



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY APPEAL NO.15 OF 2020

BRO.....APPELLANT

VERSUS

WJNWM(suing as Mother and next friend of DJO) (Minor)...RESPONDENT

(Being an appeal from the whole judgment and orders of Hon. L.K. Sindani (RM) delivered on the 6th day of March 2019 in Tononoka children's court case Number 266B of 2018)

JUDGMENT

1. By a plaint dated 7th August, 2015, the respondent herein moved to Tononoka children's court vide children case No 266B/2018 seeking several orders against the appellant her husband inter alia; order of maintenance for the minor the subject of these proceedings at a total of Khs 212,000 itemised as follows; School fees and related expenses Kshs 60,000, health medical expenses kshs 35,000, rent, electricity, water and garbage collection at kshs 45,000, house hold items kshs10,000, food kshs 47,000 and clothing kshs15,000 per month.
2. In response, the appellant entered appearance on 9th August 2018. He also filed defence and counter claim claiming that he had been giving the respondent kshs 20,000 per month to take care of the child. He offered to continue paying kshs 35,000 for rent and maintenance expenses, Kshs 10,000 for school transport, meet medical expenses when the need arises and kshs, 20,000 for school fees.
3. He claimed that his gross monthly salary was kshs168,000 out of which he was supporting a wife, two other children and 5 dependants being children of his late brother. He contended that parental responsibility should be equal and not burdening one parent.
4. In his counter claim, he prayed for; custody, care and control of the minor to be awarded to him with reasonable access to the mother (respondent) and, costs be awarded to him (appellant). In the alternative, he sought for parental responsibility to be shared equally between him and the respondent as the court may deem fit.
5. Briefly, the appellant and the respondent entered into a love affair the year 2008. Out of that relationship, a child by the name DJO was born on 25th April 2010. In her plaint dated 7th August 2018, the respondent (plaintiff) stated that, despite the parents having equal parental responsibility over the child, the appellant had neglected the child by refusing to give financial support from the year 2014.
6. That as a result of the said neglect, she filed a suit claiming a total sum of kshs 212,000 to meet school fees expenses, housing, clothing, medical expenses and maintenance of the child. She claimed that she was a teacher at [Particulars Withheld] Academy earning a net income of Kshs10, 000 per month while the appellant was earning not less than kshs 300,000 per month. She further claimed in her affidavit sworn on 7th August 2018 in support of her application of even date seeking interim maintenance orders that the appellant has other sources of income from businesses among them, [Particulars Withheld] limited, [Particulars Withheld] and [Particulars Withheld] hotel and accommodation in [Particulars Withheld] transport business.
7. During the hearing, the respondent (plaintiff) (Pw1) told the court that prior to 2014, the appellant used to give financial support to take care of the baby but withdrew for no apparent reason. She demanded for the plaintiff to meet expenses in terms of school fees, rent, food, medical care, clothing, house help and other related expenses.
8. On cross examination, she stated that the appellant was paying house rent for her at kshs 25,000 per month besides kshs 5,000 for food expenses per week. On further cross examination, she admitted that she was staying with her new boyfriend one Francis Kemberi. In her view, there was nothing wrong in staying with him in the house the appellant was paying rent for.
9. On his part, the applicant (Dw1) told the court that he was responsible to the minor as a parent. That he was paying rent at Kshs 25,000 and kshs10,000 per month for food. That depending on the need, he could pay kshs5000 to Kshs 7000 per week. He also claimed that his net pay was Kshs 98,000 out of which over Kshs 50,000 went towards the minor's support.

10. He confirmed that he was the one paying rent, school fees and school bus transport. He stated that he had furnished a house for the respondent but was offended by the respondent's behaviour in taking men to sleep with her on his bed.

11. He claimed that he has two other children from his official wife but was willing to continue paying school fees, transport and other school related expenses for the minor directly to the school. Besides, he was ready to continue supporting the baby including paying rent as he had been doing on condition that no man friend to the respondent ever entered that house.

