



REPUBLIC OF KENYA



**MBO v MNM (Civil Appeal E114 of 2023)
[2025] KEHC 10953 (KLR) (Family) (25 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10953 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E114 OF 2023
PM NYAUNDI, J
JULY 25, 2025**

BETWEEN

MBO APPELLANT

AND

MNM RESPONDENT

(Being an appeal from the Judgment of Hon R.O Mbogo (MR), Senior Resident Magistrate read and delivered virtually by Hon. Munene, Principal Magistrate on 27th September 2023 in Nairobi Children’s Case No.E460 of 2020)

JUDGMENT

1. Before this court for determination is the Appeal filed by MBO (the Appellant) through a Memorandum of Appeal dated 14th October 2023. The Appeal arises out of a Judgment delivered on 27th September 2023 by Hon. R.O Mbogo (MR), Senior Resident Magistrate in Nairobi Children’s Case No.E460 of 2021.
2. The Appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated 5th May 2025. The Respondent filed written submissions dated 12th June 2025.

Background

3. The Respondent herein filed a suit (as Plaintiff) in the Children’s Court in Nairobi being Suit No. E460 of 2020 seeking the following orders;
 - a. A custody order vesting the legal custody of the said children of the relationship upon the Plaintiff and a structured right of access to the Defendant.



- b. A declaration that the defendant has parental responsibility over the children of their relationship.
 - c. A maintenance order requiring the Defendant to make monthly financial payments, as the court shall deem fit, to the Plaintiff in respect of the maintenance of the said issues.
 - d. Costs of this suit and interests therein at court rates.
 - e. Any other relief that this Honorable Court may deem fit.
4. The Appellant and the Respondent lived together as husband and wife but due to marital issues, they divorced. They were blessed with two children; RNO who was born on 23rd December 2005 and ASO who was born on 30th April 2011.
 5. The Defendant (Appellant) filed a defence and counterclaim dated 31st August 2020 seeking the following orders;
 - a. A custody order vesting the legal custody to both parents.
 - b. A maintenance order requiring that both parents make monthly financial contributions in respect of maintenance of the two issues.
 - c. Cost of this suit and interest therein at courts rates,
 - d. Any other relief that the court may deem fit.
 6. The suit was fully heard and on 27th September 2023, Hon. A.G Munene, Principal Magistrate read and delivered the judgment virtually on behalf of Hon. R.O Mbogo, Senior Resident Magistrate in which he made the following orders regarding custody and maintenance of the minors;
 1. Parties shall jointly share legal custody of the minors.
 2. The Plaintiff shall have actual custody, care and control of the minors.
 3. The Defendant shall have access in the following terms:
 - a. During school term he shall have access on alternate weekends.
 - b. During school holidays, the access shall be shared equally between the parties.
 - c. Access during special holidays like Christmas, Easter and New Year shall be alternated between the parties
 4. The Defendant shall pay school fees and related expenses for the children at their current schools. Should they wish to change schools, they should engage and mutually agree.
 5. Both parties shall provide accommodation during the period they have custody of the children.
 6. The Defendant shall take out a medical cover or pay for medical needs when need arises.
 7. The Plaintiff shall provide clothing and nanny's salary.
 8. The Defendant shall pay Kshs.50,000/= for food and utilities. The same must be paid by the 5th of every month beginning October, 2023.
 9. Each party shall bear own costs.
 10. Each party is at liberty to apply.



7. Dissatisfied with the Judgment of 27th September 2023, the Appellant filed a Memorandum of Appeal dated 14th October 2023 in which he listed eight (8) grounds of appeal as follows:
 1. The trial magistrate erred in law and in fact by ordering the appellant to pay Kshs. 50,000 per month for the minors' food and utilities, an amount which is excessive and punitive considering that the appellant already pays for the minors' school fees, all school-related expenses and medication.
 2. The trial magistrate erred in law and in fact by failing to consider the appellant's testimony and documentary evidence regarding his earning capacity.
 3. The trial magistrate erred by failing to properly apply the applicable legal principles when making an order for maintenance.
 4. The trial magistrate erred in law and in fact by failing to grant the appellant unlimited access to the minors.
 5. The trial magistrate erred in law and in fact by failing to consider the minors' ascertainable wishes and best interests when making the custody orders.
 6. The trial magistrate erred in law and in fact by failing to consider the appellant's written submissions and authorities.
 7. The trial magistrate erred in both law and fact by considering extraneous matters not before court and thus arriving at a flawed decision.
 8. The trial court's judgement was harsh, punitive, and biased against the appellant and was against the weight of evidence and law.
8. He asked the court to allow the appeal on the following terms;
 - a. This honourable court upholds this appeal.
 - b. The trial court's judgment and order directing the appellant to pay a monthly sum of Kshs. 50,000 be set side and substituted with a monthly sum of Kshs. 15,000 or such other lower amount commensurate with the appellant's earning capacity, financial resources and obligations.
 - c. The appellant be granted unlimited access to the minors.
 - d. The respondent bears the costs in this appeal and in the trial court.

Appellant's Submissions.

9. The Appellant framed the following as issues for determination;
 - a. Whether the trial magistrate erred by ordering the Appellant to pay Kshs. 50,000/= per month for the minors food and utilities yet the appellant already pays for the minor's school fees and all related expenses and medication.
 - b. Whether the trial magistrate erred by failing to grant the appellant unlimited access to the minors.
10. On the first issue, the counsel cited Article 53 (1) of the Constitution which provides that both the mother and father of the child have equal responsibility of the child.



