



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO 11 OF 2021**

**DOB.....APPELLANT**

**VERSUS**

**DMA.....RESPONDENT**

*(Being an appeal arising from judgment/decree of*

*G.N. Barasah RM in Ogembo SPMCC No 18 of 2019)*

**JUDGMENT**

1. The respondent in her plaint before the subordinate court claimed that the appellant was the father of LJ and ZOB. It was pleaded that the appellant legally adopted LJ and in the course of their marriage they had another child ZOB. The couple lived together from 2015 up until 2019 when they separated and the respondent went back to her father's home.

2. The respondent claimed that parental responsibility is a joint venture and despite the appellant being capable of providing for the minors he had failed to do so. According to the respondent the following amounts was necessary for the maintenance of the minors:

- a) Food at Kshs 20,000/- per month
- b) Clothing at Kshs 10,000/- per month
- c) School fees as per school fee structure
- d) Medical expenses at Kshs 5,000/-
- e) Shelter at Kshs 6,000/-

3. The respondent sued the appellant before the subordinate court seeking legal actual custody, care and control of the minors; maintenance of the minors and payment of school fees; and costs of the suit.

4. Before the matter was set down for hearing the parties entered a consent on the following terms:

- i. That the defendant was to take care of the medical cover for the minors, pay school fees to a mutually agreed school and remit Kshs 2,000/- by the 28<sup>th</sup> of every month.*
- ii. The custody of the minors was to remain with the respondent.*

5. Thereafter, the appellant filed his affidavit of means and the trial court rendered its judgment, making the following order:

- 1. That legal and actual custody of both minors be given to the plaintiff herein with unlimited access given to the defendant herein.*
- 2. That the defendant to pay Kshs 20,000/- monthly (by 5<sup>th</sup> of every month towards the upkeep of the minors herein*
- 3. That the plaintiff to take care of school fees and shelter of the minors herein*
- 4. That each party to bear their own costs of the suit.*

6. The appeal before this court challenges the judgment on grounds that the amount of Kshs 20,000/- as upkeep towards the minors did not take into account the income of the appellant as per the affidavit of means filed. The appellant also contend that LJ is not his biological son and he cannot be compelled to pay his upkeep. He also attacked the finding of the trial court on grounds that it did not consider that the appellant had voluntarily agreed to take care of the school fees and shelter of the minor ZOB.

7. The order sought by the appellant in this appeal is that the order directing payment of Kshs 20,000/- be set aside.

8. The appeal was set down for hearing and the parties directed to file their respective submissions.

9. The appellant in their submissions informed the court that unfortunately the minor ZOB passed away in April of 2021.

10. The appellant argued that LJ was not his biological son, that he was not married to the respondent and therefore could not have assumed parental responsibility. He cited **section 25 of the Children's Act** which provides as follows:

***“25. Acquisition of parental responsibility by father***

*(1) Where a child's father and mother were not married at the time of his birth—*

*(a) the court may, on application of the father, order that he shall have*

*parental responsibility for the child; or*

*(b) the father and mother may by agreement (“a parental responsibility agreement”) provide for the father to have parental responsibility for the child.*

*(2) Where a child's father and mother were not married to each other at the time of his birth but have subsequent to such birth cohabited for a period or periods which amount to not less than twelve months, or where the father has acknowledged paternity of the child or has maintained the child, he shall have acquired parental responsibility for the child, notwithstanding that a parental responsibility agreement has not been made by the mother and father of the child.”*

11. The appellant urged the court to absolve him from paying any sums towards the respondent for the maintenance of LJ.

12. The respondent on the other hand submitted that the appellant should not be given audience as he has failed to comply with any of the court orders issued.

13. On the appeal, the respondent submitted that the appellant acquired parental responsibility of LJ having lived with him from 2016 to 2020. They argued that according to **section 24 (5) of the Children's Act** ‘a person who has parental responsibility for a child at any time shall not cease to have that responsibility for the child’. They contend that the amount awarded by the trial court was therefore sufficient as the appellant's salary is Kshs. 49,230/-.

14. The issues raised by the appeal can only be determined after the trial court conducts a full trial. I have perused the entire record and found that the trial court never set the matter down for hearing.

15. In the circumstances, it would be impossible at the appellate stage to consider whether the appellant assumed parental responsibility or whether the sum he is ordered to pay is high in the absence of evidence.

16. Since the matter was not set down for hearing at the trial court, none of the witnesses testified neither did they produce any of the documents in support of their claim.

17. However, this court in its appellate jurisdiction has the power to order a new trial. **Section 78 of the Civil Procedure Act** provides as follows:

***“78. Powers of appellate court***

*(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—*

*(a) to determine a case finally;*

*(b) to remand a case;*

*(c) to frame issues and refer them for trial;*

*(d) to take additional evidence or to require the evidence to be taken;*

*(e) to order a new trial.*

*(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”*

**18.** In the end, I direct that the matter be remitted back to the subordinate court to proceed according to law. The matter shall forthwith be placed before any magistrate other than Hon. G.N. Barasah for disposal on priority basis. There shall be no orders as to costs.

**DATED, SIGNED AND DELIVERED AT KISII THIS 24<sup>TH</sup> DAY OF MARCH 2022**

**R.E. OUGO**

**JUDGE**

**In the presence of:**

**Mr. Soire For the Appellant**

**Respondent Absent**

**Kevin Court Assistant**