



EMM v MNM (Civil Appeal E038 of 2022) [2024] KEHC 4056 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4056 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E038 OF 2022**

A. ONG'INJO, J

APRIL 25, 2024

BETWEEN

EMM APPELLANT

AND

MNM RESPONDENT

(Being an appeal from the judgment of Hon. D. Wangeci (PM) delivered on 29th August 2022 in Wundanyi Principal Magistrate's Court Children's Case No. E010 of 2021)

JUDGMENT

1. The Respondent, MNM sued the Appellant vide plaint dated 21st July 2021 seeking that the Appellant be ordered to pay school fees for the child joining Form 1 on 4th August 2021, that the court declares that the Appellant shall have parental responsibility for the issues of the marriage and that parties herein to have equal responsibilities for their children. The Appellant herein also asked for costs of the suit and interest.
2. In determining the suit, the trial magistrate found that in light of the provisions of Article 53 of the Constitution and in the best interest of the children, judgment was entered in favour of the Plaintiff as follows: -
 - a. That both the Plaintiff and the Defendant shall have equal responsibilities and in that regard, the Plaintiff shall provide shelter, clothes and food while the Defendant shall take care of school fees and school related expenses at Dr. Aggrey High School.
 - b. As regards order (a) above, the Defendant is directed to clear the outstanding school fees above within the next 30 days of this judgment.
 - c. The Defendant to ensure that water is immediately connected at the Plaintiff's house
 - d. This being a family matter, each party to bear their own costs.



3. The Appellant being aggrieved by the judgment of the trial magistrate lodged the appeal herein vide Memorandum of Appeal dated 23rd September 2022 on the following grounds: -
 1. That the learned magistrate erred in law and in fact by not taking into consideration that parental responsibility is shared responsibility and the same should not be used to punish one parent and favour the other.
 2. That the learned magistrate erred in law and in fact by not considering that the Respondent is a teacher and earning a salary and what he gets is from hand to mouth.
 3. That the learned magistrate erred in law and in fact by compelling the Appellant to pay the huge outstanding school fees while the Respondent is living a lavish lifestyle having a pay slip.
 4. That the learned magistrate erred in law and in fact by not determining that the Appellant can transfer the minors to a school that he can afford to pay school fees.
 5. That the learned magistrate erred in law and fact by not considering the best interest of the child while determining this matter.
 6. That the learned magistrate erred in law and in fact by not ordering for Children Report and Affidavit of Means which are very pertinent documents while deciding on a children's matter.
 7. That the learned magistrate erred in law and in fact by not considering the Appellant's submissions and authorities cited herein.
4. The Appellant proposed to ask the court for orders that: -
 - a. That the judgment delivered on 29th August 2022 be set aside and/or be varied to the extent that the minors can be transferred to a school that he can afford.
 - b. That costs be paid to the Appellant by the Respondent.
5. This appeal was canvassed by way of written submissions. The Appellant's submissions are dated 13th December 2022 whereas the Respondent's submissions are dated 20th December 2022.
6. The Appellant in his submissions said that biological parents of the minors are entitled to play part in raising of the children and the court should not punish one parent and allow one party to laugh at the other because of the orders. He referred to Section 31 and 32 of the Children Act which provide for equal parental responsibility.
7. The Appellant claimed that the court did not call for evidence to confirm the financial capability of each party before arriving at the decision which it made. He said that he was jobless but the Respondent was employed as a teacher but the court compelled him shoulder a heavy burden which will amputate and render him economically senile. He relied on Section 114 of the Children Act, 2022 which provides that the court may make a maintenance order in respect of a child after considering all circumstances of the case and being guided by the provisions in Subsection 2 (a) to (j).
8. The Appellant further argued that the trial magistrate was not right in compelling him to pay the huge outstanding school fees for the minors. He said the rule of the thumb is that parental responsibility is shared. He contended that the decision arrived at by the trial magistrate was not sound and proper since it was not fair and in consonance with the law.
9. The Appellant argued that he does not have the means to raise the huge School fees at Dr. Aggrey High where the 2 minors were learning and that the interest of the minors will be properly taken care of if the parents are able to meet the needs of the minors according to their means.



10. The Appellant also submitted that the trial magistrate did not consider the best interest of the child principle while arriving at her decision as the judgment delivered is not capable of execution by the parties. He cited Article 53 of the [Constitution](#) as well as the [Children Act 2022](#) to support his argument that every child has a right to parental care and protection and that the best interest of the child shall be the primary consideration in all actions concerning children.
11. The Appellant also complained that the trial magistrate ignored his submissions and authorities and as such proceeded and arrived at a wrong determination. He said that he was willing to cater for school fees of the minors in a school he can afford and that he should not be punished because of the children.
12. The Respondent submitted that the provisions of Article 53 and Section 4 (2) of the [Children Act](#) are the guiding factors to ensure that a just and fair decision is reached by the court in matters relating to maintenance of the children. She said the Appellant wants to run away from his parental responsibility as he ought to take care of school fees responsibility for the two boys as she takes care of other responsibilities of the minors.
13. The Respondent went further to submit on an application for execution which was not a subject before this court.
14. While waiting for the parties to file their submissions, the court made an order referring the parties herein to Court Annexed Mediation and also made an order for a Report from the Children's Officer, Voi.
15. The Mediator's Report filed on 6th January 2023 was to the effect that the Appellant was not satisfied that a cow was sold at Kshs. 40,000 and not Kshs. 120,000 and therefore no agreement was reached.
16. That the Appellant refused to selling of any of the properties to payment of school fees, he also refused to selling of household items and a motorcycle in the home where the defendant lived to payment of school fees. As a result, no agreement was reached. That the Appellant insisted on removing the children to a day school despite the fact that school fees per year for each of the two children was only Kshs. 35,000.

