



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL APPEAL NO. 11 OF 2017

BETWEEN

SA.....APPELLANT

AND

ARM (Suing as the mother and next friend of minor AMW).....RESPONDENT

(Being an Appeal from the Ruling in Busia Chief Magistrate's Court Children Case No.42 of 2016

by Hon. M.A Nanzushi- Senior Resident Magistrate).

JUDGMENT

1. The appellant herein, was the defendant in the Busia Chief Magistrate's Court Children's Case Number 42 of 2016. He had been sued for maintenance of the child.
2. After the hearing of the case the learned trial magistrate made an order that the appellant pay Kshs.7,500/= in arrears with effect from 17th August 2016.
3. The appellant was aggrieved by the ruling and filed this appeal. He was represented by the firm of Wamalwa Simiyu & Company Advocates. In the Memorandum of Appeal, the appellant set out five grounds of appeal as follows:
 - a) The learned trial magistrate erred in law and in fact when she ruled that the appellant to pay Kshs.7,500/= as arrears from 17th August 2016.
 - b) That the learned trial magistrate erred in law and in fact when she failed to observe that the appellant was paying the said Kshs.7,500/= before the said ruling.
 - c) The learned trial magistrate erred in law and in fact when she failed to consider the appellant's annexed exhibits.
 - d) The learned trial magistrate erred in law and in fact when she failed to observe that the case had been determined and finalized at the ruling stage where the appellant was penalized to pay Kshs.30,000/= per month.
 - e) The learned trial magistrate erred in law and in fact when she failed to consider that the appellant was never served with any documents pertaining to the case.
4. The respondent was represented by the firm of Ashioya & Company Advocates. She contended that the appeal lacked merit and prayed for its dismissal.
5. When the matter came for directions on 23rd November 2018, it was agreed by both counsel that the appeal would be canvassed by filing and exchanging submissions. The submissions were duly filed and exchanged.
6. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. 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 own conclusions in the matter.

7. Upon my perusal of the record in the trial court I notice that it was the appellant who offered to be paying Kshs.7,500/= monthly upkeep for the child. He now contends that the attachment of his salary was not fair for it left him with a net of Kshs.18000/=. Maintenance of a child is not meant to disadvantage either of the parties or any other child or children either of them may be having. The trial magistrate was required to have analyzed what the appellant claimed to have paid towards the child's upkeep before issuing an attachment order.

8. I am therefore setting aside the attachment order and direct that both parties appear before the trial court within 14 days of this order for accounting purposes and for any variations, if need be. Each party will bear own costs.

DELIVERED and SIGNED at BUSIA this 29th day of April, 2019

KIARIE WAWERU KIARIE

JUDGE