



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.71 OF 2012

BETWEEN

SGK.....APPELLANT

AND

GWM.....RESPONDENT

(Being an Appeal from the Judgment and Decree in Busia Chief Magistrate's Court Civil Case No.67 of 2012 by Hon. Mildred Munyekenye – Senior Resident Magistrate).

JUDGMENT

1. **SGK**, the appellant herein, was the plaintiff in the Busia Chief Magistrate's Court Civil Case Number 67 of 2012. She had sued **GWM** the respondent for the maintenance of their child in the sum of Kshs. 20,000/= per month and for an order for the release of Kshs.300, 000/= held by him for the child's trust.
2. The respondent did not enter appearance or file defence and the appellant was heard for formal proof.
3. In her judgment, the learned trial magistrate found that the appellant did not prove her case against the respondent and dismissed the case.
4. The appellant was aggrieved by the judgment which was delivered on 28th November, 2012 and filed this appeal. The appellant was represented by the firm of Ashioya & Company Advocates. She raised the following seven grounds of appeal:
 - a) That the learned trial magistrate erred both in law and in fact by dismissing the appellant's suit when the evidence on record was un-challenged and proved to statutory standards and by documentary evidence that remains rebutted.
 - b) That the learned trial magistrate erred in law and in fact in dismissing the appellant's case when the law was in favour of the appellant.
 - c) That the learned trial magistrate erred in law and in fact in setting aside interlocutory judgement on special loss without application for the purpose improperly and relied on grounds not available in law.
 - d) That the learned trial magistrate proceeded to interrogate the un-challenged evidence of the appellant as though she had taken the position of a defence counsel.
 - e) That the learned trial magistrate erred in law and in fact in setting a higher standard of proof than is permissible in civil cases and alien in civil law.
 - f) That the learned trial magistrate made a ruling that flies in the face of tested and applied principles in children's case.
 - g) That the learned trial court made a judgement that raise alarm for the welfare of a child as a ward of the court and sets wrongful and unknown parameters.
 - h) That the judgement does not consider at all the welfare of the child the primary priority of the court in similar matters.
5. The respondent was in person. He did not respond to the appeal.
6. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no

advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

7. Before the learned trial magistrate were two issues. The first issue was whether the appellant had proved on a balance of probabilities that she was entitled to a refund from the respondent a sum of Kshs. 300,000/=. The appellant contended that after she withdrew Kshs. 250,000/= from her bank account, she gave the respondent Kshs.150, 000/=. The Bank statement she produced in court was an indication of withdrawal but this cannot act as evidence that she passed some of the money to the respondent. The same would apply for the SACCO receipt she produced. She needed to adduce evidence which if uncontroverted, would prima facie support her claim.

8. This claim of Kshs.300, 000/= would have been better addressed as a civil claim and not under a claim for child's maintenance. The learned trial magistrate correctly observed so. In spite of being brought under the child's maintenance claim, it was not proved on a balance of probabilities. The learned trial magistrate was therefore justified to dismiss it.

9. The second issue was the child's maintenance. The evidence of the appellant on her status with the respondent contradicts her pleadings. In her pleadings she averred that she was married to the respondent under the Luhya/Masai Customary law. It is trite law that parties are bound by their pleadings. The court of Appeal in the case of **Global Vehicles Kenya Limited vs. Lenana Road Motors [2015] eKLR** emphasized the importance of pleadings in the dispute resolution. They also quoted **Thorp vs. Holdsworth, (1876) 3 Ch. D, 637 at 639**, the leading case on the subject. This is what the learned judges of Appeal said:

Thirdly, pleadings contribute immensely to speedy resolution of dispute and cost-efficient delivery of justice. Because pleadings ensure that the dispute is focused and precisely defined, they not only eliminate ambushes and surprises, but also wastage of time and unnecessary expenses involved in calling witnesses to prove or disprove matters that are not in dispute before the court. It can therefore be argued that pleadings also contribute immensely to the realization of the cardinal constitutional principle that justice shall not be delayed.

Jessel M. R. articulated this view very well in **Thorp vs. Holdsworth, (1876) 3 Ch. D, 637 at 639**, as follows:

The whole object of pleadings is to bring the parties to an issue and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to the definite issues, and thereby to diminish expense and delay, especially as regards to the amount of testimony required on either side at the hearing.

In her evidence, the appellant testified as follows:

I know the defendant I knew him in Busia from 2009 to 2011. I was his girlfriend and we cohabited for a little while. We were friends for four months. I got pregnant but left the country to Canada I left for Canada on 14/4/2011.

Was the appellant a wife as pleaded or a girlfriend as testified to? Secondly, there is no custom known as *Luhya/Masai Customary law*. Without elaboration as to what she meant, the court could not possibly know which of the two customs, the one under which the marriage was conducted, if indeed there was a marriage.

10. Ordinarily, it is not necessary to prove marriage between two parties for an order of maintenance for a child of such a union to issue. All what is required to show is that the man sired the child in issue. In the instant case, the appellant has not painted a picture of a truthful witness. Without evidence to prove paternity, it would not be easy to take her word that the respondent sired the child who is the subject of this case.

11. It was her evidence that the child was born in Canada and she produced documentary evidence to prove the same. However, she produced another document which she caused to be prepared for the child. The Certificate of Birth indicate that the child was born in Busia. If she could give false information contradicting what is already documented, how else did she expect the court to believe her word that the child was sired by the respondent?

12. After a careful analysis of the evidence on record, I find that the appellant did not prove her case on a balance of probabilities. The appeal lacks merit and the same is dismissed.

DELIVERED and SIGNED at BUSIA this 10th day of December, 2019

KIARIE WAWERU KIARIE

JUDGE