REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CHILDREN APPEAL NO.4 OF 2016

N E O.....APPELLANT

VERSUS

H W K.....RESPONDENT

(An appeal from the Judgment/Decree in Nakuru C.M. Children's Civil Case NO.149 of 2014 by Hon. J. Nthuku, Snr. Resident Magistrate, Nakuru dated 10th March, 2015)

JUDGMENT

INTRODUCTION

1. This is an appeal from the judgment in Nakuru Children case No.149 of 2014 delivered on the 10/3/2014

2. Vide a memorandum of appeal dated 23/3/2015, N E O (hereinafter the appellant) appeals against the whole of the judgment and he seeks orders that:

1. The matter to proceed for full hearing and determination.

2. The transfer of the case to the High Court for hearing and disposal on priority basis.

3. The costs of this Appeal be awarded to the Appellant in any event.

3. The appeal is opposed and H W K (hereinafter the Respondent) seeks that the appeal be dismissed with costs. Directions were taken that the appeal adopted be disposed off by way of written submissions.

THE APPELLANT'S CASE

4. The grounds of appeal raised by the appellant are 8 namely:

1) That the Honourable Magistrate erred in law and fact in finding that the prayers sought in the plaint lacked merit and proceeded to dismiss the whole suit.

2) That the leaned Senior Resident Magistrate erred in law and in fact by holding that the balance of convenience is in favour of the Respondent.

3) That the learned Magistrate erred in law and fact in holding that the respondent had established a *prima facie* case based on the pleadings on record.

4) That the learned Magistrate erred in law and in fact by applying her own theory in assessing the primary facts and pleadings which made her fall into error of speculation and inserted her facts and that the appellant was not the biological father of the minor yet evidence tendered by the appellant was sufficient to support his claim and the same evidence was not rebutted by the respondent.

5) That the learned Magistrate erred in law and in fact in failing to consider all the evidence through testimonies, averments exhibits i.e. birth certificate receipts photos and witness statements during the hearing and pleadings of the appellant.

6) That the learned magistrate erred in law and in fact in shifting the burden of proof to the plaintiff entirely yet respondent also raised issues at the hearing that were ignored by the court.

7) That the learned magistrate erred in fact and law in finding that the appellant had no parental responsibilities over the minor yet the evidence on record and exhibits showed the appellant had discharged his parental responsibility prior the the suit herein. Which is against the Children's Act Section 23 of 2001 and Section 53 of the Constitution of Kenya which states clearly that the parental responsibility.

8) That the learned Magistrate erred in law and fact in failing to admit the sworn statement of the respondent and statement which the respondent admitted that the appellant was the biological father and further that the respondent had no problem with the appellant having access the same facts on record were ignored by the court in its judgment.

THE APPELLANT'S SUBMISSIONS

1. The judgment of court is impugned on submission *inter alia*, that the learned magistrate failed to admit affidavit evidence (Affidavit sworn on the 15th August, 2014) by the respondent in which she admitted the appellant was the biological father of the child. Since the respondent denied in her defence that the appellant was the biological father, the burden of proof was on her. A D.N.A. test ought to have been ordered and carried out with the alleged biological father.

2. The learned magistrate is accused of failure to factor in exhibits on record including birth certificate produced by the applicant. The same bore the names of the appellant. There were also photos (sic) showing the parties living as husband and wife. The evidence of the appellant paying for the child's necessities was ignored.

3. It is submitted that the final judgment contradicts the orders of court on an interim basis which granted the appellant access to the minor and ordering him to contribute Kshs.5000/= per month for maintenance.

4. The learned magistrate is accused of bias and failing to consider **Section 33** of the **Law of Evidence (Cap 80)** in regard to facts affecting existence of a right or custom. This is in relation to the naming of the child as a photograph was exhibited showing the minor and the respondent participating in a custom of shaving the minor according to the applicant's Luhya custom. There was also a letter from the A.C.K. Church showing that the appellant and respondent participated in prayers for the minor.

