



REPUBLIC OF KENYA



KENYA LAW
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**MS v EAM (Civil Appeal E124 of 2023)
[2026] KEHC 2999 (KLR) (Family) (6 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 2999 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

CIVIL APPEAL E124 OF 2023

PM NYAUNDI & PM NYAUNDI, JJ

MARCH 6, 2026

BETWEEN

MS APPELLANT

AND

EAM RESPONDENT

(Being an appeal from the Ruling of Hon. Jackie Kibosia (P.M) delivered at Nairobi on the 26th of September 2023 in Children's Case No.1611 of 2021)

RULING

Introduction

1. Vide Memorandum of Appeal dated 24th October 2023, the Appellant herein seeks the following orders-
 - a. That this appeal be allowed
 - b. That the Magistrate's Court Ruling dated and delivered on the 26/09/2023, Decree issued on the 27th of September 2023, be set aside, and this Honourable court substitutes the said orders with orders that are fair to both parties
 - c. That the Court be pleased to make any other or further orders as may be deemed and just in the circumstances.
 - d. That the Costs of this Appeal be in the cause.
2. The appellant is aggrieved that the Court ordered that he provide monthly maintenance of the minor in the sum of Kshs 15000/- in addition to the provision of a medical cover, special medical condition



expenses, school fees, and school-related expenses. He argues that in arriving at the sum, the Court did not give consideration to his affidavit of means.

3. The Appeal was canvassed via written submissions.

Summary Of The Appellant's Submissions

4. The Appellant's Submissions are dated 3rd November 2025. The issues for determination are framed as-
 - i. Whether the trial court erred in ordering the Appellant to pay Kshs. 15,000/= monthly maintenance in addition to medical cover, special medication expenses, and school fees for the minor?
 - ii. Whether the Appellant's Affidavit of means dated 14th April 2022 is valid and proper?
 - iii. Whether the Lower court's orders and ruling of 26th September 2023, should be set aside?
4. On the 1st issue, it is submitted that in failing to consider the affidavit of means, the trial court has placed an onerous burden on the appellant contrary to the spirit of *the Constitution* and the *Children Act*, which legal instruments require that parental responsibility be equally shared between the parents and should consider the financial ability of the parties. Reference is made to the decision in KMM V MMO [2020] eKLR in support of the submission that the Court was obligated to consider the parties' income. Further reference is made to the decision in FKN v LKU (Sued as the mother and next friend of EN-Minor) (Civil Appeal E245 of 2023) [2024] KEHC 8412 (KLR)(11 July 2024)(Judgment) on the principles that a Court ought to consider in apportioning parental responsibility and provision of maintenance.
5. On the 2nd issue, it is submitted that the Court erred in ignoring the affidavit of means that were before the Court. Stemming from this, it is urged on the 3rd issue that the orders of 26th September 2023 ought to be set aside in line with the decision in Mbogo Another vs Shah [1968] EA 93. It is submitted that the earning capacity of the appellant was a material fact, and on that basis, the Court ought to have varied the partial consent recorded by the parties. Reference is made to the decision in Brook Bond Liebig (T) Ltd vs Mallya [1975] EA 266.
6. The Appellant urges the Court to exercise its mandate under Section 120 of the *Children Act* to vary the order.

Summary Of The Respondent's Submissions

7. The Respondent's submissions are dated 18th November 2025. She frames the issues for determination as-
 - a. Whether the trial Court was right in ruling that the Appellant to pay Kshs 15000/- monthly maintenance in addition to medical cover, special medication expenses, and school fees for the minor.
 - b. Whether the Appellant's affidavit of means dated 14th April 2022 is valid and proper
 - c. Whether the lower court's orders and ruling of 26th September 2023 should be upheld.
8. On the 1st issue, it is submitted that the Court was right, as apart from the monetary maintenance of the minor, the Court should also consider the non-monetary contribution of the respondent as the primary caregiver, which would balance out with the financial contribution of the appellant towards the maintenance of the minor.



9. Reference is made to the decision in JCK VEC [2025] KEHC 11964 (KLR), where the Court stated that although parental responsibility is shared, it may not always be equal.
10. It is submitted that the Magistrate judiciously exercised her discretion and that, in any event, the best interests of the minor are the paramount consideration. It is therefore submitted that the Appeal is for dismissal.

Analysis And Determination

11. In determining this appeal, I remind myself of the duty of the appellate Court which was well articulated in the High Court in the case of Prajapati v Wanjala [2026] KEHC 1047 (KLR) as-
 - [2] A first appellate Court is mandated to re-evaluate the evidence before the trial Court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.
 - [3] A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate Court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate Court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate Court had discharged the duty expected of it
12. Vide Plaintiff dated 26th November 2021, the respondent sought the following orders before the trial Court-
 - a. That the Court grants actual and legal custody of the minor to the Plaintiff
 - b. That the defendant be compelled to meet the support and maintenance expenses of the minor.
 - c. That the defendant be ordered to take out an insurance cover for the minor.
 - d. That the defendant be compelled to pay the Plaintiff such monthly sums as the Court may deem reasonable being maintained for the said issue of the union.
 - e. That the defendant bears the costs of this suit.
 - f. Such other or further relief as the Honourable Court deems fit and just to grant.
13. After several appearances in Court, at the prompting of the Court, the parties recorded a partial consent on 27th April 2023 and sought the court's direction on parental allocation on the maintenance of the minor. The parties had filed their respective affidavit of means. The affidavit of the Appellant is dated 14th April 2022. He sets out his earnings as a basic salary of Kshs 40,000, with a net pay of Kshs 34,010, against Monthly expenses of Kshs 31,000.
14. It was his contention that in that scenario, it was not within his power to contribute towards the maintenance of the minor. The Respondent's affidavit of means is dated 26th November 2021. She stated that she is a humanitarian worker and cannot afford to cater for all the needs of the minor on her own.



