S.M.M…….....….... APPELLANT

VERSUS

W.K (minor suing thro' the mother) S.W.I……..... RESPONDENT

(Appeal from judgment and decree of Senior Principal Magistrate's Court at Murang'a in Children's Court Case No. 13 of 2006 dated 8th February 2008 by T. W. Murigi – S.R.M.)

J U D G M E N T

This appeal was triggered by the suit filed in the Children's court at Murang'a by **W.K** through his mother and next of kin, **S.W.I** hereinafter referred to as "*the respondent*" against **S.M.W** hereinafter referred to as "*the appellant*". In the said suit, the respondent prayed for orders of parental responsibility and maintenance as provided for by section 23 of the Children's Act to issue against the appellant. Essentially the appellant was being called upon by the respondent to provide food, clothing, shelter and Education to their minor child. The respondent too prayed for costs of the claim.

The respondent's claim was informed by the fact that the appellant befriended her in or about the year 2002 and they started cohabiting. The respondent believed that she was "married" to the appellant. In the cause of the said "marriage", the respondent conceived and bore the minor, **W. K** on or about 12th July 2004. Soon thereafter the appellant chased away the respondent and the minor from the matrimonial house and have since refused to pay any maintenance towards the upkeep of the minor. The respondent then took up the matter with the children's office Murang'a. The Children's office however advised that their respective parents be looped into the matter. They did so and on 27th February 2005 they met with their respective parents in tow and an agreement was reached in which the two undertook to cater for the well being of the minor. However the appellant soon thereafter resiled from the agreement. Hence the suit.

In his defence, the appellant claimed that he was a stranger to respondent's allegations about the alleged marriage. He went on to plead that if the said marriage existed it was the respondent who deserted him on the 4th October 2005 on her own free will. That before the proceedings in the Children's department could be heard and determined, the respondent went to his house, opened it and carried away his documents and attempted to kill him by poisoning his food and tea. The respondent was subsequently arrested and arraigned in court vide Murang'a Principal Magistrate's Court criminal case number 10 of 2005. However before the criminal proceedings were determined it was agreed between them and their respective parents to have the criminal case and the one at the Children's office withdrawn to pave way for an amicable solution which was never arrived at due to the respondent's stubbornness.

The suit then came up for hearing before **T. W. Murigi**, SRM. The evidence tendered in the trial court was that of the respondent and appellant only. No other witnesses were called. In brief the respondent's evidence in the trial court was that the minor was born on 12th July 2004 at M District Hospital. At that time the respondent and the appellant were cohabiting as husband and wife having married each other according to the respondent sometimes in 2002 under kikuyu customary law. The minor was thereafter named after the appellant's father as the dictates of kikuyu customary law demand. Subsequently, the two went separate ways due to their constant fights. Before the parting of ways, the two plus the minor

were staying in a rented house in Murang'a town which the appellant paid for. Following the separation, the respondent and the minor relocated to hospital quarters. To back up her case that the appellant was the father of the minor, the respondent tendered in evidence a notification of birth dated 13th July 2004 showing the name of the minor as **W.K.W**, the middle name being the appellant's father's name and the last name, the appellant's. She also produced a certificate of birth issued on 18th October 2004 which too indicated the appellant as the father to the minor. A baptism card No. 3285 issued by the Catholic Church, Murang'a was also tendered in evidence and it similarly showed that the appellant was the father to the minor.

The respondent further testified that the appellant's mother and his nephew came to visit the baby two weeks after birth and some photographs were taken. Those photographs showed the appellant, his mother, nephew and respondent happily holding and cuddling the minor. There was then a commitment letter signed by both the appellant and the respondent to provide for the child. This commitment letter was signed in the presence of both parents of the appellant and the respondent during a meeting at the respondent's home in Kirinyaga.

On his part the appellant testified that the two became friends when they were working in a private hospital. When the respondent became expectant in 2004 they were still friends and after delivery the respondent did not come back to the appellant's house. The appellant further said that the respondent was unfaithful to him and he suspected that the minor was not his child.

