



**EM v WNK (Civil Appeal E124 of 2021)  
[2024] KEHC 12858 (KLR) (Family) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12858 (KLR)

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

**FAMILY  
CIVIL APPEAL E124 OF 2021**

**CJ KENDAGOR, J  
OCTOBER 17, 2024**

**BETWEEN**

**EM ..... APPELLANT**

**AND**

**WNK ..... RESPONDENT**

*(Being an appeal against the Judgment of Hon. G.M. Gitonga,  
SPM, in Nairobi Children’s Court Case No. E596 of 2020)*

**JUDGMENT**

1. The Parties herein are the biological parents of WM and WM, both minors. The Respondent filed a custody and maintenance case against the Appellant at the Children’s Court, Nairobi. The Respondent filed a defence and a counterclaim. The trial Court, in the judgment delivered on 29<sup>th</sup> September, 2021 made the following orders;
  - i. Parties were granted joint legal custody of the children.
  - ii. Actual custody, care and control of the children WM and WM was granted to the Respondent as the primary caregiver.
  - iii. The Respondent was granted unlimited access to the children whenever he is in the country including taking the children out and school visitation.
  - iv. The Respondent shall take care of the children’s housing and clothing needs by virtue of having actual custody thereof.
  - v. The Respondent shall also take care of any other miscellaneous expenses such as water and electricity bills and the cost of having a house help if necessary.



- vi. The Appellant shall take care of the children's school fees and all related expenses at their current school. If the children need to change schools, the parties shall consult and agree on a new school.
  - vii. The Appellant shall also take care of children's medical care needs by leaving the medical cover with the mother and providing cash over and above the cover whenever needed.
  - viii. The Respondent shall provide Kshs.25,000/= for the children's food needs by every 5<sup>th</sup> day of the month with effect from the 5<sup>th</sup> day of October, 2021.
  - ix. Each party is to bear their costs of the suit.
2. The Appellant, being dissatisfied with the judgement, filed this appeal and has put forward the following grounds in his Memorandum of Appeal;
- i. The Learned Magistrate erred in law and fact by apportioning more financial obligations to the Appellant than the Respondent contrary to the provisions of Children's Act, 2001 and *the Constitution* of Kenya 2010 which provides that both parents have equal responsibility towards the upkeep and maintenance of their children.
  - ii. The Learned Magistrate erred in law and fact by assigning to the Appellant financial obligations which are beyond his means.
  - iii. The Learned Magistrate erred in law and fact by failing to consider vital evidence tendered by the Appellant and of which had it been considered; the Learned Magistrate would have arrived at a different finding favourable to the Appellant.
  - iv. The Learned Magistrate erred in law and fact by assigning to the Appellant the following responsibilities: Paying school fees and catering for school expenses, provision of medical care and a monthly provision of Kshs.25,000/= towards upkeep and maintenance which obligations are onerous and unfair.
  - v. The Learned Magistrate erred in law and fact by failing to acknowledge that the Respondent has an income and, therefore, failed to allocate commensurate financial obligations towards the children to the utter detriment of the Appellant.
  - vi. The Learned Magistrate erred in law and fact by failing to afford the Appellant equal protection and/or treatment before the Law
3. The appeal proceeded by written submissions which I have duly considered together with the authorities cited.
4. The Appellant's case is that the trial Court did not equitably distribute responsibilities among the parties. In making this argument, the Appellant highlighted that the Court overlooked that the Respondent has an income and, therefore, possesses the capacity to contribute equally to the maintenance and support of the children.
5. The Respondent opposed the appeal and submitted that the trial Court had arrived at the findings based on the evidence presented. She argued that she had a greater responsibility than the Appellant, who was working abroad and away from the children. Additionally, she submitted that the trial Court took into account the special needs of both children and the financial situations of both parties when making its decision.



6. The issue for determination before the Court is whether to revise the allocation of parental responsibility assigned to the parties. This being a children’s matter, the Court is aware of its special role in upholding the best interests of the child. *The Constitution* of Kenya requires that in all matters concerning children, the child’s best interest shall be paramount. Article 53(2) of *the Constitution* of Kenya provides as follows:-

“A child’s best interests are of paramount importance in every matter concerning the child.”

7. Section 4 (2) and 4 (3)(b) of the *Children Act*, 2001 (now Section 8 of the *Children Act*, 2022) echoes the constitutional imperative that:-

“In all actions concerning children whether undertaken by public or private welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration...

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. and promote the welfare of the child”

8. I have reviewed the proceedings and judgment of the lower Court to evaluate if the Appellant is entitled to the orders requested in this appeal. As of the determination of the children's case, the children were aged 7 and 10. They are in the Respondent's actual custody as the Appellant works in South Sudan. The eldest child is stated to be asthmatic and with gastroesophageal reflux disease.

9. The law relating to the maintenance of a child is contained in *the Constitution* of Kenya and the *Children Act*. Article 53 of *the Constitution* provides:

53.

(1) Every child has the right–

- (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not;

10. The trial Court has the discretion to assess how much each parent contributes to the children's upkeep, having heard all the evidence and considered the relevant materials presented. An appellate Court can only step in if it is demonstrated that the trial magistrate either overlooked important factors or considered irrelevant ones. Additionally, the Court may intervene if the awarded amount is excessively low or high, suggesting a flawed evaluation of the expenses for the children's care. See *SLM v DAM* [2018] KEHC 4400 (KLR).

11. In apportioning responsibility, the Court is enjoined to consider the financial capabilities of both parents. The Appellant told the Court that he earns Kshs.200,000/=, and the Respondent stated that she earns Kshs.40,000/=. None of them provided proof of their earnings, and neither filed an affidavit of means.



12. In the Judgment, the trial Court assigned responsibilities for various expenses. The Appellant is responsible for school fees, incidental education expenses, and a monthly maintenance payment of Kshs.25,000/= for food. Additionally, the Appellant will cover medical care through the employer's medical scheme and is expected to pay for any expenses exceeding the coverage. On the other hand, the Respondent has been given responsibility for housing, clothing, utility bills, miscellaneous expenses, and the cost of hiring a house help if needed.
13. The trial Court took into account the roles of both parties. The Respondent is the primary caregiver for the children, while the Appellant has only requested legal custody, access, and visitation rights. Since the Appellant lives outside the country, these visitations are stated to be infrequent. As a result, the Respondent has day-to-day care and financial responsibilities. Additionally, the first child has special needs because of his medical condition.
14. Equal apportionment does not mean that parties are to contribute the same amount. The trial Court directed that changes in schools must be made only after consultation between both parties. This ensures that one parent does not unilaterally enrol the children in a school that the other parent, responsible for paying the fees, cannot afford. In making the maintenance order, the Court considered the evidence presented during the trial, cautioning that the Respondent could not use the money meant for food for other responsibilities assigned to her. The trial Court rejected the claim for Kshs.80,000/= made by the Respondent. The allocation of Kshs.25,000/= considering the special needs of the eldest minor is reasonable and appropriate.
15. After careful analysis, I conclude that the trial Court made a sound decision in apportioning parental responsibility between the two parties, the minors' parents. The decision upholds the best interests of the children and does not compromise their welfare. Accordingly, the appeal is not merited and is dismissed. Each party will bear its own costs related to the appeal.
16. It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 17<sup>TH</sup> DAY OF OCTOBER, 2024.**

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**C. KENDAGOR**

**JUDGE**

In the presence of: -

Court Assistant: Beryl

Ms. Amondi, Advocate holding brief for Macharia Advocate for the Appellant

Ms. Muraguri, Advocate holding brief for Mutua Advocate for the Respondent

