



**GWI v CMK (Civil Appeal E060 of 2022)
[2024] KEHC 9802 (KLR) (Civ) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9802 (KLR)

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

CIVIL

CIVIL APPEAL E060 OF 2022

SN RIECHI, J

JULY 31, 2024

BETWEEN

GW I APPELLANT

AND

CMK RESPONDENT

JUDGMENT

1. The parties herein are parents of the minor subjects. The parties are involved in maintenance dispute in respect of the minors. By a plaint dated 24.09.2021 under prayer (c) the respondent moved to the trial court seeking order that the defendant/appellant be ordered to meet all the educational costs for the children including tuition, extracurricular activities and school transport that are not met by the plaintiff's company, while the plaintiff cover the remainder of the children's expenses.
2. The appellant /defendant filed a response by a statement of defence dated 21st October,2021. The matter proceeded to full hearing and the trial court delivered judgement on 30th May 2022 and made the following orders;
 - “ i. Both parties shall have legal custody of the minors.
 - ii. The Defendant shall have actual custody of the minors and the Plaintiff shall have access to the minors on modalities to be agreed upon by the parties.
 - iii. Both parties shall provide clothing.
 - iv. The Plaintiff shall maintain the children in the medical cover provided by his employer.



- v. The Defendant shall remit Kshs. 694,722/- towards any education expenses not met by the Plaintiff's employer. Thereafter the said education expenses shall be shared by the parties in the ratio of 70:30.
 - vi. The Defendant shall provide food and shelter.
 - vii. Each party shall bear its own costs and shall be at liberty to apply.”
3. Being aggrieved by part of judgment orders in the appellant filed this instant appeal through an amended memorandum of appeal dated 28th July 2022 on the following grounds: -
- 1. The Learned Magistrate erred in Law and in Fact by ordering the Appellant to remit a sum of Kshs. 694,722/- towards any education expenses not met by the Respondent's employer when there was no evidence tendered to warrant the said order.
 - 2. The Learned Magistrate erred in fact and in law when she ordered that the education expenses be shared by the parties in the ratio of 70:30 on top of the - Appellant providing food and shelter.
 - 3. The Learned Magistrate erred in fact and in law when she ordered the Appellant to bear full responsibility of providing food.
 - 4. The Learned Magistrate misdirected herself on the applicable principles of law by failing to take into consideration and appreciate the authorities submitted to the court by the Appellant.
- It is proposed to ask the court for orders that:
- a. This appeal be allowed with costs.
 - b. Part of the Ruling of the Learned Magistrate made on 30th May, 2022 in Nairobi CC No. E1310 of 2021 in regards to payment by the Appellant of - Kshs. 694,722/- and sharing of education expenses in the ratio of 70:30 be set aside wholly.
 - c. Part of the Ruling of the Learned Magistrate made on 30th May, 2022 in Nairobi CC No. E1310 of 2021 directing the Appellant to wholly cater for the provision of food be set aside and in its place be substituted with an order directing parties to share the cost of food at the ratio of 50:50.
 - d. The Costs of the Appeal be awarded to the Appellant.
3. By Consent of parties this appeal was canvassed by way of written submissions. The parties filed their respective submissions.
4. I have considered the appeal submissions and the authorities relied on. I have also perused the trial court's record and the impugned judgment. The main issue for determination is whether this court should allow the appeal.
5. This being a first appeal the appellate court should not readily interfere with the discretion of the trial court.
6. In *Nkube v Nyamiro* [1983] KLR 403, the Court of Appeal held that:
- “A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”



7. The impugned judgement order provides;
- “The Defendant shall remit Kshs. 694,722/- towards any education expenses not met by the Plaintiff’s employer. Thereafter the said education expenses shall be shared by the parties in the ratio of 70:30.
- The Defendant shall provide food and shelter.”
8. The appellant submitted that the trial court erred in ordering the appellant to remit Kshs.674,722/= towards education expenses of the minor for the amount not met by the respondent’s employer when there was no evidence tendered to warrant the said order.
9. It is not in dispute that the parties had taken out a education policies with Britam for the minors. When the said policies matured an amount of Kshs. 674,722/= was remitted to the appellant as agreed by the parties.
10. During the hearing the appellant informed the court that she could not afford to pay the amount due to her low income. She stated that the parties were married and living together at the time and the plaintiff had authorized her to use the monies for a different purpose. However, no evidence was tendered to support this allegation.
11. The Constitution of Kenya 2010 requires that in all matters concerning children, the best interest of the child shall be of paramount importance. Article 53(2) of provides:
- “(2). A child’s best interests are of paramount importance in every matter concerning the child.”
12. Section 8 of the Children Act echo the constitutional imperative:
- (2). In all actions concerning children whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the 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) and promote the welfare of the child;
- (c) ...”
13. What is stated in Section 8 of the Act is the paramouncy principle which is vital in all matters concerning children and must be given prominence. While considering this matter, this Court was alert to the welfare of the child herein who are of tender years. The matter is not about the Appellant and the Respondent and their interests are secondary to those of the child. The foregoing provisions require this Court to treat the interests of the child as the first and paramount consideration and must do everything to inter alia safeguard, conserve and promote the rights and welfare of the child herein.
14. I find that the trial court exercised its discretion properly in ordering the appellant to pay the sum she used from the policy towards education of the children. If this court interfere with order it will not be acting in the best interest of the minor.



15. The appellant has also appealed on ground that the trial magistrate erred in fact and law when she ordered the education expensed be shared by the parties in ratio of 70:30 on top of appellant providing food and shelter.
16. It is important to note that both parents have equal responsibility towards the minors. Section 31 of the children's act no. 29 of 2022 defines "parental responsibility" to mean 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.
17. The Act further goes on to say at section 32 (1),

'The parents of a child shall have parental responsibility over the child 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 exercise of such parental responsibility whether or not the child is born within or outside wedlock.'
18. The Court in BRO V WJNWM [2022] eKLR stated,

' From the above cited provisions, parental responsibility is not relegated to one parent alone. It requires joint effort although not exactly the same.
19. It is not enough for one party to claim that his or her income is too small or little hence not enough to support the baby. See C.I.N v J.N.N(su pra) where the court expressed thus;

it will not do for a party to say that she has an uncertain source of income and therefore the responsibly of maintaining the children should 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 upkee p of the children".
20. On the issue of payment by the respondent of Kshs.694,722/= . I note that the basis for the same was a remit the respondent had received for the education policy but which was not used for the purpose. The trial magistrate on this issue stated in her judgement as follows;

The upshot of my judgement is that I order the defendant to pay the education expenses not met by the plaintiff's company up to a limit of Kshs.694,722/= being money she received from the education policies taken out for that purpose. The defendant did not produce any evidence or document to show that the plaintiff has authorized her to use those monies for a different purpose. She stated that he had and he denied it. Accordingly, the burden of proof shift to her since the *Evidence Act* provides at Section 107 and 108 that "he who alleges must prove" Thus,the burden lies on that person who would fail if no evidence at all were given on either side."
21. I have considered the appeal, response and submission. I find that the judgement of trial magistrate had no error of fact or law and the trial magistrate addressed herself to the principle of best interest of the children. The same is hereby affirmed. I find no merit in this appeal and is hereby dismissed with costs.

DATED AT NAIROBI THIS 31ST JULY, 2024.

S. N. RIECHI

JUDGE

