



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 21 OF 2018

CM.....APPELLANT

VERSUS

SWA.....RESPONDENT

(Being an appeal from the judgment and decree of the Honorable Resident Magistrate H. M. Mbatia (Mrs.) delivered on the 21st February, 2018 in Nairobi Children's Case No. 698 of 2017)

JUDGMENT

1. In a judgment dated 21st February, 2018 the Children Court at Nairobi in Case No. 698 of 2017 made orders directing that the defendant pay in the first instance Kshs. 132,500/= towards the school fees needs of the plaintiff and that the mother do provide for all other school related expenses because parental responsibility is shared.

2. Aggrieved by the decision, the defendant, who is the Appellant herein, approached the court by way of a memorandum of appeal dated 27th February, 2019 and filed on 20th June, 2018. The Appellant is asking the court to set aside the judgment and order of the Children's Court given on 21st February, 2018, and condemn the Respondent to pay the costs of this appeal.

3. The Appellant advanced twelve (12) grounds of appeal the gist of which is that the honorable learned magistrate erred in law and in fact by allowing the suit filed by the Respondent for extension of parental responsibility whereas:

1. The Respondent had confirmed during the hearing of the matter that the admission letter to East African Institute of Certified Studies, Nairobi produced as an exhibit in the case had lapsed and her place in the said college was no longer available.

2. The Respondent had failed to prove her case on a balance of probability as expected in civil proceedings as she failed to produce her Kenya Certificate of Secondary Education (K.C.S.E) to confirm that parental responsibility could be extended beyond eighteen (18) years by virtue of her qualification for admission to an institution of higher learning.

3. It was evident from the Appellant's net salary as exhibited in his pay slip that he could not afford to pay Kshs. 132,500/= towards the Respondent's college fees. Further that no evidence was presented to support the holding that even though the Appellant was straining financially, he had other alternative sources of income to support the Respondent's school needs.

4. The Respondent had failed to demonstrate the special circumstances envisaged under **section 28(1)** of the **Children Act** with regard to the welfare of the child to warrant an order for extension of parental responsibility. Instead, the learned magistrate misconstrued the law and held that regardless of the circumstances, once paternity is proved, extension of parental responsibility would be a matter of natural course.

5. The Respondent has been out of school for four (4) years and is engaged in personal income generating undertakings, modeling and marketing, which she admitted to during her evidence in court.

6. The Respondent's mother had elected to disown the Appellant as admitted by the Respondent in her evidence and the Appellant therefore organized his life and financial needs as circumstances would dictate, including acquisition of loans. That there is therefore nothing sinister about the said loans because it is the Respondent who elected to sit on her rights.

4. The appeal came up for directions on 24th January, 2019 where upon application by counsel for the Respondent the court directed that the appeal be disposed of by way of written submissions. The matter had initially been referred to mediation but the parties failed to reach a settlement as indicated in the Mediator's Report dated 6th November, 2018.

