



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**APPELLATE SIDE**

**Criminal Appeal 148 of 2004**

**(From Original Conviction and Sentence in Criminal Case P&D 40 of 2004 of  
Chief Magistrate's Court at Machakos: P. M. Muriuki Esq. on 8.9.2004**

**MICHAEL MUYA MUSYOKI ..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

The appellant Michael Muya Musyoki was married to Joyce Wanza in 1996. They have 2 issues of the marriage aged between 7 years and 2 years. The couple had matrimonial problems in January 2004 as a result of which they separated. The appellant filed Separation Cause No. 1 of 2004 Kangundo Court and the custody of the children was given to the mother. On 2.7.2004 the applicant was charged before Chief Magistrate's Court Machakos in Protection and Discipline 40/2004 for the offence of neglecting children contrary to section 6(1) and 7(1) of Children's Act. He pleaded guilty to the charge and the court ordered for a social enquiry report from the Children's office. When the case came up on 8.9.2004, the appellant said he could not even afford 500/- and was not willing to offer any maintenance. As a result of that the court did not await the social enquiry report but sentenced him to serve 3 months imprisonment and was ordered to pay 4,000/- per month for upkeep of the children.

The appellant appeals against this order on grounds that the court did not have the social enquiry report before sentencing the appellant and further that the court's decision was not based on any report, information and that the court did not give reasons for decision made.

The appeal was opposed on grounds that the appellant admitted that he had failed in his parental duty to maintain the children and when given time to offer his support he came and claimed he could not offer anything and was not willing to do so. The Learned State Counsel's submission is that whatever decision made, it should be in the best interest of the children and further submits that the prison sentence is not in the best interest of the child.

This court ordered that a social enquiry report be filed before the court would make its decision. The Children's Officer filed a report in which he states that on enquiry he found the needs of the children to total to Ksh. 10,800/- per month and that each parent should bear ½ that sum. The appellant filed an affidavit of means in which he says he has no income having been retrenched and that he later sunk his benefits in a shop business which he ran with the wife till they sold it and the wife took off with the proceeds to set up her own shop. Unfortunately the court did not ask for the wife's affidavit of means so that the court could then reach a fair decision on how best the needs of the children can be made. The Children's officer merely found out what the wife had to say on the needs and left it at that. All these reports should have been laid before the court before even the orders of the lower court were met. I do agree that the order by the magistrate was premature in that the Children's officer's report was not available. He did not have enough material before him.

The appellant was put in jail without option of fine. Under the Children's Act whatever order the court makes should be for the good and welfare of the child. Imprisonment would not be in the best interest of the children. As outlined imprisonment is prejudicial to the children because the appellant can not work or

work out a way to fend for the children. The prison sentence was therefore unnecessary, harsh and excessive in the circumstances.

The order that the appellant pay maintenance of Ksh. 4,000/- per month was made arbitrarily without proper enquiry as to the parties means and the same is hereby set aside.

The appellant pleaded guilty to the offence of neglecting to maintain his children. So far he has served over a month of the sentence. The conviction is confirmed but as observed above that custodial sentence is excessive, the period already served of over a month is sufficient and the court will order the appellant released and set at liberty forthwith. However, the issue of maintenance has to be reconsidered before the lower court after all the parties avail the necessary evidence on the parties means. The case is remitted to the lower court probably before a different magistrate for determination on what maintenance appellant should pay if any.

Dated, read and delivered at Machakos this 19th day of October 2004.

**R. V. WENDOH**

**JUDGE**