



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 43 OF 2018

JND.....APPELLANT

VERSUS

MIN.....RESPONDENT

J U D G M E N T

A. Introduction

1. This is an appeal from the judgment of Embu Senior Resident Magistrate Children's Case No. 30 of 2017 whereas the respondent sued the appellant for the maintenance of the minor BVM on allegations that the appellant was the biological father to the minor. The DNA profiling by the government chemist confirmed that the appellant was the minor's father and as such the trial court proceeded to allow the orders that the defendant do pay maintenance of Kshs. 8,000/= per month until the minor attains school going age after which the appellant would then takeover school fees and all school related expenses.

2. Being aggrieved by the trial court's decision, the appellant filed his memorandum of appeal dated 23rd August 2018 that was based on eight grounds that can be summarised as follows;

a) *That the learned trial magistrate erred in law and fact by denying the appellant a fair trial as there was no proof of service upon the appellant and failing to consider that the appellant's failure to file his defence was because he was a lay person.*

b) *That the learned magistrate erred in law and fact when he ordered that the appellant pay an excessive amount of Kshs. 8,000/= as maintenance.*

c) *That the learned trial magistrate erred in law and fact when he failed to consider the fact that the respondent neglected the minor who was not in her custody.*

3. In rejoinder, the respondent filed her reply in which she stated that the trial court's decision was correct as the magistrate delivered a ruling in consideration of the best interest of the minor, that there was proper service upon the appellant and that she did not abandon the minor but was chased away by the appellant.

4. The parties agreed to file submissions to dispose of the matter.

B. Appellant's Submissions

5. It is submitted that the amount of Kshs. 8,000/= per month as maintenance was excessive especially since the minor was not of school going age and further as the appellant could not afford the same.

6. The appellant further submitted that he was never served with summons and this was fatal to the respondent's case. The appellant thus submits he was never accorded a fair trial.

7. The appellant further submits that that the respondent should not be paid maintenance as she was not in custody of the minor as she had neglected the said child.

C. Analysis & Determination

8. I have carefully considered the grounds of appeal, the record and the submissions of the appellant. I have also carefully perused the judgment of the trial court on the issues raised in this appeal.

9. It is the Appellant's case that he was never served with summons and thus he was never accorded a fair trial. Further, he alleges that the amount of Kshs. 8,000/= per month as maintenance was excessive especially since the minor was not of school going age and further as he could not afford the same and in any case the respondent should not have been granted custody of the minor as she abandoned the minor. In rejoinder, the respondent stated that there was proper service upon the appellant and that the trial magistrate's decision was proper as it was in the best interest of the child.

10. A perusal of the record reveals that at all times the appellant was aware of the proceedings herein and duly participated in the hearings. The appellant had opportunity to cross examine the respondent and duly did so, in fact during the course of the hearings, the appellant agreed to undertake DNA sampling so as to determine the paternity of the minor herein. It is thus clear that the appellant was duly accorded a fair trial.

11. Regarding the issue of maintenance which the appellant deems to be excessive, a reading of the relevant paragraph of the judgment of the Children's Court reveals that while the Court ordered the Appellant as father of the minor to provide Kshs. 8,000 per month for the minor and subsequently cater for the school fees and other school related expenses, the Court also directed that the respondent take care of utility bills, clothing, rent and medical expenses.

12. On the issue of custody, the Appellant submitted that the respondent abandoned the child and as such the court should not have ordered maintenance against him. The respondent on the other hand stated that she abandoned the child as she was chased away by the appellant. This was corroborated by the children's officer's report which stated that the respondent ran away from the appellant's as a result of fighting which arose after a disagreement with the appellant.

13. This court is alive to the fact that ordinarily, custody of children of tender years will often be granted to the mother of the children unless it is demonstrated that there are exceptional circumstances not to grant the orders in favor of the mother. In arriving at such a conclusion, the court must be guided by the principle of the best interest of the child which is paramount as provided under Article 53 of the Constitution and Section 4(3) of the Children Act. The custody orders were therefore issued for the benefit of the children. It is imperative to note that the children's officer had recommended that the custody of the minor be given to the respondent.

14. It is evident from the judgment that the presiding magistrate was cognizant of the provisions of Article 53 of the Constitution and was properly guided thereby, when he made his determination to grant custody to the Respondent in line with the best interest of the children.

15. The evidence of the respondent in her affidavit was that she was not employed and could not afford to maintain the child by herself. In his evidence, the appellant said he is a businessman at [Particulars Withheld] and also serves as the chairman of the traders at the same town. Although he did not state what his income was in his evidence, his evidence on his daily engagement shows that he earns reasonable income from which he can afford to support his own child. The appellant did not dispute the fact that the respondent is jobless.

16. In considering the needs of the minor which include, food, clothing, medical expenses, entertainment among others, I find that contribution of Kshs. 8,000/= monthly is less than adequate. However, the income of the appellant and his responsibilities were not canvassed in the trial court. The respondent in her pleadings put it at Kshs. 20,000/= a month. The appellant had an opportunity to dispute it if it was incorrect but he did not do so in his testimony before the court. For those reasons, I do not wish to disturb the decision of the magistrate on the contribution.

17. As for the respondent, she may not be in gainful employment but I have reason to believe that she must be engaging in some income earning activity to maintain herself and her child as she waits upon the appellant to take up his part of the responsibility. It is the respondent who has provided shelter and basic needs for the minor since she separated with the appellant. As such, the respondent as a parent is meeting her obligation to contribute to the maintenance of the minor.

18. I have perused the proceedings of the trial court and noted that each of the parties was heard before the final decision was made. In my considered view, this is the most important part of the trial where the court hears both parties. The appellant states he was never served with the summons to enter appearance. However, he does not explain how he came to know that there was a case against him in court for him to attend,

19. I have perused the original file and noted that the parties were before the children's officer on related matters before the court case was filed. There were even criminal cases between the parties that are mentioned in this case.

20. I come to the conclusion that for the appellant to attend court and give his evidence, he must have been fully notified of this case. The court fully heard him and he was given a chance to cross-examine the respondent. For these reasons, I am not persuaded that the appellant was not accorded a fair hearing.

21. It is my considered view that the appellant has not satisfied this court on any of the grounds of appeal. I find that this appeal has no merit and I dismiss it with costs to the respondent.

22. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 25TH DAY OF NOVEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Kassim for Andande for Appellant

Respondent present