5. Finally it is submitted that counsel for the respondent got irregulary on record.

THE RESPONDENT'S SUBMISSION

6. Counsel for the respondent has submitted that:

1. The overriding factor in determining any issue involving a child, is the best interest of a child.

2. The burden of proof to prove paternity of the child entirely lies on the Plaintiff/Applicant.

3. A birth certificate is proof of paternity but not the only and final proof of the same and parental responsibility insuch a case starts after paternity of the child has been determined.

4. Interim orders issued by a court pending hearing and determination of a case can be overturned by a ruling or judgment of the same court.

5. The Advocate on record for the Respondent did enter appearance.

6. The application dated 8th August, 2014 was abandoned and the parties entered consent in court.

7. It is the respondent's case that in determining any issue involving a child, the overriding factor is the best interest of the child. Counsel agrees with the trial court that what the applicant is seeking is not aimed at furthering the interests of the child but for his own selfish needs because he states that even if he is not the father, he still seeks to provide for the child.

8. The appellant is accused of refusing to go for a D.N.A. test to prove paternity. I am referred to the decision in **PKM** V. **SPM & Another**, (2015) eKLR.

9. It is urged that the burden of proof to prove paternity of the child entirely lies on the plaintiff/appellant and that a birth certificate is proof of paternity but not the only and final proof and that parental responsibility starts after the paternity of the child has been determined.

10. Finally counsel submits that interim orders issued by a court pending hearing and determination of a case can be overruled/overturned at the judgment stage. Counsel confirms being regularly on record vide a notice of appointment of advocate dated 7th October, 2014 and filed on the same day and served on the applicant.

ANALYSIS AND DETERMINATION:

11. The appellant sued the respondent in the lower court for access to the subject minor and a declaration that he had parental responsibility over the minor. His claim was based on being the father of the minor.

12. Consequently, the appeal herein turns on whether the appellant is the father of the minor.

13. The evidence tendered at the trial court was a birth certificate, photographs and documents showing the appellant had provided for the child and reliance was placed on an affidavit earlier sworn by the respondent.

14. At the hearing, paternity was denied by the respondent and the defence prayed for a D.N.A. test, to be done. This was opposed by the appellant who stated that the respondent had admitted in an affidavit that the respondent was the biological father of the minor and he had taken up parental responsibility by providing for the child since he was born.

15. Delivering itself on the issue of the DNA test, the trial court stated that it is the plaintiff who sued and in law he had the burden of proof and he was best placed to know how to prove he was the father of the minor. The court declined to order for a DNA test.

16. I have painstakingly considered the material before court including the extensive submissions by the appellant and counsel for the respondent.

17. For a start, I notice that once confronted with the claim the respondent in answer to an affidavit in support of chamber summons dated 8th August, 2014 was categorical under oath in her replying affidavit sworn on 15th August, 2014 that the appellant was the father of the subject minor. I produce her averments hereunder:

> " 3. THAT it is not true that the Applicant and I were married but we have been blessed with the subject minor herein H K O who is seven months old.
>
> 7. THAT I also have no problem with the Defendant providing for our son only that it would be more logical to do it in the form of money to avoid instances of duplicating items."

This position is also borne out of her witness statement filed on 18th August, 2014.

ISSUE FOR DETERMINATION

18. From the material on record, the only issue for determination is whether the appellant is the father of the minor and thus entitled to access to the minor and to a declaration that he has parental responsibility on the minor.

19. In inexplicable circumstances, when the matter came up for hearing, the respondent denied paternity. The appellant when confronted with this challenge, again for reasons I can hardly understand, refused an offer to take a DNA test.

20. It is true that the burden of proof on paternity of the minor lay on the appellant. He who alleges proves. **Sections 107** to **109** of the **Evidence Act** provider as follows:

> **"107 (1) Whoever desires any court to give judgment as to the legal right and liability dependant on the existence of facts which he asserts must prove that those facts exist.**
>
> **(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies with that person.**
>
> **108. The burden of proof in suit or proceeding lies on that person who would fail if no evidence at all were given on the other side.**
>
> **109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that proof of that fact lie on any particular person."**

21. This legal position is well enunciated in the case of **Yunes Muniafu Makolwe** V. **Moses Makpkha & 3 others,** (2016) eKLR. The moment the respondent denied the fact that the appellant was the biological father of the child and the appellant insisted that he was, the burden of proof lay on the appellant to prove the fact as he wished the court to believe he was the biological father.

