



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CHILDREN APPEAL NUMBER 3 OF 2018

HWN APPELLANT

VERSUS

GKC..... RESPONDENT

RULING

1. This is an appeal against the ruling of the resident magistrate (**D.M. Mose RM**) in **Nakuru Children's Case Number 113 of 2016** dated 6/4/2018.

2. The gravamen of the appeal is found in the eight (8) grounds of appeal which I reproduce here;

1. **THAT** the trial magistrate erred in law and fact in finding that the issues of the marriage be provided with Kshs. 5,000/= monthly to meet school fees and other school related expenses of the subjects.

2. **THAT** the trial magistrate erred in law and fact in relying on the Respondent's pay slip on net salary which reflects net salary of past years.

3. **THAT** the trial magistrate erred in law and fact in failure to consider that the Respondent is a person of means and able to provide more monthly towards maintenance.

4. **THAT** the trial magistrate erred in law and fact in considering extraneous matters of other dependants at the expense of the minors in this case.

5. **THAT** the trial magistrate erred in law and fact in disputing that the minors in this case were born out of the relationship between the appellant and the respondent.

6. **THAT** the trial magistrate erred in law and fact by not considering that parental responsibility is shared responsibility and ended up burdening the appellant with the minors maintenance.

7. **THAT** the trial magistrate erred in law and fact in relying on the respondents assertion that the respondent is servicing loans elsewhere and therefore attachment of his salary will leave the respondent with no money yet the purported loans did not benefit the minors herein.

8. **THAT** the trial magistrate erred in law and fact in granting audience to the respondents when he had not complied with court orders for refund of Kshs. 15,500/= to the appellant who had paid the money as school fees to maintain the minors in school for first term of year 2017.

3. The appeal was canvassed by way of written submissions.

4. In a nutshell the respondent herein approached the court vide an application dated 13/3/2018 seeking a review, variation, discharge or setting aside of orders of court issued on 9/3/2018. These orders which are ex parte required the attachment of 1/3 of the defendant's salary to cater for fees of the minors herein.

5. The said application was certified urgent and a stay of execution granted pending hearing interpartes on 22/3/2018.

6. The record shows that both parties appeared before court and the respondent stated that his net pay was Kshs. 15,000/=, he had 6 children and if his salary was attached he would have nothing to meet needs of his children. He stated that he was willing to educate all the children in schools he could afford.
7. The appellant opposed the said application stating that the respondent has failed to pay school fees for the children. She asserts that public schools are free and the respondent would end up paying nothing.
8. In a short ruling delivered on 6/4/2018, the learned magistrate was persuaded by the respondents explanation on his earnings and the possible repercussions of attaching all his net earnings and proceeded to vary the order of attachment from 1/3 of the respondent's salary to Kshs. 5,000/=.
9. In her submissions the appellant states that the learned magistrate failed to document precisely what explanation pertaining to defendant's earnings she considered in order to set aside and vary the order of 9/3/2018 and in its place direct that only Kshs. 5,000/= of the defendant's salary was to be attached to meet school fees and school related expenses of the two (2) minors, the subject of these proceedings.
10. It is urged that the learned magistrate failed to state which of the respondent's payslips she considered in arriving at the impugned ruling and no proof of other existing dependants was given.
11. The learned magistrate is accused, *inter alia*, of sitting on her own appeal and failing to consider the best interest of the children.
12. On his part, the respondent in his submissions states he approached the court regularly and applied to have the orders set aside as he could not afford to pay anything over Kshs. 5,000/= since he has four (4) other children, two (2) in secondary school and two (2) in primary school. He urges the court to consider the fate of the other four (4) children.
13. I have had occasion to consider the memorandum of appeal and submissions by both parties. I have had regard to the record herein.
14. A cursory look at the record shows that the respondent never entered a defence to the suit against him and on the 31/11/2017 matter proceeded on formal proof.
15. Curiously, the record does not show that a formal judgment was written. Along the way an application for attachment of salary was lodged by the appellant herein resulting in the attachment of 1/3 of the respondent's salary which attachment was reduced to Kshs. 5,000/= in the impugned ruling of 6/4/2018.
16. I have re-evaluated the material presented to court during the hearing of the application dated 13/3/2018.
17. The learned magistrate was moved under review and as such had the requisite jurisdiction to deal with the application at hand. The accusation that she sat on appeal in her ruling is misplaced.
18. From the material before court it is not clear on what basis the learned magistrate settled for the reduction of the attached salary from 1/3 to Kshs. 5,000/=.
19. Indeed, even the order requiring that 1/3 salary of the respondent be attached, which was made on 9/3/2018 is not based on any empirical assessment.
20. On both occasions, the learned magistrate fell into error.
21. In **GEOFFREY ONSARE ONCHIRI – VS – LEAH MAKORI High Court Children Appeal Number 5 of 2017** this court stated;

“It is manifestly clear that the apportionment of responsibility was not pegged on any concrete evidence of the respective earnings of the parents.

In the circumstances like the one before this court, a court is enjoined to make a thorough inquiry as to the actual earnings of the parties and to ascertain with the most achievable precision the actual needs of the children.

That way the court would be in a position to make an informed decision as to the apportionment of responsibilities. Orders of maintenance should not lie whimsically or capriciously. They must be based on proved income and pegged on ascertained needs which the parents then share accordingly.”
22. A court will thus be expected to analyze the earning of parents to reach an informed decision.
23. Orders of maintenance, like all other orders of court, should not be given in vain. Such orders must pass the test of practical enforcement. It behoves on the court to call for and analyse with circumspection the earnings of the parents on the one hand and the needs of the children on the other. The need so to do is more pronounced in a case like the one before court where there is an indication that there could be other children sired by the respondent.
24. With the result that the appeal herein succeeds to the extent that the orders of 6/4/2018 are set aside. As indicated above the orders of attaching the salary of the respondent at 1/3 are also not based on any empirical evidence. I revise those orders in the interests of justice and

set them aside. I proceed to remit this matter to the trial court presided over by any other trial magistrate other than **D. Mose** requiring the trial court to conduct a proper inquiry and assessment necessary to arrive at reasonable contributions from both parents.

25. To achieve this, a summary of the ascertained children's needs including the respective cost thereof shall be filed in the trial magistrate's court. Each party herein shall within 10 days lodge in court an affidavit of means to enable the trial magistrate assess the reasonable contribution of each parent towards maintenance of the minors herein.

26. Given the urgency of the matter and more particularly to beat the school opening date sometime in January the inquiry and assessment should be completed within the next 30 days hereof. Let the parties move the court under a certificate of urgency.

27. Each party is to bear its own costs.

Dated and Delivered at Nakuru this 13th day of December, 2018.

A. K. NDUNG'U

JUDGE