5. Learned Counsel Mr. Sumba filed written submissions dated 4th February, 2019 on behalf of the Appellant in which he reiterated the grounds of the appeal and asked the court to allow the appeal in the terms prayed. Counsel urged that extension of parental responsibility cannot be conferred to the Respondent without proof that she qualified to join an institution of higher learning. Further that the Appellant's resources are not sufficient to cater for his five (5) children and still pay for the Respondent's college fees.
6. Mr. Sumba asserted that the Respondent's application in the Children's Court was premised on **section 28(1)** of the **Children Act** which required that the Respondent demonstrate exceptional circumstances for parental responsibility to be extended but this was not discharged. Counsel stated that the Respondent failed to exhibit a certificate for Kenya Certificate of Secondary Education to demonstrate that she qualified to join college. Further that she had been out of school for a period of four (4) years and was in gainful employment. That in any event, the copy of the letter of admission had already lapsed even at the time the court held that fees be paid.
7. In opposition, learned counsel Mr. Seth Ojienda filed written submissions dated 25th March, 2019 on behalf of the Respondent in which he submitted that it is in the best interest of the of the Respondent that the court sustain the lower court judgment and decree.
8. It is Mr. Ojienda's submission that the Respondent approached the Children's Court seeking extension of parental responsibility against the Appellant since she had secured admission to pursue a diploma in journalism at [Particulars withheld] Institute of Certified Studies but could not raise the fees of Kshs. 132,500/=. This prompted her to file the application since the Appellant, her biological father, had the means to pay for her tertiary education.
9. Mr. Ojienda submitted that parental responsibility is automatic and self-activating on parents upon the birth of a child and fathers cannot have the discretion of either rejecting or accepting that responsibility. That the fact that the Appellant failed to participate in the general upbringing of the Respondent does not absolve him from exercising parental responsibility over her.
10. Counsel asserted that **section 28** of the **Children Act** provides that parental responsibility in respect of a child beyond the age of eighteen years can be extended if the court is satisfied that special circumstances exist with regard to the welfare of the child. That **section 91** of the **Children Act** further provides for circumstances under which a person who is not a child can apply to the court for a maintenance order.
11. Mr. Ojienda submitted that the **Children Act** defines education to mean the giving of intellectual, moral, spiritual instruction or other training to a child. Counsel asserted that basic education is more than just learning how to read, write and calculate. It encompasses the broadest possible sense of learning at any stage of life and it is not confined to childhood and formative years. Counsel stated that the court has power to extend the right to education to a child of over eighteen (18) years if the court is satisfied upon application or on its own motion that special circumstances exist with regard to the welfare of the child. That in the instant case, the special circumstance was that the Respondent required the Applicant to pay for her college fees.
12. Counsel asked the court to take judicial notice of the Kenyan education system where a child starts school at the age of 6 years and remains reliant upon their parents for school fees, university or college fees beyond the age of eighteen (18) years. That it is the Respondent's desperation to pursue higher education that made her file the suit before the lower court.
13. It is Mr. Ojienda's submission that even though the Respondent is a child born out of wedlock, **Article 53** of the **Constitution** and the **Children Act** provide for the principles of equality and non-discrimination of legitimate and illegitimate children. Counsel asserted that the Appellant has children from his current marriage for whom he is able and willing to provide for including payment of school fees for higher education.
14. Mr. Ojienda noted that the Appellant has a daughter one MDA who is pursuing an undergraduate program in Education (Arts) at [Particulars withheld] University for whom he pays a total of one hundred and twenty six thousand shillings (Kshs. 126,000/=) per academic year. That the Respondent's reluctance to cater for the Respondent's school fees to pursue a diploma in journalism therefore amounts to discrimination. Counsel urged that the Appellant being able to afford school fees for his children within the marriage set up is compelled by law to provide for the Respondent albeit born out of wedlock.
15. The court has considered the grounds of appeal, the various authorities referred to by both counsels on record and their rival arguments to determine whether the trial court properly exercised its discretion in granting the orders for extension of parental responsibility against the Appellant. This court is alive to the fact that it did not hear the witnesses testify or observe their demeanor, and therefore should be slow to reverse the trial court's decision. It is however, not lost on this court that an appeal is in a way a retrial. It therefore must reconsider the evidence, evaluate it itself and draw its own conclusions. In the case of **Peters vs. Sunday Posts Ltd [1958] E.A. 424** at page 429, the Court of Appeal rendered itself thus:
- “It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the Judge who tried the case, and who 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.”**
16. Parental responsibility is defined under **PART III, section 23(1)** of the **Children Act** to mean all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child. The child envisaged under the **Children Act** is any human being who is under the age of eighteen (18) years. It is noteworthy however that parental responsibility in respect of a child who has attained the age of majority can be extended if the court is satisfied that special circumstances exist with regard to the welfare of the child. The special circumstances are provided under **section 28(1)** of the **Children Act** which stipulates thus:

“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:

Provided that the order may be applied for after the child's eighteenth birthday."

17. **Section 91(b)** of the **Children Act** further provides for exceptional circumstances when a person who is not a child can apply to the court for a maintenance order. The section states thus:

"Any parent, guardian or custodian, of the child, may apply to the court to determine any matter relating to the maintenance of the child and to make an order that a specified person make such periodical or lump sum payment for the maintenance of a child, in this Act referred to as a "maintenance order," as the court may see fit;

Provided that-

(a)...

