



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NUMBER 34 OF 2014

A O M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Appeal against ruling and order in Juvenile Criminal Case Number 12 of 2014 in the Senior Principal Magistrate's Court at Butere delivered by Hon. M.I. Shimenga (RM) on 19<sup>th</sup> February, 2014)*

JUDGMENT

**Background**

1. *Juvenile Criminal Case Number 12 of 2014* was filed by way of a report by the District Children's Officer, Butere. The claim against the appellant was that he had neglected 4 children namely, L.A 11 years; E.M 9 years; D.N 7 years and G.W 7 months and that the children needed care and protection.
2. In the report filed in court, it was urged that the appellant be ordered to pay a monthly upkeep of Kshs. 6,000/-, to provide medical care and educational needs of the children.
3. When the appellant was summoned to court, the court record shows that the Children's Officer briefly reiterated what was in the report. The appellant in answer to the Children's Officer's request stated that the youngest child herein was not his.
4. The Children's Officer then sought for an order of DNA whose cost was to be paid by the appellant.
5. In a ruling dated 19<sup>th</sup> February, 2014, the learned trial magistrate directed the appellant to pay a monthly maintenance sum of Kshs. 5,000/- and pay fees for the children. The court further directed the appellant to make a formal application for DNA test.

**The Appeal**

6. Aggrieved by the said decision, the appellant on 20.3.14 raising 8 grounds the main one being that he condemned unheard.
7. When the appeal came up for hearing on 6.9.18, Mr. Arwanda appearing on behalf of Mr. Musiega for the appellant relied wholly on the grounds of appeal and submissions filed on 4.10.17.
8. Mr. Juma, learned State Counsel opposed the appeal and urged the court to fully refer to the evidence on record.

**Analysis and Determination**

9. This being a court of first appeal, I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal's decision in the case of Issac Ng'ang'a Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 of 2005 where the court stated as follows:-

***“in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same.*”**

10. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for the appellant.

11. Article 50 of the Constitution provides for the right to a fair trial in the following terms:

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(i) to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence

11. From the evidence on record, it is apparent that the appellant was not given a chance to defend himself. The children's officer's report made very serious allegations against the appellant which the trial court presumed to be true without putting them to the test to assess their veracity.

12. Section 107 of the Evidence Act, places the burden of proof on the person who alleges in the following terms:

**(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

13. The appellant denied paternity of the child that was claimed to be his biological son. The trial court shifted the burden of proof against the appellant and directed that he makes a formal application for DNA test.

14. With due respect, the trial court erred in shifting the burden of proof to the appellant and by further ordering him to make a formal application for DNA test to disapprove what had not even been proved. I agree with the appellant that the court failed in its duty to uphold the best interest of the child alleged to be the appellant's biological child when it failed to set in motion a clear process to establish his paternity.

15. From the above analysis, I have come to the conclusion that the orders made against the appellant are a mockery of justice and that there is reasonable cause for this court to interfere with them.

16. Accordingly, I find that this appeal has merit and it is allowed. The matter is remitted to the *Senior Principal Magistrate's Court at Butereto* to be heard by another magistrate other than Hon. M.I. Shimenga.

It is so ordered.

**DATED AND SIGNED AT KAKAMEGA THIS 7TH DAY OF SEPTEMBER 2018**

**T. W. CHERERE**

**JUDGE**

**In the presence of-**

Court Assistants - George & Erick

Appellant - N/A

For the State - Mr. Juma