



MNK (Suing as the Minor’s Mother & Next Friend) v EIK (Civil Appeal 104 of 2019) [2023] KEHC 4035 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 4035 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 104 OF 2019**

**MW MUIGAI, J
APRIL 28, 2023**

BETWEEN

MNK (SUING AS THE MINOR’S MOTHER & NEXT FRIEND) APPELLANT

AND

EIK RESPONDENT

(Being an Appeal from the Judgment and decree by Hon. I. M. Kabuya (SRM) in Machakos (CMCC Children’s Case No. 15 of 2018 Delivered On 24th January, 2019)

JUDGMENT

Trial Court Record

1. Vide a Complaint filed on 16th April, 2018 the Plaintiff (suing as the minor’s mother and next friend) sued the Defendant for the upkeep of the minor an issue born out of their broken marriage union.
2. The plaintiff prayed for the following:-
 - a. Monthly maintenance of the minor totaling Kshs.50,000/- to cater for food, education, clothing, entertainment and medical cover.
 - b. Permanent custody, care and control of the minor herein to the plaintiff,
 - c. Permanent injunction be issued restraining the defendant from publishing any information concerning the minor in the media or to any third party.
 - d. Leave to apply during the minor’s age of minority.
 - e. Costs of this suit.
 - f. Any other or/and relief the court may deem just and expedient to grant



Statement Of Defense

3. The Defendant filed his Defense dated 5th June, 2018 stating that it was true there was a marriage union between the Plaintiff and the defendant but denied that the plaintiff had been taking care of the child solely and had been demanding custody and access rights to the child.
4. The Defendant also denied the allegations that he had constantly published defamatory or otherwise abusive and vile statements regarding the breakdown of his relationship with the plaintiff exposing the plaintiff and the minor to public ridicule.
5. The defendant further denied that his conduct with the plaintiff has demonstrated that he was not fit to have custody of the minor and/or other would be bad influence to him.
6. The Defendant stated that the plaintiff could have custody provided he was granted reasonable access to the minor.

Trial Court Proceedings

7. The hearing commenced on 23/11/2018. The Plaintiff and Defendant gave their testimony. The Plaintiff was represented by Mr. Were while the Defendant was represented by Mr. Mbuvi.

Plaintiff's evidence

8. Pw1 Miriam Nzilani Kioko a resident of Machakos told the Court that she is an employee of an insurance firm. She got married to the defendant in the year 2009 and they were blessed with one child. The Plaintiff left her matrimonial home in the year 2014 due to the defendant extreme violent behaviour. The Plaintiff took full responsibility for the minor as the Defendant abandoned his legal obligations of maintaining the minor. The Plaintiff suddenly showed up in the year 2017 and started insisting on visitation and custodial rights over the minor. The Defendant went ahead publishing some defamatory messages on his face book account with the minor's photograph underneath that the Plaintiff is not fit to be granted custody of the child clearly geared at embarking/exposing the plaintiff to public contempt.
9. During cross –examination Pw.1 stated that before the separation the defendant supported both the minor and the plaintiff. The defendant is the one who took the minor to Premese School hence should be in a position to pay up the school fees. The plaintiff is not fully providing for the minor hence the reason for filing the suit. That the Defendant is financially stable to maintain the minor.
10. During re-examination the plaintiff told the court that the defendant had not paid anything at the school since 2015. The amount outlined in the pleadings are fully with respect to the minor and not the plaintiff. The plaintiff gave the defendant the minor's back details but has never deposited anything.

Defense evidence

11. Dw1 EIK a resident of Dagoreti Corner told the Court that he was working as a watchman at a Hardware in Nairobi earning a monthly salary commission of Kshs.14,000/-. The defendant used to carry a leather business between the year 2009 – 2015 unfortunately the business went under and he was not able to pay for the plaintiff and the minor needs. The defendant had even enrolled the Plaintiff for a master's program. He later became sick and even underwent a surgery. The defendant incurred financial strain due to the effects of surgery and following up medical expenses which made him unable to pay the school fees for the minor due to his ban finances.



12. During cross-examination by court he stated that he could only afford kshs.2,500/- towards the minor's education. He did not recall the last time he visited the minor as the plaintiff had warned the school administrators not to allow the defendant access to the minor. He told the court that he had never posted the minor's photos on face book. He did not report the face book fraud account to the police because he was too busy traversing the country in search of money. That he be allowed to pay kshs.2,500/- for now and increase the amount when his finances status improves.
13. During cross-examination by Mr. Were for the plaintiff the defendant stated that he did not know where they currently live. The defendant did not have objection to the plaintiff being granted custody of the minor but he be allowed access to the minor.

