



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL APPEAL NO. E062 OF 2020**

**EKTM.....APPLICANT**

**AND**

**ECC.....RESPONDENT**

*(Being an appeal from the Judgment of the Senior Resident Magistrate at Nairobi*

*(Hon. G.N. Opakasi) delivered on 2<sup>nd</sup> December 2020 in Children Case No. 1314 of 2019)*

**JUDGMENT**

1. In the judgment delivered on 2<sup>nd</sup> December 2020 by the Children Court, it was ordered that:-

- a) the respondent ECC shall have actual custody, care and control of all the minors herein;
- b) the appellant EKTM shall access the two children (MC and RC) on every alternate weekend of the school days and half of the school holidays;
- c) the appellant shall cater for MC's and R.C's school fees and school related expenses;
- d) the appellant shall cater for MC's. and RC's medical expenses;
- e) the appellant shall cater for MC's and R.C's monthly upkeep at the rate of Kshs.30,000/= per month.
- f) the respondent shall cater for the remaining part of MC's and NC's monthly upkeep;
- g) the respondent shall cater for all of NC's needs; and
- h) on shelter, the respondent and the minors shall continue living in the mortgage house in Athi River until the determination of the matrimonial property cause. However, if the determination of the matrimonial cause will have the effect of removing the respondent and the minors from the said house, both parties shall provide for shelter on a 50:50 basis.

2. The judgment followed a cause filed by the respondent against the appellant over the fees, medical, upkeep, and shelter needs of the three children, and the appellant's counterclaim regarding them. The appellant was aggrieved by the judgment and orders and appealed to this court. In the Memorandum of Appeal, the following were the grounds: -

**“1) THAT the learned trial Magistrate erred in law and in fact by holding that the Appellant assumed parental responsibility for the minor MC.**

**2) THAT the learned trial Magistrate erred in law and in fact in holding that the Appellant should solely cater for MC and RC's school fees, school related expenses and access to MC on every weekend of school days and half of the school holidays.**

3) THAT the learned trial Magistrate failed to balance the scales of justice and failed to apply the correct principles of law leading to an erroneous decision in holding that the Appellant should cater for MC and RC's monthly upkeep at the rate of Kshs.30,000 per month.

4) THAT the learned trial Magistrate erred in law and in fact in holding that the Respondent should only cater for all NC's and the remaining parts of MC's needs hence absolving her from responsibility towards RC who is also her child.

5) THAT the learned trial Magistrate erred in law and in fact in holding that both parties should provide for shelter on a 50:50 basis if the determination of the matrimonial cause shall have the effect of removing the Respondent and the minors from the matrimonial home."

The appellant then sought the following orders:-

**"a) The Appeal be allowed and a declaration be made to the extent that the Appellant did not assume parental responsibility for the first born minor MC**

**b) A declaration be made setting aside the order that the Appellant provides Kshs.30,000 as monthly upkeep for MC and RC and the Court be pleased to declare that the Appellant's contributions in terms of house rent, medical expenses, school fees and school related expenses as sufficient contribution for maintenance on the part of the Appellant.**

**c) A declaration be made that the Respondent shall solely cater for all the needs of M.C. including upkeep, school fees and medical expenses.**

**d) A declaration be made that the Respondent shall also cater for all the other needs of R.C. apart from school fees and medical expenses which the Appellant shall cater for.**

**e) A declaration be made that the order directing parties to provide shelter on a 50:50 basis as speculative and the same should await the determination of the matrimonial cause.**

**f) In the alternative to the order in (e) above, a declaration be made to the effect that each party to cater for their own shelter while they are with the minors.**

**g) The costs of the appeal be granted to the Appellant against the Respondent."**

3. There is no dispute that the appellant and the respondent met on 29<sup>th</sup> July 2006 and begun to live together as husband and wife in September of the same year. The marriage was tumultuous but still on 11<sup>th</sup> November 2016 the couple formalized their relationship in a ceremony at the Attorney General's Office. On 18<sup>th</sup> December 2018 the respondent filed for judicial separation, and in 2019 the appellant petitioned for the dissolution of the marriage. The present position is that the couple is divorced.

4. In the course of the relationship, three children (MC born on 5<sup>th</sup> November 2006, RC born on 5<sup>th</sup> July 2009 and NC born on 19<sup>th</sup> December 2014) were born. It is not in dispute that the only child fathered by the appellant was RC The respondent's case was that she was five months pregnant when she met the appellant; that she let the appellant know about this; he accepted to have responsibility over the child; when the child was born he gave her his name in the birth certificate; and he continued to have that responsibility throughout the relationship. Regarding NC, the appellant conceded that while the marriage was subsisting, she had a relationship with another man. She conceived and the child was born. The paternity of MC and NC was part of the reason why the parties were at loggerheads.

5. The appellant had always provided shelter, school fees and medical cover for the three children. He told court that he did this believing that the three were his biological children.

6. After the couple separated the respondent and the children were left to stay in the couple's matrimonial home at Athi River. The home is on mortgage which the parties service jointly.

7. The respondent agreed to have full custody and responsibility over NC This should determine the dispute and appeal over the child. The appeal will therefore relate to MC and RC.

