



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APEAL NO. 11 OF 2017

Y J.....APPELLANT

VERSUS

G J.....RESPONDENT

(Being an Appeal from the judgment of Resident Magistrate Hon. T.M.WAFULA, delivered on 16/8/2017 at Marsabit in SRM's Court Children Case. No. 29 of 2016).

JUDGMENT

The two parties herein were married under Burji Customary Law in 2000. They were blessed with two children. The respondent filed Children Case No. 29 of 2016 seeking maintenance and financial contribution towards the welfare of the children. The parties separated and have been living separately for long. The appellant is married to another woman. The respondent has also moved on with her life.

The appeal is against the judgment of the trial court delivered on 19th December 2016. The grounds of appeal are:-

- 1) That the learned Magistrate erred and misdirected himself in Law and in fact in ordering the Defendant to pay for food, clothes, medication and academic needs. Yet parental responsibility should be shared between both parties.**
- 2) That the learned Magistrate erred and misdirected himself in Law and in fact in ordering the Applicant to pay the costs of medication and Ksh.20,000/= monthly alone yet he testified that he is unemployed.**
- 3) That the learned Magistrate erred in misdirected himself in Law and in fact in failing to appreciate that from the Plaintiff's own pleadings that the Plaintiff and the Defendant had separated for many years and the Defendant had remarried and had other parental responsibilities.**
- 4) That learned Magistrate erred and misdirected himself in Law and in fact in awarding Kshs. 20,000/= per month to the Plaintiff for upkeep yet the Defendant could hardly manage to get Kshs. 15,000/= per month from his manual jobs.**
- 5) That the learned Magistrate erred and misdirected himself in Law and in fact in being biased against the Defendant throughout and largely failed to appreciate the Defendant's financial difficulties and by making this order did not mind himself that such an order would make it impracticable for the Defendant to cope with the other family's basic needs.**
- 6) That the learned Magistrate erred and misdirected himself in Law and in fact by not granting Defendant limited custody of the children.**
- 7) That the decision was against the weight of the evidence adduced by the parties.**

In his submissions the appellant submits that he is a Muslim while the respondent is a Christian. The first child is 20years while the second child is 17years. He has another family with four children and he is willing to take custody of the child who is 17 years old. The trial court ordered that he pay Kshs. 20,000 per month yet he is struggling with other responsibilities out of the merger earnings from manual jobs. He was committed to civil jail twice but was released on medical grounds. The trial court did not apportion parental responsibilities to the respondent. The appellant cannot afford what was ordered by the court. He is not employed. He was a Christian before but converted to Islam. He is a driver but got an accident and cannot drive anymore.

The respondent contends that she has been living with the children for all the years they have separated. She is a primary school teacher. She did not complain about the past maintenance. She started complaining when the appellant sold land in 2015. She has been taking care of the

children since they were young. When the appellant filed his defence he indicated that he is a taxi driver. One of the children is in form 2 while the other child is in class 8. She has a medical cover for the children. The appellant is simply refusing to take his responsibilities.

The record shows that the parties testified before the court. Their respective evidence is quiet similar too their respective submissions. The respondent testified on 28th November 2016. She told the court that the first born child who is a boy was 15 years old. The second, a girl, was 12 years old. The appellant has never paid any rent or money for food. On his part the appellant testified that they separated when the children were young. He chips in when he has money. Sometimes he buys food and charcoal. He was managing his brother's taxi. He has no money since he has no source of income.

The judgment of the court was delivered on 19th December 2016. The record shows that the appellant filed an application dated 18th July 2017 seeking a review of the judgment. In its ruling of 16th August 2017 the court reviewed the financial contribution by the appellant from Ksh 20, 000 to Ksh 10,000. It is clear that the appellant has not been paying that amount. Although the appellant is claiming custody of the children, the record shows that the children testified before the trial court and expressed their desire to continue living with their mother. The children are approaching the age of majority and they will decide on their own where they want to reside.

Article 53 of the constitution provides for the right of children. Article 53 (1) (e) provides that every child has the right to parental care and protection which includes equal responsibilities of the mother and father to provide for the child whether they are married to each other or not. The appellant is not committing himself as to how much he can afford each month. The court cannot allow the appellant not to make any contribution towards the maintenance of the children. It appears that the appellant is of the view that since the respondent is working then she should be the one taking care of the children. The appellant has equal responsibility to take care of the children. The responsibility does not arise because of employment. One has to take care of his children whether he is employed or not. The record shows that the respondent has been the one who has been taking care of the children.

The appellant has established that he is not working. However, he has failed to show any commitment towards the maintenance of the children. I do agree with him that it would be difficult to raise Ksh 10,000 every month in view of the fact that he is not employed and has another family. That amount translates to Ksh. 120,000 each year. I do hereby review the monthly payment from Ksh 10,000 to Ksh 5,000. The appellant shall pay the respondent Ksh. 5,000 monthly towards the financial needs of the children.

In the end the appeal partly succeeds. The appellant shall pay Ksh 5,000 monthly towards the upkeep of the children instead of Ksh 10,000. Parties shall meet their respective costs.

DATED, SIGNED AND DELIVERED AT MARSABIT THIS 24th DAY OF JULY 2018

S.J. CHITEMBWE

JUDGE