



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
HIGH COURT CIVIL APPEAL NO. 9 OF 2017

M I A.....APPELLANT

VERSUS

R H M.....RESPONDENT

(From The Judgment in Mandera - SRM Children Case No. 9 of 2017 - Duncan Mutai – RM)

JUDGMENT

1. In this matter, I do not have the original record of the proceedings from the Mandera court though the file was called by the Deputy Registrar of this court since October, 2017. I also do not have the plaint, and the defence filed herein. I however, have typed copy of Mandera Senior Resident Magistrate Children’s case number 9 of 2017 as well as the typed Judgment. No party has disputed the said proceedings.

In the magistrate’s court at Mandera the learned magistrate concluded by stating as follows in the judgment delivered on 26th September, 2017:-

“1. The defendant to remit the monthly sum of *Kshs; 21,000/-* to the defendant ,(should be plaintiff) towards maintenance of the minors which sum shall be paid on or before the 10th of October, 2017 and thereafter on the 10th day of every succeeding month.

2. The plaintiff shall have custody for the minors, but shall allow reasonable access to the defendant.

3. no orders as to costs.

From the above orders of the court, the appellant who was the defendant in the magistrate’s court has come to this court on appeal on the following grounds:-

“1. That the learned trial magistrate erred in law and fact in disregarding the vital legal and factual issues while making his judgment.

2. The learned magistrate erred in law and fact when he failed to consider the applicable law to the dispute before court.

3. The learned trial magistrate erred in law and fact in the spirit of fairness, by denying the appellant the opportunity to bring his witnesses to support his claim.

4. The learned trial magistrate erred in law and fact in showing open bias and discrimination against the appellant.
5. The learned trial magistrate did not conduct the court, in a manner that is likely to suggest that it is a court of justice.
6. The learned trial magistrate basically bulldozed the appellant illegally, and unlawfully and against the rules of natural justice.
7. The learned trial magistrate erred in law and fact when he failed to consider that the appellant was not a man of means.
8. The learned trial magistrate judgment is manifestly a miscarriage of justice. ”

At the hearing of the appeal, the appellant said that he told the magistrate that he earned Kshs; 14, 000/= per month as a Duksi Muslim teacher, and that he had five (5) children with the respondent. He stated that he had another wife with one (1) child, and yet an additional wife without a child and also a mother to take care of. He felt that the Kshs; 14, 000/= he divided equally among the wives

He said also, that he had divorced the respondent and at the time of the trial in magistrate's court he had the respondent and only another wife. However, when he came for the judgment on 26th September, The magistrate said R the respondent had asked for Kshs; 21,000/= and that is why he had now appealed, because his salary was so small. He suggested also that he would pay the respondent Kshs; 9,000/= per month, because she had more children than the other wives.

He said that he loved his children, but the respondent had denied him access, and could only see them in the Madrasa school.

The respondent in response stated that, she started by going to the children's department but that the appellant bribed them. She thus came to court. According to her, the appellant owned the [particulars withheld] school and earned Kshs ;90,000/= per month, and had employed two workers. She said that the appellant used to give her Kshs; 30,000/= per month, for utilities, but then when they separated he said that he would her only Kshs; 5,000/=. Though the appellant stated that he earned Kshs; 14,000/-, he informed the trial court, that he even maintained orphans, and then he offered to pay her Kshs; 9,000/- per month she thus was asking for Kshs;14,000/=, for maintenance of the children, medical Kshs; 3,000/= and then Kshs; 3,000/= for house rent and transport and other necessities which would translate at least to Kshs; 20,000/=.

She denied the appellant access to the children, but said that she did not want him to visit the children in school because he would steal them.

This was a matter, that was brought before the magistrate's court as a Children's case. The constitution of Kenya 2010, and the Children's Act have special provisions for children. They are dependants and legally they are to be provided for equally between the parents. However, if one of the parents has better means than the other, that parent will obviously bear the higher responsibility of providing for the children.

The appellant has not denied paternity. In fact he would not succeed in such a claim because all the five children were born during the subsistence of marriage between him and the respondent. Therefore, technically he could not deny fatherhood of any of the children.

The big issue here is the amount to be paid by the appellant, to the complainant monthly for upkeep of the children. This goes according to the means of the appellant. He has said verbally that he earns only Kshs; 14,000/=. He has not brought to court nor, did he bring to the trial court any documents to show his earnings, or any independent evidence from those who pay him

monthly. In my view, if the appellant was merely earning Kshs; 14,000/=, he could not afford to pay that is Kshs; 10,000/= to the respondent or even the Kshs; 9,000/= per month which he is now suggesting, while he maintains some other two wives and a child, as well as orphans. In my view, therefore, the appellant is not earning Kshs; 14,000/= shillings per month as he says.

The respondent has maintained that, the appellant earns Kshs; 90,000/= per month from the [particulars withheld] muslim school. In my view even if that were true, it cannot be a constant income as the number of students will naturally fluctuate.

The respondent has asked for Kshs; 14,000/= for the upkeep of the children, 3,000/- for medical expenses, and 3,000/= for other incidentals. In my view a figure of Kshs; 14,000/= per month is adequate for upkeep or maintenance of the children. If anything arises, such as their entry into school and hospitalization then those issues can be raised at the appropriate time, and either at home or through the court, the appellant can be made to shoulder part of the financial responsibility. It should be emphasised that the responsibility for upkeep of the children is both for the mother and the father, not one of them alone.

To conclude, I allow the appeal in part, and order as follows:-

- 1. The appellant will from the date of this Judgment pay to the respondent every month Kshs; 14,000/= for the upkeep of the five children, such amount to be paid every 10th day of the month.*
- 2. Any additional issues arising such as medical expenses, and school fees for the children will be shared financially between the appellant and respondent in equal basis, and in default the respondent will be at liberty to apply to the court for appropriate orders to be made.*
- 3. As this is a family matter, I order that each party bears their respective costs for the appeal.*
- 4. The orders of the trial court on custody, and reasonable access to the children are upheld.*

Dated, signed and delivered at Garissa this 10th day of April, 2018

GEORGE DULU

JUDGE