



REPUBLIC OF KENYA



KENYA LAW
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**GGW v SW (Minor) Suing through EWW (Mother and Next Friend of Minor)
(Civil Appeal 27 of 2019) [2023] KEHC 1695 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1695 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 27 OF 2019
FN MUCHEMI, J
MARCH 9, 2023**

BETWEEN

GGW APPELLANT

AND

**SW (MINOR) SUING THROUGH EWW (MOTHER AND NEXT FRIEND OF
MINOR) RESPONDENT**

*(Being an Appeal from the Judgment of Hon. R. Kefa SRM delivered
on 18th March 2019 in Nyeri Children's Case No. 17 of 2018)*

JUDGMENT

Brief Facts

1. This appeal arises from the judgment of the Children Court Case No 17 of 2018 whereby the trial court granted legal and physical custody to the respondent and apportioned maintenance between the parties with the respondent catering for shelter and utility bills. The appellant was directed to cater for school fees and accessories upon the minor attaining school going age. The court further directed that both parties share medical expenses equally towards payment of NHIF cover with the appellant paying Kshs 500/= monthly and that both parties contribute Kshs 12,000/= for food and clothing per month.
2. Being aggrieved with the decision of the trial court the appellant lodged this appeal citing 7 grounds summarised as follows:-
 - a) The learned trial magistrate erred in both law and in fact in finding the two year old minor at the time of hearing required Kshs 12,000/- for food and clothing per month without any evidence or proof from the plaintiff;



- b) The learned trial magistrate erred in law and in fact in ignoring and/or failing to consider the affidavit of means of the appellant showing his monthly earnings and which also indicated that he had other family members who are dependent on his salary;
 - c) The learned trial magistrate erred in law and in fact in ignoring the fact while reaching its decision, that the respondent had admitted before court to earning Kshs 1,000/- per day translating into Kshs 30,000/- per month double what the appellant earns but nevertheless went ahead to apportion the responsibility without considering that factor;
 - d) The learned trial magistrate erred in law and in fact finding that the appellant was entitled to pay Kshs 500/- NHIF cover which would be tantamount to the appellant meeting the entire medical needs whereas the same was to be shared;
 - e) The learned trial magistrate erred in law and in fact in giving blanket order on school fees and accessories without considering the appellant's role in determining the status of the school the minor shall attend which would give a green light to the respondent to take the minor to a high cost school.
3. Parties disposed of the appeal by way of written submissions.

Appellant's Submissions

4. The appellant submits that the trial court erred in finding that the minor who was 2 years 4 months required Kshs 12,000/- for food and clothing without any basis. The appellant contends that from her evidence in chief and pleadings, the respondent did not make a claim for a definite amount of money and further she did not produce any receipts to prove her claim of Kshs 5,000/- Therefore, the trial court ought to have laid a foundation on her assessment of the amount of Kshs 12,000/-. The appellant further contends that the said amount was excessive in the circumstances and the trial magistrate was not guided by the considerations set out under section 94 (c) of the *Children's Act*.
5. The appellant relies on the cases of *RWM v PMM (2021) eKLR* and *SKM v MWL (2015) eKLR* and submits that the trial court failed to take into consideration the earning capacities of both parties. The appellant argues that he filed an Affidavit of means which shows that he earns less than the respondent who testified that she earns Kshs 1,000/= per day. The appellant further submits that the respondent earns Kshs 30,000/= per month which is considerably less than what he earns and thus the trial court ought to have considered that when making the financial provisions.
6. The appellant further submits that parental responsibility ought to be shared between the parties and thus by the trial court erred by directing that he pay Kshs 500/= for NHIF solely. He further states that by paying the whole amount himself, would amount to him meeting the entire needs of the minor.
7. The appellant submits that the prayer for school fees was premature and further the orders given by the court are open to abuse because the respondent may take the minor to a school the appellant submits that he cannot afford.

The respondent's Submissions

8. I have perused the respondent's submissions and noted that she has made submissions on the dismissal of the appeal pursuant to the application dated May 4, 2022 and not the merits of the appeal. This is despite parties abandoning the said application on November 16, 2022 to allow the expeditious disposal of the appeal.



Issue for determination

9. The main issue for determination is whether the appeal has merit.

The Law

10. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another v 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.”

11. It was also held in *Mwangi v Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.
12. Dealing with the same point, the Court of Appeal in *Kiruga v Kiruga & Another* [1988] KLR 348, observed that:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”

13. Therefore this court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

Whether the trial court erred in assessing the monthly maintenance at Kshs 12,000/.

