



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 129 OF 2010

J W W.....APPELLANT

VERSUS

T W (A minor suing through her mother and next friend M NN).....RESPONDENT

JUDGMENT

This is an appeal arising from the decision of Hon. Gichangi, learned Resident Magistrate vide Nanyuki R.M.C Children Case no. 8 of 2009. **T W**, the Respondent herein, through her mother and next friend, M N N, sued **J W W**, the Appellant herein, vide the Complaint dated 18th August 2009 whereof she sought inter-alia for her custody to be vested in her mother and next friend and for maintenance in the sum of Kshs.7,000 per month. As expected, the Appellant filed a defence denying the Respondent's claim. The learned Resident Magistrate heard the case and in his judgment delivered on 24th June 2010, the Appellant and the Respondent's were each ordered to contribute Kshs.5,250 per month for the minor's maintenance. The Respondent was given the legal custody of the minor. The appellant was aggrieved by the decision hence this appeal.

On appeal, the appellant put forward the following grounds in his memorandum of appeal:

1. **The learned Trial Magistrate erred in law and in fact for failure to dismiss the Plaintiff's case on the ground that the Plaintiff had failed to prove the case to the required standard.**
2. **The learned Trial Magistrate erred in law and in fact in holding that there was a marriage by presumption between the Plaintiff and the Defendant.**
3. **The learned trial Magistrate erred in law and in fact for failure to hold that there was no traditional marriage between the Appellant and the Respondent.**
4. **The learned Trial Magistrate erred in law and in fact for failure to hold that the Appellant had not assumed parental responsibilities towards the minor T W.**
5. **The learned Trial Magistrate erred in law and in fact for failure to hold that the Appellant was not the biological father of the minor one T W.**
6. **The learned Trial Magistrate erred in law and in fact for failure to hold that paternity had not been proved.**
7. **The learned Trial Magistrate erred in law and in fact for condemning the Appellant to pay Kshs. 5,250 towards maintenance of the minor oblivious of the fact that the appellant earns less than six thousand shillings per month and that he has a family of four people to cater.**

8. **The learned trial magistrate erred in law and in fact for holding that the minor spends Kshs. 14,800 per term without any documentary evidence.**
9. **The learned Trial Magistrate erred in law and in fact in believing in whole the testimony of the Respondent and disregarding the testimony of the Appellant.**
10. **The learned Trial Magistrate erred in law and in fact for failure to hold that there was absolutely no evidence to support the Respondent's claim and for arriving at an erroneous Judgment.**
11. **The learned Trial Magistrate erred in law and in fact for failure to consider fully the Appellant's evidence and therefore arrived at an erroneous Judgment.**
12. **The learned Trial Magistrate erred in law and in fact for failure to hold that the Plaintiff had not discharged the burden of establishing that the Defendant had the means of providing for the minor and that no affidavit of means had been sworn and filed.**

Learned counsels appearing in this appeal recorded a consent order whereof this appeal would be disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions. Though the appellant enumerated twelve grounds of appeal, in my view the same can be reduced to two main grounds. **First**, it is the Appellant's submission that the Respondent had not established her case to the required standards hence the learned Resident Magistrate should have dismissed the case. The Appellant faulted the trial Magistrate's holding presuming the existence of a marriage and for further finding the existence of a traditional marriage. The Respondent stated before the trial court that the Appellant was her husband and that their union was blessed with one child namely T W who was born on 25/12/1998.

She produced a clinic card and claimed that the appellant deleted his name from the card showing he was the father of T W . The Appellant urged this court to find that the Respondent had failed to prove that there was any form of marriage between them. I have on my part re-examined the evidence tendered before the trial court. The Respondent's evidence before the trial court is to the effect that she cohabited with the appellant from 1997 until 2008 when the duo separated. It is also her evidence that during their cohabitation, the appellant provided for her and all her children. This fact, the appellant conceded in his evidence in cross-examination. There is therefore no dispute that the parties to this dispute cohabited for about ten (10) years before separating.

The appellant has claimed that the Respondent came to live with him when she was already pregnant. There is no doubt in my mind that T W was born while the duo were cohabiting. In the circumstances, and even without establishing the existence of a marriage, both parties acquired parental responsibility over T W . The Appellant continued to provide for T W and her mother together with other children. The appellant purported to deny that they cohabited with the Respondent but there was cogent documentary evidence that the duo agreed in writing to part ways. There was also evidence that the Respondent allowed the Appellant's request to get married to someone else. With respect, I think in the circumstances of this case the appellant assumed parental responsibility over T W pursuant to the provisions of **Section 25(2)** of the **Childrens' Act**.

Consequently, the learned Resident Magistrate cannot be faulted over this issue. The Appellant had produced an agreement the Respondent is said to have executed purporting to excuse him from further performing his parental responsibility. That agreement in my view goes against the provisions of **Section 24 (5)** of the **Childrens' Act** hence the same is void.

The other contentious issue which appears to have incensed the appellant is the decision by the learned Resident Magistrate to presume the existence of a marriage. It is the appellant's submission that there was reliable evidence to reach at such a conclusion. I have carefully looked at the evidence on record. The appellant does not deny that he cohabited with the Respondent for about ten (10) years before splitting by agreement. I am also convinced, like the learned Resident Magistrate that the duo cohabited for ten (10)

years. The period is so long that a marriage between them can be presumed under **Section 119** of the **Evidence Act**. Again, the learned Resident Magistrate cannot be faulted in his holding. In my view, the appellant acquired parental responsibility over T W, first by virtue of a presumed marriage and secondly by his conduct hence he cannot now purport to run away from it.

The second ground argued on appeal is to the effect that there was no proof of the minor's monthly expenses. The appellant pointed out that the Respondent had accepted to shoulder the burden herself and that her father would take care of all her children including T W . It is also argued that the amount awarded exceeded the sum prayed for in the Plaint hence the award was exorbitant hence an erroneous assessment. I have looked at the evidence and it is clear that on maintenance the Respondent gave a detailed breakdown of the requirements of T W . In fact a total figure of Kshs. 13,400 per month was put forward. The learned Resident Magistrate tabulated the figures given to the court and came to the conclusion that T W required a sum of Kshs. 10,500 per month which he ordered each party to shoulder half-half the amount. In the Plaint, the Respondent had specifically asked for Kshs.7,000 as the minor's monthly maintenance. The appellant should not be heard to complain because the figure slapped on him is way below the amount asked for. I find no merit in this ground.

In the final analysis, I see no merit in the appeal. It is dismissed in its entirety with costs to the Respondent.

Dated, Signed and delivered in open court this 21st day of February, 2014.

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J.K.SERGON

JUDGE

In the presence of:

Mr. Ombongi holding brief for Mr. Bwononga for Appellant

N/A for Mr. Mwangi, for Respondent