



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. 77 OF 2008

S K S.....APPELLANT

VERSUS

J J K.....RESPONDENT

(An Appeal from the Judgment and Decree of the Principle Magistrate Honourable H. Nyaga (SRM), in Kabarnet SRMCC No. 6 of 2007 dated 25.06.2008)

JUDGMENT

1. This appeal arises from the judgment and decree of the Senior Resident Magistrate's court at Kabarnet Children's case No. 6 of 2007. The appellant was the defendant while the respondent was the plaintiff in the suit. The respondent had instituted the suit as the mother and guardian ad litem of L.K.K a child then aged about eight years.

In the plaint dated 25th September 2007, the Respondent averred that the appellant was the biological father of her son and that he had neglected or refused to support the minor despite having promised to marry her when he learnt about the pregnancy. Her claim against the appellant was for legal custody of the child, it's maintenance, costs of the suit and interest.

3. In his statement of defence dated 30th November, 2007, the appellant denied all the allegations in the plaint and put the respondent to strict proof thereof. He specifically denied being the father of the minor or having lived with the respondent at any time.

4. After a full trial, the learned trial magistrate found that the, respondent had established on a balance of probabilities that the appellant had acquired parental responsibility towards the child. awarded her a sum of Kshs.1,500 as monthly maintenance for the child which was payable with effect from 30th June, 2008. The respondent was also granted legal custody of the child as the same had not been contested.

5. The appellant was aggrieved by the decision of the trial court hence the instant appeal. In his memorandum of appeal dated 16th July, 2008, the appellant put forward eight grounds of appeal which can be summarized into three main grounds as follows:

(i) That the learned trial magistrate erred in law and in fact in making a finding that the appellant had acquired parental responsibility over the minor despite evidence that the respondent had been responsible for his upkeep for nine years.

(ii) That the learned trial magistrate erred in law and in fact when he entered judgment against the appellant while paternity of the child had not been proved.

(iii) That the learned trial magistrate erred in law and in fact by disregarding the evidence offered by the appellant while believing the one presented by the respondent, which was contradictory.

6. The appeal was prosecuted by way of written submissions. The respondent appeared in person while the appellant was represented by the firm of *M/s Mburu Okara & Company Advocates*. In their submissions, the parties revisited the evidence adduced before the trial court and buttressed their respective positions. The appellant emphasized that the appeal ought to be allowed as the respondent had not proved her case on a balance of probabilities.

7. This is a first appeal to the High Court. As such, it is an appeal on both facts and the law. I am well aware of the duty of the first appellate court which is to re-evaluate and consider afresh the evidence tendered before the lower court. In doing so, I should be careful to give allowance to the fact that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses. See: **Sumaria & Another V Allied Industrial Ltd [2007] 2 KLR 1;**

Williamson Diamonds Ltd V Brown [1970]EA 1; Jabane V Olenja [1986] KLR 661.

8. I have considered the pleadings in the lower court, the evidence on record, the judgment of the learned trial magistrate and the rival submissions made by the parties. Having done so, I find that the key issue arising for my determination in this appeal is whether the learned trial magistrate erred in law and in fact in finding that the respondent had proved on a balance of probabilities that the appellant had acquired parental responsibility for the child and in ordering him to make a monthly payment of Kshs. 1,500 to the respondent towards the minor's maintenance.

9. Though it is clear from the evidence on record that paternity of the minor was vigorously denied by the appellant and that it was not resolved by the trial court through a DNA analysis which would have proved the matter beyond any reasonable doubt; it is my view that as what was before the lower court was a civil suit as opposed to a criminal trial, all the respondent was required to do was to prove her case on a balance of probabilities not beyond any reasonable doubt as this higher threshold of proof is only required in criminal cases.

10. It is also my opinion that a finding on paternity on the basis of which parental responsibility can be acquired under **Section 25** of the **Children's Act** is a finding of fact which can only be determined from the totality of evidence presented before the trial court on a case by case basis.

11. It is trite that as a general rule, an appellate court ought to be slow to interfere with findings of fact made by a trial court unless it is demonstrated that the finding was not anchored on any evidence or was based on a misapprehension of the evidence or on wrong legal principles. See: **Makube. V Nyamoro (1983) KLR 403; Peter's V Sunday Post Ltd [1958]E.A 424.**

12. In this case, the learned trial magistrate in his judgment after addressing his mind to the four scenarios in which a father can acquire parental responsibility for a child born out of wedlock concluded that the appellant had acquired parental responsibility for the minor in this case despite his denial since there was evidence that he had taken the responsibility of buying milk for the child. There is no doubt that the learned trial magistrate believed the evidence of PW1 on this point which was supported by the evidence of PW2 the area councilor who confirmed that the appellant had given him Kshs.500 on two occasions to take to the respondent to purchase milk for the child's consumption.

13. It is significant to note that though he continued denying paternity, the appellant admitted in his evidence on cross examination that he was indeed sending money to the respondent to buy milk for the child. The question that then arises given this admission is why the appellant would support the child by buying it milk if he was not in fact the child's father. The appellant did not offer any explanation for his aforesaid conduct.

14. Given the evidence of PW1, PW2 and the appellant's own admission, I am unable to fault the trial magistrate's finding that the respondent had proved her case against the appellant on a balance of

probabilities. By making a finding that the appellant had acquired parental responsibility for the child under **Section 25(2)** of the **Children's Act**, the learned trial magistrate was in effect making a finding that paternity had been established on a balance of probabilities as well as the fact that the appellant had in some way maintained the child by buying it milk for a period of time.

15. The learned trial magistrate had the advantage of seeing and hearing the witnesses which is a benefit this court does not have and in the circumstances, I do not have any basis of interfering with his findings of fact including his finding on the credibility of the witnesses who testified before him. There is no indication from the court record that the trial magistrate's decision was based on a misapprehension of facts or on application of the wrong legal principles.

16. The respondent was seeking maintenance for the child in the sum of KShs. 4,000 per month. The trial court however awarded her a monthly sum of only Ksh. 1,500 with effect from 30th June, 2008 and directed that the respondent would bear the cost of the other aspects of the child's maintenance.

This in my view was fair, reasonable and just considering that it was not disputed that the appellant was a teacher by profession and he therefore had a stable monthly income. Secondly, the amount awarded was very little compared to what would reasonably be expected to be the monthly cost of maintenance for a child. This in effect meant that the respondent was left to shoulder more financial responsibility of providing for the child's upkeep. This was in keeping with the law which provides that parenthood is a shared responsibility between both parents.

17. For the foregoing reasons, I have come to the conclusion that this appeal is not merited. I consequently uphold the learned trial magistrate's judgment and dismiss this appeal with costs to the respondent.

It is so ordered.

C .W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 15th day of December 2015

In the presence of:

Mr. Cheruiyot Holding Brief for Mr. Okara for the Appellant.

The Respondent in person.

Ms Naomi Chonde Court Clerk.