



MWN (Suing as Mother & Next Friend of JEO Minor) v JOO (Civil Appeal 9 of 2022) [2023] KEHC 21763 (KLR) (Family) (28 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21763 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL 9 OF 2022
PM NYAUNDI, J
JULY 28, 2023**

**BETWEEN
MWN (SUING AS MOTHER & NEXT FRIEND OF JEO MINOR) .. APPELLANT
AND
JOO RESPONDENT**

JUDGMENT

Introduction

1. The appellant seeks to overturn the judgment of the Court delivered in Children’s Court at Nairobi, Children’s Case No. 1536 of 2017. The Plaintiff presented the case on behalf of the minor seeking maintenance and support for the minor on the following terms-
 - a. Food.....Kshs 25000 per month
 - b. Shelter.....Kshs 40000 per month
 - c. Clothing.....Kshs 30000 per month
 - d. House Help.....Kshs 15000 per month
 - e. MedicalAdequate Medical Cover
 - f. Education.....School fees as shall be advised by the fee structure from a reputable school.
2. The Appellant vide Memorandum of Appeal dated July 1, 2022, presents 6 of grounds of Appeal and prays that



- a. That this Appeal be allowed and the judgment and Decree issued in CC 1536 of 2017 by Hon C.C Oluoch on June 2, 2022 be set aside.
 - b. That the Appellant's claim for maintenance as enumerated in the Plaint dated December 13, 2017 be allowed.
 - c. That this Honourable Court be pleased to order that the Respondent includes the minor J.E.O in the Judiciary Medical Cover as a dependant with full medical benefits
 - d. That costs be awarded to the Appellant herein
 - e. That this Honourable Court be pleased to issue any other or further relief in the interests of justice.
3. This being a first appeal, the Court is obligated, as was stated in *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 and *Peters v Sunday Post Limited* [1958] to re-evaluate the evidence before the trial Court as well as the judgment and arrive at its independent conclusion bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.

Summary Of The Trial In The Lower Court

4. The Appellant testified as the sole witness. The minor subject of this matter was born out of an intimate relationship with the Respondent whom she met in 2010. The Child was born in September 2013. He was born pre-mature. At the time the matter was presented in Court she was undertaking what she described as 'small business.'
5. With a dip in her earnings she approached the Respondent to support the child but his response was not positive. Prior to filing the matter in Court, she reported the matter at the child welfare offices. He did not respond to the summons.
6. The Respondent started paying fees in 2021 but sporadically. On occasion he had delayed in remitting the fees and the child was not allowed into class. Her other grievance is that the Respondent did not support her towards meeting food expenses. This was a special need as the child was born pre mature and therefore has a special diet. In addition, he is allergic to penicillin. The support towards the medical expenses was not predictable.
7. Currently she stays in Huruma with the child. The Appellant pays the rent. The Respondent has declined to pay rent.
8. The Appellant is aware that the Respondent has another family and has 3 other children. She is aggrieved that the school those children go to is of a different standard than the one that the subject attends.
9. The Respondent does not have contact with the minor. She requires the assistance of the Respondent to provide for the Child. She seeks support for the provision of food, shelter, clothing, toiletries, househelp and medical. She is prepared to provide for clothing and toiletries.
10. On cross examination the Appellant maintained that the Respondent has not been consistent in supporting the minor and at the time of the hearing there was an outstanding fee balance. She reiterated that she was prepared to provide for clothing and toiletries and conceded that this does not amount to 50% contribution towards maintenance of the child.



11. In reexamination she stated that the Respondent pays the fees of the minor late and that the Child needs to see a development pediatrician as he has a speech problem. She stated that she does not have a steady income.
12. The defendant elected not to call any evidence and relied on his pleadings. Parties then filed submissions
13. In Judgment delivered on June 2, 2023, the Court noted that the plaintiff's claim was maintenance of the minor by the Defendant. After reviewing the evidence, the court identified the issue for determination as how much each party should contribute towards the maintenance of the minor as the parentage of the Child was not in issue.
14. The Court cited the relevant law and judicial decisions. The Court observed that none of the parties had filed an affidavit of means and neither did they disclose their respective income. The Court therefore concluded that they are both financially able to provide for the minor and found that they should share the responsibility equally.
15. The Court appreciated what each party had offered to care for and found that if in addition to providing for Education and related expenses, medical cover and maintenance of 5000 the respondent took on shelter and food he would be overburdened.
16. Consequently, the Court held that the Appellant would shoulder support for the Child with respect to food, shelter, toiletries and clothing. The Court further directed that the Appellant bring up the child in the lifestyle he has become accustomed to under her care.
17. The Court then proceeded to enter judgement on the following terms-
 - a. The defendant shall pay a sum of Kshs 8000 every month towards the upkeep of the child. The money shall be paid directly to the Plaintiff by the fifth (5th) day of every month with effect from July 2022 through mobile money transfer or any other mode of payment the parties may agree on.
 - b. The defendant shall pay school fees and meet the school related expenses, at a school that is mutually agreed on by the parties, with effect from the date of this judgment.
 - c. The defendant shall take out a comprehensive medical cover for the child,
 - d. The plaintiff shall meet all the other needs of the child, including provision of shelter, clothing and food.
 - e. Each party to bear their own costs.
18. Parties agreed to canvass the Appeal by written Submissions. The Appellant's Submissions are dated June 18, 2023 and those of the Respondent are dated July 4, 2023.

