



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 6 OF 2012

BETWEEN

J M M..... APPELLANT

AND

J C N 2ND RESPONDENT

*(Appeal from the judgment and decree of Hon. P.L. Shinyada, RM, dated 8th
December 2011 from original Kisii CM's court Child case No.19 of 2011)*

JUDGMENT

1. By a memorandum of appeal dated 17th January 2012 and filed on the same date, J M M, the appellant is seeking to set aside the judgment and decree in Kisii Resident Magistrate's Court Children's Case No.16 of 2011 dated 8th December 2011. He seeks in the alternative an order for a re-trial and costs of this appeal. He has listed seven (7) grounds of appeal namely:-

1. *The learned trial magistrate erred in fact and in law, when she made a finding that the Appellant herein did not prove his case on a balance of probability, notwithstanding the oral and documentary evidence tendered in court by the Appellant.*
2. *The learned trial magistrate erred in fact and in law by failing to appreciate the documentary evidence produced by the appellant.*
3. *The learned trial magistrate wrongly evaluated the evidence before her and applied wrong principles to prove paternity.*
4. *The learned trial magistrate failed to appreciate the delicate nature of the matter before her and deprived the appellant [of] his parenthood and right to visitation.*
5. *The learned trial magistrate erred in law and fact by importing her own proposition that divorced couples would not have an intimate relationship and bear children.*
6. *The learned trial magistrate failed to appreciate the fact that the appellant was*

in custody of another minor child and as such would not pretend in his endeavours.

7. *The learned trial magistrate misdirected her mind to the important document proving paternity by asserting that it was issued after dissolution of the marriage.*

2. The facts of this case are that the appellant filed a suit on the 18th March 2011 at the Chief Magistrate's Court in Kisii seeking:- **(i)** Legal custody of the minor – M M **(ii)** An order for unlimited right of visitation of the minor **(iii)** An order compelling the defendant to provide care and maintenance and **(iv)** costs of the suit.

3. From the evidence adduced during the trial, the appellant and the respondent were married on or about the 29th January 1999. On 27th June 2003 the said marriage was dissolved vide Malindi High Court Divorce Cause No.3 of 2003 but before the decree nisi became absolute, the parties herein reunited and sired the minor child M M on the 9th August 2006.

4. The appellant alleges that in or about July 2010, the Respondent allegedly deserted the matrimonial home and also took the minor with her.

5. The Respondent in her defence denied the allegations by the appellant and also counter-claimed for legal custody of the minor and an order for permanent injunction restraining the appellant from claiming, visiting or in any other manner interfering with the minor and the

respondent's social life.

6. After hearing evidence and considering the submissions filed by the parties the trial court dismissed the appellant's claim against the respondent with costs and entered judgment for the respondent on the counter-claim with costs. It is this decision that the appellant is contesting in this appeal.

7. The appellant taint why the trial court dismissed the appellant's case was because the parties had married and divorced. That through his advocate M/s B.N. Ogari and Co. Advocates has filed submissions and attached authorities. In highlighting the said submissions Mr. Ogari submitted that the only pe trial court found it hard to understand how parties who had divorced could come together again and sire children. He submits that this is possible and that it is clearly demonstrated by exhibits at page 28-35 of the Record of Appeal.

8. He also submits that the evidence of DW1, DW2 and DW3 shows clearly that after the divorce in Malindi the parties re-united and lived together in Kisii where the subject was born. He contends that though the respondent vehemently denied that the appellant was the father of the child claiming that one Salim was the child's father, she did not produce any documents to prove the same. That further the child's father could not have been Salim because in the respondent's replies she admitted the description of the child as given in the plaint and also produced documents at page 38 of the Record of Appeal giving the names of the child as M O, which names are for the Respondent's father.

9. Finally, counsel submits that the appellant demonstrated to the trial court that he was the father of the child hence the prayer for custody. Lastly that if the trial court had properly analyzed the evidence it could have made a similar finding, the child would know his parents as it is his right.

10. In opposing the appeal the respondent also filed written submissions through her advocates M/s Ken Omollo & Co. Advocate. It is submitted by the respondent that this appeal having been filed by an advocate who is not properly on record is incompetent and against the mandatory provisions of **Order 9 Rule 9** of the **Civil Procedure Rules**. That on that basis alone the appeal should be dismissed with costs.

11. Secondly the respondent submits that the trial magistrate correctly applied the law in dismissing the appellant's suit with costs as the evidence on record adduced by the appellant did not support the claim. That the appellant and the respondent divorced on 27th August 2003 before the minor in issue was born and the parties went their separate ways. That there was no evidence that the appellant and respondent cohabited again after they divorced and further that there was no medical evidence that the minor in issue was the appellant's child. The respondent prays that the appeal be dismissed with costs.

12. Before making any findings herein, it is important to bring to the fore the provisions of **Article 53 (1) (e)** of the **Constitution** and **Section 6** of the **Children's Act** on the paramount importance of the welfare of the child and the fact that parental responsibility is to be shared equally between the parties. This court is duty bound to reconsider and evaluate the evidence as laid before the trial court afresh, go through the judgment of the trial court and come up with its own conclusions in the matter.

