



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 7 OF 2014

(An appeal from the Judgment of the Principal Magistrate, Embu in Children Case No. 9 of 2012 dated 3/3/2014)

C N (Suing as mother and next friend).....APPELLANT

VERSUS

J M.....RESPONDENT

J U D G M E N T

1. This is an appeal against the judgment of Senior Principal Magistrate, Embu delivered on 3/3/2014 in Embu Children Case No 9 of 2012. The appellant's claim was for orders of maintenance in favour of child B M and for orders of legal custody of the child. The suit was dismissed with costs to the respondent which led to the lodging of this appeal.
2. The grounds of appeal are that the magistrate erred in law in basing his judgment on the issue of DNA and in failing to consider that the respondent had parental responsibility towards the child.
3. The appellant in her submissions stated that the magistrate was wrong in dismissing the matter because she did not request for a DNA. She further argued that DNA is not the only way to prove paternity. Her take was that the evidence adduced in the lower court was adequate to prove paternity on a balance of probability and that the absence of DNA should not be used to deny the minor justice.
4. It was further submitted that the issue of the child having two birth certificates one bearing the name of the respondent and the other one the name T M was explained in the proceedings. The appellant contended that the respondent acquired parental responsibility when he was cohabiting with the appellant. Failure to request for DNA In the lower court was a technicality and the court should look at the child's best interests.
5. The respondent opposed the appeal as he submitted that at the lower court, the appellant produced a birth certificate dated 6/5/2011 showing that the child's father was one T N M who had died three years before the case was filed. He further testified that T M was the father of the child for he is the one who paid the hospital bill after the child was born. The respondent alleged that the appellant then fraudulently acquired a second birth certificate which he caused to be cancelled.
6. The appellant cited the case of ***JOACHIM NDAIRE MACHARIA VS MARY WANGARE & ANOTHER [2008] eKLR*** where the court held that name of the father appearing on the birth certificate was sufficient proof of paternity. A year after the lower court case was determined the applicant filed an application seeking to adduce new evidence but the same was dismissed.
7. The respondent's contention was that the appellant had an opportunity to apply for DNA test to be conducted but failed to do so as she clearly knew that the father of the child was not the respondent. Failure to call DNA evidence cannot be regarded as a technicality. It is evidence which goes to the core of the case.
8. The respondent cited the case of ***GITHINJI NGURE & ANOTHER VS CHARLES WANJOHI***

WATHUKU [2010] eKLR where the court of appeal dismissed an application to call additional evidence after taking into account the overriding objective and the proportionality test. The respondent further submitted that Titus had acknowledged paternity of the child and therefore acquired parental responsibility.

9. The duty of the 1st appellate court was explained in the case of **JABANE – VS- OLENJA [1986] KLR 661**

*“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular **Ephantus Mwangi -vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870.**”*

10. Before the trial court, PW1 testified that the respondent was her husband between the year 2007 and 2011 and that the pair cohabited from 2007 till July 2008 during which she got pregnant. The child was born on 10/11/2008 after their separation but they got back together in the year 2010 and separated again on 15/12/2011.
11. The appellant further testified that on 21/8/2009 while at the children's office, the respondent accepted parental responsibility and agreed to be paying KShs.5,000/= per month. After separating with the respondent, she became friends with T M who later passed on on 27/9/2009. Titus paid the maid who took care of the child after delivery and settled the maternity fees.
12. When the appellant and the respondent got back together, the respondent proposed that the child's name be changed from B M to B1 M2. The respondent visited her parents home and paid dowry. The appellant urges the court to grant orders that the respondent provides for medical and education needs of the child as she provides for food, shelter and clothing.
13. The appellant's witness PW2 testified that she had known her for about 10 years and that the respondent was her husband. The couple cohabited together in Majengo and have a male child. PW2 further stated that she used to visit the couple and that on 25/12/2010, in the company of friends and relatives, the couple visited PW1's parents and paid dowry. PW2 accompanied the couple to PW1's parents' home on the material day.
14. The respondent DW1 testified that he has never cohabited with PW1. He knew PW1 in 2000 as a girl friend but he later married another lady in the year 2002. In the year 2008 PW1 got engaged to T M N and they later got married until the year 2009 when TMN passed on.
15. DW1 added that TMN was the father of the child in issue. However, PW1 took DW1 to the children's office in the year 2009 claiming maintenance of the child. The respondent noticed that the name of the child's father had changed to his own in the child's birth certificate. The respondent complained to the Registrar of Births and Deaths and caused his name to be deleted from the child's records.
16. Article 53(2) of the Constitution provides that;

"A child's best interests are of paramount importance in every matter concerning the child."

