REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 47 OF 2018

SWK.....APPELLANT

VERSUS

RNK.....RESPONDENT

(Being an appeal from the Judgment of Hon. B. J. Bartoo (RM) delivered on 8th March, 2018 at Thika Chief Magistrate Court in Children Case No. 38 of 2017-THIKA)

JUDGMENT

1. This appeal emanates from the judgment of Bartoo,Resident Magistrate in Thika Children Case No. 38 of 2017. By her plaint filed on 2/03/2017, the Plaintiff in the lower court and now the Respondent herein, had sued the Defendant now the Appellant claiming several reliefs including custody of a minor child **(J.B.R)** and a declaration that the Appellant was duty bound to discharge his parental responsibility concerning the minor by providing for him. She averred that she had cohabited with the Appellant over ten years and that the Appellant had assumed parental responsibility in regard to the minor, **J.B. R**.

2. The Appellant filed his defence denying that he had ever cohabited with the Respondent and disputing parental responsibility in respect of the minor herein. The matter proceeded to a full hearing where only the parties testified. In her judgment, the trial Magistrate found for the Respondent. Custody of the minor, with access to the Appellant on weekends was granted to the Respondent. The Appellant was ordered to pay school fees and any education related expenses for the minor while the Respondent would provide food, clothing, rent and electricity. The medical and related expenses of the minor were to be catered for under the Respondent's National Hospital Insurance Fund (**NHIF**) cover.

3. The Appellant was aggrieved with the lower court's judgment and has preferred the present appeal based on the following grounds:-

> **"a) That the learned trial magistrate erred in both fact and in law when she ordered the Appellant to maintain the minor subject of this matter yet he is not the biological father of the minor and no proof of extended parental responsibility was adduced by the Respondent.**
>
> **b)The learned trial Magistrate erred in fact and in law when she ordered that the Appellant be allowed visitation rights over the minor who is not his child and whom he has not had prior parental relationship with. He had equally not sought for such orders.**
>
> **c)The learned trial magistrate erred in fact and law by failing to appreciate the role of the biological father in the minor's upbringing."**

4. The Respondent's case, as it emerged at the trial was that she met the Appellant in the year 2006. She testified that she has a child one J.B.R aged eight years and a student at St. J. Academy. She added that she had the child with another man in 2009 while the Appellant was away in Botswana. That nevertheless, the Appellant supported the child by sending money *via* MPESA. She identified MPESA statements to that effect.

5. She testified further that the money sent to her by the Appellant was intended for rent and school fees. She also produced a letter from **NHIF** to prove that she and her son were registered as dependent's in their capacity as the Appellant's wife and child respectively. In cross-examination she reiterated that the Appellant was her husband and that the two started cohabiting as a couple in the year 2006 and subsequently visited each other when she moved to Nairobi in the year 2008 and that the Appellant paid rent for the house she and the minor occupied . She claimed that she also used to send money to the Appellant as she had retained his Automatic Teller Machine (ATM) card. She concluded by stating that the Appellant who always provided for the minor in this period.

6. The Appellant testified that he was married and had a child and that before that, the Respondent had been his girlfriend. That he was away in Botswana when the Respondent sired a child with another man. That upon his return to Kenya in 2011, he lived first in Mombasa before

securing a job at **K B,** Naivasha. He testified that he did not cohabit with the Respondent as alleged. He denied that he ever provided for the child, or that he was involved in searching for a school for the child. He contended that he only included the Respondent under his **NHIF** cover to show his commitment as he had intentions of marrying her. As for money he sent to the Respondent, he stated that it was intended for certain business and was to be refunded. He denied ever giving the Respondent his ATM card.

7. The court directed that the appeal be canvassed by way of written submissions. Through his advocate, the Appellant submitted that parental responsibility refers to the duties, rights, powers, responsibilities and authority that a parent has towards their child. He complained that the trial court did not allow itself to be guided by the considerations as laid out in Section 94 of the Children's Act but instead was guided by the uncorroborated evidence of the Respondent.

8. Counsel submitted that the Appellant only allowed the name of the minor to be included in his **NHIF** cover as a demonstration of his commitment to the Respondent. It was submitted that the Appellant did not assume parental responsibility by inclusion of the minor in his **NHIF** cover. The Appellant submitted that the court ought to have examined the relationship between him and the Respondent and the minor. Counsel submitted that the Respondent's testimony that she did cohabit with the Appellant from the year 2006 to 2016 was riddled by doubts as the said minor born in the year 2009 was not fathered by the Appellant and that the Appellant's passport showed that he was living in Botswana between 2009 and 2011.

