



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL NO. 26 OF 2016

NR.....APPELLANT

VERSUS

JO.....RESPONDENT

JUDGMENT

(An Appeal from the Judgement of Hon. L. K. Sindani, Resident Magistrate of 30.5.18 in Tononoka Children's Court Cause No. 81B of 2014)

1. The Appeal herein arose from the Ruling of Hon. L. K. Sindani, Resident Magistrate of 30.5.18 in Tononoka Children's Court Cause No. 81B of 2014. The record shows that NR the Appellant and JO the Respondent were married on 7.6.12 at the Registrar's Office in Mombasa. Together they have one child **SAR born on 29.12.12. The marriage has since been dissolved.** The Respondent filed suit in the Children's Court seeking an order that the Appellant has parental responsibility for the child and further that he makes periodic payment for the child's education, vehicle, upkeep, medical and holiday expenses.

2. By a consent on 16.4.14 parties agreed *inter alia* on shared custody and the Appellant was to pay to the Respondent a monthly maintenance of Kshs. 175,000/= (the maintenance amount) out of which Kshs. 65,000/= as rent would be paid directly to the landlord. This was affirmed in a judgment of the trial Court on 4.4.16. The Appellant appealed against the decision of the Court on custody and maintenance and sought the reassessment of the monthly maintenance for the child and the same be apportioned equally between the parties. This Court did on 19.10.17 direct that the Appellant seeks the reassessment in the trial Court.

3. The Appellant then filed the Application dated 31.1.18 seeking a review of the monthly the maintenance amount. In her Ruling of 30.5.18, the learned Magistrate found that there were no changed circumstances to warrant a review of the maintenance amount. The learned Magistrate thus proceeded to dismiss the Application thus provoking this Appeal. The grounds are that the learned Magistrate erred in law and fact by:

1. by failing to assess the Orders sought, Grounds, Submissions and material; facts raised by the Plaintiff before her and thereby reaching a wrong decision.
2. issuing conclusive orders with the effect of determining the matter in question and failing to make findings in the best interest of the child.
3. ignoring the weight of evidence placed before her which led her deliver Ruling per incurriam (delivered Ruling without dealing with all issues in the Application).
4. failing to take into account that the Plaintiff had more days in a month to stay with the issue therefore more expenses to meet on his part than the Defendant who had less days with the issue and continues to be dependent on the issue's maintenance.
5. by failing to take into account that the Defendant until to date continues to depend entirely on the Plaintiff's maintenance for the child and does not work for a leaving bearing the fact that she is capable of working.
6. failing to take into account that the Defendant is yet to contribute to the educational expenses as directed in the decree dated 21st April, 2016.
7. failing to take into account the provisions of Article 53 1 (e) of the Constitution 2010, which provides for equal parental responsibilities.

8. failing to deal with the issue of shared and/or equal parental responsibilities.

4. The Appellant prayed that the Appeal be allowed. He also sought the following:

(a) That the ruling be set aside.

(b) Reassessment of the monthly maintenance for the child and the same be apportioned in accordance with the number of days the child is with either parent.

(c) Costs

5. Parties filed their respective submissions which the Court has considered. The only issue for determination is whether the learned Magistrate erred in declining to review maintenance amount.

6. In the Application before the lower Court, the Appellant stated that in addition to the maintenance amount he takes care of the child's needs for the 18 days every month when the child is with him. The Respondent has the child for 12 days a month. Further, he pays for the child's medical insurance, half of school fees and all other school expenses including school uniform and transport. He says the maintenance amount he pays to the Respondent every month is too high considering the period he has the child with him and all the other expenses he takes care of. He further stated that he had given the Respondent Kshs. 6,000,000/= to start a business and the lower Court had stated that the Respondent ought to invest the same wisely to meet her constitutional duty to provide for the child. The Appellant prayed for a review of the said amount to give effect to the equality of parents to provide for the child.

7. The Respondent opposed the Application and argued that the Appellant had agreed to the maintenance amount. The custody order was by consent and the period the Appellant has the child cannot be a reason for adjustment of the maintenance amount. She further stated that the child is covered by the Appellant's medical insurance and that she had bought enough uniform for the child. She stated that she caters for the vehicle insurance, fuel and maintenance, tuition and swimming. She further argued that the Appellant recently moved to a new house and bought a new car and therefore is not financially constrained. The Appellant is aware of her dire financial state and the application was intended to cripple her financially and eventually take the child away from her. The Appellant has not introduced any new or important matter to justify the review.

8. The Appellant argues that the Respondent is a young and able-bodied woman who can help out in the maintenance of the child so that the responsibility is not solely shouldered by him. For the Respondent, it was submitted that the no new matter has arisen since the judgment. It was further submitted that the issues raised by the Appellant were raised and dealt with in HCCA No. 12 of 2016, HC Divorce Cause No. 25 of 2014 and CACA No. 45 of 2016.

9. In HC Divorce Cause No. 25 of 2014, the Appellant sought the dissolution of their marriage. In her cross petition, the Respondent also sought similar orders as well as maintenance. It emerged at the hearing that the Appellant had given to the Respondent the sum of Kshs. 6,000,000/= to enable her start a business to maintain herself but she did not use the money for that purpose and still sought maintenance. The Court noted that given the irretrievable breakdown of the marriage the Respondent “

...cannot continue longing for the good and luxurious life she had with the Petitioner before the marital breakup. She must get up and work to maintain herself.