12. On cross examination, he admitted that he used to make periodic payment of kshs 35,000 per month and Kshs 5,000 to Kshs 7,000 per week to the respondent.

13. Upon conclusion of the hearing, the court delivered its judgment on 6th March 2021 thus making the following orders.

i. There be equal parental responsibility between the plaintiff and the defendant.

ii. Legal custody to vest jointly in both the father and mother.

iii. Actual custody/physical custody care and control of the issue to be with the mother with unlimited access to the father on Saturday and Sundays during day time.

iv. The defendant to cater for the child's school fees and school related expenses directly to the child's current school or as mutually agreed.

v. School transport to be paid by the defendant and directly to the school and in the event that the plaintiff does not want the child to use school transport then she should cater for private transport.

vi. The respondent to provide an all-inclusive sum of ksh 65,000 to cater for rent, food and daily upkeep for the minor.

vii. The plaintiff to restrain from receiving other men in the house where the defendant is paying rent for the child and in the event that she will, then the plaintiff should cater for the rent.

viii. The defendant to cater for the child's medical expenses as and when the need may arise and or to enrol the child on a medical cover.

ix. Clothing and entertainment to be provided equally by the parties at 50:50. Clothing to be shopped at least and less twice in a year.

x. Either party to apply

xi. No order as to costs.

14. Aggrieved by the said judgment, the appellant (defendant) lodged an appeal dated 6th January 2021 citing 5 grounds of appeal as hereunder;

i. The learned magistrate erred in law by directing and issuing orders against the appellant and completely ignored the appellant's representation.

ii. The learned magistrate erred in law and fact by issuing orders that suggests that parental responsibility is solely and largely the father's duty

iii. The learned magistrate erred in law by bestowing full parental responsibility to the father with minimal contribution by the respondent.

iv. The learned magistrate erred in law and fact in failing to consider the evidence adduced before court in its entirety and issuing orders for maintenance of Ksh 65,000 which amount is excessive and unsustainable by the appellant

v. The learned magistrate erred in law and fact by giving orders in favour of one child of the appellant to the detriment of the other children of the appellant who are undergoing basic education and in need of care and attention too.

15. Consequently, the applicant prayed for the following orders;

i. This appeal be allowed.

ii. This honourable court substitutes the orders of 6th March 2021 with orders that are fair to both parties.

iii. The costs of the appeal be granted to the appellant

16. When the matter came up for directions, parties agreed to canvass the appeal by way of written submissions. Subsequently, the appellant through the firm of Cootow and company advocates filed submissions dated 14th June 2021. Learned counsel argued grounds 1, 2, and 3 together thus submitting that, the order for the appellant to pay kshs 65,000 per month as rent and daily upkeep of the baby besides payment of school fees, Payment for school transport and school related expenses, medical expenses and clothing was excessive on his part yet parental responsibility is an equal responsibility.

17. It was counsel's submission that parties have a joint responsibility towards their child/children and none is superior or inferior to the other. To buttress this position, the court was referred to the holding in the case of **PKM V ANM (2020) e KLR**.

18. It was contended that since the respondent is salaried, she should be assigned the duty of paying for; rent, medical expenses, food and clothing while the applicant takes care of school fees, school related expenses and school transport.

19. In solidifying the argument that parental responsibility is a shared responsibility, reliance was placed in the case of **CIN VS JNN (2014)e KLR** where Aroni J held that parties seeking the intervention of the children's court to seek maintenance for the upkeep of the child or children must also indicate what contribution they are making towards the support of the child or children.

20. According to learned counsel, the respondent is providing minimal contribution hence abusing the court process by deriving some income from the appellant at the expense of the appellant's wife and his other children's needs. To express the point that no parent should use the best interest of a child to unfairly gain from the other parent, the court was referred to this court's holding in the case of **of J OO vs A J M(2017)e KLR** where it was observed that the best interests of a child principle should not be used by one parent to the detriment of the another.

