REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT FAMILY APPEAL

CIVIL APPEAL NO. E052 OF 2020

IN THE MATTER OF HM AND MKT (CHILDREN)

JT.....APPELLANT

-VERSUS-

FN.....RESPONDENT

(Being an appeal from the ruling of the Children's Court at Nairobi by Hon. M.A. Otindo delivered on the 222nd October 2020 in Children Case No. 690 of 2019)

JUDGMENT

1. The dispute between the appellant JT and the respondent FN relates to two children MKT and HM. The respondent is the mother of the children. The children were born on 25th October 2010 and 14th May 2011, respectively. The appellant disputed that he was the father of either child. The dispute was before the learned Senior Resident Magistrate M.A. Otindo of the Children Court at Milimani. On 16th September 2019 the parties agreed to have a DNA test conducted by Kenyatta National Hospital to determine if the appellant was the father of HM. The DNA was conducted on 4th October 2019. On 21st December 2019 a report was filed in court showing that the appellant was the father.

2. The proceedings were in **Children Case No. 690 of 2019**. In the case the respondent had filed a plaint seeking that the appellant be compelled to pay fees and all school related expenses, to procure sufficient and reasonable care and to pay rent and upkeep for the child. The appellant's response was that, although he had a relationship with the respondent in 2010 the same had ended soon thereafter, and that he was not the father of the child. These were the circumstances that had led to the consent order for a DNA test to determine paternity.

3. MKT was the subject of **Children Case No. 80 of 2018** at Milimani in which the respondent had sued the appellant to pay school fees, medical care, rent and upkeep. In the matter the respondent had produced a certificate of birth showing that the appellant was the father of the child. It does not appear to be in dispute that on 13th February 2019 the court issued interim orders compelling the appellant to pay school fees and school related expenses for the minor and directed the parties to undergo a DNA test on 20th February 2018 and appear in court on 14th March 2018. After that the respondent failed to come to court or avail the child. This happened several times until the appellant had the suit dismissed for want of prosecution.

4. When the appellant defended the suit in **Children Court Case No. 690 of 2019** he also filed a counterclaim, making reference to Children Case No. 80 of 2018, and in particular the birth certificate that the respondent had produced therein indicating that he was the father of MKT. He sought orders that a DNA test be conducted for each child. If the DNA results showed him to be the father, he sought an order that the two equally share parental responsibility for each child, an order that he accesses the children and access to the children's academic information, and so on.

5. On 22nd October 2020 the trial court delivered a ruling following the applicant's application dated 12th August 2020 which sought that a DNA test be conducted for either child to determine its paternity, and that the respondent be compelled to surrender to court for determination the birth certificate No. xxxx for MKT. if the same is found to be a forgery. The court heard the application, the response and the submissions by counsel. It decided that, in respect of HM a DNA test had been conducted and results obtained confirming the appellant as the father and that the reservations by the appellant to the results had no basis as they had not been particularised. Regarding MKT, the court found that it was premature to order DNA as the respondent had not yet responded to the counterclaim which was the basis for the application. It was after the counterclaim had been responded to that the court was going to deal with the issues of a DNA test and the birth certificate.

6. It was the ruling of 22nd October 2020 that led to the appeal by the appellant. In the Memorandum of Appeal dated 3rd November 2020 the grounds of appeal were as follows:-

> **"1) The learned magistrate erred in law and in fact in failing to consider all issues presented for determination by the Appellant and thereby arriving at an erroneous decision.**
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> **2. The learned magistrate erred in fact and in law in failing to consider that the Appellant had concrete reasons as to why he desired the minor HM (10 years) be presented for a 2nd DNA while MKT (10 years) be presented for DNA testing.**
>
> **3. The learned magistrate erred in law and fact in failing to allow the Appellant's application for DNA testing for the minors despite the fact that the Appellant was fulfilling his parental obligations and no prejudice would be occasioned to the minors.**
>
> **4. The learned magistrate erred in facts and law by holding that a 2nd DNA would be a violation of the child HM's (10 years) constitutional rights a fact which was presumed that the Appellant was not entitled to the same constitutional rights.**
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> **5. The learned magistrate erred in facts and in law by holding that MKT (10 years) could not be subjected to a DNA before the Respondent had responded to the counterclaim despite the fact that the counter claim had not been confirmed for hearing and that a 1st DNA in relation to HM (10 years) had been ordered before the Appellant had filed a defence.**
>
> **6. The learned magistrate erred in law and in fact in failing to consider the Application by the Appellant and thus failed to consider the prayers thereof."**

He sought that the orders issued by the trial court be set aside and be substituted with orders directing that a DNA test be held for each child.