10. The Court further observed:

However, given that she has never worked in her life, other than running errands for the company, I will grant her an opportunity to reorganize her life and wean herself off her financial dependence on the Petitioner.

11. The Court directed the Appellant to continue remitting the monthly sum of Kshs. 50,000/= up to and including December 2017. The Court further directed him to continue remitting the monthly sum of Kshs. 175,000/= pursuant to the consent order in the Children's Court.

12. In HCCA No. 12 of 2016, this Court found that reassessment would best be done by the trial Court. In CACA No. 45 of 2016, the matter that was before the Court of Appeal was the alimony of Kshs. 100,000/= awarded to the Respondent which was to be paid together with the maintenance amount. The Court stated:

It is not enough for the respondent to claim she was unskilled and unemployed, without evidence of any effort on her part to secure some employment or to contribute to her welfare and that of SAR [the child]. As the court in WMM v. BML, (supra) observed, in light of the equality provisions of the Constitution, a spouse cannot sit idly and expect to be maintained by the other without making efforts to be gainfully employed.

13. The Court set aside the order for payment of alimony and stated that the Appellant shall continue to pay to the Respondent the maintenance amount as ordered by the Children's Court. This in my view does not take away the right negate e provisions of Section 100 allowing a party to move the Court for a variation of a maintenance order. In any event, the issue of the maintenance amount was not before the Court of Appeal for consideration.

14. In the matter herein, the Appellant's prayer is that the maintenance amount be reviewed so that the responsibility is shared between him and the Respondent. He submitted that his intention is not to run away from his responsibility but wishes to stop being used by the Respondent as a beast of burden.

15. Every child has the right to parental care. Both the Constitution and the Children Act recognize that the responsibility to provide for a child is a shared responsibility of both parents. Article 53 of the Children Act 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;

Under Section Section 24(1) of the Children Act provides:

(1) Where a child's father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility.

Similarly, Section 90 contains a presumption that:

Where the parents of a child were married to each other at the time of the birth of the child and are both living, the duty to maintain a child shall be their joint responsibility;

16. The child herein was born to the parties while they were married to each other. The child is entitled to be provided for by both parents. It would appear to me from the record that the Appellant has been shouldering the financial responsibility of the child's maintenance single-handedly. Both this Court and the Court of Appeal have noted that the Respondent has not made any effort to secure employment that would enable her contribute to the welfare of the child. Without any evidence to the contrary, it is apparent that she still depends totally on the maintenance amount paid to her by the Appellant every month. Indeed in her affidavit and submissions, all she could say was the maintenance amount was based on consent of the parties and that no new or important matter has arisen to warrant the review of the maintenance amount.

17. This Court did, in its decision of 17.2.17 in the Divorce Cause between the parties, give the Respondent up to December 2017 to reorganize her life and wean herself off her financial dependence on the Appellant. It appears to me that the Respondent has still not secured employment nor is she engaged in any income generating activity. It cannot be right that one party in a shared venture bears the entire duty while the other party does absolutely nothing by way of contribution.

18. The jurisdiction of this Court to vary the terms of a maintenance agreement is set out in Section 100 of the Children Act which provides:

Where the parents, guardians or custodians of a child, have entered into an agreement whether oral or written in respect of the maintenance of the child the court may, upon application, vary the terms of the agreement if it is satisfied that such variation is reasonable and in the best interests of the child.

19. The wording of the foregoing provision makes it clear that a maintenance order arrived at by consent of the parties such as the one in the present case may be varied by the Court upon application. For a party to deserve an order for variation of a maintenance order agreed upon by parties, such party must satisfy the Court that such variation is reasonable and in the best interests of the child. The Court has considered that the Appellant takes care of the child for 18 days in a month while the Respondent has the child for 12 days. In addition, the Appellant pays to the Respondent the maintenance amount. The question that begs is, what the Respondent's financial contribution to the welfare of the child? The answer can only be nought. This being the case, the application by the Appellant for variation of the maintenance amount on the ground that he is bearing the entire responsibility without single-handedly appears to me to be reasonable. It is also in the best interest of the child to see her mother engaged in some gainful employment rather than sitting and waiting for the Appellant to provide.

20. The maintenance amount is Kshs. 175,000/= out of which Kshs. 65,000/= was to be paid as rent directly to the Respondent's landlord. The Appellant shall continue to pay rent to ensure that the child continues to live in the same or similar house in which she has been living. There is no justification in my view for the Appellant to continue paying maintenance for the period of 12 days during which the child is with the Respondent. This is the responsibility of the Respondent.

21. In the circumstances I find that the learned Magistrate erred in dismissing the application dated 31.1.18. I allow the appeal and vary the maintenance amount on terms that the Appellant shall only pay the sum of Kshs. 65,000/= being the rent payable for the house in which the child lives with the Respondent. This order shall take effect from 1st January 2020 to give the Respondent sufficient time to reorganize and adjust her life to the new reality. There shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 10th May 2019

M. THANDE

JUDGE

In the presence of: -

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

..... for the Respondent

..... Court Assistant