



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 55 OF 2018

JW & JN (Minors suing through their mother) AW.....APPLICANT

VERSUS

MM.....RESPONDENT

JUDGMENT

1. This is an Appeal from the Ruling of Hon. R. Kefa SRM delivered on 27th August, 2018 in Nyeri Childrens Case No.22 of 2018; the appellants claim against the respondent for the remittance of the sum of Kshs.42,000/- per month to cater for the minors immediate and fundamental basic needs;

2. The trial court in its ruling ordered that the respondent includes the minors under his employers medical cover and cater for their school fees and related expenses; whereas the appellant was to provide shelter and cater for the utility bills; both parties as parents to contribute to the minors food and clothing and the respondents contribution being Kshs.10,000/- payable via mpesa or a designated bank account to be provided by the appellant;

3. Being dissatisfied with the judgment of the trial Court, the appellant filed this instant appeal and listed four (4) grounds of appeal as are summarized hereunder;-

- (i) The trial court erred in not taking into consideration the appellants evidence and submissions;
- (ii) The trial court erred in finding that parental responsibility is shared;
- (iii) The trial court failed to implement the best interests of the child as guaranteed by the Constitution.

4. When this Appeal came up for hearing, the parties were directed to file and exchange written submissions; hereunder is a summary of their rival submissions;

APPELLANTS CASE

5. The appellant submitted that despite attaching her pay slips and bank statements which indicated her strained financial status the trial court had directed that both parties contribute to food and clothing for the minors; the trial court did not take into consideration the rent she was paying it did not also consider the appellant's income in comparison with that of the respondent thereby occasioning an injustice to her;

6. The parents herein do not have equal financial or monetary capability and in this instance the appellant earned less than Kshs.30,000/- whereas the respondent earned over Kshs.200,000/- therefore the appellant argued in such a situation the financial responsibility cannot be shared equally; case law relied on **G.O. & 2 Others (Suing through their mother and next friend) EMM vs MOO [2016] eKLR**;

7. She submitted that by ordering her to contribute towards food, clothing and to pay rental and utility bills the trial court had failed to implement the best interests of the child as enshrined in Article 53(2) of the Constitution 2010 and Section 4(3) of the Childrens' Act; in failing to take into consideration her low income in comparison to the respondents the children would suffer; the parents income ought to have been considered when considering the best interests of the child; case law relied on **Civil Appeal No.36 of 2016 NMM vs JOW [2016] eKLR**;

8. In conclusion she submitted that the appeal had merit and that it ought to be allowed and the respondent be ordered to pay the monthly maintenance of Kshs.42,000/- as prayed for in her application;

RESPONDENTS CASE

9. The appeal was opposed and in response the respondent relied on Section 23 of the Childrens Act which defines parental responsibility and states that both parents have an equal parental responsibility; he also relied on Article 53(1)(e) of the Constitution and Section 24 of the Children's Act and reiterated that both parents have a responsibility to maintain their children and the parental responsibility is shared;

10. He stated that he had all along been providing for the minors by paying their school fees and had added the children to his medical cover scheme; he stated further that he earned a net pay of Kshs.85,000/- and he had since married and were blessed with one child whose needs were also his responsibility; he prayed that the court would uphold the trial court's ruling as both parents were earning a salary and that the appellant was imposing unwarranted demands for a monthly maintenance ought not be at the expense of the children; case law relied on **CM vs DN (2020) eKLR**;

11. He submitted that the best interest of the child was of paramount importance and relied on the case of **JOO vs AJM [2017] eKLR**;

12. He concluded by praying the appeal be dismissed and the ruling of the trial court be upheld.

ISSUES FOR DETERMINATION

13. After having read the written submissions filed by both parties and having perused the Record of Appeal this court has framed only one issue for determination; which is as set out hereunder;

- (i) Whether the trial court erred in finding that parental responsibility it to be shared;

ANALYSIS

14. Before addressing this issue, it is important to state that the principles to be considered when an appellate court may interfere with the trial courts exercise of discretion are laid out in the Court of Appeal case of **Mbogo vs Shah (1968) EA 93** the Court of Appeal held as follows;

'A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice.'

