



REPUBLIC OF KENYA



**KENYA LAW**  
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**LAO v OkA M (Civil Appeal 9 of 2018)**  
**[2019] KEHC 12482 (KLR) (20 September 2019) (Judgment)**

Neutral citation: [2019] KEHC 12482 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MOMBASA**  
**CIVIL APPEAL 9 OF 2018**  
**M THANDE, J**  
**SEPTEMBER 20, 2019**

**BETWEEN**

**LAO ..... APPELLANT**

**AND**

**OKA M ..... RESPONDENT**

*(An Appeal from the Judgement of Hon. V. J. Yator Senior Resident  
Magistrate of 24.1.18 in Tononoka Children's Court Cause No. 233 of 2013)*

**JUDGMENT**

1. The Appellant LAO filed Tononoka Children's Court Case No. 233 of 2013 against the Respondent OK A M seeking certain orders in respect of their child RK who was born on 5.10.09. The Appellant sought a declaration that the Respondent has parental responsibility over the child, custody of the child, monthly maintenance of Kshs. 127,167/= and an attachment of salary order for the said amount as well as costs. By an order of 8.10.14, the trial Court directed the Respondent's employer to deposit Kshs. 52,639/= being 1/3 of his salary in the Appellant's account each month. Thereafter however, by its judgment delivered on 24.1.08 the trial Court set the monthly maintenance at Kshs. 10,000/= (the maintenance amount). Being aggrieved by the said judgment, the Appellant preferred the Appeal herein.
2. The grounds of the Appeal are reproduced below:
  1. The Learned trial magistrate erred in law and in fact by failing to grant all the prayers sought in the case despite gravity of the evidence adduced during trial.
  2. The Learned Magistrate erred in both law and fact in failing to consider the principles of granting maintenance as enshrined in the provisions of the Children's [Act No. 8 of 2001](#)



3. The Learned trial magistrate erred in law and in fact by reviewing downwards the maintenance due to the minor and not in the best interest of the minor.
  4. The Learned trial magistrate erred in law and in fact by failing to take into account that the minor was a sickly child who required constant medical attention.
  5. The Learned trial magistrate erred in law and fact and misdirected herself by ordering the appellant to provide for the minor beyond her financial capacity and against the weight of evidence.
  6. The Learned trial magistrate erred in law by reviewing the issue of medical cover and treatment which was not in the best interest of the child in the circumstances.
  7. The Learned trial magistrate erred in law and in fact failing to analyse the testimony of the witnesses.
  8. The Learned trial magistrate erred in law and in fact by failing to analyse the documents produced in evidence and adopted by the witnesses as testimony.
  9. The Learned trial magistrate erred in law and fact in putting the interests of the respondent before those of the minor contrary to the provisions of the *Children Act* No. 8 of 2001 and the Kenyan Constitution.
  10. The Learned trial magistrate judgement was harsh, punitive and biased against the appellant and the child and was against the weight of evidence and law.
  11. The Learned trial magistrate erred in law and fact in failing to consider that parental responsibility was the obligation equally shared by both parents and the fact that the child resides with the appellant.
  12. The Learned trial Magistrate erred in law and fact in arriving at the entire judgement on wrong principles of law.
  13. The Learned Magistrate erred in both law and fact by failing to consider the Appellant's written submissions and authorities
  14. The learned Magistrate erred in both law and fact by failing to consider and apply the law appropriately.
  15. The Learned Magistrate erred In both law and fact in considering extraneous matters which had not been tendered in evidence or submissions.
  16. The Learned Magistrate erred in fact and in law in failing to adhere to *the Constitution* by denying the appellant a fair trial and discriminating her and the child by virtue of her status by being biased against the appellant and the minor consistently in her judgement.
  17. THAT the Learned Magistrate erred in fact and in law in failing to appreciate the Appellant's submissions and authorities.
3. The Appellant prayed that the Appeal be allowed. He also sought the following:
- (a) That the ruling be set aside.
  - (b) That the judgment delivered on 24.1.18 be set aside and be substituted with a judgment of this Court in such terms as the Court may deem fit in the best interest of the child.



