REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 1 OF 2019

JMA.....APPELLANT

VERSUS

RGO.....RESPONDENT

(Being an appeal from the Judgment by Honourable Magistrate R.O. Mbogo delivered on 7th December 2018 in the Children's Court at Nairobi)

JUDGMENT

(1) Before this Court is the Memorandum of Appeal dated **20th December 2018** filed by **JMA** (hereinafter **"the Appellant"**) against the Judgment delivered on **7th December 2018** by **Hon. Mr. R. O. Mbogo** Resident Magistrate sitting in the **Children's Court Nairobi**.

(2) The Respondent **RGO** filed Grounds of Opposition to the Appeal. The Appeal was canvassed by way of written submissions. The Appellant filed his written submissions on **17th June 2020** whilst the Respondent filed her submissions dated **13th July 2020**.

BACKGROUND

The Appellant and the Respondent were a couple who got married under Kisii Customary Law in the year **1998**. Their union was blessed with four (4) issues namely:-

(i) **MK** – born on **8th November 1998**

(ii) **FK** – born on **16th May 2000**

(iii) **JK** – born on **22nd October 2002**

(iv) **SM** – born on **16th January 2006**

The couple lived together until the year **2011** when the Appellant apparently ejected the Respondent from the matrimonial home.

(3) On **9th October 2017** the Respondent filed in the **Children's Court** at **Milimani Nairobi Children's Case No. 781 of 2011** in which she sought to be awarded actual and physical custody of the four (4) issues of the marriage and also prayed that the Court order the Appellant to pay maintenance towards the upkeep of the children.

(4) In response the Appellant field a Statement of Defence dated **16th March 2018** seeking the dismissal of the Respondent's suit. On **7th December 2018** the learned Trial Magistrate delivered his judgment in which he made the following orders:-

"1. Parties shall jointly share legal custody of the minors

JK and SM.

2. The Defendant will have reasonable and unrestricted access of the children JK and SM. The parties to agree on modalities.

3. The Plaintiff shall provide shelter and clothing.

4. The Defendant shall provide school fees and related expenses [for] JK and SM. The choice of the schools must be mutually agreed by both parties. The fees will be paid till the children earn their first degree or diploma.

5. Parental responsibility of the children MK and FKM shall be extended beyond 18 years.

6. The Plaintiff shall provide for College related expenses for JK and SM while the Defendant shall provide for College fees.

7. The Defendant shall provide medical cover for the children.

8. Both parties shall meet the cost of food and other utilities. The Defendant shall contribute Kshs. 8,000/- quarterly, while the Plaintiff shall met the shortfall.

9. Each party shall bear own costs.

10. Each party is at liberty to apply."

(5) The Appellant being aggrieved by the said decision of the trial Magistrate file this present appeal. The appeal was premised on the following grounds:-

"(a) The learned trial Magistrate erred in law by making a

Judgment without or before reading the DNA report from the Government Chemist.

(b) The learned trial Magistrate made an error by proceeding for the full hearing where there is a pending application. Dated 30th May 2017 to set aside the attachment of the Appellant's salary that for arrears of the rent where the Plaintiff confirmed that she resides in her own house.

(c) That the learned Magistrate erred in law by failing to lift the attachment of the entire salary of the Appellant making it difficult to satisfy the decree as he currently claims nothing from his employer.

REASONS WHEREOF the Appellant prays that**:**

(a) The appeal be allowed and Judgment entered on 7th December 2018 together with all consequential orders thereof be set aside.

(b) Cost of this appeal."

(6) The Respondent in turn filed Grounds of Opposition to the Appeal dated **19th November 2019** premised on the following grounds:-

1. THAT the issue of DNA had already been settled as the same confirmed that he was the biological father and the same was upheld by Hon. Justice Musyoka in High Court Civil Appeal 73 of 2012.

2. THAT the Appellant has failed to identify issues that constitute a substantial question of law being violated and had not previously been dealt with.

3. THAT the Appellant's Appeal is incompetent, misconceived, misplaced and is an abuse of the process of this Honourable Court as the Appellant's aim is to avoid his parental responsibility to the children.

ANALYSIS AND DETERMINATION

(7) I have carefully perused the Record of Appeal filed in this Court on **31st May 2019**. I have carefully considered the written submissions filed by both parties as well as the relevant law. In the case of **KIILU & ANOTHER –VS- REPUBLIC [2005]I KLR**, the Court of Appeal stated thus:-

"1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate Court's own decision on the evidence. The first Appellant Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing

the witnesses."

