



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CIVIL APPEAL NO. 98 of 2014.

[Being an Appeal from the Judgment from Original Bgm Children Case No. 41/2012 delivered

on 17th November, 2014 before Hon. M. Agutu (RM)].

S L M.....APPELLANT

VERSUS

D A M.....RESPONDENT

JUDGMENT

The appellant S L M who was the Plaintiff in the Magistrates' Court filed a suit against the Respondent D A M (the defendant in Magistrates' Court claiming;

That the Plaintiffs' claim against the defendant is for an order of custody of the minor children herein until they reach their reasonable legal age, an order of maintenance of the minors herein for an amount this court deems fit and just to grant, a further order that the defendant to pay their school fees once they attain the age of going to school according to the school fees structures and an order that the defendant be only given limited and visitation rights and access to the said minors while in the custody of the plaintiffs' mother.

The Respondent filed statement of defence admitting the marriage to the appellant and paternity of the minors J C R and J S T both twins then aged 2 years 10 months at time of hearing of this matter. Upon considering the evidence and witnesses, the trial magistrate on 17.11.2014 in her Judgment made the following orders;

1. *The plaintiff to take up the responsibility of providing shelter and clothing and house help for the minors.*
2. *The defendant to pay a monthly sum of Kshs.5,000/= for provision of food to the minors.*
3. *The defendant to pay for medication of the minors.*
4. *The defendant to pay school fees for the children once they attain the age of going to school.*
5. *The defendant to have unlimited access and visitation rights of the minors.*
6. *Costs of this suit is awarded to the plaintiff's mother.*

Aggrieved by the Judgment and decree the appellant preferred this appeal to this Court on following two main grounds;

1. *The learned trial magistrate erred in law and fact by awarding an award of Kshs.5,000/= per month as maintenance for the two minor plaintiffs which is very low.*
2. *The learned trial magistrate grossly misdirected herself by giving the respondent UNLIMITED ACCESS to the minors and not considering that their mother had separated with the respondent not stating the time and period such access and visitation rights can be done therefore not considering the best interest of the children.*

By Consent the appeal proceeded by way of Written Submissions. M/s Chungu for the appellant submitted that the evidence of the appellant was that the monthly upkeep for the 2 minors comprised rent Kshs.14,000/=, house help Kshs.5,000/=, medical care Kshs.5,000/= and general upkeep Kshs.5,000/= all totaling Kshs.29,000/= per month. Further she submitted that the appellant who is employed as a Human

Resource Officer earns Kshs.50,000/= per month and the Respondent earns Kshs.31,000/= per month. Counsel submitted that the Respondent should be ordered to pay a sum of Kshs.23,000/= per month being his ½ share of the cost of upkeep of the minors.

Mr. D.L. Were learned Counsel for the Respondent submitted that both parents are in gainful employment and the appellant earns Kshs.50,000/= per month, while the respondent earns Kshs.31,000 per month. He submitted that based on the earnings the trial magistrate rightly ordered the appellant to provide for shelter, househelp and clothing while the Respondent pays monthly maintenance of Kshs.5,000/= for food, pay school fees when due and take care of medical expenses. On access he submitted that Respondent as a parent should have unlimited access to the children as the children are in the custody of the appellant.

From the evidence and submissions;

The issues this court is to determine is whether the award granted by the trial Court was adequate and fair in the circumstances and whether the unlimited access granted was proper taking into account the best interest of the children first.

At the trial court the appellant testified that since birth she had been shouldering the burden of taking care of her children and that she was spending Kshs.14,000/= on rent, Kshs.5,000/= on house help, Kshs.15,000/= on general upkeep and Kshs.5,000/= on medication. She told court that she was employed and earned a salary of Kshs.50,000/=. She wanted to share parental responsibility with the respondent.

The respondent on his part testified that he was employed as well and earned a salary of Kshs.31,000/=. That Kshs.8,000/= went to service a loan, Kshs.3,000/= for electricity, Kshs.500/= for water and Kshs.1,500/= for garbage. That he also took another loan and invested in sugarcane. That he did not have any other responsibility.

The trial magistrate noted that parental responsibility is a shared one and ruled that the expenses on shelter, clothing and house help were to be borne by the appellant and the respondent to take care of food, medication and school fees.

In children matters, the factors that the court should consider in the assessment of the contribution in upkeep are now well settled.

Section 98 of the Children Act;

“A court shall have power to make an order and to give directions regarding any aspect of the maintenance of a child, including but not limited to, matters relating to the provision of education, medical care, housing and clothing for the child; and in this behalf may make an order for financial provision for the child.”

Ougo, J in P.M.A Vs. G.M.L. [2016] eKLR stated that in seeking to ascertain maintenance the court should have regard to existing and potential means of the parties, their respective earning capacities, financial needs and obligation; the duration of the marriage the conduct of the parties prior to divorce, their conduct that led to the breakdown of the marriage remembering that both parties have equal rights under Article 45(3) of the Constitution.

The assessment of the award of contributions by each parent to the upkeep of the children is at the discretion of the trial court who had the opportunity of hearing the evidence and considered the relevant material placed before her. An appellate court can only interfere with the amount awarded if it is demonstrated that the trial magistrate failed to consider relevant factors or considered irrelevant factors or that the assessment is so low as to show an erroneous approach to assessment of upkeep expenses.

In this case there was evidence that the appellant earns Kshs.50,000/=. She was assigned the responsibility of payment for house rent, house help, and clothing. The Respondent earns Kshs.31,000 was assigned the responsibility of providing for Medical expenses, pay School fees once they go to school and pay Kshs.5,000/= per month for food. The request by the appellant that the Respondent should pay Kshs.23,000/= for upkeep out of his proved earning of Kshs.31,000/= per month is in my view not tenable. Considering this appeal, and I am satisfied that the trial magistrate considered all the factors and the ability of each parent in making her assessment. I am persuaded that the responsibilities assigned to each of the parents in the Judgment is equitable and proper.

On the issues that the Respondent should only be granted limited access to the children the appellant submits that in view of that fact that the parents are separated the access and visitation should be limited. The children are young and in my view need the presence of both parents to enable them bond. This should obviously be reasonable and agreeable by both parties. I do not find any good reason advanced to vary the decision of the trial magistrate on access, but only add that the same must be structured and agreed before hand by the parties.

In the premises, I find no merit in this appeal; I affirm the decision of the trial magistrate and dismiss the appeal. Each party to bear his/her own costs.

Dated and Delivered at Bungoma this 10th day of September, 2018.

S.N. RIECHI

JUDGE