(b) a person who has attained the age of eighteen years may, with the leave of the court, apply to the court for maintenance order to be made in his favor in the following circumstances-

(i) the person is or will be involved in education and training which will extend beyond the person's eighteenth birthday; or

(ii) the person is disabled and requires specialized care which will extend beyond the person's eighteenth birthday; or

(iii) the person is suffering from an illness or ailment and will require medical care which will extend beyond the person's eighteenth birthday; or

(iv) other special circumstances exist which would warrant the making of the order."

18. There is no doubt that the Appellant values education as demonstrated by the caliber of schools his other children attend and the fact that he has also gone out of his way to support one of his children beyond the age of majority, one DM who is currently pursuing a Bachelors of Education degree under a parallel program at [Particulars withheld] University for a sum of Kshs. 130,000/= per academic year. The fact that he caters for his other children's education is attributable to the fact that he has been present in their lives all through and had therefore planned for them and their education.

19. From the record, it is not in dispute that the Respondent is the daughter of the Appellant who has been absent from her life until after she attained the age of majority. At the time of filing the suit in the Children's Court, the Respondent who was born on 19th February, 1996 was aged 21 years and had secured admission to pursue a diploma course in journalism at the [Particulars withheld] Institute of Certified Studies. All through the Respondent's life, she was maintained solely by her mother who the Respondent now states is financially constrained and cannot meet the costs of her tertiary education.

20. There is on record a copy of an admission letter and fee structure for the Respondent to pursue a diploma course in journalism at [Particulars withheld] Institute of Certified Studies. The admission letter is dated 7th April, 2016 and indicates that the course duration is eighteen (18) months. The annexed fee structure is for the academic year 2016/2017. At the time of filing the suit on 24th May, 2017 the 2016/2017 academic year had commenced and there is nothing on the record to show that the Respondent enrolled for the program. There is also no copy of the Respondent's Kenya Certificate of Secondary Education to demonstrate her qualifications and whether she qualified for admission into college for furtherance of her education.

21. The Appellant's case is that the Respondent slept on her rights and was coming into his life a little too late, since at the time of instituting suit, four (4) years had lapsed since she sat for her Kenya Certificate of Secondary Education examinations. That the Respondent's seamless transition from secondary school to university had therefore lapsed and that the suit was an afterthought meant to enable the Respondent accomplish a lavish lifestyle under the guise of seeking to pursue her further education.

22. The Appellant argued before the trial court that extension of parental responsibility cannot exist in a case such as this one where there has never been any parental responsibility exercised by the party against whom the orders are sought. That in any case, the Respondent is an adult who is engaged in gainful personal undertakings which generate sufficient money from which she can fend for herself and cater for her further education.

23. In granting the orders of extension of parental responsibility against the Appellant, the trial court noted that despite the Appellant's claim that he was straining financially to maintain his five (5) children and could therefore not cater for the Respondent's college fees, the strain was attributable to the loans taken out by the Appellant. The trial court went ahead to state "*it is common knowledge that loans are usually taken for investment. I can therefore safely assume that the defendant has an alternative source of income which he did not disclose.*" Further that the fact that the loan repayment would end on 5th September, 2019 meant that the Appellant would still be employed until then or that he has an alternative way to service the loans. There was however no evidence of the Appellant's investment portfolio or alternative sources of income.

24. The trial court further noted that all children are equal before the law and that children born in wedlock are no more equal than children born outside wedlock. That if the Appellant can struggle to pay parallel university fees for his daughter, he should also struggle to ensure the

Respondent gets basic tertiary education. The court went ahead to hold that special circumstances exist to extend parental responsibility and ordered the Appellant to cater for the cost of the Respondent's diploma course.

25. Indeed, all children are equal regardless of whether they are born in or out of wedlock. The main question for determination however is whether in this instance, the Respondent has demonstrated special circumstances to warrant the issuance of the orders that were granted in the lower court.

26. From the record, I find that there is no legal basis for which the trial court granted the orders for extension of parental responsibility against the Appellant. The Respondent did not demonstrate that she excelled in her Kenya Certificate of Secondary Education, or explain why she failed to transition into tertiary education immediately after completing her secondary education.

27. In my view **sections 28 and 91(b)(i)** of the **Children Act** envisage a situation where a child attains the age of eighteen (18) years, and the programme in which the child had enrolled for has not lapsed. Such child can successfully apply to the court to compel their parent to see them through the completion of that programme. At the completion of that programme, parental responsibility ceases and the child becomes an adult who ought to fend for himself or herself. (See – **Allan Njau Waiyaki vs. Eddie Waiyaki Hinga Civil Appeal 34 of 2017 [2019] eKLR**).

