



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NYERI**

**Civil Appeal 63 of 2006**

**JOACHIM NDAIRE MACHARIA .....**  
**APPELLANT**

**VERSUS**

**1. MARY WANGARE NDAIRE**

**2. JOSEPH MACHARIA NDAIRE (Suing through next of kin ESTHER  
WANJIKU**

**NJUGUNA) ..... RESPONDENTS**

*(Appeal from the Judgment of the Senior Resident Magistrate's Court at Kigumo in Children Case No. 24 of 2003 dated 20<sup>th</sup> July 2006 by Ms L. Nyambura – SRM)*

**J U D G M E N T**

The appellant, **Joachim Ndaire Macharia** was the defendant in the suit initiated in the lower court by the respondent, **Esther Wanjiku Njuguna**, the mother to the two minors, **Mary Wangare Ndaire** and **Joseph Macharia Ndaire**. She filed the suit against the appellant as the mother and next of kin to the two minors and sought an order that the appellant do provide a lump sum payment and or monthly maintenance towards the upkeep of the said two minors in terms of parental responsibility as provided for by section 23 of the children's Act 2001. Initially the respondent had filed two separate suits in respect of the two minors being children case number 23 and 24 of 2006 respectively seeking the same reliefs. The two cases were however later consolidated.

After a full hearing, the lower court found for the respondent and ordered the appellant to pay a lump sum contribution of Kshs.50,000/= and a monthly contribution of Kshs.5000/= towards the maintenance and upkeep of the two minors. Being dissatisfied with the lower court's judgment, the appellant preferred this appeal setting out 7 grounds of appeal to wit;

**1. That the learned Senior Resident Magistrate erred in law and in fact in failing to make a finding that after pregnancy compensation of Kshs.25,500/= was made in respect of Mary Wangare, the mother of the infant assumed parental responsibility of the said child and the appellant was not under any legal duty to maintain that child.**

**2. That the learned Senior Resident Magistrate erred in fact and in law when she found that the Appellant had been married to Esther Wanjiku Njuguna in 1999 or any time thereafter whereas no customary law rites whatsoever were proved to the court to have been performed to formalize any marriage.**

**3. That the learned Senior Resident Magistrate erred in law and in fact when she failed to order a D.N.A test to determine the paternity of the second child Joseph Macharia Ndaire whose paternity was denied by the Appellant and not sufficiently proved before court.**

**4. That the learned Senior Resident Magistrate was biased against the appellant by stating that the appellant had paid ex gratia payments whereas such payments and such evidence is not borne by the record.**

**5. That the Senior Resident Magistrate erred in failing to take into consideration that the appellant has his wife with two children whom the appellant is legally bound to maintain.**

**6. That the learned Senior Resident Magistrate erred in law in ordering the appellant to pay a lump sum of Kshs.50,000/= towards the maintenance of the claimants whereas there was no justification for the award of that amount.**

**7. That the amount of Kshs.5,000/= per month ordered by leaned Senior Resident Magistrate as maintenance of the two children is excessive.**

The evidence that confronted the trial magistrate was as follows; that the appellant and the respondent got married in the year 2000. Prior to that the 1<sup>st</sup> minor had been born in the year 1994 following a love affair between the two. The 2<sup>nd</sup> minor was born in the year 2001 sired again by the appellant but was physically challenged and required special needs and care. The couple separated in the year 2002 and since then the appellant has refused to offer any medical assistance towards the 2<sup>nd</sup> minor and he has also refused to exercise his parental responsibility over the two minors. It was for this reason that the minor through their mother and next of kin brought the instant action. The minors prayed that the appellant be ordered to take up his parental responsibility towards them as provided for by section 23 of the children's Act.

The appellant denied the respondent's claim. He denied having ever been married to the respondent at any one given time. He claimed that if he ever took care of the claimants' needs it was out of his own volition and not as a result of any moral or legal obligation. He further claimed that having paid pregnancy compensation to the respondent's father in respect of the 1<sup>st</sup> minor, he was discharged from having parental responsibility of the said minor. As for the 2<sup>nd</sup> minor, he denied that he sired him. Therefore he could not assume parental responsibility.

