



**SWO v ABM (Civil Appeal E005 of 2024)
[2024] KEHC 12032 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 12032 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E005 OF 2024
SN RIECHI, J
SEPTEMBER 19, 2024**

BETWEEN

SWO APPELLANT

AND

ABM RESPONDENT

JUDGMENT

1. The appeal herein arises from a ruling by the Senior Resident Magistrate’s Court in Nairobi Children Case No. E1249 OF 2014 in which the defendant/appellant filed an application dated 13th September,2023 and vide the said application, the defendant was seeking orders inter alia that;
 1. The trial magistrate be pleased to recuse itself from further conduct of the matter’
 2. That the matter be placed before any other court for conduct and disposal of the suit
 3. Costs
2. Upon hearing the application the trial magistrate delivered a ruling on 19th January 2024 in which the trial magistrate made orders as follows;

“From the foregoing, I wonder where the court has acted in a manner contrary to the law or justice. All the court did was to follow due process. The Application for Review filed by the Defendant did not constitute stay of execution of the Orders emanating from the Ruling delivered on 11/08/2023. It would have been a different case if the Defendant's case was that there was stay of execution and this court nevertheless proceeded to issue warrants against him.

The totality of the foregoing is that defendant’s application dated 13th September,2023 is an abuse of the court process. I hereby dismiss it with costs to the Plaintiff”.



3. The appellant being aggrieved by the trial court's decision, lodged an appeal through a memorandum of appeal dated 29th January 2024. In his memorandum of appeal, he raised seven (7) grounds of appeal which are as follows:
1. That , the learned trial Magistrate erred in law and in fact in dismissing the Appellant's application for recusal when there is evidence on record that by the time Hon. Terer was issuing a warrant of arrest against the said Appellant there was an application for Review of the order to pay a sum of Kshs. 27,040/= on 20 the Respondent's Notice to Show Cause dated 24th May, 2023. Your Lordship, the trial magistrate was evidently bias against the Appellant as he was arrested on 31st August, 2023 while the Application for Review was pending for directions on 21st August, 2023.
 2. That , the learned trial Magistrate erred in law and in fact and was inherently bias and failed to make a finding that the Appellant had lost confidence in the Courts independence and ability to conduct a fair hearing as indeed the said Appellant had suffered and continue to suffer premature directions to pay a sum of Kshs. 27,040/= plus costs when there is a pending Application for Review dated 18th August, 2023 which application clearly shows that the learned trial judge made an error on the face of the record and failed to add omitted payments being:-
 - (a) Kshs. 50,794/= for 26th February, 2020.
 - b. Kshs. 68,700/= for 22nd March, 2020.
 - c. Kshs. 30,933/= for 26th April, 2020. Your Lordship and in his biasness the learned trial magistrate manipulated the following figures.
 - d. Kshs. 14,210/= instead of Kshs. 10,410/= on 30th May, 2020. (e) Kshs. 5,000/= instead of Kshs. 14,123/= purchase from [Particulars Withheld] Syokimau on 22nd December, 2020.
 - f. A sum of Kshs. 18,000/= instead of Kshs. 18,500/= on 19th April, 2021.
 - g. Kshs. 4,200/= instead of Kshs. 25,114/= on 10th May, 2021.
 - h. Kshs. 20,000/= instead of Kshs. 20,500/= on 29th July, 2021.
 - 2.2. Accordingly in making a finding that the period in default was sixteen (16) months instead of fifteen (15 months as stated by the Respondent in the pleadings the learned trial magistrate was evidently bias.
 3. That , the learned trial magistrate erred in law and in fact and failed totally to discharge his mandate faithfully, independently and justly in accordance with the oath of office which required the conduct of the Magistrate to be completely beyond reproach and to enhance confidence of the public and litigants in the administration of justice and was bias in making a finding that the application dated 13th September, 2023 was an abuse of the court process.
 4. That , the learned trial Magistrate erred in law and in fact and was wrong when he made a finding that the Honourable Magistrate did not act in a manner contrary to the law or justice and overlooked serious impact of his exparte order of arrest issued on 31st August, 2023 while the Application for Review of his orders were pending interpartes on merit for 21/09/2023 as the Appellant was arrested, humiliated and gravely prejudiced as he was arrested while taking the minor to school.



