



**PAOO v EAA (Civil Appeal E143 of 2021)
[2024] KEHC 8001 (KLR) (Family) (7 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8001 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E143 OF 2021
PM NYAUNDI, J
JUNE 7, 2024**

BETWEEN

PAOO APPELLANT

AND

EAA RESPONDENT

(Being an appeal from the Ruling and Order of the Children’s Court at Nairobi (Hon . G.M Gitonga (SRM) dated 16th November 2021 in Nairobi Children.s Case Number 414 of 2020)

JUDGMENT

1. The Appeal herein is initiated by Memorandum of Appeal dated 14th December 2021 and challenges the judgment of the trial court delivered on the 16th 2021 on the grounds that the learned magistrate erred in fact and in law and in fact by failing to apportion equally responsibility of maintaining the minor between the Appellant and respondent both of whom are in salaried employment.
2. It is submitted that the trial court placed a heavier burden on the respondent and in so doing did not consider that the Respondent has other responsibilities. The effect of the order is to place the Appellant under financial strain and yet the Respondent has the means to take on additional responsibilities towards the minor.
3. The matter proceeded to hearing by way of written submissions. The Respondent did not file her submissions.

Summary of the Appellant’s Case

4. The Appellant frames the issue for determination as



1. Whether the Respondent and the Appellant have equal and joint parental responsibility over the child.
5. The Appellant is aggrieved by the decision of the Court that he provide for the school fees and school related expenses of the minor in addition to paying Kshs 25000 for the monthly maintenance of the child. It is his submission that in arriving at this decision the Court failed to consider the affidavit of means that he had filed.
6. The appellant argues that the decision runs afoul of the express provisions of Sections 8 and 30 of the *Children Act* and Article 53(1)(e) of the *Constitution* of Kenya regarding the 'best interests of the child' principle. Reliance is further placed on the decisions in *J.O.O v A.J.M* [2017] eKLR ; *S.A.K v Z.D.N.P* [2019] eKLR and *B.R.0 v W.J.N.W.M* [2022] eKLR on the requirement that parental responsibility be shared equally.
7. It is submitted that the over burdening of the appellant is not defensible and reliance is placed on the decisions *M.O.A v H.A.O* [2021] eKLR and *C.I.N v J.N.N* eKLR for the proposition that the Respondent must bear her fair share of responsibility with regards to the maintenance of the child.

Analysis And Determination.

Having considered the pleadings filed herein alongside the submissions filed, authorities cited and relevant law, I discern the following as the issue for determination

i. Whether the Appeal has merit and this Court should set aside or vary the decision of the trial Court

8. In determining this Appeal I am well guided by the decision in *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 and *Peters v Sunday Post Limited* [1958] on the duty of the Appellate Court to re-evaluate the evidence before the trial Court as well as the judgment and arrive at its independent conclusion bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.
9. In the case of *Mursal & another v Manese* (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment) Hon. Mativo J (as he then was) further enunciated on the role of the Appellate Court as follows

A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.

10. I am further guided by the decision in *Mbogo & Another v Shah*, [1968] EA, on general principles upon which an appellate court may interfere with a discretionary power of a trial, which were set out as follows: -

“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as



a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.

The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

11. In *Patel v E.A. Cargo Handling Services Limited* (1974) E.A. 75, this Court held as follows:

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules: the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”

12. At the trial, the Respondent testified. It was her evidence, that she was residing with the minor. Apart from the minor there are 2 other children of the marriage who are adults. The Appellant shouldered the school fees and school related expenses for the minor and on occasion contributed to the groceries for the house and internet, but this was sporadic. Her income was less than that of the appellant. She does not pay rent for the house.

13. She contributed to the maintenance of the child, by buying uniform, monthly subscription for sports. Apart from her salary she had rental income of Kshs 10000 per month. The child also has 2 pet dogs that have to be fed, treated and vaccinated. The children were accustomed to a lifestyle that she would not be able to sustain on her own. She sought Kshs 150,000 per month for maintenance for the minor.

14. The minor was interviewed by the Court and desired that she would stay with her mum and visit her dad.

15. At the trial, the appellant sought that fees, clothing and food needs of the child be shared equally between him and the appellant. It was his evidence that apart from the minor he was also providing for the other children of his union with the respondent and his other family. Apart from his job at Kenya National Hospital he also provided consultancy at other hospitals. He did not disclose those incomes as they were not guaranteed. He stated that when he lived with the respondent he contributed approximately kshs 90000 per month for the entire house for the groceries. He lamented that the respondent uses the bulk of her salary for self advancement; studies and constructing a home at her rural home.

16. In its judgment the Court identified the following as the issues for determination

- i. Has the plaintiff/ mother provided evidence of special circumstances to warrant extension of parental responsibility for the children VAO and JBA beyond their eighteenth birthday
- ii. Who is entitled to actual custody, care and control of the younger child DPC?
- iii. How does the court apportion parental responsibility for the child(ren)?

17. The appeal revolves on the Courts determination of the 3rd issue as relates to the minor. The Court stated that in arriving its decision it would be guided by Article 53(2) of the [Constitution](#) and Section



4(2) of the Children Act. At paragraph 20 of the impugned decision the court laid out the factors it would take into consideration guided by Section 94 (1) of the Children Act.

18. The Court then ordered that the
 - i. Both parties shall take care of the child's medical care by enrolling her in their respective medical covers and share any other cash bill over and above the said cover on a 50/50 basis
 - ii. The Defendant/ father shall take care of the child's school fees and all schoolm related expenses at the child's current school or any other school to be agreed upon be the parties.
 - iii. The plaintiff/ mother shall take care of the child's clothing needs.
 - iv. The Defendant/ mother shall take care of the child's clothing needs
 - v. The Defendant/ father shall continue remitting Kshs 25000 per month for the child's food needs. The amount shall reduce half duringschool holiday as the said holiday shall be shared on a 50/ 50 basis.
 - vi. Should the child join a boarding school the monthly maintenance shall only apply during school holidays
 - vii. Finally, this being a children case, each party shall bear its own costs of the suit.
19. Having reviewed the proceedings in the trial court and the judgment of the Court, I am of the view that the Court correctly directed itself on the applicable law. The appellant sought kshs 150,000 as maintenance. The appellant stated that prior to the fallout between him and the respondent, he was contributing kshs 90000 for groceries for the entire house.
20. In its judgment the Court was of the view that he continue providing the sum of kshs 25,000 which would be altered when the child was on holiday and in the event the child went to boarding school.
21. The judicial precedents cited by the appellant are clear that no parent can be absolved from parental responsibility as it is a shared responsibility and not necessarily equal. This position was stated in *M.K. v 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.”
22. This was reiterated in the case of *E.M.M v M.O.O(2016)eKLR*:-

“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.”
23. The trial magistrate in ordering that both parties contribute to the maintenance of the minor had considered all the material presented before her in regard to the financial capabilities of the parties.
24. The magistrate was right in finding that parental responsibility albeit shared is not necessarily equal. From the judgement, the learned magistrate apportioned responsibility to both parents based on the evidence before her on the financial position of each party.
25. Consequently, I find no fault in the judgement of the trial court and it is hereby upheld. The appeal is accordingly dismissed.
26. On costs, each party will bear their own costs.



It is so ordered

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
7TH DAY OF JUNE, 2024.**

P. M NYAUNDI

JUDGE

In the Presence of

Fardosa Court Assistant

