



CK (Infant/Minor Suing Through Mother and Next Friend PKM) v EKR (Civil Appeal E047 of 2022) [2024] KEHC 6029 (KLR) (Family) (27 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6029 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E047 OF 2022**

MA ODERO, J

MAY 27, 2024

BETWEEN

**CK (INFANT/MINOR SUING THROUGH MOTHER AND NEXT FRIEND
PKM) APPELLANT**

AND

EKR RESPONDENT

JUDGMENT

1. Before this court is the Memorandum of Appeal dated, 18th April, 2022 by which the Appellant PKM seeks the following orders:-

- “(a) That the orders of the Subordinate Court be set aside and fresh orders issued.
- b. That the Appeal Court do order the Respondent to pay monthly maintenance for the minor as follows:-
 - i. School fees - Kshs. 5,000/=
 - ii. Clothing - Kshs. 2,000/=
 - iii. Medical - Kshs. 4,000/=
 - iv. Food - Kshs. 10,000/=
 - v. Rent - Kshs. 8,000/=
- b. That the costs of this suit [Appeal] be paid by the



Respondent.

2. The Respondent EKR opposed the appeal. The matter was canvassed by way of written submissions. The Appellant filed the written submissions dated 14th June, 2023 whilst the Respondent relied upon his written submissions dated 4th July, 2023.

Background

3. The Appellant vide a plaint dated 23rd September, 2020 filed at the Nairobi Children's Court sought the following orders:-

- “(a) That the Plaintiff be granted sole custody of the minor herein CK.
- (b) That the Defendant be ordered to make contributions towards the maintenance and upkeep of the minor in terms of basic needs, education and medical cover by NSSF.
- (c) Costs of this suit and interest thereon.
- (d) Such other reliefs as this Honourable Court may deem fit to grant”

4. The Respondent entered appearance on 8th October, 2021 and filed his statement of Defence opposing the suit. The matter was heard inter partes and on 11th March, 2022, Hon Terer Resident Magistrate, delivered his judgment in which he made the following orders.

- “1. That legal custody of the minor CK shall jointly vest in the plaintiff and the Defendant.
2. That actual custody of the minor shall vest in the plaintiff.
3. That the Defendant is to be granted access to the minor on terms to be agreed by both parties.
4. That parental responsibility is to be apportioned as follows;-
Plaintiff
ShelterFood - partlyUtilitiesClothing
Defendant
School fees and school related expenses in the minor's current school including school fees arrears.
- Medical Cover through NHIF.
5. Each party to pay their own costs”

5. Being aggrieved by the decision of the trial court the plaintiff filed this Appeal which was premised the following grounds:-

- “1. The Learned trial magistrate erred in law and in fact by failing to consider the prayers made by the Appellant hence denying the Appellant a fair hearing.
2. The Learned trial Magistrate erred in law and in fact



by failing to consider and to carry out an in-depth analysis of the issues as raised in the plaint.

3. The Learned trial Magistrate erred in law and in fact in failing to consider that the effect of his judgment basically leaves the Appellant with most of the parental responsibilities.
4. The Learned trial Magistrate erred in law and in fact by failing to consider and to carry out an in-depth analysis and examination of the legal issues to be resolved, factual issues to be resolved and evidence presented by the Appellant in her Submissions.
5. The Learned trial Magistrate erred in law and in fact in failing to find that the Respondent had failed to meet his parental responsibility leaving the Appellant to solely provide for the minor over the years.
6. The Learned trial Magistrate erred in Law and in fact in fact in finding that the Appellant has no stable source of income and is in fact living purely on donations and aids from friends and relatives.
7. The Learned trial Magistrate erred in law and in fact in coming to a conclusion that the Respondent to pay a small amount of Kshs. 5,000.00 per month as maintenance, which is insufficient to maintain the minor.
8. The Learned trial Magistrate erred in Law and in fact in giving the bulk of maintenance to the Appellant who in fact is not employed and is barely surviving from hand to mount.
9. The Learned trial Magistrate erred in law and in fact in failing to consider all the evidence tendered, the facts of the case and submissions tendered as a result reaching an unfair decision.”

6. As stated earlier the appeal was opposed.

Analysis And Determination

7. I have carefully considered this Memorandum of Appeal, the record of the trial as well as the written submissions filed by both parties.
8. This is a first appeal, thus it is the duty of this court to re-evaluate and review the evidence adduced in the lower court and to draw its own conclusions on the same. In *Selle & Another -vs- Associated Motor Boat Company Limited & Others* [1968] E.A 123, the court of Appeal held that:-

“An appeal to this court from trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular this court is not bound necessarily to follow the trial judge’s findings or fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence of if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.....”



9. Similarly the same court in the case of *Kiruga -vs- Kiruga & Another* [1988] KLR 3h 8 observed that;-
- “An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong.”
10. The Appellant herein does not appear to take any issue with the orders made regarding custody of the minor. Her major challenge is with respect to the orders made on maintenance.
11. The Appellant submits that initially she was meeting all the needs of the child alone. However now that the Respondent is also earning a salary the Appellant feels that his salary ought to be shared between the two families.
12. On his part the Respondent urges the court not to interfere with the orders on maintenance made by the trial court. He submits that parental responsibility is a shared responsibility and states that he has another family who also rely on him.
13. It is pertinent to note that the impugned orders were made with respect to the maintenance and upkeep of a minor. It is trite that in matters relating to the welfare of minors, courts are required to give priority to the best interest of the child.
14. *The Constitution* of Kenya 2010 provides at Article 53 (2) that
- “(2) A child’s best interest are of paramount importance in every matter concerning the child”
15. Likewise Section 8 (1) of the *Children Act* 2022 provides as follows:-
- “8
- (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies –
- a. The best interests of the child shall be the Primary Consideration” [Own emphasis]
16. I have perused the judgment delivered by the trial court. I am satisfied that the learned trial magistrate took into account all the relevant factors to be considered in having the needs of the minor met.
17. The Appellant appears to hold the view that the Respondent (father) ought to shoulder the bulk of the child’s maintenance. This is not the correct position in law. Maintenance is a shared responsibility and the courts will make orders depending on the financial capacity of each parent.
18. The trial court also did consider the financial capacity of both parents. The court also took into account the fact that the Respondent had another family who also relied on him. The Respondent’s earnings were shown to amount to Kshs. 20,000 monthly.
19. In the circumstances I find that the orders made by the learned trial magistrate regarding maintenance of the minor were fair and just. I am not inclined to interfere with those orders.
20. Finally this appeal fails and the same is dismissed in its entirety.
21. This being a family matter each side will bear their own costs.



DATED IN NYERI THIS 27TH DAY OF MAY, 2024.

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MAUREEN A. ODERO

JUDGE

