



**DNM v RMW (Civil Appeal E007 of 2024)
[2024] KEHC 12501 (KLR) (Family) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12501 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E007 OF 2024
CJ KENDAGOR, J
OCTOBER 11, 2024**

BETWEEN

DNM APPELLANT

AND

RMW RESPONDENT

(An Appeal from the Judgement of Hon. Jackie Kibosia, Principal Magistrate delivered on 26th January, 2024 in Nairobi Children's Cause No. E905 of 2021)

JUDGMENT

1. RMW, the Respondent filed Nairobi Children's Cause No. E905 of 2021 against DNM, the Appellant. The evidence tendered before the children court is that the parties got married on 20th April, 2016 and lived as husband and wife between 20th April and 28th April, 2017 when they separated. Prior to the marriage, RMW had two issues EM and SH, aged 17 (now adult) and 11 years, respectively. In the plaint dated 23rd July, 2021, the Respondent sought in the following orders:
 - a. That the Appellant resumes/assumes parental responsibility over the children EM and SN all computed at Ksh.160,000/=;
 - b. That the Appellant pays such monthly sums for maintenance of the children until the child is over 18 years and/or capable of maintaining themselves and in the meantime parental responsibilities be extended beyond 18th birthday in respect of EM who is turning 18 years on 27th July, 2021;
 - c. That the Respondent be granted full actual and legal custody of children;
 - d. Costs.



2. In the judgment delivered on 26th January, 2024 the learned Magistrate granted legal custody of SN to both parties, with the Respondent having actual custody of the minor and unlimited access by the Appellant. The court decreed that the Respondent provides food, shelter, and clothing while the Appellant pays school fees and school-related expenses and provides comprehensive medical cover. No orders were made in respect of EM as she had attained the age of majority.
3. Being dissatisfied with the Judgment, the Appellant has appealed to this Court on grounds that the learned Magistrate erred in law and fact:
 - I. In finding the Appellant liable to pay school fees and related expenses as well as comprehensive medical cover
 - II. By holding that the Plaintiff/Respondent had proved her case on balance of probabilities;
 - III. By disregarding the fact that the Appellant is not the biological father and does not know how his name was inserted in the minor's birth certificate;
 - IV. In her order which is inordinate by excessive, all circumstances considered;
 - V. In disregarding the Appellant's defense;
 - VI. In law and in fact by failing to consider the water tight evidence and facts presented by the Appellant.
4. The Appellant prayed that the appeal be allowed and the Judgment delivered on 26th January, 2024 be set aside. The Appellant also prayed that the costs of this appeal be provided for.
5. The appeal was canvassed by way of written submissions, the Appellant filed submissions dated 29th August, 2024 while the Respondent filed submissions dated 16th September, 2024 which I have duly considered together with the authorities cited.
6. As I consider the matter, I am mindful of the constitutional and statutory imperative that the best interests of the children are paramount. Article 53 (2) of *the Constitution* of Kenya, 2010 provides:

“ A child's best interests are of paramount importance in every matter concerning the child”.

Section 4 (2) and (3) of the Children's Act (“the Act”) provides:-

 - (2) 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.
 - (3) 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.



7. The marriage and subsequent divorce are not contested. The marriage lasted one year. The appellant's primary contention is that he is not the minor's biological father or stepfather, has never accepted the minor to the point of parental responsibility, and is not obligated to provide for her. On the other hand, the respondent asserts that the appellant acquired parental responsibility over the minor and has a duty to pay child maintenance.
8. The issues for determination are;
 - i. Whether the appellant assumed and or acquired parental responsibility; and
 - ii. Whether the appellant is liable to pay child maintenance.
9. The trial court relied on Section 34 (6) of the *Children Act*, 2022 in holding that the appellant had acquired parental responsibility over the two children by virtue of the his marriage to the respondent. The Section provides as follows;

“Where the parent of a child marries, the parent's spouse shall exercise parental responsibility under the provisions of this Act, whether or not that spouse has legally adopted the child”
10. The *Children Act* No. 29 of 2022 (the 'Act') was assented to on 6th July 2022 with a commencement date of 26th July 2022. It repealed the *Children Act* No. 8 of 2001 (the 'Repealed Act'). The effect of this is that from 26th July, 2022 the Repealed Act ceased to be in force, subject to transitional provisions, including that the Act is not to be applied retrospectively to matters pending in court. Both parties highlighted the application of Section 94 of the repealed act. This section provides financial provisions for step-parents and fathers of children born out of wedlock. This section was declared unconstitutional in a Judgment delivered by Njagi J. on 7th February, 2019 in *NSA & another v Cabinet Secretary for, Ministry of Interior and Coordination of National Government & another* [2019] eKLR). At the time the parties were married and the subsequent divorce, the operating law was Section 94 of the repealed act. The specified time period is from 2016 to April 2018.
11. Section 94 provided as follows;
 - (1) The Court may order financial provision to be made by a parent for a child including a child of the other parent who has been accepted as a child of the family and in deciding to make such an order the court shall have regard to the circumstances of the case and without prejudice to the generality of the foregoing, shall 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 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;
 - (d) the income or earning capacity, if any, property and other financial resources 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) the circumstances of any of the child's siblings;



