



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO 152 OF 2018

E M.....APPELLANT

-VERSUS-

A M.....RESPONDENT

(An appeal from the judgment and order of the Honourable J.A. Agonda (Ms) Senior Resident Magistrate in the Principal Magistrate’s Court at Mavoko in Children Case No. 9 of 2017 dated the 23rd November, 2018)

IN

A M.....PLAINTIFF

VERSUS

E M.....DEFENDANT

JUDGEMENT

1. By a plaint dated 14th July, 2017, the Respondent herein, **A M**, sued the Appellant herein seeking an order for permanent custody of the minor issue of the relationship between the two parties; an order that the Appellant pays a monthly sum of Kshs 40,000/- towards the upkeep of the minor and pays the minor’s school fees and related expenses upon the minor attaining school-going age. She of course, also sought the costs of the suit.
2. According to the plaint, the parties hereto are the biological parents of the minor and since Appellant had been maintaining the said minor since his birth on 10th October, 2015 but later on declined to do so. According to the Respondent upon conceiving the minor she had to stop working and the Appellant promised to take care of the minor and to start business for the Respondent for the upkeep of the child.
3. It was pleaded that the Appellant had been paying the house rent, electricity and water bills totalling Kshs 12,220/= besides providing maintenance for the upkeep of the minor in the sum of Kshs 30,000/= per month.
4. The Respondent pleaded that since she had no source of earning she was unable to take care of the needs of the minor and as the Appellant was a man of means, he ought to be compelled to provide maintenance. It was disclosed that the Appellant owned a construction company by the name of [particulars withheld]. According to the Respondent, the child’s monthly maintenance inclusive of house rent was about Kshs 30,000.
5. In his defence, the Appellant admitted that he was the biological father of the minor and that he was providing maintenance for the minor. He however averred that he in fact set up an Mpesa business for the Respondent when she lost her job and that all the proceeds of the business are utilised by the Respondent for the upkeep of the child. He therefore contended that the Respondent actually earns income from the said shop.
6. After hearing the case the learned trial magistrate gave both parties joint custody of the child with the Respondent being actual custody and physical custody while giving the Appellant reasonable access every alternate weekend and half the school days. The Appellant was further directed to remit to the Respondent Kshs 30,000/= every month to cater for rent, medical care and clothing for the minor while the Respondent was to cater for food electricity, water and other miscellaneous expenses.

7. Aggrieved by the said judgement the Appellant has lodged the instant appeal based on the following grounds:

- 1) The learned Magistrate erred in law and fact in finding that the Appellant did not adduce any documentary evidence in proof that he had been ordered to pay maintenance of Kshs, 8,000/= in Milimani Children's case no. 802 of 2018.**
- 2) That the learned Magistrate erred in law and in fact in finding that the appellant did not proof that [particulars withheld] Limited had collapsed and was not making any earnings from the said company**
- 3) That the learned Magistrate erred in law and in fact in failing to consider the copy of motor vehicle search and sale agreement produced in proof that the appellant's wife was the owner of the motor vehicle registration no. KAW XXX.**
- 4) That the learned Magistrate erred in law and in fact in failing to consider that the appellant's employment with [particulars withheld] Limited was not formal hence no letter of termination was issued.**
- 5) That the learned trial Magistrate erred in law and in fact in finding that the appellant had concealed his other financial means despite no proof of such concealment or such other means being adduced by the respondent**
- 6) That the learned Magistrate erred in law and fact in shifting the burden of proof from the plaintiff to the defendant.**
- 7) The learned trial magistrate erred in law and in fact in failing to consider that the appellant's current financial capacity and therefore arrived at an unfair decision.**
- 8) That the learned Magistrate erred in law and in fact in allowing the respondent's claim and ordering the appellant to remit a monthly sum of Kshs. 30,000/= to the respondent, despite the appellant proving that he was earning a net salary of Kshs. 30,000/= per month.**
- 9) That the learned Magistrate erred in law and in fact in disregarding the appellant's documentary and oral evidence as well as the submissions filed.**
- 10) That the learned Magistrate erred in law and fact in relying in extraneous matters in reaching her decision.**
- 11) The learned Magistrate erred in law and in fact in finding that the respondent's claim was merited.**
- 12) The learned Magistrate erred in law and in fact in not following the correct and proper legal principles and thereby arriving at a bad decision**

