



**KM v IK (Suing as mother and next friend of EM (Minor) (Civil Appeal E150 of 2022) [2024] KEHC 457 (KLR) (23 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 457 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E150 OF 2022  
EM MURIITHI, J  
JANUARY 23, 2024**

**BETWEEN**

**KM ..... APPELLANT**

**AND**

**IK (SUING AS MOTHER AND NEXT FRIEND OF EM  
(MINOR) ..... RESPONDENT**

*(Being an appeal from the judgment delivered by Hon. R. Ongira (SRM)  
on 3/10/2022 at Tigania PM Court Children Case No. E013 of 2022)*

**JUDGMENT**

1. By Plaintiff dated 9/6/2021, the Respondent sued the Appellant seeking an order compelling the Appellant to make periodic (monthly) payments to her for the maintenance of the minor herein. She pleaded that the minor needed Ksh. 3,000 per month for clothes, Ksh. 6,000 per month for food, Ksh. 3,000 for pampers and soap, Ksh.2,000 for rent, Ksh. 800 for water and electricity, Ksh. 5,000 for house help and NHIF medical cover.
2. The Appellant denied the claim by his statement of defence dated 10/6/2022 and prayed for the Respondent’s suit to be dismissed.
3. Upon full hearing of the case, the trial court ordered as follows:

“In view of the above and given the *constitution* stipulates that both parents owe equal parental responsibility to children and that the interest of a child is most paramount, this court directs as follows;-

“The Plaintiff shall provide the following to the minors

- a) Food for the minor



b) The medical needs for the minor and shall also take out NHIF medical cover to cater for the minor's medical needs over and above including the minor in his own medical cover

c) Clothing

d) Shelter for the minor under custody

The defendant on the other hand is hereby directed to provide the following:-

a) The medical needs for the minors and shall also take out NHIF medical cover to cater for the minor's medical needs over

b) The academic needs of the minors where the Defendant shall pay school fees for the minor in accordance with the school fee structure availed by the said school, buy school stationaries and school uniforms and shoes for the minors and all other expenses touching on the minor's school needs when the minor reaches the age where he's enrolled to a school.

c) The defendant shall provide a sum of Kshs. 8,000/- monthly to the Plaintiff to cater for the food and nanny needs for the minor to be paid by the 8<sup>th</sup> day of every month.

On the issue of custody, this court finds that either party shall give reasonable access of the said minor to the other parent.”

### **The Appeal**

4. On appeal, the Appellant filed his memorandum of appeal raising 5 grounds as follows:

1. The learned trial magistrate erred in law and fact by failing to interrogate and determine the income and earning capacity of the parties thereby ordering the Appellant to make monthly financial maintenance that is manifestly excessive, exorbitant and oppressive.
2. The learned trial magistrate erred in law and fact by ordering the Appellant to pay a monthly sum of Kshs. 8,000 to cater for food and nanny needs of the minor which amount is beyond the means of the Appellant.
3. The learned trial magistrate erred in law and fact by ordering the Appellant to pay a monthly sum of Kshs. 8,000 on top of other responsibilities thereby placing a heavier responsibility on the Appellant.
4. The learned trial magistrate misdirected herself by failing to apply or applying the wrong principles on the assessment of quantum of maintenance awardable to the Respondent thus awarding monthly maintenance which was manifestly excessive in the circumstances.
5. By ordering the Appellant to cater for the nanny needs of the minor, the learned trial magistrate failed to appreciate that this should wholly be the responsibility of the Respondent who should pay for a nanny if she is too busy to spend time with the minor.

### **Duty of the Court**

5. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions,



but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others* [1968] E.A. 123).