In support of her case, the respondent called two witnesses including her father (PW2) who confirmed that both minors were sired by the appellant. That the appellant had admitted before the Elders that he was responsible for the pregnancy with regard to the 1<sup>st</sup> minor. He had even paid one ewe (mwati) to the respondent's father which was admission that he was the one responsible for the said pregnancy.

Subsequent thereto the two got married which union brought forth the 2<sup>nd</sup> minor. He confirmed that the marriage had not worked forcing the respondent to leave the appellant's matrimonial home and was now staying with him at his home. That the appellant was not assisting the respondent in bringing up the two minors. He also confirmed that the respondent's testimony that the 2<sup>nd</sup> minor because of his disability has had to constantly attend hospital. That previously the respondent had been admitted at Kikuyu Mission hospital with the 2<sup>nd</sup> minor where she had paid medical bills to the tune of Kshs.40,000/=. The respondent's other witness was PW3 whose evidence was along the same lines as PW1 and PW2.

In his defence, the appellant not only denied fathering the 2<sup>nd</sup> minor but went on to claim that he now had another wife and children. He could not therefore take care of the two minors. He also told the court that he does not have a permanent job and should not be compelled to maintain the minors. He maintained though that he was the father of he 1<sup>st</sup> minor but had settled his accounts with the respondent's father by paying an ewe. He was not the father of the 2<sup>nd</sup> minor and had never married his mother.

Having carefully evaluated the evidence tendered by both sides and submissions of learned counsel, the

court found for the respondent holding thus:

**“Having found that defendant is the father to both minors herein, the court finds that defendant has parental responsibilities over the two children. Though defendant admitted that he compensated the father to Esther for her pregnancy, that compensation did not go towards the maintenance of Mary Wangare the minor but to PW2. Defendant should therefore take up his parental responsibility over the two minors herein.**

**There was evidence that 2<sup>nd</sup> minor has some physical disability and he attends hospital often. Medical receipts were produced in court. There was evidence that defendant is a peasant farmer and he owns some tea bushes. He denied that and said that he does not have a permanent job and his income fluctuates most of the time. He also said he has wife and two children.**

**The court considered all that evidence and the submissions by both counsels. The court finds that defendant did not contribute towards the medical bill for 2<sup>nd</sup> minor herein. He should therefore pay a lump sum contribution for now and later monthly contribution towards maintenance of the children herein.**

**The court finds that both parents herein have a parental responsibility over the two children herein. Esther Wanjiku has the custody of the two minors herein. She feeds, clothes and takes care of them. She has taken up her part of parental responsibility. Defendant should also pay his role.**

**The court finds that defendant herein should maintain the children.**

**(a) Paying a lump sum contribution of Kshs.50,000/= towards the maintenance of the claimants herein.**

**(b) Thereafter a monthly contribution of Kshs.5000/= for provisions of basic needs to the claimants herein.”**

When the appeal came up for hearing, counsel appearing for the parties herein **S.K. Njuguna** and **Kirubi Mwangi Ben** respectively agreed to have the appeal heard by way of written submissions. The court acceded to their request. Consequently respective written submissions were filed and I have had opportunity to carefully read, consider and evaluate them.

I appreciate that this court has jurisdiction to review the evidence tendered during the trial to determine whether the conclusion reached by the trial court should stand. However this court 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 an 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 witnesses. See **Peters v/s The Sunday Post Ltd (1958) E.A. 424.**

