



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO. 5 OF 2013

M M.....APPELLANT

VERSUS

M N..... RESPONDENT

(From the judgment in Mwingi SRM Civil Case No. 244 of 2009 delivered on 20th March 2013 – H. N. Nyaberi Ag. SPM)

JUDGMENT

The appellant filed a plaint and later filed an amended plaint in the subordinate court against the respondent. The claim was for enticement of his wife by the respondent resulting in the birth of a daughter. He relied on Kamba Customary Law and sought compensation in the form of general damages, costs and interest. The respondent filed a defence on 16th June 2011. He denied the claim of the appellant.

After hearing, the case the trial court dismissed the case of the appellant with costs. Dissatisfied with the decision of the trial court, the appellant filed the present appeal on seven grounds as follows:-

1. The learned trial magistrate erred in law by failure to consider the affair between the appellant's wife and respondent in this case with seriousness.
2. The learned trial magistrate erred in law by agreeing with the whole statement for the respondent which was a matter of falsehood.
3. The learned trial magistrate erred in law by failure to request that test of DNA be done to establish the owner of the child as alleged herein.
4. The learned trial magistrate erred in law by failure to agree that the appellant's wife had an affair for long period as the trial magistrate refused to hear the fact.
5. The learned magistrate erred in law in failing to concisely state the issues for determination in the suit as framed and to give its decision on each issue in its judgment to meet the basic necessities of judgment under the law.
6. The learned trial magistrate erred in law by failing to adequately consider the law relating to this matter and the reason why the respondent has had an affair with the appellant wife and the wife illegally conceived by him.
7. The trial court erred in making a judgment unsupported by material before court.

The appellant conducted his appeal in person.

At the hearing of the appeal, the appellant argued that the magistrate did not summon any witness on his side and refused to order a DNA test. He also argued that the magistrate did not consider the law applicable to the case. He further argued that it was not true that elders were not informed of the

complaint, as there was a letter on the illegal love affair even from the DC's office.

Learned counsel for the respondent Mr. Kinyua, opposed the appeal. Counsel argued that it was not the duty of the court to call witnesses for parties. In addition, the appellant neither asked for a DNA test nor did he produce DNA test documents in court. He merely brought the child in court.

Counsel emphasized that since the appellant had alleged the love-affair between the respondent and his wife, the burden was on him to prove the allegation on the balance of probabilities. He did not.

Further, the appellant did not cite the law applicable in court. He cannot thus now fault the court on application of the law. Counsel maintained that no letter was produced in court to support the appellant's allegations.

Counsel lastly submitted though the appellant's wife tendered evidence and stated that she was a lover of the respondent, that story was a frame up and an attempt to get money from the respondent illegally.

This is a first appeal. As a first appellate court, I am duty bound to reconsider the evidence on record afresh and come to my own conclusions and inferences. See the case of *Selle Vs. Associated Boat Co. Ltd* [1968] EA 123.

I have perused the evidence on record. The appellant testified and called two other witnesses. One of the witnesses (PW2) was his wife. The appellant and his two witnesses tendered evidence to the effect that the respondent had a love affair with the wife of the appellant (PW2).

The respondent testified and denied the alleged love affair. He did not call witnesses. Faced with the evidence the learned trial magistrate found that the love affair (sexual intercourse) between the appellant's wife and the respondent was proved, but that it was not proved that the daughter of PW2 was sired by the respondent as no DNA test was conducted. The learned magistrate dismissed the suit with costs.

In the judgment, the learned magistrate listed three issues for determination. These were as follows:-

1. **Whether the defendant had extra marital relationship with PW2.**
2. **If the issue in (i) above is in the affirmative whether the child in question was a result of the relationship.**
3. **Whether the plaintiff is entitled to damages.**

In determining the first issue the trial court stated as follows:-

“As regards to the first issue, the learned advocate Mr. Kinyua submitted that sex is a private affair that is never discussed even by close friends. I am aware of the fact that it is not easy to adduce direct evidence to prove adultery. However, the practice has always been to infer evidence of adultery from surrounding circumstances such as confession and admissions, improper behaviours, undue familiarity or other circumstances which tend to associate the woman with the defendant. Plaintiff gave instances in which the defendant had been having sexual intercourse with PW2. PW2 while testifying confessed the existence of such a relationship and how she was caught by the plaintiff. It therefore follows that the plaintiff evidence corroborated by PW2 and PW3.”

Though the learned trial magistrate did not make an conclusion on the first issue above, from the above analysis, it can be said that the court found that sexual intercourse or enticement was committed by the respondent with the wife of the appellant.

With regard to the second issue, the trial court found that no DNA test was conducted and, as such, it was not established that the child (daughter) was sired by the respondent.

The learned magistrate after concluding that the child was not sired by the respondent, determined the 3rd issue by stating that the appellant was not entitled to damages.

In my view, the learned magistrate was right in finding that enticement and sexual intercourse with the appellant's wife was proved even if no child was sired therefrom. At common law enticement could be an actionable wrong by a husband.

The claim for enticement and damages herein is however based on Kamba Customary Law. As has been stated so often by courts, customary law in any particular case has to be proved as a fact through the tendering of evidence in court. This is because customary law is not codified and in any case there are various types of customary law applicable to different communities. Sometimes, even among one tribe or community, there could be different versions of customary law applicable. The burden is always on a plaintiff in civil cases to prove his or her case on the balance of probabilities – See the case of ***Kirugi & another Vs. Kabiya & 30 others [1987] KLR 347***. Entitlement to damages under Kamba Customary Law for enticement had to be proved on the balance of probabilities by the appellant.

Though the appellant relied on Kamba Customary Law, he did not bring to court any independent person versed in Kamba Customary Law to prove on the balance of probabilities that under Kamba Customary Law the action of the respondent of having a sexual affair with the appellant's wife was an actionable wrong entitling the appellant to compensation, and, what type of compensation. The appellant did not thus prove that a wrong was committed against him under Kamba customary law.

With regard to damages, also, no evidence was tendered by an independent person knowledgeable in Kamba customs on the mode and type and level of compensation applicable for enticement or adultery with someone's wife. The appellant thus did not establish on the balance of probabilities that he was wronged under Kamba Customary Law and was entitled to compensation. I thus will not award any damages to the appellant. In effect, I agree with the learned magistrate that the appellant did not prove his claim.

As such, I find no merits in the appeal. I dismiss the appeal and uphold the decision of the trial court, with costs to the respondent.

Dated and delivered at Garissa this 14th day of May, 2015

GEORGE DULU

JUDGE