



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**CIVIL APPEAL 23 OF 2018**

CM .....APPELLANT

VERSUS

DN .....RESPONDENT

*(An Appeal from the Judgement of Hon. L. K Sindani Resident Magistrate of 30.5.18 in Tononoka Children's Court Cause No. 296 of 2016)*

**JUDGMENT**

1. The Appellant CM and the **Respondent** DN are the parents of 2 children WM and YM born on 18.12.08 and 29.10.12 respectively. On 15.8.16, the Respondent filed Tononoka Children's Court Case No. 296 of 2016 against the Appellant seeking several orders in respect of their children. She sought a declaration that both parties **have equal parental responsibility over the children and that their custody, care and control be vested in her. The Respondent also sought an order that the Appellant do contribute a monthly maintenance for the children in the sum of Kshs. 105,700/=, obtain a medical cover, pay school fees and meet educational expenses for the children.**

2. **In its judgment, the trial Court made a declaration that both parties have equal parental responsibilities over the children. Legal custody was vested in both parties who were also ordered to retain the children in their respective medical covers and to provide clothing for them. Each party was to cater for entertainment while with the children. The Respondent was to provide shelter for the children and have actual physical custody, with limited access to the Appellant on alternate weekends and half the school holiday. The Appellant was to cater for school fees and all school related expenses and contribute the larger share to the children's upkeep in the ratio of 70:30 translating to the monthly sum of Kshs. 45,500/=.**

3 **The Appellant was aggrieved by the decision of the trial magistrate and preferred the Appeal herein.**

4. The summarized grounds of the Appeal are that the trial magistrate erred in law and fact in that she:

1. set the ratio of contribution towards the children's upkeep at the ration of 70:30, a ratio that is not supported by legal authority;
2. ordered the Appellant to cater for most of the children's expenses as well as contribute 70% of the upkeep notwithstanding that she had found that both parties had equal parental responsibility over their children and were people of means.
3. failed to differentiate between the overheads claimed by the Respondent leading to duplication of claims.
4. arrived at the total sum of Kshs. 65,000/= as overheads instead of Kshs. 59,920/= thereby directing the Appellant to pay Kshs. 45,500/=.

5. The Appellant prayed that the Appeal be allowed and the judgment be set aside or varied as this Court deems proper and appropriate. He also prayed for costs in this appeal and in respect of the proceedings in the Court below.

6. In his written submissions the Appellant raised the following 3 issues for determination:

- i) Whether the trial Magistrate erred in awarding contribution at 70:30.
- ii) Whether the trial Magistrate erred in awarding both overhead of food and shopping.

iii) Whether the trial Magistrate erred in her tabulation and hence wrong summation.

7. As I deliberate on this the matter, I am mindful of the constitutional and statutory imperative that the best interests of the children are paramount. Article 53(2) of the Constitution of Kenya, 2010 provides:

***A child's best interests are of paramount importance in every matter concerning the child.***

And Section 4(2) and (3) of the Children Act (the Act) which provides:

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

***(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.***

Whether the trial Magistrate erred in awarding contribution ratio at 70:30

8. The Appellant submitted that parental responsibility is shared equally. He is aggrieved by the trial Magistrate's apportionment of contribution at 70:30 against him. He earns a gross salary of Kshs. 250,000/= and a net salary of Kshs. 170,000/=. He was servicing 2 loans at Kshs. 70,000/= and 30,000/=. He contended that the Respondent did not provide evidence that she earned Kshs. 119,000/=. nor did she state when the alleged loan was taken, the amount or the term. Further, her pay slip of December 2015 shows that she earned Kshs. 122,252/= and no explanation was given that she had gotten a pay cut. According to the Appellant, the Respondent was not genuine in her claim and is seeking to enrich herself. The Appellant further contended that it was illogical that he is required to pay school fees of about Kshs. 86,900/= and is also required to buy clothing for the children, take care of medical needs and entertainment and still pay an additional Kshs. 45,500/= for food and upkeep for minors aged 10 and 6 years. He urged the Court to disturb the judgment as it was exploitative and exorbitant

