



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 37 OF 2017**

**NA child suing through mother and next friend SHB.....APPELLANT**

**VERSUS**

**HOW.....RESPONDENT**

(An Appeal from the Judgement of the Hon. Y.I. Khatambi SRM delivered

on 30<sup>th</sup> June, 2017 in Malindi Children's Case No. 14 of 2014)

**JUDGEMENT**

1. The Appellant, NA., who is a child has brought this appeal through her mother and next friend SHB. The Respondent, HOW. is the father of the Appellant. The appeal is against the judgement delivered on 30<sup>th</sup> June, 2017 in Children's Case No. 14 of 2014 at Malindi Chief Magistrate's Court in which it was decreed that the Appellant pays Kshs.3,000 per month as maintenance for the Appellant. He was also ordered to pay half the school fees and provide medical cover for the Appellant. The custody, care and control of the Appellant was vested in the mother of the Appellant but the Respondent was given unlimited access to the Appellant.
2. In this appeal, the Appellant avers that the learned trial magistrate erred in failing to appreciate that her mother being in actual custody of her catered for other essential necessities such as washing, cooking and bringing her up; failing to appreciate that the Respondent's salary had been adjusted by his employer; failing to consider the current financial status and financial capability of the Appellant's mother; failing to consider the high cost of living; and giving undue consideration to the fact that the Respondent had gone back to school.
3. Consequently, the Appellant urges this court to set aside the judgment of the trial court and issue a reasonable maintenance order for her.
4. The appeal was argued through written submissions. Counsel for the Appellant submitted that the trial magistrate erred by failing to appreciate the fact that the mother of the Appellant was the one living with the child and had more duties including washing, cooking, assisting the child with homework and instilling moral values on her. It was submitted that the mother's role requires time and dedication.
5. It was also submitted for the Appellant that the trial court erred in directing her mother to contribute half the school fees yet she is in informal employment unlike the Respondent who is employed by the Kenya Police Service.
6. Further, that the mother of the child is the one who pays the rent for the house they occupy.
7. According to counsel for the Appellant, Kshs. 3,000 is inadequate for maintenance considering that the cost of living has gone up. The said amount, it is submitted, is not enough to ensure the child eats a balanced diet, dresses well and attends school without fail.
8. Finally, counsel for the Appellant submitted that the best interest of the minor is of paramount importance and the child's interests come before those of the Respondent who claims that his money is held up in his further education.
9. The Respondent who is unrepresented opposed the appeal through his written submissions dated 16<sup>th</sup> October, 2018. His case is that by asking for the custody of the minor, the mother of the Appellant must have appreciated that custody comes with certain responsibilities like cooking and washing. He submits that the trial magistrate equally divided the responsibilities to be executed by each parent and he has continued meeting his obligations without fail.
10. The Respondent asserted that the responsibility for maintenance of the Appellant is equally shared by both parents and the court having found that the maintenance towards the minor was Kshs. 6,000 had equally shared that responsibility between both parents.

11. The Respondent concluded that he earns a meagre salary and had taken a loan in order to enroll for further studies. According to him, there is nothing more to squeeze from his payslip.

12. This is a first appeal and the duty of this court is to look at the evidence afresh in order to arrive at its own independent decision. In doing so, the court is guided by the fact that unlike the trial court it did not have the opportunity of seeing and hearing the witnesses testify in order to gauge their demeanour.

13. The question for the determination of this court is whether the trial magistrate, based on the evidence that was adduced before her, made the correct order.

14. In making her decision, the trial magistrate cited the decision of this Court (H.A. Omondi, J) in **Malindi H.C. Civil Appeal No. 22 of 2007 Najma Ali Ahmed v Swaleh Rubea [2010] eKLR** wherein the principles applicable in determining maintenance were stated thus:

**“I dearly in arriving at what ought to be paid as maintenance for the child a court should consider;**

**a) the earning capacity, property and other financial resources of the parties.**

**b) their financial needs, obligations or responsibilities.**

**c) financial need of the child and the child’s current circumstances.**

**d) medical needs and education.**

**The over-riding factor being the welfare and best interest of the child as envisaged under the Children’s Act.”**

15. It is therefore clear that the trial magistrate appreciated the principles guiding the making of maintenance orders. The question is whether she correctly applied those principles to the facts of the case.

16. At the trial, the mother of the child testified as PW1 and told the court after she separated with the Respondent they held a meeting in which they agreed that he would pay Kshs. 3,000 per month towards maintenance of the child. The Respondent started well by paying the agreed amount before reducing it to Kshs. 1,000 per month and eventually stopping payments altogether. She told the court that the Respondent did not provide for the child and asked that she be awarded Kshs. 6,000 per month as maintenance. Cross-examined, she stated that Kshs. 3,000 was insufficient for maintaining the child.

17. The Respondent’s testimony was that save for three months in 2014 he faithfully delivered Kshs. 3,000 every month to the mother of the minor. His testimony was that the mother of the child had refused to take the child to school but he was ready to pay fees for the child. He stated that he could not afford to pay Kshs. 6,000 per month as maintenance. Cross-examined he insisted that he had been consistently making payments and was committed to his responsibilities as a parent.

18. In her judgement, the trial magistrate observed that even though the Respondent had taken a loan to further his studies that was not a reason for him to abandon his responsibilities. This is what she said:

**“It was his testimony that he has a wife and child and further that he is servicing a loan at a rate of Kshs. 15,000 which money he used to further his education. I am of the considered view that at the point of taking the said loan the plaintiff was aware of his parental responsibilities. The needs of the child cannot be held in abeyance as the defendant furthers his education. It is surprising to note that a defendant who claims to have a wife and child would attach his salary leaving less than a third. It is my considered view that before taking the said loan the plaintiff was aware of his responsibilities.”**

19. It is not therefore correct for the Appellant to accuse the trial magistrate of having given undue consideration to the fact that the Respondent had taken a loan to pursue further studies.

20. The trial magistrate was faced with the fact that the Respondent’s net pay was Kshs. 8,416.30 and he had a wife and a child to take care of. It is true that the mother of the Appellant shouldered other responsibilities like cooking and washing. This was balanced by the fact that the Respondent was directed to provide a medical cover for the child.

21. There was no evidence of the earnings of the mother of the child and neither was the issue that she paid rent for the house she lived in with the child placed before the trial court.

22. From the facts that were placed before the trial court, I find no reason to fault the trial magistrate for her decision. She appreciated the relevant legal principles and correctly applied them to the facts of the case. I therefore find this appeal without merit. The same is dismissed. Owing to the fact that the subject of this appeal touched on the welfare of a child, I direct each party to meet own costs of the appeal.

**Dated, signed and delivered at Malindi this 24<sup>th</sup> day of January, 2019.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**