



REPUBLIC OF KENYA



**CRN v MMN (Sued as the mother and next friend of TGM (Minor) (Civil Appeal E042 of 2023) [2023] KEHC 23881 (KLR) (17 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23881 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E042 OF 2023  
LM NJUGUNA, J  
OCTOBER 17, 2023**

**BETWEEN**

**CRN ..... APPLICANT**

**AND**

**MMN (SUED AS THE MOTHER AND NEXT FRIEND OF TGM  
(MINOR) ..... RESPONDENT**

*(Appeal from the Judgment of Hon. T.K. Kwambai SRM at Chief Magistrate's Court in Embu CMCHC No. 28 of 2019 delivered on 19th October 2022)*

**JUDGMENT**

1. The appellant has filed memorandum of appeal dated 02<sup>nd</sup> August 2023 seeking orders that:
  - a. The appeal be allowed;
  - b. The honourable court be pleased to set aside the allocation of 100% parental responsibility for medical care, school fees and school related expenses, and substitute the same with equally shared responsibility between the appellant and the respondent; and
  - c. The honourable court be pleased to set aside the order directing the respondent to pay Kshs. 3,000/= monthly maintenance.
2. The appeal was premised on the grounds that:
  - a. The learned trial magistrate erred in law in failing to consider that the parties herein had agreed on the distribution of parental responsibilities through a mediation agreement dated 28<sup>th</sup> February 2020;
  - b. The learned trial magistrate erred in fact and in law by allocating parental responsibilities of the minor solely to the appellant;



- c. The learned trial magistrate erred in law and fact in failing to consider that parental responsibility is a shared responsibility which ought to be distributed equally between both parents;
  - d. The learned magistrate erred in both law and fact by issuing orders that suggest that parental responsibility is solely the father's duty; and
  - e. The learned magistrate erred in law by bestowing full parental responsibility with minimal responsibility by the respondent.
3. The plaintiff/respondent had filed the plaint dated 15<sup>th</sup> October 2019 seeking judgment against the defendant/appellant to pay medical expenses in the sum of Kshs. 37,000/=, school fees according to the fees structure and costs of the suit. The subject is a minor who is also a person living with disability and in constant need of medical care. The Plaintiff/respondent alleged that the defendant/appellant had neglected his responsibility to care for the child even though he is a man of means.
  4. In his statement of defense, the defendant/appellant denied that he is a man of means but a normal shop attendant. He denied that there were any pending bills in relation to the minor and that the minor is a beneficiary of his NHIF which caters for the medical bills. That the minor is part of sponsorship programs which takes care of her special needs. At the hearing, PW1 who was the plaintiff/respondent stated that the appellant is the father of the minor and that he has abdicated his responsibility to take care of the child. That the child needs school fees which is in arrears and medication. She admitted that upon request, she received Kshs. 10,000/= from Lenny Kivuti Foundation which was a one-time off donation and was used for school fees for the minor.
  5. DW1 who is the defendant/appellant stated that he is contending with the plaintiff/respondent because of maintenance of the minor. That he has tried to assist them but the plaintiff/respondent is too demanding. That he was unable to support them because he had a patient in hospital and he ended up selling everything he had in order to settle the medical bills. That he has another family and his wife is not working. That he stopped paying for NHIF because the plaintiff/respondent was not using it for the minor herein but for another child. That he has been paying Kshs. 8,000/= every term to the minor's school.
  6. The case had been marked for mediation and the parties reached an agreement which was filed in court. In his judgment, the trial magistrate relied on Article 53(1) of the Constitution and Section 24 of the Children Act. The court ordered that the defendant/appellant provide for the minor's medical expenses as and when they arise, pays school fees and school related expenses and provided monthly maintenance of Ksh. 3,000/=.
  7. This appeal was canvassed by way of written submissions. Both parties complied with the directions of the court to that effect.
  8. The appellant reminded the court of its responsibility as an appellate court to revisit the evidence and make its own findings, citing the cases of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 and *Peters v Sunday Post Limited* [1958] EA 424. He referred to the final mediation settlement agreement found at page 27-28 of the record of appeal and stated that the trial court ignored it. He relied on the cases of *Flora N. Wasike v Destimo Wamboko* [1988] eKLR and *Board of Trustees national Social Security Fund v Michael Mwalo* [2015] eKLR where the court stated that an agreement such as the mediation settlement agreement ought to be treated as one with a contractual effect.
  9. That the trial court erred by allowing the trial to proceed after a mediation settlement agreement had been recorded. That the judgment of the court ought to be set aside and the mediation settlement



agreement be upheld. On his argument that both parents have joint parental responsibility, he relied on the decisions of the court in the cases of *BRO v WJNWM* [2022] eKLR, *CIN v JNN* (2014) eKLR and *MOA v HAO* [2021] eKLR. That the court's order that the appellant pay monthly maintenance of Kshs. 3,000/= is overbearing to the appellant.

