



REPUBLIC OF KENYA



EKM v ROM (Civil Appeal 131 of 2019) [2023] KEHC 19683 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19683 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 131 OF 2019
PN GICHOHI, J
JULY 6, 2023**

BETWEEN

EKM APPELLANT

AND

ROM RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. Wamucii Nyotah (PM) dated 11th day of November 2019 in the original KISII Children Case No. 14 of 2018))

JUDGMENT

1. The background of this appeal is that through the firm of Ng'ang'a & Associates Advocates, the Appellant instituted a suit against the Respondent vide a plaint dated 16th March 2018 seeking that:
 1. Actual custody of the child be granted to her.
 2. The Respondent to provide Ksh. 30,000/= towards the maintenance of the child.
 3. The Defendant to pay school fees and school related expenses for the minor.
 4. The Defendant to pay costs and interest.
 5. The court does make such other or further orders as may deem just and fit to grant in the interest of justice.
2. The Appellant pleaded that she had been cohabiting with the Respondent for over ten years and they were blessed with one issue by the name of GZO, a minor, born on 4th April 2011; that the minor was a standard two pupil at [Particulars withheld] Academy Mixed Day and Boarding School in Kisii; that the Respondent has been unreliable and unpredictable in his maintenance provision to the minor leaving the Appellant with the absolute parental responsibility; that the Respondent is a man of means being a Member of Parliament but he has abdicated his parental responsibilities.



3. Simultaneously with the said plaint, the Appellant filed as Notice of Motion under certificate of urgency seeking that the Respondent be ordered to pay the minor's school fees arrears of Ksh. 22,000/= ; that the Respondent be ordered to continue to pay school fees and other school related expenses pending hearing and determination of the application and the suit and that the Respondent be ordered to provide at least Kshs. 30,000/= towards maintenance of the minor.
4. Vide a ruling dated 17th August 2018, the court granted the orders that :
 - a. The Respondent to pay Ksh. 30,000/= every month for food, clothing and entertainment.
 - b. Respondent to pay school fees and school related expenses.
 - c. Respondent to clear the outstanding school fees balance of Kshs. 22,000/=.
 - d. Costs of the Application be in the cause.
 - e. Each party at liberty to apply.
5. Subsequently, there was a change of Advocates and the Appellant filed an amended plaint dated 3rd April 2018 through the firm of Nyamweya Osoro & Nyamweya Advocates there was no change on the body of the amended plaint except that prayer No. 2 in respect of maintenance was amended from Kshs. 30,000/= to Kshs. 50,000/=.
6. Despite service, the Respondent had not entered appearance and had not filed his defence as at the time the matter proceeded for hearing ex-parte with the Appellant testifying as the only witness (PW1) for the Plaintiff's case. Judgement was subsequently delivered on 19th October 2018 and a decree issued.
7. The Respondent then entered appearance through the firm of Ochoki & Co advocates and by application dated 23rd November 2018 where a defence was annexed, he sought setting aside of the judgement and that the matter to proceed for hearing on merits. Parties then entered into a consent and the judgment was set aside and the annexed defence deemed ads duly filed upon payment of the requisite fees. Parties were sent for mediation on the matter but mediation collapsed. The Respondent was granted leave to file defence within 14 days , to clear outstanding school fees amounting to Kshs. 54,000/= before the next mention date in default the defence and all documents would stand struck out and judgment dated 19th October 2018 reinstated .
8. In his defence, the Respondent denied the appellant's claim. He stated that he could not afford the exaggerated costs of the appellant's demand and he cannot maintain a minor who is not biologically his. The respondent asked the court to dismiss the suit with costs.
9. The Respondent failed to comply and by a ruling dated 1/4/2019, the trial Magistrate struck out the defence filed by the respondent. On 4/4/2019, the Respondent confirmed he had cleared arrears. The court allowed the Respondent to comply within 21 days and failure to do so, no document being filed by the Respondent would be admitted in court.
10. According to the court record, the Respondent had not complied as at 7th October 2019 when the matter came up for defence hearing. Counsel for the respondent told the court that he was not ready to proceed since the statements were not signed. Counsel proceeded to close the defence case. Both parties did file their respective submissions. The trial court rendered its judgement on 11th November 2019 in favour of the Appellant in the following terms:-
 - a. Actual custody of the minor is vested on the plaintiff.
 - b. Defendant to pay Kshs. 20,000/= per month directly to the plaintiff.



