



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO.1 OF 2017

A A J.....APPELLANT

VERSUS

A A (Suing thro' M M.....RESPONDENT

*(From the original Civil Suit child No.20 of 2014 of Principal Magistrate's Court Marsabit)*

JUDGEMENT

The respondent filed a children case before the trial court seeking parental responsibility, custody of the issue of their marriage and monthly maintenance to the extent of Ksh.50,000 per month. The trial court delivered its judgment on the 12.1.2017. The court ordered the appellant to meet the educational and medical needs of the child and also to ensure that the child is covered under the appellant's medical scheme. The appellant is also to meet the clothing, entertainment and rental needs of the child. The custody of the child was given to the respondent and the appellant was allowed access to the child.

The appellant was not satisfied with that decision and filed this appeal based on the following grounds.

- 1. The Learned Honourable Magistrate erred in law and in fact in ordering for monthly maintenance of Ksh.25,000/= without considering the financial status of the appellant.***
- 2. The Honourable learned Magistrate further erred in law and in fact in ordering the appellant to meet the educational and medical expenses of the minor without specifying the purpose of the Kshs.25,000/- payable per month to the respondent.***
- 3. That the judgement of the learned Honourable Magistrate is ambiguous and cannot be easily comprehended.***
- 4. That the whole judgement is against the weight of the evidence tendered before the honourable Magistrate.***

Mr. Ondieki appeared for the appellant. Counsel submit that the trial court ordered the appellant to pay Ksh.25,000 monthly to the respondent. That amount is to be paid to the respondent's bank account. The order is not specific as to who will be operating the account on behalf of the minor. It is not clear whether the payment will be future investment or whether both parties are to contribute to the account. On top of that the appellant was ordered to meet school fees, all medical needs of the minor, rental and clothing needs. The trial court shared the responsibilities. One cannot invest for a minor if he is not capable. The trial court did not consider the appellant's earnings before arriving at the sum of Ksh25,000/=. The appellant is a Police officer of ordinary rank earning Ksh.36,000/= monthly. It is the respondent who alleged that the appellant was earning more than ksh100,000 without any supporting evidence. A payslip for June 2015 was produced in Court and it confirmed that the appellant earns Ksh.36,000 per month. The trial court did not examine the appellant's means. It is submitted that the orders of the trial court will incapacitate the appellant who has other children. The appellant is ready to meet all the educational and medical needs of the minor. It will be an extra burden if the appellant is to pay a further sum of Ksh.25,000 monthly. This is an error since the trial court shared responsibilities. It will not be equitable if only one party takes the responsibility of the child minus the other party. The order of Ksh.25,000 should be done away with and each party continue with the responsibilities shared by the trial court. The judgement of the trial court is against the weight of the evidence.

Mr. Biwott appeared for the respondent. It is submitted that whereas the respondent testified, the appellant did not testify yet he was present in court. He relied on his defence. He was represented by an advocate. The sum on Ksh.25,000 was arrived at as a result of the evidence of the respondent. The appellant was ordered to file an affidavit of means but declined. The appellant works with [particulars withheld] and had he provided the affidavit of means the court could have been guided. The court went ahead to award Ksh25,000. The respondent is a house wife and is not working. The trial court apportioned her responsibilities. The appellant earns more than Ksh.36,000 month. The payslip that was provided is not the correct one. The appellant declined to provide the proper payslip. According to the respondent, the appellant has only one other child and not four. He was asked to provide proof of the other children but did not. The evidence of the

respondent was not challenged.

This is a first appeal and the court is duty bound to re-evaluate the evidence and make its own conclusion. **PW1 M M** testified that she is the mother of the child. She is the mother of the child and was married to the appellant. It was her evidence that she is not employed. The child requires food, clothing and shelter. The appellant has never seen the child and did not bother to find out how the child was doing. It is her evidence that they were living well as the appellant is earning about Ksh.100,000 monthly. He also has a rental apartment which is an extra source of income. The appellant is able to provide for the child. The parties had filed a divorce case before the Kadhi's court. She prayed for a monthly maintenance for the child of Ksh.50,000. She helps her mother in a grocery shop. The two got married in 2014. She also prayed for medical expenses. The child has been sickly and the appellant took away the medical card from her.

