



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL APPEAL NO. 46 OF 2011.

T G (CHILD) SUING THRO'

B W G ::: APPELLANT.

(Mother & Guardian)

VERSUS

L K K ::: RESPONDENT.

J U D G M E N T.

This appeal arises from the decision and judgment of the Principal Magistrate at Kitale in Kitale CMCC Children Case No. 167 of 2004 in which the appellant, **T G (child)** suing through **B W G**, prayed for an order requiring the respondent, **L K K**, to provide maintenance including but not limited to school fees, food, clothing, shelter and medical care until the appellant minor attained the age of majority or until he completed the highest level of education whichever came first.

After a trial in which the respondent led no evidence, the trial court dismissed the appellant's case and in so doing, rendered itself thus,

“From the proceedings, it is not in dispute that the said minor TG was sired by B WG. What is in dispute is whether or not the said minor was fathered by the defendant. I have perused the minor's birth certificate and nowhere does it bear the defendant's names. In other words the defendant's names do not appear on the minor's birth certificate, an indication that the said minor was not fathered by the defendant.”

The appellant was dissatisfied with the decision of the trial court and filed this appeal on the basis of the grounds in the memorandum of appeal dated 12th July, 2011, to wit:-

- 1. That, the learned trial magistrate erred in law not to have found that the plaintiff's evidence and that of her witnesses were uncontroverted.***
- 2. That, the learned trial magistrate misguided himself over who could or could not be called as a witness.***
- 3. That, the learned trial magistrate erred to have questioned the validity of the exhibits produced by the plaintiff when there were no grounds to do so.***
- 4. That, the learned trial magistrate erred in law to have found that the plaintiff had not proved her case on a balance of probability.***

The appellant therefore prays that the judgment of the learned trial magistrate be set aside with costs.

At the hearing of the appeal, counsel for the appellant, **Mr. Ngeiywa**, and counsel for the respondent, **Mr. Onyancha**, presented written submissions in support of and opposition to the appeal.

Having considered the submissions by both sides, the duty of this court was to re-visit the evidence adduced at the trial and draw its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing all the witnesses.

In that regard, this court has considered the uncontroverted evidence led by the appellant (**PW1**), who testified that the minor T G was her son with the respondent with whom she had been living with in 1997 and 1998. That, the minor was born in 1998 while she (PW1) was in school but before then, the respondent had agreed before village elders to meet the costs of the minor's birth. That, after the birth, the respondent gave assistance upto the year 2003 when he stopped despite the child being a special child requiring special diet and education. It was after the respondent's refusal to assist that the appellant consulted her lawyer and instituted this case against the respondent who never denied his responsibility for the appellant's pregnancy and paternity of the child.

N W G (PW2), mother to the appellant testified that the appellant and the respondent lived as husband and wife in 1997 and after the appellant became pregnant, she (PW2) and the respondent's father convened an elders meeting where it was agreed that the respondent would assist in raising his child after it was born. Indeed, the respondent assisted the child by providing financial aid for his clothes and hospital bills but when he was asked to provide money for the child to be taken to a special school he declined and argued that the school was expensive. It was then that this matter landed in court.

A register of births, **Stanley Sirma (PW3)**, produced the minor's birth certificate indicating that he was born on 8th September, 1998 at Kitale District Hospital and that the appellant was his mother.

The certificate did not indicate the name of the father of the child.

J R G (PW4), sister to the appellant, confirmed in her testimony that the respondent had at one time provided financial assistance for the maintenance of the minor and **Dr. Samuel Chege Njenga (PW5)**, confirmed that the child was suffering from an abnormal condition called autism thereby requiring a special diet and special education.

Since the respondent did not appear at the trial and give his own evidence, the learned trial magistrate was only to consider the appellant's evidence and arrive at his final findings which are disputed herein by the respondent.

Basically, with regard to children, their welfare is of paramount importance and therefore this case had more to do with the subject minor, T G, than the appellant and the respondent.

The Children Act (section 23, 24 and 25) provides that parental responsibility should essentially be borne by both parents.

The subject minor, having been born in 1998, was aged 13 years at the time of trial and therefore a child. His welfare from the time of his birth was the responsibility of the parents. Undisputedly, the appellant was his mother as confirmed by the birth certificate (P. Exh. 2) which was however, silent with regard to the father.

The failure to indicate the name of the father in the birth certificate was a negligent omission on the part of the registration officers rather than the appellant.

Nonetheless, the respondent was perceived to be the actual father of the child. The appellant firmly testified to that effect was supported by her mother (PW2) and her sister (PW4).

The appellant and her mother (PW2) strongly indicated that even before the birth of the child, the respondent agreed before elders to care for the child after his birth.

The agreement dated 4th May, 1998 (P. Exh. 1) also went further to indicate that the respondent was the person responsible for the appellant's pregnancy which eventually resulted in the birth of the child.

The respondent's statement of defence dated 16th April, 2004, was essentially a denial of the allegations made in the plaint by the appellant dated 27th February, 2004.

The respondent thus denied that he was the biological father of the subject child and contended that he was under no obligation or duty to maintain the child. He also contended that the alleged agreement before the elders was fraudulent and an application of tricks by the appellant. He denied having undertaken to provide maintenance for the child. He therefore urged the court to dismiss the suit against him.

Despite all the foregoing denials, the respondent did not lead any evidence to establish the same.

The appellant's case in as much as it was uncontroverted, was thus established against the respondent on a balance of probabilities.

The details by the respondent were hollow. They carried no weight. The respondent was proved to be the father of the child notwithstanding the absence of his name in the birth certificate. He lived with the appellant as man and wife when she became pregnant and the agreement before the elders showed that he was the father of the child and that he undertook to provide maintenance for him. There was no evidence from the respondent that the agreement was a fraudulent document. Therefore, he could not be allowed to run away from parental responsibility by exploiting the loophole in the birth certificate to the effect that his name was not included as the father of the child.

The circumstances of this case clearly indicated that most likely than not, the respondent was the biological father of the subject child.

Consequently, it was erroneous for the learned trial magistrate to find otherwise on the sole basis of the child's birth certificate.

This appeal is therefore merited and is hereby allowed to the extent that the decision and judgment of the learned trial magistrate dated the 17th June, 2011, is set aside and substituted with a decision that judgment be and is hereby entered for the appellant against the respondent as prayed in prayer (a) and (b) of the plaint dated 28th February, 2004. the costs of the appeal shall be borne by the respondent.

Ordered accordingly.

[Delivered and signed this 31st day of July, 2014.]

J.R. KARANJA.

JUDGE.