Summary Of The Appellants Submissions

19. The Appellant identifies the following as the issue for determination

Whether the Judgement issued in Children's Case No. 1536 of 2017 dated June 2, 2022 was sound in applying the principle of the best interest of the Child
20. The Appellant submits that the decision is against the best interest of the Child as the Magistrate failed to take into consideration all factors in the said judgement which include, the financial capabilities of the parties, the cost of living at the time of delivery of the judgement and the health of the minor.



21. The Appellant contends that the trial court failed to apply or applied the wrong parameters in calculating the quantum of maintenance. As the Court failed to take into account the income or earning capacity, property and financial resources of the parties
22. In concluding the Applicant urges that the Appellant take full responsibility in shouldering medical expenses for the child, school fees and school related expenses.

Respondent's Submissions

23. The Respondent frames the issue for determination to be; whether the Appeal is merited. It is submitted that the Appellant failed to discharge her obligation to prove her case as required by Section 107 of the *Evidence Act*.
24. The Respondent contends that the Appellant having failed to demonstrate the special needs of the minor has no basis to challenge the order for Kshs. 8000 as maintenance. The Respondent submits that this court should uphold the Trial Court's rationale that it would be unfair and burdensome to the Respondent if a higher amount were ordered. The Respondent relies on the decision of RWM V PMM [2021] eKLR.
25. In response to the Appellants protestations in relation to the insurance cover the Respondent contends that the Appellant has not laid sufficient basis for this Court to interfere with the trial court's determination.
26. With regard to adequacy of the sum of Kshs 8000 as maintenance for the minor, the Respondent urges the Court to not to disturb the decision of the trial court as parental responsibility is a shared responsibility. The Respondent relies on the decision in EMK alias A v SSSS [2022] and BRO v WJNWM [2022] eKLR.
27. The Respondent therefore urges that the Court dismiss the Appeal.

Analysis And Determination

28. The parentage of the minor is not challenged as such the only issue for determination was on the quantum of maintenance that meets the Constitutional threshold of safeguarding the best interests of the Child.
29. Indeed Article 53 of *the Constitution* provides that the child's best interest is of paramount importance in every matter concerning the child.
30. Having said that and upon reviewing the evidence adduced in the trial court, the respective pleadings filed herein, submissions, authorities cited and the applicable law, I discern the following as the issues for determination.
 - a. Whether the Trial Court erred and failed to consider the best interests of the Child in determining
 - i. That the Respondent provide Kshs 8000 as monthly maintenance for the minor
 - ii. That the Respondent provide a comprehensive medical cover as opposed to directing that the Respondent include the minor in the Judiciary medical cover.



31. On the best Interests of the Child, The *Children Act* provides at Section 4(3) that:
- “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.”
32. I find that in arriving at its decision the Court was cognizant of the best interests of the Child. The Court undertook a detailed analysis of the law on parental responsibility and the principles that will guide courts in making orders on financial contribution towards the maintenance of a child as enumerated under Section 94 (1) of the *Children Act*.
33. The issue for determination being the maintenance of the Child the Court was required to satisfy itself that the following conditions were met.
1. That the basic needs of the child would be met to ensure that the child’s enjoyed emotional and physical well being
 2. That this responsibility was shared between the parents and dictated by their means.
 3. And that the Maintenance would not be viewed as a punishment or burden by either parent.
34. In challenging the award, the Appellant took issue with the award on the basis that the Respondent being a Judge is a man of means and should therefore contribute more towards maintenance. Further it is contended that the Respondent is obligated to provide for the minor herein at the same level as his other children.
35. In the absence of evidence showing that the Respondent was deliberately discriminating against or neglecting the minor, this ground cannot stand.
36. As observed neither of the parties submitted an affidavit of means, the Court in arriving at the quantum of maintenance was therefore guided by its estimation of what would be a reasonable provision for a child of that age factoring in the contribution of the Appellant.
37. It has been suggested that the Learned Magistrate erred in failing to consider that the minor has special needs. I have reviewed both the pleadings and the evidence in Court and observe that the Appellant did not tender evidence or quantify the special needs of the minor and the special requirements needed so as to provide for the Child.
38. In deciding not to interfere with the award of Kshs 8000/- I am guided by the decision in *MBOGO v SHAH (1968) 93* in which De Lestang VP (as he then was) observed at page 94.
- “I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.
- It would be wrong for this Court to interfere with the exercise of the trial Judge’s discretion merely because this Court’s decision have been different.



40. The Appellant took issue with the decision of the trial magistrate that the Respondent provide comprehensive medical cover and is urging that the Respondent include the minor in the medical scheme provided by his employer.
41. It is not the place of the Court to be prescriptive when it is making orders on maintenance of the minor. The Court can only provide that the Respondent provide adequate medical cover.
42. It is assumed that the Respondent as the Father of the minor will act in the best interests of the child. If the Appellant's contention is that the only cover that is acceptable is the cover provided by the Judiciary then this limb of the Appeal must fail too.
43. In light of the foregoing I would uphold the decision of the trial court and in so doing dismiss this Appeal in its entirety.
44. Each party will bear their own costs.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 28TH day of JULY, 2023.

P. NYAUNDI

JUDGE

In the presence of:

Ms Odongo..... for the Appellant

Mr. Ochieng h/b for Mr. Oyatta for the Respondent

Sylvia..... Court Assistant.