Trial Court Judgment

14. In its judgment delivered on 24th January 2019 the Trial Court ordered as follows;the Defendant was allowed visitation rights and access to the minor as such – during school days, he can visit the minor at school be not remove him from the said institution without prior knowledge of the plaintiff and during the school vacation in the months of April and August he shall have physical custody of the minor for 7 calendar days within the 2nd week of the subject months or as agreed by the parties.The Plaintiff was directed to solely cater for the child's primary education;The defendant was compelled to solely cater for the minor's secondary education at an institution of his choice. However should the plaintiff have preference for another institution with higher school fees, the defendant shall only contribute an amount equivalent to that which he would have contributed at the institution of his choice.With respect to tertiary education, both parties shall contribute equally to the minor's costs with priority being given to an affordable public institution.The Plaintiff was ordered to cater for the minor's shelter, clothing and medical cover through her employer's medical scheme or the NHIF. This is because the defendant was already burdened with his own health costs thus would not be able to cater for his son's medical costs at this stage. Lastly with respect to the minor's food, both parties shall cater for the same with the defendant ordered to contribute kshs.2,500/- per month towards that kitty commencing 1st March, 2019.The contribution may be channelled through the minor's bank account or the plaintiff's Mpesa number which channels shall officially be communicated to him through his advocate within 14 days from today. The orders herein are subject to review in future by any party upon making the requisite application. This being a children matter, there shall be no order as to costs.

Appeal

15. Being aggrieved by the Judgment of the Trial Court the Appellant filed her Memorandum of Appeal appealing against the whole judgment and decree based on the following grounds;
 1. The learned magistrate misapprehended the totality of the evidence before her and thereby made a wrong decision in law and fact. In particular, the Court disregarded material and relevant evidence on record and made a decision unsupported by the evidence on record.
 2. The decision by the learned magistrate to grant the Respondent custody of the child for an exclusive period of 7 days during April and August holidays was neither pleaded nor prayed for by the respondent. As a matter of fact, the Respondent unconditionally acceded to the prayers sought by the Appellant. The learned magistrate essentially released the child to a parent who has unequivocally stated that he does not wish to have the custody of the said child.
 3. The learned magistrate's decision to order the defendant to contribute kshs.2,500/- only towards the minor's care and maintenance was based on bare allegations concerning the Respondent's medical condition and on the Respondent's previous financial support to the



appellant. These allegations were unsupported by evidence and were extraneous considerations in the discharge of parental responsibilities in law.

4. The learned trial magistrate erred in law and fact in relying on inconclusive, incomplete and uncorroborated bank statements in determining the Respondents financial capacity and thereby erroneously ordered the Appellant to cater for all the minor's primary education expenses, healthcare, clothing, shelter, extra – curricular activities among others with the Respondent contributing only kshs.2,500/- to the needs of the child.
 5. The learned Magistrate failed to take into account uncontroverted evidence that the respondent had without just cause, sine 2015 made any and/or reasonable effort to provide for the child and thereby reached a decision that merely perpetuated the Respondent's negligence and/or deliberate refusal to provide for the child contrary to the law.
 6. The learned trial magistrate erred in fact and in law by failing to appreciate the evidence on record regarding a number of insensitive social medial posts (www.facebook.com) by the defendant which unduly exposed the minor to danger and ridicule and thereby wrongly declined to grant protective orders that would otherwise have been in the best interests of the child.
 7. The learned magistrate relied on the report of the children officer (Emily Muoti Kimanzi) dated 18th January, 2019 which report was prepared corruptly and the said report influenced the decision of the court.
16. The Appellant prayed that;
1. The judgment of the learned magistrate delivered on 24th January, 2019 be set aside.
 2. The prayers sought in the Appellants plaint dated 16th April, 2018 be granted
 3. In the alternative, the court order that the suit be heard denovo.
 4. The court grant any or such other or further orders as it deems fit.
 5. Costs be awarded to the Appellant.

Written Submissions

Appellant Submissions dated 15th January, 2023

17. The Appellant submitted that the Trial Court wrongly declined to grant protective orders that would otherwise have been in the best interest of the child especially the insensitive posts on social media.
18. Reliance is made in the case of MMK-vs- v Another v Attorney General & 3 others [2017] eKLR the Court observed as follows;-

“It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling' and that '[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.

.....The need for our society to be sensitive to a child's inherent vulnerability is behind the provisions of Article 53 of *the Constitution*. Article 53 is broadly worded. The interests of children are multifarious.....Children need special protection because they are among the most vulnerable members of society. They are dependent on others - their parents and



families, or the state when these fail - for care and protection. As a result, the drafters of our Constitution made children's rights a priority - and stated that the best interests of a child are the overriding concern when it comes to any matter affecting a child.”

19. The Trial Court erred in granting Respondents visitation rights and access to the minor yet the same was neither pleaded nor prayed for by the Respondent. See the case of Charles Pkiyach Kiyara –vs- Lomerisiya Dungotom [2022] eKLR the Court stated thus;

“Parties will always be and are bound by their pleadings. The Court cannot descend into the arena and grant prayers that have not been made simply because it sees that a party should have prayed for something else or crafted his pleadings differently. It also cannot imagine that the party wanted to plead or craft his/her prayers to mean something else. Again, the court cannot put itself in the shoes of a party to substitute for him or her another prayer different from what they asked for.