22. However, in our instant case, the issue of the burden of proof got convoluted the moment one considers the replying affidavit by the respondent where she unequivocally admits on oath that the appellant was the biological father of the minor and yet goes ahead to deny this in her evidence on oath while in court.

23. Faced with this dilemma, the court in my considered view ought to have adopted a different approach in the trial and for a singular important legal provision and that is that the overriding factor in determining any issue involving a child is the best interest of the child.

24. **Section 4(3)** of the **Children's Act** provides that:

> **"All judicial and administrative institutions and all persons acting in the name of these institutions, where they are**

exercising any powers conferred by this act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to:

a) Safeguard and promote the rights and welfare of the child.

b) Secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest."

25. This was a proper case for the court to go the extra mile and order for a DNA test in the best interest of the child. **Section 3(4)** of the **Evidence Act (Cap 80 Laws of Kenya)** provides that:

"A fact is not proved when it is neither proved nor disproved."

26. Neither the appellant nor the respondent proved the paternity of the minor. The appellant having been the plaintiff shouldered the burden of proof. Yet the issue of the burden on him was diluted or complicated by earlier admission and later denial by the respondent on the issue of paternity. No credible system of law would allow a party to tender evidence on oath and later on a very flimsy explanation, tender further evidence which is totally contrary to the earlier evidence. That would certainly play havoc to the rule of law and the administration of justice and it is for this reason that the law on perjury exists in our laws.

27. The resultant effect of the above scenario is that the paternity of the child was neither proved nor disapproved. Ordinarily the appellant's suit would be dismissed for lack of prove.

28. But as the appellant and respondent wrestle, we have a child in the midst and who becomes the proverbial grass that suffers when two (2) bulls fight. The proceedings before court fell short of establishing the paternity of the minor herein. This was not in the best interest of the child.

29. As held in the case of **PKM** V. **SPM & another,** [2015] eKLR it would be a minor inconvenience for the appellant if he attended to DNA testing once but for the child not to know its parents and benefit from their protection and care, the damage would linger for years to come.

30. It was therefore incumbent on the trial court when confronted with the contradictory evidence to in the best interest of the child whether on its own motion or on application (and I note the application was made) to order for a DNA test to establish paternity. This is because none of the parties proved or disproved paternity.

31. Suffice it to note that a birth certificate is proof of paternity but not the only and final prove and parental responsibility starts after paternity of the child has been determined.

I quote with approval the decision in **Wilfred Koinange Gathiomi** V. **Joyce Wambui Mutura & Another,** [2016] eKLR where paternity was central to the dispute and it was held that DNA testing was the only way to resolve the paternity issue which the appellant raised and is now reluctant to persue to its logical conclusion.

32. The decision above is supported by findings in **PKM** V. **SPM & another**, [2015] eKLR where it was stated:

"If the applicant denies paternity what other quicker way to resolve the dispute exists than to undergo a DNA test."

I agree with counsel for the respondent that DNA testing is the only final proof of paternity and the appellant refused to undergo it but I hasten to add that the matter cannot be left there. In the best interest of the child, the DNA test ought to be done.

Indeed in our instant case, the need for a DNA test becomes even more critical considering that it is the mother who is denying that the appellant is the father of the child.

33. It is in the minor's best interest that the issue of his paternity be resolved as the uncertainity of his disputed paternity will follow him for the rest of his life. By failing to order for a paternity test, the trial magistrate to fell in to error as the establishment of the truth about the paternity of the child was vital and in the best interest of the child as the matter would have been settled with finality.

34. The law relating to compulsory blood DNA testing is unsettled firstly because there is no statutory framework in place to regulate it and secondly because the judicial pronouncements on the same have not been unanimous. But there is considerable agreement on the need of DNA testing where establishing the truth is central.

35. The Court will order a party to undergo or submit to a DNA test exercising its inherent jurisdiction to establish the truth when the fact of paternity is in dispute in the case before it. The instant case is in my considered view one such case.

