



REPUBLIC OF KENYA



**ODA v FJB (Civil Appeal E012 of 2024) [2025] KEHC 9625 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9625 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA**

**CIVIL APPEAL E012 OF 2024**

**JN ONYIEGO, J**

**JULY 4, 2025**

**BETWEEN**

**ODA ..... APPELLANT**

**AND**

**FJB ..... RESPONDENT**

*(Being an appeal from the judgement and decree of Hon. Baraka Xavier (R.M.)  
delivered on 12.06.2024 in Children Case No. E015 of 2024 at PM's Court at Wajir)*

**JUDGMENT**

1. The respondent via an undated plaint moved the trial court seeking for orders that:
  - i. The defendant be compelled to provide monthly maintenance for the children totaling to Forty Thousand (Kes. 40,000.00/-) only.
  - ii. That the plaintiff be granted custody of the children as they are of tender age and require the plaintiff's care, affection and motherly intimacy which the plaintiff is best placed to provide.
  - iii. Cost of this cause.
  - iv. Any other relief that the Honourable Court may deem just and fit to grant.
2. From the plaint, it could be discerned that the plaintiff/respondent and the defendant/appellant are a married couple albeit in a strained relationship. It is clear from the pleadings that currently; the parties are separated. The respondent in her plaint averred that previously, she was married to the brother of the appellant who is deceased. That in that marriage, she was blessed with four children namely: S, H, I and M while her current marriage to the appellant (brother in-law formerly), is blessed with a minor by the name of A.
3. According to her, the appellant has been in the habit of mistreating them by physically abusing her, declining to provide any form of support either in kind or monetary thus subjecting them to untold



suffering. That the appellant is a business man who exports livestock to Somalia and also owns herds of livestock and as such, he is a man of means. She claimed that efforts to remedy the situation has been futile hence the filing of the suit herein.

4. The appellant entered appearance and filed a defence dated 13.03.2024 denying the allegations and further claiming that he cared for his family. That the respondent on her volition and influence from her father, moved from the matrimonial home on the pretext that the appellant wanted her to take care of his ailing mother. That he did not abandon his family as he strives to provide for them within his means.
5. It was his case that being a pastoralist, the herds of cattle have been affected by the drought. He averred that he is not employed hence lacks a constant income. He further stated that he had made arrangements with a local wholesale at Khorof – Harar where the respondent was to collect cash to supplement income from the shop she was operating. That he had further made arrangements for the respondent to be receiving 12,000.00/- per month but he realized that the respondent had stopped picking the same for two months.
6. He blamed the area chief for his woes and further averred that the matter was related to a matrimonial case filed at the Kadhi's Court at Wajir in Wajir KCMATC E014/2023 that was pending determination. He prayed that he be granted custody of the minors and the matter be referred to the Children's Office for mediation.
7. During the hearing, PW1, FJB testified that the appellant is her husband as they are not divorced. She however conceded that they were not living together. It was her evidence that they had been married for four years and the marriage blessed with five children, four from the previous marriage and one child from the current marriage. She alleged that the appellant and her late husband had established some business which upon his death the appellant sold everything. That her deceased husband had camels and goats but upon the appellant taking over, she has been left with nothing.
8. She also claimed that despite constructing a semi-permanent house for her and her children, the appellant chased them away from the said house. It was her evidence that four children go to school in as much as the other one is yet to start school. She also averred that she sells milk out of which she earns Kes. 1000/= per month. That it is the same amount the appellant expects her to provide and cater for the needs of the children.
9. She prayed that the appellant be directed to pay for the children's' medication and education. On cross examination, she conceded to the fact that the appellant had made arrangements that she be picking goods from a certain shop but the same was impossible as the said shop is very far away.
10. PW2, JB, the plaintiff's father testified in support of PW1 thereby confirming that indeed the appellant had directed that the respondent be picking food from a shop at Khorof Harar but the said shop is 10 miles away. It was his evidence that the appellant has been mistreating the respondent and the children to the extent that he has had to step in to support them. That the appellant had failed to pay for the maintenance of the children as he also confirmed to them that he did not need them. He told the court that the appellant was also in the habit of physically abusing the respondent.
11. DW1, O confirmed that indeed, he inherited the respondent as previously, she was the wife of his deceased brother. That the respondent's marriage to his brother bore four children while his was blessed with one issue. That his late brother was a boda boda rider and that the business in question belonged to all their brothers. According to him, his brother was killed eight months into opening and doing the said business together.