## Evidence

6. PW1 IK, the Respondent herein and a teacher by profession testified that, “The defendant had married me and together we have one child called EM who was born on 31/12/2020. We separated with the defendant in May 2022 due to family dispute and he has refused to take care of the minor. I pray he be asked to pay for the nanny of the child who is paid Ksh 6000/- and also provide food for the minor. I can take care of the minors medical needs. I still buy pampers for the minor.”
7. On cross examination, she stated that, “The food is for Ksh 200/- per day as the baby is always taking milk and snacks and previously he refused to breastfeed but now he eats. The economy has also changed and things are expensive.”
8. DW1 KM, the Appellant herein and a teacher by profession testified that, “Plaintiff is my wife. I am the father to EM. I have never neglected the minor from birth and on 14/5/22 the plaintiff left me and I tried following her and I never found her and I never knew where she went to and then I received summons to come to court. All efforts to reconcile with plaintiff has failed. Since both of us are teachers lets share costs equally. If plaintiff cannot take care of the minor she can return the child to my care as I am capable of taking care of the child. Previously it was mother who stayed with the minor and my mother can now even look after the minor as its now the dry season so that I take care of my parents with the Ksh 6,000/- since they are old.”
9. The Appellant was not cross examined.

## Submissions

10. The Appellant faults the trial court for requiring him to make a monthly payment of Ksh.8,000 for the maintenance of the minor which is unfair, excessive and beyond his means, especially because he has other responsibilities, and cites *Re CM (child)* (2022) eKLR and *RWM v PMM* (2021) eKLR. He urges that since custody of the minor falls on the shoulders of the Respondent, she is obligated to meet all the needs of the child that come with custody.
11. The Respondent did not file any submissions.

## Analysis and Determination

12. The Appellant concedes the Shared parental responsibility envisaged under Article 53 (1) (e) of the *constitution* entails equal responsibility for both parents in terms of maintenance of their children, in the following terms:
  - (1) (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not....
13. The parents’ duty of equal responsibility is elaborated in section 32 of the *Children Act* as follows:
  - (1) Subject to the provisions of this Act, the parents of a child shall have parental responsibility over the child on an 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.
  - (2) A person who has parental responsibility over a child shall at all times have the duties, powers and responsibilities as are prescribed in this Act or any other written law.



- (3) A person with parental responsibility over a child shall not act in any way that contravenes any order of a court of competent jurisdiction made with respect to the child under this Act or any other written law.
- (4) A person who has parental responsibility over a child may not relinquish or assign such responsibilities to another person.
- (5) Nothing in subsection (4) prevents a person from making temporary arrangements, during his or her absence, to allow a fit person to exercise his or her parental responsibilities over a child for and on his or her behalf.
- (6) The making of the temporary arrangements referred to in subsection (4) by a person shall not affect or limit that person's liability arising from his or her failure to exercise his or her responsibility under this section."

14. In *PKM v ANM* (2020) eKLR the court (Aroni J. as she then was) stated that:

"In my view therefore one need not go further to look at what parents need to do for a child and to what extent. In this instance the parties have joint responsibility towards their son and no one is superior to the other."

15. There is, in my view, an unfortunate attempt by Counsel for the Appellant in his submissions dated 11/11/2023 to escalate the burden of the child to be borne by the Respondent as the mother on account of presumed custody of the child as follows:

"Ground 5 of the Appeal

Although the trial Court did not pronounce itself on the issue of the custody of the child, it must be presumed that, considering the age of the child, then custody squarely falls on the shoulders of the mother (the Respondent herein). She is therefore obligated to ensure that the child is properly taken care of on a daily basis. She is expected to create time and be there always, for child. It is her responsibility to meet all the needs of the child that come with custody. If she finds that her work schedules do not permit her to play the role of a caregiver, then let her employ one herself. The Appellant should not be hard pressed to take up a higher responsibility than the Respondent. He has to incur utility bills, purchase food, pay rent for his own house and also hire the services of a nanny whenever he is with the child because he also has access to the child. We urge Your Lordship to find that this ground of appeal also has merit and set aside that order of the trial Magistrate."

16. The custody of a child on a mother does not mean that she must be there always for the child without need for nanny. She too, like the father, require to pursue daily activities for her economic and social wellbeing. Custody of the child must not mean punishment on the mother to singly provide for the child.

