



**SO v MS (Civil Appeal E133 of 2023) [2024] KEHC 15195 (KLR) (2 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15195 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E133 OF 2023  
CJ KENDAGOR, J  
DECEMBER 2, 2024**

**BETWEEN**

**SO ..... APPELLANT**

**AND**

**MS ..... RESPONDENT**

*(Being an Appeal from the judgment delivered on 27th July, 2023 by the honourable Gavava A. Mohamed, Senior Resident Kadhi – Isiolo Law Court in Divorce Cause No. E001 of 2023)*

**JUDGMENT**

**Introduction**

1. The Appellant and the Respondent married in 2016 under Islamic Law at Isiolo County and were blessed with three children. In 2021, the Appellant married a second wife. The marriage between the Appellant and Respondent faced conflicts. The Respondent accused the Appellant of cruelty and neglecting his parental responsibilities over their children by failing to provide for them and pay their school fees. The Respondent filed a Divorce Petition at the Kadhi’s Court at Isiolo in which she sought dissolution of the marriage and payment of dowry.
2. She also sought an order vesting the actual and legal custody, care, and control of the 3 children, as well as monthly maintenance of Kshs.20,000/= per month, medical expenses of Kshs.5,000/= per month, and Rent of Kshs.15,000/= per month. She also sought that the Appellant be ordered to pay school fees and cater for the education expenses of the minors. Lastly, she also sought the Appellant to be ordered to meet the clothing after every two months.
3. The Appellant filed an Answer to Petition in which he denied Respondent’s claims of cruelty. He also denied neglecting or failing to provide for the minors. He stated that he did not wish to divorce the Respondent and that the marriage could still be salvaged. Lastly, he stated that the amounts claimed by the Respondent were exaggerated and that he was not in a financial position to provide the claimed amounts.



4. The trial Court delivered a Judgment in favour of the Respondent on 27<sup>th</sup> July, 2023, which dissolved the marriage between the Appellant and the Respondent. The Court also made other orders concerning the welfare of the children in the following terms: it gave the Respondent physical custody of the children while the Appellant was to have legal custody of the minors and reasonable access. The Court also ordered that the Appellant give the Respondent Kshs.20,500/= monthly for the minors' accommodation, clothing, and maintenance. The Respondent was also required to cater for medication, school, and madrassa expenses.
5. The Appellant was dissatisfied with the Judgment and appealed to this Court vide a Memorandum of Appeal dated 17<sup>th</sup> August, 2023. He listed 7 Grounds of Appeal, which were as follows;
  1. That the learned Senior Resident Kadhi erred in law and in fact by considering extraneous issues which were not before the court and arrived at the conclusion contrary to the evidence before the court.
  2. The Honourable Senior Resident Kadhi erred in law and in fact in failing to appreciate that he had no jurisdiction over children matters.
  3. The Honourable Senior Resident Kadhi erred in law and in fact in failing to appreciate that parental responsibility is a shared responsibility between the father and the mother.
  4. The learned Senior Resident Kadhi erred in law and in fact in heaping all the parental responsibility on the shoulders of the Appellant.
  5. The learned Senior Resident Kadhi erred in law and in fact in arriving at the Judgment contrary to the law and the known provisions in a divorce case.
  6. The Honourable Senior Resident Kadhi failed to appreciate that a party is bound by his or her pleadings and awarded outside what was prayed for in the petition for dissolution of marriage.
  7. That the learned Senior Resident Kadhi's findings were against the law and evidence before him.
6. He asked the Court to allow the Appeal and set aside the Learned Senior Resident Kadhi's Judgment dated 27<sup>th</sup> July, 2023.
7. The appeal was canvassed by way of written submissions. The Respondent did not file her written submissions despite being given the opportunity to file.

### **Appellant's Written Submissions**

8. The Appellant submitted that the Kadhi's Court failed to consider that parental responsibility is a shared responsibility between him and the Respondent. He argued that *the Constitution* and the *Children Act* stipulate that parents have equal responsibilities. For these reasons, he submitted that the Kadhi's Court was not justified in ordering him to single-handedly cater for clothing, food, and education, among others.

### **Issues for Determination**

9. I have considered the grounds of appeal and the Appellant's submissions, and I am of the view that the issues for determination are;
  - a. Whether the Kadhi's Court had jurisdiction over the children matters.
  - b. Whether the Monthly contributions imposed on the Appellant are justified



- c. Whether the Appellant Should be compelled to reimburse the Kshs.54,000/= for maintenance expenses already incurred
10. It is trite law that the first appellate Court must re-evaluate the evidence in the subordinate Court on points of law and facts and come up with its findings and conclusions. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:
- “...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 ...”

### **Whether the Kadhi’s Court has jurisdiction over Children’s matters**

11. In his 2<sup>nd</sup> Ground of Appeal, the Appellant stated that the Honourable Kadhi failed to appreciate that he had no jurisdiction over children matters. He did not, however, elaborate on this ground in his written submissions. From the onset, it appears that the Appellant admitted to the Kadhi Court’s jurisdiction to determine the matter. In his Answer to the Petition, the Appellant stated:

“24. The Honourable Court has jurisdiction to hear and determine this matter.”

