



**SI v AS & As Minors (Suing through the Mother & Next of Friend FAA) (Children's Appeal Case E011 of 2020) [2024] KEHC 14122 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14122 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CHILDREN'S APPEAL CASE E011 OF 2020  
HI ONG'UDI, J  
NOVEMBER 14, 2024**

**BETWEEN**

**SI ..... APPELLANT**

**AND**

**AS & AS MINORS ..... RESPONDENT**

**SUING THROUGH THE MOTHER & NEXT OF FRIEND FAA**

*(Being an appeal from part of the judgment and order of the learned magistrate Y.I. Khatambi (PM), dated 29th July 2022 in the Nakuru Children Case No. 77 of 2020)*

**JUDGMENT**

1. In the suit before the Magistrate's court, the respondent being the plaintiff therein prayed for Judgment against the appellant for:
  - i. The legal custody of the minor be awarded to the plaintiff.
  - ii. The defendant be ordered to contribute monies in exercise or discharge of his parental responsibility as this court may deem fit being the maintenance for the subject.
  - iii. Any other relief that this honourable court may deem fit and just to grant.
  - iv. Costs of the suit be borne by the defendant.
2. The lower court rendered its judgment on 29<sup>th</sup> July 2022 in the interest of the child in the following terms;
  - i. Legal custody is granted to the plaintiff.
  - ii. There shall be shared actual/physical custody of the subjects.



- iii. The plaintiff will have custody of the subjects when schools are in session. The defendant on the other hand will have access every fortnight, he will pick the subjects on Saturday at 9:00am, and hand them over to the plaintiff on Sunday at 5:00pm effective 6 August, 2022. Parties to agree on the pick-up and drop off point.
  - iv. During school holidays, custody will be shared equally. The plaintiff will have custody of the minors on the first half of the school holiday while the defendant will have custody on the second half.
  - v. The plaintiff will cater for shelter, clothing while food will be shared equally between the parties.
  - vi. The defendant will cater for the subjects' school fees, school related expenses and medical expenses. He will remit a monthly sum of Kshs 10,000 as his contribution towards the purchase of food. Amount to be remitted on or before the 5th day of every month effective 5h August, 2022.
  - vii. Each party to bear own costs.
3. Being aggrieved by the said judgment the appellant lodged the memorandum of appeal dated 29<sup>th</sup> August, 2022 on the following grounds:
- i. The learned magistrate erred in law and in fact in granting the sole legal custody of the minors to the Respondent.
  - ii. The learned magistrate erred in law and fact in failing to give a proper basis for denying the Appellant the legal custody despite having held that neither parent was unfit or unsuitable to have custody.
  - iii. The learned magistrate erred in law and fact in granting the Respondent actual custody by relying heavily on the wishes/desires of the child as contained in the children officers report rather than what is in the best interest of the children.
  - iv. The learned magistrate erred in law and fact in failing to consider and make any determination on the Appellant's counterclaim.
  - v. The learned magistrate erred in placing more weight on the Respondent's submissions and ignoring the Appellant's submissions on various issues raised therein hence the judgment was prejudicial and biased against the appellant.
  - vi. the learned magistrate erred in law and in fact in ordering the appellant to contribute kshs. 10,000/= towards food for the children over and above catering for school fees, school related expenses and medical expenses without taking into consideration the appellant's monthly salary of kshs. 21,000/=.
4. The Appeal was heard by way of written submissions.

### **Appellant's submissions**

5. The appellant filed his submissions through Wachira Wekhomba AIM & Associates advocates and the same are dated 2<sup>nd</sup> April, 2024. Counsel gave a brief background of the case and submitted that the judgment did not conform to the hallowed principles of 50/50 parental responsibility. Further, that the said judgment was unfairly burdensome to the appellant in terms of his overall contribution vis a



vis the rights of custody granted to him. He placed reliance on the case of MAK v RMAA [§ 4 others](#) [Petition 2 E003 of 2022 2023](#) KESC 21 KLR (Civ) (2 March 2023).

