REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 40 of 2004

J G M ……APPELLANT

VERSUS

C N W……RESPONDENT

JUDGMENT

On 27th August 2003, the respondent **C N W** instituted the suit that gave rise to this appeal before the Principal Magistrate's Court at Nyahururu. The suit was brought under the provisions of the Children Act 2001. The respondent claimed that between, October 2000, she lived with the appellant as husband and wife at Wanjohi trading centre. Out of the relationship, they were blessed with twins in the month of February, 2003. The minors are named V W and D N aged 6 months at the time this suit was instituted.

At the time the respondent started living with the appellant, she had another son namely R W aged 11 years whom the appellant accepted and was providing for his support. It was the respondent's case that when she delivered the twins, the appellant chased her from the matrimonial home. The respondent was forced to move to another house, where the appellant had bought land but had barely built a house. The respondent alleged that the appellant had failed to provide maintenance for the three children. The respondent therefore sought for an order for maintenance of R W, V W and D M.

The appellant denied responsibility over the said children. In his statement of defence he alleged that he moved to Ol Kalou to live with his legally married wife, married under the customary law, with whom they have five (5) children. The appellant alleged that the respondent was married to another man and even if they were involved in a short liaison, the appellant realised that the respondent had another husband. He alleged that he had no fixed income and prayed that the respondent's suit be struck off for being incompetent.

The suit was heard before the Senior Resident Magistrate and by a judgment delivered on 12th February 2004, the learned trial magistrate found that the respondent and the appellant were living together as man and wife and the subjects, V and D were born out of that relationship. The trail magistrate ordered that parental responsibility be and was apportioned between the appellant and respondent. The appellant was ordered to pay Kshs 9,000/= per month towards the upkeep of the twins with effect from 31st February 2004.

Being aggrieved by the said judgment, the appellant applied for a stay of execution, did not pay any instalment as ordered and proceeded to file the present appeal. In the memorandum of appeal, he raised the following grounds of appeal:

1. That the learned trial magistrate erred in both law and in fact by considering the evidence of the appellant in isolation to that of the respondent thus occasioning a miscarriage of justice.

2. That the learned trial magistrate erred in both law and in fact by concluding that there was a marriage between the appellant and the respondent when no evidence nor support of such position was tendered in court.

3. That the Learned trial magistrate erred in fact and misdirected herself in law by concluding that the appellant had any parental responsibility or at all relating to the subjects therein.

4. That the Learned trial magistrate erred in law and in fact by ordering that the appellant pay Kshs 9,000/- per month towards the subsistence and upkeep of the subjects herein when no proof of his income or at all was adduced as evidence in court.

5. That the Learned trial magistrate erred in both law and in fact in failing to appreciate the tenor and implication of the Children's Act 2001 No. 8 of 2001.

6. That the learned trial magistrate erred in both law and in fact in taking undue regard to extraneous matters that never formed part of the court record.

Counsel for the appellant argued that the trial magistrate erred in holding that there existed a marriage between the appellant and the respondent which was against the weight of the evidence. He submitted that there is no marriage by cohabitation. It is not recognised in the statutes. The trial court was also faulted for relying on two affidavits which were sworn on 16th January 2001 between the appellant and respondent declaring that there was a customary marriage and that they got married in 1996 under the Kikuyu Customary Law. This is contradicted by the pleadings especially the plaint paragraph 3 which states that:

> *"The respondent married the appellant in the year 2000."*

During the hearing the respondent confirmed in cross-examination that dowry was paid between 2000 and 2001 which contradicts the averments in the affidavits. It was clear in evidence that the respondent's children allegedly born with the appellant were born in the year 2003 despite the fact that the affidavits state that they were blessed with two children. According to counsel for the appellant, the trial court ought to have disregarded the affidavits.

The trial court was also faulted for finding that the appellant had parental responsibility when it was obvious that he separated from the respondent in the year 2002 and the subjects were born on 7th February 2003 when the two had parted ways. Since the two children were born out of wedlock the appellant cannot be held to have any responsibility over illegitimate children born out of wedlock.

