



REPUBLIC OF KENYA



**KENYA LAW**  
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**MNM v SNK (Civil Appeal E008 of 2022)  
[2023] KEHC 3915 (KLR) (Family) (24 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 3915 (KLR)

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

**FAMILY  
CIVIL APPEAL E008 OF 2022**

**MA ODERO, J  
MARCH 24, 2023**

**BETWEEN**

**MNM ..... APPELLANT**

**AND**

**SNK ..... RESPONDENT**

*(An appeal from the Judgment and Decree of the Honorable Mr. F. Terer,  
Resident Magistrate made on the 10th day of December, 2021 in Children Case  
No. E741 of 2021 at the Children’s Court – Milimani Law Courts – Nairobi)*

**JUDGMENT**

1. Before this court is the Memorandum of Appeal dated 10<sup>th</sup> January 2022 by which the Appellant MNM seeks the following orders:-

- “1. That the Appeal herein be allowed and a part of the Judgement of the court made on the 10<sup>th</sup> day of December, 2021 be set aside, and be substituted with Judgement in the following terms:
  - a. The Appellant provides for the following financial needs of the minor child, namely Shelter, Medical, Clothing and utilities.
  - b. That the respondent provides School fees and School related expenses, Food in the sum of Kshs 20,000/= per month and House help in the sum of Kshs 8,000/= per month.
2. That cost of the Appeal and the suit before the lower court be awarded to the Appellant.”



2. The Respondent SNK opposed the appeal. The appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated 19<sup>th</sup> September 2022 whilst the Respondent relied upon his submissions dated 3<sup>rd</sup> October 2022.

### **Background**

3. The Appellant and the Respondent got married under Kikuyu customary law in the year 2017. They separated in 2019.
4. The parties herein are the biological parents of the minor EKN (hereinafter ‘the child’) who was born on 4<sup>th</sup> November 2017.
5. The Respondent filed in the Nairobi Children’s Court a plaint dated 24<sup>th</sup> June 2021 in suit No. XXX of 2021 seeking the following orders:-

- “a) That the Birth Certificate of the minor herein be given to the plaintiff.
- b) That legal and structured custody, care and control of the minor be given to the plaintiff.
- c) Costs of this suit.
- d) Interest on (c) above at court rates until payment in full.
- e) Any other relief the Honourable Court may deem fit and expedient to so grant.”

6. The matter was heard and both parties gave evidence before the trial court. Thereafter on 10<sup>th</sup> December 2021 the learned trial Magistrate Hon. F. Terer delivered a judgement in which the following orders were made:-

- “1. That the legal custody of the minor EKN shall jointly vest in the Plaintiff and the Defendant
2. That the actual custody shall vest in the Defendant.
3. That the Plaintiff is granted access as follows:-
  - a) On alternate weekends from Saturday 9.00 a.m. to Sunday 5.00 p.m. during school days.
  - b) During school days on a ratio of 50:50.
  - c) At school subject to school rules and regulations.

4. That parental responsibility is apportioned as follows:-
  - a) The Plaintiff provide monthly contribution towards upkeep at the rate of Kshs 9,000/= per month payable on or before the 5<sup>th</sup> day of every month.
  - b) The Plaintiff shall provide 50% of school fees and related expenses in the minor’s current school.
  - c) The Defendant shall provide shelter, clothing, house help, utilities and food partly.
5. That each party to pay own costs.”



7. Being aggrieved by the decision of the trial court, specifically with the orders made as regards maintenance the Appellant filed this present appeal. The Appeal was premised upon the following grounds:-

- “ 1. The Learned magistrate erred in law and in fact by decreeing that the Appellant meets virtually all the financial needs of the minor child, and in particular, that she provides for the underlisted need, without any legal basis and as needs, without any legal basis as against the weight of the evidence on record.
  - a. Half of the school fees and school related expenses.
  - b. Shelter.
  - c. Clothing.
  - d. Househelp.
  - e. Utilities.
  - f. Food partly.
2. That the learned Magistrate erred in law and infact by decreeing that the Respondent provides for only the following financial needs of the child, without any legal basis against the weight of the evidence on record, namely:
  - a) Half of the school fees and school related expenses.
  - b) Partly for food in the sum of Kshs 9,000/= per month.
3. Thatthe Learned Magistrate erred in law and in fact by failing to provide for the medical care of the minor child and further failed to adhere to the clear provisions of the Constitution of Kenya and the *Children’s Act* in his judgment, and in particular regarding the equal responsibility of both parents, and hence burdened the Appellant with the bulk of the financial needs of the minor child.
4. That the Learned Magistrate erred in law and in fact by failing to adhere to the pleadings and the evidence, and to apply the principles of equality and equity towards apportioning the financial responsibilities and needs of the child as between the Appellant and the Respondent”.

