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MAK (A Minor Suing Through Next Friend JKM) v AMG (Civil Appeal E034 of 2023) [2025] KEHC 14801 (KLR) (8 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14801 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CIVIL APPEAL E034 OF 2023

RL KORIR, J

OCTOBER 8, 2025

BETWEEN

MAK (A MINOR SUING THROUGH NEXT FRIEND JKM) .... APPELLANT

AND

AMG .... RESPONDENT

(Being an appeal from the judgement and decree of Hon. J.M. Gacheru, Resident Magistrate, in Marimanti P.M's Court, Children Case No. E003 of 2021 delivered on 23rd November 2023)

JUDGMENT

1. By way of a Plaint dated 16th June 2021, the Appellant (then Plaintiff) sued the Respondent (then Defendant) for child maintenance. She sought the following orders:-

   i. An order directing the Defendant to cost share the yearly budget, medical care, food, housing, home general care and all expenses including school fees when the child starts school (maintenance.)

   ii. Costs incidental to health growth well being of the minor as she grows (sic!)

   iii. Costs of the suit.

2. On 13th September 2021, the parties entered into a consent which was adopted as judgment of the court. The terms of the consent were as follows:-

   i. The orders recorded in court on the 1st day of July 2021 be and are set aside.

   ii. The defendant herein consequently admits paternity.

   iii. The defendant be remitting a sum of Kshs. 8,000 to the plaintiff on or before the 10th day of every month for the child's upkeep till the child joins school.

iv. Costs in the cause.

3. The Appellant vide an application dated 23rd August 2023 moved the trial court seeking the orders made on 15th September 2021 be reviewed upwards. She sought orders that: -

   i. That the honourable court be pleased to certify the Application as urgent and order that the same be heard expeditiously as it involves care to a child/minor.

   ii. That the court do review the order recorded in court on the 1st Day of September 2021 upwards (since the child is now in school meaning expenses have increased), to a sum of Kshs. 15,000/ = per month.

   iii. That the respondent be ordered to pay and or share in payment of school fees and other school requirements i.e. uniform, books, stationery etc.

   iv. That the court do give an order ordering the Respondent to share by half the already paid school fees by the Applicant

   v. That costs of the Application be provided for.

4. The Application was founded on the grounds on its face and the Applicant's supporting affidavit of even date. She stated that it was agreed that the Respondent would be remitting the sum of Kshs. 8,000 per month on or before 15th day of every succeeding month until the child joins school and sought that the same be revised to Kshs. 15,000. It was her statement that it had been two years since the minor had joined school. Further, that the cost of living had escalated thus the child's budget had escalated and the sum of Kshs.8,000 was inadequate to cater for the minor.

5. In response to the Application, the Respondent filed a replying affidavit dated 6th September 2023 stating that the Applicant is now employed by TSC therefore his contribution should be reviewed downwards to Kshs. 5,000 per month. He sought that the court scrap off his monthly payments so that he can wholly pay for the school fees as the Applicant takes care of the minor needs of the child and that the fee structure be supplied to him in good time to enable him to plan for school fees payment.

6. A ruling in respect of the Application was made on 23rd November 2023 in the following terms:-

   (i) The Respondent do pay school fees, school transport and school related expenses. The payments be paid directly to [Particulars Withheld] Primary School Account.

   (ii). The Respondent directed to meet the costs of medical expenses for the minor.

   (iii). The Applicant is hereby directed to cater for shelter, food, clothing, house help and utility bills.

   (iv). Each party to bear its own costs.

7. Aggrieved by the ruling, the Appellant lodged the instant appeal on the following grounds as per the Memorandum of Appeal.

   i. The learned magistrate failed to interpret Sections 94 (i) of the Children's Act in respect of the Appellant's earnings and arrived at a wrong decision.

   ii. the learned magistrate failed to appreciate the fact that there was no application by the Respondent to review the previous orders before him.

   iii. The learned magistrate failed to consider and interpret properly the financial needs of the child and the child's current circumstances.

iv. The magistrate wrongfully concluded that the application for review is meant to benefit the next friend; the mother and not in the best interest of the child.

v. The ruling of the learned magistrate was by all standards unbalanced and biased against the Appellant.

8. The Appellant prayed that:-

i. The Appeal be allowed, the ruling of the learned magistrate dated 23rd November 2023 be set aside the application dated 23rd August 2023 be allowed with or without any conditions in the best interest of the child.

ii. Each party to bear own costs of the Appeal.

9. My duty as the first appellate court is to re-evaluate and re-examine the evidence in the trial court and come to my own findings and conclusions. This principle was espoused in the Court of Appeal case of Abok James Odera T/A A.J Odera & Associates vs John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR.

Submissions on Appeal

10. The Appellant raised the following issues for determination:-

i. Whether the learned magistrate properly interpreted the provisions of Section 94 of the Children's Act read with Section 76 whereof.

