



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**CIVIL APPEAL NO. 53 OF 2015**

*(Being an appeal from the Judgment in Naivasha*

*Children Case No. 12 of 2014 S. Mwinzi - SRM)*

**G. O.**

**D. K.**

**E. A. (Suing thru' their mother and next friend)**

**E. M. M.....APPELLANT**

**-VERSUS-**

**M. O. O.....RESPONDENT**

**J U D G M E N T**

1. The background to this appeal is that **E.M.M.** and **M.O.O.** got married in 2005 under the African Christian marriage and Divorce Act and commenced cohabitation. They have three issues, all minors. It would seem that, by 2014 when the Appellant approached the lower court on behalf of the minors for maintenance, the couple had become estranged. The Appellant retained custody of the three minors **G.O.**, **D. K.**, and **E.A.** (the three Applicants herein).
2. In her suit before the lower court, the Appellant accused the Respondent of failing to provide for the issues of the marriage in terms of clothing, shelter, education food, and medication. These needs were costed at Shs. 49,000/= per month. **E.M.M.** also sought an order placing the minor children in her custody.
3. The Respondent in his defence denied the assertions of neglect and averred that he had and was always willing to provide for the stipulated needs of the minors. He did not contest custody for the children, but sought unlimited access to them and control in decisions regarding their education. The matter was heard before Hon. Mwinzi, Senior Resident Magistrate who gave judgment in favour of the Applicants.
4. In the judgment, the Respondent was required to shoulder the education of the minors and related aspects, to remit Shs 6,000/= monthly for food while being allowed access to the children. **E.M.M.** was directed to take care of the shelter and clothing needs of the minors. That judgment prompted this appeal.
5. The memorandum of appeal filed in person by **E.M.M.** was abandoned and reliance placed on the

supplementary memorandum of appeal based on seven grounds, namely:-

**“1. THAT the Learned Trial Magistrate erred in Law and facts in failing to appreciate the fact that the Appellant has no regular income that would be available to cater for shelter which is one of the Basic requirement that the children would need.**

**2. THAT the Learned Trial Magistrate erred in Law and facts in failing to make provision for medical care for the children despite the fact that all the children were of tender Age.**

**3. THAT the Learned Trial Magistrate erred in Law and facts in failing to consider the fact that there is no evidence that the Respondent was providing food and the Kshs 6,000/= that the Respondent was ordered to pay for food was miserably to low to cater in feeding three children for a whole month.**

**4. THAT the Learned Trial Magistrate erred in Law and in fact in failing to establish where and the condition in which the children were living in at the time of hearing of the case.**

**5. THAT the Learned Trial Magistrate erred in law and in fact in failing to consider the fact that equal parental responsibility as envisaged under section 24 (1) of the Children’s Act No. 87 of 2004 is only applicable where both parents have earning and have regular income.**

**6. THAT the Learned Trial Magistrate erred in Law and facts in failing to consider that school fees payment is periodical and the Respondents Monthly Responsibilities as a father to cater for the welfare of the children were not clearly spelt out.**

**7. THAT the Learned Trial Magistrate erred in Law and facts in failing to make specific orders that would ensure compliance for the welfare of the children up to the welfare of the children up to the attainment of 18 years for the said children.”**

6. In arguing the appeal, the Appellant merged grounds 2 and 5 (medical); 3 and 4 (food); 1 and 6 (income and school fees); and ground 7 on compliance. In summary, the Appellant’s submissions reiterate the joint responsibility of parents in the care of their children under Section 24 of the Children Act and Article 53 of the Constitution. And that medical care, food, education, shelter and clothing constitute basic needs of the children. That the Respondent has a higher income than **E.M.M.** and should carry a heavier financial responsibility in providing for the issues.

7. Further, the Appellant complains that the trial magistrate failed to consider the prayer for custody as contained in the plaint before the lower court. She urges the court to order that educational and related costs be met by the Respondent, who should also pay Shs 8,500/= per month as rent; Shs. 10,000/= per month for food and clothing and Shs. 10,000/= as medical expenses. And that an order be made for payment of these monies into court, with liberty to execute in the event of default.

8. For his part, the Respondent who acted in person submitted that despite the judgment not making provision for medical expenses, he has provided the same through his National Hospital Insurance Fund scheme and cash transfers. As regards rent, he pointed out that **E.M.M.** had pleaded for a sum of Shs. 5,000/= in the lower court and cannot be allowed to go against her pleadings. He defended the order for payment of Shs. 6,000/= for food as reasonable as **E.M.M.** also has an income.

9. Further, that there has been no default on his part, as he has taken care of medical expenses, education and pays Shs. 8,000/= per month for food as well as the entertainment of the children. In his view there is no merit in the appeal which he urged the court to dismiss. It is his position that **E.M.M.** ought to have sought review in the lower court rather than file an appeal.