17. In fact, the trial court did properly consider the impact of separate custody of the child in her judgment as follows:

"The Defendant and the Plaintiff in their evidence have demonstrated that they live separately and from evidence adduced. Nevertheless, the view of this court is that the needs of a minor should be met by the parents whenever the said children are because the fact that the minors



are not living with any of the parents doesn't in any way obliterate parental responsibility from a parent who does not have physical and actual custody of the child.”

18. Here, the Appellant was ordered to provide for the medical and academic needs of the minor on top of Ksh.8,000 monthly for food and nanny, while the Respondent was ordered to provide food, clothing, shelter and take out a medical cover for the minor. The Respondent pleaded in her plaint that she required Ksh. 6,000 for food, Ksh. 5,000 for nanny, Ksh.3,000 for clothing, Ksh. 3,000 for pampers/ soap and Ksh. 2,800 for rent and electricity.
19. The appellant complains that the trial court did not “interrogate the financial abilities of the parties herein so as to arrive a reasonable and non-oppressive amount of maintenance for the child” citing section 114 of the *Children Act* and the authorities of *re CM (Child)* (2022) eKLR (Cherere, J.), *RWM v PMM* [2021] eKLR (Thande) and *SKM v. MWI* [2015] eKLR, on principle that a child can only be maintained within the means of the parent in question.
20. This court finds that the trial court properly apportioned parental responsibility equally between the parties herein. The trial court properly invoked section 32 of the *Children Act* and the *constitution* on equal responsibility over the child.
21. The court observes that section 114 (2) (a) and (b) of the *Children Act* relied on by the appellant does not apply to biological parents but to step parents and guardians, as shown on the marginal note “Financial provisions by step-parents and presumptive guardian”, as follows:
  - (1) The Court may make a maintenance order in respect of a child, including a child of the other parent who has been accepted as a child of the family notwithstanding the absence of an adoption order.”
22. However, the court making an order for maintenance ought to establish that the appellant is able to meet the order for maintenance because an order for enforcement of the maintenance order under section 121 of the *Children Act* may not be made without prior inquiry as to ability as follows:

“ 121 (3) Prior to the making of an order under this section, the Court may hold an enquiry as to the means of the respondent who shall be in attendance, and the Court may direct that—

  - (a) enquiries be made as to the respondent's means by such person as the Court may direct;
  - (b) the respondent's income, assets and liabilities be searched to establish such information as the Court may require to make an order under this section;
  - or (c) a statement of means from the respondent's employer, or auditors or from such other person as the Court may direct, be availed to the Court.”
23. The Appellant has, however, now produced in the application for stay pending appeal before this court a payslip for October 2022 indicating his total earnings as 64,124/- and net salary of 17,243.85/- as he is shown to be servicing loans with Mwalimu Sacco. The loans are clearly for his benefit and, but it has not been shown that he has other means to meet the maintenance.
24. The court finds the provision by the appellant for the maintenance by way of food and nanny in the circumstances of this case to be reasonable while the respondent takes the custody of the child and cater for his other needs by way of medical care clothing and shelter while living with him.
25. However, in this court's view on account of the trial court's failure make an inquiry as to the ability of the appellant, this court having been served with evidence of net income of the appellant shall in



the interests of justice exercise the powers of the appellate court under section 78 (1) (a) of the Civil Procedure Act to reset the amount of maintenance at Ksh.7,000/- only.

**Order**

26. Accordingly, for the reasons set out above, the appeal is allowed on terms as follows:

1. The Judgment of the trial court dated 3/10/2022 is set aside and varied to the extent only that order for the payment of a sum of Ksh.8,000/- monthly to the respondent to cater for food and nanny needs for the minor is set aside.
2. The appellant shall pay the sum of Ksh.7,000/- monthly to the respondent to cater for food and nanny for the minor to be paid by the 8<sup>th</sup> day of every month.
3. All the other terms of the Judgment remain unaffected.

27. There shall be no order as to costs of the appeal.

Order accordingly.

**DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF JANUARY, 2024.**

**EDWARD M. MURIITHI**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**Appearances:**

M/S Mwenda Mwarania, Akwalu & Co. Advocates for the Appellant.

Respondent in Person.

