



**STK v ENK (Civil Appeal E053 of 2024)  
[2025] KEHC 15390 (KLR) (31 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15390 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E053 OF 2024  
MA ODERO, J  
OCTOBER 31, 2025**

**BETWEEN**

**STK ..... APPELLANT**

**AND**

**ENK ..... RESPONDENT**

**JUDGMENT**

1. Before this court is the Memorandum of Appeal dated 16<sup>th</sup> August 2024 by which the Appellant STK seeks the following orders:-
  - “(1) That the appeal be allowed.
  - (2) That the Ruling delivered on 8<sup>th</sup> day of August 2024 by Hon. Edina Nyaboke Angima in NYERI MCCHCC No. E004 of 2023 be set aside and this Honourable Court do proceed to pronounce itself on the issue of maintenance of the minor.
  - (3) That costs be granted to the Appellant.”
2. The Respondent ENK opposed the appeal. The appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated 11<sup>th</sup> June 2025 whilst the Respondent relied upon her written submissions which were not dated.

**Background**

3. The Respondent ENK (suing as Mother and next friend of minors RMK and RK) filed in the Magistrates court Childrens case No. 004 of 2023 seeking orders directing the Appellant (the Respondent in the lower court) to contribute towards the maintenance of the couples minor children.



4. However before the suit could be heard, the matter was referred for Court Annexed Mediation. The parties reached a partial settlement in the following terms;-

- “ 1. Education and related expenses for the minor at [Particulars Withheld] School Nyeri to be catered for by STK.
2. Health Expenses both in patient and outpatient to be catered for by STK.
3. Samuel Theuri to be taking the children out during holidays and catering for their entertainment expenses twice a year.
4. ENK to cater for food and shelter for the minor.”

5. The parties by consent referred the following matters back to the trial court for determination, of the following issues;-

- (a) The issue of clothing expenses for the minor.
- (b) Incidental expenses for the minor.
- (c) Costs of the suit.

6. The partial settlement Agreement was duly adopted by the court on 7<sup>th</sup> September, 2023.

7. Thereafter the Respondent filed under certificate of Urgency a Notice of Motion dated 7<sup>th</sup> June 2024 seeking the following orders;-

- “ 1. Spent.
2. That this Honourable Court be pleased to review and or set aside and or vacate the orders of mediation agreement in regards to food and upkeep of the minors.
3. That the Respondent be ordered to provide food and upkeep of the subject to a tune of Kshs. 50,000/=”

8. That application which was opposed by the Appellant was heard by the trial court. vide a Ruling delivered on 8<sup>th</sup> August 2024, the learned trial magistrate allowed the application and made the following orders;-

- “ 1. That, Education and related expenses for the minors at the [Particulars Withheld] Academy be catered for by the Respondent herein.
2. That Health expenses be catered for by the Respondent herein.
3. That the Applicant will provide shelter and incidental utility bills for the minors being electricity and water bills.
4. That both the Applicant and Respondent will cater for the food and clothing of the minors herein.
5. Considering the lifestyle that the minors have become accustomed to from the third term of the settlement agreement both the Applicant and Respondent will provide modest outlays for the minors herein.



6. The Respondent will continue taking the children out during holidays and will cater for their entertainment expenses twice a year.
  7. On account of the shared responsibilities, the Respondent will send the Applicant Kshs. 50,000/- on or before the 5<sup>th</sup> day of every month to her provided Mpesa or bank account for record keeping.
  8. I make no orders on costs as this is a Childrens' matter.”
9. Being aggrieved by the above ruling the Appellant filed this appeal which is premised upon the following grounds;-
- “1. That the trial court erred in law and in fact in failing to take into account the income and earning capacity property and financial resources of both parties while issuing maintenance orders.
  2. That the trial The Hon. Magistrate erred in fact and in law in finding and holding that the Appellant and Respondent cater for food and clothing of the minors without considering the evidence on Appellant's financial status:
  3. The Hon. Magistrate erred in fact and in law in finding and holding that the Appellant and Respondent will provide for modest outlays for the minors without considering the evidence on Appellant's financial status.
  4. The Hon. Magistrate erred in fact and in law in failing to consider the Appellants financial status and in finding and holding that the Appellant shall provide Kenya Shillings Fifty Thousand Only (Kshs. 50,000/=) towards shared responsibilities.
  5. The Hon. Magistrate erred in fact and in law by failing to consider the income of the Appellant and excessively imposed parental responsibility on him, which he cannot meet as his income is not much.
  6. The Hon. Magistrate erred in fact and in law in failing to consider the guidelines used by the court when making an order of financial provision for maintenance of a child.
  7. The Hon. Magistrate erred in fact and in law in failing to consider and appreciate the Appellant's submissions, totality of the evidence before her and reached conclusion that is contrary to the evidence on record as produced by the Appellant.
  8. The Hon. Magistrate erred in fact and in law in deviating from the mediation agreement and apportioning more responsibility on the appellant.
  9. The Hon. Magistrate erred in fact and in law in failing to appreciate the fact that maintenance orders are made in the best interest of the children and ought not to be oppressive or punitive to any party.
  10. The Learned Magistrate erred in fact and in law by failing to consider the spirit of equal share of responsibilities and principle of best interest of the minor as stated in Article 53 Subsection 1 (c) and 2 of *the Constitution* of Kenya 2010.