28. Whereas in the instant case the Respondent is yet to undertake tertiary education, she waited three (3) years post her secondary school education to pursue her tertiary education and seek the court to extend parental responsibility against her father, the Appellant herein. It is trite that equity does not aid the indolent, and the Respondent herein has clearly slept on her rights. While the Appellant has never contributed towards the Respondent's education all through her life, he is not entirely to blame for his acts or omissions.

29. The evidence on record demonstrates that it was not the Appellant's doing to be out of the Respondent's life. In her examination in chief as shown on the record, the Respondent told the court that she met the Appellant in 2015 after she had completed her secondary school education. That she had never asked her mother about her father out of fear. During cross-examination, the Respondent reiterated that while she knew of the existence of her father, she only met him in 2015. She went on to state:

“He was surprised to see me because he had not seen me for 19 years. HE recognized me because I resemble my mum. I looked for my father because I had finished form 4 and I was now waiting to join college. My mum was struggling. I did KCSE in 2013. I didn't dictate when I was supposed to meet him.”

30. From the Respondent's testimony before the trial court as shown on the record, by the year 2015 she was already two (2) years post-secondary school education having completed her Kenya Certificate of Secondary Education in the year 2013. As such, at the time of instituting the suit on 24th May, 2017 four (4) years had lapsed since the Respondent completed her secondary school education. It therefore appears that the Respondent's suit seeking extension of parental responsibility is an afterthought fueled by the Respondent's interaction with the Appellant's daughter on the Facebook social media platform. The Respondent in her cross-examination told the trial court *“... My step sister contacted me. I befriended her on Facebook...I want the Defendant to pay Kshs. 132,000/- per semester i.e. Kshs. 396,000/- per year. The Defendant's children are in public universities.”*

31. I note further that at the time when the trial court granted the orders in favor of the Respondent, her letter of admission to [Particulars withheld] Institute of Certified Studies was no longer valid and could therefore not sustain the orders. The relevant part of the Respondent's testimony during cross-examination before the trial court is as follows:

“My admission to [Particulars withheld] has lapsed. I can pursue studies at MKU. I have an admission letter. I don't talk about fees with my step sister.

Court: Is your admission to M still available?

Plaintiff: No. I wouldn't feel comfortable going back. I deferred my studies in 2015 July.

Court: If you go back will they take you?

Plaintiff: Yes it was a diploma.

Court: What did you get in KCSE?

Plaintiff: A C plain.”

32. From the record, it is evident that the Respondent is not certain of what course she wants to pursue and where to pursue it. She alluded to having been at M University previously but did not tender any evidence in support thereof. She admitted that her admission to the [Particulars withheld] Institute of Certified Studies had lapsed but stated that she could pursue her studies at MKU. She did not however present an admission letter to MKU or the fee structure of the course she intended to pursue. It appears that all the Respondent has been doing is hop from course to course and from college to college, and has no certain course or college in mind for which she would want the Appellant to cater for the cost of the fees.

33. Based on the foregoing, it is evident that at the time of instituting the suit seeking extension of parental responsibility, the Respondent was not enrolled in any programme for which the Appellant was providing for, or which she was seeking the court to compel the Appellant to cater for.

34. The Appellant no doubt caters for the educational needs of his other children including one who has already attained the age of majority. This does not in any way however compel him to cater for the Respondent's tertiary education. This is because he has always been aware of the existence of his other children and therefore planned for their needs, unlike the Respondent herein. In any event, the Respondent is an adult who can seek employment and cater for her own college fees. Further, in the instant case, the Respondent failed to smoothly transition into tertiary education and is not certain of where she wants to pursue her tertiary education.

35. In the end, I find that the Respondent is not deserving of the orders extending parental responsibility against the Appellant. The result is that the appeal is found to be meritorious and is consequently allowed. The judgment and order of the Children Court at Nairobi made on 21st February, 2018 is hereby set aside forthwith. Based on the nature of this appeal, each party shall bear their own costs. It is so ordered.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 7TH DAY OF NOVEMBER, 2019.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Appellant.

In the presence ofAdvocate for the Respondent.