10. The court has considered rival submissions in light of the judgment now challenged, and the trial evidence. Evidently, what each party has attempted to do in this appeal is to adduce further evidence. The reason for this is found in the sketchy nature of evidence that parties adduced before the trial court.

Each gave one-paragraph statements, and neither produced exhibits, despite having filed documents. Nor did they swear affidavits of means.

11. The parties were acting in person and possibly required the prompting or intervention of the court in this regard. A children officer's report would have been useful. Although the trial court did err by not considering the claim for medical expenses or custody orders, I think that its determination of issues was restricted by the nature of evidence adduced before it.

12. As stated in **Peters –Vs- Sunday Post [1958] EA 424 at Pg 429:-**

**“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellant court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.”**

13. This court is obligated under Section 4 (3) of the Children Act while considering any disputed matters involving children to give primacy to the best interest of children. This is in consonance with Article 53(2) of the Constitution which states:-

**“A child's best interests are of paramount importance in every matter concerning the child.”**

14. Both father and mother of a child have an equal responsibility to provide parental care and protection which is the right of every child under Article 53 (1). As **Kimaru J** observed in **CIN –Vs- JNN [2014] eKLR:**

**“It will not do [for a party] to say that she has an uncertain source of income and therefore the responsibility of maintaining the children should only be borne by the adverse party. The (said) party must establish, to the satisfaction of the court, that she has also made effort to provide for the upkeep of the children.”** See also **Dulu J** in **J.M. –Vs- J.M. [2012] eKLR.**

15. However, equal responsibility does not mean equal and similar contribution as the income of each parent, and other non-monetary contribution must be borne in mind. There is undisputed evidence that the Respondent earned Shs. 85,000/= as at 2014 while **E.M.M.** stated her income to be Shs. 5,000/=. At the time, the Respondent asserted that he was paying the rent, at Shs. 7,000/= and school fees amounting to Shs. 30,000/= in addition to providing food. Taking a modest estimate on food at Shs. 3,000/=: it would have meant, if his assertions are true that, he was providing about Shs. 10,000/= per month on food and shelter and Shs. 30,000/= on education.

16. For her part, **E.M.M.** did not indicate the sums required for fees, food and rent in her evidence. Nor did she mention medical expenses or tender evidence to support the respective claims as articulated in the **Plaint**. Thus, while it is undeniable that food, shelter, education, clothing and medical care are basic necessities for the children, quantum must be established through evidence. I note from the judgment of the court that the court allowed the claims contained in paragraph 11(b) & (c) of the **Plaint** against the Respondent and allocated the duty for the payment of rent and clothing to **E.M.M.**

17. No direct mention was made regarding the medical care and entertainment of the minors. In her present submissions, **E.M.M.** appears to suggest that the Respondent should bear all expenses for the upkeep of the children. That is neither equitable nor justified as **E.M.M.** has an income albeit lower, and has a duty to care for the children. Similarly, the claim in respect of rent having been pleaded at Shs. 5,000/= cannot on this appeal be reviewed upwards, or be made the sole responsibility of the Respondent when that was the only financial obligation placed on **E.M.M.** in the lower court. It is not lost on this court however that **E.M.M.** plays the important role of giving daily care to the minors.

18. Even so, her belated submissions that she requires to hire house help cannot be taken up on appeal as

no such evidence was tendered in the lower court. Thus considering all relevant matters, I would interfere with the judgment of the lower court, firstly by ordering that the custody of the three minors which is not contested be placed in **E.M.M.** I also direct that the Respondent takes up all medical expenses relating to the children through National Hospital Insurance Fund or other suitable medical scheme, and within 15 days herewith to provide the necessary documentation to **E.M.M.**, to facilitate access to suitable medical care by the minors.

19. The Respondent asserts readiness to pay Shs. 8,100/= monthly for food. In my view he should also contribute towards non-school clothing. Thus he will pay Shs. 12,000/= per month for food and clothing and entertainment. For her part **E.M.M.** will meet monthly rental costs and provide physical care for the children. For the avoidance of doubt, the Respondent is entitled to reasonable access to the children as may be agreed with **E.M.M.** The Respondent will also meet all educational and related costs in respect of the children.

20. The sum of Shs. 12,000/= in respect of food, clothing and entertainment will be deposited into court on a monthly basis, on or before the 5<sup>th</sup> day of every month. As ordered by the trial court, default will attract execution and suitable penalties. Parties are at liberty to apply for review in the lower court. Each party to bear own costs.

Delivered and signed at Naivasha this **20<sup>th</sup>** day of **September, 2016.**

In the presence of:-

For Appellant : Mr. Gichuki Advocate

For Respondent : In person

Court Assistant : Barasa

**C. MEOLI**

**JUDGE**