9. Further, on claims by the Respondent that the Appellant used to maintain her, no cogent evidence was tendered and as such the Respondent failed to demonstrate how the Appellant acquired parental responsibility. Counsel submitted that the grant of visitation rights to the Appellant was wrong as the same had not been sought. It was submitted that because the Appellant is not the biological father to the minor, the trial court should have addressed itself to the liability of the biological father as envisaged in **Section 94(1)(k) of the Children Act.**

10. Reliance was also placed on the case of ***ZAK & another v MA & another (2013) eKLR*** where it was held that it would be against the values of the Constitution for a person who has had a father/mother relationship with a child to disclaim responsibility to maintain the said minor. It was contended that the Appellant did not share such a relationship with the minor. Further, it was stated that the Appellant has a wife and a child hence his financial means were stretched by these commitments. In conclusion, the court was urged to find that the Appellant has not acquired parental responsibility over the minor and to allow the appeal.

11. For her part, the Respondent submitted that the Appellant had assumed parental responsibility over the minor as shown by the MPESA statements showing that the Appellant sent money to the Respondent for the maintenance of the minor. That the Appellant's **NHIF** records also included the minor as his son and dependent. She placed reliance on Section 24(5) of the Children Act which provides that a person who has parental responsibility for a child at any time cannot cease to have that responsibility for the child.

12. Counsel contended that the Appellant's income and earning capacity were considered by the trial court as adequate to provide for the minor's education and medical expenses. Reliance was placed on She cited in support of her submissions the case of ***ZAK & another v MA & another (2013) eKLR*** where it was held that a step-parent is obligated to honor demands and to exercise duties that relate to parental responsibility over his step child. Further, counsel relied on foreign jurisprudence to support the proposition that a step-parent has an obligation to provide for a step child. The court was therefore urged to uphold the judgment of the court below.

13. The duty of the first appellate court is to re-evaluate the evidence in the lower court and to draw its own conclusions while bearing in mind that it did not have the opportunity to hear and see the witnesses testify. (See **Selle and Another v Associated Motor Boat Co. Ltd & Others (1968) EA 123**; **Peters v Sunday Post Ltd (1958) EA 424**. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on a misapprehension of the evidence or on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did [see **Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] IKAR 278).**

14. In the case of **Antony Francis Wareham t/a A.F Wareham and 2 Others v Post Office Savings Bank [2004] e KLR,** the Court of Appeal stated that:

> **?"[W]e are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings and the issues of fact or law framed by the parties or the curst on the basis of those pleadings pursuant to order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree there of is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden should fail"**

15. There is no dispute that the Appellant was not the biological father of the child herein or that there was a relationship whose status is disputed, between the parties herein. On the former issue, the trial court in its judgment seemed to find the contrary, asserting inter alia that;

> **"The Plaintiff and the Defendant have been together for a period of 10 years from 2006 – 2016 after which they broke up…. The relationship of the Plaintiff and Defendant brought forth one issue, (J. B.R.) who was born on 20th October 2009."** (sic)

16. I do not find any reference in the said judgment to the fact that the minor was not the Appellant's biological child, or any analysis of rival evidence by the parties as to whether or not they were in cohabitation between 2006 and 2016. It appears that the trial court took the Respondent's evidence as the gospel truth and concluded that there was cohabitation in the said period and that subsequently the parties separated. Nor is there any analysis of the rival evidence concerning whether indeed the Appellant had taken up parental responsibility over the minor child.

17. Whereas the trial magistrate was well alive to the rights of children and the respective duty of parents and restated the relevant law in her

judgment, she did not attempt any analysis of the evidence to support her definite findings in the matter before her.

18. The Respondent's pleaded case was that she and the Appellant had cohabited as man and wife between 2006 and 2016 and that during that period, the Appellant provided for the minor and therefore acquired parental responsibility over the minor, whom he knew not to be his biological child. And that since the "breakup" in 2016 the Appellant had not honored his obligations in regard to his acquired parental responsibility over the minor.

19. In the lower court the parties had called to their aid the provisions Section 25(2) and 94(1) of the Children Act. Indeed it seemed that part of the Respondent's case was anchored on the former section. On this appeal however, perhaps in retrospective realization that the said section had in 2013 been declared unconstitutional, both parties agree that the law applicable is found in Section 94 of the Children Act. This section provides for financial provisions by step-parents and fathers of children born out of wedlock by such parents.

20. Section 94(1) provides that:

> **"The Court may order financial provision to be made by a parent for a child including a child of the other parent who has been accepted as a child of the family and in deciding to make such an order the court shall have regard to the circumstances of the case and without prejudice to the generality of the foregoing, shall be guided by the following considerations— (a) The income or earning capacity, property and other financial resources which the parties or any other person in whose favour the court proposes to make an order, have or are likely to have in the foreseeable future; (b) the financial needs, obligations, or responsibilities which each party has or is likely to have in the foreseeable future; (c) the financial needs of the child and the child's current circumstances; (d) the income or earning capacity, if any, property and other financial resources of the child; (e) any physical or mental disabilities, illness or medical condition of the child; (f) the manner in which the child is being or was expected to be educated or trained; (g) the circumstances of any of the child's siblings; (h) the customs, practices and religion of the parties and the child; (i) whether the respondent has assumed responsibility for the maintenance of the child and if so, the extent to which and the basis on which he has assumed that responsibility and the length of the period during which he has met that responsibility; CAP. 141 [Rev. 2012] Children [Issue 1] 44 (j) whether the respondent assumed responsibility for the maintenance of the child knowing the child was not his child, or knowing that he was not legally married to the mother of the child; (k) the liability of any other person to maintain the child; (l) the liability of that person to maintain other children."**