6. Counsel went ahead to submit on the grounds of appeal. Regarding grounds 1, 2 and 3 on who should have legal, physical and actual custody of the minors, he submitted that there was no evidence that either of the parents was unfit or unsuitable to have custody. Thus, it was unnecessary to grant legal custody to one parent only and the learned trial Magistrate did not say why the sole legal custody was given to the respondent.
7. He placed reliance on the case of SMM v ANK [2022] eKLR, where the court varied the judgment of the lower court to have the legal custody of the children shared jointly between the appellant and the respondent therein. He added that both parents have a right to make input and participate in the major decisions concerning the children including but not limited to educational, religious and medical decisions.
8. The court's attention was also drawn to sections 3 (b), 4(2) and section 83 (1) of the Childrens Act and the decision in MAA v ABS [2018] eKLR.
9. Grounds 4, 5 and 6 were condensed to read who should shoulder parental responsibilities. Counsel submitted that the trial court failed to indicate or explain the criteria which was used to arrive at the apportionment of kshs. 10,000/= as contribution from the appellant while his monthly earnings amount to kshs.21,056/=. He further submitted that it is in the best interest of the children who will still be maintained if the appellant was offered the alternative of contributing food in kind by providing food stuff as and when required instead of the monthly contribution towards food.
10. He placed reliance on several decisions among them being the case of SAK vs ZDNP (2019) eKLR, where the court found that on order by the trial court for maintenance payment of Kshs. 50,000 per month against the appellant's monthly salary of Kshs. 93,129 was a decision based on wrong principles without considering that the appellant had two other children.
11. In conclusion, he submitted that the welfare of the minors herein would best be served if actual and legal custody, and maintenance is shared at a 50/50 ratio between the appellant and the respondent. He thus urged the court to allow the appeal.

### **Respondent's submissions**

12. These were filed by G. C Nyongesa & company advocates and are dated 18<sup>th</sup> July 2024. Counsel gave a brief background of the case and identified three issues for determination.
13. The first issue is on the custody of the subjects. Counsel submitted that the lower court judgment awarded shared actual/physical custody of the subjects to the parties and sole legal custody to the respondent herein. Further, that the subjects are school going at Grade 8 and 2 respectively and it was ordered that the appellant gets access to them every fortnight on Saturday 9:00 am to Sunday 5:00pm and half of the school holiday. He added that the terms of the judgment was fair to both parties.
14. He placed reliance on several decisions among them Civil Appeal Case No. 46 of 2016 HGG V YP [2017] eKLR where the court held as follows;

“Therefore, for a court of law to depart from the general rule on custody of children of tender years, there must be exceptional circumstances which warrant the mother to be denied custody of children of tender age. Such factors should be ones which affect the welfare and best interests of the child and may include but not limited to; the mother's mental instability



or insanity; disgraceful conduct, say her immoral behaviour, drunken habit, abandoning the children; cruelty to children; and the company she keeps etc.....

Parents should be able to avail quality time to spend with their children and there is no substitute for that.”

15. He further submitted that courts are guided by the principle of the best interest of the child which is paramount as envisaged by *the Constitution* under article 53(2) and the *Children Act*, 2022. Further, that the subjects herein are entitled to their basic needs and the custody orders in force are forged in their best interest. He placed reliance on the case of HGG v YP [Supra] where the court held as follows;

“Borrowing from the judicial authorities, the focus is to attain the best interest of the child in accordance with the principle of *the Constitution* in Article 53 (2) that: “A child’s best interests are of paramount importance in every matter concerning the child”. The above phrase is therefore not a mere cliché or worn-out notion that do not call up any legal delight; it is a real facet in the administration of justice in matters involving children.”

16. On the second issue on maintenance of the subjects, counsel submitted that equal parental responsibility did not mean 50/50 and the circumstances of each parent must be taken into account in apportioning parental responsibility. Further, that the respondent has faithfully discharged her parental responsibility in terms of the impugned judgment and is still being forced to take up the appellant’s share of parental responsibility since he continues to be in contempt of the orders issued by the trial court. He added that no evidence had been tendered before this court to warrant review of the orders of maintenance.

17. He placed reliance on Article 53 (1) (e) of *the Constitution*, sections 32 (3) and 113 of the *Children Act* and the decision in G. O & 2 Others (suing thro’ their mother and next friend) E. M. M v M. O. O [2016] eKLR Civil Appeal No. 53 of 2015;

“14. Both father and mother of a child have an equal responsibility to provide parental care and protection which is the right of every child under Article 53 (1). 15. 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.”

18. Lastly, on the issue of non-compliance of court orders, counsel submitted that the appellant was guilty of contempt as his conduct amounted to abuse of the court process and the same should not be permitted. He placed reliance on the decisions in SAD v EOO [2021] EKLR and Hadkinson v Hadkinson [1952] ALL ER. He urged the court to strike out the appeal with costs to the respondent.

### **Analysis and Determination**

19. This being a first appeal, it is this court’s duty under Section 78 of the *Civil Procedure Act* to re-evaluate and re-consider the evidence tendered before the trial court and come to its own independent conclusion remembering that it did not have the advantage of seeing and hearing the witnesses as they testified.

20. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) E.A 123 where Sir Clement De Lestang (V.P) stated that:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this



Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally".

