



**JKM v RWM (Family Appeal E011 of 2023)
[2024] KEHC 15258 (KLR) (2 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15258 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
FAMILY APPEAL E011 OF 2023
HM NYAGA, J
DECEMBER 2, 2024
IN THE MATTER OF J. M. AND E. D.- MINORS**

BETWEEN

JKM APPELLANT

AND

RWM RESPONDENT

(Being an appeal against the ruling of the trial magistrate Hon. Ruth Kefa, Principal Magistrate, delivered on 12th July, 2023 in Nakuru Children Case No. 105 of 2010)

JUDGMENT

Brief Background

1. Through an amended amended plaint dated 24th October, 2016, the Respondent herein instituted a suit against the Appellant in Nakuru CM Children’s Court Case Number 105 of 2010 seeking the following orders;
 - I. An order that the Plaintiff be granted Custody of the Subject Namely J. M and E. D until they attain the age of 18 years.
 - II. An order that the defendant do provide food, education, health, shelter and other aspects of maintenance for the above named children in an amount as shall be assessed by the court until they attain the age of 18 years or as the Court may order.
2. From the record, the Appellant had initially filed his defence dated 3rd September, 2010 on 29th May 2018 denying the Respondent’s case and praying that the same be dismissed. Vide an order issued on 17th January, 2017 the appellant was granted time to file an amended defence but he did not file the same.



3. Upon hearing the parties herein, the trial Court delivered its Judgment on 10th May,2019 in the following terms: -
 - I. The Plaintiff shall have custody of the subjects and provide shelter, clothing and medical care.
 - II. The Defendant shall pay school fees and provide all school related needs of the subjects.
 - III. The Defendant shall send Ksh.10, 000/= every month to the Plaintiff for purchase of food for the minors.
 - IV. Each party shall bear his/her own costs of the suit.
4. The Appellant did not fully comply with the terms of the judgement and warrants of arrest were issued against him.
5. Subsequently the Appellant filed two applications dated 21st November,2022 and 8th March 2023.
6. In the first application, the Appellant sought for review, variance and or alteration of the orders issued in the judgement delivered on 10th May,2019 and all consequential orders and for the court to find that his financial capability had become extremely challenging and substitute the orders in the said judgement with an order directing him to transfer the minors to a public school and pay their school fees and all related expenses, and to provide Ksh.4000/= every month to the Respondent for the food of the Minors.
7. In the latter application, the Appellant sought for orders to lift the warrants of arrest issued on 14th February,2023; be granted access to the minors herein as well as their schools; and the matter to be referred to mediation.
8. The Respondents opposed both applications vide her Replying affidavits sworn on 15th June 2023 and 12th May,2023 respectively.
9. Upon hearing the applications, the trial magistrate found the applications lacking in merit and dismissed them on 12th July, 2023. In dismissing the said applications, the trial Court expressed itself as hereunder: -

“I have considered the applications as well as rival submissions. Judgement was entered on 10th May,2019 and since then the Defendant has not demonstrated any effort made to comply with the orders of the court. He argues that his business was adversely affected hence he is unable to cater for the needs of the minors. However, this court gave the Defendant a chance to enroll the minor ED to a public school on 15th February,2023. The mother and the child stayed in court until noon when the Defendant failed to show up and take the minor to school prompting this court to direct the plaintiff to take the minor to Kingdom International Premier School and for the Defendant to cater for school accessories. His explanation that he bought the necessary school requirement for Kenyatta Primary School is an afterthought after warrants of arrest were issued against him. Efforts to have the parties’ reach an amicable settlement at the Court Annexed Mediation was unsuccessful as shown by the Mediator’s report. I therefore find the Applications lack merit and are hereby dismissed. The Defendant has failed to show cause why he should not be committed to civil jail for failing to comply with orders of the court. Consequently, I hereby order the warrants of arrest to remain in force. Each party to cater for their own costs”