Analysis and Determination

17. The mandate of this court was settled in [Francis Lokadongoy Lokogy v Reuben Kiplagat Kiptarus](#) (2020) eKLR where it was held as follows: -

As this is a first appeal, this court is under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching its own conclusions in the matter. In carrying out this duty this court has to remember that it has no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. The court has also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanor of witnesses. In a nutshell a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement.

18. Having considered the evidence and judgment in the trial court, the grounds of appeal and submissions by the parties, the issue for determination is whether the trial magistrate properly apportioned parental



- responsibilities to the parties in accordance with their financial capabilities for the best interest of the child pursuant to Article 53 of the Constitution and Sections 8, 31, 32, and 144 (h) of the Children Act.
19. The only issue in dispute is payment of school fees and school related expenses for the two children at Dr. Aggrey High School by the Appellant.
 20. As at 12th August 2021, it was established by the court that there was a balance of Kshs. 38,450 being balance of school fees for 1st term after the Respondent had proved that she had paid almost Kshs. 50,000. The Appellant was therefore ordered to pay school fees arrears. However, it appears that as at 29th August 2022, when judgment was delivered, he had not made payments and it was ordered that he clears the outstanding school fees balance within 30 days.
 21. The Appellant lodged the appeal herein but did not show that he had paid a penny of the accumulated school fees arrears. He insisted on removing the two children from Dr. Aggrey High School and relocating them to a day school which he could afford.
 22. This court had the opportunity of listening to the parties herein and it was evident that the hostility and bitterness between the two of them transcends the claim for maintenance of the issues of the dissolved marriage. Upon dissolution of the marriage between the parties, they started accusing each other of causing damage to water pipes supplying the house occupied by the Respondent and the children of the marriage, dismantling of the motorcycle and the Respondent damaging wooden bed, mattress, bedsheets and two bed covers as well as threats to each other.
 23. The differences between the parties herein has rendered the children of the marriage in need of care and protection pursuant to Section 144 (h) of the Children Act which provides: -

For the purposes of this Act, a child in need of care and protection includes a child: -
whose parents are unable to provide to him or her proper care and attention by reason of being intensely engaged in litigation over custody and maintenance or other related family dispute prejudicial to the wellbeing of the child;
 24. Upon noting the litigious nature of the parties, this court referred them to the Court Annexed Mediation which did not yield much because the Appellant maintained a hard stance despite the fact that the only responsibility apportioned to him was payment of school fees and school related expenses. He has not shown that he has paid any money towards reducing the fees arrears or discharging his responsibility to pay even Kshs. 2500 per month which he purported he could pay comfortably without straining.
 25. The Respondent was ordered to cater for the children's shelter, clothes and food. There is no evidence that she has not complied with the order and in addition, she has been straining to pay school fees which the Appellant has willfully refused to pay after he was ordered to do so.
 26. The Children Officer's Report dated 17th January 2023 that was called for by this court confirms that although the Appellant may not be able to clear the fees balance amounting to Kshs. 104,000, he told the officer that his net worth per month is Kshs. 20,000 and that he could afford to pay Kshs. 2500 per month. He has never made any proposals that he wanted to pay that amount in instalments. This court therefore finds that he had not come to court in good faith. His sole purpose is to defeat the cause of the Respondent and thereby prejudicing the best interest of the children who are entitled to can education under Article 53 (1) of the Constitution.
 27. The children who are the subject of the proceedings herein aged 14 and 16 years old were interviewed by the Children Officer and they were opposed of the issue of going to stay with the Appellant saying



that he had been humiliating them, disconnected their water, DSTV, electricity and even their solar water panels just to force their mother out of the house. They said their father is able to pay their school fees but he is not paying just to punish them.

28. The Children's Officer observed that although the Appellant said his net worth per month is Kshs. 20,000, he did not produce proof of his net worth and it was not possible to know his net worth. It was also observed that the responsibilities given to the Respondent was more than that of the Appellant since she was paying college fees for the daughter in addition to the orders made by the court.
29. In consideration of the observations made herein and in consideration that the Appellant failed to compromise when referred to the Court Annexed Mediation, this court finds that there is no reason to interfere with the finding of the trial magistrate that the Appellant should pay school fees outstanding as of 12th August 2021 and school related expenses as ordered by the trial magistrate in the judgment.
30. This appeal does not have merit and is dismissed. The Appellant to bear costs of the appeal. 14 days right of appeal explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 25TH DAY OF APRIL 2024.**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Otolo- Court Assistant

Appellant present virtually

Respondent present virtually

