



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 53 OF 2018

DS (Minor suing through her mother)JWM.....APPELLANT

VERSUS

CKK.....RESPONDENT

(Being an Appeal from the Judgement and Decree of Honourable R. Kefa Senior Resident Magistrate in Nyeri Children's Case No. 30 of 2017, delivered on 27th August 2018).

JUDGEMENT

Brief Facts

1. The appeal herein arises from the judgment of the trial court in Nyeri Children's Case No. 30 of 2017. In the aforesaid suit, the appellant prayed for judgment against the respondent for custody of the minor and maintenance to the tune of Kshs. 414,000/- per annum.
2. The trial court tendered its judgment on 27th August 2018, in which it granted actual, legal and physical custody of the minor to the appellant while granting the respondent access and visitation rights agreeable by both parties. The respondent was to enrol the minor under his employer's medical cover and cater for school fees and school related expenses when the minor begins going to school. Further, the appellant was to cater for shelter and utility bills. In addition, both parents were to each contribute Kshs. 6,000/- for food and clothing for the minor.
3. Being aggrieved with the decision of the Trial Court, the appellant has lodged the instant appeal citing 4 grounds of appeal in her Memorandum of Appeal which can be summarised as follows. That the Honourable Learned Magistrate erred in law and in fact by not taking into consideration her evidence and submissions; that the trial court did not implement the best interests of the child as guaranteed by the Constitution and that the trial court erred in finding that parental responsibility is shared but not equal. The appellant prays that this Honourable court grant maintenance to the tune of Kshs. 28,400/- per month.
4. Parties were directed to put in written submissions but the respondent failed to file submissions for over a year that the court mentioned the matter for that purpose.

Appellant's Submissions

5. The appellant began her submissions by stating that the trial court erred in directing that both parties contribute each Kshs. 6,000/- for food and clothing for the minor yet has no formal employment or business income. She relied on **Section 23(1) of the Children's Act** which defines parental responsibility. She further relied on **Article 53 of the Constitution** stating that the best interests of the child are of paramount importance in matters considering a child. Additionally, **Section 4(3)a, b and c of the Children's Act** defines what is entailed on the welfare of the child. The appellant states that the trial magistrate did not consider the above provisions of the law. The trial court ought to have considered the actual needs of the child, what needed to be done to provide for them, how they were to be provided for and who was best placed to provide for them.
6. The appellant submits that maintenance is a shared responsibility and relied on the case of **Z.W. Vs M.G.W (2014) eKLR**. She further states that parental responsibility ought to be apportioned according to the needs of the child and the income of the parents. The appellant further relied on the case of **D.K.M Vs F.M.M (2018) eKLR** and asked the court to allow the appeal.

Issues for determination

7. I have identified two issues for determination as follows:-

- a) Whether the trial court erred in directing that each do contribute a monthly sum of Kshs.6,000/= for food and clothing for the

minor.

b) Whether the appellant is entitled to maintenance of Kshs.28,400/=

The Law

8. Being a first Appeal, the court relies on a number of principles as set out in **Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:**

“....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

9. It was also held in **Mwangi vs Wambugu [1984] KLR 453** that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

10. Dealing with the same point, the Court of Appeal in **Kiruga vs Kiruga & Another [1988] KLR 348**, observed that:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”

11. This Court is under a duty to delve into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but bearing in mind that the trial court had the advantage of hearing the parties.

Whether the trial court erred in directing that both parents each contribute Kshs. 6,000/- for food and clothing for the minor.

12. In matters concerning a child, it is a constitutional imperative that of paramount importance is the best interests of the child. To that extent, **Article 53(1) of the Constitution of Kenya** provides that a child’s best interests are of paramount importance in every matter concerning the child. This position is enshrined in the Children’s Act in section 4 which provides for the welfare of the child. **Section 4(2) and (3) of the Children’s Act** provides:-

(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.

13. The main contention in this appeal is that the trial court ordered that each of the parent contributes Kshs.6000/= for food and clothing of the minor. The appellant states that the trial court ought to have considered that unlike the respondent she does not have any income to facilitate her to make the said contribution. She further urges the court to grant her orders for maintenance of Kshs.28,400/=

14. The question then begs what is parental responsibility and how should the court arrive at apportioning it between the parents of the minor.

15. Parental responsibility has been defined in section 23 and 24 of the Children’s Act and Article 53(1)(e) of the Constitution of Kenya which both provide that each parent has a duty to provide the child with the necessities of life.

16. **Section 23 of the Children’s Act** provides:-

(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 it with adequate diet, shelter, clothing, medical care including

immunisation, education and guidance.

(b) The duty to protect the child from neglect, discrimination and abuse among other duties.

17. Section 24 provides that:-

(1) Where a child's father and mother were married to each other at the time of his birth, they shall have Parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility.

(2) Where a child's father and mother were not married to each other at the time of the child's birth and have subsequently married each other, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in the exercise of such parental responsibility.

(3) Where a child's father and mother were not married to each other at the time of the child's birth and have not subsequently married each other-

a) The mother shall have parental responsibility at the first instance;

b) The father shall subsequently acquire parental responsibility for the child in accordance with provisions of section 25

(4) More than one person may have parental responsibility for the same child at the same time.

(5) A person who has parental responsibility for a child at any time shall not cease to have that responsibility for the child.

