



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

CIVIL APPEAL NO.52 of 2008

(Being Appeal from the Judgment and decree of the Resident Magistrate at Embu in Children Case No.2 of 2008)

B.M.M **APPELLANT**
~VRS~
F.K.N **RESPONDENT**

JUDGMENT

The facts of this case are basically not in dispute. The Appellant and the Respondent got married under customary law in 1998 and the relationship resulted in the birth of L.N.Mon 8/11/2000. The couple lived together up to 30/3/2002 when they agreed to part and each to move on with life. On 19/4/2002 they went before the District Children’s Office and signed an agreement (exhibit 3) that the Respondent would have custody of the child and provide for its shelter, food and clothing. The Appellant was to provide for the child’s education and assist in the provision of clothing. He was to have access to the child.

The Appellant took a wife with whom he has a child. The Respondent went to live with one P.M with whom she got another child. She lived with P.M for a year or so. During the period M. took over the maintenance of the child herein. They changed the child’s name in school to read L.N.M. . When the relationship between the Respondent and P.m. ceased, the later stopped paying fees or maintaining the child.

The Respondent went to the subordinate court seeking that the Appellant be ordered to maintain the child and she be given legal custody. The Appellant opposed the suit brought on behalf of the child. His case was that since P.M. had acquired parental responsibility over the child he was no longer liable to maintain it.

The trial court received evidence from both sides and also considered the submissions by counsel for the parties. It decided that the Appellant was the father of the child who was liable to maintain it; and that the fact that P.M. had at some point exercised parental responsibility over the child did not take away the Appellant’s responsibility. The court noted that the Appellant had always taken out a medical cover for the child. He was ordered to continue paying for it. The Respondent was asked to provide shelter, clothing and other incidentals to the child. The Appellant was asked to pay fees, but directly to the school, and to pay Ksh.2000/= for food for the child and the Respondent to provide an equal amount monthly for the same. The court considered the welfare of the child, the means of the parents and their respective financial needs.

The Appellant has appealed this decision. His main ground in the Memorandum of Appeal was that under sections 24 (2) and 25 (2) of the Children’s Act, 2001 the said Peter Mwangi had become the father of the

child and acquired parental responsibility over it, and therefore that the court was wrong to ask him to maintain the child.

I have considered the recorded evidence and submissions by Mr. Mogusu for the Appellant and M/s Wairimu for the Respondent and do not find that the trial court can be faulted in any way over its decision. The Appellant and the Respondent were married to each other at the time of the birth of the child. Under section 90 (a) of the Act the court had to presume that the duty to maintain the child was the joint responsibility of the two. Peter Mwangi exercised parental responsibility over the child for the short period that he was staying with the Respondent. He was not the father of the child and therefore section 24(2) would be inapplicable.

It should be recalled that during this period, the Appellant was still maintaining a medical policy for the child. He had signed an agreement acknowledging that he had the responsibility to maintain the child. The couple had agreed that they were at liberty to each go their own way socially, physically and spiritually, but still bound to maintain the child. The fact, I find, that the Respondent had another man in her life who was providing for the child did not take away the Appellant's duty under section 90 (a).

The Appellant sought to rely on section 25(2) to say that Peter Mwangi had acquired parental responsibility over the child under section 24 (5) and that the responsibility could not cease. One wonders why the acknowledged responsibility by the father of the child should cease or be surrendered to another man! The court cannot allow the Appellant to renounce, abdicate or surrender his legal responsibility over his child.

The Appellant did not question the mode or amount of maintenance that the court below had ordered. My view regarding the matter is that the mode and amount were reached after the correct appreciation of all the factors as provided under the Act. The result is that the appeal is dismissed with costs.

Dated and signed at Bungoma on this 17th day of October, 2011.

A. O. MUCHELULE
JUDGE

Signed and delivered at Embu on this 15TH day of November 2011.

ONG'UDI
JUDGE