5. That , the learned trial Magistrate erred in law and in fact and acted contrary to the judicial service (code of conduct and ethics regulations 2020 dated 25th May, 2020 under Regulations 21 part ii and refused to recuse himself in this proceeding in which his impartiality might reasonably be questioned and especially where the Appellant had complained in writing about the impartiality of the court.
6. That , the learned trial magistrate erred in law and in fact and was evidently incoherent and inconsistent with the Appellants Application for recusal.
7. That , the learned trial magistrate erred in law and in fact and acted unfairly against the Appellant by enforcing his decree that was under Review causing injustice knowing that Application for recusal was not contested by the Respondent at all. And there was no evidence for the trial magistrate to make a finding that the Appellant's Application dated 13th September was an abuse of the court process.
4. Reasons Wherefore the Appellant pray for judgment against the Respondent for:-
 - a. That, the Ruling of Hon. F. Terer delivered on 19th January, 2024 be set aside and this Honourable Court directs that the matter be heard by an independent Court.
 - b. That, costs be provided
5. The respondent did not file a response to the appeal.
6. This appeal was canvassed by way of written submissions. The Appellant submitted through the firm of Wachana & Company Advocates whilst the respondent's Advocates did not file submissions.
7. The Appellant 's advocate briefly submitted that trial magistrate was evidently biased against the Appellant as he was arrested on 31st August, 2023 while the Application for Review was pending for directions on 21st August, 2023. Mr.Wachana further submitted that trial magistrate was in abuse of the due process of law when he issued a notice to show cause notwithstanding that the Appellant was up to date in remitting the minor's school fees and school related expenses and food needs at Kshs. 20,000/= per month as ordered by the trial Court on 11th August, 2021.
8. Counsel submitted that the Appellant has been making cash transfer from his Bank Account to Asher Mumbua Account on behalf of the minor and as at 2/1/2024 a total sum of Kshs. 207,011.00 has since been disbursed by the Appellant. He submitted that the trial magistrate is biased and indeed the Appellant has perceived him.
9. Mr.Wachana submitted further that the learned trial magistrate erred in law and in fact and was inherently biased and failed to make a finding that the Appellant had lost confidence in the Court's independence and ability to conduct a fair hearing as indeed the said Appellant has suffered and continue to suffer premature directions to pay a sum of Kshs. 27,040/= plus costs when there is a pending application for review dated 18th August, 2023 which application shows that the learned trial magistrate made an error on the face of the record and failed to add omitted payments.
10. Counsel submitted that it is the Appellants prayer that the Ruling of Hon. F. Terer delivered on 19th January, 2024 be set aside and this Honourable Court be pleased to direct the matter be matter be heard by an independent Court. From the pleadings the main issue arising for determination is whether there were grounds for recusal.



11. In *Philip K. Tunoi & another v Judicial Service Commission & another* [2016] eKLR, the Court of Appeal held that:

“ In determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias.”

12. On 19th January 2024 the trial court delivered a ruling in respect of appellant’s application dated 13th September,2023 in which the court dismissed the application. These orders appear did not sit well with the Applicant.

13. It is imperative to note that the court has unfettered discretion to issue orders that it deems fit in the best interest of the children. The decisions complained of herein were based on the law, facts and in the best interest of the children under article 153 of the *constitution* of Kenya. No evidence of trial magistrate being biased or preference has been shown. What has only been shown is that the appellant was unhappy with the ruling made.

DATED AT NAIROBI THIS 19TH DAY OF SEPTEMBER, 2024

S. N. RIECHI

JUDGE