Whether the trial court erred in finding that parental responsibility be shared;

15. The appellant's bone of contention is the fact that the trial court ordered both parents to each contribute towards the minors food and clothing; she argued that the trial court ought to have taken into consideration their divergent incomes when apportioning equal parental responsibility for the maintenance of the children, hers being a paltry salary of Kshs.30,000/- whereas the respondent's earning capacity was over Kshs.200,000/-;

16. Parental responsibility has been defined at Article 53(1)(e) of the Constitution of Kenya it is clearly stated that *'every child has a 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.'*

17. At Sections 23 and 24 of the Children's Act provide that each parent has a duty to provide the child with the necessities of life; Section 23 of the Children's Act provides as follows;

(1) In this Act 'parental responsibility' means all the duties, rights, power, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.

(2) The duties referred to in sub section (1) include in particular-

(a) The duty to maintain the child and in particular to provide him with-

I. Adequate diet

II. Shelter

III. Clothing

IV. Medical care including immunization; and

V. Education and guidance

(b) The duty to protect the child from neglect, discrimination and abuse;

18. The pleadings the appellant only makes reference to the parties as *'being the biological parents of the minors'* whereas the respondent has deponed in his Replying Affidavit that he *'.....resides with his wife and 1 child in Nairobi while the minors herein reside in Nyeri in*

the custody of the Plaintiff....’; it is therefore not in dispute that the parties were not married at the time of the children’s birth and have not subsequently married each other; from these facts the parental responsibility as set out in Section 24(3) is found to be the applicable law and it reads as follows;

‘Where a child’s father and mother were not married to each other at the time of the child’s birth and have not subsequently married each other-

(a) The mother shall have parental responsibility at the first instance;

(b) The father shall subsequently acquire parental responsibility in the child in accordance with the provisions of Section 25;

(4) More than one person may have parental responsibility for the same child at the same time.

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

19. The trial court in this instance gave the appellant as the mother of the children custody at the very first instance as set out in Section 24(a) of the Children’s Act and her parental responsibility was to provide shelter and also take care of the children; the court ordered the respondent to take care of the medical cover and to pay school fees and all school related expenses; both parents were directed to take care of the children’s food and clothing with the respondent contributing Kshs.10,000/- ; the appellant was dissatisfied with the amount awarded and had proposed a sum of Kshs.42,000/-;

20. In determining the financial provision for maintenance of the child the court also has to take into consideration the provisions of Section 94(1) of the Children’s Act which reads 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.’

21. It is trite law that a child is a joint responsibility of both parents whether married or otherwise and it is expected that either parent must make an effort to provide for the upkeep of the child;

22. Equal parental responsibility does not mean equal and similar contribution and as stated in the aforementioned Section 94 of the Act ***‘and is not geared towards overburdening the other parent for the purposes of punishing’***; case law referenced ***M.O.A vs H.A.O [2021] eKLR***;

23. This court reiterates the provisions of Article 53(1) (e) of the Constitution of Kenya 2010 and parental responsibility is clearly stated therein that ***‘...every child has a 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.’***

24. The appellant submitted that she earned a paltry salary of Kshs.29,017/- and annexed her pay-slip; with the respondents salary in mind she proposed a sum of Kshs.42,000/-;

25. Upon perusal of the Record of Appeal this court noted from the averments in the respondents Replying Affidavit he admits to having another family which he has to maintain; he attached a Marriage Certificate (MM2) and a Birth Notification (MM3) and has annexed his pay slip that demonstrates that he earns a net pay of Kshs.85,000/- (‘MM10(a)’);

26. Section 94 of the Children’s Act behoves the court to take into consideration the financial needs, obligations, or responsibilities which each party has or is likely to have in the foreseeable future; the appellant may be earning a paltry salary as she stated but after taking into consideration the net salary of the respondent and his other family it is this courts considered view that the sum of Kshs.42,000/- would be punitive in the circumstances and it would amount to placing the burden of parental responsibility on one parent;

27. For those reasons this court is satisfied that the trial court in awarding the sum of kshs.10,000/- did not apply wrong principles of law and arrived at a correct determination on parental responsibility with both parents contributing to the expenses for food and clothing with the respondent contributing an additional sum of Kshs.10,000/-; and this court finds no good reason that warrants interfering with the trial courts decision;

28. This ground of appeal is found to be devoid of merit and it is hereby disallowed.

FINDINGS AND DETERMINATION

29. For the forgoing reasons this court makes the following findings and determination;

(i) This court finds that the trial court did not err in finding that parental responsibility is shared;

(ii) The appeal lacks merit and it is hereby dismissed;

(iii) The trial court's ruling and orders dated 27/08/2018 are hereby upheld;

(iv) Each party shall bear their own costs.

Orders accordingly.

Dated, Signed and Delivered Electronically at Nyeri this 8th day of September, 2021.

HON.A.MSHILA

JUDGE