



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 2A OF 2019**

**AKK.....APPELLANT**

**VERSUS**

**BJR.....RESPONDENT**

*(Being an appeal against the judgment of the Children's Court at Nairobi, the Hon. M. Murage (CM) dated 17<sup>th</sup> December 2018 in Nairobi Children's Case No. 950 of 2014 in the matter of NM (Minor))*

**JUDGMENT**

1. The appellant AKK married the respondent BJR on 13<sup>th</sup> February 2009 at the Registrar's Office in Nairobi. They were both working for the Kenya Defence forces. They got a daughter on 27<sup>th</sup> May 2009. The two separated in 2012. On 9<sup>th</sup> August 2018 the couple divorced. The appellant left employment. He has another family of a wife and a child.
2. In 2014 the respondent filed a cause at the Children Court at Nairobi seeking legal and actual custody of the child and the appellant to pay school fees for the child and provide for its maintenance at Kshs.20,000/= monthly. The matter was defended by the appellant. The dispute was heard with both sides testifying. They had each filed evidence regarding their means. The trial court rendered a judgment on 17<sup>th</sup> February 2018. It acknowledged the joint responsibility of the two parents to educate and bring up the child. It decided that the appellant was to pay fees and school-related expenses, and also pay Kshs.10,000/= every month towards the child's upkeep. The respondent was asked to meet the child's housing, clothing and food.
3. The appellant was aggrieved by the decision and filed this appeal. The Memorandum of Appeal had many grounds, but basically the complaint was that the orders against the appellant were unreasonable and did not take into consideration his financial ability; that a heavier burden was placed on him, when he had lost his job and the respondent was in employment where she was entitled to free housing and food; and that he had asked that the child be moved to a cheaper (public school) in the rural area which the court had declined to grant.
4. The appeal was heard through the written submissions by counsel. The appellant was represented by Mr. K'Bahati and the respondent by Mr. Nyawade.
5. This court's duty is to reconsider the evidence that was tendered before the trial court and to determine whether the findings reached were supported by that evidence, while making allowance for the fact that the trial court had the benefit of seeing and hearing the witnesses as they testified (**Selle -v- Associated Motor Boat Company Ltd [1968] EA 123**). Secondly, this court will not interfere with the exercise of discretion by the lower court unless it is satisfied that the decision was clearly wrong, because it misdirected itself or because it acted on matters it should not have acted on or because it failed to take into consideration matters which it should have taken into consideration, and in so doing arrived at a wrong conclusion (**Mbogo and Another -v- Shah [1968] EA 93**).
6. This appeal relates to the education and upbringing of a child. Under **section 4(2)** of the **Children Act (Cap 141)** and **Article 53(2)** of the Constitution, this court should consider that the best interests of the child are of paramount importance. Under **Article 53(1)(e)** of the Constitution, the child has the right to parental care and protection. This includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not. The child is entitled to education and guidance, adequate diet, shelter, health care and immunisation and clothing under **section 23(2)(a)** of the **Act**. These rights shall be –  
  

**“consistent with the evolving capabilities of the child.”**
7. It is therefore important for the court to consider the needs of the child in determining, like in this case, what the contribution of either parent shall be towards its upbringing. The means of the parents is an important consideration. However, a parent cannot be absolved from responsibility just because he is not in formal employment. In the instant case, both the appellant and the respondent were employed in the Defence Forces. The appellant left employment because he was being frustrated, he said. He knew he had a child to fend for. He is not saying he cannot get another job, or create his own job. He stated that he is now a farmer. He cannot say that he had no means and at the same time start another family. The respondent has decided to keep her job, and that is how she can manage to have shelter for the child and access food at work. This access to shelter and food cannot be held against her. She has kept her job and that is why she has the facilities.
8. From the judgment of the trial court, all these matters were considered. The appellant states that he offered to take the child to a public rural school as a way of reducing her education expenses. The question is whether taking the child to a [particulars withheld] public school, away from the mother, was in the best interest of the education of the child. It is also common knowledge that, because of large numbers of

pupils, the quality of education in public school is, in relation to private schools, abit compromised. Secondly, other than complaining about the fact that the court was hard on him in relation to what the respondent was asked to provide, the appellant did not propose to the court what he was able to provide, according to his means, towards the education and maintenance of the child. The court would have been in a much better position to assess that proposal. Should he complain when he made no proposal?

9. In conclusion, I find no merit in the appeal. On the evidence, the trial court cannot be faulted in reaching the decision that it did. I dismiss the appeal with costs.

**DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 7<sup>TH</sup> day of MAY 2020**

**A.O. MUCHELULE**

**JUDGE**