15. On the 26th of September 2023, the Court rendered its ruling and directed that the appellant provide a monthly maintenance of Kshs 15000/- in addition to providing for the school fees and school related expenses, medical cover of the minor. The respondent, on the other hand, would provide food, shelter, and clothing for the minor.
16. Based on the foregoing analysis, the pleadings on record, submissions filed and the relevant, I surmise the issue for determination to be-
 - a. Whether it is in the best interests of the Child to vary the orders of the Court issued on 26th September requiring that the appellant provide a monthly maintenance of Kshs 15000 for the child?
 - b. Arising from a) above what are the consequential orders?
17. The primary consideration of a Court in a matter touching or affecting the welfare of a child is the Child's best interest. See Article 53 of *the Constitution* of Kenya and Section 8 of the *Children Act*. These two provisions are identical to Article 3(1) of the UN Convention on the Rights of the Child, which provides-

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
18. In 2013, the UN Committee on the Rights of the Child issued a General Comment on the interpretation of Article 3(1) on the Convention of the Rights of the Child, stating that it entailed-

[t]he right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. (See CRC Committee General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration art. 3, para. 1 CRC/C/GC/14 ('General Comment 14').
19. Likewise, the Supreme Court in MAK V RMAA Petition No. 2 (E003) of 2022 observed as follows-
 - (66) The children's rights legal regime (*the Constitution*, *Children Act* (repealed), CRC, and the African Charter on the Rights and Welfare of the Child) emphasizes the centrality of the best interest of the child. The best interest of the child is determined by the circumstances of the case as they specifically relate to the child. This comprises the principles that prime the child's right to survival, protection, participation, and development above other considerations and includes the rights contemplated under Article 53 (1) of *the Constitution*. As such, the focus must be on the child and what is best for him/her.
 - (67) In addition, there is no hierarchy in the children's rights provided for under *the Constitution*. In other words, all the rights provided under Article 53 are in the child's best interest. The 'best interests' concept is further strengthened by being the 'paramount' consideration. This means that the best interests of the child are to be the determining factor when making a decision on the child. It is against this aspect that parental rights ought to be balanced. This is also taking into consideration that no right should be compromised by a negative interpretation of a child's best interest.



20. In that decision, the Supreme Court went further to state-
- (81) Section 24(5) on parental responsibility stated, “a person who has parental responsibility for a child at any time shall not cease to have that responsibility for the child.” This means parental responsibility is a mandatory ongoing obligation. Parental responsibility attaches to the right of the child as it is the parent who has the responsibility to ensure that the needs of the child are catered for.
21. The fundamental principle underpinning parental responsibility is that, for as long as the Sun continues to rise in the East, the primary obligation to provide for a child rests with the child's parents. This enduring duty is emphasised in all matters concerning the welfare and maintenance of a minor. The Court recognises that each parent's financial capabilities are a crucial factor in determining the extent of their responsibility. Such abilities are typically demonstrated by the submission of an affidavit of means, as the parties did in this case. This affidavit enables the Court to assess the parents' financial circumstances and make an informed decision regarding the child's provision.
22. To achieve its purpose, the affidavit of means should not only disclose the parent's income but also include a proposal regarding the financial contribution the parent intends to make for the minor's maintenance and support. Without such a proposal, the Court will use its discretion. Upon reviewing the appellant's affidavit of means, it is evident that he details his earnings and expenses but fails to offer any proposal. Instead, he tells the Court he lacks the resources and suggests they look elsewhere for the child's maintenance. However, as mentioned, the Court has no alternative but to turn to the child's parents, which necessitates the exercise of discretion.
23. In *Mbogo & Another – vs – Shah* [1968] EA 93, at page 95 Sir Charles Newbold P. stated –
- A Court of Appeal should not interfere with the exercise of discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice
24. I find that no basis has been laid by me to interfere with the discretion of the Court. Monthly maintenance of Kshs 15,000 works out to a daily provision of about Kshs 500 for the minor. I do not think that this is so excessive as to warrant varying or review.
25. Accordingly, the appeal is dismissed, and I affirm the decision of the trial court.
26. Because of the relationship between the parties, there shall be no order as to costs.
27. Parties are at Liberty to appeal; the party exercising their right to do so within 30 days.

It is so ordered

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH MARCH 2026.

P.M. NYAUNDI

JUDGE

In the presence of:

Ng'alamoi Court Assistant

Ms. Akinyi holding brief Mr. Yusuf for Appellant



Ms. Nchabaa for Respondent

