



**Oduwo v Onyuka (Civil Appeal E077 of 2023)
[2024] KEHC 7658 (KLR) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7658 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E077 OF 2023**

**KW KIARIE, J
JUNE 26, 2024**

BETWEEN

PETER OSODO ODUWO APPELLANT

AND

BERLYL AWUOR ONYUKA RESPONDENT

*(Being an Appeal from the ruling and order in Homa Bay Chief Magistrate's
Children's Case No. 2 of 2012 by Hon. C.A.S. Mutai –Senior Principal Magistrate)*

JUDGMENT

1. On the 11th day of August 2023, Hon. C.A.S. Mutai delivered a ruling that aggrieved the appellant who filed this appeal. The firm of Sagana, Biriq & Company Advocates represented him. He raised the following grounds of appeal:
 - a. That the learned trial magistrate erred in law and fact by rendering a ruling based on irrelevant factors and failing to consider all the pleadings filed and arguments made by the parties.
 - b. That the learned magistrate erred in both law and fact by relying on facts not pleaded and evidence not adduced and thus arrived at a wrong finding. The trial magistrate cited “inflation and prevailing economic conditions” as the basis for the impugned ruling. Yet, the reason was never pleaded or argued by the respondent as grounds for her application for review.
 - c. That the learned magistrate erred in both law and fact by wrongly applying the concept of inflation and economic conditions in the circumstances of the case, given that the appellant has since had four (4) children and a housewife depending on the same salary as the subject minor.
 - d. That the learned trial magistrate erred in both law and fact by ignoring the overwhelming evidence adduced by the appellant during the trial and rendering a ruling not based on facts and law on record.



- e. That the learned magistrate erred in fact by stating that the appellant had not disclosed evidence confirming its net income of kshs.35,000/- yet the same was on record and marked as PO'3 in the appellant's affidavit sworn on 22nd March 2023, thereby arriving at an incorrect, unlawful and unjust finding.
 - f. That the learned trial magistrate erred in both law and fact by rendering a ruling that contravenes section 19(3) of the Employment Act, 2007, which forbids employers from deducting more than one-third (1/3) of the employee's monthly salary.
 - g. That the learned trial magistrate erred in law and fact by ignoring the cardinal duty of shared parental responsibility by both the appellant and the respondent under Article 53(1)(e) of the Constitution of Kenya 2010.
 - h. That despite acknowledging that since the judgment delivered on 30th October 2023, the appellant has remarried and has four (4) other children apart from the minor WHITNEY HAZEL, who is the only child to the respondent, the magistrate went on to render a ruling that not only contravenes Article 53 of the constitution but unfairly overburdens the appellant.
 - i. That the learned magistrate erred in both law and fact by failing to rule according to the principle of proportionality and not acknowledging that the respondent is a graduate teacher earning a total salary of 76,443 with no other children to take care of. The impugned ruling enables the respondent to abdicate their parental responsibility to the minor, leaving the appellant to shoulder all the burden despite having four (4) other children and a housewife to cater for.
 - j. That the learned trial magistrate erred in law and fact by allowing the respondent's application despite it not meeting the legal threshold for review under section 80 of the Civil Procedure Act, 2010 and order 45 of the Civil Procedure Rules, 2010.
 - k. That the learned trial magistrate erred in law and fact by not having any regard for the authorities cited by the appellant during the hearing of the review applications.
 - l. That the learned trial magistrate erred in law by not basing the impugned ruling on any law or judicial authority. The ruling does not cite any constitutional provision, a section of the Children's Act and attendant regulations, the Civil Procedure Rules, 2010, the Civil Procedure Act 2010 or any judicial authorities. The impugned ruling is based on an unled ground cited as "inflation and economic times".
 - m. That the learned magistrate erred in law and fact by awarding the subject minor herein kshs.19,000/= from the appellant's meagre net salary of ksh.35,165/- leaving four (4) other minors to depend on depend on the balance of ksh.15,165/-.
 - n. That the finding by the learned magistrate goes against the evidence presented, and the resulting decision is, in the circumstances, incorrect in law, unfair and unjust.
2. The respondent did not file any response or submissions.
 3. This Court is the first appellate court. I know my duty to evaluate the entire evidence on record, bearing in mind that I had no advantage in seeing the witnesses testify and watching their demeanour. I will be guided by the pronouncements in the case of *Selle vs Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its conclusions in the matter.



4. Order 42 Rule 13 (4) (f) of Civil Procedure Rules provides:

Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—

.....

.....

(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

5. The appellant did not attach a copy of the impugned ruling. He, therefore, offended the requirements prescribed by Order 42 Rule 13 (4) (f).

6. I find that the appeal is incompetent and accordingly strike it out with no orders to costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 26TH DAY OF JUNE 2024

KIARIE WAWERU KIARIE

JUDGE