8. Before the trial court, the plaintiff testified that she was unemployed and was the biological mother of the subject child who was born on 10th October, 2015 while the Appellant was the biological father. According to Respondent the Appellant did not start providing for the child till after he reached 7 months. The Respondent lost her job upon conceiving the child and upon accepting parental responsibility the Appellant promised to fully provide maintenance towards his upkeep and took over his fatherly roles by paying rents and utilities totalling between Kshs 12,000/= and Kshs 15,000/= every month with other utilities of between Kshs 30,000/= and Kshs 40,000/= every month. In total the Respondent stated that the Appellant used to spend an average monthly sum of between Kshs 50,000/= and Kshs 60,000/= and only stopped in 2017 when the Appellant's wife discovered their relationship.

9. In her statement which she adopted as part of her evidence in chief, the Respondent stated that she met the Appellant when she was working as an administrator at [particulars withheld] Limited and though the Appellant was not an employee thereat, he was some sort of a partner in the said company which was owned by a relative of the Appellant. According to the Respondent, in her capacity as an administrator she was aware that the Appellant had invested in the company by providing some of his machinery including vehicles though the said vehicles were not registered in the Appellant's names but were later registered in the company names for tender purposes. Initially the vehicles were registered in the name of RM since the Appellant informed him that he did not want his boss to know that he owned the said vehicles. At one point she was told to send some money from one of the said machineries, a grader as income directly to the Appellant and the Appellant could from time to time avail funds for payment of the company's workers'. As a stakeholder in the company, the Appellant was not receiving any salary like the rest of the workers. It was her averment that the Appellant was a contractor specialising in road construction and used to outsource his equipment to other companies and therefore was a man of means as he owned a construction company known as [particulars withheld] Company and was capable of remitting more than Kshs 50,000/= as he was already doing.

10. According to her the Appellant lived in a two bedroomed apartment in affluent Estate called 360 Estate in Syokimau where the monthly rent is between Kshs 30,000/= and Kshs 40,000/= and was informed by the Appellant that he was paying monthly rent of Kshs 40,000/= and had two school going children attending [particulars withheld] School, a high end school where he was paying combined fees of Kshs 70,000/= per term. It was her case that the Appellant was a self employed contractor earning Hundreds of Thousands of Shillings if not millions as income.

11. In her oral evidence the Respondent reiterated the foregoing and produced Mpesa transactions as evidence of the sum the Appellant used to send to her, certificate of incorporation of [particulars withheld] Company, copies of the motor vehicle records. She also produced the fee structure for [particulars withheld] School for Kshs 30,000/=.

12. It was her evidence that from the information obtained from the Appellant's relative, who was introduced to her by the Appellant, the Appellant and his wife had since relocated to Ruiru where they were living together as husband and wife. Referring to proceedings filed in Milimani maintenance Cause No. 802 of 2018, the Respondent noted that while the Appellant's wife was seeking maintenance in the sum of

Kshs 55,700/= it was indicated that the Appellant was earning Kshs 30,000/= hence the sum claimed was illogical.

13. In cross-examination the Respondent stated that the Mpesa statements related to the period when the Appellant was giving them support which he stopped in June, 2017. She insisted that contrary to the Appellant's contention that [particulars withheld] Company was in operational, the company was existing. It was her evidence that at the time she was employed at [particulars withheld] Company, the Appellant was her immediate boss and that J K was a cousin to the Appellant's wife. She insisted that though the vehicles were registered in the company names, the Appellant informed her that they belonged to the Appellant. She stated that the Appellant informed her that his wife is a housewife and does not pay school fees. She stated that she knew the Appellant was working opposite Nation along Mombasa Road and she denied that the Appellant was earning Kshs 30,000/= and insisted that he is a man of means and can afford to commute from Ruiru to Mombasa Road.

