



SNM v RWK (Civil Appeal 141 of 2024) [2025] KEHC 3100 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3100 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 141 OF 2024
FN MUCHEMI, J
MARCH 6, 2025**

BETWEEN

SNM APPELLANT

AND

RWK RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of Ruiru Principal Magistrate in SPM Children’s Case No. E051 of 2023 in which the court granted joint legal custody of the minors to both the appellant and respondent with the respondent having physical/actual custody of the minors. The court further ordered that the appellant shall have unlimited and unsupervised access to the children on alternate weekends from Saturday 9.00 am to Sunday 5.00 pm and on 50:50 basis during school holidays. The picking and dropping at a neutral place was to be agreed upon with the assistance of the parties respective advocates. Further the court directed that the appellant pays school fees and meet school related expenses for the children. The school fees was to be paid directly to the school and the school fees receipts be sent to the plaintiff for record purposes. The court further directed that the appellant continues to take care of the children’s medical expenses through the medical cover and where it does not apply to otherwise cater for them. The appellant was to also cater for the children’s clothing. Additionally, the court directed that the respondent shall continue to pay rent for their house, provide food, good grooming, entertainment and other miscellaneous expenses for the children. The appellant was to pay a sum of Kshs. 20,000/- every month as contribution for the other needs of the children. The money to be paid to the respondent by 5th day of every calendar month with effect from June 2024 through mobile money transfer.
2. Dissatisfied with the court’s decision, the appellant lodged this appeal citing 2 grounds summarized as follows:-



- a. The learned trial magistrate erred in law and in fact in ordering that the appellant pays a sum of Kshs. 20,000/- every month to cater for other needs of the minors whereas all the needs of the minors had been catered for in the judgment.
3. Parties put in written submissions. The respondent elected not to put in written submissions.

Appellant's Submissions

4. The appellant submits that the trial magistrate shared out all the parental responsibilities over the minors between the parties with the respondent taking care of other miscellaneous expenses of the minors but the court went further and added an additional Kshs. 20,000/- for other needs which were not specified.
5. The appellant submits that the additional amount of Kshs. 20,000/- has overburdened him yet he is shouldering the bigger responsibilities over the minors and thereby affecting the minors in terms of his provision to them.
6. The appellant refers to the case of JWN vs MN [2019] KEHC 8527 (KLR) and submits that parental responsibility is shared and not necessarily equally but the trial magistrate did not inquire as to his means therefore overburdening him with other needs not specified. The appellant argues that he is shouldering the heavier burden of school fees as the children are in private schools. He further submits that he has to take care of the minors upon them visiting him over the half school holidays and alternate weekend as per the court orders.
7. The appellant submits that the respondent is not shouldering a big percentage of the responsibilities. The children have their meals in school with one in boarding school and weekends are shared with him and so are the school holidays. Further, the appellant submits that he is expected to feed the minors and entertain them whenever he is with them.

Issue for determination

8. The main issue for determination is whether the trial court erred in directing that the appellant pays Kshs. 20,000/- per month as contribution for the other unspecified needs of the children.

The Law

9. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

10. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-
An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.



11. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
- c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the trial court erred in directing that the appellant pays Kshs. 20,000/- per month as contribution to the other needs of the children.

13. In matters concerning a child, it is a constitutional imperative that of paramount importance is the best interests of the child. To that extent, Article 53(1) of *the Constitution* of Kenya provides that a child's best interests are of paramount importance in every matter concerning the child. This position has been enshrined in the Children's Act in section 4 which provides for the welfare of the child. Section 8(1) and (2) of the Children's Act provides:-

- (1) 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 primary consideration.
- (2) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall 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.

14. The main contention in the instant appeal is the fact that the trial court ordered the appellant to pay an additional Kshs. 20,000/- per month for the children's other needs. The issue that arises is what parental responsibility is under the law and how the court should apportion it between the parents.

15. Parental responsibility has been defined in section 31 and 32 of the Children's Act and Article 53(1) (e) of *the Constitution* of Kenya which both provide that each parent has a duty to provide the child with the necessities of life.

16.

Section 31 of the Children's Act provides:-

1. In this Act, "parental responsibility" means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.
2. The duties referred to in sub section (1) include in particular-



- a. The duty to maintain the child and in particular to provide him with-
 - I. Adequate diet;
 - II. Shelter;
 - III. Clothing;
 - IV. Medical care including immunisation; and
 - V. Education and guidance;
- b. The duty to protect the child from neglect, discrimination and abuse;
- c. The right to-
 - I. Give parental guidance in religious, moral, social, cultural and other values;
 - II. Determine the name of the child;
 - III. Appoint a guardian in respect of the child;
 - IV. Receive, recover, administer and otherwise deal with the property of the child for the benefit and in the best interests of the child;
 - V. Arrange or restrict the emigration of the child from Kenya;
 - VI. Upon the death of the child, to arrange for the burial or cremation of the child.

