



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CHILDREN'S APPEAL CASE NO. 9 OF 2010

*[Being a judgment delivered by Hon. F. Kyambia – RM*

*in Bungoma Chief Magistrate children's case no. 44 of 2009]*

R M W.....APPELLANT

VERSUS

L M 1

L M 2 minors suing through G A B....RESPONDENT

*[Being an appeal from Bungoma CMCC No. 832 of 2010]*

#### JUDGMENT

1. The parties herein are a husband and wife. The wife G A B describes herself as next of friend of two children L M 1 and L M 2. The defendant/appellant is R M W. The appellant and his wife married under Luhya customary law in 2005. In the plaint dated 19<sup>th</sup> October, 2009 the wife (guardian) sought for Kshs. 8,000/= for food, Kshs, 5,000/= for treatment and medical care, Kshs. 10,000/= for school fees, shopping for text books and uniform, kshs. 4,000/= for shelter and Kshs. 10,000/= for clothing in a year.

2. In a defence dated 12<sup>th</sup> November, 2009 the appellant acknowledges the children but denies allegation of neglect stating that he has filed a divorce cause in view of the wife's past marriage.

3. The matter went to trial and judgment was entered in favour of the respondent where the appellant was to pay Kshs. 6,000/= as maintenance in default 1/3 of the respondent's salary was to be attached.

4. The appellant was aggrieved by the judgment and preferred this appeal on 4 grounds herein below referred to. He sought for the said judgment to be set aside. The grounds of appeal are,

1. That the learned Trial Magistrate erred in both law and fact when he awarded custody of the children to the mother.
2. That the Hon. Learned Magistrate erred in law and fact when he ordered the appellant to provide Kshs. 6,000/= to the children without regard to the appellant's income and other children.
3. That the Learned Trial Magistrate erred in both law and fact when he failed to appreciate the testimony of the appellant hence occasioning a miscarriage of justice.
4. That the Learned Trial Magistrate's findings were contrary to the law and procedure hence occasioning miscarriage of justice.

5. In his submissions Mr. Ateya Counsel for the appellant informed the court that his client acknowledged paternity of the two issues aged 6 and 8 years respectively and there was no wrong occasioned in the custody of the children being given to their mother. He admitted that the appellant's pay slip was not presented to the trial court. He however contended that the court ignored the evidence of the appellant to the effect that the respondent resides in the appellant's property.

6. The Respondent on her part submitted that she received Kshs. 6,000/- as ordered by the court which sum is all inclusive although the attachment was not consistent. She alleged threats to her life and that of the children by the appellant.

7. This being the first appellate court it has a duty to evaluate the evidence afresh analyze the same and arrive at an independent decision.

From the facts on record, the appellant and the respondent were customarily married in 2005. The parties have had issues for a while, since the appellant got employment with the Prisons Department. The appellant initially worked in Kapsabet but has since moved to Nairobi. The children of the marriage a boy and a girl namely L M 1 and L M 2 are aged 8 and 6 years respectively and remain with their mother in the matrimonial home.

9. The respondent went to court seeking for maintenance and custody of the children. She sought for maintenance as follows;

- i. Food per month Kshs. 8,000/=
- ii. Medical care per month Kshs. 5,000/=
- iii. School fees and related items Kshs. 10,000/= monthly
- iv. Rent Kshs. 21,000/= a month
- v. Clothing Kshs. 10,000/= a year.

The trial magistrate in his judgment gave custody of the children to the respondent and awarded Kshs. 6,000/= as maintenance in default 1/3 of Appellant's salary be attached.

10. In her case before the trial court the respondent contended that when the appellant got a job he deserted the family and went away for two years without providing for her and the children. She further said attempts by a human rights organization and the Children's Department to get him to assist did not bear fruits. She admitted in cross examination that she has another child outside wedlock who lives with her parents, a fact she said was well known to the appellant.

11. On his part the appellant admitted paternity of the children and the fact that he married the respondent customarily. He stated that he discovered later that the respondent had been married earlier and had other children. He asked the court to award him custody of the issues. He denied failure to provide for the wife and children. He called 2 other witnesses whose evidence as rightly observed by the trial court was not relevant in this suit but elsewhere probably; the divorce cause.

12. There is no doubt therefore in my mind that the 2 parties are the parents of the 2 minors subject of this suit and that both have an obligation to take care of the welfare of the minors which includes shelter, clothing, food, medical and school. How much money and from whom depends on the income of each one of them. There is no evidence to show that the respondent has an income of her own. Indeed the appellant claims that she provides for her and the children. The obligations to take care of the minors therefore for now falls squarely on the shoulders of the appellant. He may when circumstances change and the respondent has an income make a relevant application so as to share the responsibility with his estranged wife.

13. The parties have a divorce cause that remains pending for now. The respondent and the children remain in the matrimonial home and therefore the issue of shelter is not to be considered for now. For consideration are expenses related to;

- i. Food
- ii. Clothing
- iii. Medical &
- iv. School.

The appellant stated that he has another family but no evidence came forth to support the allegation and I will not consider the same.

14. From the court record I have seen pays slips of the appellant dating from November 2011 to March 2012 that is about 3 years back. His total earnings then were Ksh.24, 954/=. I note that he must have received some increment since then. The appellant pays PAYE of Kshs. 2,261/=. NHIF- Ksh.320/= and WCPS – kshs.358/=. I will consider these because they are mandatory deductions which he must pay which leave him with kshs. 22,615/= net pay. 1/3 of the said sum is Kshs. 7,338/=.

I decline to consider the bank loan as nothing was said of the same to the court. This is a liability incurred knowing very well that he had dependant and aware of his parental responsibility. If out of Kshs. 22,615/=. Kshs. 6,000/= is attached to take care of a family of 3, a wife and two children the amount is most reasonable.

I therefore having considered the facts of the case as set above see no reason to upset the judgment of the trial court. I accordingly dismiss the appeal with costs.

Dated at Bungoma this 19<sup>th</sup> day of May 2015.

**ALI-ARONI**

**JUDGE.**