14. 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 4(2) and (3) of the *Children’s 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.
15. Parental responsibility has been defined in section 23 and 24 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. Further, section 94(1) 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;
17. The trial court had an obligation under the law to take into account the income or earning capacity, property and financial resources of the parties in determining the monthly contributions by the parties and to consider their financial needs, obligations and responsibilities. As regards the children, the court was required to bear in mind the financial needs and circumstances. On perusal of the trial court's judgement, it is evident the trial court in coming up with the figure of Kshs 12,000/= did not state how it arrived at that figure. Looking to the evidence of the parties, the respondent on cross-examination testified that she required Kshs 5000/- as maintenance and a further Kshs 5,000/= for day care as she pays Kshs 150/= per day at day care. The respondent further testified that she is a casual labourer and earns Kshs 1,000/= per day with Wednesday and Saturday being her busiest days when she can make Kshs 1,000/-. The appellant filed his affidavit of means and attached his pay slip. He testified that he could afford to pay Kshs 2,000/= per month as maintenance and half the medical costs for NHIF cover.
18. Pursuant with the provisions of section 114 of the Act, the court has to keep in mind that parental responsibility is a shared responsibility between parents and no parent should be overburdened with a heavier financial responsibility than the other. This principle was enunciated in the case of *SKW 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.
19. From the record, the respondent's expenses for daycare and maintenance was fixed at Kshs 12,000/=. The respondent argues that no receipts were produced to proof that these expenses were or would be incurred. The respondent explained that she did not have any receipts during the hearing of the case. However, the court took judicial notice that expenses for daycare are necessary for a child aged 2½ years especially where the mother of the minor has to go out and work. Such services for day care will not be given free of charge and may increase from time to time due to high standards of living that seem to be on the upward trend in this country. The respondent explained that she had to go out for casual work in order to earn her living. In my considered view, I find the figure of Kshs 12,000/= reasonable in the circumstances to be shared by both parents.



20. The appellant also argued that he earns less than the appellant and therefore the trial court ought to have taken that into consideration. Notably, the respondent testified that she was a casual labourer earning about Kshs 1,000/= per day. This court takes judicial notice that being a casual labourer does not guarantee a person daily work or income. The likelihood of going for days without work cannot be ruled out. Thus, it is erroneous to assume that since the respondent states that she earns Kshs 1,000/= daily in her casual work, does not automatically translate to earning Kshs 30,000/= per month. It is therefore my considered view that the trial court did take into account the parties financial capabilities as it apportioned parental responsibilities.
21. The court directed that the respondent pays rent and utility bills solely and then share the expenses of providing food and clothing with the appellant which the appellant finds inappropriate. The court allowed the figure of Kshs 12,000/= for this item to be shared equally. Considering the high cost of living, this was a reasonable figure that ought to be retained bearing in mind that neither parent should be allowed to relent of his/her responsibility so as to put the other at a disadvantage.
22. The appellant argued that paying Kshs 500/= monthly for the NHIF cover for the minor amounts to him shouldering the entire responsibility while the two parents were ordered to share the expense. In this regard, I do not agree with the appellant that he will end up meeting the entire responsibility. However, this court takes note of the fact that the appellant was directed to solely pay fees for the minor as soon as she joins school on attainment of school-going age. This is a responsibility that is not a mean one bearing in mind that the cost of education has gone up over the last few years and that the responsibility will continue for several years. It is my considered view that the appellant has satisfied this court that the added responsibility of the NHIF ought to be lifted in view of his responsibility to pay school fees.
23. It is trite law that the parties bear equal responsibility and equal rights over the child. The appellant faults the trial court for not giving an order to the effect that he gives an input as to the choice of schools for the minor. In my considered view, the appellant and the respondent require to consult and agree on the best school for the minor considering the best interests of the minor and the financial capability of both parents.
24. It is my finding that this appeal is only partly successful in regard to the responsibility of NHIF card annual payment and the right of the appellant to liaise and consult with the respondent on the choice of school for the minor.
25. Consequently, I make the following orders:-
 - a) That the respondent shall meet the expense of the annual NHIF payment for the minor.
 - b) That the parties shall consult on the choice of school for the minor.
26. That all the other grounds of appeal have not been established. The judgement of the honourable magistrate delivered on March 18, 2019 is hereby upheld on all the other responsibilities save for the NHIF payment.
28. Each party shall meet their own costs.
29. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 9TH DAY OF MARCH, 2023.

**F MUCHEMI
JUDGE**



JUDGMENT DELIVERED THROUGH VIDEOLINK THIS 9TH DAY OF MARCH, 2023

