



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E025 OF 2020

ANK.....APPELLANT

VERSUS

PAO.....RESPONDENT

(Being an appeal from the Ruling of the Honorable Resident Magistrate H.M Mbatia delivered on the 10th July 2020 in

Nairobi Children's Case No. 36 of 2020)

RULING

1. In a ruling delivered on 10th July, 2020 following an application by the respondent/plaintiff for maintenance in Nairobi Children's case No. 36 of 2020, the Court directed the appellant/defendant to pay maintenance amounting to Kshs. 30,000/= per month, by the 20th of every month to cater for food and clothing of the subject minors. The respondent was to retain actual custody and the appellant was granted access every weekend on alternating days from 9 am to 5 pm.
2. The Appellant being disgruntled with that decision approached this court by way of a Memorandum of Appeal dated 13th July, 2020. In sum, his grounds of appeal were that the learned trial magistrate erred in law and fact in arriving at a monthly sum of Kshs.30, 000/= in maintenance to be paid by him to cater for the children's' food and clothing. That this was despite the lack of evidence to show that he is a person of means who earned Kshs. 300,000/= per month and lives a lavish lifestyle as alleged by the Respondent.
3. Secondly, that the trial court erred in law by relying on evidence that offended the provisions of **Section 106B** of the Evidence Act. Thirdly, that the trial magistrate completely ignored the Appellant's evidence on his income and relied on allegations made by the Respondent concerning his monthly income yet there was cogent evidence proving otherwise. Lastly, that the court completely ignored the submissions, documents and affidavits filed by the Appellant thereby arriving at a decision that ignored the irrefutable evidence and facts prevailing in the suit.
4. The Appellant asked this Court to set aside the ruling of the Children's Court and all consequential orders therein. He also sought that the respondent's application dated 10th January, 2020 filed in the lower Court be dismissed with costs. He urged the court to assess the maintenance within his means having due regard to his monthly income of Kshs. 35,000/=.
5. The appeal was disposed of by way of written submissions by consent of the counsels representing the parties herein. The firm of Murage Juma & Company Advocates appeared for the Appellant while the firm of Andego Gachagua & Associates appeared for the Respondent. Upon perusal of the arguments in the said submissions I note that the only issue for determination is whether the contribution of Kshs. 30,000/= towards the maintenance of the children of the relationship as ordered by the lower court, ought to be interfered with in the appellant's favour.
6. It was submitted for the Appellant that no evidence was provided by the Respondent to prove the allegations that he earned Kshs. 300,000/= as alleged in her pleadings. That his only source of income was from [Particulars Withheld] Limited where he was a director and documents therefrom proved that he did not earn anything above Kshs. 35,000/=. It was asserted that the Appellant was willing to maintain the minors but within his means.
7. The Appellant further submitted that since his separation with the Respondent, his financial circumstances had changed, being that he had encountered financial constraints due to the failure of the business starting September 2018. That this was elaborated in the evidence which indicated that the Company where he was a director could not even afford to pay rent even after he had invested all his time and savings and even taken up loans in an effort to sustain the business.
8. It was argued that by holding that the Appellant's circumstances had not changed the trial magistrate erroneously ignored all evidence provided by the Appellant. The Appellant cited the case of **FGN vs GWN Misc. Application No. 133 of 2017**, where the High Court

established that the best interest of the child must be calculated and accommodated within the reasonable means of the parents.

9. Lastly, it was submitted that as the father of the minors, the Appellant had always executed his parental responsibility and would continue to do so within his means and ability. That to date he continues to pay Kshs. 15,000/= as ordered by Dulu J. during his application for stay of execution pending the hearing and determination of this appeal.

10. The Respondent on the other hand, contended that during the proceedings in the trial court, the issue of the needs of the minors was greatly canvassed by both parties and the court gave cognizance thereto in arriving at a decision. Noting that both parties had an income, the court apportioned responsibilities for the children's shelter, utilities and medical care to the Respondent while the Appellant was to provide food and clothing at Kshs. 30,000/= per month. However, since schools were closed, school fees and related responsibilities were not apportioned to either party. It was submitted that the court acted judiciously in a manner proportionate to the means of the parties in view of the affidavits of means filed even though the Appellant's affidavit manifested non-disclosure.