36. In the South African case of **Botha – vs – Dreyer (now Moller) (4421/08) [2008] ZAGPHC 395**, the Court held;

"The Court is clothed inherently and constitutionally with jurisdiction to order parties to have blood tests where it finds that the competing rights and interests of the parties require the truthful verification by specific methods. Truth is the primary value in the administration of justice and should be pursued, if not for its own sake then at least because it

invariably is the best means of doing justice in most controversies.

37. Compelling a non-consenting adult to undergo DNA testing against his will constitutes a violation of his rights to dignity and privacy secured under articles 28 and 31 of the Constitution. (see SWM – VS – GMK) 2012 eKLR and RMK – VS – AKG & Another (2013) eKLR.

38. The determination of when such intrusion is justifiable under Article 24(1) of the constitution requires that the Court strikes a balance between the need to establish the truth in the matter against the rights of the affected party.

39. In the Indian case of Re G (Parentage blood sample) 1997 1 F.L.R. 360 cited in the case of R **ohitShekhar vs Narayan Ditt Tiwari & Another on 27 April 2012, High Court of Delhi IA No. 10394/2011 in CS(OS) No. 700/2008**, it was stated;

> "**Justice is best served by truth. Justice is not served by impeding the establishment of truth. No injustice is done to him by conclusively establishing paternity. If he is the father, his position is put beyond doubt by the testing, and the justice of his position is entrenched by the destruction of the mother's doubts and aspersions. If he is not the father, no injustice is done by acknowledging him to be a devoted stepfather to a child of the family. Justice to a child, a factor not to be ignored, demands that the truth be known when truth can be established, as it undoubtedly can. Whilst, therefore, I do not in any way wish to undermine the sincerity of the father's belief that contact is of a continuing good to the child and that it will be reduced if the mother's beliefs prevail, that contact is best when taking place against the reality of fact, and fact can be established by these tests being undertaken."**

40. The decision in Re G (Supra) is relevant and applicable in our instant suit. There is need to establish the truth about the paternity of the child in a situation where a mother (and conventional wisdom has it that mothers are the only ones best placed to know the paternity of a child) denies that a particular man is the father of the child and the man insists to be the father.

41. That would be in the best interest of the child in creating certainty about his parentage and to benefit from protection and care from the 'real' parents.

42. In Botha – Vs – Dreyer (Supra), the Court was of the view that as a general rule, the correct approach is that discovery of truth should prevail over the idea that the rights of privacy and bodily integrity should be respected.

43. My humble view is that it is in the best interests of the child that doubts regarding paternity are resolved and put beyond doubt using the best available evidence. The trial court shied away from this obligation.

44. I am all the while alive to the fact that DNA in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner whenever such request is made. The court has to consider diverse aspects.... the pros and cons of such order and whether it is possible for the Court to reach the truth without use of such tests (see Bhabani Prasad Jena – vs – Convener Sec Orissa Civil Appeal Nos. 6222 – 6223 – India).

I am however pursuaded that a DNA testing in these proceedings was necessary to determine paternity with finality.

45. The issue of the Advocate being irregularly on record is readily answered by the existence of a notice of appointment of advocate filed and it is also worth mentioning in passing that interim orders can always be overturned at the final judgment.

46. So, which way this appeal? For the above stated reasons, the appeal herein is partially successful. Having found that the central question before the Court was not determined properly or at all, the order that commends itself to me is to allow the appeal, set aside the judgment and decree dated 10/3/2015 and in lieu thereof remit this case back to the Chief Magistrate's Court for retrial and determination by a magistrate other than J. Nthuku Senior Resident Magistrate with a specific order that the appellant, the respondent and the minor are to avail themselves for DNA testing at the Government Chemist at a date to be agreed upon them and in any event within 30 days of this judgment. The report from government chemist be tendered in evidence before the trial court. This matter be listed for hearing and disposal on a priority basis. Each party to bear its own costs of this appeal.

Dated, Signed and Delivered Nakuru this 22nd day of March, 2017.

A. K. NDUNG'U

JUDGE