11. He sought to rely on the decision of *KMM v MMO* [2020] eKLR where the court held that maintenance is the responsibility of both parents of a child. He also cited Section 114 (1) of the *Children Act* which states the guidelines the court should consider when making maintenance orders as follows; (i) the income or earning capacity, property or any 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; (ii) the financial needs, obligations or responsibilities, which each party has or is likely to have in the immediate future.
12. He argued that he produced bank statements to show that his businesses were not doing well and was unable to pay Kshs. 50,000 for maintenance but the trial court did not consider that. Also, he filed an application to review the maintenance cost where he was ordered to pay Kshs. 30,000/= per month. He argued that the Respondent is doing well yet she was not apportioned any responsibilities.
13. He submitted that reducing the maintenance will not interfere with the best interest of the minors. He relied on the decisions of *EMK* alias *A v SSS (Family Appeal 49 of 2018)* [2022] KEHC 154 KLR where the court reduced monthly maintenance from Kshs. 120,000 to Kshs 40,000 and *FKM v NKM* [2018] eKLR where the court reduced maintenance to Kshs. 7,500.
14. On the second issue, it was the appellant's submission that the trial court had issued orders that the appellant do have unlimited access to the minors but contradicted itself when delivering judgment and ordering limited access during the holidays. The Appellant argued that there was sufficient proof that the minors would love to see him regularly which was also confirmed by the Respondent during cross examination. He stated that it was not in the best interest of the minors that access is limited.

Respondent's Submissions.

15. The Respondent identified the following as issues to be determined by this court;
 - i. Whether the trial magistrate erred by ordering the Appellant to pay Kshs. 50,000/= monthly for food and utilities.
 - ii. Whether the trial magistrate erred by failing to grant the appellant unlimited access to the minors.
16. Citing Article 53(2) of the *Constitution*, Section 8 of the *Children Act* and the decision in *MA v ROO* [2013] eKLR, the Respondent argued that the best interest of the children in this case are paramount. The Respondent argues that parental responsibility is a joint responsibility and no party shall be treated superior to the other.
17. Relying on the decisions of *KMN v EG (Family Appeal E003 of 2021)* [2022] KEHC 11302 KLR and *IK v LK (Civil Appeal 16 of 2019)* KEHC 9100 (KLR), the Respondent submits that Kshs. 50,000 maintenance is reasonable and should not be reduced given the inflation rate and that as the children grow, their demands increase. She argued that the court should take note that the Appellant in 2020 was willing to pay Kshs. 29,000 and can't claim that he wants to pay Kshs. 15,000 now as maintenance. Also, that the court should note that the Appellant was in arrears at some point and she had to step in and take care of the minors welfare. On her part, she pays rent while the Appellant lives in their matrimonial home. She argues that the trial court did not err when it apportioned the Appellant Kshs. 50,000 for food and utilities.
18. On the second issue, the Respondent relied on the decision of *AA(suing as father and next friend of FA and RA) v WH (Matrimonial Case E 009 of 2022)* [2022] KEKC 5 KLR and argued that the unlimited access has to be reasonable given the school calendar and the activities the children are involved in.



19. She urged the court to dismiss the appeal.

Analysis And Determination.

20. 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.

21. As I consider this 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 of the *Children Act* (the Act) which provide:

- (2) In all actions concerning children, whether undertaken by public or private social welfare institutions, 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 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.

22. Before I proceed, I would wish to note that one of the children RNO is turning 20 years old in December having been born on 23rd December 2005. The other child, ASO is turning 14 years having been born on 30th October 2011. The orders this court will make is in regards to the 14 year old because the other one is now an adult.

23. The Appellant argues that Ksh. 50,000 is in excess and he is willing to pay Kshs. 15,000/=.

24. This Court has power to make adjustments to an order for the maintenance of a child as it may deem fit in the circumstances of each case. Section 99 of the Act provides as follows:

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 to the whole or any part of the money paid and subsequently revive it wholly or in part as the court thinks fit.

25. 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.

26. In this case, in exercise of the discretion of this court, Kshs. 50,000/= should be reduced since one of the minors is now an adult. The Appellant pays school fees and has provided a medical cover for the minor. I find that maintenance should be reduced to Kshs. 30,000/= per month and payments should be paid on the 5th of every month.
27. The Appellant argues that he was not given unlimited access of the children.. Access provided for under Children’s Act, Section 103 (2) and (3);
 - (2) Where a custody order is made giving custody of a child to one parent, the Court may order that the person not awarded custody shall nevertheless have all or any rights and duties in relation to a child, other than the right to actual possession, jointly with the person who is given custody of the child.
 - (3) The rights specified in subsection (2) include the right of access to the child on such terms as the Court may direct.
28. From the judgment the subordinate court gave both parents legal custody of the children. None was denied their parental responsibilities over the children. The court demarcated the time each would have the actual custody of the children. In my view that is well defined despite the current contest over the period of time each was granted with the children.
29. In the end, the appeal only succeeds to the extent of reducing maintenance amount to Kshs. 30,000 per month
30. Each party will meet their own 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:

Morara for Respondent

MO Appellant in person

Fardosa Court Assistant