Nonetheless, this Court will first determine this issue.

12. The High Court in *MAA v SIE (Civil Appeal E009 of 2024)* [2024] KEHC 4894 (KLR), faced a similar question where the Appellant questioned the jurisdiction of the Kadhi’s Court to deal with maintenance and children matters. The High Court held:

“Custody and maintenance of children are incidental to marriage and divorce, and therefore, they fall squarely within the jurisdiction of the Kadhi’s Court.”

13. This issue was exhaustively handled by the High Court in *ZUDG v SJKUR (2020) eKLR*, where the Court held that the Kadhi’s Court has jurisdiction over children matters.

“This court for now, aligns itself, so did the Kadhis who sat in this matter with the thought that the Children’s Act did not oust the jurisdiction of the Kadhi or other subordinate courts in dealing with issues of children. Indeed, lately all magistrates are gazetted to handle children matters and in this court’s considered view, by implication Kadhis too being in the category of magistrates should and ought to hear such matters and more so where the same are connected and incidental to the cause before the kadhi, so long as the said court applies the principles laid down by The Children’s Act and in particular applies the best interest of the child’s principle as enunciated by the said Act.”

14. Based on the above authorities, I do hold that the Kadhi’s Court had jurisdiction to hear and determine the children issues of maintenance and custody.

### **Whether the Monthly contributions imposed on the Appellant are justified**

15. The Court ordered that the Appellant pay Kshs.20,500/= monthly for accommodation, clothing, and maintenance of the minors. The Respondent was also required to cater for medication, school, and



madrassa expenses. The Appellant submitted that the lower Court failed to appreciate that parental responsibility is a shared responsibility between both parents. He also argued that he was not in a position to raise the entire amount.

16. The Court is invited to consider whether the said monthly and periodic obligations placed on the Appellants are justified. I have looked at Kadhi's judgment to ascertain whether he appreciated the principle of shared parental responsibility. On page 7 of the Judgment, the Court observed as follows;

“[Section 24 (1) of the Children's Act] means that the parents have equal rights to exercise their responsibilities towards their children and it is a duty upon the parties to this case to exercise diligently and dutifully this right.”

To my mind, the Honourable Kadhi appreciated the principle of equal responsibility between parents when he was determining the matter.

17. The last issue for determination is whether the Monthly contributions imposed on the Appellant are justified. Courts have established principles that should guide a Court in determining how to share parental responsibilities between the parents. In *C.I.N v J.N.N* [2014] eKLR, the court held as follows;

“It will not do for the Respondent to say that she has an uncertain source of income and therefore the responsibility of maintaining the children should only be borne by the Appellant. The Respondent must establish, to the satisfaction of the court, that she has also made effort to provide for the upkeep of the children. The above constitutional requirement is a game changer. Parties seeking the intervention of the Children's Court to secure maintenance for the upkeep of the child or children must also indicate what contribution they are making towards the support of the child or children. This is because both the mother and the father of the child have equal responsibility towards the upbringing of the child or children.”

18. Courts have also held that Maintenance orders are made in the best interests of the children and ought not to be oppressive or punitive to any party. This principle was restated in *SKM v MWI* [2015] eKLR, where the Court held as follows:

“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.”

19. Neither party disclosed to the Court the amounts of income earned. They, therefore, made it impossible for the learned Magistrate to determine their income or earning capacity. The Respondent claimed that the Appellant is a Businessman, but the Appellant refuted the claims. The Appellant stated that he had lost his job and had even moved to Machakos in search of greener pastures. He, however, did not state what he was earning in the meantime. On her part, the Respondent stated that she was a housewife. She admitted that the Appellant had quit his job. She also admitted that the Appellant used to provide for his children before he lost his job.



20. Parties in this case did not file Affidavits of Means to assist the Court in determining how to apportion responsibilities. The significance of an Affidavit of Means in child custody and maintenance matters was discussed in *EMO v JMN* [2021] eKLR, where the Court stated as follows;

“16. It is prudent for parties contesting maintenance to file an affidavit of means stating the financial contributions they would be willing to make towards the upkeep of the children. The court in *A M K v S D M HIGH COURT CIVIL APPEAL 45 OF 2017* [2018] eKLR set out the contents of a comprehensive affidavit of means thus:

“... ideally the affidavit of means should include income earning capacity and other financial resources by each party/parent; the financial needs, obligations and responsibilities by each party / parent and propose contribution which each party has made or intend to make for the welfare of family/child (ren) including looking after the children through day-to-day care and support.”

17. Comprehensive affidavits of means assist courts to make an informed decision on the contribution each party is to make towards the upkeep of the minor. The parties in this case did not file affidavits of means or indicate in the evidence what they earned or the financial contributions they were willing to make.”