(8) The following on my view are the issues which arise for determination in this appeal-

(i) Whether a DNA test was conducted to prove the parentage of the children and if so were the results of said DNA test communicated to the parties.

(ii) Whether the attachment of the Plaintiffs salary ought to be lifted.

(iii) Whether the learned Magistrate erred by extending suo moto parental responsibility in respect of the children MK and FK.

DNA TEST

(9) The Appellant had initially denied paternity of the four (4) children and insisted that a DNA test be conducted to establish whether he was indeed the father of the four (4) children. The Appellant claims that the results of that DNA test were never made public neither were said results read out in the lower Court. This issue was dealt with by the trial Magistrate who in his Judgment dated **7th December 2018** stated as follows:-

"The Defendant disputed paternity of the children and demanded DNA to be conducted. The DNA results were read in open Court in [High Court] File No. 73/2011. The Defendant was ordered to pay school fees and medical ……" [own emphasis]

(10) From the record of the trial it is clear that a DNA test was conducted at **Kenyatta National Hospital** and that the Appellant even refunded **Kshs. 15,000/-** being the cost for the DNA test. Further at page **70** line **7** of the proceedings the Appellant under cross examination admits-

"… DNA confirmed the results would be read in open court. I doubt the results because they were never read to me. I have never accessed the file [referring to High Court Case No. 73 of 2012]. I haven't asked for another DNA. I have seen the results we were served. The DNA is false …"

(11) First the defendant denies having been informed of the results of the DNA. Next he admits that he was served with the results and has seen them but claims that the said results are false. The Appellant here is speaking from both sides of his mouth. He has clearly admitted to having seen the results of the DNA test.

(12) Finally this matter was put to rest by **Hon. Justice Musyoka** in his Ruling in **Civil Appeal No. 73 of 2012**, where he stated that **Hon. Justice Kimaru on 8th March 2013** found that from the paternity test carried out, the Appellant was indeed the father of the four (4) children. In the Ruling in **HIGH COURT CIVIL APPEAL NO. 73 OF 2012 JMA –VS- RGO Hon. Justice Musyoka** stated as follows:-

"6. The issue of paternity which is raised in the application as disposed of following the order made on 8th March 2013 by Kimaru J. It would appear from the submission filed by the parties that the paternity tests were carried out and it was confirmed that the Appellant was the father of the subject children."

(13) I therefore find no merit in the Appellants allegation that the learned trial Magistrate rendered his Judgment without the benefit of the results of the DNA test. That ground of the appeal is dismissed.

(14) The Appellant submits that the trial Magistrate erred in proceeding to hear the suits whilst there was still pending an application dated **30th May 2017** seeking to set aside the attachment by the Court of the Appellant's salary for payment of arrears of rent. Firstly as correctly pointed out by the Respondent in her written submissions this application having been filed by the Appellant it was incumbent upon the Appellant to move the Court to hear the said application. Secondly there were no orders in existence staying the trial pending the hearing and determination of said application.

(15) Thirdly the Appellant's claim that the attachment of his salary was ordered to pay rent arrears yet the Respondent resided in her own house was misleading. The record indicates that from **2012** to **2018** (a period of six (6) years) the Appellant had failed and/or declined to make any payment towards the maintenance of the children. The attachment ordered by the Court vide the Ruling of **18th December 2015** was to made cater for the arrears of rent which arose during the period in question. The application seeking to lift the attachment of the Appellant's salary was the Appellant's application. The onus was on the Appellant to prosecute the application. His failure to do so cannot be blamed on the Court. Further I note that Counsel for the Appellant did not raise this issue before the trial commenced.

(16) Finally the Appellant submits that the learned trial Magistrate erred in law extending parental responsibility for the two children of the marriage **'MK'** and **'FK'** yet both children had attained the age of 18 years. The Appellant argues that the Court ought not to have acted '**suo moto'** where there was no application before the Court seeking for the extension of parental responsibility.

