



REPUBLIC OF KENYA



**KENYA LAW**  
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**JCK v EC (Children's Appeal Case E038 of 2024)  
[2025] KEHC 11964 (KLR) (11 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 11964 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CHILDREN'S APPEAL CASE E038 OF 2024  
RN NYAKUNDI, J  
AUGUST 11, 2025**

**BETWEEN**

**JCK ..... APPELLANT**

**AND**

**EC ..... RESPONDENT**

*(Being an Appeal from the Judgement and Decree of Hon. Keyne Odhiambo  
Gweno SRM, delivered on 15.2.2024 in Eldoret Children Case No. E140 of 2023)*

**JUDGMENT**

1. This Appeal emanates from the Judgement delivered on 15<sup>th</sup> February 2024 in Eldoret Children Case No. EXXX of 2023 EC v JCK in which Judgement was entered in favour of the Plaintiff as follows;
  - a. The Plaintiff shall have actual/physical custody of the two minors.
  - b. The legal custody of the two minors shall be shared jointly between the plaintiff and the defendant.
  - c. The defendant shall pay school fees and all school-related expenses for the two minors as per the fee structure.
  - d. The defendant shall pay monthly upkeep for the two minors at kshs. 8,000.
  - e. The Plaintiff shall provide food, shelter and clothing for the two minors.
  - f. The medical needs of the two minors shall be shared equally between the Plaintiff and the defendant.
  - g. The defendant shall have unlimited access to the two minors with prior arrangements being made with the Plaintiff.



- h. The physical custody of the two minors shall be shared equally between the Plaintiff and the Defendant during the school holidays.
    - i. No order as to the costs.
  2. The Appellant herein being aggrieved and dissatisfied by the Judgement filed a Memorandum of Appeal dated 29<sup>th</sup> February 2024 based on the following grounds;
    - a. That the Learned Magistrate erred in law and fact in placing more weight on the Respondent's submissions and ignoring the submissions filed by the Appellant and was heavily prejudicial and biased against the Appellant.
    - b. That the Learned Magistrate erred in law and fact by failing to appreciate provisions of Article 53 of *the Constitution* as well as provisions of section 31 of the Children's Act 2022 on shared parental responsibilities.
    - c. That the Learned Magistrate erred in law and fact in placing over reliance on the Respondent's evidence and case in reaching his decision when in fact the Appellant's list of documents filed and evidence adduced were not put into consideration.
    - d. That the Learned Magistrate erred in law and fact in making outright prejudicial substantive conclusions, applying selective justice and disregarding tendered by the Appellant.
    - e. That the Learned Magistrate considered extraneous issues which vitiated his judgement thus arriving at erroneous and/or unfair finding.
  3. The Appellant herein prayed that that the Learned Trial Magistrate's judgment and decree herein on Maintenance orders be set aside and/or vacated and the same be substituted as follows:
    - a. That the appeal herein be allowed as prayed.
    - b. That this Honourable court be pleased to set aside and/or vacate the award on Monthly maintenance of Kshs. 8,000/=.
    - c. That a just and fair finding be made in the circumstances upon considering the evidence on record.
    - d. That the costs of this appeal be borne by the Respondent.
  4. The Appeal herein was canvassed by way of written submissions.

#### **Appellant's Written Submissions**

5. The Appellant filed his written submissions dated 20<sup>th</sup> May 2025 through his Learned Counsel Ms. Ogendi. The Learned Counsel submitted that the Appellant would combine grounds 1, 3 & 5 and argue them as one limb while grounds 2 & 4 would be argued as one limb. Counsel listed 3 issues for issues for determination as follows:

**Whether the Learned trial magistrate erred in law and fact by making outright prejudicial and selective justice for failing to appreciate provisions of Article 53 of *the Constitution* and those of the Children's Act. 2022 by directing the Appellant to pay monthly maintenance of Kshs. 8,000/=.**