11. The Respondent maintained that the Appellant earned an income above Kshs. 300,000/= per month and was able to comfortably provide for the maintenance needs of the children. It was asserted that in instances where the Affidavit of means cannot be relied on, the Court ought to be guided by the established standard of living that the subject children were accustomed to before separation of the parents. The case of **M W M vs F N K [2015] eKLR** was cited where the issue of the standard of living was analysed. The respondent urged the Court to dismiss the appeal with costs.

12. This court has carefully considered the appeal herein, the grounds proffered, the Appellant's submissions and the orders appealed against. It is not lost on this court that an appeal is in a way a retrial. The Court should therefore reconsider the evidence, evaluate it itself and draw its own conclusions. In the case of **Peters -vs- Sunday Posts Ltd [1958] E.A. 424** at pg. 429; - the Court of Appeal rendered itself thus:

"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the Judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution, it is not enough that the appellate court might itself have come to a different conclusion."

13. On the main issue of maintenance, the provisions of **Article 53(e)** of the **Constitution** provides the guiding principle as follows:

"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."

14. The other pertinent law is the **Children's Act No. 8 of 2001** and in particular **Section 4** thereof, which provides that in arriving at a decision on a matter concerning children, the paramount consideration should be the survival and best interest of the child. In considering what is the best interest of the child herein, I am minded of the decision of **Kimaru, J** in **M A vs R O O [2013] eKLR** where the Court described the meaning thus:

'...What is the best interest of the child has not been defined by the law. This is as it should be because the best interest of each particular child will depend on the circumstances of each particular case at any one particular time. What is not in dispute, however, is that there are certain minimum requirements that have universally been accepted to constitute the best interest of the child. This includes the right of a child to be provided with shelter, food, clothing and education. The child is entitled to medical care. The child's welfare should be taken care of under the best possible circumstances. The child is also entitled to parental guidance. This guidance shall where possible, be provided by both parents. The child is further entitled to be given a suitable, conducive and loving environment in which to grow up in. '...This court agrees with the Respondent that his right as the biological father of the child should not in the circumstances be ignored. However, such right shall be subject to what constitutes the best interest of the child. As an adult, the right of the respondent as the father of the child cannot be considered to be of paramount importance to that of the best interest of the child ...'

15. It therefore follows that the best interests of the children is the first and paramount consideration herein and the court must do everything to safeguard, conserve and promote their rights and welfare.

16. A reading of the relevant paragraph of the ruling of the Children's Court reveals that while the Court ordered the Appellant as father of the children to cater for their food and clothing amounting to Kshs. 30,000/= per month. None of the parties herein were directed to cater for the school fees of the children. This was due to the fact that at the time, all schools had been closed due to the Covid-19 pandemic and were scheduled to re-open in January, 2021. In making its decision, the court noted that the evidence provided by the Respondent did not depict an individual earning Kshs. 35,000/= as alleged. Further, that he was able to adequately and comfortably provide for his family before their separation.

17. On his part, the Appellant asserted that the financial status of his business had greatly changed and that he had been surviving on loans and therefore he could no longer sustain the maintenance ordered by the court. It was his prayer that he be allowed to pay Kshs. 15,000/= in maintenance which was commensurate to his income. He argued that the court failed to take into consideration the financial statements he had filed showing that indeed the business was not doing as well as alleged by the Respondent.

18. From the record, both parties filed affidavits of means. The Appellant indicated that he earns not more than Kshs. 35,000/= per month while the Respondent stated that she earns Kshs. 73,129.26/=. The Appellant also filed bank statements and Mpesa statements indicating the running balances of the various accounts under his name. From this, it is clear that the Children's Court did not peg the apportionment of maintenance on this evidence stating that only audited accounts of his business could prove the business had dramatically reduced or ground to a standstill.

19. This may be true, but that finding was made at the interlocutory stage, before the case was heard and determined to its conclusion. It is evident from the ruling that the presiding magistrate was cognisant of the provisions of **Article 53(1)(e)** of the **Constitution** and was properly guided thereby, when she made her determination. However, being that at the time schools were not opened, no orders on the payment of school fees was made.

20. I therefore find no just basis to interfere with the decision and ruling of the presiding magistrate as regards the maintenance order made and the apportionment of parental responsibility onto the parties. In the premise, I find that the appeal is lacking in merit and consequently dismiss it. The parties shall revert to the Children’s Court for a full hearing of the matter. There shall be no orders as to costs.

It is so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 7TH DAY OF OCTOBER, 2021.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Appellant.

In the presence ofAdvocate for the Respondent.