11. The Learned Magistrate erred in fact and in law by failing to impose equal financial responsibility on both the Respondent and Appellant and yet the Respondent is able provide for the minor.

### **Analysis And Determination**

10. I have carefully considered this memorandum of appeal as well as the record of Appeal filed in this matter.
11. This is a first appeal. It is settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and fact and come up with its own findings and conclusions [see *Peters v Sunday post limited* [1958] E.A 424]
12. In *Selleand Another v Associated Motor Boat Company Ltd& Others* [1968] 1 E.A 123 it was stated as  
“ .....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind [the fact] 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 that he has clearly failed on some point to take into account particular circumstances or probabilities materially to estimate the evidence.”
13. Likewise in *Gitobu Imanyara & 2 Others v Attorney General*[2016] eKLR, the Court of Appeal stated as follows:-  
“ An appeal to this court is by way of a 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.”
14. It is not in dispute that the parties herein entered into a partial Mediation Settlement Agreement dated 12<sup>th</sup> July 2023. That Agreement provided for the contribution to be made by each party towards the maintenance of their two children. That Agreement was duly adopted by the Court on 7<sup>th</sup> September 2023. The Respondent later filed an application seeking to vary the partial settlement agreement.
15. The question then is whether the trial court was right to vary the consent agreement.
16. It must be noted that the partial settlement agreement upon adoption by the court became a consent judgment which was binding on both parties. There exists a litany of authorities in Kenya providing that consent judgments once adopted by a court can only be varied and/or set aside in very specific circumstances.
17. In *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* [1982] KLR 485, the court held inter alia, that -  
A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement....



18. Similarly in *Brooke Bond Liebig v Mallya* (1975) EA 266 Hon. Mustafa Ag. vP stated as follows:-
- “The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.” (Emphasis my own)
19. In the same case LAW Ag P stated that:-
- “A court cannot interfere with a consent judgment except in such circumstances as would afford ground for varying or rescinding a contract between the parties.”
20. In the case of *Board of Trustees National Social Security Fund v Micheal Mwalo* [2015] eKLR the Court of Appeal had this to say on the matter:
- “The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.” [Emphasis added]
21. In her Supporting affidavit seeking a review of the partial settlements Agreement, the Respondent indicated that she was facing difficulties providing for the minors. She stated that the Appellant was financially capable as he was earning from his business ventures. The Respondent urged the court to order the Appellant to contribute Kshs. 50,000 towards the maintenance of the minors.
22. The grounds upon which a consent judgment may be varied and/or set aside are very clear. There are fraud misrepresentation and lack or ignorance of sufficient facts. The Respondent made no allegation of fraud or misrepresentation. She merely alleged that the Appellant was deriving substantial income from his businesses and investments. No proof was tendered by the Respondent in the lower court of the income which she alleged the Appellant was earning. The Respondent did not explain whether or not she had been aware of these alleged earnings at the time she entered into the mediation agreement.
23. In her judgment the learned trial magistrate held that:-
- “The mediation Agreement cannot be considered to be a contract in the strict sense of the law since this forum is only meant to aid parties amicably resolve their legal matters in a more relaxed setting than the mainstream rigorous litigation process.”
24. With respect I disagree. The partial mediation agreement was adopted by the court. Upon adoption it became a binding court order and was in fact tantamount to a legally contract binding between the parties which set out the responsibility of each party towards the maintenance of the minors.
25. The learned trial magistrate erred in downplaying the binding nature of the mediation agreement.



26. As rightly pointed out by the trial court mediation provides a more relaxed forum at which parties are free to ventilate their concerns and with the assistance of a mediator reach some consensus. That agreement is then presented to the court for adoption.
27. The Respondent voluntarily entered into the consent agreement.  
It appears that she later changed her mind regarding what contribution the Appellant should make.
28. This court is cognizant of the fact that this matter concerns minors and that by virtue of Section 8 (1) (a) of the *Children Act* the “best Interest” of the child should take priority. However I have carefully perused the partial settlement agreement and in my view it provided for a fair distribution of the burden of maintaining the children.
29. It must be remembered that the partial mediation agreement consisted of temporary orders of maintenance which were to remain in force pending the determination of the main suit which is yet to be heard. It is during this hearing that a full enquiry can be made into the financial means and capabilities of both parties.
30. Finally I find that the Respondent did not present before the Lower Court any convincing reasons/ grounds to have the partial mediation agreements which she voluntarily consented to, reviewed or set aside.  
None of the known grounds for repudiating a contract were proved. The Respondent did not adduce any evidence to prove a change in circumstances to warrant such review.
31. In conclusion I find this appeal is merited. The Ruling delivered on 24<sup>th</sup> August 2024 is hereby set aside. Each party to meet their own costs.
32. For avoidance of doubt the Partial Mediation Agreement entered into by the parties on 12<sup>th</sup> July 2023 as adopted by the court on 7<sup>th</sup> September 2023 remains valid and enforceable pending determination of the main suit.

**DATED IN NYERI THIS 31<sup>ST</sup> DAY OF OCTOBER 2025.**

.....

**MAUREEN A. ODERO**

**JUDGE**