14. The Respondent however disclosed that she was businesswoman earning Kshs 45,000/= while the Appellant's wife earned Kshs 75,000/=.

15. In re-examination, she stated that the Appellant was working at K and also at F and used to send her Kshs 40,000/= when he left K for F.

16. On his part, the Appellant also relied on his statement in which he stated that he had consistently provided the necessary maintenance for the child's upkeep and that the issue was adjudicated by the Children's Officer, Athi River and a consent was reached that he pays Kshs 4,200/= per month and a parental responsibility agreement was signed by both parents. According to him, he had formed a company known as [particulars withheld] Limited but being unable to operate it, it ceased operations and he sought employment hence the said company is a shell with no office, employees, work or income. He disclosed that he is in employment of [particulars withheld] Limited as a plant operator earning Kshs 30,000/= per month and he has a family with two children with monthly responsibilities of Kshs 23,000/=. According to him, some of the family needs are catered for by his wife who is a businesswoman as he is also repaying a loan which he took in April, 2017 to set up an Mpesa Shop for the Respondent, a shop which the Respondent is earning and retaining all the profits. Despite that the Respondent continued asking for funds from him as a result of which he invited the said Children's Officer to adjudicate hence the said agreement dated 12th July, 2017. He also took up many soft loans from friends and relatives in an attempt to keep up with the Respondent's demands which loans he is still repaying.

17. According to the Appellant, the child is barely 2 years and the budget annexed by the Respondent is not only exaggerated but contains items that a minor would not need. In any case from her income, the Respondent should cater for all the child's need.

18. The Appellant denied that he owned three vehicles and that he was a shareholder of [particulars withheld] Company and [particulars withheld] but stated that he only worked there part-time to supplement his income. According to him one of the vehicles mentioned is actually registered in the name of the said company motor vehicle. He also denied that he was related to the directors of the said company though the main shareholder of the company was a first cousin to his wife and it was through his wife that he would get part-time jobs at the company.

19. The Appellant averred that on 4th November, 2017 his wife left him taking away their two children after they quarrelled with her over his relationship with the Respondent and that his attempts at reconciliation were in vain. As a result, he moved into a bed sitter in December. He stated that his wife had cut all contacts between him and [particulars withheld] Company telling the manager that it is through that company that he got to know of the Respondent hence he was to blame for their marital problems. As a result, the managing director neither wanted to see him nor could he get part-time jobs any longer. He stated that his wife would supplement their financial situation through the support of her well to do extended family as well as her business an alternative source of income he has lost.

20. In his evidence in court he identified the documents filed including an order issued in the said Maintenance Case. According to him the amount sought is far above what he can pay based on the documents exhibited. In his view he can only afford Kshs 5,000/= as he has other children whose needs he is expected to cater for. He reiterated that he only earns Kshs 30,000/= and that he is not a director of any company but works at [particulars withheld] Company. He disclosed that whenever the managing director of [particulars withheld] was away he would run the company. In his evidence one of the vehicles mentioned by the Respondent belonged to his wife while the others belonged to the said company. He stated that he lives in Utawala and not Ruiru as alleged and that the last time he was with his wife was in 2017 when she left with the children. He stated that he has to pay Kshs 8,000/= to his wife.

