REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 904 OF 2005

J M & ANOTHER.....APPELLANT

VERSUS

S C N.....DEFENDANT

(An appeal against the conviction and sentence of Resident Magistrate G.P Ngare in Kangema Civil Case No. 71 of 2001 delivered on 8th November, 2005)

JUDGEMENT

The appellants are father and daughter who sued the respondent in the lower court for damages for pregnancy compensation under Kikuyu customary law. Their suit was dismissed by the lower court hence this appeal. In the memorandum of appeal they faulted the trial court for finding that the 2nd appellant and the respondent ought to have been friends for the respondent to be liable to pay pregnancy compensation.

The trial magistrate was also faulted for stating that the appellants refused to let the 2nd appellant undergo a DNA test. He was also faulted for finding that the appellants had not proved the agreement between them and the respondent to pay compensation demanded, and that he was also wrong to find that the case was not proved on a balance of probability.

As the first appellate court I have considered the evidence adduced before the trial court with the view to arriving at independent conclusions. The trial court found that it was important for the appellants to prove that there was sexual intercourse giving rise to the pregnancy. The evidence on record was that the respondent raped the 2nd appellant. This was denied by the respondent and at the end of it all, it was the word of the 2nd appellant as against that of the respondent.

The trial court found that the best answer to the issue was for the parties to submit to a DNA test to determine paternity but this was not done. He also dismissed the alleged agreement between the parties for reasons that there was doubt as to whether the respondent participated in the proceedings. In what would appear to have been a straight forward case, the evidence left several loose ends.

The 2nd appellant did not report the sexual encounter with the respondent to her parents until she was taken to hospital by the 1st appellant. This was a criminal case of rape yet no report was made to the police. Corroborative evidence is lacking in material particulars.

Whereas pregnancy compensation is allowed under Kikuyu Customary law and perimeters settled, proof was lacking in this particular case. The trial court was correct to dismiss the appellant's case. I am in agreement therefore that this appeal is lacking in merit and therefore dismissed. Each party however, shall bear their own costs.

Dated, signed and delivered at Nairobi this 30th Day of November, 2016.

MBOGHOLI MSAGHA

JUDGE