- (h) the customs, practices and religion of the parties and the child;
- (i) 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 has assumed that responsibility and the length of the period during which he has met that responsibility;
- (j) whether the respondent assumed responsibility for the maintenance of the child knowing the child was not his child, or knowing that he was not legally married to the mother of the child;
- (k) the liability of any other person to maintain the child;
- (l) the liability of that person to maintain other children.

12. In revisiting the case's evidence, it is uncontested that the parties cohabited as husband and wife throughout the one-year duration of their marriage. From the evidence on record, the two children were also living with them; they were 5 and 13 years old when the parties officiated their union in 2016.
13. The inclusion of the appellant's name as the children's father in the birth certificates was done in January, 2017 when the marriage was subsisting. Whereas the appellant disputes that he did not consent to the inclusion of his name in the birth certificates, he acknowledged in cross-examination that he had not lodged any complaint nor taken any steps to have the issue actioned against the respondent. Based on the available evidence, it is reasonable to conclude that he was involved in the implementation of the change.
14. The appellant acknowledged that when they lived together, he paid rent, food, and utility bills. However, the parties were not in agreement on who was paying fees. Child support arrangements do not take into account the specific roles of each parent in meeting the children's needs. What is of significance is that each parent fulfils their duty in supporting the children.
15. Upon review of the evidence presented in court, it is evident that the two children related to the appellant as their father. The court was made aware of the circumstances surrounding the birth of the minor SN during cross-examination, and this information was not contested. She has known no other parents apart from the parties herein. In his capacity as their stepfather, the appellant dutifully provided for them, thereby assuming parental responsibility. Parental responsibility includes but is not limited to matters relating to the provision of food, shelter, education, medical care and clothing for the child.
16. I am well guided by the case of *ZAK & another v MA & another* [2013] eKLR, Mumbi Ngugi, J (as she then was) stated:-

“Looked at through the prism of *the Constitution*, particularly Article 53 (2) which requires that the best interests of the child be the paramount consideration in any matter concerning the child, I believe that a step-parent in such circumstances must be held to have an obligation recognised in law to exercise parental responsibility as defined in Section 23 of the *Children Act* over his or her step-child. It would be an affront to morality and the values of *the Constitution* for a party who has had a relationship with a child akin to that of a father or mother to disclaim all responsibility and duty to maintain the child when he or she falls out with the parent of the child”.

The learned Judge went on to say:

“Such responsibility would, however, depend on the circumstances of each case, and the relationship that is shown to have existed between the person in question and the children



in respect of whom he or she is sought to be charged with parental responsibility for”.
(emphasis mine)

17. Article 53 of *the Constitution* provides as follows on child maintenance:-

“ 53.

(1) Every child has the right–

(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;”

18. The Constitutional principle of equal parental responsibility was restated in the case of C.I.N v J.N.N [2014] eKLR relied on by the Respondent. Kimaru, J (as he then was) opined:-

“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. The above constitutional requirement is a game changer. Parties seeking the intervention of the Children’s Court to secure maintenance for the upkeep of the child or children must also indicate what contribution they are making towards the support of the child or children. This is because both the mother and the father of the child have equal responsibility towards the upbringing of the child or children”.

19. Maintenance orders are made in the best interests of the children and ought not to be oppressive or punitive to any party. This was the holding in SKM v MWI [2015] eKLR, where Musyoka, J. expressed himself thus:-

“Maintenance orders are not meant to punish or oppress any party. They should be designed to provide for the needs of the child or children in question, while at the same time respecting the financial status of the parent. A child can only be maintained within the means of the parent in question”.

20. The income or earning capacity of the parties was presented before the trial court through the affidavit of means. I have analyzed the affidavits sworn by the appellant on 6th September, 2021, and the respondent’s sworn on 14th September, 2021. The learned magistrate apportioned parental responsibility and assigned the respondent food, shelter, utilities, and clothing. The appellant was assigned school fees and related expenses and to provide comprehensive medical cover. The distribution of responsibilities is well-balanced in light of the circumstances. Upon review, the judgment satisfies the Constitutional standard for determining the best interests of the minor.

21. The upshot of the above is that this Appeal is not merited. I proceed to dismiss the same. Each party shall bear its costs.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 11TH DAY OF OCTOBER, 2024.

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C. KENDAGOR



JUDGE

In the presence of: -

Court Assistant: Beryl

Mr. Makaba Advocate for the Appellant

Mr. Kitindio Advocate for the Respondent