6. Counsel submitted that the Appellant appreciates provisions of Article 53 of *the Constitution* which is the anchor law on parental responsibility of a parent to a minor and that the Appellant further



appreciates the principle of best interest when making a decision regarding the well-being of the minor. He added that it is on this basic principle that the Children's Act, 2022 has also re-echoed and placed emphasis on. Counsel referred to section 31 of the said Act which defines and elaborates what parental responsibility is to each parent of a child. She stated that section 32 of the Act has further given guidelines on equal parental responsibility in the following terms: "subject to the provisions of this Act, the parents of a child shall have parental responsibility over the child on an equal basis and neither the father nor the mother shall have superior right or claim against the other in exercise of such parental responsibility whether or not the child is born within or outside of wedlock." she further added that the provision thereto is to the effect that the court may make an order and give directions regarding any aspect of the maintenance including matters relating to the provision of education, medical care, housing, and clothing for the child.

7. Counsel also submitted that directive (d) of the Learned Magistrate directing the Defendant/Appellant to pay monthly maintenance of Kshs. 8,000/= did not take into account the Appellant's means and thus unsustainable in the circumstances and that it is his judgment which appears at pages 136 - 140 of the Record of Appeal, the trial court indeed did appreciate that both parents were in employment with a regular monthly income. Counsel made reference to 19 of page 138 of the Record, where the learned Magistrate took note of the fact that the Plaintiff/Respondent herein "appeared" to have financial obligations towards maintaining the children towards the Defendant/Appellant without providing evidence to demonstrate that the Defendant could support the Children as had proposed. Counsel also added that the court did note further that the defendant/Appellant had not taken issue with the minors' school fees and school related expenses.
8. Counsel furthermore added that even though the Defendant/Appellant on the other hand also submitted that he too has a loan that he is still servicing for their matrimonial home, it worth to note that immediately the case was concluded on 15.2.2024, the Plaintiff/Respondent moved and filed Matrimonial proceedings at Nakuru High Court vide HCFOS case no. E013 OF 2024 in which she is seeking division of the said matrimonial home. She added that the Plaintiff/Respondent lamented several times that it is the said matrimonial property that the defendant is earning extra income i.e. by rearing 5 dairy cows and growing subsistence food. It was also submitted that there was no justification for the Learned Magistrate to issue directive (d) on maintenance of Kshs. 8,000/= against the Respondent by merely arguing that during the hearing the Defendant/Appellant admitted to have been spending Kshs 6000/= per month on his family when he was still living with the Plaintiff/Respondent. She also opined that such a basis was extraneous since the Defendant/Appellant agreed that at that time they were living as a family and that means both parents i.e. parties herein each were contributing the kshs. 6,000/= towards the sustainability of their family and/or children.
9. The Counsel stated that, parental duties concerning all the basic needs of the subject minors herein as spelt out under sections 31 and 118 of the Act to wit: basic nutrition (food), shelter, education, medical care, clothing were well spelt out in the Learned Magistrate's Judgment delivered on 15.2.2024 as it appears at page 139 of the Record of Appeal herein. She added that the subject minors are not lacking as to warrant the maintenance of Kshs. 8,000/= as monthly maintenance against the Defendant/Appellant. Counsel made reference to the case of NS v JM (Family Appeal E031 of 2023) [2024] KEHC 3566 KLR) (5th April 2024) where the Honourable Judge Gregory Mutai I. declined to allow the appeal in which the Plaintiff/Appellant had sought orders of maintenance of exorbitant amount of Kshs.54, 650/= per month. It was the Learned Counsel's closing submission on this issue that directive (d) of the Learned Magistrate's judgment imposing monthly maintenance fee of Kshs. 8,000/= against the defendant/Appellant herein be set aside.



