



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**CIVIL APPEAL NO. 60 OF 2015**  
**(FORMERLY KISII HCCA NO. 104 OF 2013)**

**BETWEEN**

**D O A..... APPELLANT**

**AND**

**B A O ..... RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. D.K. Kemei, SPM at the Senior Principal's Magistrates Court in Migori in Children's Case No. 2 of 2013 dated 29<sup>th</sup> July 2013)***

**JUDGMENT**

1. The parties to this appeal were married under Luo customary law in the year 2008. Their marriage was blessed with one child; S A O aged 2 years at the time of the judgment. It is not in dispute that the marriage was beset by many problems and as a result divorce proceedings were commenced by the respondent. The marriage was dissolved on 18<sup>th</sup> April 2013 in ***Rongo Divorce Cause No. 22 of 2013***. The court declined to deal with the issue of maintenance of the child and instead directed the parties to move the Children's Court for appropriate relief.
2. The respondent then filed a suit in the subordinate court seeking orders of custody and maintenance. In his defence the appellant sought custody of the child and the grant of visitation rights to the respondent. After hearing the matter the learned magistrate awarded the respondent custody of the child and directed the appellant to pay Kshs. 4,000/- monthly towards upkeep of the child.
3. The appellant appeals against the judgment and decree on the grounds that the court ought to have granted custody of the child to him as the respondent had gone back to live with her former husband, that he ought not to have been condemned to pay maintenance as he had been supporting the child comfortably before the respondent deserted him. That is assessing maintenance the learned magistrate failed to take into account the fact that he was not in gainful employment and had several children and wives to take care of and therefore the sum of Kshs. 4000/- awarded was without regard to him means.
4. At the hearing of the appeal, the appellant stated that the respondent had custody of the child and that the only issue he wished to challenge was that of maintenance. He submitted that he was a peasant farmer with other children who he supported and as such the appeal should be allowed.

5. Despite service of court process, the respondent did not attend court for the hearing of the appeal.
6. As this is a first appeal, this Court is entitled to review the entire evidence and reach its own independent conclusions bearing in mind that it neither saw nor heard the witnesses testify (see ***Selle v Associated Motor Boat Co. [1968] EA 123*** and ***Kiruga v Kiruga & Another [1988] KLR 348***).
7. Having reviewed the evidence, I find that the testimony on both sides was focused on the state of the marriage which had irretrievably broken down. The witnesses who testified on both sides were not helpful as regards custody and maintenance.
8. On the issue of the child, the respondent testified that at the time the child aged 2 years and was still breastfeeding. She stated that the appellant had abandoned her hence she sought maintenance as follows; clothing – Kshs. 2000/-, rent – Kshs. 2000/-, food – Kshs. 2000/-, medical Kshs. 3000/-, school fees – Kshs. 12,000/- and other expenses totaling Kshs. 27,500/-. She testified that the appellant was a farmer and had a posho mill, motorcycle taxi, rental houses and a car wash.
9. The appellant testimony was that he had built for the respondent a house valued at Kshs. 200,000/- and that since she deserted, he had undergone a loss. He accused the respondent of going back to her former husband and that he was being forced to maintain her and her three children. He stated that he was able to take care of the child himself.
10. The learned magistrate correctly held that since the child was of tender years and was still breastfeeding at the time, it was in the best interests of the child that the respondent should have custody of the child and appellant should have access. As regards the issue of maintenance, the learned magistrate held as follows;

*The plaintiff claims the Defendant is a businessman but did not provide documentary proof of the Defendant's income so that this court could know the exact amount to be ordered to be paid towards maintenance. The Court at Rongo ordered the Defendant to maintain the child in question. The Defendant stated that he has a large family with children in school who depend on him since the child is young and yet to grow up to go to school and taking into consideration the Defendant's circumstances and compelled by the fact that the plaintiff did not provide evidence of the Defendant's financial means, I would find that it would be fair to order the Defendant to be paying a sum of four thousand shilling per month towards the upkeep and maintenance of the child.*

11. The duty to maintain a child falls on both parents yet in circumstances such as these where one party states that she is unable to maintain the child, the court is duty bound to investigate the circumstances of each parent and determine the fair or equitable provision to be made for the child. While it is correct to state that the respondent did not provide documentary evidence, I think it is stretching the issue of evidence too far to expect that a rural Kenyan woman steeped in a paternalistic culture would keep a record, let alone documentary record, of her husband's assets and expenditure. In most cases she would be only be aware of what her husband does for a living. On the other hand, the courts must expect the other party to be candid on his or her means. If necessary, the court may direct the other party to file an affidavit of means making a full disclosure of assets, income and expenditure. Furthermore, the nature and extent of income is usually a matter of personal knowledge and therefore such the person must be expected to make full disclosure otherwise the court will be entitled to make a negative inference from the facts available.
12. In order to give full effect to the best of interests of the child which is anchored by **Article 53(2)** of the Constitution and reinforced by **section 4(2)** of the ***Children Act***, the parties must be candid and must provide the court with the necessary information for a proper assessment of maintenance to be made by the court. In this case the appellant merely made bland statements of fact that he had other children whom he was supporting. He did not disclose how many children he has, how

much he was paying for each of them and what his sources of income were. At least he stated that he had built for the respondent a house worth Kshs. 200,000/-. Based on the information available the learned magistrate cannot be faulted for ordering payment of a monthly sum of Kshs. 4,000/-.

13.I decline to intervene in the determination by the subordinate court. I affirm the judgment and dismiss the appeal. There shall be no order as to costs.

**DATED and DELIVERED at MIGORI this 6<sup>th</sup> day of May 2015.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.