10. On the other hand, the respondent submitted that she has been living with the child and providing for her with her small earnings. That the minor is in constant need of medication as she is blind. That the minor attends Thika School for the Blind and maintaining her in that school is an uphill task for the respondent. That the appellant has not met his obligations as ordered by the court in Embu HC Misc. E026 of 2023 to date. She stated that she has no problem sharing parental responsibility as long as the appellant is also involved. That she had been providing food, shelter and clothing for the minor for the past 8 years and so the appellant should provide education and medication needs for the minor going forward. She urged the court to dismiss the appeal.
11. Based on the foregoing, the issues for determination are as follows:
  - a. Whether the mediation agreement should be upheld and the judgment of the trial court be set aside; and
  - b. Whether this appellate court can re-apportion parental responsibility equally between the parties herein.
12. In this and all cases relating to children, the best interests of the child takes pre-eminence as provided by the constitution and the Children Act as follows:

Article 53(1)(e) of the constitution provides that:

“Every child has the right 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

Article 53(2) A child's best interests are of paramount importance in every matter concerning the child.”

And Section 4(2) and (3) of the Children Act (the Act) provide:

- “(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.”



13. According to the trial court's proceedings, after the plaint was filed, the suit was referred to court-annexed mediation through directions of the court on 30<sup>th</sup> October 2019. A mediation final settlement agreement dated 28<sup>th</sup> February 2020 was received at the Embu Law Courts Mediation Registry on the same day. There is no record showing that the mediation settlement agreement was adopted as judgment by the trial court. On 13<sup>th</sup> January 2022, the parties agreed to proceed to full hearing of the matter and both of them testified. At the end of the hearing, the court delivered its judgment on 19<sup>th</sup> October 2022. I am left with the question of what happened to the mediation settlement agreement?
14. On the first issue for determination, a mediation settlement agreement is as good as a consent between the parties, that is recorded in the court and adopted as a final determination of a case. The mediation settlement agreement must be signed by both parties and the mediator for it to be authentic. In the case of a court-annexed mediation, the settlement agreement is to be returned to the trial court for adoption as the judgment of the court within 10 days of completion of the mediation. This is according to Rule 34(1) the *Civil Procedure (Court-Annexed Mediation) Rules*, 2022 which provides:
34. Adoption of settlement agreements.
- (1) The Mediation Deputy Registrar or other officer designated for that purpose shall, within ten days after the settlement agreement being filed under rule 32, place the settlement agreement before the trial court or other designated officer for adoption.
15. In the case of *Alios Finance Kenya Limited v Country Farms Limited* (Civil Appeal E005 of 2020) [2022] KEHC 11012 (KLR) the court held:
- “The process of CAM is governed by the Judiciary of Kenya Practice Directions on Court Annexed Mediation issued by the Chief Justice under Article 159 of the *constitution* and Section 59B (1) (a), (b) and (c) of the *Civil Procedure Act*. Paragraph 12 of The Judiciary of Kenya Directions of *Court Annexed Mediation* (as amended in 2018) provides as follows:-
- “Any agreement filed with the Deputy Registrar or Magistrate or Kadhi as the case may be shall be adopted by the Court and shall be enforceable as a Judgment or order of Court.”
- Notably, once a mediation agreement is signed, it becomes final and binding on the parties. Mediation agreements were in the nature of consents. It is for that reason that this court considered the consequences and implications of entering a consent.”
16. From a perusal of the mediation settlement agreement dated 28<sup>th</sup> February 2020 between the parties herein, I shall apply my mind to the provisions of Article 53(1) of the *constitution* and therefore insist that the responsibility to take care of the child vests equally on both parents of the child. In the instant case, the respondent lives with the child and provides her basic needs, even when the appellant allegedly refuses to do so. It is the appellant's allegation that the respondent is always demanding for money for unclear reasons. However, it has been ascertained that the minor in question is in constant need of medical care and therefore money will always be needed for her upkeep and special diet. The minor is also attending a special school which is most favorable because of her disability.
17. With all this in mind, I do note that the issues in the trial court and some arising in this appeal are settled in the mediation settlement agreement. For instance, the parties at meditation agreed that the appellant would pay for NHIF premiums for use by the respondent and the minor, that they would



communicate to each other via text message regarding future medical expenses of the minor, they would both take care of school fees and school-related expenses, among others.

18. In my view, and in determination of the 2<sup>nd</sup> issue, the mediation settlement agreement is favourable in light of Article 53(1) of the *constitution* and section 24 of the *Children Act*. The interests of the child are taken care of and therefore the issues in the plaint are settled. Both parties expressed themselves according to their abilities to care for the child and they agreed. In the case of *SKM v MWI* [2015] eKLR, the court held 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. The trial magistrate indeed erred by failing to consider the mediation settlement agreement which includes both parents in taking care of the minor. The error goes as far as issuing a judgment for a case that had been completed expeditiously through mediation.

20. I take note that throughout the hearing and even after delivery of the judgment of the trial court, this case has had a continuous flow of applications against the appellant demanding maintenance of the minor. The appellant is reminded that parental responsibility must and should not stop at whatever point, as provided under Section 24 (5) of the *children Act* which provides:

“A person who has parental responsibility for a child at any time shall not cease to have that responsibility for the child.”

21. In the end, having considered the arguments made on this appeal and the relevant laws, I find that the appeal has merit and is hereby allowed with orders as follows:

- a. The judgment of the trial court dated 19<sup>th</sup> October 2022 and consequential orders is hereby set aside;
- b. The matter is referred back to the trial court for adoption of the mediation settlement agreement dated 28<sup>th</sup> February 2020 as the judgment of the court; and
- c. There shall be no order as to costs.

22. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 17<sup>TH</sup> DAY OF OCTOBER, 2023.**

**L. NJUGUNA**

**JUDGE**

.....**for the Applicant**

.....**for the Respondent**