**Whether the learned trial magistrate erred in law and fact by placing over reliance on the Respondent's evidence and submissions while ignoring the evidence tendered by the Appellant thus arriving at an erroneous decision in issuing directive on monthly maintenance of Kshs. 8,000/- against the Appellant.**

10. Counsel submitted that this issue is closely related to issue no. 1 above and that the Appellant has been able to point out that indeed the learned Magistrate seemed to have placed over reliance on the Plaintiff/Respondent's evidence. She added that the Appellant has pointed out that there was no justification whatsoever as to warrant the Learned magistrate to issue directive (d) of the judgment against Appellant on a monthly maintenance fee of kshs. 8,000/=. Moreover, Counsel stated that in any case the trial court did take note that the Plaintiff/Respondent appeared to have placed all financial obligations on the Defendant/Appellant herein and that she also had not disclosed her other income generating assets during the trial were it not the Defendant/Appellant who disclosed them vide his list of documents and exhibits produced during the hearing.
11. It was learned counsel's submission that the Plaintiff/Respondent is acting dishonest in the entire of the proceedings with the sole intention to frustrate the Defendant/Appellant using maintenance as a result of their failed marriage and that the maintenance orders should be sought in the 'best interest of the children' and not in the interest of any party. To demonstrate further, she submitted that the Plaintiff/Respondent is comfortable with the responsibilities she was given as spelt out in the trial court's judgment delivered on 15.2.2024 on providing food, shelter and clothing and that she did not appeal or expressed dissatisfaction on those responsibilities since she is financially stable.

**Whether the Learned Magistrate's decision albeit a discretionary one was plainly wrong in the circumstances**

12. The Learned counsel submitted that there was no justification into taking into account such evidence since the Defendant/Appellant testified that at that time they were living together with the Respondent and their children as a family and thus it is obvious that their monthly expenditure was shared between them towards the well-being of their family and/or children. Counsel further added that directive (d) on monthly maintenance of kshs. 8,000/= against the Appellant is punitive and made unfairly considering the totality of the circumstances surrounding this case and also that the said directive was not made in the best interest of the minors as the law requires since all the basic needs of the minors were shared out in the judgement.

**Respondent's Submissions**

13. The Appellant filed her submissions dated 27<sup>th</sup> May 2025 through the firm of Mose & Mose Advocates where the Counsel on record submitted as follows that the court considered the income of both parties and in the affidavit of means; the Appellant's net pay is kshs. 60,267/= (PAGES 66-67 of the record of appeal) while that of the Respondent is kshs. 31, 137/= pages 154. They both annexed the current pay slips at the time and the court took into account each party's income.
14. Counsel also submitted that the Appellant also raised an issue that the court did not take into account the minors' best interest while awarding upkeep of kshs. 8,000/= but failed to demonstrate in the appeal what would have been the best approach. Counsel also stated that the Respondent urge the court to set aside the award for minors' upkeep but with no other proposal of what will happen to the minors' upkeep and that he has also lamented that the principal under Article 53 of *the constitution* was not put into account while giving an order for shared responsibilities. Counsel also submitted that



it is clear from the court's judgment that equitable sharing of responsibilities was made and it is not that the Appellant was given much responsibility.

15. It was further submitted that the mother shall provide food, shelter and clothing and that the Respondent in her affidavit clearly demonstrated that she was required to raise about kshs. 18,000/= monthly for a decent house, about kshs. 10,000/= per month for food, salary for the minor's nurse/house help of kshs. 10,000/= per month. Counsel further added that in monetary terms, the Respondent's annual net amount towards children upkeep is about kshs. 38,000 times 12 giving a total of Kshs. 456,000. It was further submitted that the appellant on the other hand is kshs. 8,000 times 12 plus annual school fees amounting to kshs. 30,500/= for JKC and 50,500/= for JC and that gives annual net contribution of kshs. 177,000/=.
16. The learned Counsel opined the court should review the monthly upkeep upwards to kshs. 10,000/= noting that the Appellant has the ability to raise and for the interest of the minors and to keep the constitutional principal of equal parental responsibility. This court was further urged to dismiss the appeal and review upwards the upkeep amount from kshs. 8,000 to kshs. 10,000 as was ordered earlier by the trial court and that this will supplement what the Respondent is raising for food, shelter and clothing. Counsel also invited this Court to take note that the Appellant has never met the requirement of school related expense aside from school fees and the mother has been left to struggle to meet the same and this led to the Notice to Show Cause before the Trial Court against the Appellant which this court stayed.

