



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION, MILIMANI LAW COURTS
CIVIL APPEAL NO.72 OF 2012

N KAPPELLANT

-VERSUS-

A W KRESPONDENT

*(An Appeal from the judgment /Ruling of the Resident Magistrate D. K. Kuto dated the 2nd October, 2011
in the Children's Court Cause No. 210 of 2011)*

In

CHILDREN CAUSE IN 210 OF 2011

BETWEEN

V K (Suing through next of friend)

A W KPLAINTIFF

AND

N K.....DEFENDANT

JUDGMENT

Background

1. The above appeal arose from the decision of Resident Magistrate Mr. Kuto delivered on 2nd October 2011 in Children's Case No. 210 of 2011 at Nairobi. The Respondent who was the Plaintiff then, came to court seeking a declaration that the Appellant who was the Defendant has parental responsibility for the issue of the relationship. She also sought orders vesting the legal custody of the said issue upon the Respondent and granting unlimited access to the Appellant. She further sought a maintenance order requiring the Appellant to make periodic financial payment as the court would deem fit, to the Appellant towards the maintenance of the said issue.

2. The Appellant filed a defence on the 8th September, 2011 praying that the Respondent's suit against him be dismissed with costs. The suit proceeded for hearing on diverse dates between the year's 2011 and 2012 culminating in the judgment of 2nd October, 2012, in which Mr. Kuto made orders granting the Respondent actual custody, care and control of the child in issue and joint legal custody to both parties.
3. The Appellant was granted reasonable access to the child and was to continue meeting fees and related expenses for the child. Both parties would meet the child's medical expenses using their respective medical covers and in addition, the Appellant would remit Kshs.25,000/= per month to the Respondent, for the child's general maintenance and up keep. The money for maintenance was to be paid on the 8th of each month with effect from October 2012. It is these orders of the court that provoked this appeal.

Grounds of Appeal

4. The grounds of the appeal filed on 17th September 2013 are that the learned trial magistrate erred in law and fact in arriving at a monthly sum of Kshs.25,000/= in maintenance to be paid by the appellant, without taking into consideration the evidence adduced by both sides during the trial. Secondly, that no authority or basis for a monthly sum of Kshs. 25,000/= was given. Thirdly, that the court erred by leaving it to the parties to determine the issue of visitation and lastly, that the court failed to consider that the Respondent earned income from three different sources when it apportioned the financial responsibility.
5. Simultaneously with the appeal in the High Court, the Appellant also filed an application in the lower court under certificate of urgency, seeking orders that the execution of and all proceedings to enforce the judgment delivered on 2nd October 2012 be stayed, pending the hearing and determination of this appeal. The court granted the application on condition that the Appellant immediately sets down the appeal for hearing and that he also continues to pay school fees and related expenses, together with a monthly maintenance of Kshs.15,000/= for the minor with effect from April 2013.

Issues for determination

6. By the consent of the parties the appeal was disposed of by way of written submissions. The firm of Avedi & Co, Advocates appeared for the Appellant while the firm of Musyoka Mogaka & Co. Advocates appeared for the Respondent. Upon perusal of the oral arguments in the said submissions I distilled two issues for determination. The first is whether the contribution of Kshs.25,000/= towards the maintenance of the child of the relationship as ordered by the lower court, ought to be interfered with in the appellant's favour and the second is whether there is need for the court to make orders on a structured right of visitation of the minor by the Appellant.

7. Appellant's case

On the issue of maintenance it was submitted for the Appellant that the Respondent had two other streams of income besides her job at *[particulars withheld]* Co. Ltd, which income the court did not take into account when it ordered the Appellant to pay monthly maintenance of Kshs.25,000/= for the minor. It was also argued that the Respondent had manifestly exaggerated her monthly rental and living expenses; that the appellant was the sole breadwinner for the two children of his marriage, their mother having demised from cancer. That the Appellant had been solely responsible for the expenses of caring for his cancer stricken wife before her demise.

8. The appellant further urged that there was no basis, formula or authority relied upon by the presiding magistrate, to arrive at his decision, on the amount payable for maintenance and he considers this be a traversity of justice visited upon him by the court.

