



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 67 OF 2009

P.W.G (Suing on behalf of A.M.M, a minor).....APPELLANT

VERSUS

NELSON MWANGI MUTAHI.....RESPONDENT

(Being appeal against the judgment of T. W. Murigi, Senior Resident Magistrate, in Muranga Senior Principal Magistrate's

Children's Case No. 23 of 2008 delivered on 29th October 2009 at Muranga)

JUDGMENT

On the 20th day of May 2009, T. W. Murigi, learned Senior Resident Magistrate, delivered a judgment in favour of **P.W. G**, the Appellant herein and against **N.M.M**, the Respondent herein. In the aforesaid judgment, the trial magistrate issued an order directing the Respondent to pay Ksh.3,500/= to the Appellant as monthly maintenance for the minor i.e. A.M. The Appellant was unhappy with the aforesaid decision hence this appeal. On appeal, the appellant put forward the following grounds in her Memorandum of Appeal:

- 1. The learned magistrate erred in the law and in fact in failing to address herself in the principles applicable in the determination of maintenance suits.***
- 2. The learned magistrate erred in law and in fact in making an award of Kshs.3,500/= to cater for the minor's education, food and medical expenses which the said award was too low in the circumstances of the case.***
- 3. The learned magistrate erred in law and in fact in failing to take into consideration that the appellant had all along been providing single handedly for the minor and thus refused to order reimbursement/identification to the appellant.***

4. The learned magistrate erred in law and in fact in making an assumption that Kshs.3,500/= would be sufficient to cater for the minor's medical, education and food.

5. The learned magistrate erred in law and in fact by failing to consider that the appellant is a person of little means whilst the respondent is a person of large means and capable of adequately providing for the minor.

When the appeal came up for hearing, this court directed learned counsels appearing in the matter to file written submissions. At the time of writing this judgment, the Appellant was the only party who had filed his submissions.

I have re-evaluated the case that was before the trial court and the submissions filed herein. The case that was before the trial court was expressed by the Plaint dated 1st August 2008 in which the Appellant had sought for judgment against the Respondent in the following terms *inter alia*:

- (a) Reasonable monthly maintenance for the child.**
- (b) Provision for the child's education.**
- (c) Costs of the suit.**

The Appellant testified before the trial court whereupon she stated that she was married to the Respondent and that their marriage was blessed with one issue namely A.M. She told the trial magistrate that the child was then in baby class with a challenging medical condition. The Appellant stated that she received a monthly salary of Ksh.1,500 from her employment with a local veterinary shop hence she was unable to meet the minor's upkeep save for shelter. She said that the respondent should be ordered to meet food, educational and medical expenses. The Respondent on his part told the trial magistrate that he was a public health officer. He also admitted that the Appellant was his girlfriend for five years. He further admitted that he had a child with the Appellant whom he usually meets his medical and school expenses. On cross-examination, the Respondent was unable to show that he paid the minor's medical expenses. The Respondent claimed he could not pay for rent because the Appellant lives in a house rented by a police officer whom she cohabits with. After hearing the evidence of both sides, the learned Senior Resident Magistrate came to the conclusion that there was evidence showing that the Respondent paid school fees for the minor. The Learned magistrate further decreed that the Appellant was to provide for shelter whereas the Respondent was to pay a monthly sum of Ksh.3,500/ to meet the minor's medical, educational and food expenses. The Appellant was unhappy with the aforesaid decision. It is the Appellant's submission that the award was inordinately low and that the trial magistrate did not consider the principles guiding the award of maintenance. The Appellant urged this court to enhance the figure to Ksh.15000/= per month.

When it comes to the provision of maintenance of a child, Sections 90-93 of the Children Act comes into play. It is not in dispute that the parties to this dispute were not married at the time of birth of the minor. There is also no evidence that they got married thereafter. Under Section 90 (e) of the Children Act, the law places the parental responsibility to maintain the child upon both of them jointly. In this case the Appellant has shown that she lives with the child and that she earns Ksh.1,500/= per month. She has offered to meet the costs of sheltering the child. In her evidence the Appellant indicated that the child spends about Ksh.1000/= per month on account of his medical care. I have looked at the record and it is clear that the respondent did not tender any evidence of his monthly income. It is apparent from the copy of the bank statement attached to the respondent's replying affidavit of 14th August 2008 that he receives a monthly salary of Ksh.9,148.30/=. The Appellant has urged this court to enhance the monthly maintenance award from Ksh.3,500/= to Ksh.15,000/=. The record shows that the learned magistrate did not give reasons for making the award of Ksh.3,500/=. The law is very clear that the duo share parental

responsibility. There is no dispute that the Appellant earns a monthly salary of Ksh.1,500/=. That amount is enough to meet the costs of shelter. The Respondent earns a monthly salary of Ksh.9,148/30. The evidence tendered shows that the average monthly school fees is approximately Ksh.1,200/= and the medical fee is about Ksh.1500/=. There is no estimate as to how much is spent on food. It is obvious from the above that the amount spent on medicine and school per month is Ksh.2,700/= leaving a sum of Ksh.800/= to meet expenses on food. I agree with the Appellant that the award made on maintenance was inordinately low. With the escalating food prices, it is inconceivable for one to survive on a sum of Ksh.800/= on food per month. For the above reason, I will allow the appeal.

In the end the appeal is allowed. The award of Ksh3,500/= by the trial court is set aside and is substituted with an award of Ksh.5,000/= per month. Costs of the appeal is given to the Appellant.

Dated and delivered at Nyeri this 20th day of May 2011.

J. K. SERGON

JUDGE

In open court in the absence of parties with notice.