



**In re AHM & AWM (Minors) (Children's Appeal Case E067 of 2022)
[2023] KEHC 19732 (KLR) (Family) (23 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19732 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY**

CHILDREN'S APPEAL CASE E067 OF 2022

MA ODERO, J

JUNE 23, 2023

BETWEEN

AHM 1ST APPELLANT

AWM 2ND APPELLANT

SUING THROUGH VLM

AND

JPM RESPONDENT

*(Being an Appeal from Judgement delivered by Hon. F. Terer on 17th June
2022 in the Children's Court at Nairobi in Civil Suit No. 499 of 2021)*

JUDGMENT

1. The Appellant herein VLM filed the Memorandum of Appeal dated 18th July 2022 challenging the Judgement of the learned trial Magistrate delivered on 17th June 2022 in Nairobi Children's Court case No. 499 of 2021.
2. The Respondent JPM opposed the Appeal through the Replying Affidavit dated 18th November 2022. The appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated 13th February 2023 whilst the Respondent did not file any written submissions.

Background

3. The parties herein are a couple who cohabited as man and wife from the year 2011 to 2013. They underwent customary marriage on 14th December 2013 and later underwent a Civil Marriage on 26th October 2016.



4. The Appellant and the Respondent are the biological parents of the two (2) minors AHM and AWM.
5. The Appellant filed in the Children's Court Civil Case No. 499 of 2021 seeking the following orders:-
 1. Custody of the minors, being AHM and AWM.
 2. That she may be granted such sums by way of maintenance of the said children as may be just in the following term:
 - i) Medical Insurance of outpatient Kes. 100,000 and Inpatient Kes.5,000,000;
 - ii) Rent in the sum of kes 35,000.00;
 - iii) Electricity Bill in the sum of Kes. 4,000.00;
 - iv) Water bill in the sum of Kes.2,000.00;
 - v) Monthly shopping in the sum of Kes. 20,000.00;
 - vi) House girl salary in the sum of Kes.10,000.00; and
 - vii) School fees in the sum of Kes.80,000 per term.
 3. That the Defendant be directed on the terms of visiting and/access to the minors as the court may deem fit, just and fair to the security of both the minors and guardian.
 4. Costs of this suit.
 5. Any other relief the court deems fit to grant.”
6. The suit was fully heard and on 17th June 2022, Hon. Terer, Senior Resident Magistrate delivered a judgement in which he made the following orders regarding custody and maintenance of the two (2) minors.
 1. That the legal custody of the minors, A.H.M and A.W.M shall jointly vest in the Plaintiff and Defendant.
 2. That their actual custody, care and control shall vest in the Plaintiff;
 3. That the Defendant is granted access as follows:
 - a) During school days on alternative weekends from Saturday morning (9a.m.) to Sunday evening (5p.m.).
 - b) During school mid-terms and school holidays at the ration of 50:50 with the Defendant going first.
 - c) During public holidays on alternative basis.
 - d) At school, unlimited but subject to school rules and regulations.
 4. That parental responsibility between the parties is apportioned as follows:

Plaintiff:

 - i. Shelter
 - ii. Clothing
 - iii. House help



iv. Utilities

Defendant

i. School fees and school related expenses

ii. Monthly contribution towards food an upkeep at the rate of Kshs.15,000 payable on or before 5th day of every month; and

iii. Medical

5. Each party to bear own costs.”

7. Being aggrieved by the decision of the trial court the Appellant filed a Memorandum of Appeal dated 18th July 2022 seeking the following orders:-

“ 1. The court orders as to parental responsibility to set aside and/or varied in the following manner:

(a) Monthly contributions by the Respondent be enhanced to Kes.50,000.00.

8. The Appeal was premised upon the following grounds:-

“ 1. The Hon. Magistrate erred in fact and in law in failing to take into account the income or earning capacity, property and financial resources of both parties while issuing maintenance orders.

2. The Hon. Magistrate erred in fact and in law in failing to consider the Appellant’s employment status and in finding and holding that the Respondent shall provide Kenya Shillings Fifteen Thousand Only (Kshs.15,000/=) towards the maintenance of the two (2) children without considering the evidence on Appellant’s financial and employment status.

3. The Hon. Magistrate erred in fact and in law in failing to consider the guidelines used by the court when making an order of financial provision for maintenance of a child.

4. The Hon. Magistrate erred in fact and in law in failing to consider and appreciate the totality of the evidence before him and reached a conclusion that is contrary to the evidence on record as produced by the Appellant.

