



REPUBLIC OF KENYA



KENYA LAW
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**In re SB & AB (Minors) (Civil Appeal E037 of 2021)
[2023] KEHC 24284 (KLR) (Family) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24284 (KLR)

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

**FAMILY
CIVIL APPEAL E037 OF 2021**

**MA ODERO, J
OCTOBER 19, 2023**

BETWEEN

AB APPELLANT

AND

SS RESPONDENT

(Being an Appeal from the part Judgement and orders of the Children’s Court in Children’s Case No. 411 of 2018, SS vs AB, delivered by Hon. G.M. Gitonga (Mr.) SRM on 22nd January 2021)

JUDGMENT

1. Before this Court for determination is the Memorandum of Appeal dated 5th May 2021 by which the Appellant AB seeks the following orders:- That
 - “ 1. The Judgement and in particular, order Numbers 5,6, and 7 of the Children’s Court dated 22nd March 2021 be set aside.
 2. This appeal be allowed.
 3. The child upkeep be shared equally.
 4. In the alternative, an order do issue directing each party to take care of the children maintenance during the time they are in their custody.
 5. The costs of this appeal be borne by the Respondent.
2. The Respondent SS opposed the appeal. The matter was canvassed by way of written submissions. The Appellant filed the written submissions dated 16th February 2023 whilst the Respondent relied upon her written submissions dated 3rd April 2023.



Background

3. The parties herein got married to each other on 4th April 2009 under Hindu Marriage laws. Their union was blessed with two (2) children (the subject – minors) as follows:-
 - (a) SB – born on 29th November 2011
 - (b) AB – born on 15th October 2013.
4. The marriage began to experience problems and in September 2016 the Appellant moved out of the matrimonial home.
5. Vide a Plaint dated 10th April 2018 filed in Nairobi Children Case No. 411 of 2018 the Respondent (mother) sought the following orders:-
 - “ a) That parties be granted joint legal custody of the minors.
 - b) That the Plaintiff be granted care and control of the minors.
 - c) That this honourable court do structure the terms of access to the children so as to introduce certainty and stability for them.
 - d) That the Defendant and/or his agents be restrained from using police to intimidate and harass the Plaintiff.
 - e) That the Defendant be restrained from exposing the children to his extra marital affairs.
 - f) That the cost of this suit be to the Plaintiff.”
6. The matter was heard inter parties and on 22nd January 2021 Hon. G.M. Gitonga Principal Magistrate delivered a judgement in which he made the following orders in respect of the custody of the minors:-
 - i) The Defendant/father shall have actual custody, care and control of the children every first two weeks of the month with effect from the 1st of February 2021 while the Plaintiff/mother shall have actual custody of the said children the last two weeks of the month. The parties may also agree on the converse of this order.
 - ii) During the two weeks that the children shall be in the custody of the one party, the other party shall reach them by way of mobile communications at the appropriate times in the evening between 7.30 p.m. and 8.30p.m.
 - iii) The parties shall also share school holidays with the children on a 50/50 basis.
 - iv) The parties shall equally share the new year other festivities, and also important dates in the children’s lives in an alternating manner.
7. With respect to maintenance of the minors the trial court ordered as follows:-
 - i) The Defendant/father shall take care of the children’s school fees and all other related expenses including transport and back to school if he does not drop them himself.
 - ii) The Defendant/father shall also take care of the children’s medical care needs.
 - iii) The Plaintiff/mother shall take care of the children’s clothing needs.



- iv) The Defendant/father shall continue taking care of the children's food needs but he shall remit Kshs.20,000 and not Kshs.36,000 for food during the two weeks the children shall be in the custody of the mother. The said amount shall be remitted at least two (2) days before the Plaintiff takes custody of the children. This shall be the case during school holidays as well.
8. Being dissatisfied with portions of said judgement the Appellant filed the Memorandum of Appeal dated 5th May 2021, which appeal is premised on the following grounds:-

“The Learned Judge erred in law and in fact:

- 1) In directing that, the Appellant do take of the children's school fees and all school related expenses including transport to and back from school if he does not drop them himself.
- 2) In directing the Appellant to continue taking care of the children's food needs by remitting Kshs.20,000 for food, during the two weeks the children shall be in the custody of the Respondent, at least 2 days before the Respondent takes custody, including during the school holidays as well.
- 3) In directing the Respondent to take care of the children's clothing needs only.
- 4) In failing to appreciate that parental responsibility should be borne by both parents.
- 5) In directing the Appellant to shoulder the bulk of the children upkeep burden.
- 6) In determining the issue of child upkeep not paying attention to the fact that, the Respondent never filed an affidavit of means and without regard to the evidence rendered during the hearing.
- 7) In failing to appreciate the law and in misinterpreting the principle of the best interest of the children.

Analysis and Determination

9. This being a first appeal, it is the duty of the court to review the evidence adduced before the lower court and draw its own conclusions. In *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA. 123 it was held that:-

“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...”

