



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

Civil Appeal 114 of 2008

J M M APPELLANT

VERSUS

J M(on behalf of NGUMBAU MUTEMI & MUSEE MUTEMI RESPONDENT

J U D G M E N T

This is an appeal filed by the appellant from the decision of the subordinate court. The decision of the subordinate court was in the following terms:-

“I find it suitable and in the interest of the children to make the following orders on maintenance of the children:-

(a) The defendant to pay the mother of the plaintiff’s Kshs.8,000/= per month for the maintenance and education of the plaintiffs. In the result I allow the suit in the following terms:-

- A. The custody of MM goes to the mother but the defendant to have access.**
- B. The defendant do pay the mother of the plaintiffs Kshs.8,000/= per months.**
- C. Since this is a maintenance cause each party bears their own costs.**
- D. The counterclaim stands dismissed with no order as to costs.”**

This appeal of the appellant, filed for him by Musyoka & Wambua Advocates, is on the following grounds:-

- 1. That the learned magistrate erred in law and fact in finding that the appellant do pay monthly a sum of Kshs.8,000/= for the maintenance of the minors.**
- 2. That the figure of Kshs.8,000/= per month is excessive, exorbitant and oppressive.**
- 3. That the learned magistrate erred in law and fact in failing to take key considerations into account in arriving at the figure of Kshs.8,000/= per month.**
- 4. That the learned magistrate erred in law and fact in failing to take into account the appellants monthly income.**
- 5. That the learned magistrate erred in law and infact in failing to take into account the monthly needs the minors and those other needs that are non-monthly.**

6. That the learned magistrate erred in law and fact in failing to consider that the appellant has been paying school fees for the minor 1st respondent.

Parties' counsel, Mr Musyoka Wambua for the appellant and Mr B.M. Mung'ata & Company for the respondent filed written submissions, which I have perused. Mr Muigai and Mr Mung'ata who appeared at the hearing of the appeal, relied on the written submissions.

The appellant's counsel suggests that the figure of maintenance awarded be split between the husband and wife at 50/50 on which he states the husband will pay 4321/50 per month. Counsel for the respondent, on the other hand, stated that the appellant had, in the lower court offered an amount of Kshs.6,000/= per month and wondered why there was now a change of heart.

This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings – See **Selle –vs- Associated Boat Co. Ltd (1968) EA 123.**

I have perused the record of the subordinate (children's) court. There is no dispute that both the husband and wife, who are now living separate, are P1 teachers. The husband's (appellant's) gross salary is slightly less, as per the copy of payslips relied upon. It was Kshs.20,847 per month in June 2007, as against his wife's salary for July 2007, of Kshs.24,624/=. Each had several deductions. The parties do not have any issue on whether the two children identified as dependants by the children's court need to be maintained. The issue is the amount and the distribution between the two parents.

Under section 24 (1) of the Children's Act No. 8 of 2001, both parents of a child born within marriage have equal parental responsibility. The section provides:-

24 (1) Where a child's father and mother were married to each other at the time of the child's birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in the exercise of such parental responsibility.

In my view, where the responsibility to provide for a child is financial, the income of each parent has to be considered. This is so because often times, one parent could have regular income while the other might not. Such an approach in, my view, will protect the best interests of the child as envisaged under section 4 (2) of the Children's Act which provides:-

4(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a paramount consideration.

Having said so, it was necessary for the trial court to have made a finding on the monthly financial requirement of the two children, and then split the total requirements into two portions, as the father and mother of the children are all P1 teachers. Whatever costs or expenses are of the spouse was already incurring for the children, that should have been taken into account in the division of parental responsibility. It has to be appreciated also that the parents need to survive and earn a living, before they can provide maintenance for the children. Therefore, each of them needs to have some disposable income for their own use. Whatever parental financial responsibility is to be awarded, the same can only be financed through the respective parent's incomes. Parents who are earning large amounts of money will obviously be required to provide more for their children than those with meager incomes. The issue as to what school the children should attend, has to be discussed between parents, because it has to be in tandem with their means as the supporters and educators of the children. It is not right for one parent to unilaterally take a child to an expensive school and unfairly burden the other parent.

Considering the totality of this matter, I find that the learned magistrate erred in not determining the total amount for monthly maintenance required for the two children and splitting the same between the two spouses, who are equally able to provide for the children. I find that the two children's expenses and requirements can be catered for with 8,000/= per month. I am also persuaded by the proposal of the

counsel for the appellant.

Consequently, I set aside the orders of the learned magistrate and substitute therefore an order that the amount Kshs.8,000/= will be split. The appellant will now pay to the mother of the children J M a sum of Kshs. 4,400/= monthly for the maintenance and upkeep of the two children, unless on application, the court orders otherwise. The mother will bear the Kshs.3,600/= per month, as she is living with the children.

On costs, as this is a family matter, I order that parties bear their respective costs.

Dated and delivered this **2nd** day of **August** 2012.

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George Dulu

Judge

In the presence of:

Nyalo – Court clerk

Mr Kituku holding brief for Mr Musyoka for Appellant

N/a for Respondent