



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**

**CIVIL APPEAL NO. 11 OF 2015**

*(From the original Civil Suit No. 1 of 2014 of SRM's Court at Kyuso – E. M. Mutunga – R.M).*

D N..... APPELLANT

V E R S U S

W D ..... RESPONDENTS

**JUDGMENT**

The respondent W D filed a case in the Children's court at Kyuso No. 1 of 2014, on behalf of her six children F M D, J K D, R N D, L N D, S M D, and E N D. The case was filed against the appellant who was the defendant therein D N, her husband.

After hearing witnesses, the trial court delivered its judgment on 11th June 2015 and ordered that the appellant do pay the respondent Kshs 8,000/- monthly for the upkeep of the issues; that the respondent will take care of the clothing; that the appellant will further continue paying school fees in the respective school the issues are in; visitation rights granted to the parties much as it was not an issue on trial; and finally no order was made on costs.

Dissatisfied with the decision of the trial court, the appellant filed this appeal in July 2015 through counsel Mr. Mulinga Mbaluka Advocates, on the following grounds:-

- 1. That learned trial magistrate erred in law and fact when he directed all the responsibilities to be with the appellant.***
- 2. That learned trial magistrate erred in law and fact holding that the appellant should provide for education, shelter, and pay Kshs 8,000/- wherefore his salary is Kshs 10,000/-.***
- 3. The learned trial magistrate erred in law and fact by failing to order any responsibilities to the respondent.***
- 4. The learned trial magistrate failed in law and fact by over burdening the appellant with responsibilities.***
- 5. The learned trial magistrate erred in law and facts when he failed to give children responsibilities to the respondent who is also earning.***
- 6. The learned trial magistrate erred in law and fact when he failed to consider the fact that the appellant had done what is possible for the protection of the minors.***

**7. The learned trial magistrate erred in law and fact when he failed to consider that the appellant earns peanuts.**

**8. The learned trial magistrate erred in law and fact in awarding the respondent prayers not sought.**

**9. The learned trial magistrate erred in law and fact when he made a decision against the weight of the evidence."**

Counsel for the appellant Mr. Mulinga Mbaluka, also filed written submissions to the appeal. The respondent filed submissions to the appeal in person in the form of a replying affidavit. Mr. Mbaluka who appeared in court relied on the written submissions filed. The respondent relied on the replying affidavit and added that she wanted the appellant to take care of the children and pay for their education because he was a man of means with a job and running businesses, including an Mpesa shop. She stated that she was a tailor at Kathiani market.

I have perused and considered the written submissions of counsel for the appellant. I have also perused and considered the submissions filed by way of replying affidavit by the respondent. I have also perused the record of the trial proceedings and the Judgment.

During the hearing of the case before the trial magistrate, the respondent called seven witnesses, while the appellant called one witness.

In brief the evidence on both sides was as follows:-

It was the respondents evidence that she was married to the appellant under kamba customary law and they had children, some of whom were attending school by then. She stated that since 2009, the appellant had abandoned her and the children and was now living in Nairobi with another woman.

She stated that the children were in various schools and that at the time of tendering her testimony, F M was 20 years of age. She stated also that she needed about Kshs 30,000/= for the upkeep of the children. Six of the children testified in court and supported her position. Documents on school fees payable were tendered in court.

She stated that, following the courts intervention the appellant had paid fees for the children. However the children still continued attending school and needed payment of school fees from their father the appellant. She stated that she was a mere tailor with low earnings (Kshs 1,000/= per month). She maintained that the appellant had means to support the education and pay upkeep for the children.

In his defence, the appellant stated that he was a messenger and driver at Karen in Nairobi. He stated that he paid school fees for the children and provided copies of receipts for the payment.

He maintained that he provided everything for the children and that the respondent who is the mother, did not pay anything towards the upkeep of the children. He stated that his monthly salary was merely Kshs 10,000/= and that he had another wife. He stated also that the respondent merely cooked for the children and asked that she should share the responsibilities of maintaining the children.

It is on the above evidence that the court delivered its judgment which is now contested by the appellant.

