



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**FAMILY DIVISION**  
**CIVIL APPEAL NO. 11 OF 2015**

**M W M.....APPELLANT**

**VERSUS**

**F N K.....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

By an appeal filed on 12th, 2015 the appellant M W M informed the Court through Counsel Mr. Ogutu that she sought the following orders;

The defendant F N K, be and hereby ordered to pay Ksh. 173, 500/= a month or any reasonable amount that the Court may deem fit pending hearing and determination of the appeal. The Appellant's salary is not sufficient to cater for the children's upkeep while in his custody and the Appellant is over burdened while the children are suffering.

Annexed to the appeal is the Appellant's affidavit that outlines her reason for appeal. She is aggrieved by the Court order of the Children Court Case No. 588 of 2014 specifically the Court orders of 16<sup>th</sup> January, 2015, that each party to meet the food and clothing needs of the children while in their custody.

The Respondent filed a Replying Affidavit on 23<sup>rd</sup> March, 2015, and outlined several issues; among them; that The Appellant commenced proceedings in the Children Court after she withdrew Ksh. 390,000/= which was held in a family joint account and left Ksh. 56.65/ only. He is currently unemployed as he lost his job in May, 2014. He has struggled to ensure that he continues to comply with the Children's Court Orders to the best of his ability. He borrows from friends and family and has settled school fees.

He has paid Kshs. 220,000 as school fees and Ksh. 73, 333.33 as school expenses for the children. He left the matrimonial home and resides in a different home and also incurs expenses. He raised the issue that the Appellant who is gainfully employed and works in other institutions did not and has not disclosed her affidavit of means, what she is willing to take up as expenses upkeep and maintenance of the children of the marriage.

The Respondent took issue with the break down items that confirmed of Ksh. 173,000/= monthly

maintenance for the children on top of school fees and school expenses and medical insurance for the children.

In the listed items in paragraph 10 of the appellant's supporting affidavit; the items were; Car fuel, maintenance and repairs was not justified as the children have school transport. Secondly, internet, entertainment and DSTV were extras and not necessities for the children

### **ORAL SUBMISSIONS**

During the hearing of the appeal the appellant through the advocate Mr. Ogutu summed up the matter premised on the following issues;

1. The Respondent did not pay school on time and there was a risk of the children being sent away for school.
2. The Appellant lives in a rented house at Ksh.52, 000/= each month. Her salary is Ksh. 65,000/=. The balance of Ksh. 13,000/= is hardly enough to meet other needs of the children and her own expenses.
3. The Respondent gave money for food intermittently once in a while he paid Kshs 8,000/= when one of the children called him and another time gave Ksh. 2,000/=. These amounts are hardly enough to meet the necessities for the children. The food per day is at Ksh. 500/= and Ksh. 15,000/= is not sufficient.
4. The Appellant proposed figure of Ksh. 173,000/= a month and it is an estimate. She expected the Respondent to make a counter proposal for the Court to consider. The Appellant requests that a final amount is determined and paid monthly instead of demanding for school fees spousal and children support from the Respondent.
5. The Appellant alluded to the principle of shared parental responsibility for the children. The responsibility cannot be shared without considering and taking into account what each spouse earns and the responsibility each one has.

The Respondent's position through Counsel Mr. Njomo, informed the Court;

- a. That he is unemployed since May, 2014 and had to meet his financial obligation through financial support from friends and family members. He left the matrimonial home and he cannot sustain the rent of Ksh. 52,000/= each month. He has paid school fees and expenses under a payment schedule with *[particulars withheld]* School. He is due to make further payments in July, 2015.
- b. The Respondent informed the Court that the Appellant left the children for three (3) years and went to the U.S.A. During this period, the Respondent solely took care of the children and on coming back she obtained custody of the children and the matrimonial home.
- c. Any efforts of reconciliation with the Appellant through his father were unfruitful. He is not allowed access to the home and any shopping he does for the children is not accepted. He cannot meet all these demands for now as he is unemployed.

### **ISSUES**

1. Should the Respondent pay monthly amounts for upkeep and maintenance of the children of the marriage of Ksh.173, 500/= or any other sum?
2. Should each party Appellant and Respondent meet the food and clothing needs of the children while in their custody?
3. What other order can the Court order in the circumstance?

### **LAW**

**Article 53(1)(e) of the constitution Section 25 of the Children Act 2001** which provides that;

**(1) “where a child’s father and mother were not married at the time of his birth-**

**a. The Court may, on application of the father, order that he shall have parental responsibility for the child; or**

**b. The father and mother may by agreement (“a parental responsibility agreement”) provide for the father to have parental responsibility for the child.**

**(2) where a child’s father and mother were not married to each other at the time of his birth but have subsequent to such birth cohabited for a period or periods which amount to not less than twelve months, maintained the child, he shall have acquired parental responsibility agreement has not been made by the mother and father of the child”.**

### **ANALYSIS/DETERMINATION**

There are two (2) competing important considerations; the best interest of the children is paramount and must be upheld at all times. The Court should ensure that the children are adequately housed and the carer has enough money to meet their needs. The resident parent may or may not receive income support depending on the peculiar circumstances of each case.