Lastly, the judgment was challenged for ordering the appellant to pay Kshs 9,000/= per month, without any evidence to show that he was capable of paying such an amount. The evidence that the trial court relied on, such as the money used to purchase land and for construction of a house, was before the suit was filed. There was no basis therefore for the trial court to order the appellant to pay such an exorbitant amount when he is not in any gainful employment and was having the responsibility of providing for his legitimate children.

This appeal was opposed by the respondent who submitted that the trial court properly evaluated the evidence and arrived at the right conclusion that the appellant and respondent cohabited together as husband and wife. In deed they swore affidavits or statutory declarations where they declared themselves husband and wife. Further, the two swore affidavits to support the respondent's change of maiden name on the identity card to reflect the appellant's surname. The appellant admitted in evidence that he used to live with the respondent and when they parted ways he decided to assist her in building a house. The appellant admitted that he lived with the respondent up to June 2002 and he signed the affidavits declaring the marriage. Even the first wife of the appellant admitted that the appellant was living with the

respondent from 2000 and he also admitted the respondent left his house while pregnant.

This was sufficient evidence for the trial court to make a finding that there existed a marriage between the appellant and respondent and in the cause of the marriage; the respondent became pregnant and gave birth to the twins. The birth certificates for the twins clearly indicated the appellant is their father. There is sufficient evidence especially documents showing that the appellant was purporting to transact a land deal on behalf of the respondent barely three days after she had given birth. In that transaction, he referred to the respondent as a wife. The way the appellant held himself as demonstrated by those documents, he can be presumed married to the respondent.

Under the Children Act, the appellant was held responsible for the upbringing of the children he sired. The respondent presented evidence to show the respondent was a man of means. The appellant admitted that he assisted the respondent to construct a house and even produced receipts for the building materials. It is on the basis of that evidence that the court found the appellant had means and ordered him to pay Kshs 9,000/=. Counsel therefore urged the court to dismiss the appeal with costs and to uphold the judgment of the lower court. Since judgment was delivered, the appellant never paid a single cent to support the children who are now going to school.

This being a first appeal, this court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. This court should however bring to bear that it never saw the witnesses testify and give due allowance for that. The principles to guide the first appellate court have been set out in several decisions and one such leading authority is to be found in the case of Peter vs. Sundy (1958) E.A. page 429 as follows:

> *"It is a strong thing for an appellate court to defer from the finding, on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."*

This matter was brought under the provisions of the Children Act, 2001. Section 24, 25, 26, 27 and 28 makes provisions as to who should have parental responsibility of children born within marriage, and outside marriage. Section 90 of the Act, makes provisions on the orders the court can make for maintenance of children by the parents of the child.

The plaintiff in her suit, did not seek for orders of presumption of marriage by virtue of cohabitation. She only sought for an order of maintenance of the children. The respondent contended that she had cohabited with the appellant from the year 2000, and in the course of the cohabitation, the appellant had agreed to support even the respondent's two children who were born before she started cohabiting with the appellant. Unfortunately, one of the children passed away, the respondent alleged that she was married to the appellant and she gave birth to the subjects in the course of the cohabitation.

For reasons that the alleged marriage was denied by the appellant, it became necessary for the trial court to delve into the issue of whether there was a marriage by virtue of cohabitation. The respondent testified and produced documents, principally two statutory declarations sworn by both the appellant and respondent declaring them married. She gave further documents where the appellant was purporting to transact on her behalf by a document dated 10th February 2003. Furthermore the appellant purchased a piece of land for the appellant and constructed for her a house after the subjects were born. The respondent testified that she was forced out of the matrimonial home by the appellant before the twins were born. The appellant on his part admitted that the respondent left when she was pregnant.

