



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVL APPEAL NO. 46 OF 2018

RJM.....APPELLANT

VERSUS

CK.....RESPONDENT

(Being an appeal from the judgment of the Honourable I. M Kahuya, RM, delivered on the 12th April, 2018 in Machakos Children’s Case No. 28 of 2017)

BETWEEN

CK..... APPELLANT

AND

RJM.....RESPONDENT

JUDGEMENT

1. This appeal arises from a Children’s Case which was instituted by the Respondent herein against the Appellant. In the said case, the Respondent who was suing as the mother and next friend of the minor, AW, pleaded that the Appellant herein was the father of the said minor, aged 7 years and that the said minor was conceived and born out of a relationship between the Appellant and the Respondent in 2008. According to the Respondent the said minor was born on 18th September, 2009.
2. Following the birth of the said minor, the appellant was notified of the need for him to take up his parental obligation and to provide for the minor but the Appellant refused to do so thus abdicating his said responsibility. The Respondent lamented that despite the Appellant having been approached to share the said responsibility, the Appellant only gave unfulfilled promises and sometimes became abusive and evasive. The Appellant also failed to honour the summons issued by the Children Department, Machakos.
3. It was the Respondent’s case that the minor, who is in standard three, needs proper teaching, parenting and moulding and since the Respondent is still a student, the minor is living with the Respondent’s relatives hence the Appellant ought to maintain the minor and foot or cater for his education and upkeep besides offering him parental affection.
4. It was pleaded that the Appellant is capable and a man of means hence ought to provide for maintenance, upkeep and related expenses for the minor.
5. The Respondent therefore sought an order that the legal and physical custody of the minor be vested with her; that the Appellant be ordered to pay a monthly maintenance and upkeep for the minor, house-help and food in the sum of Kshs 50,000.00 per month and to cater for the minor’s education and related expenses. She also sought for the costs of the suit.
6. In her evidence, the Respondent testified that she was a student at [Particulars Withheld] in Nairobi and that the Appellant used to be her boyfriend and as a result of the said relationship they sired the minor who by the time of the testimony was aged 7½ years old. She produced a copy of the birth certificate and stated that the minor was staying with her younger brother as well as her aunt. It was her testimony that the minor was studying at [Particulars Withheld] Academy and that the Appellant had declined to take up parental responsibilities for him yet he was a [Particulars Withheld] officer.

7. In support of her case, the Respondent produced the minor's admission letter and school fees invoice. It was her desire that the minor should study in a private school and she offered to assist in the payment of school fees. She however disclosed that there were cheaper schools than [Particulars Withheld] Academy. It was her prayer that she be given physical custody of the minor with visitation rights to the Appellant subject to earlier arrangements. She therefore sought monthly maintenance of Kshs 50,000.00 which would include school, monthly rent of Kshs 5,000.00 for a single room. She however averred that she was only able to cater for food, clothing and medical care.

8. In cross examination, the Respondent averred that the minor was then 8 years old and she had never been assisted by the Appellant in raising the minor though she has never been employed. She confirmed that she was aware that the Appellant had 2 other children. Referred to the Appellant's monthly pay of between Kshs 16,000.00 and 18,000.00, the Respondent denied that that was the true position. She reiterated that the minor was staying with her brother though it was her desire to stay with him hence her prayer for payment of rent. While she was aware that the Appellant was by then in Somalia, she stated that he was due to return in January, 2008.

9. In his defence, the Appellant admitted the existence of the relationship with the Respondent that gave rise to the birth of the minor. He however denied that he neglected his parental obligation as he was not aware of the said minor until he was sued. He averred that the same ought to be shared equally between both parents. He therefore disclosed that he was ready to cater for the minor's medical and education needs in a public school which is what he could afford by then and that the same could be reviewed after 6 months. He however prayed for unlimited access to the minor.

10. As regards his defence, the Appellant relied on his affidavit of means as well as his replying affidavit.

11. In his replying affidavit, the Appellant stated that he was unaware of the birth of the minor until the said suit was filed. He accordingly denied being the father of the minor as his name was not indicated in the birth certificate. According to him he was working with [Particulars Withheld] and was based in Somalia but could not provide for the minor. While he disclosed that he was ready and willing to take up his parental responsibility once it was proved that he was the biological father of the minor, he prayed that the same be shared between him and the Respondent equally.

12. It was his evidence that he could not afford the more than Kshs 50,000.00 the Respondent was seeking as he was solely relying on his employment and had a family with 2 children he was taking care of as he was the sole breadwinner. He disclosed that he could only afford to pay Kshs 3,000.00 per month towards the minor's upkeep.

13. In his affidavit of means, the Appellant disclosed that he was employed as a driver with [Particulars Withheld], based in Somalia earning a salary of Kshs 18,000.00 per month. He was also married with 2 children and was the sole breadwinner. His monthly expenses were Kshs 17,000.00. According to him, the Respondent was earning from her business. He reiterated that he could only afford Kshs 3,000.00 towards the minor's support.

14. In her judgement, the learned trial magistrate found that it was in the minor's interest that the Respondent be given her custody while the Appellant would be entitled to visitation rights and access to the minor. As regards maintenance, the learned trial magistrate was guided by section 90 of the Children Act and the fact that the Appellant had never provided for the minor since birth. She found that from the Appellant's payslip, he was earning a net pay of Kshs 14,758/- while in his statement, he admitted his earning as Kshs 18,000.00 implying that some deductions had been done away with. The court found that the bulk of his deductions were in respect of a loan hence the Appellant had other sources of income rather than his pay. It was found that these other sources of income were never disclosed. Since the Respondent was willing to provide for everything except for the minor's fees and shelter as well as medical costs, the Appellant was directed to provide for the minor's school fees in a mission/church-based institution while in primary and secondary school, but in respect of a public institution in the University. He was also ordered to pay for the minor's food and clothing in the sum of Kshs 7,000.00.

