



**PKM v CMM (Civil Appeal 94 of 2021)  
[2024] KEHC 1816 (KLR) (23 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1816 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL APPEAL 94 OF 2021  
TM MATHEKA, J  
FEBRUARY 23, 2024**

**BETWEEN**

**PKM ..... APPELLANT**

**AND**

**CMM ..... RESPONDENT**

*(Appeal from part of the judgment of Hon Otieno J (RM) Makueni  
Children Case no E001 of 2020 delivered on the 2nd December 2021)*

**JUDGMENT**

1. In the matter before the children court the issues for determination were whether the appellant was the biological father of the two minors DMM and AMK on whose behalf the suit was filed, and if so whether the appellant was liable for their maintenance, and if so, how much. The court was also to determine the issue of legal and actual custody.
2. The issue of paternity was determined via a DNA and was settled through an interlocutory application. The report was revealed to parties on 13<sup>th</sup> May 2021. A request for a 2<sup>nd</sup> DNA by the appellant was denied and that decision was not appealed against.
3. On maintenance the court made a finding that the appellant had proposed to cater for the education of the children and medical expenses, while the plaintiff would cater for the rest- food shelter and clothing as the children were in her actual custody.
4. The trial court determined that the appellant would cater for the education of the children – all school fees and related expense, take out and maintain a medical cover for the children and pay and additional 5000 per month for nanny expenses.
5. Both parties were to have joint legal custody while the respondent would have actual custody.



6. Aggrieved, the appellant lodged this appeal on 8 grounds which are really just two grounds: that the award against him did not take into consideration of the fact of his meager earnings, and that that the court did not take into consideration that he had parental responsibility over other children and the children subject to this matter did not rank higher than those children.
7. In the submissions filed by his counsel on 12<sup>th</sup> May 2023, he argued that the trial court had misdirected itself on the law on maintenance of minors. He submitted that parental responsibility is an equal and joint responsibility as per Article 53(1) ( e) of the Constitution , s. 94 (1) of the now repealed Children Act . That the appellant had demonstrated in the subordinate court that what his salary was, and to be condemned to foot all the school expenses, medical expenses and 5000 for the nanny expenses was way beyond his means and would have the result of him neglecting his responsibilities over the other minor. He relied on SKM v MWI [2015] eKLR where the court held that maintenance orders were not meant to punish or oppress any party, but should be designed to provide for the needs of each child in question while taking into account the financial means of the parents as a child can only be maintained within the means of the parents; CIN v JNN [2014]eKLR where the court clearly indicated that the Constitution of 2010, was a game changer as person coming before the children court for maintenance must also satisfy the court as to what they too have done to maintain the child, i.e. that they must also demonstrate their contribution because the mother and father have equal responsibility toward the upbringing of the child or children.
8. It was also argued that the trial court had taken into account extraneous matters in making its orders. That the appellant did not propose to provide as was indicated in the judgment but that he had offered to take parental responsibility only if he was found to be the father of the children through a DNA test. That his position would be supported by the record.
9. The respondent did not file submissions.
10. I asked for affidavits of means and welfare report from the children officer on the children of the appellant.
11. With respect to the affidavit of means the respondent filed hers on 17<sup>th</sup> November 2023 where she deponed that she is a trained P1 teacher waiting employment by the Teachers Service Commission and that she depended on casual jobs whereby she was able to earn Ksh 10,000 per month. That the allegations by the appellant that she was employed by an NGO and had a business by name [Particulars Withheld] in Mavindini was not true. She did not disclose the nature of casual jobs.
12. The appellant filed an affidavit of means on 9<sup>th</sup> November 2023 annexing his August, September and October 2023 pay slips showing that his Gross Salary as Ksh 68, 038/00 and Net Salary was Ksh 11, 122/10. He has two loans with Hela Credit and Platinum Credit of about Ksh 600,000, and two other loans adding up to about Ksh 2. 4million from Kenya Police Sacco. The payment of these loans takes up about Ksh 35K out of his salary.
13. He has also produced documents to show that he has another child LFK DOB 11<sup>th</sup> February 2020 whose mother is his wife. This child joined play group in a school last year in January. The documents do not say how much he pays as fees. He does not state the contribution of the mother to her child's upkeep, and simply states that she is unemployed.
14. A children Officer's report was filed on 17<sup>th</sup> November 2023 on the welfare of the two minors subject of this matter. The order had also indicated that the report was to cover all the other children the appellant alleged he was providing for. These two are DMM, 15 years old (DOB 12<sup>th</sup> August 2008) and AMK 6 years old (DOB 7<sup>th</sup> December 2017).



