

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT THIKA**  
**CIVIL APPEAL NO. E325 OF 2024**

**ANN NJAMBI GICHIGI.....**  
**.....APPELLANT**

**VERSUS**

**PETER WACHIRA WANJOHI.....**  
**.....RESPONDENT**

**(Being an Appeal from the Judgment of Hon. Y. M. Barasa (PM) delivered on 21<sup>st</sup> November 2024 in Children’s Case No. E083 of 2024)**

**JUDGEMENT**

**Brief facts**

1. This appeal arises from the judgment of Thika Principal Magistrate in CM Children’s Case No. E083 of 2024 in which the trial court granted actual custody and care of the minor to the respondent pending the hearing and determination of the suit. The trial court granted the appellant custody of the minor and the respondent was granted unlimited access. The trial court further directed that the respondent pays school fees and school related expenses, shelter, medical expenses, clothing and monthly maintenance of Kshs. 6,000/-.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 4 grounds of appeal summarized as follows:-

a) The learned trial magistrate erred in law and in fact by granting the respondent unlimited access of the minor whereas the respondent had not sought for the same and further he denied paternity and has never bonded with the minor.

b) The learned trial magistrate erred in law and in fact by finding that the respondent had provided the minor with shelter whereas there was no material evidence to support such contentions and neither was there a prayer for the provision of shelter thus arriving at a wrong conclusion.

c) The learned trial magistrate erred in law and in fact by completely ignoring her Further Affidavit and submissions in regard to the respondent's means.

3. Parties put in written submissions.

### **Appellant's Submissions**

4. The appellant relies on **Article 53(2) of the Constitution** and **Section 8(1) of the Children's Act** and submits that the court ought to consider the best interests of the child. The appellant argues that the respondent never sought to be granted access of the

minor as in his Statement of Defence, he denied paternity of the minor. Further, the respondent has never interacted with the minor nor has he bonded with the said minor. Thus, the appellant argues that the learned magistrate erred in awarding the respondent unlimited

access and should the respondent desire to have access of the minor, he is at liberty to go back to court and seek for the same. To support

her contentions, the appellant relies on the case of **Lamba vs National Social Security Fund & Another CA No. E168/21 KECA 124 [KLR]**.

5. The appellant submits that the respondent did not tender any documentary evidence to prove that he bought the parcel of land and constructed the house in which she lives in with the minor. Thus, the trial court concluded wrongly that the respondent is the one who provided shelter.

#### **The Respondent's Submissions.**

6. The respondent relies on **Article 53 of the Constitution** and **Section 8 of the Children Act** and submits that the minor's best interests should be taken into account in the matter herein. The respondent submits that he and the appellant are the biological parents of the minor and there will be no disadvantage to the minor if he bonded with his daughter hence the need for unlimited access to her.

7. The respondent argues that the appellant in her affidavit of means did not in any way demonstrate how she arrived at the figures she claims as monthly maintenance of the minor. Further, although the appellant claims that he has built multi storey apartments, she has not produced any documentary evidence to prove ownership. Further, on the allegation that he owns motor vehicles, the documents she has produced to prove ownership show that one is

jointly owned with another person and the second vehicle belongs to another party.

### **Issue for determination**

8. The main issue for determination is whether the appeal has merit.

### **The Law**

9. Being a first Appeal, the court relies on a number of principles as set out in **Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 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 into account of particular circumstances or probabilities materially to estimate the evidence.”**

10. In **Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR** the Court of Appeal stated that:-

**An appeal to this court from a trial by the High Court is by way of 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.**

11. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

- a) That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b) That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the

advantage of seeing and hearing the witnesses testify before it; and

- c) That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

14. In matters concerning a child, it is a constitutional imperative that of paramount importance is the best interests of the child. To that extent, **Article 53(1) of the Constitution of Kenya** provides that a child's best interests are of paramount importance in every matter concerning the child. This position has been enshrined in the Children's Act in section 4 which provides for the welfare of the child. **Section 8(1) and (2) of the Children's Act** provides:-

**(2) 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 a primary consideration.**

**(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the**

**first and paramount consideration...to the extent that this is consistent with adopting a course of action calculated to -**

**a) Safeguard and promote the rights and welfare of the child;**

**b) Conserve and promote the welfare of the child;**

**c) Secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.**

12. From the record, the matter in the trial court proceeded by way of written submissions. The trial court directed on 6<sup>th</sup> November 2024 that the respondent file an affidavit of means and thereafter parties file submissions. On 13<sup>th</sup> November 2024, Counsel for the respondent informed the court that he had filed and served his affidavit of means. Counsel for the appellant sought for a further mention date which the court scheduled for 20<sup>th</sup> November 2024. On the said date, Counsel for the appellant informed the court that she had filed her submissions and so did the respondent and sought for a judgment date. Thus, it is evident that the appellant did not file any affidavit to counter the affidavit of means by the respondent as she alleges. Furthermore, on perusal of the record, there is no affidavit to counter the affidavit of means nor is it mentioned anywhere in the trial court's

judgment. The said affidavit only appears in the Record of Appeal on pages 10 - 12. Furthermore, Counsel for the appellant when stating that she had filed her submissions did not say anything about the affidavit. It is thus evident that the said affidavit was not before the learned magistrate as he wrote down his ruling. Thus, this court cannot consider the same as the learned magistrate rendered the judgment based on the pleadings filed in court.

