



REPUBLIC OF KENYA



KENYA LAW
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**TKY v BMS (Civil Appeal E046 of 2021)
[2023] KEHC 22634 (KLR) (26 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22634 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E046 OF 2021
SM GITHINJI, J
SEPTEMBER 26, 2023**

BETWEEN

TKY APPELLANT

AND

BMS RESPONDENT

*(Being an Appeal from part of the Decree and or Judgment of Children's
Court at Malindi by Hon D.Wasike – SRM dated and delivered on
19th May, 2021 in Malindi CM's Children case No.E001 of 2020)*

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Appellant in Person

Respondent in Person

1. This appeal arises from the judgment and decree of Hon Wasike SRM in Malindi Children's Case No E1 of 2020 which judgment was delivered on May 19, 2021 in the following terms;
 - a. Actual and legal custody of the minor EM be and is hereby granted to the biological mother BMS with unlimited access to the father TKY;
 - b. The defendant to take out medical insurance for the minor by 30th January each year and cater for medical expenses of the minor if they are not covered by the insurance cover;
 - c. The plaintiff does provide shelter; clothing, uniform, stationery, shoes and payment of utility bills for the minor;



- d. The defendant does provide monthly maintenance of the minor in regard to food and entertainment at a sum of Kshs 17,500 per month on or before 5th day of each month and the parties are at liberty to move the court for revision of the same when circumstances change.
- e. The defendant to pay the school fees of the minor directly. The schools to be agreed on by both plaintiff and defendant.
- f. Both the plaintiff and the defendant have equal parental responsibility for the minor;
- g. The minor EM has a right to equal and fair treatment and a right to use the father's name TKY and have the father's name reflect on her documents;
- h. Each party to bear their costs of the suit.

Aggrieved by the decision, the appellant lodged the instant appeal on the following grounds;

- i. That the learned magistrate fundamentally erred in both law and in fact by unreasonably disregarding the defendant's/appellant's defence, submissions and the evidence tendered in the subordinate court without evaluating and/or considering in totality the facts and evidence by the appellant/defendant tendered at the trial thereof.
- ii. That the learned trial magistrate erred grossly both in fact and in law by issuing as its order No (d) of the judgment delivered on May 19, 2021 that the defendant/appellant herein does provide monthly maintenance of the minor in regard to food and entertainment at a sum of Kshs 17,500 per month on or before 5th day of each month and the parties are at liberty to move the court for revision of the same as and when the circumstances change; which amount is unfounded, unreasonable and unjustifiable as it was arrived at without any basis and consideration of the financial capability of the appellant herein.
- iii. That the learned trial magistrate erred grossly in fact and in law by failing to consider the underlying principles that guide the children's court in issuance of maintenance amounts or orders as stipulated under the *Children's Act* cap 141 Laws of Kenya.
- iv. That the learned magistrate fundamentally erred in fact and law by failing to conclude that maintenance responsibilities just like parental responsibilities ought to be shared equally between the parents of the minor regardless of whether they are living together or not and in turn condemning the appellant to pay an excessive amount of Kshs 17,500 towards the minor as well as condemning the appellant to meet the most fundamental and expensive needs of the minor.
- v. That the learned magistrate erred both in law and in fact by failing to consider other financial obligations of the appellant when making the maintenance order, notwithstanding that the appellant had provided evidence of other financial obligations during the trial that had to be met by him.
- vi. That the learned trial magistrate erred in both fact and in law by ordering that the appellant herein do provide a monthly maintenance amount of Kshs 17,500 which is excessive and exorbitant considering that the appellant had other obligations including taking out a medical insurance cover and paying of school fees towards the minor herein.



- vii. That the learned trial magistrate fundamentally erred in both fact and law by failing to share the parental responsibilities of the parents toward the minor as enshrined under article 53 (1) (e) of the 2010 Constitution and under the provisions of section 24 and 90 of the Children's Act Cap 141 Laws of Kenya.
2. The appellant filed written submissions while the respondent elected to give oral submissions. I have taken into account the submissions made by parties and the authorities cited to me by the appellant.

Determination

3. In determining this matter, I am conscious of the constitutional and statutory provisions in regards to children matters; that the best interest of the child is paramount.
4. Article 53(2) of the Constitution of Kenya, 2010 provides:

“A child’s best interests are of paramount importance in every matter concerning the child.”

Section 4(2) and (3) of the Children Act (the Act) provide:

- (2) 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.
- (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. conserve and promote the welfare of the child;
 - c. secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.
5. The law relating to 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;
6. Maintenance is an aspect of parental care and is the responsibility of both parents of a child. Section 94(1) of the Children Act stipulates the considerations by which the court shall be guided when 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;
- d.
7. The appellant’s contention in the instant appeal is the sum of Kshs 17,500 that he was directed by the trial court to pay as monthly maintenance in respect of the minor on or before 5th day of every month. His position is that the amount is excessive considering that he shoulders school fees and a medical cover. Further, it is his position that he is the bread winner of his extended family and do as well as cater for expenses of another minor sired out of wedlock.
8. Maintenance orders are made in the best interests of the children and ought not to be oppressive or punitive to any party. This was the holding in *SKM v MWI* [2015] eKLR, where Musyoka, J. expressed himself thus:
- “Maintenance orders are not meant to punish or oppress any party. They should be designed to provide for the needs of the child or children in question, while at the same time respecting the financial status of the parent. A child can only be maintained within the means of the parent in question.”
9. Having gone through the record of the trial court, I am of the view that the learned magistrate analyzed in depth the financial standing of the parties herein. The appellant filed a copy of his then recent pay slip at the time which guided the leaned magistrate. In the impugned judgment the learned magistrate observed as follows; “I have considered the break down by the plaintiff for the sum of Kshs 35,500.00/=; further, all children are equal and just as the defendant is maintaining another of his children, he cannot compromise the maintenance of his other child on grounds that he is maintaining another of his children...the best interest of the child always come first before any other interest.”
10. That said, and of which I fully agree with, I find that the appeal lacks merit and the same is hereby dismissed with no orders as to costs.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 26TH DAY OF SEPTEMBER, 2023.

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S.M.GITHINJI

JUDGE

In the Presence of; -

1. Applicant
2. Respondent

