



REPUBLIC OF KENYA



**KENYA LAW**  
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**SKN v GMM (Children’s Appeal Case 3 of 2020)  
[2024] KEHC 2552 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2552 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CHILDREN’S APPEAL CASE 3 OF 2020  
HI ONG’UDI, J  
MARCH 14, 2024**

**BETWEEN**

**SKN ..... APPELLANT**

**AND**

**GMM ..... RESPONDENT**

*(Being an appeal from part of the ruling and order of the children’s court  
by Honourable Limo B. Benjamin (Mr.) Senior Resident Magistrate,  
dated 26th June 2020 in Nakuru Children’s case No. 37 of 2020)*

**JUDGMENT**

1. In the suit before the Magistrate’s court, the respondent being the plaintiff therein prayed for Judgment against the appellant for:
  - i. Custody of the minors to be granted to her.
  - ii. The appellant to be granted access with prior arrangements.
  - iii. The appellant be compelled to contribute Kshs. 50,000/= towards the monthly upkeep of the minors.
  - iv. Costs of the suit be provided.
2. It is averred in the plaint that the appellant and the respondent had lived as husband and wife since 13<sup>th</sup> December 2015 whereof they were blessed with two issues. Further that the appellant threw the respondent together with the first minor out of their matrimonial home not caring that she was pregnant with the second minor. Efforts to reconcile them had borne no fruits and the appellant neglected to provide for his children making it difficult for the respondent to care for them.



3. The lower court rendered a ruling on 26<sup>th</sup> June, 2020 in respect of an application dated 4<sup>th</sup> June 2020 ordering the appellant to pay Kshs. 45,000/= per month towards the upkeep of the minors. He was however to access the minors at an agreed time and venue in the presence of the respondent during alternative weekends.
4. Being aggrieved by the said ruling the appellant lodged this appeal dated 24<sup>th</sup> May, 2023 on the following grounds:
  - i. The learned magistrate erred in law and fact when he failed to find that parental responsibility should be shared on a 50-50% basis between the parents.
  - ii. The learned magistrate erred in law and fact in ordering the appellant to pay kshs. 45,000/= per month for the children's upkeep out of the prayed for kshs. 50,000/=.
  - iii. The learned magistrate erred in law and fact in failing to appreciate that the appellant is already paying for medical expenses and cover, shelter and education for the children.
  - iv. The learned magistrate erred in law and fact in rejecting and or ignoring the appellant's affidavit of means.
5. The appellant prayed that the appeal be allowed with costs in his favour. Further, that the court be pleased to order the respondent to pay for medical cover, provide entry to the shelter he co-owns with the respondent and pay child upkeep for the minors in the sum of kshs.10,500/= per month.
6. The Appeal was heard by way of written submissions.

### **The Appellant's Submissions**

7. The appellant filed his submissions through Philip Muoka company advocates and the same are dated 30<sup>th</sup> November, 2023. Counsel identified four issues for determination. The first issue is whether the subordinate court apportioned the share of parental responsibility over the minors in accordance with the law. He submitted that there was immense prejudice against the appellant due to failure by the subordinate court to consider and/or make provisions for the earlier apportionment of the education needs of the minors.
8. Counsel invited the court to note that the above failure by the subordinate court was contrary to section 94(1) (b) of the *Children Act*, 2001 (now repealed) which was then in force and provided as follows;

“the court may order financial provision to be made by a parent for a child...and in deciding to make such an order the court...shall be guided by the following considerations-

  - (b) the financial needs, obligations, or responsibilities which each party has or is likely to have in the foreseeable future.”
9. On the second issue on whether the apportionment of parental responsibility in the monthly sum of kshs. 45,000/= to the appellant was fair and/or just, counsel submitted that nowhere in the pleadings filed before the subordinate court was any computation of the minors' food expenditure, made. Further, that in the impugned ruling of 26<sup>th</sup> June 2020 there was no mention as to how the figure of 45,000/= was computed. He urged the court to find that the computation of the said figure against the appellant was arbitrary and/or against the evidence before the court.



10. On the third issue as to whether the subordinate court gave due regard to the appellant's affidavit of means, counsel submitted that the purpose of an affidavit of means was to guide the court on the extent of a party's financial obligation /responsibilities as set out under section 94(1) (b) of the *Children Act*, 2001. He added that in departing from the contents of the said affidavit of means, the subordinate court contravened the aforementioned section of the law.
11. Finally, on whether the apportionment of parental responsibility was in accordance with the law, counsel submitted that the subordinate court in ordering the appellant to cater for 70% of the parental responsibility violated the provisions of Article 53(1)(e) of *the Constitution* of Kenya, 2010. The court's attention was drawn to the case of JNA V SA (Petition 281 Of 2015) [2016] KheC 7267(KLR) where the court held as follows; -

“In addition, Article 53(e) of *the Constitution* needs no more than the simple and literal interpretation apparent in its language: parents of any child bear equal responsibility in the upbringing of their children.”