The Appeal

10. Dissatisfied with the said ruling, the appellant filed this appeal and listed the following six (6) grounds of appeal: -
 - I. That the Learned trial magistrate erred in law and fact by failing to make a determination on the Application dated 21st November, 2022.
 - II. That the Learned Magistrate erred in law and fact by failing to make an informed decision on whether the Appellant was in a position to provide the minors as per the provisions of the *Children Act, 2022*.
 - III. That the Learned Trial Magistrate erred in Law and fact by failing to post-pone the Warrants of Arrest and imprisonment for purposes of establishing whether the failure by the Appellant was willful refusal or neglect or whether the same was occasioned by his indebtedness and inability to meet his financial responsibilities.
 - IV. That the Learned Trial Magistrate erred in law and fact by failing to establish whether the respondent's lifestyle and expectations were beyond the Appellant's means.
 - V. That the trial magistrate misdirected herself by failing to address the gravamen of the Appellant's applications and the same has subjected the Appellant to a trial that was unfair, unjust and the same infringed his right to a fair trial as protected by Article 50 of *the Constitution*.
 - VI. That the trial Magistrate's ruling and orders failed to consider the entirety of the proceedings by disregarding the Appellant's evidence and the same is not supported by facts and the provisions of the law, consequent to which, the same cannot be sustained.
11. The appellant's prayer is for this court to allow the appeal, set aside the impugned rulings with all consequential orders, to allow the Application dated 21st November, 2022 with costs and grant the costs of this Appeal.
12. The appeal was canvassed through written submissions.

Appellant's Submissions

13. Citing the cases of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123 & *Kamau-vs-Mungai and another* (2006) 1KLR 150 on duty of the first appellate court, the Appellant urged this court to re-evaluate and assess the evidence herein and reach its own conclusion.
14. The Appellant submitted that the trial court erred by finding that his application dated 21.11.2022 lacked merit and consequently dismissing it. He contended that at the time the trial court delivered its ruling he had demonstrated through his affidavit sworn on 21.11.2022 that few of his businesses were struggling to survive despite the pending court execution process and that all his businesses had been frustrated by his indebtedness and had run into a total standstill thereby limiting his financial capability to fulfil some of his obligations.
15. The Appellant asserted that at the time he had a romantic relationship with the respondent that resulted into the birth of the minors herein, he was a successful business man dealing in animal feeds and husbandry but the said business slowly deteriorated and finally collapsed.



16. The Appellant submitted that he is currently a married man with school going children and despite undergoing financial hardships, he has always strived to ensure the children's needs are guaranteed as enshrined under Article 53(2) of *the Constitution*.
17. The Appellant argued that the trial court in its judgement failed to take into account the income/earning capacity, property and other financial resources which he had both then and in the foreseeable future, and also the children's financial needs, obligations or responsibilities.
18. He argued that the trial court ought to have considered his capacity to provide for the minors had reduced and review the orders issued on 10.05.2019.
19. The Appellant faulted the trial court for declining to postpone the warrants of arrest in order to establish whether he had willfully neglected to fulfil his obligations or whether failure to fulfil the same was occasioned by his indebtedness and inability to meet his financial responsibility.
20. The Appellant posited that maintenance orders are made in the best interests of the children and ought not to be oppressive or punitive to any party. To support this position, he relied on the case of *Kamau-vs-Mungai* and another (2006) 1KLR 150.
21. The Appellant contended that subjecting him to civil jail will not be in the best interest of the children herein and his family as they will not be catered for and his earning capacity will be disabled.
22. In view of the foregoing, the Appellant prayed that this appeal be allowed with costs.

Respondent's Submissions

23. The Respondent submitted that from the time the trial court's judgement was entered, the Appellant has been quite erratic and has always failed to act in the best interest of the minors herein.
24. She argued that warrants of arrest had been issued severally and the only time the Appellant complies with court orders is when he is pushed to the limit.
25. The Respondent submitted that despite the Appellant being a man of means and capable of maintaining the minors he has totally failed to do so.
26. The Respondent submitted that the review application sought on 21st November, 2021 did not meet the threshold stipulated in Order 45 Rule 1 of the Civil Procedure Rules as it was filed with unreasonable delay.
27. With respect to the prayer for transfer of minors to public schools and the Appellant to be ordered to pay school fees and school related expenses, the Respondent submitted that the first Minor is in a public school yet the Appellant has consistently failed to pay his school fees and related expenses.
28. Regarding the second Minor, the Respondent submitted that on 15th February, 2023, the trial court gave the Appellant a chance to enroll the minor in a public school and she and the minor stayed in court until noon but the Respondent failed to show up thus necessitating the court to order that the minor report to Kingdom International Premier School where she had already secured an admission. The Respondent posited that in the circumstances the trial court acted in the best interest of the child.
29. With regard to the Appellant's prayer for provision of Ksh. 4000/= every month for food of the minors, the Respondent submitted that since delivery of the judgement the Appellant only paid Ksh. 10,000/= for minors' food on 29th April, 2022 and wondered why he has never paid Ksh. 4000/= per month if indeed he is capable of paying the same as demonstration of good faith.