The issue before the trial court to my mind was whether the appellant was the father of the siblings. Once that fact was established then the issue of parental responsibility would automatically attach. The appellant by his own admission stated that he sired the first minor. He is therefore the father of the said minor. However he wishes to escape parental responsibility as defined by section 23, 24 and 25 of the children’s Act on the basis that having paid pregnancy compensation to the respondent’s father he was no longer under any obligation and legal duty to maintain that minor. The appellant takes the view that having not married the respondent and having paid pregnancy compensation, the customary connection between the appellant and the respondent and her child was severed and as such the appellant was not under any legal duty to maintain the child. That position cannot be possibly correct. The issue in the lower court was not about pregnancy compensation or application of customary law. It was about maintenance of the two minors and parental responsibilities towards them in terms of the children Act. The Children Act has no room for the application of customary law that is prejudicial, subversive and or in contravention of the said Children Act. It must be born in mind that the children Act was enacted **“..... 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 convention 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 have no place. Further under the act, when it comes to who has parental responsibility, it does not matter whether those responsible for bringing the child into this world were married or not. The act even extends parental responsibility to parents who are not biological parents of a child. So that marriage perse of the parents of the child or lack of it is not a hindrance to the application of the children Act nor is the fact that the father paid some compensation resulting from out of marriage pregnancy. The convention on the rights of the child and the African Charter on the rights and welfare of the child outlaws customary rights which have the effect of discriminating against a child. If the position of the appellant was to be upheld, in effect we will be according different treatment to the child on account of a customary rite which is oppressive. As correctly submitted by the learned counsel for the respondent, a customary claim cannot oust a mandatory provision of the written law governed by an Act of Parliament. 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 remarkably well to my mind was to bring the appellant within any of the brackets of parental responsibility set out in Sections 23, 24 and 25 of the Children Act. Indeed the appellant himself did admit that he was the father to the 1<sup>st</sup> minor.

With regard to the 2<sup>nd</sup> minor, the respondent testified that she gave birth to the same whilst she was cohabiting with the appellant as man and wife. In fact she cohabited with the appellant in his homestead although no dowry had been paid. The respondent alleged in her evidence that she cohabited with the appellant from 1999 until 2002. The 2<sup>nd</sup> minor was born on 6<sup>th</sup> May 2001. It would appear therefore that the 2<sup>nd</sup> minor was born whilst the appellant and respondent were cohabiting. The appellant on the other hand denied having cohabited with the respondent. The evidence of the respondent received major boost from PW2 and PW3. They all confirmed that the appellant had at one point or another cohabited with the respondent as husband and wife. Indeed the 2<sup>nd</sup> minor was named after, the appellant's father according to Kikuyu customs. Now if the two were not married as the appellant wanted the court to believe then he ought to have objected to the naming of this child allegedly not his after his father. The appellant called no other witness to confirm his testimony that he had never married the respondent. At least his mother was a valuable witness. She could have been able to shade light as to whether or not the respondent had ever cohabited with her son. The evidence on record shows that the appellant's father passed on. However his mother was still alive. Why was she not called by the appellant? Could she have given adverse evidence against her own son? The answer is possibly no or yes. That is what in law is called 'withheld evidence' and should go in favour of the respondent. Yes, dowry may not have been paid. However I am not aware of a requirement that all customary law rites should be performed first to prove the existence of a marriage. A marriage can be inferred from the conduct of the parties. In any event some of the customary law marriage rites can be performed whilst the marriage is in existence. Some of them may even be performed long after the parties had been cohabiting. Indeed something like dowry is life long undertaking. It can be paid at anytime during the marriage and in fact in other communities even in death. Considering the evidence on record I am persuaded just as the learned magistrate was that the 2<sup>nd</sup> minor was born whilst the appellant and the respondent were cohabiting as husband and wife. In law therefore a presumption arises that the 2<sup>nd</sup> minor is a legitimate son of the appellant and thus has parental responsibility towards his upkeep and maintenance.

More important however is the tendering in evidence by the respondent of the birth certificate of the 2<sup>nd</sup> minor. The birth certificate clearly shows the appellant as the father of the minor. On the face of the said birth certificate it is clearly stated thus "**..... 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 the seal of the principle Registrar shall be received as evidence of the dates and facts therein contained without any proof of such entry.....**" This is the essence of section 26 (4) of the Births and Deaths registration Act. It is clear from the record that the birth certificate of the 2<sup>nd</sup> minor tendered in evidence was a certified copy and had the seal of the principle registrar. Accordingly it was receivable in evidence. The dates and facts contained therein cannot therefore be challenged. The important fact contained therein was that the appellant was

shown as the father of the 2<sup>nd</sup> minor. The respondent need not call any other evidence to prove paternity therefore. That entry is sufficient to attach the 2<sup>nd</sup> minor's paternity to the appellant.