With regard to the photographs, he denied that his mother and nephew appeared in them. In sum the appellant's evidence was that he had a casual relationship with the respondent which did not in law amount to a marriage. The minor whom the respondent claimed to have been fathered by the appellant was not his. It was possible that he was fathered by someone else as the respondent had been unfaithful to him. He also questioned what appeared to be his names and that of his father in the minor's documents produced by the respondent in support of her case.

Having carefully evaluated the evidence tendered by both sides and submissions filed by both counsel on record the court found for the respondent holding thus:

"**I find the appellant's defence to be mere denial lacking any credibility. The next of kin impressed the court as a truth (sic) witness. From the evidence on record I find that the appellant (defendant) is the father to the claimant and has a parental responsibility towards the claimant".**

It is from this holding that the instant appeal was preferred. Through **Messrs Mwaniki Warima & Co. Advocates** the appellant advanced 4 grounds of appeal to wit:-

"**1. The learned magistrate misdirected herself in law in failing to appreciate the import of the judgment in civil case No. 1351/02 and thus arrived at an erroneous decision.**

2. The learned magistrate erred in law in failing to hold that in order for the appellant (sic) be found liable the claimant was under a duty to prove the existence of a valid legal marriage.

3. The judgment was against the weight of the evidence.

4. The learned magistrate erred in law in awarding an award without paying regard to the means of the appellant."

When the appeal eventually came up for hearing before me on 27th July 2009 parties agreed to argue it by way of written submissions. Such submissions were subsequently filed and exchanged. I have carefully read and considered them together with cited authority.

This court has jurisdiction to review the evidence tendered during the trial so as to determine whether the conclusion reached by the trial court should stand. In doing so the court however cannot properly substitute its own factual finding for the trial court unless there is no evidence to support the finding or

unless the findings are shown to be plainly wrong. Indeed it is wrong for the appellate court to differ from the findings on a question of fact of the trial magistrate who tried the case and who had the advantage of seeing and hearing the parties. **(Peter v/s The Sunday Post Ltd (1958) E.A. 424).**

The issue before the trial court was only whether the appellant was the father of the minor. It had nothing to do with the marriage between the two. Once that fact was established, then the issue of parental responsibility automatically attached. The finding of the trial magistrate reproduced elsewhere in this judgment cannot be faulted as she is the one who heard the evidence saw the parties testifying and had the opportunity to see their demeanours. The trial magistrate found that the respondent was a truthful witness. This is a finding on the demeanour of a witness. I am guided by the principle that the first appellate court should not interfere with the findings of the trial court which were based on the credibility of witnesses unless no reasonable tribunal could make such findings, or it was shown that the findings of the trial court are erroneous in law. It has not been shown to me that there was no basis for the learned magistrate to reach such conclusion.

The learned magistrate thereafter addressed herself and rightly so in my view to the appropriate Articles in the convention on the rights of the child and the African Charter on the rights and welfare of the child which provides that no child shall be deprived of maintenance by reference of the parents' marital status. The said charter also outlaws customary rights which have the effect of discriminating against a child. The appellant's refusal to take parental responsibility was said to be anchored on want of a valid marriage between the two and that he was not certain about the minor's paternity. The issue in the lower court was not about marriage or application of customary law. It was about maintenance of the minor and parental responsibilities towards the minor in terms of the Children's Act. The Children's Act has no room for a party to escape liability on the ground of want of marriage, customary or otherwise.

The purpose for which Children's Act was enacted was: "**to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institution; to give effect to the principles of the contention on the rights of the child and the African Charter on the rights and welfare of the child and for connected purposes ....."**

As can be seen from this preamble, customary law with regard to the rights of the child has no place. As for paternity, the appellant merely stated that he suspected that the minor was not his. He never went further to seek for a paternity test such as D.N.A. He is in the medical field and knows better. D.N.A test would have conclusively resolved the question of paternity if at all it was in doubt. In any event under the children's Act, when it comes to parental responsibility, it does not matter whether those responsible for bringing the child into this world were married or not. The Act even extends the parental responsibility to parents who are not biological parents of a minor. So that marriage perse of the parents of the minor or lack of it is not a hindrance or an impediment to the application of the Children Act. So that whether or not there was a marriage between the appellant and the respondent is immaterial. All that the respondent was required to prove and which she did with remarkable ease if you were to ask me was to bring the appellant within the brackets of parental responsibility under that Act.