21. Regarding grounds 4 and 5, counsel submitted that, the appellant produced his pay slip reflecting a gross salary earning of Ksh 168,000 and a net pay of Kshs 121,317 after tax. That the appellant has a wife with two children and 5 other dependants being his late brother's children all whom depend on the same salary. That if he were to meet all those expenses he will be using more than 50% of his salary on one child alone.

22. Counsel contended that, had the court considered the appellant's source of income, it could not have made the orders it did. To support this position, counsel referred to the case of **SAK vs ZDNP (12019) e KLR** where the court found an order by the trial court for maintenance payment of Kshs 50,000 per month against the appellant's monthly salary of Kshs 93,129 was an act based on wrong principles in reaching such an order without considering that the appellant had two other children.

23. On her part, the respondent appearing in person filed her submissions on 9th October 2021. It was her submission that the appellant has been providing most of the minor's financial needs among them school fees and related expenses, rent, medical expenses, and food amounting to Kshs 60,000 per month which money he is still willing to pay as long as she does not entertain any men into the house a fact she denied was without evidence nor basis. She contended that the appellant has not demonstrated that she is likely to suffer any damage should the appeal be dismissed.

24. She asserted that on a balance of convenience, the best interests of the child would best be served by retaining the impugned orders. According to the respondent, the only reason for the appellant filing the appeal is to take care of the interests of the appellant's extended family. She further submitted that the appellant has come to court with dirty hands as he has failed to honour the court order without any justification. That the appellant has failed to table his bank statements and pay slips to confirm his current state of income. That the appellant has large M -pesa transactions which he has not established its source.

25. It was the respondent's contention that, prior to the institution of the suit, the appellant was providing Kshs 60,000 to cater for the same obligations hence no evidence has been tabled to suggest that his income has since changed. She urged the court not to vary the orders as it will not serve the best interests of the child. In support of that proposition, the respondent referred the court to the case of **ZMO V EIM (2013) e KLR**

Determination.

26. This is a first appeal. As the first appellate court, I am duty bound to reconsider, re- evaluate and re -assess the evidence tendered before the trial court and arrive at an independent determination and or conclusion without losing sight of the fact that the trial court had the advantage of seeing and listening to the witnesses to be able to assess their demeanour. See **Selle and another vs Associated Motor Boat Co. Ltd and others (1968) E.A 123 and Peters Vs Sunday post limited (1958) E.A 424.**

27. I have considered the record of appeal, grounds of appeal and written submissions by both parties. There is no dispute that the appellant is the biological father to the minor the subject of these proceedings. It is also not in dispute that the appellant was ready and willing to pay school fees and other related school expenses, maintenance expenses plus house rent on condition that no man-friend to the respondent visits the respondent while occupying that house.

28. It is also clear from the appellant's own testimony that he used to pay Ksh 65,000 to the respondent monthly to meet rental and general upkeep expenses for the baby. He further confirmed that he was willing to continue paying what he used to pay.

29. If the appellant in his words was willing to meet the expenses he used to undertake before this suit was instituted, what is the problem or point of contention?

30. It is trite law that parental responsibility is an equal joint responsibility of the parents to a child and no parent shall be treated specially as having a superior right over the child than the other. See Section 24 of the Children Act **PKM VS ANM (Supra)** where Aroni J stated that;

“in my view therefore one need not go further to look at what parents need to do for a child and to what extent. In this instance the parties have joint responsibility towards their son and no one is superior to the other...”

31. As to what constitutes parental responsibility, Section 23 of the Children Act is very clear. That Section thus provide that;

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 Sub -section (1) include in particular-

(a) the duty to maintain the child and in particular to provide him with-

(i) Adequate diet

(ii) Shelter

(iii) Clothing

(iv) Medical care including immunization

(v) Education and guidance

(b)...

(c)...

32. There is no doubt that parental responsibility is a joint and equal responsibility. Both parties are equally aware and does affirm that they have an equal task to support their baby. This position is further amplified by Article 53 (1) (e) of the Constitution which provides that every child has a right to parental care and protection, which includes equal parental responsibility of the mother and father to provide for the child, whether they are married to each other or not.

