



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 81 OF 2018

MNB.....APPLICANT

VERSUS

J N M.....1ST RESPONDENT

A S M2ND RESPONDENT

(Being an Appeal from the Ruling and Orders of Children's Court at Nairobi (Hon. M. Aotindo (SRM) in Case No. 392 of 2018 on 27th July, 2018)

JUDGMENT

1. This is an appeal from the Ruling delivered on 27th July, 2018 in Nairobi Children's Case No. 392 of 2018.
2. The Appellant MNB filed a Notice of Motion in Nairobi Children's case No. 392 of 2018 against his parents (the 1st and 2nd Respondents) seeking the following orders:
 - (i) **THAT his parent's parental responsibility be extended beyond his 18th birthday.**
 - (ii) **THAT the Appellant be granted leave to apply for maintenance against his parents after his 18th Birthday.**
 - (iii) **THAT the costs of the Application be provided for.**
3. The Application was argued orally before the trial Court, the Appellant said the Respondents who are his biological parents had denied him a right to education by failing to provide for his school fees and related expenses at the University.
4. The Appellant further said the 2nd Respondent who is his father had abandoned him and his twin and his twin sister at birth and they managed to trace him in the year 2013 but he chose to support his twin sister and not him.
5. The Appellant said he had attained Diploma Studies and is now pursuing a degree course at [Particulars Withheld] University and he requires school fees urgently.
6. The 1st Respondent who is the Appellant's mother said the 2nd Respondent sired the twins through a rape ordeal and ran away from responsibility and she single handedly raised the Appellant and his sister until they completed their fourth form/Secondary Education and that is the time the Appellant sought his father to support him.
7. The 2nd Respondent said he had no knowledge that the 1st Respondent had given birth to children sired by him but he admitted that he had a relationship with her.
8. The trial court dismissed the application and ruled that the 2nd Respondent did not exercise any parental responsibility over the Appellant prior to his 18th birthday and he cannot now be ordered to take up parental responsibility when the appellant is over 25 years old.
9. The Magistrate's Court further said that the Appellant ought to have finished his basic education at his current age of 26 years and allowing people to pursue their parents at such an age would be opening a Pandora's box for many cases.
10. The appellant who was dissatisfied with the said ruling has now filed this Appeal on the following grounds:

(i) THAT the Learned Magistrate erred in Law and fact in failing to extend parental responsibility in favour of the Appellant against the Respondents.

(ii) THAT the Learned Magistrate erred in Law and fact in failing to consider the evidence that was produced by the Appellant to the effect that he is entitled to extension of parental responsibility particularly the right to education.

(iii) THAT the Learned Magistrate erred in Law and fact in failing to consider the Appellant's right to education as outlined in the constitution and the Children's Act.

(iv) THAT the Learned Magistrate erred in Law and fact by failing to consider enormous responsibilities placed upon Appellant under African Laws and customs.

(v) THAT the Learned Magistrate erred in Law and fact in failing to consider the financial capacity of the Respondents herein vis a vis the Appellant's right to education

(vi) THAT the Learned Magistrate misdirected herself by refusing to adhere to the spirit of Articles 48 and 159 (2) (d) of the Constitution.

(vii) THAT the Learned Magistrate misdirected herself and closed her eyes to numerous authorities at her disposal which are in favour of extension of parental responsibility.

(viii) THAT the Learned Magistrate misdirected herself in failing to take Judicial Notice of African Cultural values that advocates for the Parents to exercise some authority and responsibility over their children beyond the age of majority.

11. The Parties were directed to file Written Submissions in the Appeal. The Appellant submitted that parental responsibility is an inescapable obligation of every parent which is recognized by Article 53 (1) (e) of the constitution of Kenya and further that section 98 of the Children Act empowers the Court to make orders of maintenance.

12. The Appellant also relied on the following cases where the Court held that parental responsibility can be extended beyond the age of 18 years:

(i) ANM VS PMN [2016] eKRL

(ii) PASS VS. PASS 118 S O . 2d769

13. The Appellant also submitted that the learned magistrate erred in law and fact in failing to extend the parental responsibility beyond 18 year as the Appellant had shown that he was not able to support himself and further that the training he has enrolled in is critical to his personal development.

14. Finally the Appellant submitted that the fact that he came to know the 2nd Respondent as his father when he was an adult does not extinguish the 2nd Respondent's parental responsibility and further that the 2nd Respondent has demonstrated concern towards the Appellant's twin sister and that this Court should not let him run away from his obligations.

15. The 1st Respondent did not participate in this appeal. The 2nd Respondent submitted that the assumption of parental responsibility is provided for and that parental responsibility is defined in section 23 and 24 of the Children Act 2001 and Article 53 (1) (e) of the Constitution of Kenya.

