



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 58 OF 2019**

RWM.....APPELLANT

VERSUS

PMM.....RESPONDENT

**(An Appeal from the Judgement of Hon. H. M. Mbatia (Mrs),**

**Senior Resident Magistrate of 20.5.19 in Nairobi**

**Children's Cause No. 641 of 2017)**

**JUDGMENT**

1. PMM, the Respondent filed Nairobi Children's Cause No. 641 of 2017 against RWM, the Appellant. She claimed **that when she and the Appellant married under Kamba customary law in 2012, he willfully adopted her 2 children from another relationship, AKW aged 17 years and CMW aged 9 years. The parties then had their own child SKW aged 2 years. The Respondent further claimed that in November 2015, the Appellant without justification threw her and the children from their matrimonial home in Kitengela, leaving her to fend for the children. In her plaint dated 26.4.17, the Respondent sought in the main, the following orders:**

**a. Actual custody of the children.**

**b. That the Appellant pays to her the monthly sum of Kshs. 125,350/= for the upkeep of the children until they attain the age of majority.**

**c. That the Appellant pays the children's school fees and related expenses until they complete school.**

**d. Costs.**

2. In the judgment of 20.5.19, the learned Magistrate granted legal custody of the children to the parties with the Respondent having actual custody of the child S and unlimited access by the Appellant. The Respondent was to cater for shelter and clothing for the children and include them in the medical cover provided by her employer. The learned Magistrate directed the Appellant to remit the monthly sum of Kshs. 7,500/= to the Respondent for the upkeep of Christian, and upon his joining boarding school, the sum was to be remitted during half term and the school holidays. The Appellant was also directed to pay school fees and related expenses for S at a school to be agreed upon and the monthly sum of Kshs. 13,000/= for his upkeep. No orders were made in respect of **A as she had attained the age of majority.**

3. Being dissatisfied with part of the judgment, the Appellant has appealed to this Court on grounds that the learned Magistrate erred in law and fact by:

**1. ordering the Appellant to pay monthly sum of Kshs. 13,000/= and Kshs.7,500/= towards maintenance of the minors SKW, and CMW respectively.**

**2. failing to consider that the figures of Kshs. 13,000/= and Kshs.7,500/= per month are excessive, exorbitant and oppressive.**

**3. failing to take into account the Appellant's earning capacity.**

**4. failing to take key considerations into account in arriving at her judgment.**

**5. failing to appreciate the totality of the evidence before her and not considering the submissions on behalf of the Appellant, and reaching to a conclusion that is contrary to the evidence on record.**

4. The Appellant prayed that the appeal be allowed and the judgment delivered on 20.5.19 be set aside and the orders made in terms of maintenance of the minors SKW and CMW be reviewed. The Appellant also prayed that the costs of this appeal be provided for.

5. Parties filed their written submissions which I have duly considered together with the authorities cited.

6. As I consider this the matter, I am mindful of the constitutional and statutory imperative that the best interests of the children are paramount. 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.**

And Section 4(2) and (3) of the Children Act (the Act) which 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.**

7. 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;**

8. 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. ...**

9. While considering the order for financial provision for the maintenance of children, the trial Court was obligated to take into account the income or earning capacity, property and financial resources of the parties both then and in the foreseeable future. The trial Court was also to consider the parties' financial needs, obligations, or responsibilities. As regards, the children the Court was required to bear in mind their financial needs and circumstances.

10. The Appellant contended that the learned Magistrate erred in directing him to pay the sums of Kshs. 13,000/= and Kshs. 7,500/= towards maintenance of the minors S and C respectively, which he termed excessive, exorbitant and oppressive. He faulted the learned Magistrate for failing to consider the Appellant's income or earning capacity as required under Section 94(1)(a) of the Children Act, thereby making orders that were exorbitant, oppressive and without justification. He further faulted the learned Magistrate for not taking into account the needs of the children. He urged the Court to set aside the orders and make such orders as it deemed fit in the circumstances.