21. In cross-examination, he stated that at the time he met the Respondent, she was working as a secretary but did not handle any documents. At that time his salary was Kshs 30,000/= though it was not a definite salary but he was not an employee. He admitted having received Kshs 80,000/= but contended it was thanksgiving. He however would send the Respondent money from the company when the managing director was not around due to pressure from the Respondent. According to him he would send Kshs 40,000/= a day. He admitted that he had no evidence that his financial circumstances had changed. He reiterated that he was staying in Utawala paying Kshs 3,000/= in a bed sitter. Though his other children used to study at [particulars withheld], they were transferred to [particulars withheld] when his wife left with them and it is the wife who is caring for their schooling. The previous year, h indicated that he would pay Kshs 30,000/= to Kshs 40,000/= per term per child yet he was earning Kshs 30,000/=. He admitted that he disclosed to the Respondent confidential information regarding money and that he brought Kshs 100,000/= towards the payment of employees.

22. According to him, he used to operate his wife's truck from which he would earn money to pay the Respondent but his wife left with the truck.

23. According to the Respondent, the appellant's decision to take in another wife after his disagreement with the respondent warranted that award in that he left no room for reconciliation and no home for the respondent.

Determination

24. I have considered evidence that was adduced by the parties, the findings of the learned trial magistrate thereon and the submissions made herein.

25. Section 4(2)(3) of the *Children Act* states the principle that ought to guide the courts in determining matters where the welfare of children is concerned by providing as follows:

***“4(2). In all actions concerning children whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the 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.

26. According to Mumbi Ngugi, J in L.N.W vs. Attorney General & 3 Others [2016] eKLR:

“The law must demand that fathers of children born outside marriage step up to the plate and take parental responsibility for their children.”

27. In this case the Appellant does not deny that he has parental responsibility. He is only contesting the extent of his said responsibility. Therefore, in this appeal the appellant only challenges the award in respect of maintenance to the Respondent.

28. That both the mother and the father have parental responsibility for the children whether born within or outside wedlock is not in doubt. However, in assessing the contribution to be made by the parties, it is my view that the factors which the court ought to take into account include the present and future income, if determinable, and earning potential of the parties, taking into account their ages and professional qualification, the financial needs and obligations of the parties, their standard of living, the contributions or obligations of the parties to others for whom they are obliged to provide and the paramountcy of such obligations, and the conduct, where relevant, of each party.

29. In this case it is not in doubt that apart from the minor the subject of these proceedings, the Appellant herein was also obliged to provide for two other minors of his marriage. In determining the payment that the appellant ought to make, the learned trial magistrate ought to have taken into account the appellant's obligation to those other minors since just like the minor herein, their interests must similarly be taken into account.

30. However, the East African Court of Appeal in Tolley vs. Tolley [1977] KLR 116; [1976-80] 1 KLR 549 set out the circumstances under which an appellate court can interfere with an award of damages in such cases the following terms:

“An application for variation of an order for maintenance cannot be equated with an award of damages, which represents an exercise of discretion. General damages are assessed without regard to the defendant's means; the sole criterion being what is fair and just compensation for the injury suffered by the plaintiff. In proceedings for maintenance, the husband's means are highly relevant. The wife may need a certain sum of money a year to maintain herself adequately; but if the husband's means are such that he could not pay that sum, it would not be awarded. Whereas an appellate court will not interfere with an award of general damages, unless it is so manifestly excessive or inadequate as to represent an erroneous estimate, the position in the case of maintenance orders is quite different, and an appellate court will substitute the figure which it considers right, even if only a very small variation is involved. It is to be remembered that in this class of case, the court may arrive at a figure, which is not greatly in excess of the figure, which the court below has ordered, and yet which might make a material difference to a woman who has to support herself and three infant children. In the field of general damages there is generally room for more than one opinion as to the proper sum to be awarded; and the appellate court does not interfere unless it can say that the damages awarded have been on a scale, which is manifestly wrong. When one comes to the question of living expenses, however, one is moving in a field where it is possible for much greater accuracy in the estimate. Accordingly, the rule whereby the court does not interfere unless the figure given below is greatly out of scale ought to be applied in this type of case with some caution.”