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Section 32:-

- 1. Subject to the provisions of this Act, the parents of a child shall have parental responsibility over the child on equal basis 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 whether or not the child is born within or outside wedlock.
- 18. Section 114(2) of the Children’s Act stipulates the considerations by which the court shall be guided when making an order for financial provision for maintenance of a child. These considerations include inter alia:
 - a. The income or earning capacity, property and other financial resources which the parties or any other person in whose favour the court proposes to make an order, have or are likely to have in the foreseeable future;
 - b. The financial needs, obligations, or responsibilities which each party has or is likely to have in the foreseeable future;
 - c. The financial needs of the child and the child’s current circumstances;
- 19. Looking to case law on the subject, Meoli J stated the following in the case of EMM vs MOO Naivasha HCA 53/2015:-

“It will not do for a party to say that she has an uncertain source of income and therefore the responsibility of maintaining the children should only be borne by the adverse party. The



(said) party must establish to the satisfaction of the court that she has also made an effort to provide for the upkeep of the children.”

20. Similarly in the case of L.A.O vs O.K Arap M. (2019) eKLR where Justice Thande pronounced herself as follows:-

“In the present case, the appellant states that she does not have a job and only assists her father on the farm and in running her late mother’s business. The appellant is paid Kshs. 40,000/= by her father, and receives Kshs. 10,000/= from the respondent each month. She is not exactly destitute. In spite of this, she still seeks that the respondent be saddled with the entire financial responsibility over the child. This negates that constitutional principle that parental responsibility is a shared responsibility. In this regard, I agree with Kimaru J in C.I.N vs J.N.N [2014]eKLR, where the court stated that:-

“It will not do for the respondent to say that she has an uncertain source of income and therefore the responsibility of maintaining the children should only be borne by the appellant. The respondent must establish, to the satisfaction of the court, that she has also made effort to provide for the upkeep of the children.”

21. From the above, it is clear that a child is a joint responsibility of both parents, therefore it is expected that either parent must make an effort to provide for the upkeep of the child.

22. It is also true that though parental responsibility is to be shared, it can never be equal. The court must also take into account the financial capability of each parent in apportioning parental responsibility. This position was stated in M.K. vs C.K.K HCA. 51/2015 where the court held:-

“Parental responsibility is shared and not equal based on the financial position of each parent. The mother as the resident parent has a nurturing role to the children and the father to provide maintenance and upkeep of the children.”

23. Equal parental responsibility does not mean equal and similar contribution. In the case of E.M.M vs M.O.O. (2016)eKLR Meoli J observed that:-

“However, equal responsibility does not mean equal and similar contribution as the income of each parent, and other non-monetary contribution must be borne in mind.”

24. In the case of M.O.A vs H.A.O [2021] eKLR the court held:-

“Although parents may not have equal financial ability for the court to demand equal contribution, one must at least exhibit some sense of seriousness in making some contribution as a sign of good will that he or she is not geared towards overburdening the other parent for the sole purpose of punishing him or her using the best interests of a child principle or as a ground to settle scores out of marital differences.”

25. Bearing the above principles in mind, the court notes that the respondent lives with the minors and therefore provides shelter, feeds them and provides parental care to care to them. The court below ordered that the appellant do take care of medical cover, school fees and school related expenses as well as provide a sum of Kshs. 20,000/- per month for the other needs of the children and clothing. It is imperative to note that none of the parties availed an affidavit of means despite the fact that the respondent stated that she was unemployed. Furthermore, the trial court shared all the responsibilities between the parties but did not specify what the Kshs. 20,000/- per month was meant to cover. Taking



into account all these factors it is my considered view that it was important for the court to clearly define or specify “other needs of the children” in giving the sum of Kshs. 20,000/- per month. All the specified parental responsibilities were shared out leaving no doubt as to what each parent was to cater for. It is the duty of the court to avoid ambiguity and uncertainty in its orders to make it easier for the parties to execute such orders. Furthermore, both parties have equal responsibility in supporting their children. The responsibility as apportioned by the court may not be equal due to the fact that each parent is playing a different role from the other and computing the actual cost for each docket is not an easy task. However, justice must be seen to be done and the court must ensure that no party is overburdened and especially with roles that are not defined. It is noted that the appellant was allocated payment of school fees for the children who are in private schools which he gladly accepted. This ought to be taken into consideration as a heavy financial responsibility on the appellant to start with. He was also to meet all school related expenses.

Conclusion

26. I reach a conclusion that the magistrate erred in apportioning funds for an undefined responsibility which resulted in overburdening the appellant.
27. Consequently, I hereby set aside the order for monthly payment by the appellant of the Kshs.20,000/- to the respondent. The rest of the orders of the magistrate were well defined and are reasonable and this court hereby upholds them.
28. The appeal is hereby allowed.
29. Being a family matter, each party will meet their own costs.
30. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 6TH DAY OF MARCH 2025.

F. MUCHEMI

JUDGE

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