12. He thus urged the court to allow the appeal.

### **The Respondent's Submissions**

13. The respondent filed her submissions through Mugweru & Company advocates and the same are dated 10<sup>th</sup> January, 2023. Counsel listed the grounds of appeal and submitted on each of them. On the first ground he submitted that pursuant to the provisions of Article 53(1) of *the Constitution* of Kenya, maintenance was an aspect of parental care and a responsibility of both parents.
14. Counsel submitted further that equal responsibility did not mean 50:50 financial contribution by each parent and that the court was required to interrogate the full picture of the financial position of the parents. She placed reliance on the case of G. O & 2 Others (Suing through their mother and next friend) EMM v MOO [2016] eKLR, where the court stated follows;  

“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.”
15. The court's attention was drawn to the case of Najma Ali Ahemed v Swaleh Rubea, Malindi H.C Civil Appeal No. 22 of 2007 [2010] eKLR.
16. On the second ground of appeal, counsel submitted that both the appellant and respondent used to reside in Nairobi where they had managed to purchase a house and lived a comfortable life. Further, that the appellant was working at Jamii Bora bank (now Kingdom Bank) and the trial magistrate directed that he provides kshs. 45,000/= . Additionally, that the respondent was to shoulder kshs. 13,905/= this being the minors' monthly expenses.
17. Counsel went on to submit that in the best interest of the minors, they should not be removed from the environment where they were sheltered before. She placed reliance on the case of M A v R O O, High Court Civil Appeal Number 21 of 2009 [2013] eKLR, where the court held as follows;

“...the best interest of the children shall constitute in the child not being destabilized from the current environment he is currently living in, which environment included where the child is sheltered and educated”



18. On the third ground of appeal, counsel submitted that medical expenses are taken care of by the appellant's employer. Further, that he should equally shoulder education since school fees payable was dependent on the available means of a party on whom such responsibility was placed.
19. Finally, counsel invited the court to take judicial notice of the rise in the inflation rate and direct the appellant to remit the sum of kshs. 45,000/-, ordered by the trial magistrate which was in arrears from the time the trial Court's ruling. Counsel went on submit that this court has power to adjust an order for maintenance as it deems fit based on the circumstances of each case as provided under Section 99 of the *Children Act*;

“The Court shall have power to impose such conditions as it thinks fits to an order made under this section and shall have power to vary, modify or discharge any order made under Section 98 with respect to the making of any financial provision, by altering the terms of payment or by increasing or diminishing the amount payable or may temporarily suspend the order as to the whole or any part of the money paid and subsequently revive it wholly or in part as the Court thinks fit.”
20. He urged the court to dismiss the appeal with costs.

### **Analysis and Determination**

21. This being a first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act* to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion considering the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd (1968) E.A 123* where Sir Clement De Lestang (V.P) 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. 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”.
22. Having carefully considered the record of appeal, grounds of appeal, and both parties' submissions, I find that the main issue for determination to be whether the appeal herein has merit.
23. The appellant contends that the learned magistrate erred in law and fact when he failed to find that the parental responsibility should be shared on a 50-50% basis between the parents. The respondents on the other hand argued that the equal responsibility did not mean 50:50 financial contribution by each parent and that the court was required to interrogate the full picture of the financial position of the parents. Both counsel in support of their client's case cited several sections of the *Children Act*. This court notes that the said sections have been repealed and therefore cannot be relied on.



24. It is trite law that parental responsibility is an equal joint responsibility of the parents to a child and no parent shall be treated specially as having a superior right over the child than the other. In PKM V ANM (2020) eKLR, where Aroni J 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...”

25. As to what constitutes parental responsibility, Section 31 of the [Children Act](#) is very clear. It provides as follows

- (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 subsection (1) include, but are not limited to—
  - (a) the duty to maintain the child and, in particular, to provide the child with—
    - (i) basic nutrition;
    - (ii) shelter;
    - (iii) water and sanitation facilities;
    - (iv) clothing;
    - (v) medical care, including immunization;
    - (vi) basic education; and
    - (vii) general guidance, social conduct and moral values;

26. As to what constitutes equal parental responsibility, Section 32 of the [Children Act](#) is very clear. It provides as follows.

Equal parental responsibility

- (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.

27. In view of the above, there is no doubt that parental responsibility is a joint and equal responsibility. Both parties herein are equally aware and do affirm that they have an equal task to support their babies. This position is further amplified by Article 53 (1) (e) of *the Constitution* which provides that every child has a right to parental care and protection, which includes equal parental responsibility of the mother and father to provide for the child, whether they are married to each other or not.