5. The Hon. Magistrate erred in fact and in law in failing to appreciate the fact that maintenance orders are made in the best interest of the children and ought not to be oppressive or punitive to any party.”

Analysis and Determination

9. I have considered this appeal filed by the Appellant, the Replying Affidavit filed by the Respondent as well as the submissions on record. This being a first appeal it is the duty of this court to examine the



evidence adduced during the trial and to draw its own conclusions on the same. In *Selle & Another -vs- Associated Motor Boat Company Ltd & Others* [1968] E.A. 123 the court held as follows:

“An appeal to this court from 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 through 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 facts 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 demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan*, (1955), 22 E.A.C.A. 270).”

10. As a general rule the High Court will not interfere with findings made by the trial court unless it finds that the trial court erred or misapprehended the facts of the evidence. In *Kiruga -vs- Kiruga & Another* [1988] eKLR the court observed as follows:-

“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.”

11. This court cannot lose sight of the fact that his appeal arises from a Children’s Case. In all matters relating to the welfare a minors courts are obliged to give priority to the ‘best interests’ of the child.

12. The *Constitution* of Kenya 2010 provides at Article 53 (2) as follows:-

(2) A child’s best interest are of paramount importance in every matter concerning the child. [own emphasis]

13. Section 8(1) of the *Children’s Act* of 2022 provides as follows:-

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(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—

(a) the best interests of the child shall be the primary consideration;” [own emphasis].

14. The Appellant does not seem to have any issues with regard to the orders made by the trial court relating to the issue of custody of the minors. Nor does she take issue with the orders made granting the Respondent access to the minors.

15. What the Appellant takes issue with are the orders to the effect that the Respondent be required to pay Kshs.15,000 monthly towards the maintenance of the minors. The Appellant asks that this amount be enhanced to Kshs.50,000 per month.

16. The Appellant states that when she was living with the Respondent he was catering for 90% of the family expenses. She states that she has since lost her job and is unable to meet the needs of the minors.



17. The parameters which a court must consider in making orders for the financial provision towards the maintenance of minors is found in Section 94(1) of the *Children Act* 2002 which provides as follows:-
- (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)
18. Parental Responsibility is a shared responsibility which falls on both parents. Under Article 53 of the *Constitution* of Kenya 2010 every child has the right to parental care and protection. In *C.I.N-vs-J.N.N.* [2014] eKLR Hon. Justice Kimaru (as he then was) stated as follows:-
- “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 only be borne by the adverse party. The (said) party must establish, to the satisfaction of the court, that she has also made effort to provide for the upkeep of the children.”
19. I have perused the judgement of the trial court. The Hon. Trial Magistrate stated as follows:-
- “From the material before me; I find that the Plaintiff's Affidavit of means is inconclusive as to her exact earning capacity and/or income. When she refers to savings which are rapidly being depleted. She did not stipulate the figure....” The trial Magistrate then went on to allocate what provision each party was to make towards the maintenance of the minors.
20. The Appellant who is the custodial parent was ordered to provide for shelter, clothing and paying the Nanny. The Respondents is to provide for all the education and medical needs of the minors in addition to pay Kshs.15,000 per month.
21. Although the Appellant asks that the Respondent be ordered to pay Kshs.50,000 per month she has not advance any justification for this amount. The Appellant cannot just sit back and claim that she has no means to provide for the children. What efforts has she made as the mother of the children to seek employment or to seek out income generating activities to provide for her children.
22. It is said that one cannot bleed a stone. The court cannot order a parent to pay what they do not have. Whereas when the couple lived together the Appellant may have shouldered the larger burden of caring for the family, the fact is that the parties have now separated and no longer live together. As such each parent must pull their weight in ensuring that the needs of their child/children are taken care of. The Respondent cannot be condemned to bear the greater burden in providing for the children.
23. In *SKW-VS-MWI* [2015] eKLR, Hon. Justice Musyoka stated as follows:-
- “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.”



24. I find no evidence to show that the learned trial Magistrate misapprehended the law or the facts in coming to the to the decision on maintenance. I am satisfied that the trial Magistrate put into consideration all necessary factors in coming to the decision of what each parent will provide for the children.
25. Finally, I find no merit in this Appeal. The same is hereby dismissed in its entirety. This being a family matter each side will bear their own costs.

DATED IN NAIROBI THIS 23RD DAY OF JUNE 2023.

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MAUREEN A. ODERO

JUDGE

