



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CHILDREN'S APPEAL NUMBER 5 OF 2017**

**GOO.....PLAINTIFF**

**VERSUS**

**LM .....DEFENDANT**

**(Being an appeal from the judgment of Hon. R. Amwayi, Resident Magistrate dated and delivered at Molo on the 18<sup>th</sup> October, 2017 in Molo Children's Case Number 2 of 2017)**

**JUDGMENT**

1. This is an appeal from judgment of the Resident Magistrate **Hon. R. Amwayi** dated and delivered at Molo on the 18<sup>th</sup> October, 2017.

2. Dissatisfied with the judgment of the learned magistrate, the appellant seeks orders that;

**1. The judgment of the subordinate court allowing the plaintiff's counter-claim be set aside.**

**2. In the alternative, the monthly contribution by the plaintiff be scaled down to such an amount that he can master the means to raise being Kshs. 3,000/= per month.**

**3. Costs herein be awarded to the plaintiff appellant.**

3. Seven (7) grounds were raised in support of the appeal. I reproduce the same herebelow;

1. THAT the learned trial magistrate erred in law and in fact in dismissing the plaintiff's suit and allowing the defendant's counter-claim on grounds that the defendant had proved her case to the required standards.

2. THAT the learned trial magistrate erred in law and in fact in finding that the plaintiff, if given custody of the minors, will not be staying with them and they will be living with their step-mother.

3. THAT the learned trial magistrate erred in finding that the plaintiff should be contributing Kshs. 10,000/= per month on top of meeting the educational and medical needs of the children.

4. THAT the learned trial magistrate erred in law in failing to ascertain the financial capability and means of the plaintiff to the effect of meeting the excessive alimony above.

5. THAT the learned trial magistrate erred in law and in fact in failing to appreciate and or consider the evidence given by the plaintiff.

6. THAT the learned trial magistrate erred and misguided herself on the law relating to custody and shared parental responsibility in regard to the Children Act.

7. THAT the learned trial magistrate erred in law in failing to consider that the defendant's evidence was untruthful and contradictory rendering it irrelevant.

4. The appeal was canvassed by way of written submissions.

5. For the appellant, it is submitted that parental responsibility should be shared equally between parents as envisaged under **Section 23 and 24 of the Children Act**.
6. It is urged that since the 2 parents are not living together anymore, the appellant no longer acquire (sic) parental responsibility against the minor. Counsel submits that both parents are in gainful employment and can therefore meet the needs of the children.
7. It is the appellant's case that he is a family man and has another family which he is taking care of. The order made by the trial court directing the appellant to make monthly contributions of Kshs. 10,000/= for the minors food was erroneous and burdensome to the appellant bearing in mind that the court had not even seen the appellant's payslip.
8. The appellant, in addition, has been tasked with the burden of paying school fees and all educational needs of the 2 minors.
9. The appellant submits that it was clear from the evidence that the minor, WOO, was in the custody of the respondent's sister. The trial court is faulted for basing its finding on custody on the reason that the children could not be separated. The appellant adds that no orders of access were made which means that despite the heavy responsibilities given to him. The appellant had no right to access the minors.
10. It is the appellant's prayer that the decision of the trial court be set aside and be substituted with an order awarding custody of the minor WOO to the appellant and an order scaling down the monthly upkeep to Kshs. 3,000/=.
11. For the respondent, it is submitted that there was evidence that during the time the appellant had custody of the minor, the minor was living with his step mother. The trial court was therefore right to hold that if custody was given to the appellant, the child would live with the step mother.
12. It is urged that it is for the appellant to prove that he could not afford the Kshs. 10,000/= ordered by court.
13. It is urged that in making an order for custody, the court is guided by the **Constitution of Kenya** and the **Children Act**. The guiding principle in making such orders is that the best interest of a child is paramount. Counsel submits that the appellant seeks custody of a minor who has a sibling who the appellant is not keen to have custody of. The trial court deemed it to be in the best interest of the child to have the two siblings stay together.
14. I have had regard to the appeal herein and the respective submissions of counsel. The questions for determination are whether the trial court erred in granting custody to the respondent and secondly whether the trial court erred in assessing the amount of money support that the appellant should extend to the minors.
15. It is clear from the record of the lower court that the appellant sued for the custody of the minor WOO. He acknowledges that at the time he married the respondent, she had one child, Adeline, who was 5 years old. It is not contested that the appellant proceeded to live with his wife (respondent) and Adeline (the child).
- 16. Section 25 of the Children Act** makes provision for circumstances under which parental responsibility may be acquired and this includes where a father has maintained such a child. In our instant case, it erroneous for the appellant to state that since he is no longer living with the child he no longer acquires (sic) parental responsibility. Once he lived with the minor and maintained her, parental responsibility was acquired. In my considered view, such responsibility does not terminate the moment the parents go to separate ways.
17. The trial court was thus spot on in making a finding that the parents herein were to exercise equal parental responsibility for the children despite the fact that they no longer lived together.
18. As regards the custody of the children, I have re-evaluated the evidence herein. It is a fact that was not contested that the 2 minors are aged 10 and 5 years old respectively. The trial court applied the correct principles in granting the custody of the minors to the respondent. At page 11 of the judgment, the trial court made reference to the decision in **Civil Appeal Number 54 of 2010 DK vs. JKN [2011] eKLR** where the court held;
- “The general rule is that where the custody of a child of tender years as defined by Section 2 of the Children Act is in issue, the mother of the child should have custody unless special circumstances are established to disqualify the mother from having the custody of such a child.”**
19. Indeed the trial magistrate was further guided by the decision in **Sospeter Ojaamong vs. Lynette Amondi Otieno, Court of Appeal Number 175 of 2006** where the court held;
- “The exceptional circumstances would include if the mother is unsettled, has taken a new husband or her living quarters are in a deplorable state.”**
20. Further the trial magistrate correctly applied the decision in **Martha Olela & Another vs. Jackson Obiero (Court of Appeal number 16 of 1979)** where it was held that special circumstances would include **“disgraceful conduct, immoral behaviour, drunken habit or bad company”**.
21. In our instant case, the minors herein are of tender age. The mother should have custody unless special circumstances exist to disqualify the mother from having the children. No special circumstances were shown in evidence to disqualify the mother.