18. Section 94(1) of the Children's Act stipulates the considerations by which the court shall be guided 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 needs of the child and the child's current circumstances;

19. Looking to case law on the subject, Meoli J stated the following in the case of E.M.M Vs M.O.O Naivasha HCA. 53/2015:-

"It will not do for a party to say that she has an uncertain source of income and therefore the responsibility of maintaining the children should only 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."

20. Similarly in the case of L.A.O vs O.K Arap M. (2019) eKLR where Justice Thande pronounced herself as follows:-

"In the present case, the appellant states that she does not have a job and only assists her father on the farm and in running her late mother's business. The appellant is paid Kshs. 40,000/= by her father, and receives Kshs. 10,000/= from the respondent each month. She is not exactly destitute. In spite of this, she still seeks that the respondent be saddled with the entire financial responsibility over the child. This negates that constitutional principle that parental responsibility is a shared responsibility. In this regard, I agree with Kimaru J in C.I.N Vs J.N.N [2014]eKLR, where the court stated that:-

"It will not do for the respondent to say that she has an uncertain source of income and therefore the responsibility of maintaining the children should only be borne by the appellant. The respondent must establish, to the satisfaction of the court, that she has also made effort to provide for the upkeep of the children."

21. From the above, it is clear that a child is a joint responsibility of both parents, therefore it is expected that either parent must make an effort to provide for the upkeep of the child.

22. It is also true that though parental responsibility is to be shared, it can never be equal. The court must take into account the financial capability of each parent. This position was stated in M.K. vs C.K.K HCA. 51/2015 where the court held:-

"Parental responsibility is shared and not equal based on the financial position of each parent. The mother as the resident parent has a nurturing role to the children and the father to provide maintenance and upkeep of the children."

23. In regard to ground 2 in the memorandum of appeal, the appellant is aggrieved that she was denied the custody of the minor. perusal of the judgement shows that the appellant was granted the actual, legal and physical custody of the minor while the defendant was only granted

access visitation rights to the minor. I find no basis of this ground in that the orders desired by the appellant were granted.

24. In regard to ground 4 that the magistrate failed to make a finding that parental responsibility is shared but not equal in the circumstances. The appellant's prayer was for maintenance and other expenses including, medical, house rent, clothes, housegirl wages, food and diapers all totalling to Kshs.414,000 per annum.

25. It is not in dispute that the respondent earns a monthly salary of kshs.100,000/= per month, as an employee of Kenya Power & Lighting company Limited. It was also not disputed that the respondent has another family with two children whom he provides for. He said he has Sacco loans and other deductions including statutory that leave him with a net of about Kshs.50,000/=

26. The court in its judgement considered the relevant law being Article 53(1) of the constitution and Sections 24(1) and 91 of the children's Act on the rights of the parents on custody and shared responsibilities. The court found that shelter and utility bills should be provided by the person who takes the custody of the child.

27. The respondent was ordered to enroll the child in his employer's medical cover and that both parties contribute Kshs.12,000 a month for food and clothing, thus Kshs.6,000/= for each party. The appellant herein is asking the court to set aside the order of her contribution of Kshs.6,000/= and provide her with monthly maintenance of kshs.28,400/= from the respondent. This court should not lose sight of the fact that the respondent was ordered to cater fully for the school fees and accessories when the minor attains school going age.

28. It is trite law that equal parental responsibility does not mean equal financial or other contribution as it was held in the case of *E.M.M Vs M.O.O(2016)eKLR*:-

“However equal responsibility does not mean equal and similar contribution as the income of each parent, and other non-monetary contribution must be borne in mind.”

29. In the case of *M.O.A Vs H.A.O[2021]eKLR* the court held:-

“Although parents may not have equal financial ability for the court to demand equal contribution, one must at least exhibit some sense of seriousness in making some contribution as a sign of good will that he or she is not geared towards overburdening the other parent for the sole purpose of punishing him or her using the best interest of a child principle or as a ground to settle scores out of marital differences.”

30. The appellant says she is not under gainful employment. This does not impose any responsibility on the respondent to maintain her and the child. The respondent's shared responsibility is in favour of the minor . The request of the sum of Kshs.28,400/= per month is in my view unreasonable in that the court placed a reasonable measure of responsibility to each party. It was held in the case of *M.O.A Vs H.A.O(supra)*. The appellant must demonstrate some seriousness of meeting her obligation as a parent with shared responsibility. She will not remain unemployed should she make effort to engage in self-employment in minimal manner which will give her some income for herself and the child. Small beginnings grow into big things. The appellant must be seen to make some effort towards contributing to the maintenance of the child as required by the law. She cannot wholly depend on the respondent whose income is also limited bearing in mind his other responsibilities as was demonstrated.

31. The trial magistrate in ordering that both parties to contribute a monthly sum of Kshs.6,000/=for food and clothing for the child had considered all the material presented before her in regard to the financial capabilities of the parties.

32. It is not correct as alleged in ground 4 that the magistrate failed to make a finding on shared but not equal responsibility. From the judgement, the learned magistrate apportioned responsibility to both parents based on the evidence before her on the financial position of each party.

33. Consequently, I find no fault in the judgement of the trial court and it is hereby upheld.

34. It is my finding that this appeal lacks merit and it is hereby dismissed.

35. Each party to meet their own costs.

36. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 20TH DAY OF MAY, 2021.

F. MUCHEMI

JUDGE

JUDGMENT DELIVERED THROUGH VIDEO LINK THIS 20TH DAY OF MAY 2021.