



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

CIVIL APPEAL NO 117 OF 2018

SW.....APPELLANT

VERSUS

ZHS.....RESPONDENT

(Being an Appeal from the Ruling of Hon P. Mbulika (RM) delivered at Kisumu in Chief Magistrate's Court Children Case No 63 of 2012 on 1st November 2018)

JUDGMENT

INTRODUCTION

1. In her decision of 1st November 2018, the Learned Trial Magistrate, Hon P. Mbulika, Resident Magistrate, reviewed the Trial Court's Judgment dated 30th November 2012 in the following terms:-

a. Order 6; regarding monthly payment of support. The Defendant shall pay a sum of 7,000 on or before every 5th of the month.

b. All the other orders shall remain as it is(sic)

2. Being aggrieved with the said decision, on 16th November 2018, the Appellant filed a Memorandum of Appeal dated 16th November 2018. He relied on seven (7) grounds of appeal.

3. The Appellant filed his Written Submissions dated 30th April 2021 on 4th May 2021 while the Respondent filed her undated Written Submissions on 22nd July 2021. The Judgment herein is therefore based on the said Written Submissions which both parties relied upon in their entirety.

LEGAL ANALYSIS

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein rendered itself as follows:-

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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..."

6. The principle behind this conclusion is that as an appellate court will not have had the advantage of having seen and heard the evidence of witnesses, it should exercise its jurisdiction to review the evidence with caution and it is not enough that the appellate court might have come to a different conclusion.

7. Having looked at the Memorandum of Appeal, Record of Appeal, Appellant's and Respondent's Submissions, it was the considered view

of this court that the issue that had been placed before it for determination were as follows:-

a. Whether or not the Learned Trial Magistrate erred in having distributed the various parental responsibilities to the Appellant and the Respondent without considering his net pay warranting the interference of this court.

b. Whether or not the Learned Trial Magistrate erred in having awarded the Respondent herein actual custody of the children.

8. The Appellant admitted that he was the father of the two (2) children he sired with the Respondent herein and argued that he therefore had a right to access and/ or visitation and ought to be given a chance to guide and counsel the children as a parent.

9. He asserted that he had been informed by strangers that his daughter had been sexually harassed by the Respondent's lover which was confirmed by a doctor at Aga Khan Hospital who informed him that the child suffered a psychological problem.

10. He urged the court to reduce the monthly upkeep of Kshs 7,000/= to Kshs 3,500/= as he was straining to pay for boarding fees for Hope Miriam and still pay Kshs 7,000/= to the Respondent for upkeep. He contended that the Respondent ought to bear the other half as she was in a gainful employment and must take the responsibilities as a parent and as required by law.

11. On her part, the Respondent submitted that she adduced receipts before the Trial Court which indicated how she incurred the expenses contested by the Appellant in Ground of Appeal No 1. She added that her daughter was still undergoing treatment, psychiatric counselling and therapy treatment in which she spent more than Kshs 7,000/= per month.

12. She pointed out that she used her medical scheme to cater for the medical expenses but that at times it exhausted her monthly scheme forcing her to use cash. She added that she also took care of his son's medical expenses whenever the need arose. She urged this court to direct that together with the Appellant, they share any medical expenses that could not be taken care of by the scheme.

13. She averred that it was her wish that his children would bond with their father as he was allowed to visit them once they close schools and take them out for bonding but that the few times she had tried to assist the children bond with him, he insulted her instead. She added that she even gave their daughter a mobile phone to communicate with the Appellant and sometimes she would cry after his insults. She asserted that he would tell their daughter to stop calling and disturbing him as it would break his marriage. She urged the court not to allow him to disturb the children's peace of mind.

14. She admitted that he had been paying school fees for the daughter only neglecting their son. She asked the court to direct the Appellant to assist in the shopping expenses also. She was emphatic that the last time the Appellant bought shoes for the children was in 2018 January.

15. She urged this court to raise the sum he paid monthly from Kshs 7,000/= to Kshs 10,000/= due to the rise of cost of living that has been caused by the pandemic. She argued that the Appellant is a deputy head teacher whose salary was high and was able to pay the said sum of Kshs 10,000/=.