The appellant again in a bid to disentangle himself from parental responsibility faults the trial magistrate for not ordering a DNA test on him to determine the paternity of the 2<sup>nd</sup> minor. However this is a red herring. The learned magistrate could not have ordered what she was not asked to do. The record does not show that the appellant requested for DNA to be performed on him and the request was denied by the learned magistrate. It is also important to note that the issue of DNA test was never seriously canvassed in the trial court. It only arose by way of cross-examination. When cross-examined by counsel for the respondent, the appellant stated "**Joseph Macharia was born on 6<sup>th</sup> February, 2001. Macharia is not my child. I have not gone for DNA test....**" That is all that the appellant said on the issue. The appellant cannot therefore be heard to say that he requested for a DNA test and the learned magistrate refused. In the end I agree with the finding by the learned magistrate that the two minors were sired by the appellant and he must therefore assume parental responsibility.

The learned magistrate ordered the appellant to pay Kshs.50,000/= as a lump sum. I am unable to understand the basis for that figure. In her evidence, the respondent stated that she paid Kshs.40,000/= for booking the bed at PCEA Kikuyu Mission hospital for the 2<sup>nd</sup> minor. She also testified that she incurred other medical expenses to the tune of Kshs.6,800/= thereby making a total of Kshs.46,800/=. By ordering the appellant to pay Kshs.50,000/= it would appear that the learned magistrate was ordering him to refund the amount the respondent had incurred as aforesaid. If that be the case then, she should have ordered a refund of Kshs.46,800/= and not Kshs.50,000/=. In any event the law on parental responsibility is that the same is shared. In my view therefore the said sum of Kshs.46,800/= ought to have been shared by both the appellant and respondent.

There is evidence that the appellant had married another woman, indeed a cousin of the respondent and started a family. The appellant is a carpenter cum tea grower. In his own testimony he stated that he did not have a permanent job. It fluctuates. The respondent in her testimony also testified that the appellant was a freelance carpenter. That he also owned about 5,400 tea bushes. He earns about Kshs.7000/= - 8000/=. The respondent on her part claimed that she had no source of income but on the other hand said she had or used to have a matatu and she had even engaged a driver who the appellant accused of having an affair with her and which fact caused the family discord. That being the case therefore section 94 of the children Act comes into play. In ordering the appellant to pay a monthly sum of Kshs.5000/= towards the upkeep of the two minors, the court did not consider that the appellant had another family, his financial means had not been thoroughly investigated and the fact also that the respondent had some form of income. If the appellant earns Kshs.7,000/= to 8000/= I do not think that the justice of the case would have demanded that he be compelled to pay Kshs.5000/= per month. It is my view therefore that the sum of Kshs.50,000/= and 5,000/= respectively ordered by the learned magistrate to be paid by the appellant were excessive having regard to the above circumstances. It calls for my intervention. Doing the best I can in the circumstances and weighing one thing against the other, I am of the view that the lump sum of Kshs.50,000/= ordered to be paid to the respondent by the appellant should be reduced to Kshs.23,400/= and the monthly sum of Kshs.5,000/= be reduced to Kshs.2,000/=.

The end result is that save for the reduction in the amount ordered to be paid by the appellant to the respondent the appeal succeeds to that very limited extent otherwise the appeal stands dismissed with no order as to costs. For the avoidance of doubt, the appeal stands dismissed save that instead of the appellant paying to the respondent the lump sum of Kshs.50,000/= and thereafter a monthly sum of Kshs.5,000/= as maintenance towards the 2 minors, the appellant shall now be required to pay a lump sum of Kshs.23,400/= and thereafter a monthly remittance of kshs.2,000/=. The monthly payment of Kshs.2,000/= shall be with effect from 21<sup>st</sup> July 2006. Orders accordingly. Each party shall bear his/her costs of this appeal.

*Dated and delivered at Nyeri this 15<sup>th</sup> day of February 2008*

**M. S. A. MAKHANDIA**

**JUDGE**