12. That upon the death of his brother, his father told him to move to Ethiopia where he is been living and doing business. He averred that while in Ethiopia, he managed to marry and currently has a family consisting of a wife and three children. It was his evidence that the goods that were in the shop when his brother died, expired and therefore nothing much was salvaged. He alleged that he used to send Kes. 10,000.00/- per month for 18 months towards the maintenance of the minors.
13. That upon returning, his father told him to marry the respondent despite him having another family in Ethiopia, a direction which he complied with. He stated that he is a businessman who deals in selling goats in Nairobi and that from his business, he makes about Kes. 30,000/- to 40,000.00/- per month. It was his claim that the respondent had since chased him away from his home. On cross examination, he stated that he set up a shop for the respondent and that in the homestead, there stand two houses with one belonging to him while the other, his deceased brother. It was his evidence that he was ready to live with the respondent peacefully.
14. DW2, Mohamed Elmi Muhumed, an elder testified that he had been involved in reconciling the two but in vain. He stated that he desired the parties to reconcile and continue living together as he would strive to ensure that the respondent gets everything she needs.
15. The trial court deliberated the facts before him and the law and on 12.06.2024, delivered a judgment decreeing that:
  - i. The court grants the mother/plaintiff actual custody of all children noting that they are all girls of tender years. The court is convicted that both the plaintiff and the defendant are fit to be allowed legal custody.
  - ii. The court orders that the defendant pays maintenance of Kes. 12,000.00/- to the plaintiff by 5<sup>th</sup> of every month. The plaintiff shall settle the balance of Kes. 3,000.00/-. The defendant shall pay directly to the plaintiff's mobile number or deposit in the children's office on or before 5<sup>th</sup> of every month.
  - iii. As a tread off therefore, the mother/plaintiff shall cater for clothing obligation for Kes. 6,000.00/-.
  - iv. Medically, the court orders that the plaintiff caters for the medical needs of the family. The plaintiff to register under Universal Health Coverage as established under Social Health *Insurance Act* and cover the children's medical needs through her medical card. Plaintiff to pay the monthly subscription fees.
  - v. The court directs the defendant to pay monthly Kes. 8,000.00/- to the plaintiff being education and related expenses. All children must be enrolled to school at least a public school. The amount must be paid on or before 5<sup>th</sup> of every month directly to the plaintiff or to the children's office.
  - vi. The court further notes that the plaintiff's former husband had established a house for the family to reside, the court directs the defendant to allow the plaintiff and the children to reside in their house.
  - vii. Each party to bear own costs.
16. The appellant being dissatisfied with the judgment and decree of the trial court filed a memorandum of appeal dated 10.07.2024 on the grounds that:



- i. The learned magistrate erred in law and fact by finding that the respondent herein had proved her case and warranted the orders which were granted by the court.
  - ii. The learned magistrate erred in law and fact by condemning the appellant to pay school fees for the minors and in total disregard to the fact that the children attend public school and therefore the awarding of the school fees for the children was excessive and without any substantive facts.
  - iii. The learned magistrate erred in law and in fact by awarding excessive dugsu fee for the minors in total disregard that the said charges had been exaggerated and excessive and the same was unsupported by any tangible evidence.
  - iv. The learned magistrate erred in law and fact by relying on uncorroborated evidence of the appellants earning, asserted by the respondent, without demanding for material evidence which had he put into consideration, he would have arrived to a different decision.
  - v. The learned magistrate erred in law and fact by admitting the evidence of a stranger to the case and forcefully imposing the strange witness evidence and action against the appellant.
  - vi. The learned magistrate erred in law and fact by adjudicating on extraneous matters, which had not been litigated for in the pleadings i.e. that by upholding that the dwelling house the appellant is residing was constructed by the plaintiff's former deceased husband without any concrete evidence.
  - vii. The learned magistrate judgment was totally predisposed and against the principal of fair hearing and the principals for natural justice.
  - viii. The learned magistrate erred in law and fact by failing to consider and appreciate the evidence tendered by the appellant.
  - ix. The learned magistrate erred in law and fact when he failed to demonstrate neutrality, control and fairness in the proceedings and accordingly demonstrated bias towards the appellant at the expense of the respondent and therefore the judgment entered cannot be said to be fair.
  - x. The learned magistrate misdirected himself by not appreciating that it was not available for the court to stretch its imagination, invoking les pendes and filling gaps and inadequacies in the respondent's case.
  - xi. The learned magistrate's judgment was marred with numerous contradictions rendering it confusing and unenforceable.
17. The appellant sought for the following prayers:
- a. That the appeal be allowed.
  - b. That the Honourable Court be pleased to reverse in its entirety the judgment of the lower court delivered on 12.06.2024.
  - c. That in the alternative, the Honourable court do find that the monthly maintenance cost awarded by the lower court was unreasonably excessive.
18. The court directed that the appeal be canvassed by way of written submissions.
19. The appellant filed submissions dated 13.11.2024 urging that the respondent did not substantiate the reasons why she had required Kes. 40,000.00/- from him. That the respondent in her pleadings averred that she was not employed but along the hearing, she changed the version to that of running a small



