



**EWM v EK (Civil Appeal E149 of 2023) [2024] KEHC 16827 (KLR)
(Family) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 16827 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E149 OF 2023
BM MUSYOKI, J
SEPTEMBER 18, 2024**

BETWEEN

EWM APPELLANT

AND

EK RESPONDENT

*(Being an appeal from ruling and orders of Honourable A.G. Muenene (PM)
in Milimani Children’s Courts case number 1255 of 2019 dated 24-11-2023)*

JUDGMENT

1. The appellant brought suit against the respondent in Milimani Children’s court case number 1255 of 2019 on behalf of their child ENM where she was asking for maintenance and custody of the child. The matter did not go for full trial as on 19-12-2020, parties entered into a consent which was adopted by the court as the final judgment. The terms of the consent were as follows;
 1. Both parties be granted legal custody of the child.
 2. The plaintiff be granted actual custody of the child.
 3. The defendant to have structured access and visitation rights as shall be agreed by the parties.
 4. The father shall cater for school fees and related expences at the rate of Kshs 120,000.00 per year. In the event the fees is increased beyond his means, parties shall engage and secure a new school.
 5. The father shall further provide Kshs 15,000.00 per month for food.
 6. The mother shall cater for shelter, utilities, clothing and nanny’s salary.



7. There shall be liberty to apply.
 8. The costs of the suit shall be borne by each party.
 9. Both parties to maintain the NHIF for the child to use in case of sickness. Any tops above NHIF shall be paid by the defendant.
2. Later, by chamber summons dated 20th April 2023, the appellant sought prayers to review the consent orders to the extent of monthly maintenance and school fees. She sought that the monthly maintenance be increased to Kshs 35,000.00 and the respondent be compelled to pay school fees and related expences without capping the same at Kshs 120,000.00. The application was grounded on allegation that the cost of living had gone up as well as the child's needs in relation to school fees and related expences. Honourable A.G. Munene, Principal Magistrate heard the parties and on 24-11-2023 delivered a ruling in which she dismissed the application. According to the magistrate, the appellant had not proved the rise of cost of living and that she did not engage the respondent on the choice of school as provided in the consent. The appellant was dissatisfied with the said ruling and preferred this appeal.
 3. The appellant had raised six grounds of appeal but when it came to submissions, she stated that she would argue grounds 'c' and 'd' which state; That the Honourable Magistrate failed to consider that the minor in issue has grown and advanced in school thus the expences had increased; and That the Honorable Magistrate failed to appreciate the ever changing economy and constant rise in cost of living hence the need to review the monthly upkeep provided by the respondent. The Magistrate failed to properly analyse the overwhelming evidence presented before the trial court thus arriving at an unfair decision.
 4. This is a first appeal and as such, I have mandated in law to re-examine, re-analyse and re-evaluate the evidence produced before the lower court and come to my own independent conclusion always bearing in mind that I did to have the benefit of taking the evidence first hand and observing the demeanour of the witnesses. This is an appeal arising from a ruling and the issue of demeanour of witnesses will not arise. Similarly, the evidence before the lower court was in in form of affidavits and I do not think in the circumstances, the consideration of taking evidence first hand matters much.
 5. When the matter came for mention before me on 10-07-2024, the respondent had not filed his submissions and I directed that he files them within seven days. As I write this judgment, the respondent has not filed his submissions. What he has filed is a document he refers to as a 'replying affidavit to the appeal' which is dated 8-07-2024. I will take that as his submissions. The appellant's submissions dated 8-07-2024 are on record. Having read the record of appeal, the respondent's replying affidavit and the appellant's submissions, I have come to the conclusion that the only issue for determination in this appeal is whether there was a basis for the court to review the parties' consent recorded in court on 19-11-2022.
 6. There is no dispute that the court had jurisdiction to review the consent order. In children matters, unlike the ordinary suits, the court always has jurisdiction to review or vary orders to suit the best interest of the child which is the paramount point for consideration. The jurisdiction is granted by Section 120 of the Children's Act. In *EKK & Another vs HKK (2020) eKLR* Honourable Justice L.W. Gitari held that;

