside.
 - ii. That this Honourable Court to allow this appeal and quash the orders of the Magistrate's Court made on 31st May 2023 in their entirety.
 - iii. Costs be in the cause.

Appellant's Submissions.

10. The Appellant framed the following as issues for determination;
 - a. Whether the subordinate court apportioned the share of parental responsibility over the minors per the law;
 - b. Whether the apportionment of parental responsibility in the monthly sum of Kshs. to the appellant was fair and/or just;
 - c. Whether the subordinate court gave due regard to the appellant's affidavit of means; and,
 - d. Whether the Judgement given by the Honorable R.O. Mbogo on 31 set May 2023 should be set aside and this appeal allowed.
11. On the first issue, the counsel the decision of JOO v AJM [2017] eKLR, it was submitted that the best interest of a child principle should be construed to mean the provision of the basic needs of a child inter alia shelter, food, clothing, medical care and education. To meet this requirement, both parties have an equal role to play and it should be sustainable and within their means
12. On the second issue, it was the appellant's submission that the division of parental responsibility of the lower court violates the provisions of Article 53(1)(e) of *the Constitution* of Kenya, 2010. It was his submission that although equal responsibility does not mean equal and similar contribution, the trial court did not consider the affidavit of means filed by both parties. He sought to rely on the decision of M.O.A v H.A.O[2021] eKLR where the court held that one must exhibit contribution and should not overburden the other parent. He also relied on the case of SAK v ZDNP [2019] eKLR where the court held that parental responsibility falls on both parents and no parent have a superior right or claim against the other in exercise of parental responsibility.
13. On the third issue, the appellant submitted that although both parties filed an affidavit of means, the trial court did not consider them or justify how the sum of Kshs. 40,000 was arrived at. That despite showing that he had huge loans that he was servicing, the trial court still placed a heavy burden of him and failed to appreciate that he has always been paying school fees for the minor. He sought to rely on the decision of CM v DN [2020] KEHC 10002 KLR where the court held that the trial



Court was obligated to consider the income or earning capacity, property and financial resources of the parties both then and in the foreseeable future. The court further stated that the trial Court was also to consider the parties financial needs, obligations, or responsibilities.

14. He argued that he is a polygamous man and has other children to take care of. He urged the court to balance the rights of the parties to contribute to the welfare of the minor.
15. On the fourth issue, the Appellant submits that the trial Magistrate failed to uphold the principle of equal parental responsibility as stipulated in Article 53 of *the Constitution* and the Children's Act. That both parents have an equal duty to provide for the child's needs. The order unfairly places the entire financial burden of food, shopping, and utilities on the Appellant, while the Respondent is only obligated to provide accommodation, clothing, and nanny's salary. The Appellant argues that the order does not serve the best interests of the child. The financial burden placed on the Appellant may strain the relationship between him and the Respondent and negatively impact the child's well-being in the long term. That a balanced approach, where both parents contribute proportionally to their means, would be more beneficial.

Respondent's Submissions.

16. The Respondent identified the following as issues to be determined by this court;
 - i. Whether this Honourable Court should set aside and/or discharge the Appellant from Order no. 8 of the judgement delivered on 31st May 2023.
 - ii. Whether the Lower Court fairly assessed the award of contribution by each parent?
17. On the first issue, the respondent submitted that *the Constitution* of Kenya 2010 as well as the *children Act* 2022 provides that both parents are equally responsible for the upkeep of the child. That in apportioning the responsibilities of each parent, the court considered the best interests of the minor considering that both parents have equal parental responsibility over the minor. She sought to rely on Section 31 of the *Children Act* and Article 53 of *the Constitution* which provide for parental responsibility of children. She also relied on the decision of PKM v ANM (2020) eKLR where the court held that both parents have equal responsibility over the minor and none has a superior right over the other one.
18. She argued that it is not in the best interest of the minor that the judgment of the trial court be set aside especially the order that the appellant does pay Kshs. 40,000/= for food, shopping and utilities.
19. On the second issue, the respondent submitted that the trial court considered the earning capacity of both parents. She argued that the appellant's salary is Kshs. 1,167,150 while his Net Salary Kshs. 105,665. On the other hand, her Gross salary is Kshs. 140,891 while her Net Salary Kshs. 68,241. That the lower court confirmed the financial muscle of each parent. She sought to rely in the case of SLM v DAM [2018] eKLR where the court held that;

The assessment of the award of contributions by each parent to the upkeep of the children is at the discretion of the trial court who had the opportunity of hearing the evidence and considered the relevant material placed before her. An appellate court can only interfere with the amount awarded if it is demonstrated that the trial magistrate failed to consider relevant factors or considered irrelevant factors or that the assessment is so low as to show an erroneous approach to assessment of upkeep expenses.
20. Relying on the decision of EMM v MOO [2016] eKLR and M.K. v C.K.K HCA. 51/2015, the Respondent submitted that although parental responsibility is equal, it doesn't mean equal and similar



contribution. In this case, she argued that she has the actual custody with the minor and she makes non-monetary contribution needs for the minor. She argued that the appellant is a man of means and is able to take care of the minor's needs.

Analysis And Determination.

21. The issue for determination is whether the trial court erred in finding that the appellant will pay a sum of Kshs 40000 towards the maintenance of the minor?
22. This is a first appeal. The duty of a first appellate Court is well settled and 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.

23. As I consider this the matter, I am mindful of the constitutional and statutory imperative that the best interests of the children are paramount. Article 53(2) of *the Constitution* of Kenya, 2010 provides:
A child's best interests are of paramount importance in every matter concerning the child.

And Section 8(1) and (2) of the *Children Act* (the Act), 2022 which 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 a primary consideration.
 - b.
- (2) 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 and promote the welfare of the child;
 - (c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.

Did the Trial Court err in directing that the Appellant pay a monthly sum of Kshs 40000 towards the maintenance of the minor?

24. The Appellant submitted that the court failed to consider the evidence and in particular his affidavit of means thereby fixing the maintenance at a level that was beyond the means of the appellant. Further, he submits that responsibility for the minor has not been equally shared as he has a heavier responsibility.
25. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 the Court stated:

...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to



take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

26. I note that in arriving at the maintenance payable by the Appellant, the Court referred to the principles enunciated under Article 53(2) of *the Constitution*, Sections 31 and 114 of the *Children Act*. The Court considered the earning capacity and the needs of the minor.

27. The Court in SLM versus DAM [2018] eKLR stated as follows: -

Ougo, J in PMA versus GML [2016] eKLR stated that in seeking to ascertain maintenance, the court should have regard to existing and potential means of the parties, their respective earning capacities, financial needs and obligation; the duration of the marriage the conduct of the parties prior to divorce, their conduct that led to the breakdown of the marriage remembering that both parties have equal rights under Article 45(3) of *the Constitution*.

The assessment of the award of contributions by each parent to the upkeep of the children is at the discretion of the trial court who had the opportunity of hearing the evidence and considered the relevant material placed before her. An appellate court can only interfere with the amount awarded if it is demonstrated that the trial magistrate failed to consider relevant factors or considered irrelevant factors or that the assessment is so low as to show an erroneous approach to the assessment of upkeep expenses

28. In light of the foregoing, I find that the appellant has not succeeded in laying a basis for this Court to interfere with the discretion and decision of the trial Court. The Appeal is accordingly dismissed and the judgment of the trial court upheld in its entirety.

29. Each party shall meet their own costs.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF JULY 2025.

P M NYAUNDI

JUDGE

In the Presence of

Ms. Kathurima for Respondent

Fardosa Court Assistant