33. However, Section 94 (1) of the children Act stipulates factors that guides the court when making an order for financial provision for maintenance of a child as follows;

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 need of the child and the child’s current circumstances

34. From the above cited provisions, parental responsibility is not relegated to one parent alone. It requires joint effort although not exactly the same. 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(supra) 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 upkeep of the children”.

35. The main ground of appeal in this case is that the learned magistrate ignored the respondent’s evidence and bestowed full parental responsibility on him alone. From the impugned judgment, the learned magistrate analysed the evidence and facts presented before him. At page 222 of the record of appeal, the learned magistrate stated as follows.

“From the evidence, the defendant has taken up most of the child’s financial needs such as school fees and related expenses, medical, rent and food of about 60,000 per month which he is willing to continue doing as long as the plaintiff stops bringing other men in the house where he pays rent”

36. Basically, order No 6 of the judgment for payment of an all-inclusive sum of Kshs 65,000 to cater for rent, food and daily upkeep for the minor was basically an endorsement of what the appellant used to pay and was willing to continue paying. The court did not significantly change the amount payable per month. I do not see any error in the court directing the appellant to continue paying what he used to pay with a caveat that rent was to be paid only on condition that the respondent does not entertain any other man in the house. The appellant cannot be heard to complain that the court did not take into account his evidence and presentation.

37. The appellant having committed himself to continue paying what he used to do, he cannot abdicate his responsibility by claiming that he has a bigger burden in educating his two children , a wife and 5 children left by his late brother under his care. Those children and

dependants were there by the time he was testifying and committing himself to continue paying what he used to pay.

38. I do not see any error or mistake committed by the trial court ordering the appellant to pay kshs 65,000 per month. Although the appellant stated that his net income is about kshs112, 000 per month against the dependants being two other children, a wife and 5 children for his late brother, he did not explain how he used to sustain them with the same salary. His commitment to continue paying what he used to do implies that he has other sources of income thus vindicating the respondent's position that the appellant does not depend on salary alone.

39. For the above reasons stated, I am satisfied that the trial court properly acted by directing the appellant to continue paying what he used to pay to meet rental and other maintenance expenses. Equally, he should continue paying school fees and other related school expenses as he used to do including school transport payable directly to the school as advised by the trial court. If he feels that circumstances have since changed, he can seek review or variation of orders and not an appeal.

40. However, it is clear that the appellant is shouldering a huge burden on parental responsibility as opposed to that of the respondent. The respondent is a teacher who decided to commit her salary to loans and remained with 15,000 net. She is under obligation to make her contribution and not simply sit and hide behind paying for some utilities like salary for the house help, electricity, water and garbage. She must demonstrate her efforts towards discharging her parental responsibility See DS (minor suing through the mother) **JMW VS CK K (2021) e KLR** where the court stated that;

“the appellant must demonstrate some seriousness of meeting her obligation as a parent with shared responsibility ...”

41. In view of the large responsibility being shouldered by the appellant, the respondent should also take her fair share by taking full responsibility in shouldering medical expenses for the child, entertainment and provision for clothing. Accordingly, order No 8 and 9 in as far as the responsibility of bearing the burden of medical expenses, entertainment and clothing is totally removed off the appellant's shoulders and full responsibility on the same shifted to the respondents. This is meant to cushion the appellant off some burden to enable him attend to the other children who also have a right to be taken care of just as the minor in his case.

42. In conclusion, the appeal partially succeeds with orders that;

a. The appellant shall continue meeting all his obligations as directed by the trial court save for order No 8 and 9 of the impugned judgment which responsibility shall fully be borne by the respondent.

b. For a voidance of doubt, order No 8 and 9 of the impugned judgment are substituted with the order that the respondent /plaintiff shall solely provide medical care, entertainment and clothing expenses for the minor.

c. This being a family related issue, each party shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 28TH DAY OF FEBRUARY 2022

J .N. ONYIEGO

JUDGE