



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 35 OF 2017

IN THE MATTER OF S S A, S K W AND M S

**J S T (suing as the mother and
next friend of the minors) APPELLANT**

VERSUS

F E W.....RESPONDENT

(Being an Appeal from the Ruling of Hon. Wandia J.N., R.M.

in Malindi CMCC Children’s Case No. 19 of 2017)

JUDGEMENT

1. In a plaint filed before the Chief Magistrate’s Court at Malindi on 3rd May, 2017 the Appellant, Jacqueline Santa Thoya sought custody of S.S.A., S.K.W. and M.S. being children born of a relationship between her and the Respondent, F E W. She also sought an order directing the Respondent to take up his parental responsibility by providing for the children’s upkeep including medical and school expenses. She also prayed for the costs of the suit.

2. At the time of filing the plaint, the Appellant also filed a chamber summons application seeking orders as follows:

- “1. THAT this Application be certified urgent and be heard ex-parte in the First Instance.**
- 2. THAT pending the hearing and determination of this application interpartes this Honourable Court be pleased to order that the Respondent do pay school fees and school based expenses for the minors at Kshs.60,000.00 per year.**
- 3. THAT the Respondent be ordered to pay the Plaintiff apart from the school fees, a monthly stipend of Kshs.50,000.00 to meet the minors’ monthly necessities.**
- 4. THAT this Honourable Court be pleased to Order the Respondent to take out a medical policy with a reputable insurer for the minors.**
- 5. THAT costs of this application be provided for.”**

The application was supported by the grounds on its face and an affidavit sworn by the Appellant.

3. In summary, the Appellant averred that she got married to the Respondent in church on 24th December, 2006. Their marriage was subsequently blessed with three children namely S.S.A., S.K.W. and M.S. She also averred that she had custody of the minors. Her averment was that she had separated from the Respondent owing to difficulties in her marriage and had moved back to her parents’ home in **[particulars withheld]**, Malindi.

4. It was the Appellant’s case that the Respondent who worked for a Non-Governmental Organisation in **[particulars withheld]** as a pharmacist earning a salary of over Kshs.10,000 per month had failed, refused or neglected to pay school fees and provide upkeep for the

children. She thus urged the trial court to issue the orders sought in her application.

5. The Respondent opposed the application through an affidavit sworn on 16th May, 2017. His averment was that he had enrolled the two children in **[particulars withheld]** Academy before the Appellant spirited them away to her ancestral home in Malindi. That he was later summoned by the Children's Department at Malindi whereupon he signed a parental responsibility agreement. He asserted that he had taken care of his family and had even opened businesses and a bank account for the Appellant who had run down the businesses and mismanaged the money in the bank account. The Respondent also averred that he had taken out medical insurance for the children and the Appellant.

6. The Respondent concluded by stating that the Appellant had not established the financial support she had given the children. He stressed that parental responsibility was to be shared between him and the Appellant.

7. After hearing the submissions by the advocates for the parties, the learned trial magistrate directed the Respondent to pay school fees including other school expenses and provide medical insurance for the children. The Appellant was directed to provide shelter for the children and clothes to be worn at home. She was also directed to provide food for the children.

8. The Appellant was aggrieved by the orders of the trial court and has moved this court seeking a variation of the orders.

9. The Respondent's view is that the decision of the trial court was Solomonian and if the Appellant desires to have more from him then she might as well forfeit to him the custody of the children.

10. The trial magistrate's understanding of the law and the Constitution on what constitutes parental responsibility cannot be faulted. The only question is whether she appreciated the facts and circumstances of the case when making the orders.

11. In the case at hand, the Appellant's disclosure that she was unemployed and was without any source of income was not challenged by the Respondent. The Respondent's monthly income of over Kshs.100,000 was also not disputed.

12. The Appellant is living with her parents and is therefore deemed to be getting free accommodation. However, the children must eat. Without an identifiable source of income, it cannot be imagined how the Appellant will feed the children. I appreciate the Respondent's frustration at the Appellant's inability to run a business and to manage money given to her. I, however, note that the money she sought was not for her comfort but for the welfare of the children.

13. Considering the orders already made by the trial court and in light of the fact that the Respondent must have other commitments, I direct that the Respondent remit to the Appellant the sum of Kshs. 6,000 every month for purchasing food and other necessities for the children. The Appellant's appeal succeeds only to that extent. Otherwise the orders already issued by the trial court shall remain undisturbed.

14. Each party shall bear own costs of this appeal.

Dated, signed and delivered at Malindi this 27th day of September, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT