



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL N0.16 OF 2012

J K N.....APPELLANT

VERSUS

J T K.....RESPONDENT

JUDGMENT

The Appellant was aggrieved by the decision of the Children’s Court (Ocharo PM) delivered on 28th March 2012 in which the Appellant was ordered to pay to the Respondent the sum of Kshs.5,000/- per month to cater for the food for the younger child of the Appellant and the Respondent during the school days and also to pay a further sum of Kshs.10,000/- per month during the school holidays when both children will be under the Respondent’s custody. The Children’s Court ordered the Appellant to pay the Respondent the said sums of money with effect from April 2012. The Appellant was required to make these payments in addition to providing for education and medical expenses of the children. The costs of clothing and entertainment of the children was to be shared equally between the parties.

In his memorandum of appeal, the Appellant raised several grounds of appeal challenging the decision of the Children’s Court. The Appellant was aggrieved that he had been ordered to pay the monthly maintenance to cater for the food of the younger child yet in actual fact both children were in boarding school. The Appellant was aggrieved that the Children’s Court had failed to take into consideration that the Respondent was a financially able person and was therefore able to provide for the food needs of the children. The Appellant took issue with the trial court’s failure to take into consideration the fact that the Respondent too had equal parental and financial responsibilities over the children. The Appellant was aggrieved that he had been ordered to pay the sum of Kshs.10,000/- during the school holidays even when he was staying with the children. In the premises therefore, the Appellant urged the court to allow the appeal, set aside the order of the Children’s Court and substitute it with an appropriate order of this court.

At the hearing of the appeal, this court heard oral rival submission made by Miss Makoffu for the Appellant and by Mr. Njiraini for the Respondent. From their submission, it was clear that despite of several grounds of appeal raised by the Appellant, the actual dispute between the Appellant and the Respondent is the question of the sum of money that should be paid by the Appellant to the Respondent when she is in actual custody of the children. The Appellant stated that he had agreed to cater for the educational and medical expenses of the children. However, he wanted the Respondent to cater for the daily needs of the children when they are in her custody. At the time the case was being urged before the Children’s Court, one of the children was in boarding school while the other child was staying with the Respondent. The Respondent had applied for the Appellant to be compelled by the Children’s Court to

provide for the daily upkeep of the child who was then living with her. The Appellant was of the view that since the Respondent was a woman of means, she ought to take care of the daily needs of the said child. The position has however changed. The child who was living with the Respondent is now a student in a boarding school. The Appellant is catering for his fees. The Respondent conceded that it was no longer necessary for the Appellant to be compelled to provide for the daily upkeep of the said child save for the time the said children will be on school holidays.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the facts placed before the trial court so as to determine whether or not to allow the appeal. This being a children's case, the guiding principle in determining such cases is provided under **Article 53(2)** of the **Constitution** which provides that:

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

This Constitution prescription is reinforced by **Section 4(3)** of the **Children Act** which mandates all judicial and administrative institutions to:

“treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to -

- a. safeguard and promote the rights and welfare of the child;***
- b. conserve and promote the welfare of the child;***
- c. secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.”***

In case where the child has both parents, **Article 53(1)(e)** of the **Constitution** further provides that parental responsibility between a mother and a father shall be equal. This is further emphasized by **Section 90(a)** of the **Children Act**.

In the present appeal, this court understood the Appellant to say that he was willing to do his bit towards the maintenance and support of the child provided that the Respondent also played her part, taking into consideration that she was also earning an income as a businesswoman. Having carefully evaluated the facts of this case, it was clear to this court that the Appellant indeed made a case that in situations where both parents earn an income, the court should take into account the income of both parents in determining what order of maintenance should be made. This is because it is no longer sufficient for the Applicant in such cases to make a list of what he or she requires to be paid as maintenance without stating what he or she will contribute towards such maintenance. This is on account of the fact that parental responsibility is now shared equally between both parents. In the present appeal, the Appellant established that the Respondent earns an income and therefore should contribute towards the upkeep of the children when they are in her custody.

In the premises therefore, this court would partially allow the appeal. The Respondent conceded that both children are now in boarding school. The order requiring the Appellant to provide for the food needs of the younger child to the sum of Kshs.5,000/- per month during the school term is therefore set aside. The Appellant will however continue to pay the sum of Kshs. 10,000/- per month (subject to review) during the school holidays whenever the children will be with the Respondent. The Appellant shall continue to cater for the educational and medical needs of the children. He shall also continue to share the costs of clothing and entertainment of the children with the Respondent. Either party shall be at liberty to apply to the Children's Court in the event that there shall be developments that shall require the intervention of the court. Of course, as ordered by the Children's Court, the Respondent shall retain the actual custody of the children with the Appellant having reasonable access to be agreed between the parties. There shall be no orders as to costs.

DATED AT NAIROBI THIS 21ST DAY OF MARCH 2014

L. KIMARU

JUDGE