28. However, Section 114 of the *Children Act* stipulates factors that guide the court when making an order for financial provision for maintenance of a child as follows;

Financial provisions by step-parents and presumptive guardian

- (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.
- (2) Without prejudice to the generality of subsection (1), the Court shall consider all the circumstances of the case and be guided by the following considerations —
  - 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 immediate future;
  - b. the financial needs, obligations, or responsibilities which each party has or is likely to have in the immediate future;
  - c. the financial needs of the child and the child's current circumstances;
  - d. the income, if any, derived from the property of the child;
  - e. any physical or mental disabilities, illness or medical condition of the child;
  - f. the manner in which the child is being or was expected to be educated or trained;
  - g. whether the respondent has assumed responsibility for the maintenance of the child and, if so, the extent to which, and the basis on which, he or she has assumed that responsibility, and the length of the period during which he has met that responsibility;
  - h. whether the respondent assumed responsibility for the maintenance of the child knowing that the child was not his child;



- i. the liability of any other person to maintain the child;
- j. the liability of that person to maintain other children.

29. From the above cited provisions, it is clear that parental responsibility is not relegated to one parent alone. It requires joint effort although not exactly the same. It is not enough for one party to claim that his or her income is too small or little hence not enough to support the baby. In CIN VS JNN (2014) eKLR where the court expressed thus;

“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 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”.

30. From the impugned ruling in paragraphs 7 and 8, the learned magistrate observed as follows;

“The issue of determination is whether the defendant is a person of means. From the annexures before me, the defendant is able to provide for the needs of the minors in monetary terms. He is employed whereas the plaintiff is not currently working, a fact that is not denied. The court is therefore constrained to address what is urgent in the circumstances. To this extend, I shall order the defendant to provide for the needs of the two minors in the sum of kshs 45,000/= per month to cater for food for the minors during this time of the pandemic pending opening of schools and hearing of this suit.

Be that as it may, section 6 of the *children Act* provides that children have a right to be taken care of by both parents and as such the welfare of a child is a shared responsibility. It is the view of the court that the plaintiff shall continue to provide for other needs namely shelter and clothing pending hearing of the suit.”

31. From the material presented to court there is no dispute that:

- i. The two minors are under the custody of the respondent.
- ii. The respondent was as at the time of the impugned Ruling not in any formal employment.
- iii. The appellant is an employee of Jamiibora Bank Limited now Kingdom Bank earning a net pay of Shs 170,741/00.

32. The appellant was ordered to pay Ksh 45,000/= per month for the minors’ needs, before the opening of schools. Children went back to school after the Covid -19 pandemic. In this case who is paying for the school fees, and school needs of the children? What schools are these children attending and how much is the appellant paying for them?

33. All these are critical questions that the trial court ought to have addressed before issuing the orders he did. The fact that the respondent is unemployed does not mean she is not capable of contributing to the welfare of the children. She too has a duty towards the children. The appellant swore an affidavit of means on 22<sup>nd</sup> June, 2020 outlining his means and expenditure. I have not seen it mentioned anywhere in the impugned Ruling.

34. I note that the said ruling was as a result of an interlocutory application. The matter before the trial court is yet to be heard. The material before the court was therefore limited. From my analysis I find that both the appellant and respondent have a joint responsibility towards the bringing up of the children, within their means. Secondly, the court is not clear on whether the respondent is now employed or self



employed as the younger of the two children is almost five (5) years old or thereabout. Thirdly, it is critical that the case before the Magistrate Children's court is heard and determined with speed.

35. I therefore find merit in the Appeal which I hereby allow and set aside the Ruling and orders issued by the learned trial Magistrate on 26<sup>th</sup> June, 2020. The following orders shall issue:

- i. The appellant to pay school fees and cater for the school needs for the two children. This must be in a Public School.
- ii. The appellant to make a sum of Ksh 25,000/= per month for the children's upkeep. The said amount to be deposited in the respondent's account whose details should be availed to the appellant through his advocate.
- iii. Both parties in the presence of their advocates and the children's officer to agree on a visitation program of the children by the appellant
- iv. The Trial Court is directed to expedite the hearing of this case. The same should be finalized within 12 months with no excuses.
- v. The learned trial Magistrate to ensure compliance with the above orders
- vi. In view of the nature of this case there shall be no order as to costs.

36. Orders accordingly

**DELIVERED, DATED AND SIGNED THIS 14<sup>TH</sup> DAY OF MARCH, 2024 IN OPEN COURT AT NAKURU**

**H. I. ONG'UDI**

**JUDGE**

