



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**AIJ v EMA (Civil Appeal E005 of 2025)
[2025] KEHC 13086 (KLR) (24 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13086 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL APPEAL E005 OF 2025
JN ONYIEGO, J
SEPTEMBER 24, 2025**

BETWEEN

AIJ APPELLANT

AND

EMA RESPONDENT

*(Being an appeal from the ruling of Hon. Otuke S. (S.R.M.)
delivered on 03.01.2025 CMCC No. E055 of 2022 at Garissa)*

JUDGMENT

1. By a plaint dated 31.08.2022, the respondent(Plaintiff) averred that she was married to the appellant (defendant) under Islamic law and that they were blessed with one minor known as LA aged 12 years as at the time this suit was filed. That during the subsistence of their marriage, the defendant abdicated his parental responsibilities to the said minor thereby occasioning her untold pain and suffering contrary to the provisions of the best interest of a child.
2. That the minor had since dropped out of school due to lack of school fees and outstanding fee balances both in the normal and [Particulars Withheld] Schools. Consequently, she sought for orders as hereunder;
 1. The defendant to cater for the upkeep of the child to the tune of Kshs 10,000/=.
 2. The defendant to pay school fees of the minor as per the fees structure
 3. The defendant to pay the outstanding school fees of kshs 27,600/= of the minor.
 4. That payment of costs be provided for
 5. That the court grants any other relief the court may deem fit.



3. Upon being served with the pleadings, the appellant entered appearance and further filed a statement of defence dated 26.09.2023. In as much as he conceded that the minor herein is his daughter, he denied the allegation that he had not been providing for her. It was his case that he paid the minor's school fee and further, that he was still willing to ensure that the same is paid. He denied the alleged cruelty towards the minor and further urged that a Khadhi should intervene in the matter herein.
4. Directions were given that the parties file their documents wherein only the plaintiff filed witness statements, list of documents (including school outstanding fee balances from – [Particulars Withheld] Academy and Madarastul Bahrain denoting an amount Kes. 27,600 and 39,000 respectively) and the minor's birth certificate of serial No. 74xxx.
5. Despite being served the hearing notice of the matter herein, the appellant failed to attend court on the hearing day. It thus follows that the hearing proceeded ex parte. The respondent basically reiterated the content of her witness statement dated 25-7-2023 seeking for the court to grant the orders sought. She insisted that the minor was out of school due to lack of school fees. That she was jobless hence a person of no means. The hearing closed without the appellant appearing. Consequently, the case was fixed for judgment.
6. By a judgment delivered on 16.05.2024, the trial magistrate ordered as follows:
 - i. The defendant shall cater for the minor's school fees and school related expenses.
 - ii. The defendant shall clear the outstanding fee balance of Kes. 27,600/- at [Particulars Withheld] Academy.
 - iii. The defendant shall remit Kes. 10,000/- to the plaintiff as maintenance of the minor herein on or before 05th of every new month w.e.f the month of June,2024.
 - iv. The defendant shall clear the balance of Kes. 39,000/ at Madarastul Bahrain.
 - v. In reference to order (iii) above, the Duksi classes being optional, the defendant thereafter shall not be obliged to make payments towards the said classes.
 - vi. Both parties to register the minors in their medical insurance schemes.
 - vii. No order as to costs.
7. Meanwhile, the appellant failed to honour the court orders culminating to the respondent filing a notice to show cause dated 2-7-2025. When the notice to show cause why execution could not issue against the appellant was issued, he appeared before court on 30-08-2025. He expressed his inability to honour the court orders citing the following reasons; he is the sole breadwinner of his family; his pay slip is committed with a mortgage against a salary of Kshs 20,000/=; he has 8 other children; he has a bedridden mother; he is disabled and that the respondent is already married to another man. He however, offered to pay kshs 2000/= per month.
8. Upon hearing both parties, the trial court found that the appellant had deliberately refused to honour the court orders and that court orders are not made in vain. The court also observed that the appellant had not tendered any affidavit of means to justify the amount he was proposing to pay. Consequently, the court ordered the employer to the appellant to deduct arrears amounting to Kes 76,000/= and 10,000/= monthly maintenance.
9. The appellant being dissatisfied with the said ruling' filed two sets of memorandum of appeal dated 10-1-2025 and 13-1-2025 citing seven similar grounds of appeal summarized as follows:



- i. That the learned magistrate erred in law and in fact in failing to consider that the appellant being a person living with disability, directed him to cater for the minor's education in a private learning institution.
 - ii. That the learned magistrate erred in law and in fact in reaching the impugned determination yet he was never informed of the existence of the suit herein.
 - iii. That the learned magistrate erred in law and in fact in failing to consider his financial position in directing him to remit Kes. 10,000/- towards the maintenance of the minor.
10. Reasons wherefore, the appellant prayed for orders:
 - i. That the appeal be allowed.
 - ii. That the judgment delivered by the Honourable Magistrate be set aside.
 - iii. That the costs of this appeal be awarded to the appellants.
11. The appeal was disposed of by way of written submissions.
12. The appellant via submissions dated 21.05.2025 contended that the respondent has denied him the right of access to the minor and as such, urged this court to direct the respondent to allow him access rights. That the trial magistrate erred by directing him to pay a monthly maintenance to the respondent yet he is incapable of doing so due to his condition. Further, that he has another family which he needs to cater for and therefore, according to him, Kes. 5,000/- would be appropriate in the circumstances.
13. On whether he needs to clear the alleged arrears, he submitted that the minor has since completed the Islamic religious education and therefore, the alleged arrears should not be paid. On the ordinary schooling, he urged that the alleged arrears ought not be paid since the said private school that the minor used to attend collapsed thus it no longer exists. He therefore argued that this appeal be allowed as prayed.
14. The respondent filed submissions dated 05.05.2025 urging this court to dismiss the appeal herein for want of merit. That the appellant did not demonstrate to this court why the trial magistrate's orders ought to be set aside. It was urged that in as much as the appellant desired to have custody of the minor, the same ought not be allowed due to the circumstances of the case.

Analysis and determination.

15. This court has independently considered the grounds of appeal, trial court's record and submissions by both parties. As the 1st appellate court, it is duty bound to re-evaluate, re-assess and re-consider a fresh the evidence tendered before the trial court and make its own determination and conclusion. [See Peters vs Sunday Post 1958 (EA) 424].
16. PW1, the respondent herein adopted her statement dated 25.07.2023 and further testified that the minor was born out of a relationship between the parties. That the appellant has continually neglected providing for the minor in terms of general upkeep and school fees. She thus produced the minor's birth certificate as Pex 1, school fee balance form from [Particulars Withheld] Academy and Madarastul Bahrain as Pex 2 and Pex3 respectively.
17. She stated that the minor has since dropped out of school for the reason that there is an outstanding fee balance that is yet to be settled. She urged this court to intervene and ensure that the best interest of the minor is catered for by compelling the appellant to play his parental responsibilities towards the minor.



18. It is worth noting that the appeal before this court emanates from a ruling dated 3-1-2025. This ruling was borne out of a notice to show cause application dated 2-7-2024 in which the appellant was said to have disobeyed the orders contained in the court's judgment of 16-05-2024. The notice to show cause application was therefore allowed and the court directed recovery of the outstanding and monthly due maintenance from the salary on monthly check of system from the employer's payroll.
19. It is clear that the appellant is mixing up issues by referring to the appeal as against the judgment and ruling. I want to make it clear that there are no two appeals here. The decision being challenged in the instant appeal is the decision of 3-1-22025 and not the judgment of 16-05-2024. If the appellant intended to challenge the judgment of 16-05-2024, he would have sought leave to file appeal out of time. He cannot be allowed to challenge the judgment while hiding behind the appeal challenging the ruling of 3-01-2025. For avoidance of doubt, the decision subject of this appeal is that against the ruling of 3-01-2025 directing attachment of salary and not the judgment. The judgment is deemed undisturbed.
20. With the above clarification, the only issue for determination is whether the execution order by way of salary attachment made on 30-1-2025 was proper.
21. Judgment having been duly entered and the same having not been formally challenged, the ordinary course of events was for the respondent to apply for execution. It is trite law that the respondent and for that matter the minor is entitled to the fruits of her judgment. There is no doubt that the best interests of a child are paramount in every decision making process.
22. The UN Convention on the Rights of the Child and the African Charter on the Rights of the Child have emphasized the centrality of the best interest of the child. The same has also been captured under [the constitution](#) 2010 in article 53(2) as follows: a child's best interests are of paramount importance in every matter concerning the child.
23. From the onset, it is clear that what matters to this court is the best interest of the minor. While considering the same, this court makes reference to the case of MAA v ABS [2018] eKLR, where it was held as follows:-

