DMK v FJM (Civil Appeal 22 of 2019) [2022] KEHC 12760 (KLR) (31 August 2022) (Judgment)

Neutral citation: [2022] KEHC 12760 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 22 OF 2019

JN ONYIEGO, J

AUGUST 31, 2022

BETWEEN

DMK ..... APPELLANT

AND

FJM ..... RESPONDENT

(Being an appeal from the judgement of the Resident Magistrate's Court at Tononoka Children's Court Mombasa before honourable L.K.Sindani delivered on 2nd May, 2019 in T.C.C NO.304 OF 2017)

JUDGMENT

1. The appellant herein and the respondent started cohabiting as husband and wife sometime in 1995. They later formalized their marriage on August 15, 2015. They were blessed with four children namely; FM, CI, JMM and DO born; July 5, 2000, December 25, 2001, August 15, 2004 and March 17, 2007 respectively.

2. Due to irreconcilable differences, the couple separated in June 2017 after the appellant(defendant) allegedly deserted their matrimonial home. That he neglected, ignored and failed to adequately provide for their children. According to the respondent, the appellant was a person of means who operates a shylock business.

3. Consequently, the respondent (plaintiff) through a plaint dated September 19, 2017, filed Tononoka children's case No 304 of 2017 against her husband DMk seeking orders that;

    a. A declaration be made that both the plaintiff and defendant have equal parental responsibility for the issues herein namely; FM, CI, JMM and DO

    b. A residence order to issue in favour of the plaintiff requiring the children to reside with the plaintiff

    c. Legal custody, care and control of the children to vest in the plaintiff

d. An order requiring the defendant to contribute Kshs 34,833/= per month for the maintenance in respect of the issues herein and that the said monies to be remitted through the plaintiff's account on or before the 5th day of every month

e. The defendant to pay school fees as required from time to time by the children's learning institution.

f. An order requiring the defendant to make adequate contribution towards additional medical and educational expenses, as and when the same may arise.

g. Costs of the suit and interests therein at court rates.

h. Any other relief that the court may deem fit

4. In total, she prayed for a sum of Kshs 38,833 per month broken down as follows; food Kshs 15,000 pm, rent Kshs 7,500 pm, utility bills, Kshs 1,500 pm, medical Kshs 5,000 pm, uniforms kshs 20,000 pa, clothing Kshs 40,000 pa and shoes Kshs 10,000 pa.

5. The appellant filed his defence dated March 7, 2018 denying paternity of their last born child DO. He termed the suit as incompetent, bad in law, frivolous, and incurably defective.

6. During the hearing, the respondent(PW1) in her evidence told the court that since separation with the appellant, she was the one catering for the children's welfare singlehandedly.That the children were school going with the first two in secondary school both in form 2 in [particulars withheld] Girls and [Particulars withheld] High School respectively while the last two were in primary school. She stated that the children were attending tuition which was exclusive of school fees. She further claimed that the children's performance had dropped since the appellant left the house and that they also lacked materials to facilitate them. That J needed spectacles worth Kshs 5000 while flovian also needed medical attention.

7. It was her evidence that despite having resigned from his job, the appellant was working as a private process server and a shylock. That out of Kshs 1.36 million paid to the appellant as compensation for wrongful arrest and detention on June 10, 2017, he only gave her Kshs 77,000 school fees for F and Kshs 20,000 for household utilities.

8. She further told the court that when the appellant married her, she had a two month pregnancy which she did not know. That after the child known as N was born, she (respondent) wanted to join school but the appellant refused to support the child. That she had to look for the biological father to support the child who has since qualified as teacher.

9. It was her evidence that the appellant had neglected his parental responsibility. She urged the court to order the appellant herein to cater for school fees, to continue paying the amount of Kshs 5,000 as ordered in the ruling of the court on February 12, 2018 and medical expenses.

10. In cross examination by the appellant, PW1 told the court that; the child known as N was named after the appellant's family; the appellant was all along aware of what happened and that the child was not his; when the child needed a birth certificate, the appellant who was in jail was reluctant to give his ID card thus she sought the option of looking for the biological father to the child; Except for N, all the other children were sired by the appellant; she was ready for DNA examination and that she named their last born child DO after her late brother.