17. Section 4(2) of the Children's Act provides that;

"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"

18. The issue for determination in this case is whether the trial magistrate misdirected himself in finding that the appellant had failed to prove her case in the absence of the DNA.
19. The appellant argues that DNA is not the only way to prove paternity and that the magistrate ought to have considered other evidence in determining the case. It is not in dispute that the appellant did not present DNA evidence before the trial court. The appellant did not apply for orders for a DNA during the trial which was very crucial to her case.
20. The court proceeds to examine the evidence before the trial court with a view of re-evaluating it and arriving at its own conclusions. The testimony of PW1 is that she cohabited with the

- respondent in the years 2007 and 2008 before separating. The child was born during their period of separation on 10/11/2008.
21. During the time of separation, PW1 befriended one T M whom she cohabited with and who paid the maternity fees after delivery of the child in issue. The appellant named the child as B N. When she resumed cohabitation with the respondent in 2010, the child's name was changed to B M allegedly on the respondent's request.
 22. The parties later differed and referred the issue of maintenance to the Children's office where the respondent agreed to provide for the child for a short time.
 23. The appellant took out a birth certificate for the child after birth which indicated that T M was its father. The respondent testified that another birth certificate was obtained but he caused its cancellation with the Registrar of Births and Deaths, a fact which was not denied by the appellant.
 24. The argument of the appellant that paternity can be proved by other evidence is correct but proof depends on the strength and credibility of that other evidence. If the evidence is credible and consistent, the court may accept it as proof of paternity.
 25. In the case before me, the respondent denied paternity. The appellant had a duty to present the evidence of DNA by obtaining an order from the trial court. This would have surely settled the issue of paternity at the earliest opportunity. Its surprising that the plaintiff did not make any attempt to obtain this crucial evidence during the trial.
 26. In her submissions, the appellant prays for an order that a DNA be conducted. This prayer cannot be entertained in the submissions, and to make matters worse, in the submissions of the appeal. The appellant has a counsel representing her in this appeal who ought to have advised her that this was not the correct approach.
 27. An appeal is supposed to deal with the issues which arose during the trial and with the findings of the trial magistrate. No new matters should be introduced on appeal. The appellant made an application before this appeal was heard that additional evidence of DNA be admitted. The DNA was yet to be done at the time the application was made. The court considered all the issues raised in the application and dismissed it for reasons given in the ruling.
 28. It was also noted that the evidence of the appellant in the lower court was inconsistent and lacked credibility. This is a condition that the court must consider in determining an application for additional evidence.
 29. The appellant was represented by a counsel and it cannot be expected that a prayer rejected earlier and which does not form the subject of this appeal be re-introduced for reconsideration in the submissions. This was not the correct approach.
 30. The other evidence analyzed above and which the appellant relied on appears to be wanting. During the short period that the appellant cohabited with T M, the appellant changed the name of the child twice and obtained two birth certificates one of which was subsequently cancelled. Names maybe changed on agreement of the parties but I am not sure that the registrar can issue two different birth certificates of any one person unless the second one was obtained through fraud.
 31. The appellant admitted that she did not surrender the first birth certificate as she applied for the second one. This action brings the character of the appellant into disrepute and renders her evidence incredible.
 32. The appellant seems to be trying all ways and means to get maintenance of the child even by hook and crook. She said in her testimony that TMN was not the biological father of the child, but she got him so as to settle the maternity charges.
 33. The first birth certificate was obtained during the one year she cohabited with TMN. It is said that TMN died in 2009 and she was to be re-united with the respondent in 2011.
 34. The trial court observed that the first birth certificate was obtained on 16/05/2011 which was about two years after the death of Titus. The second birth certificate was obtained on 1st July 2011 only two months after the 1st one was issued. This case was filed on 5/2/2012 about seven months later. The second document was then cancelled on 19/4/2012 on application by the respondent who claimed his name was wrongly included as the father. For the registrar to cancel the certificate he must have been convinced that it was a forgery.
 35. Given the brief background of the two documents, the trial court was faced with the question of the purpose of obtaining the documents. The magistrate concluded that there was a high probability that the defendant could have been blamed wrongly.

36.The evidence of the plaintiff on paternity was founded on very shaky grounds and was found to be like sort of designed to achieve a certain objective. The court found it not sufficient to prove the case on the balance of probability.

37.Section 107 (1) and 108 of the Evidence Act imposes this burden on whoever alleges a fact.

38.It was held in the case of **D.T. DOBIE (K) LTD VS WANYONYI WAFULA CHEBUKATI [2014] eKLR** where Denning, J.'s dictum on the burden of proof of **MILLER VS MINISTER OF PENSIONS [1941]** was discussed thus

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not.

Thus proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

39.I find that the trial magistrate was correct in his findings that the appellant had failed to prove her case. The evidence before the court did not meet the test of proof. The appellant had failed to discharge the burden of proof on the balance of probability as set out in the **D.T. DOBIE** case (supra).

40.It is my finding that this appeal has no merit and I dismiss it with costs.

41.It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF MAY, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

The Appellant