7. I have had the benefit of reading the written submissions by M/s Muhanda for the appellant and Mr. Oketch for the respondent. This being a first appeal, it is the duty of this court to evaluate the evidence before the trial court and make its own conclusions, remembering that it neither saw nor heard the witnesses, and to make due allowance for that **(Selle –v- Associated Motor Boat Company Ltd [1968]EA 123).** It is out of respect for this principle that I have in the foregoing carefully brought out the evidence that the trial court was dealing with.

8. The appeal is easy to deal with. The parties agreed to conduct a DNA test to determine the paternity of HM. They agreed on the institution to conduct the DNA test. The results came out showing that the appellant was the father of the child. In the application, the court noted, the appellant expressed reservations without saying what the basis of his reservations was. Minding that there was need to protect the bodily security and integrity of the child, the court observed that it was not enough for the appellant to say that he had reservations. He needed to lay down specific and substantive reasons why he believed that the DNA results were not acceptable. The court found that, under those circumstances, to subject the child to a second DNA test would violate its constitutional rights.

9. In short, the trial court gave its reasons why it could not order a second DNA for HM. I find that the reasons were valid, and therefore there is no merit in the complaint by the appellant.

10. As for MKT the court found that it was premature to deal with the question of a DNA test or the validity of the birth certificate that had been produced by the respondent. It sought the parties to wait for the respondent's reply to defence and defence to counterclaim to be filed so that it could deal with the questions. In other words, the court adjourned the two questions in relation to MKT. It did not decide one way or the other on the two questions.

11. The parties need to recall that under **section 73** of the **Children Act (Cap. 141)** the primary jurisdiction to decide all matters children, including their paternity, belongs to the Children Court. This court will only intervene when a party is aggrieved by a decision that the Children Court has made.

12. In conclusion, I find no merit in the appellant's appeal which I dismiss with costs.

13. The cross-appeal by the respondent followed the dissatisfaction with the ruling delivered on 3rd September 2020 by the trial court. In the Notice of Cross-appeal dated 12th April 2021, the respondent gave the following grounds:-

> **"1) The learned Magistrate erred in law by failing to direct that the Appellant herein caters for the minor's outstanding school fees balance of Kenya Shillings Five Hundred and Forty-Two Thousand, Eight Hundred (Kshs. 542,800/=), being the outstanding fees balance from the time the minor commenced her schooling to the time of the ruling.**
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> **2. The learned Magistrate erred in law by providing for an amount of Kenya Shillings Fifteen Thousand (Kshs. 15,000/=) as upkeep for the minor which amount is not sufficient in light of the prevailing economic conditions;**
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> **3. The learned Magistrate erred in law and in fact by failing to hold that the order for monthly upkeep of the minor to be deemed to have been issued and operational at the date of the minor's birth.**
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> **4. the learned Magistrate erred in law by her failure to appreciate the fact that the equal responsibility in parenthood commences from the time of the minor's birth."**

She proposed that –

"1. The court direct the Appellant to pay to the Respondent on behalf of the Minor an amount of Kenya Shillings Five Hundred and forty Two Thousand, Eight Hundred (Kshs. 542,800/=) being the outstanding fees balance from the time of filing of the suit to the time of the ruling.

2. The court reviews upwards the amount Kenya Shillings Fifteen Thousand (Kshs. 15,000/=) being the amount awarded as the monthly upkeep for the minor.

3. The amount for upkeep awarded be deemed to have been issued and operational at the date of the Manor's birth. Consequently, the Appellant be ordered to pay for monthly upkeep from the date of the Minor's birth."

14. I agree with the applicant that this was not a cross-appeal but a separate appeal. A cross-appeal would have arisen if the respondent was dissatisfied with the trial court's ruling of 22nd October 2020. A cross-appeal is a request filed by a cross-appellant requesting that a higher court reviews a decision made by a lower court. The cross-appellant is already a party (a respondent) to an appeal filed against him by the appellant in the same decision. In the instant case, the respondent was not aggrieved by the ruling of 22nd October 2020. If she was aggrieved by the ruling of 3rd September 2020, then hers was a different appeal which under **section 79** of the **Civil Procedure Act** ought to have been filed within a period of 30 days from date of the ruling, unless there was leave to file it out of time. There was no such leave sought or obtained. The appeal is therefore hopelessly out of time. It is incompetent and is struck out with costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER, 2021

A.O. MUCHELULE

JUDGE