



**JGM v MW (Civil Appeal 20 of 2017)
[2024] KEHC 6043 (KLR) (Family) (27 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6043 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL 20 OF 2017**

MA ODERO, J

MAY 27, 2024

BETWEEN

JGM APPELLANT

AND

MW RESPONDENT

JUDGMENT

1. Before this court for determination is the Memorandum of Appeal dated 31st March, 2017 by which the Appellant JGM seeks for orders that
 - “ 1. The Appeal be allowed.
 2. The judgment on maintenance aforesaid be set aside and substituted by a judgment that is equitable and just to the parties in the best interests of the minor.
 3. Costs of the appeal be provided for”
2. The Respondent MW opposed the appeal. The matter was canvassed by way of written submissions. The Appellant filed the written submissions dated 30th May, 2023, whilst the Respondent relied upon her written submission dated 28th July, 2023.



Background

2. The Appellant herein had filed in the Children’s Court Civil Suit No. 8 of 2001 in which he sought the following orders -
 - “(a) An order vesting legal custody, care and control of AKG and JKG to both the plaintiff and the Defendant.
 - (b) Costs of the suit.
 - (c) Any other relief the court deems fit to grant”

4. The Respondent filed a statement of Defence and counter claim dated 20th January, 2016. The suit was heard interpartes and vide a judgment delivered on 2nd March, 2017, Hon. MA. Otindo, Senior Resident Magistrate made the following orders:-
 - (i) The plaintiff shall provide for school fees and school related expenses for both minors at a school both parties shall agree on.
 - (ii) The plaintiff shall also provide for medical care for the minor and the clothing needs of the minors.
 - (iii) The plaintiff shall provide for shelter and the related expenses plus the caregiver expenses.
 - (iv) The food expenses of Kshs. 36,000/= shall be shared as follows: the plaintiff shall contribute Kshs. 20,000/= per month while the defendant shall contribute Kshs. 16,000/= per month.
 - (v) The entertainment expenses shall be catered by each party at their own pleasure.
 - (vi) The diaper expenses considering the age of the child, is allowed at a reasonable sum of Kshs. 3,500/= per month which shall be equally shared at Kshs. 1,750/= per month for the next one year only.
 - (vii) Each party shall bear their own costs of the suit and be at liberty to apply.”

5. Being aggrieved by this decision the Appellant filed this Memorandum of Appeal which was premised upon the following grounds;-
 - “1. That the learned Magistrate erred in fact and in law in awarding maintenance of a larger proportion against the appellant without considering that child maintenance is an equal parental responsibility of both parents.
 2. That the learned Magistrate erred in fact and in law in failing to consider the Appellant’s and Respondent’s financial means considering that both parties are in formal employment before making a determination on the minors maintenance.
 3. That the learned Magistrate erred in fact and in law in making a finding that the appellant conceded to provide shelter and other related expenses and caregiver expenses which was not in evidence adduced at the trial.
 4. That the learned Magistrate erred in fact and in law by erroneously disregarding evidence on record thus failing to consider the appellant’s evidence on basic requirements he was willing to offer and thereby erroneously



making a determination without considering the Appellant's evidence and submissions.

5. That the learned Magistrate erred in fact and in law by alluding to evidence which the Appellant is purported to have testified and thus occasioning the Appellant to be prejudiced by the trial Magistrate's judgement."

Analysis and Determination

6. I have carefully considered this appeal as well as the written submissions filed by the parties.
7. 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 v Associated Motor Boat Company Limited & Others* [1968] EA 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 or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally....."

8. The Appellant does not seem to have any issue with the orders made by the court regarding custody of the children. What the Appellant appears to be challenging is the court's decision with respect to the maintenance of the two minors. He submits that the learned trial magistrate condemned him to shoulder over 90% of the financial burden for the maintenance of the minors.
9. This court cannot lose sight of the fact that the orders made by the trial court related to the custody and maintenance of a minor. It is trite law that in matters concerning the welfare of children courts are required to give priority to the best interest of the child.
10. 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."
11. Likewise *Children Act* 2022 at Section 8 (1) 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]

12. In determining question of maintenance the court is required to consider the needs of the minor as well as the financial capacity of each parent. Maintenance orders should not unfairly overburden one parent at the expense of the other.



13. In *SKM -vs- MWI* [2015] eKLR Hon Justice William Musyoka, stated as follows:-

“Maintenance orders are not meant to punish or oppress any party. They should be designed to provide for the needs of the children in question while at the same time respecting the financial status of the parent. A child can only be maintained within the means of the parent in question.” [Own emphasis]

14. I have carefully perused the judgment delivered by the trial court. I find that the learned magistrate did carefully analyze the needs of the minors as well as the capacity of the parents. She considered at the bundle of receipts which had been presented before the court and also put into consideration Article 53(1) (e) of the *Constitution* of Kenya as well as Section 90 of the *Children Act*. The Court noted that both parents are professionals earning a reasonable income. The Appellant is a Human Resources Officer at Nokia whilst the Respondent works as a Doctor at the Agakhan Hospital.

15. In the circumstances I find that in requiring the Appellant to cater for education costs, medical cost as well as shelter (rent) and maintenance contribution, the court did unfairly overburden the Appellant.

16. In my view both parents have the financial capacity to share on a more or less equal footing the costs for the maintenance of the two minors.

17. Accordingly this appeal succeeds. I set aside the orders made by the trial magistrate in the judgment delivered on 2nd March, 2017 and in their place this court now makes the following orders;-

- (i) The Appellant (Father) is to provide for the school fees and all school related expenses like uniform, books, school trips, school transport etc for the minors.
- (ii) The Appellant (Father) to cater for the medical expenses for the minors and to continue paying for the children life insurance.
- (iii) The Respondent (Mother) to provide the accommodation (shelter), food, house help costs and clothing for the minors.
- (iv) Each party to provide for the entertainments costs during the periods when the minors are in their custody.
- (v) This being a family matter each side to bear their own costs.

18. It is so ordered.

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

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MAUREEN A. ODERO

JUDGE