The other consideration is that parental responsibility is shared by both parents to the children of the marriage. By admission of both parties it is common ground that due to separation and divorce, the resources that used to support the household must now support two (2) households. When the Appellant has the children she has the responsibility to solely cater for their shelter, food and clothing and similarly the Respondent when the children are with him, he incurs expenses to maintain the children. Clearly and unfortunately each of the parties is worse off financially as the financial resources that have been pulled together in joint effort are now spread across two (2) households. Therefore there is need to be realistic each party lowers expectations and prioritize the best interest of children over other considerations.

The Court has considered pleadings and submissions and finds that really each party is straining financially, the appellant solely burdening the expenses to provide shelter, food and clothing to the children while in her custody. The Respondent has had to obtain alternative shelter and make a home for the children who they visit and stay with him. He also contributes to food and clothing for the children.

With this reality in mind, the Court has factored the income, earning capacity property and financial resources of the Appellant and Respondent now and in future. The parties did not file the affidavit of means to enable this Court make appropriate orders. The Court can confirm from the record that the Respondent is unemployed and it has adversely impacted on the family the appellant and children. The appellant is deprived spousal support and the children’s standard of life is compromised. The appellant is strained financially as she has to meet expenses solely unlike before when they were both employed.

The Court has to consider the financial needs obligation and responsibilities of each of the parties to the marriage has or his likely to have in the foreseeable future. The Applicant pays for rent of Ksh.52,000/= each month, shopping for food and sometimes pays utility bills, water and electricity, house help, Car fuel, maintenance and repairs, internet services and DSTV, security and garbage collection and fence trimming and entertainment for the children all totaling to Ksh.173, 500/=.

The Respondent on the other hand has to pay rent, water and electricity bills for his residence, food and clothing for the children when they are with him. He also pays the children’s school fees and school expenses text books, transport, lunch, uniform, snacks, pocket money all totaling to Ksh. 245,000/=.

The Court is to take into account the standard of living of the family was accustomed to before the separation and divorce. The evidence of gleaned from the record strongly suggests the family was comfortable financially and socially. Despite the reality that the resources are now stretched to cater for the two (2) homes, it is in the best interest of the children that they remain in almost same standard as far as the Appellant and Respondent able to contribute to. Their residence and school environment should

remain as is. The children attend [*particulars withheld*] School and live at their current residence.

The Court has also taken into account the contribution which each of the parties has made as is likely to make to the welfare of the family after the separation and divorce.

During the marriage, the appellant made direct and indirect contribution. It is common ground that she worked as a Secondary School Teacher and pursued studies to improve herself and is a lecturer. She also looked after the family, home making and child caring.

The Respondent contributed to providing for his family financially and socially, maintaining them and their upkeep. For the time the appellant pursued further studies he also took care of the children of the marriage single handedly.

Therefore in terms of the above mentioned facts; the Court finds that at this stage in the absence of concrete evidence of both parties income, earning capacity, property and financial resources and corresponding financial needs obligations and responsibilities and contributions this Court shall make orders to uphold the best interests of the children of the marriage.

The Appellant is straining to meet the needs of the children of the marriage solely. The Respondent is unemployed and also straining and the Court notes that he was paid terminal benefits from his former employer which was a lump sum. Secondly during employment, he made investment that and may draw revenue or income. Thirdly although not employed as a professional, engineer he could undertake consultancies. Until proved otherwise this Court is of the view that he is making some money legally and professionally sufficient to support the upkeep of his children.

Therefore until there is full disclosure of the financial means of each of the parties, the Respondent and Appellant; this Court orders as follows;

- a. *The Court orders of 6<sup>th</sup> January, 2015 by the Children Court are upheld except for*
- b. *In light of the ongoing hardships by the appellant is solely catering for the children up keep solely, the Court order the Respondent to pay a monthly sum of Ksh.30,000/= to the Appellant for food, toiletries, water and electricity bills for the upkeep of the children until*
- c. *Both parties provide to the Court detailed and full disclosed affidavit of means of income, financial resources, earning capacity and properties and financial needs, obligation and responsibilities and contributions*
- d. *Any aggrieved party or if circumstances change any party may apply.*
- e. *No orders as to costs.*
- f. *The Appellant to provide shelter, clothing, food, entertainment, internet, DSTV Services and car maintenance, security and garbage collection for the children and part of food and utilities.*
- g. *The Respondent to provide school fees and school expenses, medical care, and share in food, toiletries and utility bills.*

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JUNE 2015.**

**M. MUIGAI**

**JUDGE**

***In the presence of;***

***Ms. Osoro for the Applicant.***