Under section 118 of the Evidence Act;

> *"The that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after dissolution, the mother remaining*

unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten"

When this suit was filed, the respondent must have been sure that she was married to the appellant, after all, she was armed with the affidavits declaring the marriage and according to her, and some dowry was paid which is part of steps towards the formalization of Kikuyu Customary Marriage. The appellant denied there was marriage and the trial court had to go into determining whether the relationship between the respondent and appellant constituted marriage. The trial court was right to do so, because under Section 24(1) of the Children Act where the child is born out of wedlock the parental responsibility of the child is placed on the mother in the first instance. The father of the child can acquire parental responsibility in accordance with the provisions of Section 25(1) which provides as follows:

"(1) where a child's father and mother were not married at the time of his birth –

(a) The court may, on application of the father, order that he shall have parental responsibility for the child; or

(b) The father and mother may by agreement ("a parental responsibility agreement") provide for the father to have parental responsibility for the child."

The above provision has been criticised and rightly so, for offering differential treatment or for discriminating against children borne out of wedlock. I do not intend to go into a discourse into the provision of section 25(1) of the Act, save to comment that it is the high time Parliament deemed it fit to amend the Act and make it possible for either the mother, child, guardian or anybody to make an application for parental responsibility even for a child born out of wedlock.

Coming back to the decision by the learned trial magistrate, I agree with the findings that going by the evidence before the court, there is no doubt the appellant and respondent were cohabiting as husband and wife. In the course of the cohabitation, the subjects were born. Counsel for the appellant argued that there is no marriage by cohabitation that is recognised in the statute. The statutes especially marriage laws that date to the colonial period may not recognise cohabitation as a form of a marriage. The reality on the ground however, is many Kenyans are routinely living together as man and wife, they have given birth to children, when the relationship go awry, or one of the partners die, the victims who are usually women, come to Court to seek for justice. In this case, the Courts, have not shunned away from the responsibility of administering justice. The Courts have held in numerous decisions that a marriage can be presumed to exist where parties who have capacity to enter into a marriage hold themselves as such and cohabite for a period of time. See the case of Machani v. Vernoor [1985] KLR 859 where the Court of Appeal held:

"1. the presumption of marriage covers two aspects, that the parties have capacity to enter in a marriage and that they did so in effect …

2. The court can presume existence of a marriage where there has been a ceremony of any form followed by cohabitation or under customary law and the respondent has to show their marriage fits in any of the two."

Under the Children Act 2001, especially Section 4, the welfare and the best interest of the child is of paramount consideration and every judicial officer is enjoined to treat the best interest of the child as such. Section 4(3) provides:

"(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to –

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child;

(c) Secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest."

This being the framework, in order to uphold the best interest of the child, the trial magistrate properly conducted the trial and investigated the issues in dispute. The Learned trial magistrate found that the subjects were sired by the appellant, consequently the appellant was properly ordered to contribute to their welfare and upbringing. The trial court found that the appellant went as far as making statutory declarations, constructing a house for the respondent, generally holding out the respondent as his wife not to mention engaging in sexual liaisons without reminding himself of the consequences.

It was too late for the appellant to merely deny parenthood. According to a leading text book on Family Law Bromley's Family Law 9th Edition by Nige Lowe & Gillian Bougles page 52 it is the opinion of the learned authors *that if a marriage is challenged;*

" the burden lies upon those challenging it to prove that there was in fact no marriage and not upon those alleging it to prove that it was solemnized."

On the issue of whether the assessment was exorbitant, the appellant did nothing to assist the court arrive at a reasonable assessment by failing to provide any evidence of his earnings. The court had to rely on the documents which were on record to arrive at the figure of Kshs 9,000/=. I find that on a balance of probabilities the respondent was able to prove her case. The appellant's mere denial and his evidence fell short of proving his case.

I have carefully evaluated the evidence on record and I find the evidence by the appellant unreliable especially in the face of sworn declarations and the documentary evidence availed by the respondent which was not challenged. It was too late for the appellant to merely deny the relationship and that he fathered the subjects. An issue of parenthood is a serious one, which cannot just be merely denied when all the circumstances point at the appellant as being the father of the subjects. For the above reasons, I find no merit in this appeal which I dismiss with costs to the respondent. The decision of the trial court is upheld.

Judgment read and signed on 23rd day of May, 2008

M. KOOME

JUDGE