The Appellant submitted that the learned magistrate failed to interpret Sections 94 (1) of the Children's Act as read with Sections 76 which generally stipulate the guiding principles in making financial provisions for parents. That the learned magistrate ruled on the assumption that the Appellant was an employee of the Teachers Service Commission without any evidence being provided. It was also submitted that the Appellant's expectation in that application was that the monthly contribution of Kshs. 8,000 per month can only be increased and not scrapped altogether. In addition, that the consent had a rider for review when the child joins school. Further, that if the learned magistrate was in any way in doubt of the income of the parties, he ought to have started by the welfare checklist through the Children's officer Marimanti to enable him make an informed decision. Reliance was placed on the authority of KMM v MMO Civil Appeal No. 3 of 2020- Eldoret.

11. The Appellant further submitted that in the ruling dated 23rd November 2023, the learned magistrate not only quashed and or removed the orders recorded by consent of both counsel and their clients, but also went ahead to purport to amend them downwards without an application by either party. Counsel relied on Flora W. Wasike V Destimo Wamboko (1988) eKLR.

12. Lastly, counsel submitted that the impugned orders went against the express provisions of Section 4 (2) of the Children's Act 2001. That the learned magistrate sympathised with the Respondent and not the child's best interest.

Respondent's submissions

13. The Respondent raised the following issues for determination.

i. Whether the trial magistrate erred in setting aside the previous orders and allocating specific responsibilities for child maintenance between the parties.

The Respondent submitted that the learned magistrate acted within the bounds of the law when he set aside the previous monthly maintenance order in line with Section 118 and 119 of the Children's Act 2022. It was also submitted that the consent recorded in court provided that the sum to be deposited as upkeep would be Kshs. 8,000 and would remain the same until the child joined school. Therefore, the learned magistrate acted within the bounds of the law and exercised discretion in setting aside the previous orders and issuing new orders on specific responsibilities for child maintenance between the parties.

ii. Whether the learned magistrate erred in limiting Respondents contribution to school fees, school transport, school related expenses, medical expenses of the minor while the Applicant should cater for shelter, food, clothing, house help and utility bills.

The Respondent submitted that the decision that the Respondent would provide for school fees, school transport, school related expenses, medical expenses of the minor while the Applicant should cater for shelter, food, clothing, house help and utility bills was well founded, balanced and in the best interest of the minor and thus should be upheld. Counsel relied on Section 31 and Section 114 of the Children's Act and the case of CIN V JNN [2014] eKLR and S.K.W v M.W.I [2015] eKLR

iii. Whether the decision of the learned magistrate was in the best interest of the minor as required by Article 53 of the *Constitution* of Kenya and the Children's Act.

The Respondent submitted that the issue concerning the minor's education had not been resolved in the prior court order and education being a fundamental need, it was imperative that the same be duly addressed.

Analysis and determination

14. I have distilled the issues for determination from the grounds of appeal and the submissions of both parties as follows:-

i. Whether the learned trial magistrate properly applied Section 94(1) of the Children's Act 2022 in assessing maintenance obligations.

ii. Whether the learned trial magistrate erred in varying the consent orders without a formal application for review from the Respondent.

iii. Whether the trial court's orders were consistent with the best interests of the child under Article 53(2) of the *Constitution* and Section 8 of the Children's Act 2022.

iv. Whether the appeal has merit.

(i) Interpretation of Section 94 & income evidence

15. Section 94(1) of the Children's Act 2022 provides:-

> " The court may make an order for financial provision for a child, having regard to the income, earning capacity, property, and other financial resources which each parent has or is likely to have in the foreseeable future, as well as the financial needs, obligations, or responsibilities which each parent has or is likely to have in the foreseeable future."

16. The Appellant contends that the learned magistrate failed to consider this provision, particularly the financial needs of the child and the earning capacity of both parents. She argued that the court assumed

she was employed by the TSC without proof, and failed to obtain a Children's Officer's report to guide the court on the welfare and financial circumstances of the parties.

17. The Respondent, however, maintained that the trial magistrate correctly apportioned responsibilities based on the changed circumstances, in line with Sections 118 and 119 of the Act, which empower the court to vary maintenance orders upon proof of change in circumstances.

18. In KMM v MMO [2020] eKLR, the Court of Appeal emphasized that in determining maintenance, the court must consider both the needs of the child and the ability of each parent to provide support, noting that the burden should be equitably shared. That the trial court must make a reasoned assessment grounded on evidence, not assumptions.

19. Further, in MNM v SNK [2023] KEHC 3915 the court held that maintenance was a shared obligation and the courts must balance the financial capacity of both parents.

