



ECM v MNM (Civil Appeal E019 of 2023) [2025] KEHC 10150 (KLR) (11 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10150 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CIVIL APPEAL E019 OF 2023**

**JN NJAGI, J
JULY 11, 2025**

BETWEEN

ECM APPELLANT

AND

MNM RESPONDENT

JUDGMENT

1. The Respondent herein issued a Notice to Show Cause at the lower court against the Appellant seeking payment of outstanding monthly maintenance money amounting to Ksh.111,500/= owing from the appellant to the Respondent for maintenance of the children of both the appellant and the respondent as per a consent dated 19th December 2019 wherein the appellant was to remit Ksh.8,500/= per month. It was the case for the respondent that the Appellant has failed to pay the outstanding amount between the months of September 2021 and December 2022.
2. The appellant on the other hand contended that he had paid the amount claimed save for the months of November and December 2022.
3. The trial court found that the Appellant had not discharged the NTSC and committed him to civil jail unless he made good his default. The appellant was aggrieved by the ruling and filed the instant appeal. The grounds of appeal are that:
 1. That the learned magistrate erred in fact and in law in failing to exercise her discretion in favour of the Appellant.
 2. That the learned magistrate erred in fact in finding that the Appellant is liable to the Respondent.
 3. That the learned magistrate erred in fact in failing to refer to consent adopted as judgment of the court dated 19th November 2019.



4. That the learned magistrate erred in fact and in law by taking into account irrelevant factors and failing to take into account relevant factors thereby arriving at an erroneous ruling.
5. That the learned magistrate misapprehended the facts in his ruling.
4. The Notice to Show Cause at the lower court proceeded by way of viva voce evidence. The respondent who was the plaintiff in the case testified that the initial agreement was for the appellant to pay the monthly remittances through Mpesa. That in 2021, the Appellant stopped paying through Mpesa and started to pay by cash. That between September 2021 and December 2022 the Appellant made a few cash payments and accumulated unremitted sum of Ksh.111,500/=. She issued a Notice to Show Cause to the appellant.
5. The Appellant testified in the case and called 3 witnesses. In his evidence, he stated that the initial agreement was to pay the remittances through Mpesa. That he later changed to cash payment due to problem with Mpesa services in their area. That he was paying the cash remittances through his current wife and later through the village headman. However, that he was paying the money late due to late payment of his salary by his employer. It was his case that he has paid all the remittances since November 2019 without fail save that on certain occasions he made late payments due to financial constraints.
6. The wife to the Appellant who was DW2 in the case testified that she and her husband were making monthly remittances to the Respondent. That they were initially paying through cash but the Respondent was sending them abuses whenever they delayed in making payments. They resorted to paying in cash. That she was making the payments through a local children issues volunteer called Maimuna. Later the Appellant protested payment through Maimuna and a person called Seif took over the payments. He paid once and pulled out after citing abuses by the appellant. A person called Athman took up the role of payments in May 2021. He continued to pay even up to the time the witness was testifying in court. It was her case that it is only in November and December 2022 that they did send the payments.
7. Maimuna DW3 told the trial court that she is a community children volunteer at Mkokoni. That the Appellant and his wife engaged her for a period of 7 months to deliver cash payments to the respondent. The monthly payments were Ksh.8500/=. She delivered a total of Ksh.51,500/= in the 7 months' period. However, that the respondent was not signing anywhere on her delivering the money.
8. Ahmed Athman DW4 testified that he is the headman of Mkokoni village. That between May 2021 and October 2022 he was engaged by the Appellant to deliver monthly remittances of Ksh.8,500/= to the respondent. That he made all the remittances during the stated period but the respondent was not signing anywhere whenever he delivered the money.
9. The trial magistrate in her ruling stated that the appellant breached an oral agreement made after the consent for the remittances to be made through Mpesa. That on the few occasions that he made the payments through Mpesa the payments were erratic as shown by his Mpesa print-out. That the Appellant was receiving his salary through Mpesa and therefore his assertion that there was a problem in sending money to the respondent through Mpesa was mischievous. The court found that the appellant had not discharged the NTSC.

Submissions

10. The appellant made submissions in the appeal but the respondent did not make any. The appellant submitted the consent judgment did not provide for payment through Mpesa nor was there an oral agreement to make payments through Mpesa. That the appellant made all the remittances but resorted



to cash payments due to network problems at Mkokoni. That the cash payments were made in time except in November and December 2022 when payments were not made due to financial constraints.

