



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 100 OF 2015**

**NNM.....APPELLANT**

**VERSUS**

**GKN.....RESPONDENT**

***(Being an appeal from the Ruling of the Honorable Resident Magistrate Z.W. Gichana delivered on the 24<sup>th</sup> September, 2015 in Nairobi Children's Case No. 831 of 2010)***

**JUDGMENT**

1. In a ruling delivered on 24<sup>th</sup> September, 2015 following an application for review of orders made on 7<sup>th</sup> October, 2013 by the Children's Court at Nairobi in Children's case number 831 of 2010 the Court made orders for adjusting the maintenance by the respondent/father from Kshs. 12,000 per month to Kshs. 25,000 per month, being part contribution towards the upkeep and to provide for the school fees and related expenses of the child. The Applicant/mother was to take care of the child's medical care needs through a medical cover whenever circumstances so demand and other accruing expenses. The respondent/father was to have reasonable access to the child on the terms to be agreed upon between the parties.
2. The Appellant being dissatisfied with that decision approached this court by way of a Memorandum of Appeal dated 5<sup>th</sup> December, 2015 and filed on 5<sup>th</sup> October, 2015.
3. In his grounds of appeal, the Appellant argues that the presiding magistrate misdirected herself in reviewing her judgment and increasing the monthly maintenance from Kshs. 12,000 per month to Kshs. 25,000. This was despite a lack of evidence to show that his salary had improved. Further, that in reviewing the monthly maintenance upwards, the Appellant was likely to withdraw the minor from her current school and enroll her to a less expensive school which will likely affect the education of the child. The Appellant is asking the court to set aside the ruling of the Children's Court in the interest of justice and order that he continues paying monthly maintenance of Ksh. 12,000.
4. The appeal came up for hearing on 10<sup>th</sup> November, 2019 where upon application by Counsel for the Appellant the court directed that the appeal be disposed of by way of oral submissions. It was the Appellant's case that the learned presiding magistrate reviewed the maintenance orders upwards without having a full picture of the financial position of the Appellant. It was submitted that claims by the respondent that he was in a better financial position to provide more were far-fetched and that the presiding magistrate relied on copies of logbooks of motor vehicles bearing the name of the Appellant and financiers to show improved financial status. This was despite the fact that he was still servicing loans for the vehicles and that in any case the said motor vehicles are no longer in existence.
5. The Appellant challenged the claims by the respondent that he was operating 25 bank accounts stating that there was no evidence presented to ascertain these claims. He also questioned the authenticity of the respondent's pay slip which indicated that she only earned Kshs. 45,000 per month and did not indicate house allowance as part of her income. The Appellant submitted that his monthly salary is Kshs 73,880 with which he is supposed to take care of seven children including the respondent's child. He emphasized that he had never abdicated his parental responsibility asserting that when possible he sends an extra Kshs. 5,000 in maintenance. He urged the court to consider his income and not to rely on hearsay evidence.
6. The respondent who was acting in person opposed the Appellant's arguments. She argued that the needs of the child have increased since the order to pay Kshs. 12,000 in child maintenance was made. She asserted that she caters for all the other needs of the child not catered for by the Appellant. She denied claims that the Appellant had seven children stating that she only knew of five biological children with the other two being subject of a custody case. The respondent stated that the Appellant had sold the motor vehicles referred to and opened up other businesses at the time of the hearing of this Appeal. She challenged the Appellant to show how he could afford to take all his children to [particulars withheld]Group of Schools and pay school fees of up to Kshs. 108,000 per term with a monthly salary of Kshs. 73,880 if he had no other source of income She accused the appellant of making sporadic payments and failing to cater for school uniforms and other relevant school expenses. She urged the court to dismiss the Appeal.
7. This court has carefully considered the appeal herein, the grounds proffered, the submissions by the parties and the orders appealed

against. This court is alive to the fact that it did not hear the witnesses testify or observe the in demeanor, and therefore should be slow to reverse the trial court's decision. It is however not lost on this court that a first appeal is in a way a retrial. The court must therefore consider the evidence, evaluate it itself and draw its own conclusion. In the case of **Peters vs Sunday Posts Ltd[1958] E.A. 424** at pg 429; the Court of Appeal rendered itself thus:

***“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.”***

8. This court is obligated under Section 4 (3) of the Children Act while considering any disputed matters involving children to give primacy to the best interest of children. This is in consonance with Article 53(2) of the Constitution which states:-

**“A child’s best interests are of paramount importance in every matter concerning the child.”**

On the main issue of maintenance, the provisions of Article 53 (1) (e) of the Constitution of Kenya provides the guiding principles as follows:

**“Every child has the right to parental care and protection, which includes equal responsibility of the mother and the father to provide for the child, whether they are married to each other or not”**

9. Both the father and mother of a child have an equal responsibility to provide parental care and protection which is the right of every child under **Article 53(1) (e)**. As Kimaru J observed in **CIN Vs JNN [2014] eKLR**:

**“It will not do [for a party] to say that she has an uncertain source of income and therefore the responsibility of maintaining the children should only be borne by the adverse party. The (said) party must establish, to the satisfaction of the court, that she has also made effort to provide for the upkeep of the children.”**

10. However, equal responsibility does not mean equal and similar contribution as the income of each parent, and other non-monetary contribution must be borne in mind. There is undisputed evidence that the Appellant and the Respondent herein are in formal employment. The Appellant claimed that he earned Kshs. 73,880 per month and the respondent claimed that she earned Kshs. 45,000 per month. Out of this sum, the Appellant proposed to remit Kshs. 12,000 per month as maintenance and pay school fees and other related expenses as the the court had earlier determined. The respondent sought an increase in the monthly contribution due to the improved financial status of the Appellant.

11. After evaluating the evidence and taking the necessary factors into consideration, the learned magistrate opined in her ruling that Kshs.25,000 would be the appellant’s share of contribution since there had been undeniable inflation and his means of income had improved since judgment was entered in 2013. In reviewing the amount upwards, the learned magistrate noted that the Appellant had chosen not to reveal to the court his means or expenditure although the court had directed that an affidavit be filed to that end.

12. It is evident from the ruling that the presiding magistrate was cognisant of the provisions of **Article 53(1) (e)** of the Constitution and was properly guided thereby, when she made her determination. I also note that the basis of the decision on maintenance was the level of incomes of each parent and their respective other financial responsibilities. Having taken all this into consideration, I see no legitimate reason to interfere with the in which the presiding magistrate apportioned the financial responsibility.

13. Considering the circumstance of this case in totality, I find no reason to interfere with the pronouncement of the presiding magistrate on the maintenance order made. The appeal is therefore found to be lacking in merit and is dismissed with costs to the respondent.

**SIGNED DATED AND DELIVERED IN OPEN COURT THIS 18<sup>TH</sup> DAY OF DECEMBER, 2019.**

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**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of.....Advocate for the Appellant**

**In the presence of .....Advocate for the Respondent**