15. In the plaint amended on 9<sup>th</sup> April 2021 the respondent had sought from the children court maintenance for the children at the rates set out as follows;
- i. School needs, fees, uniform Ksh 50,000 per term
  - ii. Rent Ksh 15,000 per month
  - iii. Clothing Ksh 10,000 per month
  - iv. Food Ksh 20,000 per month
  - v. House help Ksh 10,000 per month
  - vi. Medical expenses Ksh 15,000 per month
  - vii. Entertainment Ksh 10,000 per month
- Total Ksh 130,000 with Ksh 80,000 paid monthly
16. The respondent averred in her plaint at paragraph 6 that though she was unemployed, she had always taken full responsibility over the minors by taking casual jobs.
17. She also averred that the respondent was employed was a Police Officer with the GSU as an [Particulars Withheld] engineer' and hence had the financial capacity to provide for the children.
18. In his defence the appellant denied all the averments and specifically that the children were not entitled to 50K fees per term as one was attending a public school and the other was not school going by then, that the respondent was living with the minors in her parents' home and no rent was required, that the Ksh 10K monthly for clothes was highly exaggerated, that school going child would be in school 9 months in a year in school uniform, and Ksh 12K per year for clothing would be sufficient, and similarly the Ksh 20K for food was not realistic as again the elder minor would in school most of the year, that the younger child was a child of tender years, that house help costs within the area the appellant was living were about Ksh 4-5k per month. On medical cover, that if the children were his he would procure an appropriate medical cover for them, and that the sum claimed for entertainment was lacking in basis. At paragraph 13 he averred that he was ready and willing to foot education bills for the children.
19. I have carefully considered all the evidence before me: that includes the proceedings in the lower court, the statements adopted as evidence, the affidavits of means, the children officer's report, the submissions by the appellant and the authorities cited. The issue is whether the appeal has merit.
20. It is important to point out when it comes to the welfare of and the upbringing of children, the courts ought not to be the first point of call. Parents are expected to take care of their children and their children's needs without coercion. Indeed, this is recognized in *the Constitution* at Article 53 (1) (e) where it states that Every child has the right... 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; And at Article 53 (2) the focus changes from the interests of the parents to those of the child in that a child's best interests are of paramount importance in every matter concerning the child. The maintenance of a child and exercise of parental responsibility is a matter concerning the child and in the best interests of a child and therefor is of paramount importance.
21. No parent should be forced by anyone to take care of their own child. These parents before me did what produces children by themselves. There is no evidence of coercion; they ought to bear their responsibility just as readily and willingly. However, when the best interests of the child are at risk because of the negligence of a parent then the law takes its course and that is why making a child to