22. More importantly, the appellant's circumstances make him unsuitable to have custody. He is married and with another family. No evidence was adduced to show that this other family would be receptive of the minor. As correctly stated by the trial court, it was necessary for the appellant to prove by way of evidence that the step mother to the child was first and foremost ready to receive the child and secondly was ready to give him the maximum care possible.

23. There would be no justification whatsoever to uproot the minor from his usual environment and separate him from his siblings and place him in a new environment where he would have to strive to integrate with a new mother and new siblings. Such a move would not be in the best interest of the child.

24. The trial magistrate, however, fell into error by failing to make orders of access in favour of the appellant. Such orders ought to have arisen unless special circumstances were shown necessitating denial of access. No such circumstances were shown and the trial court thus ought to have made orders for access.

25. As regards the amount ordered for maintenance, I have reevaluated the evidence herein. The same was rather scanty in so far as the earnings of the parents was concerned. The appellant did not adduce evidence at all on his earnings despite there being a prayer for maintenance in the counter claim.

26. The respondent on the other hand merely and casually stated in evidence that she earns Kshs. 10,000/=.

27. At page 14 of the judgment the trial magistrate stated;

**“From the evidence on record, the plaintiff is a primary school teacher while the defendant is a subordinate staff at Mama [Particulars Withheld] Hospital. They are therefore in gainful employment and can meet the needs of the children. I will therefore apportion parental responsibility as follows:-**

**a. The plaintiff who is the father of the children will meet the education needs of the children by paying school fees for both children, buying school uniform and school shoes, and stationery.**

**b. The defendant will meet the medical needs of the children by taking out NHIF cover for the children.**

**c. The plaintiff will meet the food needs of the children by contributing Kshs. 10,000/= per month towards the food needs of the children every 5<sup>th</sup> day of every month starting on 5/11/2017.”**

28. It is manifestly clear that the apportionment of responsibility was not pegged on any concrete evidence of the respective earnings of the parents.

29. In the circumstances like the one before this court, a court is enjoined to make a thorough inquiry as to the actual earnings of the parties and to ascertain with the most achievable precision the actual needs of the children.

30. That way the court would be in a position to make an informed decision as to the apportionment of responsibilities. Orders of maintenance should not lie whimsically or capriciously. They must be based on proved income and pegged on ascertained needs which the parents then share accordingly.

31. With the result that I uphold the trial court's finding on the issue of custody.

32. I proceed to set aside the orders of maintenance and remit the matter back to the trial court presided over by any other magistrate other than **R. Amwayi** for the purposes of reassessing the level of maintenance in terms of contribution by each of the parents herein.

33. A summary of the ascertained children's needs including the respective cost thereof shall be filed in court.

34. Each party herein is to within 30 days lodge in court an affidavit of means to enable the trial court assess the reasonable contribution of each parent towards maintenance of the minors herein.

35. In the best interest of the minors and noting that their lives and needs do not stop as a result of the pendency of this matter, the orders of the trial court on maintenance shall remain in force pending re-assessment by the trial court which in any event should be completed within 60 days hereof.

36. The parties shall make proposals on access rights of the appellants timelines and place(s) of access by the appellant for the court to make appropriate orders.

37. Since the appeal is only partially successful, each party is to bear its own costs.

**Dated and Delivered at Nakuru this 17<sup>th</sup> day of October, 2018.**

**A. K. NDUNG'U**

**JUDGE**