The evidence on record no doubt shows that the appellant and the respondent had between 2001 and 2004 cohabited, according to the respondent as husband and wife. The appellant implicitly admits that much when he states that both used to work in a private hospital and then became friends and that when she became expectant in the year 2003 they were still friends and "**after delivery she did not come to my house"**. He further continued to say..... "**We started having differences even before she conceived and I lost interest ..... The plaintiff was unfaithful to me and I suspected the child is not mine"**. When it came to the naming of the child the appellant's father's name and the appellant' all featured. Much as the appellant disputed the fact, I have no doubt in my mind that the minor plaintiff was named in accordance with the Kikuyu Customs. He even provided the names. If the contrary was true the appellant should have resisted the naming of the minor in accordance with the requirements of kikuyu custom. After all he was suspicious of his paternity.

In further proof that the appellant was the father of the minor, the respondent produced a notification of

birth issued on 13th July 2004, a day after she gave birth. The child's name is indicated as **W.K.W**. The appellant calls himself **S. M.W**. The respondent calls herself **S.W.I**. There is a similarity in the names of the child and the appellant's last name. More important however was the tendering in evidence by the respondent of the minor's birth certificate wherein the appellant is indicated as the father. At the bottom of the said birth certificate it is stated categorically that:-

"**This certificate is issued in pursuance of the Births and Deaths Registration Act (cap 149) which provides that a certified copy of any entry in any register or return purporting to be sealed or stamped with seal of the Principal Registrar shall be received as evidence of the dates and facts therein contained without any or other proof of such entry....."**

It is clear from the record that the birth certificate of the minor tendered as evidence was a certified copy and has the seal of the Principal Registrar. Accordingly it was admissible in evidence and the dates and facts contained therein cannot therefore be challenged. An important entry or fact contained therein was that the appellant was indicated as the father to the minor. The respondent need not therefore call any other evidence to prove paternity. So that appellant's submission that he ought to have maintained the minor for 12 months or more as per the Children's Act for parental responsibility to attach to him is inapplicable and indeed immaterial.

The respondent advanced her case further by producing an undertaking by both the appellant and the respondent to maintain the minor herein. The said undertaking was reduced into writing on 27th February 2005. This undertaking was in the presence of witnesses from both sides of the divide who also appended their respective signatures. If therefore the appellant was not the father of the minor he would have declined to give such an undertaking. There is no evidence that the appellant was coerced into the undertaking and or that he executed it under duress.

Last but not least there are the photographs. The respondent explained the circumstances under which the photographs were taken. The appellant, his mother and nephew plus the respondent are captured in the photographs. According to the respondent, the appellant's mother and sister had come to see the minor two weeks after he was born and that it was the appellant who had called them.

The appellant of course denied the photographs. To resolve this, the appellant should have called his mother who was still alive to disown the photographs. The court would also have perhaps seen her and compared her with the photographs and arrived at an informed decision on the issue. Can it be assumed that if the mother had been called as a witness, she would perhaps have confirmed that she was the one in the photograph to the detriment of the appellant? That possibility cannot be ruled out entirely.

The appellant has also faulted the magistrate in making an award without paying regard to his means and source of income. I do not think that this accusation is valid. The trial magistrate addressed herself sufficiently on the issue of the parties incomes. The appellant and the respondent are a clinical officer and nurse respectively. The respondent tendered in her evidence her payslip for the month of January 2007 which shows a net pay of Kshs.8,312.45. On the other hand the appellant merely said that he earned Kshs.6,000/= without as much as placing before court documentary evidence to that effect as the respondent had endeavoured. He never advanced any reason(s) why he could not avail his payslip. I would imagine that the appellant thought he was being smart and clever which turned out to be wishful thinking.

In ordering that both parties contribute Kshs.4,000/= each towards the maintenance of the minor, the magistrate was I suppose guided by section 24 of the Children's Act which confers equal parental responsibility on both parents. The award was fair in my view to both parties and should not be disturbed.

In the result I find that the appeal lacks merit and is accordingly dismissed with costs to the respondent.

Dated and delivered at Nyeri this 29th day of October 2009

M. S. A. MAKHANDIA

JUDGE