 'Under Sections 73 and 99 of the Act the court is given wide discretion to impose conditions and to vary orders given regarding maintenance of a child. It would mean that in matters concerning maintenance of children, the court has discretion to vary the consent orders on application by the parties. Section 100 of the Act provides where the parents and guardian or custodian of a child, have entered into an agreement whether oral or written in respect of



the maintenance of the child, the court may upon application vary terms of the agreement if it is satisfied that such variation is reasonable and in the best interest of the child.

7. It is clear that the court has jurisdiction to set aside consent orders or judgment in a matter concerning the child. The guiding principle is the best interest of the child.’
8. The sections cited by the Judge in the above authority are still applicable to date despite repeal of the then Children Act as they have been replicated in the current Children Act 2022, in sections 119 and 120.
9. The appellant claimed that the cost of living had gone up and proposed that the court enhanced the respondent’s monthly maintenance contribution from Kshs 15,000.00 to Kshs 35,000.00. If we were to go by the proposal of by appellant, it would mean that the cost of living had since the time of the consent to the date of the application which was a period of three years gone up by more than double. In her plaint dated 6th September 2019, the appellant had not particularized the monthly expences but gave a global figure of Kshs 150,000.00. In her witness statement, she gave a breakdown of the expences which amounted to Kshs 151,000.00 per month plus Kshs 60,000.00 for school fees per term. The breakdown was as follows;
 - a. Rent Kshs 100,000.00.
 - b. Food Kshs 10,000.00.
 - c. Clothing Kshs 6,000.00.
 - d. Medical Kshs 5,000.00.
 - e. Other utilities Kshs 10,000.00.
 - f. Entertainment Kshs 10,000.00.
 - g. House help Kshs 10,000.00
 - h. School fees Kshs 60,000.00 per term.
10. In her affidavit in support of the application dated 20th April 2023, the appellant gave a breakdown of expences as follows;
 - a. School fees exclusive of school related expences Kshs 167,950.00.
 - b. Housing Kshs 100,000.00
 - c. Food per month Kshs 35,000.00
 - d. Clothing per year Kshs 80,000.00
 - e. Medical cover per year Kshs 156,000.00
 - f. Entertainment and other expences Kshs 150,000.00
 - g. House help Kshs 12,000.00
11. I take it that when the consent was recorded, the parties must have put into consideration all the above claims. The proceedings indicates that the consent was entered into after lengthy discussion. This is what is recorded; ‘After lengthy discussion between the parties and their representations, the parties have further agreed by consent.’ What this means is that the parties sat down and looked at the items of



expences and their veracity and were satisfied that unless things changed, the amount of Kshs 15,000.00 per month was sufficient for food.

12. From the above two breakdowns, it is clear that what the appellant claimed to have changed was;
 - a. Food from Kshs 10,000.00 to Kshs 35,000.00.
 - b. Clothing from Kshs 72,000.00 per year to 80,000.00 per year or Kshs 6,000.00 per month to Kshs 6,667.00 per month.
 - c. Medical from 5,000.00 per month to Kshs 13,000.00 or Kshs 60,000.00 per year to Kshs 156,000.00 per year.
 - d. Entertainment from Kshs 10,000.00 to Kshs 150,000.00.
 - e. House help from Kshs 10,000.00 to Kshs 12,000.00.
13. In support of her claim for increased cost of the food, the appellant attached some receipts for 2021, 2022 and 2023 which were meant to show the variation of some prices of selected food items. The magistrate in analysing the said expences held that the receipts totaled to Kshs 8,785.00 whereas the defendant had been paying Kshs 15,000.00. My understanding is that, the receipts were exhibited as samples for purposes of showing variation of costs within the period of 2021 to 2023 and not as proof of what the appellant had actually spent on the said items. However, I hold the opinion that the magistrate may have been wrong on that aspect but in my analysis and view, the sampled receipts were not enough to prove the cost of living had more than doubled as the appellant wanted the court to believe.
14. It was not enough for the appellant to flash figures and leave the court to fill in the gaps. Even in her submissions before me, the appellant has not isolated or made proper analysis of the probative value of the sampled receipts. I have seen a table of analysis attached to the supporting affidavit in the lower court which has not been included in the record of appeal. I have gone through it and found that only oatmeal, ugali flour, mincemeat and cooking fat are shown to have doubled in prices. In my view, the receipts were not sufficient to prove the alleged rise in the cost of living. The appellant did not show that she was spending more than Kshs 15,000.00 the respondent was providing. In view of this, I find no reason to upset the magistrate's finding on that point. Whereas I do acknowledge that cost of living keeps rising, it is also important for parties to understand that children must live within their parent's means. This fact was acknowledged in the consent recorded by the parties when they agreed that, in case the school fees went beyond the appellant's means, they would engage in securing an alternative school. I share the position taken by Honourable Justice J.N. Njagi in *AWM vs JWW (2022) eKLR* where he held that;