31. In this case I agree with the decision of Chitembwe, J in AAJ vs. AA suing through MM [2018] eKLR where he noted that:

“The Court should not simply consider the interest of the children in maintenance cases and close its eyes on the needs of the parent who is expected to cater for the children...It is not the duty of the Court to burden parents with heavy maintenance expenses which visibly amounts to pampering the child.”

32. I also associate myself with the decision in A M Kimweri vs. Yusufu Athumani Dar-Es-Salaam HCCA No. 107 of 1969 that before a court can determine a figure for maintenance, it must first ascertain the means of the respondent before deciding how much he can afford to and should pay. Similarly, Sergon, J in Crispus Maghanga Mzae vs. Mary Mukhwana Kwanusu Mombasa HCDC No. 58 of 2004 held that when fixing the amount for maintenance the Court must ensure that the sum fixed, is in all circumstances fair, reasonable and that the figure does not depress the husband below the subsistence level.

33. Makhandia, J (as he then was) in Joachim Ndaire Macharia vs. Mary Wangare Ndaire & Another Nyeri HCCA No. 63 of 2006 held that:

“The law on parental responsibility is that the same is shared and the expenses incurred by the respondent ought to have been shared by both the appellant and the respondent...In ordering the appellant to pay Kshs 50,000.00 the court did not, under section 94 of the Children’s Act consider that the appellant had another family, his financial means had not been thoroughly investigated and the fact also that the respondent had some form of income. If the appellant earns Kshs7000.00 to 8,000.00 the justice of the case would not have demanded that he be compelled to pay Kshs. 5,000.00 per month. Therefore the sum of Kshs 50,000 and 5,000.00 respectively ordered by the learned Magistrate to be paid by the appellant were excessive having regard to the above circumstances and calls for intervention. Therefore since the expenses were Kshs 46,800/= the Kshs 50,000/= is reduced to Kshs 23,400/= and the monthly sum of Kshs 5,000/= reduced to Kshs 2,000/=.”

34. In this case the Respondent relied on the maintenance that the appellant was providing to the child before the breakdown in their relationship. The Appellant contended that following the said breakdown his source of earning was cut off by his wife. He exhibited evidence from the court showing the strained relationship between him and his wife and the order made in the said cause. He also exhibited evidence showing his present earnings of Kshs 30,000/= and that his style of living had since changed. These are factors which the trial court ought to have taken into account before determining the amount to be contributed by the appellant in form of maintenance.

35. It is my view that the sum arrived at by the trial court, based on the evidence adduced would have had the effect of depressing the Appellant below the subsistence level. On the other hand, the award ought not to be so little as to make the child of the union a destitute. In this case while I find that the Kshs 30,000/= ordered to be paid by the Appellant is on the higher side in the circumstances, I similarly find that the proposed Kshs 5,000/= by the Appellant would be grossly inadequate to maintain the child.

36. Accordingly, I hereby reduce the sum that the Appellant ought to contribute towards the child’s maintenance to Kshs 20,000/= per month.

37. I must however state that in matters affecting children the doctrine of *res judicata* does not apply. As noted by **Muigai, J** in **A N M vs. P M N [2016] eKLR**:

“*Res judicata* is not applicable to children matters as it is not expressly provided for in Children’s Act 2001. Practically, it behoves, parents, family community and society to support the child in growth and development up to the stage the child or young adult has ability to fend for himself/herself. Therefore, naturally there will be upcoming issues with regard to the child to safeguard the child’s interest.”

38. It therefore follows that if circumstances change or if the Respondent herein discovers that the appellant’s earnings have improved, the Respondent would be at liberty to move the trial court for the variation of these orders. Similarly, if the conditions of the appellant change either favourably or otherwise, any of the parties is at liberty to move the court appropriately.

39. There will be no order as to costs considering the nature of this case, being a children’s matter.

40. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 21st day of January, 2020

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Nzei for Mr Musyimi for the Appellant

CA Geoffrey