REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO.48 OF 2013

S A .....APPELLANT

VERSUS

F J C.....RESPOBNDENT

(From the judgment of Hon B.N. Ireri, SRM in Vihiga Children Case No.18 of 2010 delivered on 13th September, 2012)

JUDGMENT

1. This is an appeal from the judgment of Hon B.N. Ireri, SRM in Vihiga Children Case No.18 of 2010 delivered on 13th September 2012 in which the magistrate ordered the appellant to:-:

> (a) pay his enstranged wife F J C, the respondent, a sum of Kshs.5,000/- per month for the maintenance of their minor son, the subject matter in this case;
>
> (b) also pay school fees for the child.

The appellant was dissatisfied with the said judgment and has hence filed this appeal.

2. I have perused the court file but I have not seen any response from the respondent opposing the appeal. That notwithstanding, it is the duty of this court as the first appellate court to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see *Selle vs Associated Motor Boat* (1968) EA 123.

3. PROCEEDINGS IN THE LOWER COURT:-

The case was filed at Vihiga Senior Principal Magistrate's court on the 18th August 2010. The appellant filed his statement of defence/counterclaim on 3rd November 2010 through the firm of M/s Lugadiru & Co. Advocates. The respondent testified in court on the 19th January 2011 before Hon. T.N. Bosibori, resident Magistrate and was cross-examined by the advocate for the appellant. On 3rd July, 2011, the parties recoded consent in the following terms:-

> *"By consent, the defendant to deposit in court Kshs.3,000/- on 10th of every month with effect from July 2011, for the maintenance of the child herein."*

4. On 4th June 2012 the respondent re-testified before Hon B.N. Ireri, Senior Resident Magistrate, as the previous trial magistrate had gone on transfer. The respondent was cross examined by the appellant. The

matter was then adjourned. Later the respondent took a hearing date at the registry for hearing on 12th July 2012. Come that day the appellant's advocate did not turn up in court though the advocate had been served as per a return of service dated 27th June 2017 that was filed with the court. The magistrate all the same adjourned the matter. Another hearing date was taken at the registry for hearing on 26th July 2012 when on that day the appellant was not in court and the matter was adjourned to 1st August, 2012. Come that day, the appellant and his advocate were absent in court though his advocate had been served as evidenced by a return of service dated 31st July 2012 that was filed with the court. The Magistrate proceeded to hear two witnesses for the respondent and ordered the case for the defence to be closed. The court delivered its judgment on 13th September, 2012.

5. THE CASE FOR THE RESPONDENT IN THE LOWER COURT:

The respondent testified that she married the appellant in the year 1998. That in the year 2003, they were blessed with a child, the subject matter in this case. That in the year 2008, the appellant chased her and the child from the matrimonial home and that since then she has been living with the child at her parents' home. That the appellant is a primary school teacher but he has neglected to maintain the child. That she is a casual labourer unable to maintain the child and hence she filed this case seeking to have the appellant ordered to pay maintenance money for the child. During the hearing of the case in court, she produced documents that indicated that in 2012 the child was a pupil at [Particulars withheld] Academy in Vihiga. The respondent did not however produce any documents to show the appellant's monthly earnings.

6. CASE FOR THE APPELLANT:

The appellant did not adduce evidence in the lower court as he failed to turn up on the date of the hearing.

7. THE APPEAL:

The grounds of appeal are that the learned magistrate:

(1) Erred in law by passing judgment by evidence that was totally conflicting.

(2) Erred in law by failing to consider the appellant's views in respect to the marital relationship of the respondent.

(3) Erred in law by relying on evidence of the respondent at the expense of the appellant herein.

(4) Erred in law in passing judgment against the appellant by not appreciating parental responsibilities.

(5) Erred din law by shifting the burden of responsibility by being biased.

(6) Erred in law and fact by failing to uphold fairness in her judgment.

(7) Erred in law by pronouncing judgment against the weight of evidence on record.

(8) Was otherwise biased in her judgment.

8. SUBMISSIONS BY THE APPELLANT'S ADVOCATES:

The advocates submitted, *inter alia*, that:

(1) The appellant was not heard nor given an opportunity to be heard and was thus denied a fair hearing.

(2) The court was biased against the appellant as despite being represented, he was forced to proceed in person in breach of his constitutional right to be represented by an advocate.

(3) The appellant's advocate had not been served with hearing notices on the days that the case proceeded in his absence.

(4) Parental responsibility is a shared responsibility and it was unfair to burden the appellant with all parental responsibilities by attaching 1/3 (one third) of his salary.