- c. Defendant to pay school fees and school related expenses as and when they arise.
 - d. Each party be at liberty to apply as and when circumstances do change.
11. The Appellant being dissatisfied with the judgement preferred the instant appeal on the following grounds:-
- a. That the trial Magistrate erred in law and in fact by failing to determine the issues before her;
 - b. That the trial Magistrate erred in law and in fact by ordering a sum of Kshs. 20,000/= as maintenance, an amount which is inordinately low in the circumstances against the best interest of the minor;
 - c. That the trial Magistrate erred in applying the wrong principles in the law thus arriving at a wrong conclusion;
 - d. That the trial Magistrate erred in law and in fact by giving more credence to the evidence of the defence without any documentary proof on his salary and even the defendant testifying in court;
 - e. That the trial Magistrate erred in law and in fact by misapprehending the evidence of the appellant/plaintiff.
12. The appellant prayed for orders that:-
- a. This appeal be allowed with costs and the court do vary maintenance order and have it increased.
 - b. The judgement be set aside and have the amount of Kshs. 20,000/= be increased.
13. Pursuant to directions taken herein, the appeal was canvassed by way of written submissions. The Appellant filed her undated submissions on 20th January 2023 while the Respondent filed his on 16th January 2023. The Appellant contended that this appeal mainly relates to the maintenance of the child; that Section 94 (1) of the *Children Act* provides guidelines in obtaining the rights and protection of the interests of the children; that the amount of Kshs. 20,000/= was inordinately low and against the best interest of the minor; that the trial court was obligated to take into account the income capacity of both parties before rendering its judgement.
14. The Appellant further submitted that the respondent is a former Member of Parliament for Kitutu Chache South and now the Senator for Kisii County, did not proof his income, his payslip and neither did he come to court to testify save for stating he only earns Kshs. 69,539 per month; that the sum of Kshs. 20,000/= is inordinately low towards maintenance of the minor who is a son of a Member of Parliament and the orders did not take into account the needs of the minor.
15. Further, the Appellant submitted that the Magistrate erred in failing to direct the parties to file affidavit of means to have the picture of the financial position of both parties before apportioning maintenance between the parties. The appellant urged this court to set aside the orders and vary the maintenance orders pursuant to the needs of the child.
16. On his part, the Respondent submitted on two issues. On whether the Magistrate applied on the principles relating to maintenance, the Respondent referred to Article 53 of the *Constitution* and Section 94 (1) of the *Children's Act* and submitted that the trial court was obligated to take into account the earning capacity and financial resources of each party before making maintenance orders.



17. It was submitted that the Appellant has not given particulars of the needs of the minor to give a justification of the award of Kshs. 50,000/=; that the Respondent had offered a sum of Kshs. 5,000/= which the court found to be low. He submitted that the trial court was satisfied with the constitutional imperative of Article 53(1) that parental care is a shared responsibility.
18. On whether the decision was unconstitutional and not in the best interest of the child, the Respondent submitted that the trial court did not deviate from the principles of the law relating to maintenance of the child or compromise his best interests. He therefore submitted that the Appellant failed to discharge the burden of proof and hence, the appeal lacks merit and the same ought to be dismissed.

Determination

19. I have considered the appeal, the proceedings in the trial court and the submissions by both parties. Both parties have aptly quoted relevant constitutional and statutory provisions in regard to the rights of a child and in particular care and protection. He stated that he could not afford the exaggerated costs of the appellant's demand and he cannot maintain a minor who is not biologically his. The broad issue that arises for determination is whether the trial court applied the correct principles in assessment of maintenance costs.
20. As this is the first appeal, this Court has taken the liberty to highlight the lower court record in order to arrive at its own conclusion in this appeal - See the decision in *Selle & Another vs Associated Motor Boat Co. Ltd* (1968) EA 123.
21. As earlier highlighted, the Appellant was the only witness in this case. The Respondent did not tender evidence before court. However, it was the duty of the Appellant to prove her case. In her amended plaint, she did not indicate anywhere her financial capability. She did not mention what she does for a living.
22. In her supporting affidavit to the Notice of Motion dated 16th March 2018, the Appellant stated that she had "enrolled a medical scheme for the minor and was willing to provide shelter and a minder together with other daily needs of the minor." She does not state her source of funds to enable her deal as stated.
23. Though she says that the Respondent is a man of means as he is a Member of Parliament, there is no affidavit of means in regard to the Appellant or the Respondent. Maintenance cannot be based on the title a parent holds in society. It is not enough for a party to imagine what the other party earns. It is also not enough for a party to say what he earns. That assertion should be backed by an affidavit of means and further buttressed by documentary evidence of their financial status. I am persuaded by the decision in *AMK v SDM* [2018] eKLR on the contents of an affidavit of means where M.W.Muigai J stated:

"...ideally the affidavit of means should include income earning capacity and other financial resources by each party/parent; the financial needs, obligations and responsibilities by each party /parent and propose contribution which each party has made or intend to make for the welfare of family/child (ren) including looking after the children through day-to-day care and support."
24. In this case, the Appellant was seeking that the Respondent provides Kshs. 50,000/= for maintenance of the minor. She relied on the birth Certificate of the minor (Exh. 1) and the Fees Structure (Exh. 2). She testified that she spends Kshs. 20,000/= per month on food. She was willing to take up rent,



medical and house help expenses while the Respondent should take up food , clothing and education expenses.

25. The trial magistrate took into consideration the provisions of the *Children Act* and highlighted the provisions of Article 53 (1) of the *Constitution* in regard to care and protection of the child which includes equal responsibility of the mother and father. In arriving at the decision on contribution of maintenance by the Respondent, the trial magistrate stated:

“The Plaintiff claims a sum of Kshs. 50,000/ per month being the cost of maintaining the minor although she does not give particulars of the maintenance required. She told the court that she is willing to take up rent, medical care and house help expenses. I find the Plaintiff’s offer reasonable considering that I have given her custody of the children. Care and control of the child can never be quantified...She proposes that the Defendant takes food , clothing and education. The Defendant proposes Kshs. 5,000/= arguing that his net salary is Ksh. 69,539/= and there is no justification for a claim of Ksh. 50,000/- by the Plaintiff because according to the Defendant the ...the financial needs of the minor cannot amount to that amount and that the Plaintiff has offered to cater for the rent, medical care and house help. Going by the Defendant's argument, food ,clothing and education remains uncatered for....that then should be the Defendant’s responsibility and I do so order. Kshs. 5,000/= proposed by the defendant is too low. I order the defendant to pay Kshs. 20,000/- per month towards maintenance of the minor.”

26. I am satisfied that the reasoning above is sound, based on law and on facts before the trial court. The magistrate was well guided and properly exercised her discretion in arriving at the amount of maintenance herein which in is my view is reasonable in the circumstances. Indeed, maintenance orders ought not be oppressive or punitive and was held by Musyoka J in *SKM v MWI* [2015] eKLR 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.”

27. In event that the circumstances of the minor or either of the parties change in terms of expenses, Section 161 (3) of the *Children’s Act* No. 29 of 2022 allows the party to apply to the trial court as and when required seeking review of the maintenance amount and that is the reason the trial magistrate concluded her judgment that “each party be at liberty to apply...” That section provides: -

“The Court may review the order for periodic payment upon-

- (a) the death of the person liable to make the periodic payment;
- a. significant change of circumstances of either parent or guardian, provided that the change is not detrimental to the best interest of the child.”

28. In the upshot, this appeal is dismissed for lack of merit. The Judgement and Decree dated 11th day of November 2019 by Hon. Wamucii Nyotah (PM) is hereby upheld. Each to bear his own costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 6TH DAY OF JULY, 2023.

PATRICIA GICHOHI

JUDGE



In the presence of:

N/A for Appellant

Mr. Achoki for Respondent

Kevin Isindu, Court Assistant