21. Having carefully considered the record of appeal, grounds of appeal, both parties' submissions and the law, I find the main issue for determination to be whether the appeal herein has merit.
22. The appellant contends that the learned magistrate erred in law and fact in granting the sole legal custody of the minors to the respondent. Further, that the interest of the minors would be best served if actual and legal custody, and maintenance was shared at a 50/50 ratio between the appellant and the respondent. He added that trial court failed to indicate or explain the criteria which was used to arrive at the apportionment of kshs. 10,000/= as contribution from him while his monthly earnings were kshs.21, 056/=.
23. He further contends that the learned magistrate erred in law and fact in failing to consider and make any determination on his counterclaim. Additionally, that the learned magistrate erred in placing more weight on the respondent's submissions and ignoring his submissions on various issues raised therein.
24. The respondent on the other hand argued that the terms of the judgment were fair to both parties. Further, that the subjects are school going at Grade 8 and 2 respectively and the appellant had access to them every fortnight on Saturday 9:00 am to Sunday 5:00pm and half of the school holiday. She added that equal parental responsibility did not mean 50/50 as the circumstances of each parent must be taken into account in apportioning parental responsibility.
25. She further argued that she had faithfully discharged her parental responsibility in terms of the impugned judgment but the appellant was not discharging his role. She added that no evidence had been tendered before this court to warrant review of the orders of maintenance.
26. As to what constitutes parental responsibility, Section 31 of the [Children Act](#) is very clear. It provides as follows:
  - (1) In this Act, "parental responsibility" means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.
  - (2) The duties referred to in subsection (1) include, but are not limited to—
    - (a) the duty to maintain the child and, in particular, to provide the child with—
      - (i) basic nutrition;
      - (ii) shelter;
      - (iii) water and sanitation facilities;
      - (iv) clothing;
      - (v) medical care, including immunization;
      - (vi) basic education; and
      - (vii) general guidance, social conduct and moral values;



27. As to what constitutes equal parental responsibility, Section 32 of the *Children Act* is very clear. It provides as follows.

Equal parental responsibility

- (1) Subject to the provisions of this Act, the parents of a child shall have parental responsibility over the child on an equal basis, and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility whether or not the child is born within or outside wedlock.
- (2) A person who has parental responsibility over a child shall at all times have the duties, powers and responsibilities as are prescribed in this Act or any other written law.
- (3) A person with parental responsibility over a child shall not act in any way that contravenes any order of a court of competent jurisdiction made with respect to the child under this Act or any other written law.
- (4) A person who has parental responsibility over a child may not relinquish or assign such responsibilities to another person.
- (5) Nothing in subsection (4) prevents a person from making temporary arrangements, during his or her absence, to allow a fit person to exercise his or her parental responsibilities over a child for and on his or her behalf.
- (6) The making of the temporary arrangements referred to in subsection (4) by a person shall not affect or limit that person's liability arising from his or her failure to exercise his or her responsibility under this section.

28. In view of the above, there is no doubt that parental responsibility is a joint and equal responsibility. Both parties herein are equally aware and do affirm that they have an equal task to support their children. This position is further amplified by Article 53 (1) (e) of *the Constitution* which provides that every child has a right to parental care and protection, which includes equal parental responsibility of the mother and father to provide for the child, whether they are married to each other or not.

29. Section 114 of the *Children Act* stipulates factors that guide the court when making an order for financial provision for maintenance of a child as follows;

Financial provisions by step-parents and presumptive guardian

- (1) The Court may make a maintenance order in respect of a child, including a child of the other parent who has been accepted as a child of the family notwithstanding the absence of an adoption order.
- (2) Without prejudice to the generality of subsection (1), the Court shall consider all the circumstances of the case and be guided by the following considerations—
  - 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 immediate future;
  - b. the financial needs, obligations, or responsibilities which each party has or is likely to have in the immediate future;
  - c. the financial needs of the child and the child's current circumstances;
  - d. the income, if any, derived from the property of the child;



- e. any physical or mental disabilities, illness or medical condition of the child;
- f. the manner in which the child is being or was expected to be educated or trained;
- g. whether the respondent has assumed responsibility for the maintenance of the child and, if so, the extent to which, and the basis on which, he or she has assumed that responsibility, and the length of the period during which he has met that responsibility;
- h. whether the respondent assumed responsibility for the maintenance of the child knowing that the child was not his child;
- i. the liability of any other person to maintain the child;
- j. the liability of that person to maintain other children.

30. From the above provisions, it is clear that parental responsibility is not relegated to one parent alone. It requires joint effort although not exactly the same. It is not enough for one party to claim that his or her income is too small or little hence not enough to support the baby. In *CIN VS JNN (2014) eKLR* the court expressed this;

“it will not do for a party to say that she has an uncertain source of income and therefore the responsibility of maintaining the children should be borne by the adverse party. The (said) party must establish to the satisfaction of the court that she has also made an effort to provide for the upkeep of the children”.