### **Analysis and Determination**

17. In determining the issues in this appeal one must turn into the legal framework for parental responsibilities. First and foremost, Article 53(1) of *the Constitution* of Kenya asserts that a child's best interests are paramount in all matters concerning them. The *Children Act* in Sections 4 and 8 echoes this principle, mandating that the child's welfare must be the primary consideration in any parental agreement. The Act has defined the best interests of the child principle as at prime the child's right to survival, protection, participation and development above other considerations. It includes the rights contemplated under Article 53(1) of *the Constitution* and Section 8 of this Act.
18. The other key yardstick measures are legislated in the Children's Act No. 29 of 2022 provides the legal foundation for parental responsibility agreements and the key provisions in co-parenting include:  
  
Section 31: Establishes the equal parental responsibilities of the mother and the father, which include the duty to provide the child with basic nutrition; shelter; water and sanitation facilities; clothing; medical care, including immunization; basic education; and general guidance, social conduct and moral values.  
  
Section 32: Emphasizes equal parental responsibility and emphasizes that both parents share equal parental responsibility on an equal basis, and neither the father nor the mother of the child shall have a superior right or claim against the other in the exercise of such parental responsibility whether or not the child is born within or outside wedlock.  
  
Section 33: Details of Parental responsibility agreement as a tool for equal parenting of a child whose parents are not living together, outlining the financial and non-financial child maintenance and support, decision-making, etc.
19. The other essential components of parental responsibility agreement is expected to meet the features as herein under outlined: Custody Arrangements: Specify whether custody is joint or sole, and outline physical custody arrangements, including where the child will live primarily and visitation rights for the non-custodial parent. Visitation Schedule: Clearly define when each parent will spend time



with the child, including regular visits, holidays, and special occasions. Financial Responsibilities: Detail how parents will contribute to the child's expenses, including housing, education, healthcare, and extracurricular activities. This section should specify which parent is responsible for specific costs. Decision-Making Authority: Outline how decisions regarding the child's education, health, and religious upbringing will be made. This can include joint decision-making processes or designate one parent as the primary decision-maker. Dispute Resolution Mechanism: Include provisions for resolving disagreements amicably, potentially through mediation before escalating to court proceedings. This helps maintain a cooperative co-parenting relationship. Notification of Changes: Require parents to inform each other of significant changes, such as relocations or changes in contact information, to ensure ongoing communication and involvement in the child's life.

20. This being the first appeal, I have the duty to re-evaluate the evidence tendered before the trial court. I must, however, warn myself that I did not see or observe the witnesses testify. Although this is an appeal against a decision of the trial court in respect of a review application the said warning holds. The Court of Appeal in the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR stated: -

“This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and 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 allowances in this respect.”

21. Moreover, the mandate of this court was settled in *Francis Lokadongoy Lokogy v Reuben Kiplagat Kiptarus* [2020] eKLR where it was held as follows:

“As this is a first appeal, this court is under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching its own conclusions in the matter. In carrying out this duty this court has to remember that it has no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. The court has also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanor of witnesses. In a nutshell a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement.

22. I have considered the appeal and the rival submissions by both parties. It is now my duty to analyze the grounds, the court's record below, and the parties' written submissions in order to decide whether the reliefs sought should be granted. To this end, there is one issue manifest for determination i.e. whether the appeal has merit and ought to be allowed.

23. It is not lost to this court that the orders made by the trial court related to the welfare and maintenance of a child. Courts in Kenya are obliged to give priority to the best interests of a child. Article 53(2) of *the Constitution* of Kenya 2010 provides that: “A child's best interests are of paramount importance in every matter concerning the child”.

24. Similarly Section 8 (1) of the *Children Act* 2022 provides:-(8). (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law,



administrative authorities or legislative bodies—(a)the best interests of the child shall be the primary consideration;” (own emphasis)

25. Moreover, the law relating to maintenance of a child is contained in *the Constitution* of Kenya 2010 and in 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.” Maintenance is an aspect of parental care and is the responsibility of both parents of a child. Section 114(1) of the *Children Act* 2022 sets out the considerations, which should guide the court in 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.”