9. The Respondent submitted that parental responsibility though equal, is gauged by the capability of the individual parent. According to the Respondent, the trial Magistrate considered the income of the parties and was thus correct in arriving at the 70:30 ration. She contended that the Appellant had set a high standard for the children and gave them a life that the Respondent cannot manage on her own. He cannot now deviate from the same as this would cause trauma on the children. The Respondent urged the Court not to interfere with the discretion of the trial Magistrate.

10. The law relating to maintenance of a child is contained in the Constitution of Kenya, 2010 and the Children Act. Article 53 of the Constitution provides:

**53. (1) Every child has the right—**

***(e) 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;***

11. Maintenance is an aspect of parental care and is the responsibility of both parents of a child. Section 94(1) of the Children Act stipulates the considerations by which the Court shall be guided when making an order for financial provision for the maintenance of a child. These considerations include *inter alia*:

***(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;***

***(d) ...***

12. While considering the order for financial provision for the maintenance of children, the trial Court was obligated to take into account the income or earning capacity, property and financial resources of the parties both then and in the foreseeable future. The trial Court was also to consider the parties' financial needs, obligations, or responsibilities. As regards, the children the Court was required to bear in mind their financial needs and circumstances.

13. On earning capacity, the trial Magistrate accepted that the Respondent earned Kshs. 119,000/= and treated the mortgage repayments of

Kshs. 38,000/= as provision for shelter. She also found that the Respondent earned Kshs. 250,000/= and pension of Kshs. 60,000/=. She then stated that since the Respondent was providing shelter, then the defendant should cater for school fees and school related expenses. She also found that other household expenses amounted to Kshs. 65,000/= per month and ordered:

***g) Parties to share monthly maintenance of food and upkeep at a ratio of 70: and 30 as against the defendant and the plaintiff respectively thus the defendant to contribute Ksh. 45,500/- per month. Payable to the plaintiff on or before the 5<sup>th</sup> day of every month.***

14. It is noted that the trial Magistrate did not say anything about the Appellant's evidence that he too was servicing loans. The amount of pension as stated in the Appellant's evidence is also Kshs. 40,000/= and not Kshs. 60,000/= as indicated by the trial Magistrate. Be that as it may, no evidence was placed before the trial Court to support the figures stated by each party regarding their earnings and their loans. Without any supporting documents, it could very well be that both parties earn more than what they actually stated in Court. The Court does note that in her affidavit sworn on 11.8.16, the Respondent annexed a pay slip showing that her gross salary was Kshs. 122, 252/=. Notably, the pay slip is for December 2015. She filed her plaint on 15.8.16. The question begs, why would she seek to rely on a pay slip that is 8 months old to show what she referred to as her current income. Was this intended to conceal the Respondent's current income?

15. As regards the financial needs, obligations, or responsibilities of each party, the Court notes that the Respondent lives with the children and therefore provides shelter and also takes care of them. The Appellant pays school fees and school related expenses, albeit with challenges. Both parties are to take care of clothing and entertainment. The children who were born in 2008 and 2012, are young, dependent and still in school and therefore still require provision for all their needs. Whereas the maintenance of children is an equally shared responsibility of both parents, shared responsibility presupposes ability. The parties herein are gainfully employed. Indeed, the trial Magistrate stated that ***"both parents are people of means thus capable of providing for the family."*** From the evidence, it would appear that the Appellant earns more than the Respondent. It is however noted that the Appellant also has another family, a fact admitted by both parties and brought to the attention of the trial Court. When all these factors are taken into account, I find that there is sufficient reason for this Court to interfere with the finding of the trial Magistrate on the ratio of contribution.

Whether the trial Magistrate erred in awarding both overhead of food and shopping.

Whether the trial Magistrate erred in her tabulation and hence wrong summation.