31. From the impugned ruling at page 6, the learned magistrate observed as follows;

“The plaintiff offered to cater for shelter, clothing and proposed that cost for food be shared equally. The defendant on the other hand offered to cater for school fees and school related expenses. He argued that he could not make any contribution towards food since he had borrowed a loan in order to settle his advocate’s fees. The defendant was well aware of his parental duties when he obtained the loan. He was well aware that the subjects were entitled to basic needs which include provision of food. The plaintiff despite being unemployed offered to cater for clothing, shelter and half the cost for food. The court has carefully considered the evidence on record. In the best interest of the subjects the defendant is ordered to cater for the subjects’ school fees and related expenses, medical expenses, and half the cost of food.

32. From the material presented to court there is no dispute that:

- i. The two minors are under the custody of the respondent.
- ii. The respondent was as at the time of the impugned Judgment not in any formal employment.
- iii. The appellant is employed and has a basic earning of Kshs.43,478.26/= from his payslip.

33. The appellant was ordered to pay Ksh 10,000/= per month for purchase of food and he was to also cater for the subjects’ school fees and school related expenses plus medical expenses. The respondent on the other hand was to cater for shelter, clothing and half cost of food.



34. It is trite law that parental responsibility is an equal joint responsibility of the parents to a child and no parent shall be treated specially as having a superior right over the child than the other. In PKM V ANM (2020) eKLR, where Aroni J stated that;
- “In my view therefore, one need not go further to look at what parents need to do for a child and to what extent. In this instance the parties have joint responsibility towards their son and no one is superior to the other...”
35. In light of the above cited authorities, the provisions of Section 114 of the *Children Act* and considering the appellant’s earnings, I find the order to have the appellant pay kshs. 10,000/= per month for food as well as cater for all educational and medical expenses for the minors to be unreasonable given the circumstances of this case. In my view, it is only fair and just that he caters for the subjects’ school fees, school related expenses and medical expenses while the respondent caters for shelter, clothing and food. As a father he is at liberty to once in a while bless his children with food.
36. From the above analysis I find that both the appellant and respondent have a joint responsibility towards the bringing up of the children, within their means. Thus, the trial Magistrate failed to properly apportion responsibility to both parents based on the evidence before her regarding the financial capacity of each parent.
37. On the issue of legal custody of the minors. The trial Magistrate in the impugned judgment at page 5 at paragraph 2 observed as follows;
- “The plaintiff and defendant have a right to participate in their children's life (sic). The foregoing notwithstanding the court takes note of the hostile relationship that exists between the plaintiff and defendant. During trial it became apparent that the parties had an acrimonious separation as a consequence they were unable to see eye to eye, they failed to agree on simple issues when called upon to do so. It is for the said reason, and for ease of decision making that legal custody is granted to the plaintiff.”
38. It is now settled law that in the determination of any matter where the welfare of a child is concerned, the child’s best interest should be of paramount consideration. Where the custody of a child of tender years is in issue, such custody should be with the mother of the child unless there are extenuating circumstances. In that regard, in KMM vs JIL [2016] eKLR Mungai J held thus:
- “A child of tender years’ best interest and welfare are where the legal custody is awarded to the mother barring extenuating circumstances that would prevent the mother from providing protection and care of the child. Case law lends credence to the proposition that in cases of a child of tender years of less than 10 years as defined under Section 2(1) of the *Children Act* 2001, custody is granted to the mother.”
39. Further, in Mehrunnisga vs Parves [1981] KLR 547, the court of Appeal stated;
- “The custody of a child of tender years should always be a mother’s right except where she has through her own misconduct, divested herself of that right.”
40. In light of the authorities cited above and considering the children in this matter are of tender age, I find that the trial Magistrate did not err in law and in fact in awarding legal custody to the mother (the respondent herein).



41. The appellant's contention that the trial Magistrate did not consider his submissions is not correct since the Judgment at page 2 noted that the court considered the rival submissions. Regarding the counter claim filed by appellant the same sought for actual custody which was granted equally to the parties and legal custody to the respondent. The appellant also sought for visitation, support and access of the minors. The said claims were addressed in the orders issued in the lower court judgment and therefore the counterclaim partially succeeded. Thus, for the respondent to say that the same was not addressed is not true.
42. The upshot is that the appeal partially succeeds and the following orders shall issue:
- i. The order directing the appellant to pay Ksh 10,000/= per month for the children's food is hereby set aside. He is however at liberty to bless his children with food at anytime
  - ii. Save for order (i) all the other orders by the trial court remain intact.
  - iii. This being a family matter each party will bear its own costs.
43. Orders accordingly

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2024 IN OPEN COURT AT NAKURU.**

**H. I. ON'UDI**  
**JUDGE**

