



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CHILDREN APPEAL NO.1 OF 2017

(FORMERLY HCCA.8/2016)

(Appeal Originating from Nyahururu CM's Court Child.Case No..46 of 2015by: Hon. A.W. Mukenga – R.M.)

EWM.....APPELLANT

V E R S U S

RKK.....RESPONDENT

J U D G M E N T

The appellant, **EWM**, has filed this appeal against **RKK** challenging the orders of Hon. Mukenga R.M. made on 14/7/2016.

The appellant, by a plaint dated 7/10/2015 and filed in court on 8/10/2015 sought the following orders against the respondent:

(a) (a)

(a) A declaration that the defendant/respondent has parental responsibility for JW;

(b) A maintenance order requiring the defendant to make financial payment as the court may deem fit to the plaintiff in respect of the maintenance of the said issue;

(c) Costs of the suit

After hearing the suit, the trial court gave judgment in the following terms:

- (1) The plaintiff shall provide the subject with shelter and medical care;***
- (2) The defendant shall provide the subject with food and clothing needs to a tune of Kshs.4,000/= per month;***
- (3) The defendant shall cater for the subject's education and all educational related expenses;***
- (4) Each party shall bare its own costs.***

These orders aggrieved the appellant and she filed this appeal in which she cited three grounds:

- (1) That the learned magistrate erred in not considering that the parties had earlier proposed to record a consent to the effect the respondent was to remit Kshs.8,000/= monthly for the maintenance and upkeep of the minor;***
- (2) That the court misdirected itself by not considering that the respondent is a man of means as opposed to the appellant who has been maintaining the subject single handedly;***
- (3) That the court erred by not granting the prayers sought by the plaintiff in the plaint which were for the best interests of the child.***

The appellant therefore prays that the appeal be allowed and the court do award the prayers sought in the plaint.

Though the matter came up severally and the appeal was said to have been served, the respondent did not appear and the appeal proceeded undefended.

The appellant appeared in person and submitted that the court failed to consider the affidavit of means and the fact that the parties had entered into consent, that the respondent pay Kshs.8,000/= per month till the child reached school going age. She also prayed for costs of this appeal and the costs of the appeal.

This being a first appeal, it behoves this court to examine the evidence tendered in the lower court afresh, analyze it and make its own findings. See ***Selle v Associated Motor Boat Company Ltd 1968 EA 123***.

The appellant testified as PW1. She told the court that she resides at Ol Kalou and operates a Kiosk; that they started cohabiting with the defendant as husband and wife in 2012. She became pregnant in December, 2012 and in April she discovered that the defendant had another wife and left. She gave birth to a child, JW, on XXX; that the respondent refused to support maintain the child. She reported to the Area Chief but the respondent refused to go when he was summoned. The respondent was then summoned by the Children's Officer but the respondent refused to appear, which prompted her to come to court. She therefore prayed that the respondent be ordered to provide clothing, food and school fees for the child while she provides shelter.

RKK (DW1) the respondent on the other hand testified that one day while he was at work, the appellant went and dumped the child in a vehicle at the stage; that he used to send PW1 Kshs.3,000/= periodically; that he has three other children; that the appellant calls and insults his wife, insults him at his place of work; that he works as a driver and only earns Kshs.350/= per day; that one of his hands was injured, he has back pains and cannot till the land to supplement his income; that he had a lorry which he sold due to stress. He denied having consented to paying the appellant Kshs.8,000/= per month.

When considering matters concerning children's custody and welfare, the Constitution requires that the best interest of the child be of paramount importance. Article 53(2) provides:

"A child's best interests are of paramount importance in any matter concerning the child."

The same standards are echoed in Section 4(2) and 3(b) of the Children's Act.

Section 53(2) (e) of the Constitution provides 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.