9. On the right to visitation, the Appellant appears to have been aggrieved by what he terms as the court's decision to leave the question of visitation of the child by the appellant, to the two parties to work out. He set this out as one of the grounds of appeal. He however did not advance any submission thereon.

Respondent's Case

10. The Respondent on the other hand, contended that during the proceedings in the trial court, the issue of the needs of the minor was greatly canvassed by both parties and the court gave cognizance thereto in arriving at a decision. That all along the Appellant was solely responsible for the maintenance of his family, since his wife was unemployed and ailing from cancer and therefore, the unfortunate passing of his wife leaving him to fend for the children alone does not change anything. That the Appellant who told the court that he had a medical cover did not state whether the said medical cover was depleted or did not extend to his wife, to convince the court that his financial resources had been strained due to the care he had to provide for his ailing wife.
11. The Respondent maintained that the Appellant provided no proof that he was indeed married to the woman he referred to as his wife, or that he had other children he was taking care of, nor did he provide proof of the other jobs he said brought the Respondent extra income. It is the Respondent's assertion that the Appellant told the trial court that he earned a gross salary of Kshs.313,950/= and lived in his own house and that he used to pay rent of Kshs.15,000/= for the Respondent before they fell out. In her view the Appellant could not now claim inability to pay. Lastly, the Respondent urged that the trial court was mindful of the Appellant's income and expenditure when it apportioned financial responsibility in a manner it deemed fair.
12. On visitation the Respondent submitted that at no point did the Appellant raise the issue of visitation rights and their determination by the trial court. That when she raised the issue of custody order vesting the legal unlimited access of the minor upon her, the Appellant did not raise any objection and neither did he pray for structured rights of access. She referred the court to the decisions in **M. A. v R.O.O. [2013] eKLR** and **B N K v E M M [2013] e KLR**.

Court's findings

13. This court has carefully considered the appeal herein, the grounds proffered, the Appellant's submissions and the orders appealed against. This court is alive to the fact that it did not hear the witnesses testify or observe their demeanour, and therefore should be slow to reverse the trial court's decision. It is however, not lost on this court that an appeal is in a way a retrial. It therefore must reconsider the evidence, evaluate it itself and draw its own conclusions. 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 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.”

14. On the main maintenance the provisions of **Article 53(e)** of the **Constitution** provide the guiding principle on the question of maintenance as follows:

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

The other pertinent law is the Children's Act No. 8 of 2001 and in particular Section 4 thereof, which

provides that in arriving at a decision on a matter concerning children, the paramount consideration should be the survival and best interest of the child.

15. On the issue of visitation I note from the record that it was not a contested issue in the trial court. The Appellant did not contest the prayer for custody nor seek a determination on the manner of access. It would appear that the trial court gave direction thereon for clarity's sake. Even now the Appellant has set this out as ground number three of the appeal, but has not submitted on it at all.
16. No submissions or evidence have been brought before this court, to show that the Appellant has run into difficulties of the Respondent's making, or at all, in trying to exercise his right of visitation with the child. In considering what is the best interest of the child herein, I am minded of the decision of Kimaru J in **M A vs R O O [2013] eKLR** and **B N K vs E M M [2013] eKLR**, to which the Respondent referred.
17. In conclusion therefore, it is evident from the judgment that the presiding magistrate was cognisant of the provisions of **Article 53(e)** of the **Constitution** and was properly guided thereby, when he made his determination. I also note that the basis for his decision on maintenance was the level of the 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 manner in which the presiding magistrate apportioned the financial responsibility.
18. On visitation, ordinarily it would be in the best interest of the child for the father to have unlimited access to him at this formative stage in his life. This is also what the Respondent had prayed for. The presiding magistrate however, exercising abundant caution, granted the Appellant reasonable access to the child.
19. Considering the circumstances of this case in totality therefore, I find no reason to interfere with the pronouncement of the presiding magistrate either on maintenance or on visitation.

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 **27th day of February 2015**.

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L. A. ACHODE

JUDGE