REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 86 of 2005

J K .....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(From original conviction and sentence in Criminal Case No.69 of 2004 of the Children's Court at Nairobi - Mrs. J.E. Ragot - RM)

JUDGMENT

J K, the appellant, was charged in the Children Court jointly with one A N, with neglecting a child contrary to section 127(1) of the Children Act No.8 of 2001. The particulars of charge were that on diverse dates between 2002 and 2004 at Nairobi within Nairobi Area jointly being parents of R M and L M aged 10 years and 7 years respectively neglected them by abandoning them thereby exposing them to unnecessary suffering or injury to their health. After a full trial, both accused persons were convicted and placed on probation for one year each. The appellant, being dissatisfied with the learned magistrate's decision appealed to this court against both the conviction and sentence. The other accused, who was the biological mother of the two children, appears not to have appealed. The grounds of appeal were that:

1. The charge was fatally defective.

2. The trial magistrate erred in law and fact in finding that the appellant had parental responsibility for the children.

3. The trial magistrate erred in law in relying on evidence of a co-accused to convict him.

4. The magistrate erred in holding that the appellant was the father of the children in the absence of cogent evidence.

5. The learned magistrate misdirected herself in failing to appreciate that the appellant was arrested on orders of the Children's Court in case No. 283 of 2003.

6. The judgment of the learned magistrate was based on hearsay inadmissible evidence and her own hypothesis rather than cogent evidence and facts.

At the hearing of the appeal, Mr Kabaka, appeared for the appellant. Mr Kabaka argued that the magistrate erred in finding parental responsibility which was not proved. Secondly, no evidence was tendered to establish that the appellant was the father of the children, as no DNA test was conducted.

Counsel contended that the two children were not in the custody of the appellant, therefore, the appellant could not have neglected children who were not in his custody. Counsel also submitted that, it was the co-accused who had admitted to neglecting the children. Counsel submitted that it was wrong for the same magistrate to order the arrest of the appellant and try him. Lastly, counsel argued, the charge was defective, as if alleged that the appellant was the parent of the children, while there was no evidence to that effect.

The learned State Counsel, Mrs Gakobo, opposed the appeal and supported both conviction and sentence. Counsel argued that, though no DNA test was conducted, the appellant had admitted at the trial that he had cohabited with the co-accused for 3 years, had one child with her. Counsel contended that cohabitation for 12 months created parental responsibility upon an unmarried man. Under section 24 (5) of the Children Act, parental responsibility is continuous. Counsel contended that PW2 gave evidence that she collected the children from Nyumba Estate, where they had been abandoned. That was evidence which established that the children had been actually exposed to danger and were neglected. Counsel also argued that the charge sheet was not defective, as the particulars were specified and proved. Counsel lastly, argued that the defence of the appellant was considered and rejected.

In reply, the counsel for the appellant submitted that there was no evidence to establish co-habitation. Therefore, the issue of parental responsibility under section 25(2) of the Act could not arise.

This is a first appeal, and being so, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences - see OKENO vs REPUBLIC [1972] EA 32.

The first issue for consideration is whether the charge is defective. Counsel for the appellant has submitted that the charge is defective as it alleges parentage which was not proved by evidence. In my view, that cannot be a defect on the charge. A defect in the charge could arise if the charge was framed contrary to the requirements of law, or where it does not disclose an offence. The issue of parentage was an allegation which had to be proved by evidence, and, if the allegation was not proved that did not make the charge defective.

The second issue is the proof of the charge. The prosecution was required to prove the case against the appellant beyond any reasonable doubt see MUIRURI vs REPUBLIC (1983) KLR 205.

In our present case, there was evidence that the two co-accused in the subordinate court, at one time cohabited. There is evidence that the female co-accused was actually the biological mother of the two children. The issues with regard to the appellant were, whether he was the father of any of the two children and whether he had taken up parental responsibility, as provided for under the Children Act No.8 of 2001, for him to be found guilty of the offence. The relevant section of the law to under section 25(2) of the Act, provides:-

"**25(2) Where a child's father and mother were not married to each other at the time of his birth but have subsequently to such birth cohabited for a period or periods which amount to not less amount than twelve months, or where the father has acknowledged paternity of the child or has maintained the child, he shall have acquired parental responsibility for the child, notwithstanding that a parental agreement has not been made by the mother and father of the child."**

In the above regard, there was need for the prosecution to prove beyond reasonable doubt either, that the appellant was the father of the children or that he had acknowledged paternity of the children, or had maintained the children. There was no DNA test conducted, therefore proof that the appellant was the biological father of the children was not established. There was no proof also that before the case was instituted, the appellant had acknowledged paternity of the child. There is also no proof that the appellant had willingly maintained the children for any length of time, thus acquiring parental responsibility. I appreciate the evidence of the mother of the children, who was the co-accused. Her evidence implicates the appellant. However, in my view, such proof beyond reasonable doubt needed the evidence of independent witnesses other than the mother of the children, who was actually an interested party, and a co-accused. Her evidence per se cannot be taken to be proof beyond any reasonable doubt.

There is definitely, evidence of some cohabitation between the two accused who were tried in the subordinate court. However, that on its own, cannot prove the offence alleged against the appellant.

Having re-evaluated all the evidence on record, in my view, the prosecution failed to prove the case against the appellant beyond reasonable doubt. They therefore did not discharge their burden as required in criminal cases. For that reason, I will allow the appeal.

Consequently, I allow the appeal, quash the conviction and set aside the sentence imposed by the learned magistrate. If the appellant is in custody for this offence, I order that he be released forthwith unless he is otherwise lawfully held.

Dated and delivered at Nairobi this 11th April, 2008.

George Dulu

Judge

In the presence of:-

Appellant0

Mr Kabaka for appellant

Mrs Gakoba for State

Mwangi court clerk