16. These 2 grounds will be considered together due to their conceptual similarities. The Appellant's complaint is that the trial Magistrate erred in awarding the amount for food and shopping separately. To him, the trial Magistrate's decision to award the sum of Kshs. 32,050/= for food for children aged 10 and 6 and still award a further sum for shopping was punitive and exploitative. He also faulted the trial Magistrate for arriving at a figure of Kshs. 65,000/= for maintenance whereas the amount ought to have been Kshs. 59,920/=. His 70% contribution should have been Kshs. 41,944/= which in his view is also too high. He urged this Court to relook at the finding and make a fresh award as he was overburdened.

17. For the Respondent, it was submitted that food and shopping were rightly separated as food included edibles while shopping included non-edible household necessities. To the Respondent, the sum of Kshs. 32,050/= was modest and in any event, the same was to be shared between the parties. The Respondent further argued that since she has custody of the children, there are a lot of things that are involved in the care of children that cannot be quantified. She urged the Court to dismiss the Appeal and uphold the judgment of the trial Court.

18. In the judgment, the trial Court directed that the Appellant pays school fees and school related expenses. In addition to that, he is to cater for the children's entertainment while with the children as well as provide clothing on a 50:50 ratio. Additionally, he is to pay the monthly sum Kshs. 45,500/= being his 70% contribution. This in my view is punitive to the Appellant and negates the equality principle in parental responsibility.

19. An order for maintenance is intended to secure the best interests of children. The Respondent submitted that the children need to be maintained at the standard they were used to, before the collapse of the parties' marriage. It would therefore appear to me that the Respondent is more interested in maintaining the ***"high standard he had already set for the children,"*** but at the expense of the Appellant. She has equated this ***"high standard"*** to the best interest of the children. Little wonder that she stated in her submissions that the monthly sum of Kshs. 32,050/= for food ***"is actually modest."*** In this regard, I agree with Onyiego, J. who in J O O v A J M [2017] eKLR, observed the following:

***However, what amounts to the best interest principle has greatly been overblown to unprecedented proportions to the extent that lavish lifestyle of a child has been equated to the best interest of a child and a source of income for the other parent.***

20. The Court is alive to the well settled principle that an appellate Court should be slow in interfering with the exercise of the discretion of the Court below. An appellate Court may only tinker with a decision, if it is satisfied that the discretion of that Court was exercised injudiciously. In Mbogo & Another versus Shah [1968] E.A. 93, it was held at page 96 that:

***An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court 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 has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice.***

21. In the present case, as demonstrated herein, this Court has found that the decision of the trial Magistrate is punitive to the Appellant. The Court has power to make adjustments to an order for the maintenance of children as it may deem fit in the circumstances of each case. Section 99 of the Act provides as follows:

*The court shall have power to impose such conditions as it thinks fit to an order made under this section and shall have power to vary, modify or discharge any order made under section 98 with respect to the making of any financial provision, by altering the times of payments or by increasing or diminishing the amount payable or may temporarily suspend the order as to the whole or any part of the money paid and subsequently revive it wholly or in part as the court thinks fit.*

22. In the end, having evaluated the evidence and the law, I am satisfied that there is sufficient ground to interfere with and vary the order of the learned Magistrate, in so far as the contribution ratio is concerned and also in the sum payable as maintenance. Accordingly, I set aside the order that contribution be at the ratio of 70:30 and the order that the Appellant pay Kshs. 45,500/= being his share of monthly contribution. I substitute therefor an order that the Appellant shall pay to the Respondent, on or before the 5<sup>th</sup> day of each month, the sum of Kshs. 30,000/= being his contribution towards the upkeep of the children. For the avoidance of doubt, all other orders remain the same. This being a matter concerning the parties' children, there shall be no order as to costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 17<sup>th</sup> day of July 2020**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Appellant**

..... **for the Respondent**

..... **Court Assistant**