



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**CIVIL APPEAL NO. 1 OF 2016**

ZWN.....APPELLANT

**-VERSUS-**

CMK.....RESPONDENT

(An appeal from the judgment of the Hon. Mr. J.N. Wambilyanga (SRM)

dated 22<sup>nd</sup> December, 2015) In Nyeri C.M.C.C Children's Case No. 21 of 2015

**JUDGMENT**

Sometime between the years 2012 and 2014 the appellant and the respondent were either a married couple or cohabited in circumstances that would lead a reasonable man to believe that they were such a couple. They later separated but not before their union, whatever its nature, was blessed with one issue, ANW (herein, 'the minor').

On 19<sup>th</sup> March, 2015, the respondent instituted a suit in the name of the minor, as her mother and next friend seeking for, *inter alia*, an order of parental responsibility against the respondent; in the same breath, she asked the court to compel the appellant to deliver on his share of parental responsibility towards the minor. She also sought for the minor's custody.

The appellant contested the claim against him and to that end filed a statement of defence in which he denied having forced the respondent out of their matrimonial home. He did not deny that he is the father to the minor or her paternity for that matter but stated that as far as his parental responsibility towards her is concerned, the appellant had undertaken to be solely responsible for all the minor's needs.

Upon conclusion of the trial, the Children Court in which the suit had been instituted found for the respondent and made the following orders;

1. Both the appellant and the respondent have equal parental responsibility towards the minor;
2. The respondent was to retain the legal and the physical custody of the minor though the appellant is entitled to access but such the access is restricted to such periods as weekends and public holidays at a place agreeable to both parties;
3. The respondent to cater for the minor's shelter and all the utility bills;

4. The appellant to bear all such expenses associated with the minor's education and that the minor should be admitted in a school with which he will be comfortable in meeting his responsibilities towards the education of the minor; in this regard, the court ordered that he should be consulted as and when the child is eligible to commence her education;
5. The parents to share the expenses related to the minor's food and clothing and to this extent, the appellant was ordered to pay the sum of Kshs. 3,500 every month; this amount was to be paid by the fifth day of every month.
6. The parents were to share in equal proportions the minor's medical expenses whenever such expenses have to be incurred.

The appellant was not satisfied with the decision of the lower court and so on 5<sup>th</sup> January, 2016 he filed an appeal against it on grounds that the learned magistrate erred in law and in fact in ordering him to pay the sum of Kshs. 3,500/= for clothing; that she also erred in law and in fact in not finding that there was no marriage between the parties; and, that she also erred in law and in fact in failing to find that the respondent had undertaken to maintain the minor without any help from the appellant. He also faulted the learned magistrate for what he thought was he failure to find that certain text messages sent to the appellant by the respondent were offensive; that the respondent did not produce a certificate of marriage; and, finally, that the decision was against the weight of evidence.

An examination and reappraisal of the evidence on record would reveal whether any of these grounds holds water and therefore whether the learned magistrate erred in her decision.

The record shows that the parties were in agreement that the minor was born out of their union; in other words, it was not in contention that they are the biological parents of the minor. Apart from accepting their child, the appellant intimated in his testimony that indeed the respondent was his wife and that the two were cohabiting before they separated. As a matter of fact, he acknowledged that prior to the respondent's departure they both shared in a "matrimonial home". He went further to state that he was the bread winner of the family. All these things are captured at the beginning of his evidence in chief. This is what he had to say:

**I am called ZWN. I do come from Nyeri-Kieni West Muiga but I work in Othaya with Biashara Sacco Society. I do know PW1(that is the respondent). She was my wife and actually we had been living together. We had not undertaken any customary marriage. She came and resided in my house and I started taking care of all the expenses. We had a child together that is ANW.**

To a great extent, this testimony answers what, in my humble view, is the fundamental question of parental responsibility towards the minor. This is the question that concerned the Children Court and which is also central to the present appeal.