13. The appellant faults the trial court for granting unlimited access to the respondent of the minor whereas he did not plead for the same in his pleadings. It is not disputed that the parties herein are the biological parents of the minor, a fact that the respondent has admitted. Thus, it would be in the best interests of the child if the respondent is granted access to the minor as provided in **Section 8 of the Children Act** and the First Schedule. Furthermore, **Section 135 of the Act** gives courts the power to make access orders.
14. The appellant further faults the trial court for directing the respondent pay Kshs. 6,000/- as monthly maintenance and argues that the respondent ought to pay Kshs. 20,000/-.
15. Parental responsibility has been defined in section **31 and 32 of the Children's Act and Article 53(1)(e) of the Constitution of Kenya** which both provide that each parent has a duty to provide the child with the necessities of life.

16. **Section 31 of the Children’s Act** provides:-

**(1) In this Act, “parental responsibility” means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child’s property in a manner consistent with the evolving capacities of the child.**

**(2) The duties referred to in sub section (1) include in particular-**

**(a) The duty to maintain the child and in particular to provide him with-**

- I. Adequate diet;**
- II. Shelter;**
- III. Clothing;**
- IV. Medical care including immunisation; and**
- V. Education and guidance;**

**(b) The duty to protect the child from neglect, discrimination and abuse;**

**(c) The right to-**

- I. Give parental guidance in religious, moral, social, cultural and other values;**
- II. Determine the name of the child;**
- III. Appoint a guardian in respect of the child;**

**IV. Receive, recover, administer and otherwise deal with the property of the child for the benefit and in the best interests of the child;**

**V. Arrange or restrict the emigration of the child from Kenya;**

**VI. Upon the death of the child, to arrange for the burial or cremation of the child.**

17. **Section 32:-**

**(1) Subject to the provisions of this Act, the parents of a child shall have parental responsibility over the child on equal basis and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility whether or not the child is born within or outside wedlock.**

18. **Section 114(2) of the Children's Act** stipulates the considerations by which the court shall be guided when making an order for financial provision for 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;**

19. In **E.M.M vs M.O.O Naivasha HCA. 53/2015** Meoli J stated:-

**“It will not do for a party to say that she has an uncertain source of income and therefore the responsibility of maintaining the children should only be borne by the adverse party. The (said) party must establish to the satisfaction of the court that she has also made an effort to provide for the upkeep of the children.”**

20. Similarly in the case of **L.A.O vs O.K Arap M. (2019) eKLR** where Justice Thande pronounced herself as follows:-

**“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 vs J.N.N [2014]eKLR, where the court stated that:-**

**“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.”**

21. From the above, it is clear that a child is a joint responsibility of both parents, therefore it is expected that either parent must make an effort to provide for the upkeep of the child.

22. 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 **M.K. vs C.K.K HCA. 51/2015** where the court held:-

**“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.”**

23. Equal parental responsibility does not mean equal and similar contribution. In the case of **E.M.M vs MO.O. (2016)eKLR** Meoli J observed that:-

**“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.”**

24. In the case of **M.O.A vs H.A.O [2021] eKLR** the court held:-

**“Although parents may not have equal financial ability for the court to demand equal contribution, one must at least exhibit some sense of seriousness in making some contribution as a sign of good will that he or she is not geared towards overburdening the other parent for the sole purpose of punishing him or her using the best interests of a child principle or as a ground to settle scores out of marital differences.”**

25. Bearing in mind the above principles the court notes that the appellant lives with the minor and although the appellant denies that the respondent has not provided shelter as the house she lives in with the minor is his, she has not provided any proof to the contrary. Furthermore, in her pleadings, she has listed the minor’s needs, she has not listed shelter which supports the averment that the respondent provides the same. Based on the parties affidavit of means and pleadings, the trial court ordered

that the respondent provides for school fees and school related expenses at the appropriate time as well as shelter, medical expenses, clothing and monthly upkeep of Kshs. 6,000/-. On perusal of the record, it is my considered view that the sum of Kshs. 6,000/- as monthly maintenance is sufficient as the respondent is still to cater for the minor's education, shelter, clothing and medical expenses. It would be punitive to place the burden of parental responsibility mostly on one parent, in this instant, the respondent.

26. In regard to the unlimited access, this is an order of the court that is yet to be tested since it was given by the lower court only one (1) year ago. The appellant has not shown any problem experienced by the parties in the unlimited access. In the event that such a problem arises. The aggrieved party can approach the lower court for review.

27. I have considered the grounds of appeal vis a vis the evidence and judgment of the lower court and I find that none of the grounds has been established to warrant the intervention of this court.

28. I find no merit in this appeal and I hereby dismiss it accordingly.

29. Being a family matter, each party shall bear their own costs.

30. It is hereby so ordered.

***JUDGEMENT DELIVERED VIRTUALLY, DATED AND  
SIGNED AT THIKA THIS 11<sup>TH</sup> DAY OF DECEMBER  
2025.***

**F. MUCHEMI  
JUDGE**