8. The respondent agreed with the findings of the trial court and sought the dismissal of the appeal with costs.

9. Mrs. Rotich for the appellant and M/s. Jemator for the respondent filed written submissions on the appeal. I have considered them.

10. It is common ground that, this being a first appeal from the trial court, this court should reconsider all the evidence on record, evaluate it and draw its own conclusions, while bearing in mind that it did not have the benefit of seeing and hearing witnesses as they testified (**Kenya Ports Authority –v- Kusthon (Kenya) Limited [2009] 2 EA 212**). Secondly, it was reiterated in **Richard Kaitany Chemagong –V- R. [1984]eKLR** that,

**"A court on appeal will not normally interfere with a finding of fact by the trial court whether in a civil or criminal case**

**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 the findings he did.”**

11. Further, this dispute revolves around the rights of two children:- MC and RC Under **Article 53(2)** of the Constitution and **section 4(2)** and **(3)** of the **Children Act**, this court should determine whether the trial court, in reaching the decision it did, considered the paramountcy principal of what is in the best interest of the children.

12. Regarding RC, there was no question that both sides agreed that responsibility over her was a shared one on equal terms. It is accepted that, in determining how much responsibility each parent will bear, the court has to ascertain the specific needs of the child in question and critically examine the financial and other ability of each parent to be able to decide what portion will be borne by either parent. It makes sense to note that, the needs of the child must be reasonable and moderate and should relate to the standards of the parents. The needs of the child should not be such that, at the end of the day, the parents are left in financial stress.

13. There is no dispute that prior to the filing of the cause in the trial court, the appellant was educating and generally taking care of the three children. Secondly, following the separation of the couple, the respondent was left in the matrimonial home with the children. It was common ground that the home (house) is on mortgage which both parties were servicing. The respondent, I find, has a stake in the house. The value of the stake will be determined when the parties file originating summons for the appropriate declaration and division of their matrimonial property. When the trial court ordered that the respondent continues to stay here with the children, that was in accordance with admitted facts and the acknowledgment that she had an interest in the property. In any case, without a court order, a spouse cannot be forced out of a matrimonial house.

14. There was an acknowledged provision by the appellant, through his employer, to the medical welfare of the children.

15. The appellant complained that in apportioning responsibility over MC and RC the trial court did not consider the financial means of the parties, and did not consider the parties' equal responsibility towards the education and upbringing of the children. Over MC the appellant's case was that because he was not the biological father, and given that the respondent hid this fact from him, he should not have been held to have any responsibility over the child.

16. Beginning with MC, the trial court received evidence on how she came to be born. It was the appellant's case that all along he knew this was his biological child. That was why he gave her his name in the birth certificate and brought her up until this cause came up. The respondent's evidence was that when she met the appellant she was five months pregnant. The pregnancy was discussed and the appellant accepted to take up responsibility. They later begun to live together as husband and wife. The trial court considered the rival versions and accepted that of the respondent. I find no reason to disturb that finding.

17. In any case, as the stepfather of the child, he brought her up, took her to school and provided for its medical. The trial court considered the role of a step-parent under **section 94(1)** of the **Children Act**, and considered various decided cases, including that of **ZAK & Another – v- MA & Another [2013]eKLR**, and found that because of the 14 years that the appellant had related with the child and provided for her in all ways, and given her his name, he should be considered to have assumed responsibility over her in the same way a father would. I find no reason to depart from the determination of the trial court on the issue.

18. The conclusion of the trial court was that, over MC and RC the parties had equal responsibility to provide for them as was commanded by **Article 53(1)** of the Constitution. The trial court was alive to the provisions of **section 94(1)** of the **Act** that deal with the considerations when making an order for financial provision for the maintenance of a child. They include:-

**“(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.”**

19. The trial court ordered the appellant to provide for the education and education related needs of the children, their medical needs and to provide Kshs.30,000/= monthly for their upkeep. The respondent was to cater for their other needs.

20. Whereas in the judgment the trial court discussed the financial means of the parties, there was nowhere the court, in reaching the decision on the Kshs.30,000/= per month, had considered the monthly financial needs of the two children. Where did the figure of Kshs.30,000/= come from? What was going to be bought monthly for the children? Secondly, in ordering that the respondent takes care of the children's other needs, there was no specific reference to those needs. Were they clothes, food, maid, for instance? How much were they going to cost monthly?

21. I have carefully considered the facts of the case. In my estimation, after the court determined that the appellant was going to take care of the medical needs of the children, and take care of their education and all education related needs, it was onerous, given the discussed means of the parties, to ask him to pay Kshs.30,000/= monthly for the children's upkeep. The upkeep (clothing, food, maid etc) is one that the respondent should have been asked to pick. In reaching this decision, I have considered that the parties were equally providing for the shelter of the children, and that the appellant had better financial means than the respondent. I have taken judicial notice of the fact that education and medical are two most expensive items in the upbringing of a child.

22. In conclusion, the appeal is allowed only to the extent that the appellant will not be required to pay Kshs.30,000/= towards the monthly upkeep of the children MC and RC

23. I order that each party pays his/her costs, given the nature of the dispute.

**DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF APRIL 2022**

**A.O. MUCHELULE**

**JUDGE**