16. She was categorical that the children required maintenance as follows:-

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|--|-------------------------|
| i. Food | Kshs 10,000 per month |
| ii. Clothing | Kshs 2,000/= |
| iii. Rent | Kshs 10,000/= per month |
| iv. Medical | Kshs 10,000/= per month |
| v. Security and bills | as per the use |
| vi. Uniform and stationery | Kshs 20,000/= per annum |
| vii. School fees | as per structure |
| viii. Back to school shopping and pocket money | Kshs 5,000/= |

17. She urged the court to compel the Appellant to honour his duty as a father.

18. Article 53 (1) (d) of the Constitution provides that every child has the right 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.

19. It is also a constitutional imperative that in matters concerning a child, the interests of the child are paramount. To that extent, Article 53 (2) provides that a child's best interests are of paramount importance in every matter concerning the child. This is emphasised in the Section 4(3) of the Children Act which also recognises the fact that the welfare of the child is paramount.

20. According to Section 24 of the Children Act No 8 of 2001, neither the father nor the mother of a child shall have a superior claim against

the other in exercise of such parental responsibility of the duties set out in Section 23(2) of the Children Act. As it was not in dispute that both the Appellant and the Respondent were biological parents of two (2) children, they shared the parental responsibility equally.

21. On 30th November 2012, the Learned Trial Magistrate entered Judgment as follows:-

- 1. Legal custody of both children is hereby vested up on both parents.**
- 2. Actual custody of the 2 minors is vested up on the Plaintiff/mother with visitation rights to the Defendant/father.**
- 3. Medical expenses of the firstborn child shall be catered for by the insurance and if the treatment fee shall be an excess of cost the Defendant/father shall cater for it.**
- 4. The cost of Kshs 30,000/= that the Plaintiff has already incurred shall be shared. The Defendant to refund the Plaintiff the sum of Kshs 15,000/= on or before the 5/12/2012.**
- 5. The Defendant shall pay school fees of both children. Notice that the first born shall continue to stay at our Lady of Grace (close to hospital) and all school needs/expenses.**
- 6. On or before 8th day of every month the Defendant shall pay a sum of Kshs 10,000/= to cater for food and clothing for the children**
- 7. The Plaintiff shall cater for shelter, clothing, bills and security.**
- 8. No order as to costs.**

22. Subsequently, on 1st November 2018, she reviewed Order six (6) of her said Judgment and reduced the monthly payment by the Appellant to Kshs 7,000/=.

23. This court took the view that this was highly irregular for the reason that the Trial Court became *functus officio* when it delivered its decision on 30th November 2012.

24. Having critically scrutinised the Memorandum of Appeal, the Record of Appeal and rival Submissions, this court found that the Learned Trial Magistrate erred in having directed the Appellant to pay the sum of Kshs 7,000/= as she had no power to review the judgment. The impugned Ruling was irregular as a result of which this court found itself in difficulties in making a determination as to its merit or otherwise.

25. According to Order 45 of the Civil Procedure Rules, 2010, an order and/or decree of a court can only be reviewed in very limited circumstances. The same provides as follows:-

“(1) Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

26. This court did not see any of the grounds cited hereinabove existing in the circumstances of the case. In fact, the only remedy that was open to the parties after delivery of the Judgment was to appeal against the Trial Court’s decision.

27. This court therefore found it prudent not to consider the merits or otherwise of the grounds of appeal that had been raised to give the Appellant an opportunity to lodge an appeal against the substantive judgment in the event he still wished to appeal.

The Respondent was also at liberty to file a Cross-Appeal as the issues she raised herein could only be brought by way of a cross-appeal.

DISPOSITION

28. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Appeal lodged on 16th November 2018 be and is hereby allowed as technically part of Ground of Appeal No (4) was merited. The effect of this is that the Ruling of the Learned Trial Magistrate that was delivered on 1st November 2018 be and is hereby set aside and/or vacated and that the orders of the Judgment delivered on 30th November 2021 shall remain in force until otherwise vacated and/or set aside on appeal.

29. As the matter herein involved a family, each party will bear its own costs of the Appeal herein.

30. It is so ordered.

DATE AND DELIVERED AT KISUMU THIS 24TH DAY OF NOVEMBER, 2021

J. KAMAU

JUDGE