10. Similarly, the Court of Appeal in *Kiruga v Kiruga & Another* [1988] eKLR 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.”

11. The Appellant herein was not aggrieved by all aspects of the judgement delivered in the lower court. The Appellant does not seek to challenge the decision by the court that the parties have joint actual custody care and control of the two minor children nor did the Appellant take any issue with the orders made regarding access.
12. The Appellant only sought to challenge the decision of the trial court that he take care of all school related expenses and also remit a sum of Kshs.20,000 as maintenance during the two (2) week period when the minors are in the custody of the Respondent. He complains that the Respondent was only directed to cater for the children’s clothing which is a minimal cost.
13. The Appellant submits that parental responsibility is a joint responsibility. That by its orders the trial court placed upon him the greater burden of providing for the upkeep of the minors.
14. The Appellant argues that the Respondent earns a steady income from a reputable law firm and as such she should be directed to cater for a fifty percent (50%) share of the children’s needs.
15. The court is mindful of the fact that this is a matter concerning the welfare of children. As such the court is obligated to give priority to the best interest of the child.
16. 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.”
17. Likewise Section 8 (1) of the Children Act 2022 provides as follows:-
 - “(8).
 - (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]
18. In the case of *MAA v ABS* [2018] eKLR it was held as follows:-

“What is stated in Section 4 (3) (b) now Section of the 2022 Act] of the Act is the paramount principle which is vital in all matters concerning children and must be given prominence. While considering this matter this court was alert to the welfare of the child herein who is of tender years. The matter is not about the Appellant and the Respondent and their interests are secondary to those of the child. The foregoing provisions require this court to treat the interests of the child as the first and paramount consideration and must do everything to inter alia safeguard conserve and promote the rights and welfare of the child herein acting in the best interests of the child.” [own emphasis]
19. The Appellant submits that the court placed upon him an unfair burden in providing for the needs of the minors. He argues that he purchased the house which the Respondent and the children live in so the Respondent pays no rent yet, he also has to pay rent for his own accommodation having moved out of the matrimonial home.



20. Further the Appellant states that the Respondent was only directed to buy clothing for the minors which is a negligible cost given that he purchases the children's uniforms as ordered by the court.
22. On her part the Respondent parental responsibility is a shared responsibility which falls on both parties under Article 53 of the *Constitution* each child has the right to parental care and protection. In *C.L.N v 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 maintain 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.”
23. In determining issues of maintenance and how much each parent should be ordered to provide the court will be guided by Section 11 of the *Children Act 2022*.
24. In making maintenance orders courts ought to be guided by the needs of the child and the financial capacity of each parent. Maintenance orders should not unfairly overburden one parent as opposed to the other.
25. In the case of *SKM v 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.” [own emphasis]
26. I have carefully considered the circumstances of this case. The court ordered the Appellant to cater for the school fees, books, uniforms school transport ad all education related costs for the two minors.
27. The Appellant was also ordered to provide for the medical needs of the children. Already the Appellant is providing for a big portion of the expenses of the minors.
28. The trial court gave joint custody to the parties and each parent is to have actual custody of the minors for two (2) weeks of each month. It is only fair that the custodial parent cater for the food, nanny and accommodation of the children during the period when they have actual custody.
29. As it is the Respondent resides in a house purchased by the Appellant for which she pays no rent. The Appellant on his part lives in a house in which he has to pay rent. It is unfair to expect the Appellant having provided accommodation for the Respondent and the children to also pay Kshs.20,000 when the minors are with their mother.
30. In her evidence before the trial court the Respondent admitted that she secured employment when the suit was ongoing. The trial court did not appear to take this into account. As such the Respondent clearly has the capacity to provide for the needs of the children whilst they are in her care.
31. The Respondent ought to take care of food, nanny and other miscellaneous expenses when the children are in her custody. I therefore set aside the order requiring the Appellant to remit Kshs.20,000 to the Respondent during the two (2) week period when the children are in her actual custody.
32. I do agree that the orders made by the trial court have unfairly overburdened the Appellant. Accordingly, I do find merit in this appeal and set aside the orders on Maintenance only made on 22nd March 2021.



33. Instead this court directs as follows:-

- (1) The Appellant (Father) shall take care of the childrens school fees and all school related expenses like uniforms, books, school transport etc.
- (2) The Appellant (Father) shall provide for the medical care for both minors.
- (3) The Respondent (Mother) shall take care of the clothing needs for the two minors.
- (4) Each parent shall be responsible to provide for food nanny, entertainment and other miscellaneous costs for the period when the minors are in their actual custody.
- (5) For avoidance of doubt the orders of custody and access made by the trial court are to remain in force.
- (6) This being a family matter each side will bear their own costs.

DATED IN NAIROBI THIS 19TH DAY OF OCTOBER, 2023.

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MAUREEN A. ODERO

JUDGE