20. In the present case, the trial court relied on unverified claims regarding the Appellant's employment and income. No documentary evidence was produced by the Respondent to prove her employment by the TSC. The court also did not seek a Children's Officer's welfare report nor ask the parties to file respective affidavits of means which would have provided an objective assessment of both the Appellant's and Respondent's true financial standing. This omission was material and contrary to Section 76(3) of the Children's Act, which requires welfare considerations in every proceeding involving a child.

ii. On variation of the consent dated 13th September 2021

21. In children matters, unlike ordinary suits, a Children's court has jurisdiction to review or vary orders paying regard to the best interest of the child which is of paramount consideration. The jurisdiction is granted by Section 120 of the Children's Act. In EKK & Another vs HKK (2020) eKLR Gitari J. held that:-

> " Under Sections 73 and 99 of the Act the court is given wide discretion to impose conditions and to vary orders given regarding maintenance of a child. It would mean that in matters concerning maintenance of children, the court has discretion to vary the consent orders on application by the parties. Section 100 of the Act provides where the parents and guardian or custodian of a child, have entered into an agreement whether oral or written in respect of the maintenance of the child, the court may upon application vary terms of the agreement if it is satisfied that such variation is reasonable and in the best interest of the child."

22. I am persuaded by the above to find that the court has jurisdiction to set aside consent orders or judgment in a matter concerning the child. To do this however, the court must be moved by the parties. I hasten to add that sections 73 and 79 of the repealed Act were replicated in sections 119 and 120 in the current *Children Act* 2022.

23. In EWM v EK MNM v SNK (Civil Appeal E008 of 2022) [2023] KEHC 3915, the Court held that maintenance is a shared obligation and the courts must balance the financial capacity of both parents against the child's needs. However, whether variation may be downward (reducing the Respondent's obligations) or upward depends on evidence of changed circumstances. Further in Gachago v Wainaina (Civil Appeal 45 of 2023) [2024] [2024] KEHC 12318 (KLR) Ado J. considered variation of maintenance orders where there was a substantial change in circumstances, affirming that the court has jurisdiction to review or modify maintenance orders were justified.

24. In the present case, the changed circumstances were that the minor was now joining school which factor was not at play at the time the Consent on maintenance was entered into by the parties. In varying the terms of the said consent, the trial court took into consideration the changed circumstances which included the minor's education. In apportioning parental responsibilities, the trial court allocated school fees and school related expenses to the Respondent while the Appellant was apportioned shelter, food, clothing, house help and utility bills.

25. The consent of 13th September 2021 was clear that the Respondent would remit Kshs. 8,000 per month until the child joined school and that the same could be reviewed upwards upon change of circumstances.

26. The learned magistrate, in the impugned ruling, did not just review the amount but set aside the monetary maintenance set by consent and replaced it with apportioned responsibilities without any application by the Respondent to vary the Consent.

17. The trial court, therefore, exceeded his jurisdiction by unilaterally altering the consent terms, contrary to established principles on review and variation of consent orders. I further observe that the court had no means of assessing the financial capability of each parent in order to apportion responsibility equitably.

27. Article 53(2) of the *Constitution* of Kenya and Section 8(1) of the Children's Act 2022 mandate that the best interests of the child shall be the primary consideration in all matters affecting the child.

28. The trial court's approach in dividing responsibilities rigidly between the parties may have been well-intentioned but failed to reflect the child's overall needs. The order effectively removed monthly upkeep and replaced it with conditional payments, potentially exposing the child to lapses in daily sustenance.

29. I am persuaded by the case of ZAK v MA & another [2013] eKLR, where Mumbi Ngugi J. observed that child maintenance should be structured in a way that guarantees continuity and stability of the child's welfare. Similarly, in S.K.W v M.W.I [2015] eKLR, the court stressed that maintenance must be consistent and reliable to secure the child's dignity and welfare.

30. The Respondent's obligation to pay only when "school fees or medical expenses arise" lacks continuity and predictability contrary to the principle that child maintenance must ensure sustained support for food, shelter, and growth.

31. Having re-evaluated the record, it is my finding that the trial court erred in varying a consent order without a formal application or justification; and that the orders issued did not fully safeguard the best interests of the child as envisaged by Article 53(2) of the *Constitution* and Section 8(1) of the Children's Act.

32. Accordingly, the appeal succeeds to the extent that I set aside the ruling of the trial court. I order as follows:-

    i. The suit is remanded back to the trial court to call for affidavits of means for both parties.

    ii. To hear the parties on their respective positions with respect to responsibility over their joint issue; and;

    iii. Apportion responsibility equitably and fairly.

Orders accordingly.

33. This matter shall be mentioned before the trial court for directions on expeditious disposal.

JUDGMENT DELIVERED, DATED AND SIGNED AT CHUKA THIS 8TH DAY OF OCTOBER, 2025.

....

R. LAGAT-KORIR

JUDGE

Judgment delivered in the presence of Mr. Ondani for the Appellant and N/A for the Respondent. Muriuki (Court Assistant).