



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT VOI**

**AT VOI LAW COURTS**

**CIVIL APPEAL NO 14 OF 2017**

**BETWEEN**

**D M M.....APPELLANT**

**VERSUS**

**R M M.....RESPONDENT**

**(Being an Appeal from the decision of the Principal Magistrate's Court Hon. G.K. Kimanga (Resident Magistrate) at Taveta dated 14<sup>th</sup> June 2016 in PMCC No 19 of 2012)**

**R M M.....PLAINTIFF**

**VERSUS**

**D M M.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. In his judgment of 1<sup>st</sup> October 2012, Hon D.K. Matutu Resident Magistrate entered judgment in favour of the Respondent herein against the Appellant for the payment of Kshs 3,000/= payable on or before 5<sup>th</sup> of every month from November 2012 until majority (**sic**) which was subject to review depending on the needs of the child. He ordered that each party bear its own costs of the suit.
2. Over time, the Appellant defaulted in payment of the sum of Kshs 3,000/= as a result of which arrears accrued. He was committed to civil jail by Hon R.K Ondiek PM on 5<sup>th</sup> December 2013 for six (6) months but was released on 6<sup>th</sup> December 2013 after he paid the Respondent a sum of Kshs 13,800/=.
3. He defaulted in paying further arrears that accrued and on 15<sup>th</sup> July 2015, he was again committed to civil jail for thirty (30) days. On the same day, he paid a sum of Kshs 21,000/= as had been ordered by Hon W.K. Kitur RM and was thus released from prison.
4. As the time the matter came up in court on 15<sup>th</sup> December 2015, the arrears had accrued to Kshs 29,700/=. When he failed to pay the said sum by 22<sup>nd</sup> December 2015, he was committed to civil jail for an additional fourteen (14) days. By 4<sup>th</sup> January 2016, he had been released from civil jail.
5. As at 21<sup>st</sup> January 2016, the arrears had accrued to Kshs 33,700/=. On that day, Hon W.K. Kitur RM, committed him to civil jail for four (4) months. He remained in jail until 21<sup>st</sup> May 2016 by which time the arrears had accumulated to Kshs 58,900/=. On 14<sup>th</sup> June 2016, Hon G.K. Kimanga RM (hereinafter referred to as "Learned Trial Magistrate") directed that he pay the monthly maintenance of Kshs 3,500/= and an additional Kshs 1,000/= to clear the outstanding arrears. However, the Appellant indicated that he was unable to pay and was hence committed to five and half (5 ½) months civil jail till payment.
6. Being dissatisfied with the order of the said Learned Trial Magistrate, the Appellant who was acting in person lodged his Petition of Appeal on 6<sup>th</sup> July 2017. He relied on two (2) Grounds of Appeal. M/S John Bwire & Co Advocates took over the matter on his behalf filed an Amended Memorandum of Appeal dated 12<sup>th</sup> October 2017 on 16<sup>th</sup> October 2017. He now relied on eight (8) Amended Grounds of Appeal.

7. His Written Submissions were dated 9<sup>th</sup> February 2018 and filed on 12<sup>th</sup> February 2018. Those of the Respondent were dated 19<sup>th</sup> February 2018 and filed on 20<sup>th</sup> February 2018.

8. When the parties appeared before this court on 6<sup>th</sup> March 2018, they informed it that they would be relying on their respective written submissions in their entirety. The judgment herein is therefore based on the said written submissions.

### **LEGAL ANALYSIS**

9. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

10. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

**“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”**

11. Having the aforesaid holding in mind and having looked at the Appellant’s Memorandum of Appeal and the parties’ respective Written Submissions, it appeared to this court that the following questions are what had been placed before it for determination:-

**a. Whether or not the Appellant could be committed to Civil jail for more than six (6) months;**

**b. Whether or not the Appellant was accorded a fair trial;**

12. It did appear to this court that the two (2) issues were inter-related and were thus addressed together.

13. The Appellant submitted that he had served an aggregate of six (6) months and twenty one (21) days by the time this court granted him bail pending appeal on 17<sup>th</sup> August 2016.

14. He referred this court to Section 42 (1) & (2) of the Civil Procedure Act Cap 21 (Laws of Kenya) provides as follows:-

**1. Every person detained in prison in execution of a decree shall be so detained where the decree is for the payment of a sum of money exceeding one hundred shillings, for a period not exceeding six months (emphasis court).**

**2. A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be able to be rearrested under the decree in execution of which he was detained in prison.**

15. It was his contention that he could not serve more than six (6) months in jail and that in any event, Section 107 of the Children Act, 2001 stipulates that a parent who fails to pay maintenance cannot be detained for more than four (4) weeks.