- become in need of care and protection is a criminal offence. It the reason why parents who deliberately neglect their duty should face both the civil and criminal processes provided for by the law at the same time.
22. But more importantly such parents should be subjected to a child inclusive mediation/ AJS process where the children are heard as provided for in the *Children Act* and their issues taken into consideration. This is because unlike in a trial scenario, the mediation space is less formal and evidentiary rules do not apply. In that way real solutions to the problem at hand will be arrived at which the parties themselves will be able to implement. This process provides the opportunity to restore broken family relations especially between children and parents and the establishment of open lines of communication for estranged parents who have no choice but to co- parent.
  23. In this matter the welfare report did not indicate what the current needs of the children are. The children have grown, one is in high school and the one who was not of school going age is going to school. These parties expect the court to determine their contribution to the maintenance of the children with insufficient data. No school fees structure has been presented by either party, neither have they indicated in terms of money how much they are willing to contribute.
  24. Reading the plaint I note that the respondent stated that she had taken full responsibility of the needs of the children. The appellant also stated in black and white that if the DNA test established that the children were his, he would take up the school and medical needs of the children. The record shows that the DNA tests established that the two children are his. It was only logical for the learned trial magistrate to hold him to his word.
  25. It is the respondent's averment that she took responsibility for all the needs of the children but nowhere in her testimony nor in the affidavit of means does she demonstrate how she arrived at the sums she claims. The witness statement she adopted as her evidence does she provide evidential support of the sums of money claimed in the plaint. The evidential requirement that a litigant who expects the court to give judgment in their favor must prove their claim also applies in these matters. It is not acceptable to pluck figures from the air and place them in the plaint and expect the court to arrive at the requested judgment without the supporting evidence. If indeed the respondent was paying fees of 50K per term where is the evidence? If she was spending 10K on entertainment, 15K on medical, 10K on clothing, 10K on the nanny and 20K on food all on a monthly basis there ought to have been some supporting evidence especially these days of MPESA and other modes of electronic and mobile money transfer. If as she alleges she has been relying on relatives to support her and the children where is the evidence. None was called to court to testify to support those claims. He also claimed to be in debt of over Ksh 160,000 but placed no evidence before the court to establish the claim.
  26. Hence I am not persuaded that she has no source of income sufficient to contribute to the upbringing of the children.
  27. The trial court gave the appellant the opportunity to participate in determining the schools the children would attend so that their school fees would be within his means. There is no evidence that he ever did that and he cannot be heard to complain if he neglected to do so. Did he expect the children to stay out of school while he was still dilly dallying on what to do? The fact that he committed his salary, which he says that that is his only source of income to loans cannot be held against the children. As a responsible parent he must be knowing how he will provide for his children even when he is repaying loans. Committing his only source of income to loans cannot be a reason for him to neglect his parental responsibilities.
  28. Section 152 of the *Children Act* 2022 takes cognizance of this fact and makes it a crime by providing the penalty for cruelty to and neglect of children



- (1) Any person who, having parental responsibility, custody, charge or care of any child, and who —
- (a) willfully assaults, ill-treats, abandons, or exposes, in any manner likely to cause the child unnecessary suffering or injury to health, including injury or loss of sight, hearing, limb or organ of the body, or any mental illness; or
  - (b) by any act or omission, knowingly or willfully causes that child to become, or contributes to his becoming, in need of care and protection, commits an offence and is liable, on conviction, to imprisonment for a term not exceeding ten years or to a fine not exceeding five hundred thousand shillings, or to both.
29. In this case it is evident that the children herein are in need of care and protection because they are children whose parents have been litigating since 2021, and their parents are not exercising proper care and attention, in addition the appellant's refusal and neglect to exercise his parental duties is definitely making them to be in need of care and protection as children exposing them to circumstances likely to interfere with their physical, mental, psychological and social development.
30. Section 31 of the Act demonstrates why this is so. It provides for equal parental responsibility and defines "parental responsibility". The definition is not about shillings and cents. It is about the whole welfare of the child and the children officer's report ought to provide that information to the court while proposing ways to ensure the same so as to mitigate the impact of neglect. Parental Responsibility means much more: it is about the full parenting of a child; 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.

Section 31 (2) sets out the duties referred to in subsection (1) to include, but are not limited to—

- (a) the duty to maintain the child and, in particular, to provide the child with—
  - (i) basic nutrition;
  - (ii) shelter;
  - (iii) water and sanitation facilities;
  - (iv) clothing;
  - (v) medical care, including immunization;
  - (vi) basic education; and
  - (vii) general guidance, social conduct and moral values;
- (b) the duty to protect the child from neglect, abuse, discrimination or other differential treatment;
- (c) the duty to—
  - (i) provide parental guidance in religious, moral, social, cultural and other values that are not harmful to the child;
  - (ii) determine the name of the child;
  - (iii) procure registration of the birth of his or her child;
  - (iv) appoint a legal guardian in respect of the child;