11. On his part, the appellant (DW1) told the court that he and the respondent were husband and wife blessed with five children as indicated by PW1 with the 1st child being N who was above 18 years. That

in 2009 December he was charged of an anti-corruption case but was set free in November, 2010. That upon his release, he found that the first child's name had been changed from NKM to another man's name known as JO whose ID he found in his house. That PW1 lied to him for 15 years that the child was his and that marked the beginning of their misunderstandings.

12. It was his evidence that he was paid Kshs 1.3 million on July 11, 2017 as damages for wrongful arrest out of which he paid debts worth Kshs 300, 000, Kshs 150,000 to the respondent for the children and later an additional sum of Kshs 97,000. That the balance of Kshs 750,000 he bought land at his rural home on which he built a house. That he stopped working due to blood pressure hence resorted to farming. He further told the court that he was willing to support in paying school fees, rent and clothing but subject to sharing the responsibility.

13. DW2 one Bernard Mulatya Mulube merely told the court that the appellant had borrowed from him Kshs 50,000 which he said was legal fees and school fees for his children.

14. After hearing the evidence from both parties, the court pronounced itself on May 2, 2019 thus giving the following orders;

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

    b. There be joint legal custody with actual custody of the subject minor remaining with the plaintiff with unlimited access to the defendant.

    c. The defendant to pay school fees for the children and the plaintiff to cater for school related expenses.

    d. The defendant to provide Kshs 8,000/=every month to cater for the general upkeep of the children and food payable to the plaintiff on or before the 5th day of every month. The plaintiff to top up.

    e. The defendant to cater for the children's medical expenses from time to time as and when the same may arise.

    f. The plaintiff to cater for shelter and clothing for the children and utility bills.

15. As a result, the appellant felt aggrieved by the judgement of the children's court resulting to this appeal which is based on the following grounds;

    a. That the learned honourable magistrate erred in law by entering judgement for the respondent/plaintiff against the appellant /defendant as prayed in the suit.

    b. That the learned honourable magistrate erred in law and in fact by dismissing the appellant's application notice of motion dated March 5, 2018 without evidence of the purported business which the respondent claims the appellant has.

    c. That the learned honourable magistrate erred in law and in fact by not allowing a paternity test to be done.

    d. That the learned honourable magistrate erred in law and in fact by not considering the evidence of the appellant.

    e. That the learned magistrate erred in law and in fact by finding that the Kshs 247,000 did not even last for two months without any evidence.

    f. That the learned magistrate erred in law and in fact in making the finding which were a total misdirection and legal deviations from the express provision of the law.

g. That the learned magistrate erred in law and in fact as the judgement is not based on the evidence adduced by the parties.

16. The appellant urged the court to allow the appeal and set aside the orders of the learned magistrate and in place thereof allow the prayers sought in the notice of motion application dated March 5, 2018.

17. When the matter came up for directions, parties who appeared in person agreed to canvass the matter through oral submission.

18. In submission, the appellant basically reiterated the evidence tendered before the trial court. It was his submission that the respondent who was staying in Mikindani had refused to accompany him to his rural home in Kitui to avoid unnecessary expenses as he was no longer working. It was his further submission that his child M was in Kisii without his knowledge and that the second child was impregnated while in form two and as a result dropped out of school hence she is at home with a baby.

19. In response, the respondent submitted that they have been in court since 2017 when the appellant was directed to take care of the children but has reneged after paying Kshs 77,000 when F joined secondary school. That after three weeks, he demanded refund for that money which she refused thus marking the beginning of their problems.

20. She further submitted that the appellant refused to pay further school fees after their daughter F conceived and dropped out of school. That C is in [particulars withheld] High School while J is in [particulars withheld] Secondary School in Kisii. She stated that DOM was in class 8 but she was unable to pay school fees alone. She urged the court to uphold the judgement of the Children's Court.

21. In his rejoinder, the appellant submitted that he was not in a position to pay Kshs 8,000 per month but offered to pay Kshs 3000-4000 per month.