### **Analysis and Determination**

8. I have carefully considered the Appeal before this court as well as the written submissions filed by both parties. The Appellant submits that the orders made in respect of the maintenance of the child were skewed. That the obligation to provide for a child ought to be joint and equal between both parents yet the trial court apportioned the greater financial burden on the Appellant.
10. Finally the Appellant submitted that during the trial the Respondent had indicated his willingness to cater for all the educational needs of the child, thus it was erroneous for the learned trial magistrate to shift the said expenses to the Appellant without any legal justification. As stated earlier the Respondent opposed the appeal.
11. The Respondent readily acknowledges that he is the biological father of the child and states that he is ready and willing to provide for the needs of his son. However, the Respondent submits that as a



simple Uber driver his earnings are limited. That on the other hand the Appellant is a banker earning a stable income.

12. The Respondent further submits that he now has another family and as such has other financial responsibilities. He urges that the orders made by the learned trial magistrate were fair and proportionate given the circumstances. The Respondent urges this court to uphold the orders made by the trial court and to dismiss this appeal.
13. The only issue for the determination of this court is whether this appeal has merit and ought to be allowed.
14. It is not lost to this court that the orders made by the trial court related to the welfare and maintenance of a child. Courts in Kenya are obliged to give priority to the best interests of a child. Article 53(2) of the Constitution of Kenya 2010 provides that:-

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

15. Similarly Section 8 (1) of the *Children Act* 2022 provides:-

“(8). (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;” (own emphasis)

16. The law relating to maintenance of a child is contained in the Constitution of Kenya 2010 and in 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.”

17. Maintenance is an aspect of parental care and is the responsibility of both parents of a child. Section 114(1) of the *Children Act* 2022 sets out the considerations, which should guide the court in making an order for financial provision for the maintenance of a child. These considerations include inter alia:

- “(a) The income or earning capacity, property and 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 foreseeable future;
- (b) The financial needs, obligations, or responsibilities, which each party has or is likely to have in the foreseeable future;
- (c) the financial needs of the child and the child's current circumstances;
- (d) .....

18. Maintenance of a child is a joint responsibility of both parents, therefore each parent is required to provide for the upkeep of the child. Though parental responsibility is to be shared, it may not always



be equal. The court has to take into account the financial capability of each parent. This position was stated in *MK v CKK* HCA 51/2015 where the court held thus.

“Parental responsibility is shared and not equal based on the financial position of each parent.

The mother as the resident parent has a nurturing role to the children and the father to provide maintenance and upkeep of the children.”

19. Therefore each parent is obliged to make provision for the maintenance of the child and such provisions will be dependant upon the financial capacity of said parents.
20. The Appellant is aggrieved that she was ordered by the trial court to bear the heavier burden financially for the maintenance of the child. It is not in dispute that the Appellant has a stable job as a banker from which she earns a stable income. Additionally the Appellants job entitles her to a good medical insurance cover which she is able to extend to the child.
21. The Respondent on the other hand is an Uber Driver. His income is significantly less and is not reliable. At the same time, the Respondent is paying off a car loan. He told the court that he has another family for which he was also financially responsible.
22. The Appellant was ordered to enroll the child in her employer’s medical cover and that both parties contribute half of the school fees. The Appellant was further ordered to cater for clothing, shelter, utilities, food partly and house help. The Respondent was ordered to pay Kshs 9,000 monthly for food. The Appellant herein is asking the court to set aside the above orders and instead order that the Respondent do provide school fees and school related expenses, food in the sum of kshs 20,000/- per month and house help in the sum of Kshs 8,000 per month.
23. The learned trial magistrate did take into account the peculiar circumstances of each parent in coming to her decision regarding maintenance of the child. The trial court took into account the provisions of Article 53 of the *Constitution* of Kenya as well as the provisions of Section 94(1) of the 2001 *Children Act* (now captured by section 114 of the 2022 Act).
24. As stated above equal responsibility does not always mean equal financial contribution. In the case of *EMM v MOO* [2016] eKLR the court stated as follows:-

“However equal responsibility does not mean equal and similar contribution as the income of each parent and other non-monetary contribution must be borne in mind”
25. Likewise in the case of *MOA v HAO* [2021] eKLR the court held-

“Although parents may not have equal financial ability for the court to demand equal contribution, one must at least exhibit some sense of seriousness in making some contribution as a sign of good will that he or she is not geared towards overburdening the other parent for the sole purpose of punishing him or her using the best interest of a child principle or as a ground to settle scores out of marital differences.”
26. The court must at all times put the best interest of the minor first. The wishes and/or conveniences of the parents play a secondary role. It is not possible to bleed a stone. One cannot be ordered to provide what one does not have. I find the Appellants demand for a sum of Kshs 28,000 per month as well as payment of all educational expenses for the minor to be unreasonable given the circumstances of this case.



27. I disagree with the Appellants submissions that the trial court failed to adhere to known legal principles in coming to his decision. I find that the learned trial magistrate properly apportioned responsibility to both parents based on the evidence before him regarding the financial capacity of each parent.
28. I therefore find no grounds upon which to fault the decision of the trial court. The Appellant is at liberty to seek a review of the maintenance orders in the Childrens’s Court should the circumstances of either parent materially change.
29. Finally I find no merit in this appeal. The same is dismissed in its entirety. This being a family matter each side will bear its own costs.

**DATED IN NAIROBI THIS 24TH DAY OF MARCH, 2023.**

.....

**MAUREEN A. ODERO**

**JUDGE**