- (v) receive, recover and otherwise deal with the property of the child for the benefit, and in the best interests, of the child;
  - (vi) facilitate or restrict the migration of the child from or within Kenya;
  - (vii) upon the death of the child, to arrange for the burial, cremation of the child or any other acceptable method of interment; and
- (d) the duty to ensure that, during the temporary absence of the parent or guardian, the child shall be committed to the care of a fit person. (emphasis added)
31. Evidently there are things that money cannot pay for and can only come from the actual involvement of a parent. In this case the two parents have the duty to sit down together and come up with an agreement of how that will happen as none of them has any superior rights over the children.
32. I also note that the welfare report did not contain the views of the wife of the respondent over his other children. This was necessary as the co-parenting will require her cooperation and the children officer needed to make sure that she was alive to that fact.
33. Never the less taking the cue from s. 31 and the evidence on record I am of the following view:
34. The respondent is to take over all the schooling and school related expenses and medical cover of the two children. To that end he must get into conversation with their mother and the schools the children are attending and the requirements for the same. If he has any problem with the schools, he has the option to discuss with the mother and arrive at mutually agreed schools that are within his means. He must keep in mind that his obligation is to treat all his children the same. On the medical cover, he can take out a cover or add the children to any that he has for his other child.
35. On food and shelter, the respondent having the actual custody of the children will provide.
36. On clothing both parents will buy their children clothes
37. On the other aspects of parenting the parents will agree on the issues of access to enable the children interact with their father.
38. Final orders:
- a. The appellant will take over with immediate effect the schooling needs of the two children. He will visit their schools and confirm their requirements and make the appropriate arrangements with the school authorities on the payment of school dues, and provision of all the school requirements. If he is not satisfied with the schools he is at liberty, in consultation with the respondent and the approval of the children's court, to change the same at his own cost.
  - b. The appellant will provide a medical cover/include the children in his own cover.
  - c. The appellant will retain actual custody, provide shelter and food
  - d. On clothing the parents will buy clothes. The respondent had suggested 12K a year.
  - e. In the best interests of the children the respondent will have access to the children over half the school holiday
  - f. On (e) and other issues, the parents are at liberty to enter into a parental responsibility agreement as provided for by section 33 of the Act which provides



- (1) Parents of a child and who are not married to each other may enter into a parental responsibility agreement, in the prescribed form, whereby both, in the best interests of the child, designate and agree on clear individual responsibilities towards the child.
  - (2) An agreement under subsection (1) may be in the nature of a parenting plan in which the parents specify—
    - (a) how the child or children shall spend time with each parent;
    - (b) how the parents shall make joint decisions on matters relating to their respective parenting responsibilities, including religious upbringing;
    - (c) contact information;
    - (d) visitation schedule;
    - (e) holiday and school break schedule;
    - (f) transport and travel within and outside Kenya;
    - (g) responsibility for health insurance and healthcare services;
    - (h) the need for notification of parental movement in cases where either or both parents relocate or change residence;
    - (i) the manner in which decisions relating to the education of the child shall be made; and
    - (j) the joint and several responsibilities expenses for extra-curricular activities of the child.
  - (3) A parental responsibility agreement may only be revoked or terminated by an order of the Court made on application by—
    - (a) a person who has parental responsibility over the child; or
    - (b) a child, with the leave of the Court.
  - (4) The Court may only grant leave under subsection (3)(b) if it is satisfied that the child sufficiently understands the nature and effect of the application made to the Court.
- (g). to effect s. 33(2) of the Act and (e) above the matter is referred to mediation and the outcome be dealt with by the children court. (h). To enable (g), a P&C file be opened in the Children Registry, by the children officer and placed before the children court for further directions on the Parental Responsibility Agreement. The Deputy Registrar to serve this order on the Children Officer.
- i. The matter is returned to the children’s court to be mentioned within 14 days hereof for compliance of the orders.
  - ii. Each party to bear its own costs

**DATED, AND SIGNED THIS 23RD DAY OF FEBRUARY 2024**

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**MUMBUA T MATHEKA**  
**JUDGE**



Delivered via email this 23rd day of February, 2024

CA Nelima/Elizabeth

Muumbi & Co. Advocates for the appellant

Respondent in person

