**DLK v CM (Civil Appeal 17 of 2019) [2024] KEHC 810 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 810 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KAKAMEGA**

**CIVIL APPEAL 17 OF 2019**

**SC CHIRCHIR, J**

**JANUARY 31, 2024**

**BETWEEN**

**DLK ..... APPELLANT**

**AND**

**CM ..... RESPONDENT**

***(Being an Appeal against the Ruling of delivered on 7th February 2019 on C.N Njalale in Butali Children's case No. 3 of 2019 .)***

**JUDGMENT**

1. This Appeal is against the Ruling of the trial court delivered on 7th February 2019 in which the said court awarded interim custody of children, QAK and TSK ( minors) to the Respondent . The court further ordered the Appellant to pay ksh. 20,300 every month in maintenance. The orders were to subsist the hearing of the main suit.

2. The Appellant was dissatisfied with the ruling , and filed this Appeal setting out the following grounds:

    a. That the learned magistrate erred in law and in fact by taking away custody from the appellant on an interim application.

    b. That the learned magistrate erred in law and fact in awarding an excessive amount of maintenance against the appellant without establishing the appellant's income.

    c. That the learned magistrate erred in law and in fact by failing to engage the services of the children officer as requested by the counsel for the appellant before giving custody orders to the respondent

3. The Appeal was canvassed by way of written submissions

**Appellant's submissions**

4. On custody the Appellant submits that custody is a shared responsibility of both parents; that there were no reasons advanced as to why the Appellant was denied custody ; that by taking away the child from him , he was treated as though he was a criminal.

5. He further submitted that the court failed to order for a children's report before making custody orders.

6. On maintenance it is the Appellant's submission that the court did not lay a basis for awarding ksh. 20,300 for maintenance; that there was no evidence to prove that the Appellant could raise ksh. 20, 300. The Appellant further faults the trial court for failing to take into consideration the income of the Appellant before making the award.

7. It is the Appellant's further submission that the award was excessive in any event as the court failed to consider the fact the he was providing the medical cover for the children; and finally the Trial court failed to consider the fact that the Respondent was equally earning an income.

8. The respondent did not file any submission.

**Analysis and determination**

9. This is a first Appeal and this court is under the duty to review the evidence afresh , re- evaluate it and arrive at its own conclusion , without ignoring the findings arrived at by the trial court ( see *Gitobu Imanyara & 2 others v A.G* (2016) eKLR)

10. Two issues arise for determination:

    a).' Who should be granted custody of the minors

    b). Whether the amount of ksh. 20,300 in maintenance was too excessive.

**Custody**

11. On the custody of the minors, section 108(1) of the *Children's Act* empowers the children' court to make interim orders on custody. The Appellant's submissions that custody order ought not to have been made on an Interim Application therefore has no basis in law.

12. On the merit of the said decision, I take note of the fact that the children herein were under the age of 2 years, at the time. They are both female. Indeed, the younger child was an infant, who ordinarily would be feeding exclusively on breastmilk. Short of very compelling reasons it is inconceivable why such a child should be separated from the mother. This child's best interest is to be in the custody of the mother. The older child is also under 2 years. Both children are in effect babies who needs the care and nurturing of a mother.

13. In any event, it is trite law that children of tender years ought to be placed in the custody of the mother unless the Applicant demonstrates that the mother is unfit to have custody of the children. In *Midiwa v Midiwa* [2002]2 EA 453, the Court of Appeal re- stated the principle as follows:

> ' It is trie law that , prima facie, other things being equal , children of tender age should be with their mother , and where a court gives custody to the father , it is incumbent upon it to make sure that there really are sufficient reasons to exclude prima facie Rule. (See Re S (an infant) [1958], ALL ER 783 at 786 and 787 and *Karanu v Karanu* [1975] EA 18].....

> The learned judge in our view did not correctly direct herself on the principle that in cases of custody of the children the paramount consideration is their welfare"

14. In *Sospeter Ojaamong v Lynnette Amondi Otieno*, Civil Appeal No. 175 of 2006 And *Githunguri v Githunguri* [1979] eKLR it was stated that the "...the custody of very young female children should be granted to their mother, in the absence of exceptional circumstances which do not in my opinion exist in this case..... When dealing with the paramount consideration of welfare, especially where young female children are concerned, there is a rule that the mother is normally the person who should have custody".

15. It was incumbent upon the Appellant to prove that there were exceptional circumstances that disqualified the Respondent from having custody of the children. The Appellant told the court that the Respondent was currently living with another man. I agree with the trial court that the existence of such relationship was not adequately proved.

**Whether the award on maintenance was too excessive.**

16. On maintenance, the appellant faulted the trial court for awarding an excessive amount of maintenance without establishing his monthly income.

17. He submitted that the interim maintenance of Kshs.20,300/= was too excessive since he provided the medical care for the minors . He also pointed out that the respondent too was earning an income.

18. Article 53 of *the Constitution* provides that Every child has the right–

> "53 (1) (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"

19. Section 114(2) of the *Children Act* No. 29 of 2022 stipulates the considerations by which the Court shall be guided when making an order for financial provision for a child. These considerations include *inter alia*:

    a. The income or earning capacity, property and other financial resources which the parties or any other person in whose favour the court proposes to make an order, have or are likely to have in the foreseeable future;

20. In this case, the trial Court was obligated to consider the income or earning capacity, property and financial resources of the parties both then and in the foreseeable future as provided under the aforesaid section. of the *children's Act*.

21. However, I have taken note of the fact that none of the parties swore an Affidavit of means or provided proof of income to enable the court make a determination on the financial capability of each party. How then was the court supposed to establish what the Appellant income was if he did not provide proof of his earnings. The Appellant 's complain therefore that the trial court went ahead to determine the amount of money he should remit every month without ascertaining his monthly earnings is devoid of sincerity.

22. Nevertheless, I have noted the breakdown of the needs of the children as set out in paragraph 8 of the Respondent's Affidavit sworn on 14.1.2019. The requirements are modest and reasonable and I believe with the inflationary trends from the year 2019, the costs of most of the items must have gone up. The Appellant proposes contribution of ksh. 7,000. However, that would leave the heavier burden on the respondent in the light of the above stated requirements.

23. It is the responsibility of both parents to take care of their child, as set out in Article 53 ( *supra*). The same provision is reiterated under section 110(a) of the *children's Act*. Considering that each party withheld their earnings from the court, there is no reason why the Appellant was made to carry the heavier part of it, when the financial capability of each was and is, unknown. The amount of ksh. 20300 in my view considered against a total expenditure of about ksh. 30,300 was - on the higher side. Both parties should have been made to make contribution in fairly equal portions.

24. In the end , I hereby proceed to make the following orders:

    a. The Appeal against custody orders is hereby dismissed.

    b. The award on maintenance by is hereby reviewed downwards to ksh. 15,000 per month.

    c. Each party to meet their own costs in this Appeal

**DATED SIGNED AND DELIVERED AT KAKAMEGA THIS 31ST DAY OF JANUARY 2024.**

**S. CHIRCHIR**

**JUDGE.**

In the presence of :

Rono – Court Assistant

No appearance by the parties.