13. From the record it is clear that the appellant and respondent were husband and wife but they divorced in the year 2003. They had a daughter by the name Monica K M who is in the custody of the appellant. It is claimed by the appellant that after the divorce in 2003 they met again with the respondent in 2004 and that the issue herein was born some time in 2006 though the marriage had been dissolved. The appellant claims that he is the biological father of the issue herein. During the hearing in the lower court the appellant produced the clinic card and a birth notification. He also claims to have obtained the birth certificate but he only had a copy during the hearing in the lower court. He claimed that he paid school fees for the child who was attending Genesis Preparatory School. He produced the school fees receipts as supporting his prayer for custody of the minor.

14. The respondent in her testimony during the trial maintained that the child was born after they had divorced with the appellant herein. She claims that she was never intimate with the appellant after the divorce. She confirms that the child was born in the year 2006 and that the appellant herein has never paid school fees for the child in question. She maintained that the father of the child is in Nairobi and that she had never taken out any birth certificate for the child. She confirms that the child was born in Nyangena hospital, in Kisii.

15. **Article 53 (2)** of the **Constitution** states **"A child's best interests are of paramount importance in every matter concerning the child."** This principle is also stated under **Section 4 (2)** of the **Children's Act** which states as follows:-

"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."

16. The principle of the best interests of the child has been applied by courts when determining cases involving children. To my mind the best interests of the child involve the rights of the child as contained in **Part II** of the **Children's Act**. These include survival and development of the child, rights and welfare of the child, food, shelter, education including religious education, parental care guidance and correction, leisure and recreation, non-discrimination healthcare, protection from drugs and harmful substances, protection from child labour, from sexual exploitation, from abuse and so forth.

17. While this court is aware that it is not only the parents who can accord children these rights, it is on both parents, especially in ideal situations, where the greatest responsibility lies. It does not matter whether the parents are married or not. These rights are not dissimilar to the principles considered in an Australian case of **U-v-U (2002-2003) CLR 238 at 257** cited with approval in **Manjit Singh Amrit -vs- Papinder Kaur Atwal (2009) e KLR**.

18. The general principle has always been that custody of young female children

should be granted to the mother unless there be shown exceptional circumstances to justify depriving the mother of her natural right to nurture the child.

19. I have carefully considered all the grounds of appeal and the submissions made. On the first two (2) grounds the appellant argues that the respondent admits that the minor child is called M M which fact he has supported by documentary evidence produced in court. There is the acknowledgement of birth notification found at page 28 of the Record of Appeal which shows that the child's name is M M and the appellant's name "M" appear at the column reserved for the father's name while the names of the respondent appear at the column reserved for the mother's name.

20. The appellant has also put forth before the court a copy of the certificate of birth at page 30 of the Record of Appeal which also shows the names of the minor as M M, the father as J M M and the mother as C N O. There is also a register of birth for the minor child in which the minor's father's name is given as J M M.

21. From the said documents, the appellant maintains that the trial court failed to appreciate the documentary evidence tendered before the court and thereby reached a wrong conclusion.

22. Appellant has also argued ground 5 by submitting that dissolution of marriage would not in itself prove that parties who have divorced could not sire children between them and that he has shown that he and the respondent cohabited after the divorce and sired the infant in question.

23. On grounds 3, 4 and 7 the appellant argues that as provided for under **Article 53 (1) (a) and (e)** of the **Constitution** and **Section 6** of the **Children's Act 2001** a child should be assisted to know who his parents are and thus the need to have a D.N.A. conducted. They argue that the trial court was duty bound to direct the parties to undergo a DNA test in order to conclusively determine the issue of paternity. The appellant submits that this is the reason why he is seeking a retrial so that a DNA test is done.

24. **Section 22 (2)** of the **Children's Act** vests jurisdiction in this court to make such orders issue such writs, and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of **Sections 4 to 19** of the **Act**. This court has jurisdiction under **Section 22** of the **Act** to issue orders to compel determination of a child's paternity by DNA.

25. On the whole, evidence in this case shows that the minor in this case was not under the care of the appellant but that of the respondent. I have not come across any evidence to show that there are circumstances that make the respondent be denied custody. She has told the court that she is in gainful employment and she is capable of taking care of the minor. There is no evidence to the contrary.

26. I also find that the appellant's contention that the lower court was duty bound to refer the parties for a DNA test is true. In my considered view therefore, rather than refer the matter back to the lower court for a re-trial or even set aside the judgment of the lower court, it will be in the interest of justice that the issue of paternity be conclusively determined.

27. In the premises I order that the parties herein do undergo a DNA test and a report be tabled before this court within sixty (60) days from today. The costs of the DNA test shall be borne by both the appellant and respondent equally. The final judgment of the appeal will be determined by the outcome of the DNA test. In the meantime the child shall remain in the custody of the respondent.

Dated and delivered at Kisii this 13th day of March, 2014

R.N. SITATI

JUDGE.

In the presence of:

Mr. Bosire Gichana for B.N. Ogari (present) for Appellant

M/s Ken Omollo (absent) for Respondent

Mr. Bibu - Court Clerk