business that generated Kes. 1,000.00/-. It was urged that the assertion by the respondent that she was only earning Kes. 1,000.00/- was not tenable as the appellant established her a general shop which brings along a reasonable income. To that end, the appellant relied on the case of C.I.N. vs J.N.N. [2014] eKLR where it was held that:

“It will not do for the respondent to say that she has an uncertain source of income and therefore the responsibility of maintaining the children should only be borne by the appellant. The respondent must establish to the satisfaction of the court that she has also made effort to provide for upkeep of the children. The above constitutional requirement is a game changer. Parties seeking the intervention of the children’s court to secure maintenance for the upkeep of the child or children must also indicate what support they are making toward the child or children. This is because both the mother and father have equal responsibility towards the upbringing of the child or children’.

20. The trial magistrate was faulted for ordering for an award that is allegedly oppressive and punitive for the reason that the appellant enabled the respondent to set up a shop to enable them augment their family income. That the alleged amounts indicated as school fees were exaggerated as the students attend public schools. It was urged that it was instructive for the trial magistrate to inquire the financial capability of the parties before granting orders that are unattainable.
21. Counsel urged that despite the appellant imploring the court that he was and still is willing to contribute Kes. 12,000 towards the sustenance of the children, the trial magistrate disregarded the same. This court was urged to reconsider the amount awarded by the trial court in recognition of his status and the fact that he has another family which he also provides to.
22. On whether the learned magistrate erred in law and fact in adjudicating on extraneous matters not pleaded, counsel urged that the principles of fair hearing mandate that a party be informed in advance of the facts about his case in order to prepare in advance and rebut the same; and also adduce the evidence against any allegation fronted against him.
23. That the evidence before the trial court was succinct that the parties herein are still married and therefore the order by the trial magistrate that the respondent to stay in her former husband’s house was untenable. Counsel submitted that this order was given without any substantive facts tabled before the court. In support of the foregoing, the appellant relied on the High court decision at Kisii in Civil Suit No. E098 of 2022 Patricia Karani Ogando vs Watu Credit Limited and Judy Nyangate Ongera where the court held that indeed parties are bound by their pleadings. This court was urged to find that the trial court went overboard by venturing into an issue that was not pleaded by the respondent.
24. On whether the respondent should be granted both legal and physical custody of the children, counsel urged that prima facie, custody care and control of children should be granted to their natural mother. That the case herein is unique as the parties are still legally married and are /were still residing together before the institution of this case and further, the appellant has no intention of divorcing the respondent. This court was therefore called upon to re-evaluate the evidence, weigh the best interest of the minors herein together with financial ability of the appellant and reach a determination.
25. The respondent on the other hand in her submissions reiterated her averments in the plaint by urging that the appellant has exposed her with her children to untold suffering. That the appellant has since ejected the respondent from her matrimonial home despite the fact that the appellant did not contribute in any way towards the construction of the same.
26. It was submitted that the appellant is a man of means engaging in export business and has fondly provided for his family in Ethiopia as opposed to the respondent. That despite attempts to reconcile



- the parties, the appellant has refused and/or declined to resolve their problems. She urged this court to uphold the finding of the trial court by dismissing the appeal herein.
27. I have considered the grounds of appeal, the submissions by the respective parties together with the lower court record and find that the issue for determination is whether the appeal has merits.
28. On the ground that the trial court's determination was not supported by the facts herein, it is trite that he who alleges must prove. [ See section 107(1) of the Evidence Act].
29. From the plaint filed by the respondent, it was clear that the respondent sought for orders as already enumerated above being that of custody and maintenance. It is my view that the trial magistrate ought to have restricted himself to the foregoing prayers only.
30. It is trite that the law relating to maintenance and custody of children is contained in the Constitution of Kenya, 2010 and the Children Act 2022. Article 53 (2) of the Constitution provides:  
A child's best interests are of paramount importance in every matter concerning the child.
31. 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.”
32. In the same breadth, section 116(3) (b) of the Children's Act stipulates that:
- (3) The Court may review the order for periodic payment upon—
- (a) ...
- (b) significant change of circumstances of either parent or guardian, provided that the change is not detrimental to the best interest of the child
33. From the above quoted provisions, it is clear that this Court has power to review the maintenance order but this can only be done if there is significant change in the circumstances of the parents or guardians. In the instant case, no evidence of a significant change in either parent's circumstances was tendered but the appellant urged that the trial magistrate did not base his order on any tangible evidence in reference to the earnings of the parties. In fact, he urged that the magistrate was at fault for ordering for an award that is allegedly oppressive and punitive without enquiring his financial capability.
34. It is a fact that in considering the amount to apportion responsibilities to parties in such a case, it is imperative for the court to take into account the income or earning capacity, property and financial resources of the parties both then and in the foreseeable future. The trial Court also ought to consider the parties' financial needs, obligations or responsibilities. As regards, the children, the Court ought to bear in mind their financial needs and circumstances as well as any physical or mental disabilities, illness or medical condition.
35. It therefore follows that the court in exercise of its powers 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. 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.