26. Maintenance of a child is a joint responsibility of both parents, therefore each parent is required to provide for the upkeep of the child. Though parental responsibility is to be shared, it may not always be equal. The court has to take into account the financial capability of each parent. This position was stated in *M.K. v C.K.K HCA 51/2015 MNM v SNK (Civil Appeal E008 of 2022) [2023] KEHC 3915 (KLR) (Family) (24 March 2023) (Judgment)* where the court held thus.

“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.” Therefore, each parent is obliged to make provision for the maintenance of the child and such provisions will be dependent upon the financial capacity of said parents.

27. From the case at hand, the Appellant contends that the learned trial magistrate unfairly imposed an upkeep burden of Kshs. 8,000/= per month without adequately assessing his financial capacity. It was argued that the Respondent also earns a stable income and should bear an equal share of the financial responsibility. According to pay slips and affidavit evidence, the Appellant earns a net monthly income of Kshs. 60,267, while the Respondent earns Kshs. 31,137. Based on this disparity, the trial court correctly found that the Appellant was in a better financial position to contribute towards the children’s monthly upkeep. Additionally, the trial court judgment shows a balanced distribution of responsibilities:

- a. The Appellant was directed to pay school-related expenses and Kshs. 8,000 monthly.
- b. The Respondent was tasked with providing food, shelter, and clothing.
- c. Medical needs were to be shared equally.
- d. Holiday custody and access arrangements were mutually structured.

28. This mirrors the reasoning in *MNM v SNK (supra)* where the High Court upheld a similar apportionment based on relative income, reiterating that the court must consider proportionality rather than rigid equality as discussed elsewhere in this judgement.



29. The Appellant moreover asserts that the Kshs. 8,000 monthly award was punitive and not based on a proper analysis. However, the trial court made clear reference to evidence adduced during trial—particularly the Appellant’s past acknowledgment of contributing Kshs. 6,000 when cohabiting with the Respondent and his responsibility to continue supporting the children.
30. In NS v JM (Family Appeal E031 of 2023) eKLR, the Court stated as follows in paragraph 21: “On whether the learned Magistrate erred in law and, in fact, in ruling that the Respondent should not contribute towards the children’s maintenance and upkeep, in the sum of Kes.54,650/- per month, as prayed by the Appellant, I note from the court’s ruling that no such order was issued; instead, the learned magistrate enhanced the provision orders given to the Respondent by ordering him to continue catering for shopping and pocket money for the child in boarding school as well as transport during opening and closing day.” In the present case, however, the Kshs. 8,000 award is modest, proportional, and in line with the father’s income bracket.
31. Further, the Respondent detailed monthly expenses exceeding Kshs. 38,000 (house rent, food, nanny wages), while the Appellant’s contribution amounted to an annual total of Kshs. 177,000 (Kshs. 96,000 in upkeep and Kshs. 81,000 in school-related expenses). This, too, is proportionate based on comparative financial means. Furthermore, I take note that the court considered the best interest principle under Article 53(2) of *the Constitution* and Section 114(1) of the *Children Act*, 2022, which provides a matrix for financial provision including the parents’ resources, responsibilities, and the child’s needs. The magistrate rightly noted the Respondent’s responsibilities and acknowledged the Appellant’s capacity to contribute reasonably.
32. This court finds that the trial court’s judgment was grounded in both fact and law. The Appellant’s claim that the court was biased, ignored his evidence, or failed to consider the Respondent’s income is unsubstantiated. The judgment demonstrates a reasoned, proportionate, and child-centered approach in distributing parental responsibilities. While the Appellant may seek variation if his circumstances materially change, no error or injustice is apparent in the trial court’s decision. Accordingly, I make the following orders:
- a. The appeal is dismissed in its entirety.
  - b. The Judgment of the Trial Court delivered on 15<sup>th</sup> February 2024 in Eldoret Children Case No. E140 of 2023 is hereby upheld.
  - c. This being a family matter, each party shall bear their own costs in the appeal.
33. It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 11<sup>TH</sup> AUGUST 2025.**

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**R. NYAKUNDI**

**JUDGE**