15. In this appeal it is contended that the learned trial magistrate erred in law and in fact in the manner she weighed the evidence adduced; by awarding Kshs 7,000.00 s monthly maintenance for the minor yet the appellant earns Kshs 14,000.00 and has other children to take care of; by ordering that apart from paying the monthly maintenance, he should cater for the education for the minor from his said salary.

16. In his submissions, the appellant relied on Article 53(1)(e) of the Constitution and section 90 of the **Children's Act** and contended that parental responsibility ought to be shared. While the appellant is expected to make adjustments regarding his budget to cater for the minor herein and his other children, it was submitted that this should not be unjust, unfair and or prejudicial to the other children. It was submitted that for the lower court to order the appellant to pay monthly maintenance of Kshs 7,000.00 in addition to catering for the minor's education it was unjust, unfair and prejudicial to the other minors from his marriage hence the said order ought to be reviewed, varied and or set aside.

17. This court was therefore called upon to examine and re-evaluate the evidence and findings of the trial court. It was submitted that taking into consideration the appellant's salary as well as his obligations, he should be ordered to pay Kshs 3,500.00 per month and that he should not be ordered to pay school fees and other related expenses as his monthly income cannot cater for this.

18. On behalf of the Respondent it was submitted that the appellant should maintain the minor in accordance with the standards of a military officer hence the court should confirm the judgement.

Determination

19. Section 4(2)(3) of the **Children Act** states the principle that ought to guide the courts in determining matters where the welfare of children is concerned by providing as follows:

***“4(2). In all actions concerning children whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the 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.

20. According to **Mumbi Ngugi, J** in **L.N.W vs. Attorney General & 3 Others [2016] eKLR:**

“The law must demand that fathers of children born outside marriage step up to the plate and take parental responsibility for their children.”

21. In this case the Appellant does not deny that he has parental responsibility. He is only contesting the extent of his said responsibility. That both the mother and the father have parental responsibility for the children whether born within or outside wedlock is not in doubt. However, in assessing the contribution to be made by the parties, it is my view that the factors which the court ought to take into account include the present and future assets, if determinable, income, and earning potential of the parties, taking into account their ages and professional qualification, the financial needs and obligations of the parties, their standard of living, the contributions or obligations of the parties to others for whom they are obliged to provide and the paramountcy of such obligations, and the conduct, where relevant, of each party.

22. In this case it is not in doubt that apart from the minor the subject of these proceedings, the Appellant herein was also obliged to provide for two other minors of his marriage. In determining the payment that the appellant ought to pay, the learned trial magistrate ought to have taken into account the appellant’s obligation to those other minors since just like the minor herein, their interests must similarly be taken into account.

23. In this case the learned trial magistrate found that the appellant may not have fully disclosed his source of income. Considering the learned trial magistrate’s reasoning in arriving at the said finding, I am not prepared to interfere therewith. Accordingly, I have no basis for interfering with the decision that the appellant pays Kshs 7,000.00 to cater for the minor’s food and clothing. As regards the fees, it is my view that the kind of education that the minor herein is entitled to be as far as practicable similar to that of the other two minors. Though the learned trial magistrate directed that the appellant caters for the minor herein’s education in a mission/church-based school, the court did not consider whether such fees would be within the amount that the appellant is capable of paying considering the needs of the minors.

24. This court appreciates that the learned trial magistrate was exercising a discretion. However, in **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231,** the same court held that:

“A Court will not interfere with the exercise of discretion unless it is satisfied that it is clearly wrong, because it has misdirected himself, or acted on matters which it should have not acted or failed to take into consideration matters which it should have considered and in so doing arrived at a wrong conclusion...Discretion must be exercised judicially and not arbitrarily or capriciously; nor should it be exercised on the basis of sentiment or sympathy.”

25. In other words an appellate court is justified in interfering with the exercise of discretion where it is satisfied that it is clearly wrong, because it has misdirected himself, or acted on matters which it should have not acted or failed to take into consideration matters which it should have considered and in so doing arrived at a wrong conclusion or where the discretion is exercised arbitrarily or capriciously or should it be exercised on the basis of sentiment or sympathy rather than judicially. Where the figure awarded is not based on the evidence, the exercise of discretion may well be arbitrary.

26. In this case without evidence that the appellant’s other children were going to similar school as the court directed, that decision was clearly not based on evidence. In the premises, I hereby set aside the said decision and direct that the appellant is obliged to cater for the minor’s education in accordance with the requirements in public schools in both primary and secondary schools. I must however state that in matters affecting children the doctrine of *res judicata* does not apply. As noted by **Muigai, J** in **A N M vs. P M N [2016] eKLR:**

“Res judicata is not applicable to children matters as it is not expressly provided for in Children's Act 2001. Practically, it behoves, parents, family community and society to support the child in growth and development up to the stage the child or young adult has ability to fend for himself/herself. Therefore, naturally there will be upcoming issues with regard to the child to safeguard the child’s interest.”

27. It therefore follows that if circumstances change or if the Respondent herein discovers that the other children of the appellant are being subjected to a differential treatment in a manner prejudicial to the minor herein, the Respondent would be at liberty to move the trial court for the variation of these orders. Similarly, if the conditions of the appellant change either favourably or otherwise, any of the parties is at liberty to move the court appropriately.

28. There will be no order as to costs considering the nature of this case being a children’s matter.

29. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 28th day of May, 2019

G V ODUNGA

JUDGE

Delivered the presence of:

Respondent in person

CA Geoffrey