16. Section 107 of the Children Act provides as follows:-

**“The court shall have power under this section to issue a warrant committing the respondent to imprisonment for a period not less than five days or more than four weeks”**

17. He averred that he was unable to pay the arrears for the child’s upkeep because he was unwell while he was in prison, he was unemployed and that he was constantly in prison, which he stated, the Learned Trial Magistrate ought to have considered before committing him to civil jail for a further five and a half (5 ½ ) months.

18. He was emphatic that execution by way of arrest and detention was not intended to be punitive and violate a person’s constitutional right not to be deprived from freedom and arbitrarily or without just cause as enshrined in Article 29(a) of the Constitution of Kenya, 2010. He submitted that he had served the maximum period stipulated in law for civil arrest and detention.

19. The Respondent was acting in person. On her part, she did not respond to the Appellant’s aforesaid submissions but merely contended that she had been struggling all by herself to cater for the needs of the child she got out of the eight (8) union with the Appellant. She added that since the order had been issued by a competent court, then the same had to be obeyed. She termed the Appellant’s appeal a waste of court time and urged this court to dismiss the same.

20. As can be seen hereinabove, the Appellant continuously defaulted in paying for arrears for the maintenance of his child with the Respondent. Although he consistently denied that the child was his, his paternity was confirmed following a DNA test that was ordered by this court on 29<sup>th</sup> September 2016. The Respondent was therefore right in demanding that he meets his parental responsibility towards their child.

21. However, as was also rightly pointed out by the Appellant, execution proceedings for decretal sums had to be within the confines of the

law. Going outside the law would be a violation of a judgment debtor's right. In this case, the Appellant was committed to civil jail four (4) times in the execution of the same decree and had served an aggregate of six (6) years and twenty one (21) days by the time he lodged his Appeal in this court. The period of arrest and detention was therefore clearly outside what was permitted under Section 42 of the Civil Procedure Act and Section 107 of the Children Act.

22. Indeed, civil jail ought not to be used to threaten or coerce a judgment debtor into paying a decretal sum. It is a drastic execution procedure and must be used sparingly and as a last resort. This is because a judgment debtor who serves the maximum period of six (6) months incarceration in a civil jail for a civil debt cannot be arrested and detained again under the same execution proceedings. Further, as has been provided in Section 42 (2) of the Civil Procedure Act, the Appellant could not be re-arrested in execution of which he was detained in prison.

23. This court therefore agreed with the Appellant that despite the provision in the Civil Procedure Act since he had been arrested and detained for not maintaining his child, he could not have been committed to civil jail for more than four (4) weeks.

24. The orders that were issued from 15<sup>th</sup> July 2015 were illegal and had no legal basis as the Appellant had already been committed to civil jail and released on 6<sup>th</sup> December 2015. In any event, at one point he stayed in civil jail for a continuous period of four (4) months.

25. This was in complete violation of Section 107 of the Children Act. In fact, his incarceration for an aggregate six (6) months and twenty one (21) days was a violation of his constitutional rights under Article 29 (a) of the Constitution of Kenya that provides as follows:

26. Accordingly, having considered the parties written submissions, this court came to the firm conclusion that the Learned Trial Magistrate acted on the wrong principles and misdirected himself when he committed the Appellant to five and a half (5 ½ ) years imprisonment in the civil jail on 14<sup>th</sup> June 2016.

27. It is really unfortunate that the Respondent has been left to raise their child all by herself. However, the sword of justice must cut both ways for the reason that the interests of the child must be safeguarded within the confines of the law, which in this case was absent.

28. In the premises foregoing, this court found and held that Amended Grounds of Appeal Nos (1) – (8) were merit and the same are allowed.

#### **DISPOSITION**

29. For the foregoing reasons, the upshot of the court's decision was that the Appellant's Petition of Appeal that was lodged on 6<sup>th</sup> July 2016 was merited and the same is hereby allowed and upheld.

30. The order of the Learned Trial Magistrate of 14<sup>th</sup> June 2016 is hereby set aside and/or vacated as the same was illegal and had no legal basis.

31. Further, this court's order of 17<sup>th</sup> August 2016 that the Appellant executes a personal bond of Kshs 2,000/= is now spent. He is hereby discharged from any further obligation to this court.

32. It is so ordered.

**DATED** at **NAIROBI** this 12<sup>th</sup> day of **June** 2018

**J. KAMAU**

**JUDGE**

**READ, DELIVERED** and **SIGNED** at **VOI** this 20<sup>th</sup> day of **June** 2018

**F. AMIN**

**JUDGE**