16. The 2nd Respondent submitted that the Appellant did not establish the existence of special circumstances to warrant extension as provided for in **Section 28 (1)** of the Children Act that said Section States that;

28. Extension of responsibility beyond eighteenth birthday

(1) Parental responsibility in respect of a child may be extended by the court beyond the date of the child's eighteenth birthday if the court is satisfied upon application or of its own motion that special circumstances exist with regard to the welfare of the child that would necessitate such extension being made: Provided that the order may be applied for after the child's eighteenth birthday.

17. The 2nd Respondent said that a reading of Sections 28 and 91 show that the extension can only be done if there existed an order for Parental responsibility before the child attained the age of majority.

18. The 2nd Respondent urged Court to dismiss the Appeal with Costs to the 2nd Respondent.

19. I have considered the submissions filed in the Appeal herein together with the authorities relied on by the parties. The issues for determination in this appeal are as follows:

(i) Whether the 1st and 2nd Respondent's parental responsibility for the Appellant should be extended beyond the age of 18 years.

(ii) Whether the Appellant should be granted leave to apply for Maintenance against the 1st and 2nd Respondents after his 18th birthday.

(iii) Who pays the cost of this Appeal?

20. On the issue as to whether the parental responsibility of the 1st and 2nd Respondents toward the Appellant should be extended beyond his 18th birthday, there is evidence that the Appellant is now 26 years and that the 1st Respondent took care of the Appellant until he completed his secondary education and also attained a diploma.

21. It is upon attaining his diploma that the Appellant decided to pursue the 1st Respondent seeking support for his University education.

22. The Magistrate's Court found that at the age of 26 the Appellant ought to have completed his basic education and further that the 2nd Respondent did not exercise any parental responsibility before the Appellant attained the age of majority.

23. With respect to the 1st Respondent, I find that the Appellant did not make any submissions or seek any orders against her. The Appellant appears to have abandoned his appeal against the 1st Respondent. In any case the Appellant never filed any suit against her to provide for him.

24. The Appellant should be grateful to the 1st Respondent for the role she played single handedly in raising him and providing for him until he finished secondary education and obtained a diploma. It is not clear why the Appellant sued the 1st Respondent after he has attained the age of majority.

25. Regarding the 2nd Respondent, the Appellant said he discovered that the 2nd Respondent was his father after he had attained the age of majority. The Appellant is aggrieved that the 2nd Respondent is assisting his twin sister and that he has ignored him hence this suit.

26. The Learned Magistrate said in her Ruling as follows:

“The 1st Respondent and the Appellant despite believing that the 2nd Respondent had parental Responsibility did sit back on their rights and did not pursue him as law provides to have taken up his responsibility, it is my observation that even as at the year 2003, When the Appellant traced the 2nd Respondent, he still did not pursue him to take his parental responsibility”

27. I find that a reading of **Section 28 and 91** of the Children Act indicate that Parental responsibility can be extended if the Court is satisfied that special circumstances exist with regard to the welfare of the child that would necessitate such extension being made.

28. **Section 91 (b) (1)** also says that such a maintenance order may be applied for with leave of Court, when a person has attained the age of 18 where the person is or will be involved in education and training which will extend beyond the person's 18th birthday.

29. In the current case, I find that no order of maintenance existed prior to the Appellant attaining the age of majority.

30. The Appellant is now a young adult aged 26 years old and he is no longer a minor.

31. For the parental responsibility to be extended it must have existed in the first place and that is not the case here.

32. The appellant had an opportunity to move to Court prior to his attainment of the age of majority. This Application is being made 7 years after the Appellant attained the age of majority and I find that the same is belated.

33. The reasons the Appellant advanced for not making the application earlier is that he did not know his father and further that he was ignorant as what he should do.

34. I find that there is evidence that in the year 2003, the Appellant was already made aware by the 1st Respondent that the 2nd Respondent was his father. I further find that the said issue was disputed by the 2nd respondent and it needs to be proved by the person alleging the same.

35. Even if the said paternity is not in dispute, to ask the 2nd Respondent to assume parental responsibility for an adult aged 26 years old would amount to setting a dangerous precedent.

36. The whole purpose for providing for extension of parental responsibility is to provide for special circumstances where the attainment of the age of majority would prejudice the welfare of a child already enjoying parental responsibility

37. It was never meant to apply to a situation when the applicant has long attained the age of majority.

38. I accordingly find that the appeal herein lacks in merit and the same is accordingly dismissed.

39. On the issue of costs, I order that each party bears its own costs of this appeal.

DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 22ND DAY OF NOVEMBER, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.