36. In the instant case, the respondent in her plaint indicated that she required Kes. 15,000 as maintenance together with custody of the minors. I must say that the trial court in coming up with the amount of Kes. 12,000,00/- for maintenance was guided by the fact that the appellant had stated that he was willing and had previously been giving the respondent the said amount. In my view therefore, the said amount was reasonable and the appellant can't be heard complaining over the same.
37. In relation to education, the respondent listed the same at Kes. 8,000.00/- and Dugsi as Kes. 6,000.00/- without any evidence to support the same. In as much as the respondent in her testimony stated that four children were school going, there was nothing provided before the court to support the same. It would have been useful if the respondent provided school receipts/structures or invoice or whatever could have demonstrated that indeed the children were in school. The same notwithstanding, it is expected that these being young human beings, they are at a stage where they are expected to attend and attain education.
38. There being no evidence of school fees payment, it would be difficult to attach a fixed amount of school fees. Besides, school fees keep varying from time to time due to inflation. In my view, the best order to make is that the appellant shall pay school fees and all attendant expenses associated with the educational needs for all the children in their current school/s and Duqsi. The fixed amount of Kshs 8000/= is therefore set aside.
39. This court is alive to the fact that the only issues that fell due for determination before the trial court were those of custody and maintenance. It was thus not useful for the court to digress and determine issues relating to matrimonial property. I say so for the reason that the trial court sat as a Children's court hence not a matrimonial property court. The same was buttressed by the fact that the appellant stated that a matrimonial property case was pending determination before a Kadhi's Court in Wajir KCMATC E014/2023. As such, it was not proper for the trial court to venture into the same. It is trite that parties are bound by their pleadings. See *Ogando v Watu Credit Limited & Another* (Civil Suit E098/2022) (2024) KEHC 3074(KLR)(14 March 2024)(Judgment).
40. On custody, this court is mindful of the provisions of Section 101 of the *Children Act* 2022 and specifically, section 103 on the principles to be applied in making custody order.
41. In this case, the appellant urged that the parties herein are still legally married and are /were still residing together before the institution of this case and further, the appellant has no intention of divorcing the respondent. Of importance to note is the fact that the parties conceded to the fact that they are currently separated. It follows therefore that in as much as the parties are not divorced, it is of best interest of the children that custody of the children be taken care of even as the parties attempt to address their issues.
42. It is trite that custody of children of tender age is ordinarily given to the mother unless there exists special circumstances. See *JO v SAO* (2016)e KLR. In the circumstances of this case, the children are below 14 years. They are all girls whose basic needs are best taken care of by the mother. Above that, the appellant is mostly based in Ethiopia where he has settled with his original family hence will have little time to interact with the children who are based in Kenya. For that reason, custody of the children was properly granted to the mother (respondent).
43. Having considered the circumstances surrounding this case and the totality of the evidence tendered it is my finding that the appeal is meritorious hence allowed with orders that;
- i. The respondent is hereby granted the actual custody of the minors.
  - ii. Both parties are hereby granted joint legal custody of the children.



- iii. The appellant to cater for the education and related expenses of the children in their respective schools including Duqsi.
- iv. The payment of kes 8,000/= as school fees expenses is set a side
- v. The respondent to provide medical care to the minors.
- vi. The respondent to provide clothing for the children
- vii. The appellant to remit Kes. 12,000.00/- per month to the respondent on or before 5<sup>th</sup> of every month as maintenance expenses.
- viii. The appellant to pay outstanding arrears of kes 3000/= as ordered by the trial court.
- ix. The orders herein shall be subject to review from time to time as circumstances may dictate.
- x. Each party to bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 4<sup>TH</sup> DAY OF JULY 2025**

.....

**J. N. ONYIEGO**

**JUDGE**

