



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Appeal 185 of 2007

B.M.P..... APPELLANT/APPLICANT

VERSUS

A.M.M..... RESPONDENT

(Being an appeal from the Ruling of Honourable (Mrs) H.A Omondi CM

dated 4th October 2007 in Machakos Chief Magistrate Divorce Case No. 1 'B' of 2002)

JUDGMENT

1. This Appeal arises from the Ruling delivered on 4/10/2007 by the Chief Magistrate, Machakos subsequent to a decree dissolving the marriage between the parties which decree was issued on 27/7/2007. The gist of the Ruling was that as regards one child of the troubled union, R.M, the maintainance and school fees shall be paid by the Appellant, B.M.P. The Appellant's prayer is that he and the Respondent should share the responsibility of maintaining their two children including, one D M.
2. It is important to note that as regards custody of the minors, the learned magistrate ordered that D M would remain in the custody of the Appellant while R M would remain in the custody of the Respondent and that each would have visitation rights until the maturity of the children.
3. From the submissions made by the Appellant's and Respondent's advocates, two issues must be quickly resolved. The first is whether there is a proper appeal before this court. The Respondent's argument is that the order that the Appellant should pay for R M's maintainance was made in the judgment of the court and the Ruling appealed from was only as regards the amount that he should pay monthly. I disagree with the proposition that there is nothing to be appealed from because the order in the judgment became concrete when the Ruling was delivered. In fact the Appellant is unhappy with the order that he solely maintains the child and also that the sums ordered were oppressive to him. I will return to the substance of that complaint shortly.
4. The other issue is; what is the law applicable to the matter? The advocate for the Appellant has invoked Section 24 (1) and (5) as well as Section 90 (a) of the Children's Act to argue that parental responsibility over children is shared and to burden one parent is unfair. The advocate for the Respondent

argued that the two sections were quoted out of context because the Respondent is also maintaining R M save that the Appellant is to pay school fees, books and school uniform for her.

5. My view on the second question is this;

Section 24 (1) and (5) of the Children's Act provide as follows:-

“24.(1) Where a child's father and mother were married to each other at the time of his 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 exercise of such parental responsibility”.

6. Section 90 (a) then provides as follows:-

“90. Unless the court otherwise directs, and subject to any financial contribution ordered to be made by any other person, the following presumptions shall apply with regard to the maintenance of a child.

(a) where the parents of a child were married to each other at the time of the birth of the child and are both living, the duty to maintain a child shall be their joint responsibility;

(b) where two or more guardians of the child have been appointed, the duty to maintain the child shall be the joint responsibility of all guardians, whether acting in conjunction with the parents of the child or not;

(c) where two or more custodians have been appointed in respect of a child it shall be the joint responsibility of all custodians to maintain the child;

(d) where a residence order is made in favour of more than one person, it shall be the duty of those persons to jointly maintain the child;

(e) where the mother and father of a child were not married to each other at the time of birth of the child and have not subsequently married, but the father of the child has acquired parental responsibility for the child, it shall be the joint responsibility of the mother and father of the child to maintain that child.”

7. To my mind the responsibility of parents is shared and correctly so. In an evolving society where each parent has an income, to burden the husband solely is both unfair and oppressive. In this case, both parties are in gainful employment and it is admitted that the Appellant has custody of D M and fully maintains him. The Respondent was not ordered to contribute anything towards D M upkeep and yet again the Appellant was ordered to pay R M school fees then totalling Kshs.26,510/=. In her Ruling, the learned magistrate was alive to the fact that he was already paying school fees for his brothers and D M and stated that he is only being asked to shoulder that sole responsibility. The learned magistrate took into account the earnings of each party in determining the issue. She found that since the Appellant was earning Kshs.63,000/= net the Respondent's net payoff Kshs.23,391/= would not secure the child sufficiently.

8. Did the learned magistrate misdirect herself? I do not think so. Even in determining what each parent should contribute towards their children's upkeep, the net earning of each of them should be taken into account. The Appellant is unhappy that the Respondent took R M to L Academy and the school fees payable increased by an extra Kshs.7,000/=. In the course of the Appeal, parties agreed to share that sum but the appellant also failed to stick to the schedule of payments and had to be prodded to reach an agreement with the school to pay the fees by instalments.

9. What is the Respondent's involvement in R upkeep? She has custody and therefore pays for her daily needs. Is that contribution sufficient? Yes, in view of her earnings and although parties must share the responsibilities and although D M is fully maintained by the appellant, the orders of the learned

magistrate were reasonable and I see no reason to interfere with the same.

10. In the end therefore, I see no merit in the Appeal and the same is hereby dismissed.

11. Orders accordingly.

Dated and delivered at Machakos this **18th** day of **September** 2009.

ISAAC LENAOLA

JUDGE

In presence of: Mr Makau for Applicant

Mrs Nzei for Respondent

ISAAC LENAOLA

JUDGE