4. Parties filed their written submissions. The Appellant condensed the grounds into the following 2 major grounds:
  - i) Whether the trial Magistrate applied the principles of law relating to maintenance.
  - ii) Whether the decision by the trial Magistrate was unconstitutional and not in the best interest of the child.
5. The 2 grounds will be considered together due to their conceptual similarities. The law relating to maintenance of a child is contained in *the Constitution* of Kenya, 2010 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;
6. Maintenance is an aspect of parental care and is the responsibility of both parents of a child. Section 94(1) of the *Children Act* stipulates the considerations by which the Court shall be guided when 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) the income or earning capacity, if any, property and other financial resources 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) the circumstances of any of the child's siblings;
  - (h) the customs, practices and religion of the parties and the child;
  - (i) ...
7. The paternity of the child herein is not in dispute nor is the parental responsibility of both parents to maintain the child. What is disputed is the quantum of that maintenance which was reduced by the trial Magistrate in the impugned judgment. This Court has been called upon to determine whether the trial Magistrate was guided by the foregoing considerations when she reduced the maintenance amount.
8. The trial Magistrate in her judgment directed that the Appellant caters for shelter and utility bills as well as school related expenses. On his part, the Defendant was to provide for school fees and transport, medical expenses whenever they arise together with a monthly contribution of Kshs, 10,000/=. Both



parties shall cater for the clothing needs of the child and each parent was to meet the entertainment needs when the child was in their respective custody. The learned Magistrate stated:

The Plaintiff has been receiving Ksh. 52,000/= per month, the Defendant attached a payslip of Ksh. 138,272.82. he has another family to support.

The Plaintiff alleged in evidence that he (sic) works for her father in Kisumu. She does not state her contribution to the welfare of the child, her allegations that the Defendant took away her certificates is (sic) not substantiated. All in all she is of good health and able to contribute towards the welfare of the child as is required by *the constitution* and statute.

9. While considering the Appellant's application for maintenance of the child, the trial Court was obligated to take into account the income or earning capacity, property and financial resources of the parties both then and in the foreseeable future. The trial Court was also to consider the parties' financial needs, obligations, or responsibilities. As regards, the child, the Court was required to bear in mind his financial needs and circumstances as well as any physical or mental disabilities, illness or medical condition.
10. I have considered the evidence on record against the factors enumerated in Section 94 of the Act. The Court notes that the Respondent's salary according to his pay slip is Kshs. 138,272.82. There is no evidence of any other financial resources available to the Respondent. The record further shows that in addition to the child herein, the Respondent has 3 other minor children aged about 4, 14 and 16 years according to exhibited birth certificates. They too require maintenance by their father. From this pay slip, he is required to pay school fees and transport, medical expenses whenever they arise and his share of the clothing as well as entertainment needs when the child is with him. The Respondent is also required to make a monthly payment of Ksh. 10,000/=. It is noted that the child remains in the medical cover provided by the Respondent's employer.
11. The trial Magistrate directed that the Plaintiff caters for shelter and utility bills as well as school related expenses. She is also to meet her share of the clothing and entertainment needs of the child. In her affidavit sworn on 16.3.18, the Appellant averred that she lives with her elderly father in Kisumu and assists him with farm work for which she is paid an allowance, the amount of which was not stated. She also helps in running her late mother's business for which she is paid Kshs. 40,000/= per month. Her father saves the monthly sum of Kshs. 5,000/= for the child and even purchased a 5 acre piece of land for him in Chemelil. In total, it would appear that the Appellant has at her disposal each month the sum in excess of Kshs. 50,000/=. Given that other major needs, in particular, school fees and medical expenses are catered for by the Respondent, this amount in my view is adequate to take care of the school related expenses, utilities, clothing and entertainment. All the Appellant needs to do is live within her means and not seek a life of beyond this at the expense of the Respondent who has other responsibilities. To require the Respondent to pay more to her out of his salary is tantamount to oppressing him and would militate against the best interest of the Respondent's other children.
12. It was submitted for the Appellant that she solely took care of the child who has a special condition that is terminal and requires constant hospitalization. Citing the case of G. O. & 2 others (Suing thru' their mother and next friend) E. M. M. v M. O. O. [2016] eKLR the Appellant argued that the trial Court ought to have taken this into account as part of the Appellant's contribution towards maintenance of the child. In that case, Meoli, J stated:

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.