This is a first appeal. As a first appellate court, I am required to reconsider the evidence on record afresh and come to my own conclusions and inferences – see the case of ***Selle -vs- Associated Boat Company Ltd (1968) EA 123.***

This was a case on maintenance and education of children. Under both the Constitution of Kenya 2010 and the Children's Act No. 8 of 2001, courts are required to ensure that the interests of minor

children are given paramount importance. Article 53 of the Constitution is particularly relevant in this regard, the relevant part of which states as follows:-

***“53(2) a child’s best interests are of paramount importance in every matter concerning the child”.***

The appellant and the respondent agree that they are husband and wife. They also agree that they have school going children. They are now staying separate, though they are not legally separated. The appellant lives in Nairobi and is married to another wife. The respondent lives near Mwingi town in Kathiani, with the children, doing a tailoring business. Both parties agreed in their evidence at the trial that they are equally responsible for maintaining and educating the children.

The respondent said that the appellant has a high income which was enough to pay for school fees and upkeep. The court ordered that the respondent lives with the children and that she provides clothing for them. The court also ordered that the appellant should continue paying school fees for the children, as he had said that he was already doing so, and also pays Kshs 8,000/= to the respondent monthly for the upkeep of the children.

The appellant has now come to court on appeal complaining about the order for payment of Kshs 8,000/= monthly for the upkeep of the children, claiming that his salary was Kshs 10,000/= per month, and that he had another wife to take care of. The respondent says that the appellant, in addition to the monthly salary, owned businesses including an Mpesa shop. No dispute has been recorded on the allegation that the appellant has an Mpesa- shop and infact documents on the business transaction on the Mpesa shop were used in the trial court.

None of the parties produced any documents at the trial to support the alleged income by either. No doubt this failure of the parties to disclose or provide more detailed information to the trial court on their actual incomes, made the work of the magistrate in assessing the level maintenance for the children difficult.

In my view the amount for maintenance per month for the children should have been based on the evidence tendered in court. The respondent said that she earned Kshs 1,000/= per month from her tailoring business and was unable to pay school fees. The appellant said that he earned only Kshs 10,000/= per month and that he was living with another wife. He offered to pay all the school fees for the children which was a big burden. He had paid school fees for the children upto the time of hearing of the case, though admittedly on court orders.

I appreciate that parental responsibilities under the Children’s Act is on the basis of 50/50 between the two parents - see section 24 of the Act. However in my view, that formula applies only in the ideal situation where both parents are able to bear their equal responsibilities for the upkeep and education of the children.

In reality however, in more cases than not, one of the parents is earning tangible income and another one is either not earning any monthly income or is earning very little. In such situations, the parent who has the means, in view of the fact that the interest of the child have been given paramount importance as required by both the Constitution and the children’s Act, the parent who has financial ability has to bear a bigger responsibilities for bringing up the children.

Assuming that the appellant was earning a net salary of Kshs 10,000/= per month or even a net salary of Kshs 15,000/=:, in my view paying maintenance for the children of Kshs 8000/= per month was too burdensome, since he was also to pay school fees. He stated that he had build a house in which they were living. He also needed to survive and take care of his personal needs, and further he had another wife to take care of.

From the above considerations, I am of the view that the amount of Kshs 8,000/- per month for the maintenance of the children was on the higher side. One of the children was already 20 years of age and capable of fending for herself. I will thus vary the amount for the maintenance of the children and order

that instead the appellant will pay the respondent Kshs 4,000/- per month for maintenance or upkeep of the children. The other orders of the trial court are still upheld. I find no order that was completely unrelated to the issues, on this was a matter involving the welfare of children.

Consequently I allow the appeal only to the extent that I set aside the order of the trial court for payment by the appellant to the respondent of Kshs 8,000/= per month for the upkeep of the children, and order that instead the appellant will pay the respondent an amount of Kshs 4,000/= per month for the upkeep of the children with effect from the date of delivery of this judgment. The other orders of the trial court are upheld.

As for costs, since this is a matter between husband and wife, and relates to the welfare of their children, I order that each party will bear their respective costs of the appeal.

**Dated and delivered at Garissa this 12th day of July 2016.**

**GEORGE DULU**

**JUDGE**