22. I Have considered the appeal herein and oral submissions by both parties. Issues that emerge for determination are;

a. Whether the honourable magistrate erred in law and in fact by not allowing paternity test.

b. Whether the learned magistrate erred in law and in fact by issuing maintenance orders against the appellant without taking into account his means of income.

23. This being a first appeal, I am duty bound to re-evaluate, re-assess and re-consider afresh the evidence tendered before the trial court so as to arrive at an independent determination without losing sight of the fact that the trial court had the advantage of seeing and listening to the witnesses. See *Jackson Kaio Kivuva v Penina Wanjiru Muchene* [2019] eKLR where the court stated;

> "This being a first appeal, parties are entitled to and expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that."

24. On whether the honourable magistrate erred in law and in fact by not allowing paternity test, the appellant raised the said issue in his statement of defence paragraph 3 where he admitted the contents of paragraph 4 of the plaint but contested the paternity of the 4th child DO.

25. Further, in his affidavit sworn on 8th December and filed on January 15, 2018 paragraph 9 and 10 the appellant raised concerns on paternity by stating as follows;

> " that by the plaintiffs conduct in respect of our first and last children in stating somebody else's name as their father instead of me has made me to be very doubtful as to whether the other children named herein are indeed mine or they belong to another man or men.
>
> That I would like this honourable court to order for a DNA test to be carried out first of all on all the children named herein before any adverse orders are issued."

26. The issue of paternity test emerged again during the trial at the cross examination of the respondent by the appellant and during the evidence in chief of the appellant where he stated;

> " Since she played games with me on paternity of the 1st child how then am I to believe that the rest of the children are mine. I pray that she proves paternity of the rest of the children through DNA, it is not me to prove."

27. The respondent on the other hand insisted that the child was sired by the appellant and that she had named him after her brother known as O. On his cross examination at page 36 of the court proceedings, the appellant acknowledged that the respondent had a brother known as O. Paternity of the first born N who is an adult and a teacher by profession is not an issue as both parties agreed that her biological father was OJ. Since she is no longer a minor and paternity having been resolved DNA could not apply.

28. The only reason cited for demanding for a DNA test for all the children was the fact that the respondent had kept paternity of N as a secret and also the naming of D as O. Were the two grounds sufficient enough for the trial court to have ordered for DNA examination? It is trite that before an order for DNA could be ordered, the party demanding for such examination must lay a firm and persuasive foundation to convince the court that it would be in the best interest of justice for such examination to be conducted. See *SWM v GMK* [2012] eKLR and *RK v HJK & another* [2013] eKLR where both courts held the positon that for an order for DNA testing to issue, a proper legal and factual basis must be laid or established by the applicant before a respondent is ordered to undergo A DNA test to establish paternity at an interlocutory stage.

29. The trial court in its judgement analysed the issue of paternity and specifically on the child known as DO and noted that the reasons for doubting paternity by the defendant was due to the fact that he had raised the first child N under the belief that she was his only for the respondent to turn around and say that the child was not his and that the name of the child did not belong to the appellant's tribe.

30. After considering the dispute, the trial court in its decision on paternity of the child stated as follows;

> " basing on the best interest of the child I do not find it fair in the absence of a paternity test to assume that since his name is not of Kamba origin then he does not belong to the defendant.
>
> Further the fact that the first child was not the defendant's daughter does not take away paternity of the last child just because he was named after the mother's brother.
>
> In the absence of the paternity test this court makes a presumption that since the child was born while parties were still together then the defendant is the father to the child David."

31. There is no dispute that all the children the subjects of these proceedings were born during the subsistence of coupl's marriage. All the children's birth certificates bear the appellant's name as the father. The fact that the first born turned out to have been conceived before the couple's marriage does

not form a basis to called upon J, F and C whom the appellant admitted in his defence as his children to undergo a DNA test. It is trite law that parties are bound by their pleadings. See *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & three others* [2014] eKLR.

32. On the second ground relating to the naming of the last born child as DO, the respondent explained that she named the baby after her brother known as O. The appellant admitted in his cross examination that the respondent had a brother by that name. The trial court dismissed this ground as baseless. I do agree with the hon. magistrate that the aspect of naming the child in a name other than Kamba the appellant's tribe, is quite trivial in my opinion. It does not form a concrete basis for a DNA examination to be ordered.

