



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 127 OF 2011

S M.....APPELLANT/RESPONDENT

VERSUS

1. J M

2. F M

3. E K M.....RESPONDENTS/APPLICANTS

J U D G M E N T

1. **J M** and **F M** minors aged **6 years** and **4½ years** respectively sued their father **S M** (Appellant) through their mother and next friend, **E K M**, seeking maintenance. Their mother also sought custody of the children. Their parents (Appellant and 3rd Respondent) were married under the **Kamba Customary Law**. The 3rd Respondent was forced into desertion following allegations of cruelty on the part of the Appellant. Consequently the Appellant neglected the minors.

2. In his defence the Appellant prayed to maintain the children while in his custody.

3. The trial court considered evidence adduced and ordered the Appellant to make monthly contribution to the 3rd Respondent of **Kshs. 10,000/=** being maintenance of the 1st and 2nd Respondents. The Appellant was also required to meet the 1st and 2nd Respondents school fees, uniforms and/or shoes until they reach the age of majority. The Appellant was to have unlimited access to the children subject to prior arrangement with their mother.

4. Being aggrieved by the decision of the court the Appellant appealed on grounds that:

- There were no grounds necessitating grant of custody of the children to the 3rd Respondent.
- No consideration was given to the fact that the 3rd Respondent deserted the matrimonial home without a just cause.
- Awarding the 3rd Respondent **Kshs. 10,000/=** together with payment of school fees, and provision of uniforms and shoes for children was erroneous as the Appellant's monthly salary could not support such maintenance.
- The Defendant's net salary was not taken into account.
- Holding that the 3rd Respondent had no income was contrary to her evidence that she worked and earned **Kshs. 3,000/=** per month.

5. The appeal was canvassed by way of written submissions that I have taken into consideration.

6. This being a first appeal, this court is duty bound to re-evaluate the evidence adduced at the trial court, analyze it and come to its own conclusion bearing in mind that it neither saw nor heard witnesses who testified. **(See Peters v. Sunday Post Limited (1958) EA 424).**

7. The learned trial magistrate has been faulted for granting custody of the children to the 3rd Respondent without any basis. Looking at the statement of defence filed, the Appellant averred that the 3rd Respondent deceived him into believing that he was the biological father of the 1st and 2nd Respondents whereby he was fraudulently caused to provide for them. He requested for determination of paternity.

The **Deoxyribonucleic Acid (DNA)** examination carried out revealed that he was their biological father. He did not specifically pray for custody of the children. He stated that he would only be willing to take custody of the children once there was proof that he was their biological father.

8. Both parents have equal rights to custody of a child. When it comes to deciding which one of them should be granted custody the court must consider:

- The welfare of the child.
- The conduct of parents.
- The wish of the child.

(See Section 83(1)(a)(d)(j) of the Children Act).

9. The children herein were aged **6 years** and **4½ years** respectively. These were children of tender years. **(See Section 2 of the Children Act).** Ordinarily children of tender years would be given to their mother, unless there are exceptional circumstances. **(See Karanu v. Karanu (1975) EA 18).** These were children who lived with their mother in **Migwani Location** all along as their father stayed away in **Nairobi**, his place of duty. The 3rd Respondent demonstrated by way of evidence that she is fit to continue taking care of the children as she had done previously. Even when the Appellant declined to support her and the children, she continued to fend for them. After she was forced into desertion, the Appellant did not care about the children. This was tantamount to abandoning the children to be taken care by someone else. This was lack of responsibility on the part of the Appellant as a parent. His conduct as a parent was questionable.

10. This court appreciates that there are exceptional and compelling reasons that may disqualify a mother from getting custody of the children. Such exceptional circumstances would include: The mother being a person who is unsettled such that she cannot contribute to the children's emotional and material growth; The mother's house being unsuitable place for the children to live in; or where she is not possessed of sufficient means to guarantee the children a sense of belonging.

11. The learned trial magistrate in granting the order considered the fact that all along the children lived with their mother without any input from their father. He found her a fit and proper person to stay with them.

12. Having re-evaluated evidence adduced I consider the 3rd Respondent the best parent to have been placed by the trial court to take care of the children. The order made was in their best interest.

13. Secondly, there is the issue raised in respect of the sum awarded for maintenance. It is submitted that the Appellant offered to pay **Kshs. 3,000/=** per month a sum that was enhanced to **Kshs. 5,000/=** by the court on granting of the stay order. He finds the sum reasonable and prays to continue paying the same. Further, he prays that payment of school fees, uniform and shoes should be shared between both parents.

14. Custody of the children having been granted to their mother she was entitled to maintenance until the children attain the age of majority.

15. Both the Appellant and the 3rd Respondent had responsibility to maintain the 1st and 2nd Respondents. They were duty bound to provide for their basic requirements like food, shelter, clothing, medical care and education (**See Section 23(2) of the Children Act**).

16. It is evident that the 3rd Respondent provided for their shelter, clothing and medical care. What the Appellant was ordered to provide was education and cash money that would supplement other requirements. I am persuaded by the case cited of **Najma Ali Ahmed vs. Swaleh Rubea (2010)eKLR** where the court stated:

“In considering what ought to be paid as maintenance for a child a court should consider:

- a. *The earning capacity, property and other financial resources of the parties, the financial resources of the parties, their financial needs, obligation or responsibilities.*
- b. *Financial needs of the child and the child’s current circumstances,*
- c. *Medical needs and education, and the overriding factor being the welfare and best interest of the child as envisaged under the Children’s Act.”*

17. The 3rd Respondent was in gainful employment earning **Kshs. 3,000/=** per month. The Appellant on the other hand earned a gross salary of **Kshs. 40,000/=**. In the month of June, 2011 he had liabilities therefore earned a net salary of **Kshs. 15,538.15**. It was not suggested that he had other financial resources or other responsibilities.

On cross examination it emerged that he was not paying the children’s fee despite knowing that they were learning at [particulars withheld] Academy. He was not providing for their food, and could not even tell in which class they were. In the circumstances the order made by the trial court directing him to pay their school fees and provide them with uniforms and shoes was justified. With regard to the monthly contribution where he was ordered to pay **Kshs. 10,000/=**. Considering his personal needs, a sum of **Kshs. 8,000/=** should have been sufficient in the circumstances.

18. From the foregoing the appeal shall succeed partially. I therefore uphold the orders made by the Lower Court in regard to custody of the children and maintenance. Save that the sum the Appellant is required to contribute on monthly basis shall be reduced from **Kshs. 10,000/=** to **Kshs. 8,000/=**.

19. Each party shall bear costs of the appeal.

20. It is so ordered.

Dated at Kitui this 16TH day of NOVEMBER, 2015.

L. N. MUTENDE

JUDGE

Dated, Signed and Delivered at Machakos this 2nd day of December, 2015.

P. NYAMWEYA

JUDGE