11. As regards the child S who is the parties' biological child, the Appellant does not dispute his parental responsibility. He however took issue with the apportionment and quantum of the financial provision between the parties. According to the Appellant, the learned Magistrate failed to interrogate and determine the income and earning capacity of the parties and thereby arrived at an apportionment that was impractical. For the Respondent, it was submitted that the Appellant the learned Magistrate analyzed all the evidence and arrived at a

decision that was in the best interest of the children.

12. On earning capacity, the record shows that the trial Magistrate noted from the evidence that the Respondent was an administrative officer with the Teacher's Service Commission, while the Appellant farmed on 1.5 acres of his 2-acre farm. The water in his borehole was not enough to support his farming or to supply anyone with water. The learned Magistrate further noted that under Section 23 of the Act, parental responsibility means all duties, rights, powers, responsibilities and authority which a parent legally has in relation to a child. She observed that the first duty is to provide a child with adequate diet, shelter, clothing medical care, education and guidance. The learned Magistrate then proceeded to direct that the Appellant to provide school fees and related expenses for the child, as well as Kshs. 13,000/= per month for what she referred to as food and grooming. The Respondent was to provide shelter and clothing. She was also to include the children in her medical cover.

13. It is noted that other than the Appellant claiming that the Respondent earned over Kshs. 100,000/= and the Respondent claiming that the Appellant was a man of means, neither party disclosed to the Court the amount of income earned. They therefore made it impossible for the learned Magistrate to determine their income or earning capacity.

14. 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.**

15. Parental responsibility is a shared responsibility between the parents of a child. The learned Magistrate directed the Appellant to take care of school fees and school related expenses and in addition a monthly sum of Kshs. 13,000/=. The Respondent on the other hand was directed to take care of shelter and clothing. It would appear to me that the learned Magistrate placed a heavier responsibility on the Appellant without knowing just how much each of the parties brought in by way of income. My view is that in the interest of fairness and given that the income or earning capacity of the parties is unknown, the amount awarded for food and grooming for the child ought to be shared equally.

16. The constitutional principal of equal parental responsibility of both parents of a child was restated in the case of C.I.N v J.N.N [2014] eKLR relied on by the Respondent. Kimaru, J. opined:

**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. The above constitutional requirement is a game changer. Parties seeking the intervention of the Children's Court to secure 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. This is because both the mother and the father of the child have equal responsibility towards the upbringing of the child or children.**

17. In the case of the child C, who is not a biological child of the Appellant, it was submitted that the learned Magistrate failed to take into account relevant factors in holding that the Appellant had assumed parental responsibility over the child. For the Respondent, it was argued that the Appellant did not in his memorandum of appeal challenge the learned Magistrate's finding that he had parental responsibility. It was further submitted that that the learned Magistrate was right in finding that the Appellant had parental responsibility over the child.

18. In her decision, the learned Magistrate noted that HKM, the biological father of the child was providing for this child. She stated in the judgment:

**"I order CMW's biological father HKM, to cater for his school fees and related expenses until he attains the age of majority since the Constitution has imposed equal parental responsibility on him. In any event, the evidence shows that he sent the Plaintiff Kshs. 24,500/= on 29<sup>th</sup> April 2016, the Plaintiff 16, Kshs. 26,200/= on 4<sup>th</sup> April 2016 and Kshs. 30,200/= on 20<sup>th</sup> December 2016. I take note that the Plaintiff left the Defendant's house in April 2016. I can therefore safely assume that the Plaintiff informed HM that her marriage was over and her resumed sending money for his son.**

19. The learned Magistrate then observed that Appellant had assumed some parental responsibility over the child Christian and directed that he contributes the monthly sum of Kshs. 7,500/= towards his food. Her decision was informed by the provisions of Section 24 (5) of the children Act which provides:

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

20. The rationale of Section 24(e) of the Act is to ensure that no child suffers as a result of a person who has had parental responsibility for a child, ceasing to have that responsibility. Here we have a situation where C's biological father is discharging his parental responsibility by sending money to the child's mother on a quarterly basis. As indicated above, the learned Magistrate noted that the child's biological father had **"resumed sending money for his son"**. The mother the Respondent, is working and is also doing her part. How is it then that responsibility is placed on the Appellant to provide additional funds for a child whose biological parents are taking care of his needs. Although the Respondent argued that the Appellant did not challenge the learned Magistrate's finding on parental responsibility, I find it unconscionable that a woman would seek maintenance for her child from 2 men; the biological father and another man. The order requiring the Appellant to pay monthly maintenance for the child C, when it is on record that the biological father of the child is also making contribution, is in my view fundamentally wrong. Such order should not be allowed to stand.

21. The Respondent in her submissions relied on the holding in the case of ZAK & another v MA & another [2013] eKLR, Mumbi Ngugi, J (as she then was) stated:

**Looked at through the prism of the Constitution, particularly Article 53(2) which requires that the best interests of the child be the paramount consideration in any matter concerning the child, I believe that a step-parent in such circumstances must be held to have an obligation recognised in law to exercise parental responsibility as defined in Section 23 of the Children Act over his or her step-child. It would be an affront to morality and the values of the Constitution for a party who has had a relationship with a child akin to that of a father or mother to disclaim all responsibility and duty to maintain the child when he or she falls out with the parent of the child.**

The learned Judge went on to say:

**Such responsibility would, however, depend on the circumstances of each case, and the relationship that is shown to have existed between the person in question and the children in respect of whom he or she is sought to be charged with parental responsibility for.**

22. Article 53(1)(e) of the Constitution places the responsibility of providing for the child on both the mother and father equally and it matters not whether they are married to each other or not. The circumstances of this case are that Christian's biological father is in the picture and has been supporting the child. I therefore find no justifiable reason for the Appellant to continue taking on the responsibility on behalf of another man who is alive and well and who has resumed his parental responsibility. In so finding, I am mindful of the constitutional imperative that the best interests of the child are of paramount importance in this matter. Given that both biological parents are providing for the child C, relieving the Appellant of the financial responsibility imposed upon him by the learned Magistrate does not militate against the best interests of the child.

23. Before I conclude, there is an issue which, although not raised herein, must be addressed. The Court notes that C, who was born on 15.5.08 has 2 birth certificates. The first birth certificate was issued shortly after his birth on 7.7.08 and date of registration indicated as 21.5.08 and the entry number as 260829614. HKM, the biological father of C, is indicated as the father of the child. The second birth certificate was issued on 28.8.13 with the date of registration given as 27.8.13 and the entry number as xxxxxxx. The Appellant is indicated as the father. It is not possible or indeed legal for a child to have 2 birth certificates with different dates of registration, different entry numbers, different places of birth and different fathers, one of whom is not the biological father. The same applies to A. She too has 2 birth certificates with different dates of birth and of registration, different entry numbers, different places of birth and different fathers. Nothing, not even assumption of parental responsibility over a child nor indeed adoption can justify the falsification of critical documents such as birth certificates. These latter birth certificates ought to be surrendered to the Registrar of Births and Deaths for cancellation for containing falsified particulars.

24. In the end, having evaluated the evidence and the law, I am satisfied that there is sufficient ground to interfere with the order of the learned Magistrate, in so far as it relates to the maintenance of the 2 children. Accordingly, I make the following orders:

- i. The order requiring the Appellant to make payment to the Respondent for the maintenance of CMW and SKW is hereby set aside.
- ii. The Appellant's monthly contribution towards the food and grooming of the child SKW is hereby reduced from Kshs. 13,000/= to Kshs. 6,500/= and shall be paid to the Respondent on or before the 20<sup>th</sup> day of each month.
- iii. This being a matter concerning the parties' children, there shall be no order as to costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 6<sup>TH</sup> DAY OF AUGUST 2021**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

.....for the Appellant

.....for the Respondent

.....Court Assistant