11. It was submitted that the three witnesses called by the appellant accounted for the cash payments. That the respondent admitted to receiving some cash payments. That her denial of having not received all the monthly payments was false as she never made any complain from October 2021 when she alleges that the appellant ceased to make the remittances. The appellant faulted the trial court for ignoring the cash payments and leaned towards Mpesa payments. He also faulted the court for basing its decision on irrelevant factors. It was submitted that the issue in the case is as to which party the court is to believe in the case.

Analysis and Determination

12. I have considered the grounds of appeal, the record of the trial court and its ruling and the submissions. The issue for determination is whether the appellant paid all the remittances as contended except the months of November and December 2022.

13. The appellant contends that all the remittances were done except for only two months. The respondent on the other hand testified that the appellant made intermittent payments between September 2021 and December 2022 thereby leaving unremitted balance of Ksh.111,500/=. That during that period she only received payments as follows:

September 2021.....Ksh.4,000/=

November 2021Ksh.4,500/=

January 2022.....Ksh.4,000/=

April 2022.....Ksh.4,000/=

July 2022Ksh.4,000/=

August 2022Ksh.4,000/=

14. The above makes a total of Ksh. 24,500/=. It was her evidence that the rest of the remittances were not received during the 16 months' period that is in issue in issue. She was in that period supposed to receive a total of Ksh. 136,000/=. She received only Ksh.24,500/=. thereby leaving a balance of Ksh.111,500/= that she claimed.
15. The consent judgment was entered into on 19th November 2019. There is no dispute that all the remittances from that date up to August 2021 were made. The dispute is therefore the remittances from September 2021 to December 2022.
16. The Appellant admitted in cross-examination that she had agreed with the respondent that the remittances be made through Mpesa. He however changed that arrangement and resorted to using his wife and the headman to make cash payments to the respondent.
17. The respondent does not deny receiving cash payments through Maimuna DW3, Ahmed Athman DW4 and Seif. Maimuna said that she made deliveries to the respondent for a period of 7 months. The respondent did not dispute the deliveries by Maimuna. She did not dispute the delivery by Seif. The dispute was only with the deliveries made by Ahmed during that period
18. Ahmed Athman said that he made deliveries to the respondent between May 2021 and October 2022. The respondent is not disputing that Athman made full cash deliveries to her for the four months between May 2021 and August 2021. The dispute is the cash deliveries made by Athman



between the months of September 2021 and December 2022. According to the tabulation by the respondent, Athman made deliveries amounting to Ksh.24,500/= and never made deliveries amounting to Ksh.113,500/=. Athman on his part claims to have made full deliveries between May 2021 and October 2022. It is admitted by both sides that there were no records being signed by the parties whenever a deliver was made. The question then is as to who between the Respondent and Athman is telling the truth on whether full payments were made or not. The trial court did not specifically determine the issue but found that the sum of Ksh.113,500/= as claimed by the respondent was not made.

19. The standard of proof in a civil case is on a balance of probabilities. In *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLE 526, Kimaru J. (as he then was) stated the following on the issue:

“In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

20. I have considered the evidence adduced before the trial court in its entirety. It is not in dispute that after the consent order was entered, the parties agreed that the remittance be paid through Mpesa. The appellant paid via mpesa for a period of about 2 years but he thereafter and unilaterally started to pay cash through emissaries. His explanation as to why he stopped paying through mpesa was due to network problems in their area. He at the same time admitted that he himself was receiving his salary from his employer via mpesa. His reason as to why he stopped making mpesa payments is not convincing.
21. The respondent admits that Athman made full payments between the months of May and August 2021. In view of the fact that the respondent admits the cash payments made by Maimuna and Seif and admits part payment by Athman, I do not think that she is lying that she did not receive full payments from Athman, DW4. The appellant himself cannot know whether Athman made full payments or not. He did not insist on the respondent signing for the money when it was paid by Athman. The burden of proof was on him to prove that the payments were made. He did not discharge that burden. I find no evidence to show that full payments were made as claimed by the appellant’s witness, Ahmed Athman DW4.
22. The upshot is that I do not find any merit in the appeal. The same is dismissed with costs to the respondent.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 11TH DAY OF JULY 2025.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Murithi for Appellant

N/a for Respondent – Absent

Parties - Absent

Court Assistant – Ndonye

