



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 80 OF 2011**

**JAA.....APPELLANT**

**VERSUS**

**HTS.....RESPONDENT**

***(Being an appeal against the Ruling of Honourable B. Kituyi Resident Magistrate,***

***Nakuru dated 21<sup>st</sup> April, 2011 where she dismissed the applicants***

***application dated 22<sup>nd</sup> September, 2010)***

**JUDGMENT**

The Appellant is the mother of one SR, a minor and the Respondent her biological father.

By an order of maintenance issued by the trial court on the 27<sup>th</sup> June 2007 in Children's Case Number 3 of 2007 filed at the Chief Magistrate's Court at Nakuru, the Respondent was to contribute to the minor's upbringing and school needs by paying a sum of KShs.10,000/= per month and (½) half share of her educational needs, then, said to have been KShs.36,000/= per year thus the Respondent was to pay ½ of that sum per year. The minor was then eight(8) years old and a pupil at at *Particulars withheld*.

By an application dated the 22<sup>nd</sup> April 2010, the Appellant applied for review and variation of the maintenance orders and sought that the Respondent be ordered to increase the monthly maintenance for the minor to KShs.40,000/= per month. In her Supporting Affidavit sworn on the 22<sup>nd</sup> September 2010, she stated that she had custody of the minor and was unable to pay school fees and maintain the minor adequately, that the cost of living had gone up and the amount ordered paid by the Respondent was low. She tabulated her needs to the tune of KShs.100,600/=, and on top prayed that the respondent do pay school fees, transport and other school related needs for the minor.

Upon hearing the application the trial magistrate dismissed the application stating that the applicant did not show the court how the standard of living had changed since the orders made on the 27<sup>th</sup> June, 2007, and that it was not shown what the minor needed in terms of increased school fees and other requirements as none were placed before the court and not mere averments in the affidavit in support of the application.

The appellant lodged the appeal and preferred five grounds of appeal as follows:

1. That the trial Magistrate erred in Law and in fact in not finding that inflation has gone up from 2007 when the initial judgment was read giving maintenance of KShs.10,000/= per month.
2. That the trial Magistrate erred in law and fact in failing to note that school fees has gone up from 2007 and now the fees requirement plus transport and tuition is Kshs.23,000/=.
3. That the trial magistrate erred in law in failing to take Judicial notice of the inflation that has pushed the costs of food, clothing and other essentials.
4. That the trial magistrate failed to take into consideration the facts raised in the appellant's supporting affidavit and finding swearing an affidavit was not enough to show the high cost of living.
5. That the trial Magistrate misdirected himself in law and fact in arriving at the conclusion of dismissing the case without fully considering the supporting evidence.

The court is urged to set aside the trial court's ruling and order a monthly maintenance to the minor of KShs.40,000/= and school fees be paid by the Respondent.

Parties filed written submissions. The Appellant in her submissions stated that the minor was a form two student at *Particulars withheld* since February 2013 and that her needs had gone up since the year 2007 when she was in primary school – hence the trial court erred in failing to enhance the maintenance to KShs.40,000/= per month, and that the trial magistrate erred in failing to take judicial notice that the cost of living had considerably gone up.

The Respondent on his part submitted that the subject was a boarding school student and spends most of her time in school and there was no justification at all, and none was shown, for the demand to increase the monthly upkeep from KShs.10,000/= as he also pays school fees that includes boarding fees and food and pays for her shopping needs. It is his submission that since the minor joined High school, he has been paying half of the increased school fees and other school related needs in addition to the KShs.10,000/= monthly upkeep, and also does shopping and gives pocket money to the minor. It is his submission that there is no justification whatsoever for enhancement of the maintenance.

I have considered submissions by counsel and the grounds of appeal as stated in relation to the application dated the 22<sup>nd</sup> April 2010 and the trial courts ruling dated the 21<sup>st</sup> April 2011 subject of this appeal. It is trite law that the upkeep and maintenance of a child is the joint responsibility of both parents as stated in the Childrens Act. The record shows that the Respondent has faithfully discharged his obligations as ordered by the trial court, and has gone further to increase payment of school fees and other related needs of the minor when she joined High School including providing shopping and pocket money for the minor.

The appellant on her part has not demonstrated on what basis she sought increment of monthly payment to Kshs.40,000/= per month.

I agree with the trial magistrate that it is not enough to state in an affidavit that KShs.40,000/= was needed. It was incumbent upon the appellant to prove by evidence, say by attaching school fees structure, transport charges and other expenses that the minor requires to persuade the court to vary its earlier orders. Blanket averments cannot be relied on as it would be asking the court to wonder in the bushes in search of elusive particulars so as to be seen to have the child's welfare and interest at heart. It is not in doubt that the cost of living has gone up. In the same breath, the appellant has increased his share of contribution towards the child's welfare by paying half of the school fees and other school related needs in her current school. The Respondent has not shown the Court what she has done on her part – and what she would require the amount of KShs.40,000/= per month for.

In its totality, I find that the appellant has not shown to the satisfaction of this court how the trial magistrate erred, either in law or fact in dismissing the application dated 22<sup>nd</sup> September 2010.

For reasons stated above, I find no merit in the Appeal and it is dismissed.

As this is a Childrens matter, I make no orders as to costs.

**Dated, signed and delivered in open court this 2<sup>nd</sup> day of July, 2015.**

**JANET MULWA**

**JUDGE**

**In the presence of:**

Kaim for Njoroge for appellant

No appearance for the Respondent

Court clerk – Lina.