9. THE LAW:

The case involves maintenance of children. The relevant law is the Constitution of Kenya 2010, The Children Act and Case Law.

(1) The Constitution – *Article 53* provides that every child has a right to:

……..

(e) parental care and protection, which includes equal responsibility of the mother and father to provide for the child whether they are married to each other or not.

(2) The Children Act – *section 24(1)* provides that:-

"*Where a child's father and mother were married to each other at the time of birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility*" –

S.91 provides that:-

"*Any parent guardian or custodian of the child, may apply to the court to determine any matter relating to the maintenance of the child and to make an order that a specified person make such periodical or lump sum payment for the maintenance of a child, in the Act referred to as a "maintenance order", as the court may see fit*."

10. DETERMINATION:

I have considered all the issues raised in this appeal and the law pertinent to the case. The law is clear that it is the responsibility of both parents to maintain their children and that parenting is a shared responsibility between father and mother. In the present case there is no dispute that the appellant is the father to the child. He and the respondent have parental responsibility to maintain the child. The respondent was within the law to file a case of maintenance on behalf of the child.

11. The appeal is based on the grounds that the appellant was not given an opportunity to be heard as he did not adduce evidence in the lower court and also on the ground that the trial magistrate was biased against him.

12. It is clear from the court record that the appellant's advocates were served with hearing notices on the two occasions that the case proceeded in their absence. Hearing Notices duly stamped by the said firm of advocates are in the court file indicating that the advocates were so served. The advocates have not explained why they failed to turn up in court on the two occasions. The advocates were agents for the appellant on the issue of service. The appellant is thereby deemed to have been duly served through his advocates. There is then no truth in the contention that the advocates were not served or that the appellant was denied a fair hearing.

13. The appellant and his advocate were under duty to assist the court to expeditiously hear and determine

the matter as provided by *section 1A* of the Civil Procedure Act which states that:-

> *"(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.*
>
> *(2)* ……..

> *(3) A party to civil proceedings or an advocate for such a party is under duty to assist the court to further the overriding objective of the Act and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.*"

14. Cases involving maintenance of children should be heard expeditiously and without undue delay as they touch on the life and health of children. The case was filed in court in August 2010. Hearing did not commence until January 2011. The case was adjourned several times mostly due to the non-appearance of the appellant and his advocate.The case was finalized in September, 2012 which was 2 years after it was filed. A case for maintenance of a child which takes two years to be concluded cannot be said to have been heard expeditiously. I do not fault the magistrate in proceeding even in the absence of the appellant's advocate (who had been served with the hearing dates) as the magistrate was under duty to expeditiously hear and determine the case. There is no substance in the argument that the appellant was denied an opportunity to be heard. It is him and his advocate who squandered the opportunity of being heard. There was no bias on the part of the trial magistrate.

15. The respondent did not produce any documents to show what the appellant was earning in a month. Be that as it may be, the trial magistrate did not order the appellant to pay an outlandish figure. The court seems to have been alive to the fact that the appellant was a primary school teacher and that he had offered to pay Kshs.3,000/- as maintenance. So it only added Kshs.2,000/- to what he had offered. The court record indicates that the appellant earns more than Kshs.20,000/- in a month. An order to pay a modest sum of Kshs.5,000/- per month as maintenance and to pay school fees for the child is not in any way unreasonable and it cannot be said that the court did not take into consideration the appellant's other commitments..

16. The respondent is a casual labourer. The child is in school. I do not think that the sum of Kshs5,000/- is sufficient to take proper maintenance of a school going child. The mother must be supplementing that sum to cater for the needs of the child. The argument that the appellant was condemned to solely bear parental responsibility is far from the truth.

17. In the foregoing, this court finds that the orders made by the trial magistrate were justified and thereby upholds the decision of the lower court. The appeal has no merits and is therefore dismissed with no order as to costs.

However, the lower court's file indicates that the amount of money attached by the Teachers Service Commission from the appellant's salary is Kshs.7,101/- per month which is 1/3 (one third) of the appellant's salary. The judgment of the court was for Kshs.5,000/- and not Kshs.7,101. It was wrong for the court to later on substitute a decree of Kshs.5,000/- to Kshs.7,101/-. That has to be corrected. The Teachers Service Commission is henceforth directed to remit Kshs.5,000/- only to the respondent, unless otherwise directed by a court of competent jurisdiction.

Judgment delivered, dated and signed in open court this 30th day of March, 2017

J. NJAGI

JUDGE

In the presence of:-

……..... for the Appellant

…… for the Respondent

Court Assistant ……...