“...this Court is alert to the welfare of the children herein who are of tender years. The matter is not about the applicant/appellant and the respondent; and their interests are secondary to those of the child. The foregoing provisions require this Court to treat the interests of the child as the first and paramount consideration and must do everything to inter alia safeguard, conserve and promote the rights and welfare of the child herein. Acting in the best interest of the children in question.”
24. In the same breadth, it is trite law that parental responsibility is an equal joint responsibility of the parents to a child and no parent ought to be treated specially as having a superior right over the child than the other. See Section 32(1) of the [Children Act](#).
25. Nyaundi J. in the case of MWN (Suing as Mother & Next Friend of JEO Minor) v JOO (Civil Appeal 9 of 2022) was of the view that to determine issues of maintenance, the court is required to satisfy itself that the following conditions are met.
 - i. That the basic needs of the child would be met to ensure that the child enjoyed emotional and physical well-being.
 - ii. That this responsibility was shared between the parents and dictated by their means.



- iii. And that the maintenance would not be viewed as a punishment or burden by either parent.
26. As already noted, it is not in dispute that the parties herein are the parents of the minor in question. It therefore follows that both parents ought to provide for the minor in the realization of her best interest. In as much as the respondent conceded that the appellant has since provided medical care to the minor, it was her concern that the minor had since dropped out of school due to lack of school fee.
27. On the other hand, the appellant urged that he had been directed to maintain the minor in a private school against his financial ability. That the respondent be directed to register the minor in a school where he can afford noting that he had since remarried and blessed with other children whom he is also taking care of. To my understanding, the appellant has not declined paying for the minor the required school fees save for the fact that he urges that the minor be transferred to a school where he can easily afford bearing in mind his financial capacity and the fact that he is also providing for his other family.
28. However, when balancing parental interest vis a vis those of a child, regard must be given to the possible consequences likely to arise out of a court order being sought. To remove the child from a school she has been would be tantamount to interrupting her studies and psychologically traumatizing. To that extent the order for continued payment of school in that school shall remain.
29. In regards to the monthly upkeep, the appellant urged that the Kes. 10,000/- as directed by the trial court was on the higher side noting his financial capacity thus he proposed an amount of Kes. 5,000/- as appropriate.
30. As was held in the case of *Mbogo vs Shah (1968) 93, De Lestang VP* (as he then was) observed at page 94.
- “I think it is well settled that this Court will not interfere with the exercise of its 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 has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion”.
31. This court is well aware that it has been called upon to consider the best interest of the minor in question. As a consequence of the foregoing, all the parties herein must thus play an equal role to ensure that the child’s best interests are catered for. Considering the physical inability of the appellant as clearly reflected from the certificate of disability submitted before this court, and the net salary as confirmed by the pay slip tendered reflecting a net pay of 19,500/= per month, it is only fair that an adjustment be made.
32. Besides, the appellant stated that he is married to another wife after his divorce with the respondent and that he has 8 more children all of whom depends on him his disability notwithstanding. This fact was not disputed.
33. Indeed, if we were to share the same salary against 9 children and other social responsibilities like food, shelter, clothing etc, each child would probably get peanuts or even not go to school. To be fair to other family members, one child cannot be favoured at the expense of others. it is my view that under the circumstances herein, an amount of Kes. 5,000/- is enough for maintenance of the minor under the custody of the respondent. For the given reasons, I am inclined to disturb the finding of the learned magistrate on the appellant’s contribution towards the minor.
34. As such, the orders that are commendable to me are as follows:



- i. The respondent is hereby granted the actual custody of the minor
- ii. The appellant shall have access rights to the minor and that the modalities on the said access shall be mutually agreed upon by parties in default the children officer of the concern jurisdiction shall direct.
- iii. Both parties are hereby granted joint legal custody of the child.
- iv. The appellant to cater for the education and related expenses of the child in the school she is currently schooling to avoid interruption with her studies.
- v. The appellant to provide medical care to the minor.
- vi. The appellant to remit Kes. 5,000.00/- per month as maintenance to the respondent on or before 5th of each succeeding month.
- vii. The respondent to provide for shelter and clothing for the minor.
- viii. Noting that the judgement ordering payment of the arrears was regular, the said arrears shall continue to be deducted from the appellant's pay slip till completion.
- ix. Each party to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF SEPTEMBER, 2025

.....

J.N.ONYIEGO
JUDGE