21. The key question on this appeal, and which ought to have been carefully considered by the trial court, is whether the Respondent had proved on a balance of probabilities, that the Appellant had during their alleged union or cohabitation assumed parental responsibility as a step - father or parent responsible for providing for the minor child. The question whether the Appellant had acquired and assumed parental responsibility under Section 94(1) was a matter of fact.

22. The Respondent's evidence on alleged cohabitation, and strenuously denied by the Appellant, was not corroborated by any other witness. Not a single independent witness was called, or probative documentary material produced by the Respondent to confirm such cohabitation. Not even a single photograph was placed before the court to support the alleged cohabitation. Moreover, the admitted fact that the Appellant had during the ten-year period between 2006 and 2016 sent her some money on only four occasions, and that the minor was fathered by a different man during the alleged cohabitation introduced doubt to the Respondent's case. Although the MPESA transactions record was marked and never produced as an exhibit, the Appellant admitted that he had on four occasions transacted with the Respondent who in return, had on one of those occasions sent him money.

23. It cannot be that during a cohabitation of 10 years, the Respondent and the child were supported by four MPESA transactions. No other evidence of financial support was tendered. Besides, no documentary or other plausible evidence was tendered to show that these monies were intended as support for the minor child in particular. One would have expected to see evidence in the form of letters, call logs or messages exchanged in that regard between the parties, especially in the period when the Appellant admittedly lived in Botswana and the Respondent in Kenya.

24. There is evidence by the Appellant, that is admitted by the Respondent, that at the time the minor was born (in 2009) he had travelled to Botswana and remained there until 2011 when he returned to Kenya. He then moved to Mombasa and later to Naivasha in 2013. The Respondent admitted that the Appellant left the country for Botswana in 2009 when she got the subject child with another man. From her evidence in chief she did not travel to Botswana or communicate with him until 2011. Had she cohabited with the Appellant in Nakuru since 2006, which cohabitation was interrupted when since came to Nairobi in 2008, and later allegedly resuming in 2009 in Nairobi and later Mombasa between 2011 and 2012, she would surely have been able to call witnesses such as parents, siblings, friends or neighbours or to tender documentary evidence in proof, beyond the four MPESA transactions.

25. The Respondent placed much reliance on the **NHIF** record, also not produced but admitted by the Appellant. According to her, the Appellant initially contributed to the medical cover for the minor and herself and she later took it up and subsequently made necessary contributions. She admitted however, without explanation, that the child had not been treated on the said cover. The Appellant's position is that the Respondent was a girlfriend to whom he was committed and intended to marry but she did not seem to be too keen therefore delaying such plans. That he never cohabited with her as alleged. He admitted that he had included both the Respondent and her child as **NHIF** dependents but explained that he did so because the former was his girlfriend whom he hoped to marry. He denied ever taking further care of the child.

26. Reviewing the evidence tendered in the lower court, I am of the view that there was neither credible proof of cohabitation between the parties, nor assumption of parental responsibility by the Appellant as a step-parent or otherwise for the maintenance of the child, as envisaged in Section 94(1)(i) and (j) of the Children Act. Since the Respondent's case as pleaded could only be properly anchored primarily on these grounds, it ought to have failed on that basis. As earlier observed, the trial magistrate gave short shrift to the evidence by the Appellant and merely accepted the Respondent's case without undertaking any analysis of the entire case or a consideration of all relevant matters enumerated under Section 94(1) of the Children Act.

27. I am cognizant that several sections of the Children Act including Section 94(1) (j) have been declared unconstitutional by **Njagi J** (on 7th February 2019) in **NSA and Another v Cabinet Secretary for Ministry of Interior and Coordination of National Government and Another [2019].** However, at the time of the trial and subsequent judgment before the lower court delivered in 2018, the provisions of Section 94(1)(i) and (j) of the Children Act were in force and applicable.

28. In view of all the foregoing, I find that this appeal is merited and will allow it. This court therefore sets aside the judgment of the lower court and substitutes therefor an order that the Respondent's suit stands dismissed. In light of the nature of the dispute, parties will bear their own costs on this appeal and in the lower court. The sum of KShs.19,500 deposited into the court by the Appellant is to be released to him.

DELIVERED AND SIGNED AT KIAMBU THIS 31ST DAY OF OCTOBER 2019

C. MEOLI

JUDGE

In the presence of:

Ms Matengo holding brief for Ms Kimiti for Appellant

Respondent in Person

Court Assistant - Kevin