33. On whether the learned magistrate erred in law by issuing maintenance orders against the appellant without ascertaining his means of income, I will borrow leave from the holding in the case of *SMW v EWM* [2019] eKLR where the court in dealing with maintenance stated as follows;

> " The basis for a maintenance order is parental responsibility. This is defined at s 23 (1) of the *Children Act* as-
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> The duties
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> Rights
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> Powers
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> Responsibilities
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> Authority
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> which by law a parent has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child. So, these duties, rights, powers, responsibilities and authority of a parent over a child are defined by law, and may change depending on the changing capacities of the child. That is to say they will be determined by law.
>
> That is why the same law goes on to define some of the duties to include maintenance of the child. Maintenance includes the provision of adequate diet i.e. food, shelter, clothing, medical care, education and guidance, protection from neglect, discrimination and abuse.
>
> The parent's rights include the right to give parental guidance – in religious moral, social, cultural and other values, determine the name of the child, appoint a guardian etc.
>
> These duties have been set out as the rights of the child under article 53 of the *Constitution* as the right – to a name and nationality, to education, basic nutrition, shelter and health care, protection from abuse, neglect, and all forms of violence and to parental care and protection – which is the equal responsibility of the father and the mother."

34. The appellant in this case argued that he gave the respondent certain amount of money back in 2017.That he is unemployed and cannot afford to pay kshs 8,000 per month. The respondent on the other hand argued that she only received Kshs 97,000 from appellant comprising of Kshs 77000 school fees for F and Kshs 20,000 for household items.

35. The trial court in its decision on maintenance stated as follows;

> " As much as the defendant gave money in 2017 July be it 79,000 or 150,000 that can't be said it will last forever. I am very sure the money did not even last for two months...

> I therefore don't see any basis for the defendant to rely on this money as his defence not to provide further. Even lapse of time explains that the money is not still there given that the defendant has not been providing.
>
> When two parents fight over such issues it is the children who will suffer. I therefore find that the parties being parents to the children should share responsibilities equally."

36. The court went ahead to order the appellant to provide Kshs 8,000 per month for general upkeep, to pay school fees for the children and cater for medical expenses as the need arises. On his part, the appellant offered to pay school fees, provide clothing and pay maintenance expenses at Kshs 4,000 per month. Although it is prudent to ascertain the source of income of a parent, some sources are not specifically ascertainable. For instance, the appellant said that he is a farmer and a part time process server. These are sources of income which cannot be verified but it is nevertheless an income capable of taking care of a family. Therefore, by the court making the orders before calling for an affidavit of means was not fatal as it relied on the evidence at hand.

37. At the time of making this orders, the children were teenagers aged 19, 17, 15 and 12 respectively. The first two namely; F and C were in form 2 while the other two J and D were in primary school. It is therefore presumed that F who dropped out of school and got a baby and C are through with their form four education and therefore adults. The implication of this is that, the appellant has reduced burden in paying school fees.

38. Is the amount of Kshs 8000 excessive in the circumstances? Under article 53(1) (e) of the *Constitution*, parental responsibility is a shared responsibility. None of the parties has a superior right than the other. Courts do not make maintenance orders only against parents in formal employment. Given the rate of inflation since the impugned orders were made, I do not find the amount excessive. It is trite law that in every decision made affecting a child, the best interests of a child should be taken into account. This is a constitutional imperative as stated under article 53(2) of the *Constitution* and section 4(2) & (3) of the *Children Act*. In my view, it will not be in the best interest of the children that the maintenance a mount be varied or set aside.

39. However, upon the children attaining their 18th Birth day, the appellant will not be bound to pay maintenance expenses unless the same is extended. Equally, upon any one child attaining the age of majority and where there is no extension of parental responsibility, then the appellant shall be at liberty to apply to the trial court for review of its orders to accommodate only children below 18 years.

40. In view of the above finding, it is my holding that I do not find any merit in the appeal herein hence the same is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 31ST DAY OF AUGUST2022.

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JN ONYIEGO

JUDGE