The appellant testified that the respondent was his wife. They had a child born on 31.8.2007. They were divorced in 2007 after the birth of the child. He works with [particulars withheld] in Nairobi. He has since remarried after the divorce. He has four children out of the new marriage. Two of the children are in school. One is in baby class while the other one is in nursery. He gave the dates when the other children were born as 12.2.2009 (baby girl), 5.8.2011 (baby boy), 17.4.2013(baby girl) and 3.1.2015(baby girl). He stays with his family in his house which is under tenant purchase scheme and he is expected to pay Ksh.908,000 yearly. He has not finished paying for the house. The last time he saw the child with the respondent was in April 2014 when he returned the child at the Kadhi's court as the respondent demanded for the child. He was living with the child from 2010 to April 2014. The child had joined a pre-unit class in 2013 but left in 2014. The child had good progress in school. The child has a full medical cover and does not need money for medical fees. He is paying the school fees. His net salary is Ksh.36,000.

From the grounds of appeal, and the submission by the appellant's Counsel, it is clear that the appellant is mainly contesting the order requiring him to pay Ksh.25,000 monthly into the account. The child was seven years old when the plaint was filed in 2014. The judgment of the trial court made the following order:

- 1. The defendant to pay Ksh.25,000 per month for maintenance**
- 2. The above amount to be paid in a bank account to be opened for and operated for the benefit of the issue.**
- 3. The defendant shall meet the educational and medical needs of the issue as and when they arise and shall ensure that the child is covered under his medical scheme.**
- 4. Plaintiff shall have custody of the child and the defendant has right of access.**
- 5. The plaintiff shall meet the clothing, entertainment and rental needs of the issue.**

Counsel for the appellant contends that the trial Court shared out the responsibilities for each parent. The order for Ksh.25,000 monthly is not necessary. On the other hand, Mr. Biwott maintains that the appellant failed to provide proof of his means. That is why the trial Court estimated the figure of Ksh.25,000.

The record of the trial court shows that the sum of Ksh.25,000 was made under the sub-heading of maintenance. Contrary to Mr. Biwott's contentions, the birth certificates for the appellant's other children are in the trial Court's file. The first child was born on 12.2.2009. The second one on 5.9.2011 and the third one on 17.4.2013. The birth certificate for the 4<sup>th</sup> child is not in the file and it seems the child was born after the case was filed. According to the appellant, the 4<sup>th</sup> child was born on 3.1.2015. There is enough evidence that the appellant has other children.

The main issue before the trial court was how the child was to be maintained. The appellant was living with the child before he was ordered to surrender him to the respondent. Maintenance entails financial support to someone with a view to enabling him cater for his/her daily needs. In this case, the maintenance involved is not that of the respondent but that of the child.

According to the respondent, the appellant is earning over Ksh.100,000 monthly. In her evidence before the trial court she stated that she believes the appellant earns about Ksh.200,000 month.. There is no formula set by the law to determine how much should the court award in terms of maintenance. All what the Court has to consider is the circumstances of the case. There is evidence that the appellant has four other children. This gives a total of five children. If one child is to be allocated Ksh.25,000 monthly, that would give a total of Ksh.125,000. This is above the sum of Ksh.100,000 the appellant is said to earn. Further, the appellant has a wife and has to pay school fees for the other five children. He has to cater for his personal needs. The court should not simply consider the interest of the children in maintenance cases and close its eyes on the needs of the parent who is expected to cater for the children. The parent also has his/her own personal needs.

Assuming we go by the respondent's position that the appellant has only one other child. At the rate of Ksh.25,000 per child, this makes a total of Ksh.50,000. If the wife is to be allocated another Ksh.25,000 then the appellant will be left with about Ksh.25,000. That is assuming that he earns Ksh.100,000 monthly. The judgement of the trial court ordered the appellant to meet the child's educational needs and medical needs. The rental expenses for the child is to be met by the defendant as well as his clothing. All what remains is the food for the child. I am satisfied that the extra sum of Ksh.25,000 monthly for the child is quite excessive. It is not the duty of the Court to burden parents with heavy maintenance expenses which visibly amounts to pampering the child. Ksh.25,000 monthly is equivalent to the monthly salary of many Kenyans. The child's education and medical care is already provided for. The child's rental, entertainment and clothing is also already catered for. He does not require a further Ksh.25,000 monthly from a parent who has other children.

I am satisfied that the appeal is merited. I do find that the sum of Ksh.25,000 monthly is quite excessive. The appellant is currently paying ksh.7000 monthly. I do find that Ksh.7000 monthly is quite fair and will sufficiently provide for the child's food.

The upshot is that the appeal is allowed. The order of the trial court requiring the appellant to pay Ksh.25,000 monthly to a bank account is

hereby set aside. It is replaced with monthly payment of Ksh.7000/=. This amount can be paid directly to the respondent or to a bank account agreed between the parties. Parties shall meet their own respective costs of the appeal.

**Dated, Signed and Delivered at Marsabit this 18<sup>th</sup> day of April 2018**

**S. CHITEMBWE**

**JUDGE**