



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 35 OF 2017**

**D K M (Suing as mother and next of friend of R A M).....APPELLANT**

**V E R S U S**

**F M M.....RESPONDENT**

**J U D G M E N T**

1. The appellant was aggrieved by the judgment of Embu Senior Resident Magistrate in children's case No. 26 of 2017. The learned magistrate dismissed the application of the appellant which sought seeking for orders that the respondent be ordered to pay maintenance for minor R A M at the rate of Kshs.32,000/= per month.

2. The appellant's lists about nine grounds which may be condensed as follows:-

(i) That the learned magistrate erred in failing to take into consideration the evidence and submissions of the appellant.

(ii) That the magistrate erred in finding that the respondent was not responsible to provide maintenance for the minor R A M.

(iii) That the magistrate erred in failing to find that both the appellant and the respondent had equal responsibilities of maintaining the child thus leaving the appellant to bear the burden solely.

3. The evidence of the appellant was that the respondent had willingly refused to contribute to the maintenance of the minor. The appellant said her income was about Kshs.10,000/= per month from her job as a sales lady with [particulars withheld] Embu while the respondent's income was around Kshs.200,000/=. In her affidavit of means, the appellant computed the monthly expenditure of the child including food, clothing, entertainment, house-help wages, house rent as a total of Kshs.33,000/=. The school fees payment was to commence in January 2018 and was not a part of this application.

4. The appellant is the mother of the minor while the respondent is the father. It was her case that the respondent is a man of means whereas she is woman of straw with a meagre income of about Kshs.10,000/=. The respondent had been summoned by the Children's Officer on the issue of maintenance of the minor but refused to positively to the arrangement between the parties.

5. The respondent opposed the application and said the minor is only aged two (2) years and that the list of financial expenses outlined were an exaggeration. He deposes that when the appellant left home, he was left with their two older children aged 20 and 7 years respectively namely M K and B M. The first child M is at [particulars withheld] University while the second one B is in standard 2 at [particulars withheld] Primary School. The respondent solely maintains and pays school fees for the two children. He says he is ready and willing to contribute only Kshs.7,000/= towards the maintenance of the minor.

6. It was argued that parental responsibility is shared between the parents and it is appropriate that the appellant who is in gainful employment be ordered to do her part of the bargain. It would be punitive for him to be ordered to pay Kshs.32,000/= per month given that his income as a [particulars withheld] is only Kshs.20,000/= and that he solely maintains and educates the two older children.

7. In support of their arguments, the parties filed submissions which have been given due consideration herein.

8. The issues for determination in this appeal is whether the learned magistrate erred in dismissing the application dated 29/05/2017 which translated into absolving the respondent from responsibility of maintaining the minor R A M.

9. The relevant law in this case is Article 53(1) of the Constitution and Sections 90 of the Children's Act.

10. Article 53(1)(e) provides:-

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

11. Section 90 of the Children's Act provides that:-

*...unless the court otherwise directs and subject to any financial contribution ordered to be made by any other person, the following presumption shall apply:-*

*(a) Where the parents of a child were married to each other at the time of the birth of the child and are both living, the duty to maintain a child shall be their joint responsibility.*

12. The law is very clear that the responsibility over a child is a shared responsibility by both parents. The parties in their submissions have articulated to these provisions and their only difference is the income of each parent and the responsibility being undertaken by the responsibility currently.

13. The learned magistrate in his judgment rightly appreciated the provisions of the law. However, the reasoning that led to his finding was that the respondent was maintaining and educating two other children in his custody namely M K and B M. The appellant had the responsibility to maintain the minor for she had no other responsibility.

14. As for the income of the parties, it is important that this aspect be taken into consideration. The appellant said that the respondent works as a [particulars withheld] officer which he admitted in his pleadings. He did not disclose his job earning. The appellant said that the respondent owns an [particulars withheld] shop at Chuka which gives him further income. This was not denied by the respondent. With his job as a [particulars withheld] as he called it and his [particulars withheld] business, the monthly income of Kshs. 200,000/= was not far fetched.

15. The appellant's occupation was that of a sales lady at a [particulars withheld] in Embu with a monthly income of Kshs.10,000/=.

16. The trial court believed the parties on the extent of their income of Kshs.200,000/= and Kshs.10,000/= respectively. The issue of the amount of income of the parties is not an issue in this appeal.

17. The parties admitted that they have two other children staying with the respondent. The respondent claimed he maintains and pays school fees for the two older children. For the minor in this appeal, the respondent had abdicated responsibility in that he did not claim to have been providing for her. However during the hearing of the case, the respondent offered to pay Kshs.7,000/= a month which he felt he could afford bearing in mind that he bore responsibility of the other two children.

18. The magistrate said that the respondent had enough responsibility and that he could only pay the Kshs.7,000/= for the minor if he wished to do so. It is my considered opinion that this was a misdirection on part of the magistrate. The minor is a child of the parties in this case and ought to be maintained by both parents. The sharing of responsibility ought to be apportioned according to the needs of the child and the income of each party.

19. The respondent argued that the expenses were exaggerated to Kshs.33,000/= a month but did not give a figure of what he thought was reasonable. The listed items include the house girl wages of Kshs.5,000/=, Kshs.10,000/= for food, Kshs.4,000/= for utility bills, house rent of Kshs.10,000/= and Kshs.4,000/= for entertainment.

20. The minor was aged about two years and not of school going age. As such school fees was not required.

21. The appellant is working and should be in a position to maintain herself by way of paying rent and utility bills. She should also provide her own food and clothing. These provisions should also support the minor in way of shelter, food and clothing. The respondent is providing similar facilities for himself and the two children.

22. Considering the tender age of the minor, a house help would be needed to take care of her. The wages of Kshs.5,000/= is reasonable. The minor need entertainment, medical expenses from time to time which the appellant has been providing on her own. These expenses all inclusive may be computed at Kshs.20,000/= a month which the parents ought to share based on their income.

23. It is my finding that the learned magistrate erred in finding that the minor was not entitled to any maintenance from the respondent. It was a misdirection to dismiss the application and disregard the maintenance needs of the child as provided for by the law.

24. I hereby find that it is fair sharing of responsibility for the respondent to pay Kshs.15,000/= monthly while the appellant provides Kshs.5,000/= per month.

25. In essence, I allow this appeal and set aside the ruling of the learned magistrate.

26. The application dated 29/05/2015 is hereby allowed in the foregoing terms.

27. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF MAY, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Ngithi for Ithiga for Respondent**

**Mr. Andande for Muthoni Ndeke for Applicant**