20. The law maintenance of a child is contained in *the constitution* of Kenya, 2010 and 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.”

21. See the cases of KMM –vs- MMO [2022] eKLR and MOA –vs- HAO [2021] eKLR and CIN –vs- JNN [2014] eKLR.

22. On whether the Trial court disregarded material evidence and considered extraneous matters in determining the case reliance is made in the case of Mbogo & another –vs- Shah [1986] E.A. 93 where the court held that:

“An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion.”

23. It is finally submitted that the finding arrived at by the Trial court was unjust and unfair and the appellant prays that the appeal be allowed as prayed.

24. The Respondent did not file submissions.

Determination

25. The court considered the pleadings/appeal lodged by the Appellant and note with concern that the Respondent was to be served with the appeal and order to file written submissions but the same was not complied with.

26. This Court relies on the law that safeguards the well-being of children as follows;

- a. Article 53 of CoK 2010 that provides in detail among other requisite provisions;
Article 53(1)(e) CoK 2010 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;
- b) Section 31 of *Children Act* 2022 on Equal parental responsibility 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 subsection (1) include, but are not limited to—
 - (a) the duty to maintain the child and, in particular, to provide the child with—
 - (i) basic nutrition;
 - (ii) shelter;
 - (iii) water and sanitation facilities;
 - (iv) clothing;
 - (v) medical care, including immunization;
 - (vi) basic education; and
 - (vii) general guidance, social conduct and moral values;

27. With this background, it is not clear from the Trial Court record whether both parents are carrying out their parental responsibility to the child of the union/marriage before separation.
28. The Court record reflects/confirms according to the Appellant, that the union between parties broke down due to violence visited on the Appellant, whilst the Defendant /Respondent attributed the same to business collapse financial strain and ill-health.
29. Whereas the circumstances differ, with regard to maintenance of the child, the Trial Court was to enquire based on documentary evidence the capability of each parent to shoulder responsibility for the child as well as access, custody and/or visitation rights of the parties to the child.
30. The Court notes from the Ruling of the Trial Court, the Appellant continues to be burdened with payment of school fees, shelter, clothing and medical cover for the child whereas the Respondent shall pay a paltry Ksh 2,500/- per month for the child's food. The Trial Court reached this decision based on the Defendant's ill health. The Defendant did not produce medical evidence to confirm ailment and projected medical costs that would hinder his contribution to maintenance of the child. Yet despite ill health and financial constraints, he was/is allowed custody, visitation rights to the child and option of changing the child's school seemingly without paying the school fees.
31. The Trial Court appreciated the Defendant's predicament however, the Appellant is unduly burdened after shouldering the sole responsibility since 2015 of catering for all the child's needs up to 2019 when the Respondent resurfaced with no explanation.
32. These circumstances depict overburdening one parent at the expense of the other whilst sharing access, custody and /or visitation, rights to/of the child.
33. The Court ought to consider each parent's capability by seeking Affidavit of Means from each party, interrogate the documents presented, ascertain fair and just contribution by each parent for the welfare and wellbeing of the child without over burdening and almost punishing the Appellant who has since 2015 taken care of the child.



34. It is appreciated that each child requires both parents but physical custody of the minor child is to the mother except in exceptional circumstances. See A.A vs V.O. [2011] eKLR & HCCA EO11 of 2021 SCKK vs JJWK NKU HCT for contrast on custody care and maintenance of the child.
35. The Affidavit of Means would entail both parties' incomes, earning capacity, business opportunity, asset portfolio, any benefits and other financial resources. The other consideration would be verification of each party's financial needs, obligations and responsibilities. The standard of living of the child and contributions to be made by each party at the time and into the future for the welfare and well-being of the child.
36. Therefore, if the Respondent was/is granted visitation rights over the child, the right ought to be accompanied by equal or fair financial assistance if each parent is carrying out parental responsibility to the child.
37. The Ruling of the Trial Court was perhaps applicable at the time due to prevailing circumstances but it is almost 4 years now, the Defendant may have fully recovered and is healthy and has found financial opportunities to increase his financial support for their child.
38. This Court concurs with the Appellant and Trial Court that the time for review or fresh assessment is long overdue and the appeal is allowed, the Ruling of 24/1/2019 is set aside and the matter of custody care visitation and maintenance shall be interrogated and assessed afresh in compliance with the legal provisions and the current Affidavit of means of each party/parent.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 28TH APRIL 2023.
(VIRTUAL/PHYSICAL CONFERENCE)**

M.W.MUIGAI

JUDGE

In The Presence Of:

Mr. Nderitu For Mureithi - For The Appellant

No Appearance - For The Respondent

Geoffrey - Court Assistant