13. This Court notes that the Appellant lives with the child and does in fact take care of his day to day needs. The trial Magistrate no doubt took all this into account when she directed that the Appellant takes care of shelter and utility bills as well as school related expenses while the Respondent provides for school fees and transport, medical expenses whenever they arise together with a monthly contribution of Kshs, 10,000/=. Both parties were to cater for clothing and entertainment. The trial Magistrate's decision was informed by her finding that the Appellant was of good health and able to contribute towards the welfare of the child. She further took into account the income of the Respondent and the fact that he had other children to support. This in my view satisfies the constitutional imperative in Article 53(1) that parental care is a shared responsibility and the provisions of Section 94 of the Act.
14. I now turn to the child's medical condition which the learned Magistrate did not allude to in her judgment. The Appellant states that the child is of special needs and suffers from a terminal illness. The child had serious stomach pains causing him to roll on the ground. The Appellant further avers that according to the doctor, the medical condition the child suffers is stress related. She says that the child saw text messages sent to her phone by the Respondent stating that he hates the child and wishes death upon him. It would appear to the Court that the Respondent is given to vulgar and offensive language and has no qualms about documenting the same in his text messages to the Appellant. Why however, the Appellant would retain such messages in her phone within the reach of her vulnerable child is beyond comprehension. It is clear that the child's medical condition is psychosomatic. There is however nothing on record to show that the child's condition is terminal. It is therefore in the best interests of the child that he is shielded from all negative and destructive material that would affect him emotionally and psychologically with a devastating impact on his physical health. This is the constitutional responsibility of both parents.
15. The Court has power to make adjustments to an order for the maintenance of a child as it may deem fit in the circumstances of each case. Section 99 of the Act provides as follows:

The court shall have power to impose such conditions as it thinks fit to an order made under this section and shall have power to vary, modify or discharge any order made under section 98 with respect to the making of any financial provision, by altering the times of payments or by increasing or diminishing the amount payable or may 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 thinks fit.
16. The Court in exercise of its power may impose conditions, vary, modify or even discharge a maintenance order for the making of a financial provision. The Court may also increase or decrease or change the times of payments of the amount payable under a maintenance order. Additionally, the Court has the power and discretion to temporarily suspend the whole or any part of the maintenance amount and subsequently revive it wholly or in part as it deems fit. For a party to be deserving of an order of variation of a maintenance order, it must be demonstrated that such variation is in the best interests of the child.
17. In the present case, the Appellant states that she does not have a job and only assists her father on the farm and in running her late mother's business. The Appellant is paid Kshs. 40,000/= by her father, and receives Kshs. 10,000/= from the Respondent each month. She is not exactly destitute. In spite of this, she still seeks that the Respondent be saddled with the entire financial responsibility over the



child. This negates that constitutional principle that parental responsibility is a shared responsibility. In this regard, I agree with Kimaru, J in C.I.N v J.N.N [2014] eKLR, where he stated:

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.

18. In the end, having evaluated the evidence and the law, I have come to the conclusion that the trial Magistrate did not deviate from the principles of law relating to maintenance of the child or compromise his best interests. The decision of the trial Magistrate is not in my view unconstitutional. Accordingly I find no reason to interfere with the said decision. The Appeal herein lacks merit and the same is hereby dismissed. This being a matter concerning the parties' child, there shall be no order as to costs.

**DATED, SIGNED AND DELIVERED IN MOMBASA THIS 20<sup>TH</sup> SEPTEMBER 2019**

**M. THANDE**

**JUDGE**

In the presence of: -

.....for the Appellant

.....for the Respondent

.....Court Assistant

