



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

**CORAM: D. S. MAJANJA J.**

**CIVIL APPEAL NO. 116 OF 2019**

**BETWEEN**

**JMM.....APPELLANT**

**AND**

**FWK.....RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. N. M. Kyanya-Nyamori, RM dated 26<sup>th</sup> June 2019 at the Thika Magistrates Court in Children's Case No.49 of 2019)***

**JUDGMENT**

1. The appellant and respondent were married under Kikuyu customary law and they have three children, LNM, EN and PM. The respondent filed the suit for maintenance on the ground that the appellant had left the matrimonial home and had not made provision for the children. After hearing the matter, the trial magistrate directed the respondent to take care of shelter, medical expenses and other school related expenses and ordered the appellant to pay the following:

- |                                   |                                 |
|-----------------------------------|---------------------------------|
| a) School fees for LNM, EN and PM | as per the school fee structure |
| b) Clothing for children          | Kshs. 5,000/- per month         |
| c) Food                           | Kshs. 10,000/- per month        |
| d) Uniform                        | Kshs. 15,000/- per quarter      |

2. The appellant now appeals against the judgment and decree on the grounds set out in the amended memorandum of appeal dated 30<sup>th</sup> August 2019. He complained that the trial magistrate failed to take into account the fact that respondent and children were living in the matrimonial home built by the appellant. That the order directing the respondent to pay other school related expenses was not specific. He further complained that the trial magistrate failed to consider his affidavit of means.

3. The appellant proposed that the appeal be allowed based on his proposal that he cater for school fees as per the fee structure, school uniforms whenever required, food worth Kshs. 2,000/- and for clothing at Kshs. 5,000/- half yearly. He also proposed that the respondent cater for medical expenses, food for Kshs. 2,000/- per month and children's clothing at Kshs. 5,000/- half yearly.

4. As this is a first appeal, I am alive to the principle that the first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see *Selle v Associated Motor Boat Company Ltd* [1968] E.A. 123).

5. Since this is a matter concerning children, the court is guided by **Article 53(2)** of the Constitution and **section 4(2)** of the *Children Act* which provide that in all matters concerning children, the best interests of the child are of paramount importance. Further and under **section 53(1)(e)** of the *Children Act*, a child has a right to parental care and protection which includes equal responsibility of the mother and father to provide for the child. Parental responsibility is shared and either party must show that they have made the effort to provide financial and non-financial support to the children to the best of their ability.

6. In the case of financial support, it is important for both parties to make full disclosure of their financial status through filing affidavits of means. In this case only the appellant filed an affidavit of means. The respondent did not provide an affidavit of her means though there was evidence to show that she was a business woman and that the appellant has supported her in her business. The appellant's allegations on this issue remained unanswered and the trial magistrate did not deal with them.

7. The respondent was willing to contribute towards school trips, books, medical charges and miscellaneous expenses. The appellant's complaint according to the proposal set out in the memorandum of appeal is that the amount he pays for food, uniform and clothing is on the higher side and ought to be reviewed.

8. While the appellant must contribute to the maintenance of the children, it must be pegged on his assessed means and the means of the respondent. It does not appear from the judgment that the trial magistrate established a basis for assessing the amount ordered to be paid by the appellant.

9. I am aware that the judgment in this matter was delivered about a year ago. Circumstances have changed bearing in mind that the record shows that the parties are business people.

10. I allow the appeal, remit the case back to the Children's Court to be heard by another magistrate other than Hon. Kyanya-Nyamori. The court shall conduct a fresh inquiry on the financial ability of each parent and arrive at a reasonable contribution from each parent, taking into account non-financial contribution, and in that regard direct each parent to file an affidavit of means.

11. In the meantime, the appellant shall continue to pay the school fees for the children and pay the respondent Kshs. 7,000/- for food per month from the month succeeding the date of this judgment until further orders of the court.

12. There shall be no order as to costs.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> day of MAY 2020.**

**D. S. MAJANJA**

**JUDGE**

Ms Otieno instructed by Ochieng' Ogutu and Company Advocates for appellant

S. G. Mbaabu and Company Advocates for the respondent.