30. The respondent believes the above conduct shows that the Appellant takes court orders casually.
31. The respondent submitted that the documents attached to the Appellant's record of appeal i.e. document dated 27th June,2012 and letters dated 13th April,2015, 8th March 2014 & 24th April,2014 from Munene Chege Advocates, Manini Auctioneers and Maina Njuguna Advocates respectively were not produced in the main suit and as such she did not get a chance to cross examine the Appellant on them.
32. The Respondent submitted that this is a clear case of total disregard of court orders and urged this court to dismiss the Appeal.

Analysis and Determination

33. This is a first appeal. As the first appellate court, I am duty bound to reconsider, re- evaluate and re - assess the evidence tendered before the trial court and arrive at an independent determination and or conclusion without losing sight of the fact that the trial court had the advantage of seeing and listening to the witnesses to be able to assess their demeanour. (See *Selle and another vs Associated Motor Boat Co. Ltd and others (1968) E.A 123* and *Peters Vs Sunday post limited (1958) E.A 424.*)
34. I have considered the record of appeal, grounds of appeal and written submissions by both parties. In my considered view the sole issue for determination is whether the learned Magistrate erred in declining to review the orders issued on 10th May,2019.
35. Section 80 of the *Civil Procedure Act* provides that: -
 - “ Any person who considers himself aggrieved: -
 - a. By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. By a decree or order from which no appeal is allowed by this Act may apply for review of the judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit”.
36. Under order 45 rule 6 of the Civil Procedure Rules a court can review its orders if the applicant proves that there was discovery of any new matter or evidence that was not available after the exercise of due diligence when the decree was passed or order made; existence of mistake or error apparent on the face of the record application has been filed without undue delay or for any other sufficient cause. See *Francis Njoroge v Stephen Maina Maina Kamore (2018) eKLR* where the court emphasized on proof of the a foresaid elements.
37. Having held as above, I'm cognizant of the fact that this is a Children matter and a strict application of section 80 of the *Civil Procedure Act* may not be desirable. It is for this reason that the *Children Act* has provided for review of orders made under it. Section 116(3) of the Children's Act provides that the Court may review the order for periodic payment upon—
 - a. the death of the person liable to make the periodic payment;
 - b. significant change of circumstances of either parent or guardian, provided that the change is not detrimental to the best interest of the child.
38. Section 119 of the same Act provides that in relation to an order made under section 116, the Court may—



- a. impose such conditions as the Court deems fit;
 - b. vary, modify or discharge any order made under section 116 with respect to making of any financial provision, by altering the schedule of payments or by increasing or diminishing the amount payable; or
 - c. temporarily suspend, the order as to the whole or any part of the money paid and subsequently revive it wholly or in part as the Court deems fit.
39. Muchelule J, as he then was, held in *EAW versus WAN* [2021] eKLR at paragraph 4 as follows: -
- “The Children Court has the jurisdiction to periodically review and adjust the maintenance and education orders which it has issued where the circumstances of the child and the parents change (*JKW versus AWM* [2018] eKLR). In order to review upwards or downwards, as the circumstances may demand, the court has to fully hear the parties and examine whatever evidence of means that will be availed. It is only then that the court can reach a decision as to the appropriate maintenance and education amount. Such decision is reviewable, or appealable as the case may be”.
40. From the above it is clear that a review of any orders under the *Children Act* is driven by the circumstances that exist at the time of the application.
41. In the Application before the lower Court, the Appellant prayed for review of the Judgement delivered on 10th May,2019 for reasons that his business had ran into a standstill and had been declared as heavily indebted and as a result he couldn't sustain any of his businesses, and the profits expected therefrom had been frustrated and since business was his only source of profits, he was unable to comply with the court orders. To demonstrate this position, the Appellant attached a proclamation notice from Gillette Traders Auctioneers & official court brokers dated 27th June,2012; a letter from the firm of Munene Chege & Co. Advocates dated 13th April,2015 advising one of his companies i.e. Nzuri Feeds Supplies Ltd to pay Ksh. 818,978.70 within 7 days to avert execution; proclamation notice from Manini Auctioneers General Agencies dated 8th March,2014 showing that his company known as Nakuru Dawa Center Ltd's movable properties had been attached; & a letter from Maina Njuguna & Associates dated 24th April,2014 instructing one of his companies i.e. Nakuru Dawa Services to pay auctioneer's outstanding balance of Ksh 34,707.00.
42. In rebuttal, the respondent averred that the Respondent attached the above documents to escape responsibility as they are very old documents dating over 12 years ago.
43. I note that the main suit was heard on 27th September, 2018 and the Appellant neither relied on the above documents nor sought them to be included in his evidence yet they were not new documents as they were available to him prior the said hearing date. The Respondent therefore did not get a chance to cross examine the Appellant on them considering he presented them after the trial court had rendered its judgement.
44. However, the documents cannot be ignored as they may be an indication of the fact that the appellant may actually be struggling financially and has other responsibilities that may affect his capacity to earn.
45. The Appellant further submitted that he is now a married man with other school going children who also depend on him. Even though he did not provide evidence to that effect, it emerges from the proceedings that indeed he has another family. Even that being the case, he cannot abscond his obligations towards the children herein.



