



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL APPEAL NO.195 OF 2002**

(From original Civil Suit No.53 of 2002 of SRM Court at Migori)

**EB; VG; MN (Minors).....APPELLANTS**

**SUING THRO' THEIR MOTHER ROBI GEORGE )**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

On 24th July 2002 the District Children Officer Migori referred the case of 1. EB – 7YEARS 2. VB – 6 YEARS 3. MN – 2 YEARS to Children’s Court Migori as being children in need of protection under s. 119(1) of The Children Act. He indicated that the parents GLADYS ROBI the (appellant herein) and GEORGE NYAMBURI MAGAIGWA married in the year 1994. In the year 2001 disputes arose and the appellant was sent home by the Respondent husband. She was then staying with the 3 children in her parents home.

The matter appeared first before Odhiambo B. F. Senior Resident Magistrate on 25/7/02. He issued summons for the Respondent and matter fixed for mention on 6/8/02. He did not appear in court on that day and the Children’s Officer told court that he did not respond to the summons. He asked the court to order him maintain the children as the mother was jobless. The court ordered:

**“the father of the children herein is ordered to take care of this (sic) children accordingly.”**

On 3/9/02 the court once again issued summons to the Respondent to appear on 9/9/02. It is not clear if he appeared on that day as there is nothing on record but an order was made on 11.9.02 as follows:

**“The father of the children is advised to take the Children from his wife who is apparently unco-operative. She has stated categorically that she is not ready to go back to her husband. She will however have reasonable access to her children at all reasonable time.”**

It is against this order the appeal is preferred.

Respondent did not appear on the hearing day. The appellant told court that she was relying on the grounds in her memorandum of appeal.

In ground 2 of the appeal the appellant stated that the magistrate failed to make proper and accurate proceedings in the case before him, although he makes a finding against the mother.

It is very clear for the proceedings that the magistrate never kept any proper record of the proceedings. No hearing was ever conducted. The record for 11th September 2002 do not even show if the appellant and the respondent were present.

There is only consent and an order. The order is from the blues as there is no indication that any party addressed the court on that day or any other day. There is no record to show that the appellant had refused to go back to her husband. The court therefore could not make any order as there was no basis to do so. The magistrate should have heard the parties and then make a ruling.

I therefore find the appeal succeeds on that ground alone. I set aside the order made on 11/9/02.

Since as I have said no hearing was conducted and court cannot be able to determine the issue of custody and maintenance. I therefore direct that the case be retried by the children's court kehancha. The court to give the hearing of the case priority.

It is so ordered.

**Dated at Kisii on 13th October 2004.**

**KABURU BAUNI**

**JUDGE.**

**13/10/04**