The concept of parental responsibility is defined in **section 23** of the **Children Act, cap.141**. That section reads:

### **23. Definition of parental responsibility**

**(1) In this Act, "parental responsibility" means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.**

**(2) The duties referred to in subsection (1) include in particular—**

- (a) the duty to maintain the child and in particular to provide him with— (i) adequate diet;**
  - (ii) shelter;**



**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 the exercise of such parental responsibility.**

**(3) Where a child's father and mother were not married to each other at the time of the child's birth and have not subsequently married each other—**

**(a) the mother shall have parental responsibility at the first instance;**

**(b) the father shall subsequently acquire parental responsibility for the child in accordance with the provisions of section 25.**

**(4) More than one person may have parental responsibility for the same child at the same time.**

**(5) A person who has parental responsibility for a child at any time shall not cease to have that responsibility for the child.**

**(6) Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in that responsibility; but nothing in this Part shall be taken to affect the operation of any enactment which requires the consent of more than one person in a matter affecting the child.**

**(7) The fact that a person has parental responsibility for a child may not entitle that person to act in any way which would be incompatible with any order made with respect to the child under this Act.**

**(8)**

**(a) A person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another but may arrange for some or all of it to be met by one or more persons acting on his behalf.**

**(b) The person with whom such arrangement is made may himself be a person who already has parental responsibility for the child concerned.**

**(c) The making of any such arrangement shall not affect any liability of the person making it which may arise from any failure to meet any part of such person's parental responsibility for the child concerned.**

As noted earlier the paternity of the minor was not in dispute; from the evidence of the appellant himself, the minor was born when he was married to her mother. According to **section 24 (1)** of the **Children Act** he is bound to bear parental responsibility towards the minor as much as the respondent would. From the very beginning, the extent of his responsibility could not be in doubt because he admitted that he single-handedly provided both for his wife and the minor for the entire period they lived together. Having taken up that responsibility it was not open to him to abdicate from it only because the minor was now in the sole custody of the respondent or because the respondent was capable of undertaking that task on her own. The appellant's arguments in this regard are contrary to section 24(4) which provides that more than one person may have parental responsibility for the same child at the same time and section 24(5) which is to the effect that a person who has parental responsibility for a child at any time shall not cease to have that responsibility for the child.

The evidence on record shows that both the appellant and the respondent were in formal employment; as far as the appellant is concerned, there is evidence to the effect that he earned a monthly salary of Kshs.. 34,980. Out of this sum, he proposed to remit the sum of Kshs. 2,850/= per month as his contribution towards the minor's upkeep. After evaluating the evidence and taking the necessary factors into consideration, the learned magistrate opined that the sum of Kshs. 3,500/= would be the appellant's fair

share of his contribution towards the minor's clothing and food. As noted, she further held that both the appellant and the respondent would share the minor's medical expenses but that this would only be incurred as and when the minor needed medical attention. As far as education of the minor is concerned, the appellant was given such a wide berth that he has to be consulted on the school that the child will be enrolled in.

The trial court could not have been any fairer to the appellant; if anything, it was extremely lenient to him. If the respondent had cross-appealed, I would have been tempted to revise upwards the amount of money the appellant is bound to remit as monthly contribution. It cannot be argued, as the appellant suggested, that the amount he was ordered to pay is excessive in the circumstances; instead, I find it quite modest if not paltry.

At any rate I find the orders made by the learned magistrate to have been consistent with **section 98** of the **Children Act** on the orders and directions that the Children's Court can make with respect to the general welfare and maintenance of a child; that provision reads as follows:

**98. Other maintenance provisions**

**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 provisions for the child.**

In the final analysis I do not find any merit in any of the grounds of appeal. Accordingly, the appeal is dismissed with costs to the respondent.

**Dated, signed and delivered in open court this 7<sup>th</sup> December, 2018**

**Ngaah Jairus**

**JUDGE**