(17) Under the **Children Act Cap 141 Laws of Kenya** a Court is obliged and indeed is authorized to make any orders as are necessary to promote the best interests of a child. **Section 4(2)** of the said **Act** provides-

"(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." [own

emphasis]

(18) Furthermore the same **Act** gives to Courts the power to make any orders or to vary, modify or discharge any order made relating to maintenance as the Court thinks fit. **Section 98** of the **Children Act** provides:-

> **"The Court shall have power to impose such conditions as it thinks fit to an order made under this Section and shall have power to vary, modify or discharge any order made under Section 98 with respect to the making of any financial provision, by altering the times of payments or by increasing or diminishing the amount payable or may temporarily suspend the order as to the whole or any part of the money paid and subsequently revive it wholly or in part as the Court thinks fit."**

(19) More specifically **Section 28(1)** of the **Act** provides as follows:-

> **"28(1) parental responsibility in respect of a child may be extended by the Court beyond the date of the child's eighteenth birthday if the Court is satisfied upon application or of its own motion that special circumstances exist with regard to the welfare of the child that would necessitate such extension being made." [own emphasis]**

(20) Therefore **Section 28(1)** specifically empowers a Court to extend parental responsibility in respect of a child who has attained or is over the age of eighteen, so long as the Court is satisfied that special circumstances exist in relation to the welfare of the child to warrant such an extension of parental responsibility.

(21) In the Judgment delivered on **7th December 2018** (at page **79** of the record) the learned trial Magistrate stated as follows:-

> **"Section 28 of the Children's Act provides for the extension of parental responsibility in respect of a child beyond 18 years if the Court is satisfied that special circumstances exist with regard to the welfare of the child. The Court has been given a wide discretion in that it can do it on its own motion. I have taken note that this suit commenced way back in 2011 when both children were minors, the suit has stayed for over 7 years without proceeding to full hearing. Circumstances of these children have changed. They have cleared secondary school and they will go to College so that they can get a course which will help them to [be] self sustaining. Already one is in College and will need College fees and related expenses. I will extend their parental responsibility beyond 18 years without qualms. Both parents must support these children so that they realize their dreams."**

(22) The law clearly authorizes a Court to act ***suo moto*** in extending parental responsibility beyond 18 years. The learned trial Magistrate has clearly explained the circumstances of the two older children which led him to make that decision. In my view the trial Magistrate was right. In the world today one does not stand a fighting chance without a College Degree. The 1st child **MK** was already a student at **[Particulars Withhheld] University** whilst the second born **FK** had completed her secondary education and was awaiting admission into a College. Both would need to be supported financially to enable them attain at least a first Degree. In the circumstances I find no error on the part of the trial Magistrates in deciding to act ***suo moto*** to extend the parental responsibility of the Appellant in respect of both children. They both had genuine educational needs which could only be realized through an order of extension of parental responsibility.

(23) A similar situation held in the case of **CMG –VS- MMM [2014]eKLR** where **Hon. Justice Luka Kimaru** held as follows:-

> **"This court has taken the following view of the matter: under Section 4(3) of the Children Act, this court is required, in exercising its judicial power, to always treat the interest of the child as of first and paramount consideration. That is the consideration too that the trial court was also required to uphold. It appears that the Appellant is labouring under legal misapprehension that the Children's Court did not have jurisdiction to determine a case involving maintenance for a child who is over 18 years when a specific application has not been made by such party for extension of parental responsibilities as envisaged under Section 28(1) of the Children Act. Section 28(1) grants the Children Court jurisdiction *"if the court is satisfied upon application or of its own motion"* that special circumstances exist with regard to the welfare of the child that would necessitate such extension to be made. In the present appeal, the special circumstance was that the Respondent required the Appellant to pay the college fees for the child. It is this court's holding that it is not necessary that an application to be made by an applicant for the Children's Court to extend parental responsibility in respect of the welfare of a child. When the court formed the opinion that it would be in the best interest of a child, on its own motion, it can grant such extension of parental responsibility beyond the 18th birthday of the child and proceed to issue an appropriate maintenance order. This was the case in the proceedings of the Children's Court that resulted in the order that is being sought to be impeached in the present appeal. The court cannot fault the Children's Court in the decision that it took because the decision was made with the best interest of the child in mind." [own emphasis]**

CONCLUSION

(24) Finally I find no merit at all in this appeal. The same is hereby dismissed in its entirety. Costs are awarded to the Respondent.

Dated in Nairobi this 5TH day of FEBRUARY, 2021.

.....

MAUREEN A. ODERO

JUDGE