21. Courts have given directions on how parental responsibilities should be shared in cases where the income of the parties is unknown. In *EWM v RKK* [2019] eKLR, the court held as follows;

“The appellant told the court that she operates a Kiosk, therefore, a small scale trader. She however, told the court that the respondent is a transporter earning about Kshs.100,000/= per month. The respondent denied that fact. Instead, he told the court that he is a mere driver earning Kshs.350/= per day. At one time, however, he admitted to having owned a transport vehicle which he has disposed of. It is likely that the respondent is a transporter. The parties did not file affidavits of means and the court has no idea what exactly each earns. The court will exercise its discretion in awarding what is reasonable in the circumstances of the parties without necessarily burdening either.”

22. I note that the parties entered into a Parental Responsibility Agreement (PRA) at the Children’s Office on 1<sup>st</sup> February, 2023. The Agreement required the Appellant to take care of medical, educational, and food expenses while the Respondent was required to pay the rent. I note that the agreement was duly executed by the two parties in the presence of a Children’s Officer. The parties have not disowned the PRA or even requested the court to vacate it.

23. I also note that the Appellant used to provide for the children before the two entered into the PRA. For instance, in January 2023, the Appellant transferred Kshs.11,900/= to the Respondent. The Appellant produced a Mpesa statement to show this.

24. The Court in *EWM v RKK* [2019] eKLR held that Parental Responsibility should be shared and need not be equal. The court observed as follows:

“It is also true that though parental responsibility is to be shared, it can never be equal. The court must take into account the financial capability of each parent. This position was stated



in MK vs CKK HCA.51/2015 where the court said: “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.”

25. In the circumstances, I find that it is just and appropriate for the Appellant to contribute to the children’s maintenance to the tune of Kshs.15,000/= per month. I also find it suitable for the Appellant to cater for the children’s medical needs, education and related expenses, and madrassa. The parties shall consult one another and agree on the selection of the school. I find it appropriate for the Respondent to provide housing for the children and cover any additional maintenance needs for food and essentials. In the case of a medical situation that incurs significant expenses or requires serious medical intervention, the parties shall discuss and mutually agree on their contributions toward the costs, prioritizing the best interests of the minors. The lower Court’s decision requiring the Appellant to pay Kshs.20,500/= monthly for accommodation, clothing, and maintenance is hereby set aside.

**Whether the Court should compel the Appellant to reimburse the Respondent Kshs.54,000/= for maintenance expenses already incurred for the children?**

26. The Kadhi’s Court observed that the Appellant had not provided any maintenance for the Minors for the last six months. The Court directed the Appellant to reimburse the Respondent Kshs.54,000/= as the maintenance cost. The Appellant argued that the Court was not considerate and submitted that he has no means of paying the same. This court has analyzed the appropriateness of this award to ascertain whether it is just to compel the Appellant to reimburse the already spent maintenance cost.

27. A similar question arose in the case of HR v NJAC [2021] eKLR, where the court interrogated whether it was just to compel one parent to reimburse the other parent for maintenance expenses already incurred. It held as follows;

“Regarding refund to the Applicant of the maintenance of the children from November 2018 to present, it is my considered view that both parties have parental responsibility towards their children. In the absence of one party providing for the children, the other party ought to step in and ensure the children’s rights are protected. As noted, the order for maintenance was not specific on what each party should provide in this regard. I see no need to grant an order for refund of the money allegedly used by the Applicant in maintaining the children.”

28. Following the above authority, and in the circumstances of this case, it is unjust to require the Appellant to reimburse the Respondent Kshs.54,000/= for maintenance expenses that have already been incurred for the children. This is particularly so because the costs were not itemized for the reimbursement sought and were not proven with evidence. Additionally, there was no interim Court order for maintenance. The Lower Court’s order for the payment of Kshs.54,000/= to the Respondent is hereby set aside.

**Disposition**

1. I find no reasons to disturb the following orders of the trial Court; Order 1, Order 2, Order 3, Order 4, Order 5, Order 7, Order 8, Order 11, Order 12, and Order 13. These nine orders are hereby upheld.
2. I set aside the following orders of the trial Court; Order 6, Order 9, and Order 10, and substitute the same as below.



3. The Appellant shall provide for the Children's food and maintenance needs at Kshs.15,000/ = per month.
4. The Appellant shall cater for the children's education and related expenses, which may be paid directly to the institution. This must be in a school/s to be agreed upon between the parties. The Appellant shall also cater for Madrassa fees.
5. The Appellant shall cater for the children's medical needs. In the case of a medical situation that incurs significant expenses or requires serious medical intervention, the parties shall discuss and mutually agree on their contributions toward the costs, prioritizing the best interests of the minors.
6. The Respondent shall provide shelter, clothing and cater to any additional maintenance needs for food and essentials.
7. No order as to costs.
8. It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS PLATFORM ON THIS 2<sup>ND</sup> DAY OF DECEMBER, 2024.**

.....

**C. KENDAGOR**  
**JUDGE**

In the presence of:

Court Assistant: Beryl

No attendance by parties

