



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO.32 OF 2016

JNN APPELLANT

VERSUS

WWM RESPONDENT

(Being an appeal from the Ruling and Orders of Hon. M.N. Gicheru Chief Magistrate in Children case No.20 of 2015 at Embu Law Courts)

JUDGMENT

This appeal is against the ruling of the trial court of 9th May, 2016. The trial court ordered the appellant to be paying Ksh.4000 monthly towards the upkeep of their children. The grounds of appeal are:-

- 1. That the learned Chief Magistrate erred in law and fact in holding that the Appellant has a regular income.***
- 2. That the learned Chief Magistrate erred in law and fact in failing to appreciate the fact that both parents had equal parental responsibility towards the children.***
- 3. The learned Chief magistrate erred in law and fact in failing to consider and analyze the evidence on record tendered by the Appellant.***
- 4. The learned Chief Magistrate erred in law and fact in holding that the amount ordered to be paid was subject to-review upwards after every six months.***
- 5. The learned chief magistrate erred in law and fact in failing to find that the Appellant had gone out of his way to provide for the children***

Mr. Andande appeared for the appellant. Counsel submit that the trial Court erred by holding that the appellant had a regular income. Evidence was tendered which confirmed that the appellant's net income was Ksh.9,851/60. The trial Court went ahead and ordered the appellant to make a monthly payment of Ksh.4000 for food every month. This is almost a half of the appellant's earnings. It is further

submitted that parents have equal responsibilities to provide under Article 53(I)(f) of the Constitution. Heavy burden was placed on the appellant who is also paying school fees. The trial Court failed to analyze the evidence on record. The appellant produced receipts as proof that he used to purchase food items. The order that the monthly payments be reviewed upwards after every six (6) months is unfair. The appellant has huge responsibilities.

The respondent contends that the appellant has a regular income as he is an assistant chief. The net salary of Ksh.9,851/60 is due to huge loans taken by the appellant. The school fees per term is only Ksh.7,500 making a yearly total of Ksh.22,500. It is submitted that the responsibilities were fairly distributed. She pays house rent, water and electricity bills and other unforeseen expenses. The appellant stated in his own affidavit that his time frame to provide food for the minors was over.

I have gone through the record of the trial court. The dispute has been mentioned in Court several times. The respondent filed the original suit seeking maintenance for three children. In his defence dated 21st may, 2015 the appellant admitted fatherhood to two children. The two children were aged four and two years respectively. The respondent is living with the children. Several orders have been made by the trial court. The respondent filed a notice to show cause alleging that the appellant was not complying with the court orders. He was paying school fees but not providing food. The orders of the trial Court which are the subject of the appeal are that the appellant provided for fees but failed to provide for adequate food. He was ordered to pay Ksh.4000 monthly on top of the school fees.

The issue for determination is whether the orders of the Court are unfair. The contention that the trial Court erred by holding that the appellant has a regular income is misplaced. The appellant is an assistant Chief and gets a monthly income. That is regular income.

The children seem to be in Pre-primary school. The school fees paid as per the respondent's submission is only Ksh.22,500 yearly. The fee schedule for the school is attached to the respondent's submission. It is established that each child pays about ksh.3,900 per term. This translates to about Ksh.12,000 yearly for each child and Ksh.24,000 yearly for both children.

The appellant produced his payslip. His total pay is Ksh.30,089 before tax. The total taxes including NHIF is less than ksh.5000. This gives him a net balance of about Ksh.25,000. He is paying loans of Ksh.13,000 to Equity bank and contributing Ksh.2000 to his Sacco.

The dispute involves the monthly payment of Ksh.4000/=. Since the respondent is catering for shelter and other expenses, I do find that the order of the trial Court is fair. Even if shelter is provided by the respondent's mother, it is still the respondent who is responsible for that shelter. The appellant cannot just pay the termly school fees and leave all the other responsibilities to the respondent. The children are young girls and are under the custody of the respondent. Ksh.2000 per child for food monthly cannot be held to be excessive. I do not see any logic in the appellant's complaint. I am certain that if the appellant was living with the children he would be spending more than Ksh.2000 monthly per child.

Given the nature of the appeal, I do find that the same is unfounded. The contention that the half yearly review is unfair is also misplaced. The children are growing and should there be need to increase the monthly payment, the trial court will evaluate the request and deal with it on its own merit. An upward review should not be automatic. The court will equally consider the appellant's financial status.

In the end, I do find that the appeal lacks merit and is hereby dismissed. Parties shall meet their respective costs this being a dispute

involving maintainance of the their children.

Dated and signed at Marsabit this Day of July, 2018

S. CHITEMBWE

JUDGE

Dated, signed and delivered at Embu this 3rd day of August, 2018

F. MUCHEMI

JUDGE