46. What the court needs to do is to ensure that there is fairness to all the children, be it those of the respondent or otherwise. An excessive award would end up punishing the other children and the appellant may even end up in court again with another maintenance suit. I do not think that this was the intention of the Act.
47. It is trite law that the upkeep and maintenance of a child is the joint responsibility of both parents. Article 53 (1) (e) of *the Constitution* stipulates the rights of the child thus;
- “ Every child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married or not;
48. Article 53 (2) of *the Constitution* provides;
- “ A child’s best interests are of paramount importance in every matter concerning the child.”
49. Section 110 of the *Children Act* provides that it shall be the joint duty and responsibility of both parents to maintain the child whether or not the parents are married to each other.
50. Section 8 (1) (a) of the same Act provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.
51. In the instant case the applicant seeks to transfer the minors to a public school. The respondent indicated that the first-born child was selected to join Cardinal Otunga High School which is a public school. This position was confirmed during the hearing of the appeal. It is my view therefore that the trial court did not err by declining to issue review orders sought based on this ground.
52. The Appellant should therefore continue to pay the 1st minor’s school fees and provide all school related needs as was directed by the trial court.
53. Regarding the second minor, the Appellant was granted an opportunity to secure a public school for the minor. The court record shows that the child was undisputedly out of school for one month due to the Appellant’s failure to admit him to school within a reasonable time. The court record further shows that on 15th February, 2023 the Appellant was supposed to pick the minor from the court and take him to school but he failed to do so necessitating the court to order the respondent to take the child to Kingdom International School where she had secured an admission and to pay for his school fees whereas the Appellant do cater for school related expenses. The court noted that it would be in the best interest of the child to report to school immediately considering he had been away for one month after schools reopened.
54. As per the above order, it is clear the Appellant is only required to pay for the minor’s school related expenses. The trial court orders were therefore reasonable under the circumstances and I do find not find any solid ground to interfere with it.
55. The Appellant also had applied for revision of the monthly contribution from Ksh.10,000/= to Ksh.4,000/= on ground that his financial circumstances had changed. The trial court in its ruling did not consider this prayer.
56. The Appellant faulted the trial court for failing to take into account the income/earning capacity, property and other financial resources which he had both then and in the foreseeable future, and also the children’s financial needs, obligations or responsibilities in its judgement.



57. In view of the prevailing circumstances, I find that there is evidence to demonstrate change of circumstances in terms of the appellant's income and his other responsibilities.
58. After re-evaluating the material on record I am of the view that an excessive award may end up having a negative effect on the parties and the children involved. There is no use of maintaining such an award if there is almost certainty that the appellant will keep on defaulting.
59. Having considered the matter, it is my finding that the appeal on this award is partly successful, and I review the monthly maintenance downwards from Ksh. 10,000/- to Ksh. 7,000/- per month.
60. The other orders of the trial court are upheld.
61. Each party to bear their own costs.
62. Orders accordingly.

SIGNED AND DELIVERED VIRTUALLY AT MERU THIS 2ND DAY OF DECEMBER, 2024.

H. M. NYAGA

JUDGE