‘Families have to learn to live within their means as maintenance orders are not supposed to be punitive to any party. The court cannot order a parent to pay what he cannot afford.’

15. The same position was taken in *S.K.W. vs M.W.I (2015 eKLR* where Honourable Justice Musyoka J held that;

‘Maintenance orders are not meant to punish or oppress any party. They should be designed to provide for the needs of the child or children in question, while at the same time respecting the financial status of the parent. A child can only be maintained within the means of the parent in question.’



16. On the issue of school fees, the appellant claimed that she had engaged the respondent but he went mute on her. I have seen letters dated 22-03-2023, 13th March 2023 and 17th August 2021. These were also excluded in the record of appeal but are available in the lower court file. The letters were exchanged between the advocates for the parties. None of the letter suggests change of schools. They bespeak of the appellant's demand that the respondent increases the amount for school fees and related expences. There was no proposal of a different affordable school. It is my finding therefore that the magistrate was right when she held that the appellant had not engaged the respondent in the change of school.
17. The above notwithstanding, I have looked at the school fees structures attached to the supporting affidavit as annexure 'E2'. They clearly show that the fees was Kshs 62,950.00 for the first term, Kshs 52,950.00 for the 2nd term and Kshs 52,950.00 for the third term. That would mean that per year, the fees amounted to Kshs 167,950.00. At the time the consent was recorded, the appellant had put school fees at Kshs 60,000.00 per term which would translate to Kshs 180,000.00 per year which is more than what the latter pleadings show. The appellant did not exhibit the fee structures for 2019, 2020, 2021 and 2022 to show that there were changes in the fees structure or invoices. She did not even show how much she paid for the fees after receiving the agreed Kshs 120,000.00 from the respondent. It must be taken that when the parties engaged in negotiations, they factored in the school fees and related expences at Kshs 180,00.00 per year as then pleaded by the appellant which would mean that the circumstances had not changed as at the time the application was made.
18. The prayer in the application in respect of school fees was couched in a manner which if granted would mean that, the respondent would be compelled to pay school fees in whatever school the respondent chose without a capping of the amount. In my view, this would have been unfair to the respondent and unconscionable.
19. The appellant has not demonstrated that she was carrying higher burden than the respondent. She did not attach receipts or proof of expences for the items she was responsible for. She only chose those which the respondent was responsible for. There was no proof of the amount for rent, house help, clothing and entertainment. This would have helped the court reach a decision on who was bearing more weight than the other. It was also illogical for her to claim for medical cover when the appellant had maintained the NHIF cover and there was no proof that the child had been denied treatment for lack of payment of the premiums.
20. Based on the above, I find that this appeal lacks merits and it is dismissed with costs. For purposes of clarity, this judgement should not be construed to mean that the parties are not at liberty to in future apply for variation of the consent orders in the lower court.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgement delivered in presence of Mr. Alphonse for the respondent and in absence of the counsel for the appellant.