The said responsibility entails provision of inter alia, education needs, food, shelter and medical care. In her affidavit, the appellant pleaded what her expenses are:

1. **Food** - Kshs.10,000/=
2. **Shelter** - Kshs.7,000/=
3. **Electricity** - Kshs.1,000/=
4. **Water** - Kshs.1,000/=
5. **Clothing** - Kshs.1,000/=
6. **House** - Kshs.5,000/=
7. **Medical** - Kshs.5,000/=

The appellant told the court that she operates a Kiosk, therefore, a small scale trader. She however, told the court that the respondent is a transporter earning about Kshs.100,000/= per month. The respondent denied that fact. Instead, he told the court that he is a mere driver earning Kshs.350/= per day. At one time, however, he admitted to having owned a transport vehicle which he has disposed of. It is likely that the respondent is a transporter. The parties did not file affidavits of means and the court has no idea what exactly each earns. The court will exercise its discretion in awarding what is reasonable in the circumstances of the parties without necessarily burdening either.

The child being a joint responsibility, it is expected that either parent must make effort to provide for the upkeep of the child and I am supported by the words of J. Meoli in ***E.M.M. v M.O.O. Naivasha HCA.53/2015*** where the judge said:

"It will not do (for a party) to say that she has an uncertain source of income and therefore the responsibility of maintaining the children should only be borne by the adverse party. The (said) party must establish to the satisfaction of the court that she has also made effort to provide for the upkeep of the children."

It is also true that though parental responsibility is to be shared, it can never be equal. The court must take into account the financial capability of each parent. This position was stated in ***M.K. vs C.K.K. HCA.51/2015*** where the court said:

"Parental responsibility is shared and not equal based on the financial position of each parent. The mother as the resident

parent has a nurturing role to the children and the father to provide maintenance and upkeep of the children.”

Bearing the above principles in mind, I do agree with the trial court that the claim for Kshs.10,000/= for food for the child is on the higher side. The appellant did not provide any justification for the said sum. It is not enough to throw figures at the court.

The appellant's claim for Kshs.3,000/= for clothing per month is also on the higher side. Though the child is still young and growing, there indeed may be need to buy clothes regularly. However, it cannot be done on a monthly basis.

The trial court granted the appellant Kshs.4,000/= after it considered the fact that the court had ordered the respondent to be remitting Kshs.4,000/= per month to the appellant for the upkeep of the child and he had been doing it faithfully. The court considered the said sum to be sufficient so that the respondent may also provide for his other children's needs. Apart from the above, the respondent was ordered to cater for the subject's educational needs and education related needs.

The appellant told the court in her submissions that the respondent can afford more than Kshs.4,000/= because they had even signed a consent to the effect that the respondent pays Kshs.8,000/=.

I have seen the court record of 2/11/2015 where a consent that had been filed was adopted. In the consent, apart from agreeing to remit Kshs.8,000/= per month, the respondent had also agreed to share the medical expenses. The record of 7/4/2016 indicates that the appellant told the court that she was not agreeable to the terms of the consent. The respondent then also said that he had changed his mind about the terms of the consent and they took a hearing date. Although the court did not record it, it is obvious that the parties agreed by consent not to be bound by the terms of the consent which was within their mandate. The consent was set aside by consent. The appellant cannot therefore purport to rely on the said consent. Whereas the court does not know the means of the parties, it cannot impose an award that may be a burden to one party and end up in default.

Soon the respondent will start paying fees and other educational related needs which will keep rising as the child grows. I also take into account that the resident parent normally carries a non monetary burden of care that cannot be measured in money e.g. when a child is sick.

In doing my best, I think that the estimation of the trial court was not wrong and in doing my best, I think that a sum of Kshs.5,000/= to cater for both food and clothing payable by the respondent is not unreasonable.

In the end, I allow the appeal in part, I make the following orders:

- (1) The appellant do provide for the subject's medical care and shelter;***
- (2) The respondent do provide for the subject's food and clothing needs to the tune of Kshs.5,000/= per month;***
- (3) That the defendant will cater for the subject's education and educational related expenses;***
- (4) Each party to bear its own costs.***

Dated, Signed and Delivered at NYAHURURU this 4th day of April, 2019.

R.P.V. Wendoh

JUDGE

PRESENT:

Appellant Esther Mbithi – present in person

Mbiyu – Court Assistant