



REPUBLIC OF KENYA

High Court at Garissa

Civil Appeal 3 of 2012

PETER MUTEMI MWENDWA.....APPELLANT

VERSUS

RACHAEL SALA KILUNGU.....RESPONDENT

RULING

1. Peter Mutemi Mwendwa (the appellant) is challenging the judgement of the Senior Resident Magistrate at Mwingi (Mr. H. M. Nyamberi) in SRMC Children Suit No. 30 of 2011 delivered on 25th January 2011. He raises the following grounds of appeal as they appear on the memorandum of appeal:

- i. The learned trial magistrate erred in law and fact in finding that the appellant do pay a monthly sum of Kshs 4,000 for the maintenance of the minor.
- ii. The learned trial magistrate erred in law and fact in failing to consider that the figure of Kshs 4,000 per month is excessive, exorbitant and oppressive.
- iii. The learned trial magistrate erred in law and in fact in failing to take into account the appellant's monthly income which was roughly suggested to be ranging between Kshs 15,000 and 25,000 and yet the appellant is a casual worker and has no pay slip.
- iv. The learned trial magistrate erred in law and fact when he failed to record the entire appellant's evidence produced in court by himself and his witness during the hearing of the suit.
- v. The learned trial magistrate erred in law and fact in failing to order for the DNA test to establish the biological father of the minor.
- vi. The learned trial magistrate erred in law and fact by failing to thoroughly evaluate and interpret the evidence on record and the prevailing law which omission made him reach a decision unsupported by any law or evidence.
- vii. The learned trial magistrate erred in law and fact by giving judgement in favour of the respondent when she had not proved her case on a balance of probabilities.

2. I have reviewed the evidence contained in the record of the lower court. The minor child **L. K. S** had sued the appellant through the respondent, her mother and next friend, asking the court to make orders that the appellant takes full and immediate parental responsibility over the minor; maintenance for the minor by making a monthly payment through her mother; custody of the minor be granted to the mother, costs of the suit and any other relief the court may deem fit to grant. The case for the applicant was supported by the evidence of the respondent and Kilungu Mwinzi the respondent's father.

3. The respondent testified that she and the appellant became friends in 2006 and in February 2007 she became pregnant. The appellant promised to support her once she gave birth. In November 2007 she gave birth to the **L. K. S**, the minor subject matter of this appeal. Her father paid the hospital bill upon her discharge from hospital. She testified that the appellant used to meet her weekly and used to give her Kshs 300 to 500 to support the child and when the child got sick the respondent would call the appellant to assist and he used to send her money. The relationship lasted until June 2010 when the appellant refused to assist her and threatened to beat her. She reported the matter to the police and Human Rights Organization. An agreement was reached that the appellant would be paying Kshs 2,000 per month as well as school fees but the appellant refused to honour the agreement. She told the court that she was not able to support the child alone because she earned Kshs 100 per day as a seamstress. She told the court that the appellant earned about Kshs 25,000 as a bus driver.
4. The case for the defence in the lower court was supported by the evidence of the appellant who denied having been the respondent's friend or having a child with her. He said he was not ready to take responsibility of a child he knows nothing about.
5. The trial magistrate evaluated this evidence and found in favour of the respondent although he noted that paternity had been denied. The trial magistrate noted that the appellant had pleaded in his defence that he would petition the court to order for DNA test to establish paternity but he did not do so. The trial magistrate also considered that the appellant has supported the respondent after the child was born and therefore on a balance of probability he was the father of the child. The trial magistrate considered that it is likely that the appellant earned Kshs 15,000 and 25,000. He ordered payment of Kshs 4,000 per month as maintenance and gave custody and care of the child to the respondent.
6. Like everyone else in this country, the child's rights are secured under our law. Every child has a right, among others, to food, shelter, healthcare, protection from neglect, and parental care and protection. Parental care and protection includes equal responsibility of the mother and the father to provide for the child, whether they are married to each other or not (**see Article 53 of the Constitution of Kenya 2010**). The best interest of the child is the primary consideration in all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (**see section 4 (2) of the Children's Act**).
7. The Children's Act goes farther to define parental responsibility in section 23 (1) to mean all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child. In section 24 of the same Act where a child's father and mother were not married to each other at the time of the child's birth and have not subsequently married each other the mother shall have parental responsibility at the first instance and the father shall subsequently acquire parental responsibility for the child by applying to court in accordance with section 25 of that Act.
8. The object of quoting the above provisions of the law is to emphasize the fact that in cases touching on the rights of a child courts must enforce these rights by ensuring that no parent should abdicate his/her parental responsibility. Enforcement of these rights becomes uncomplicated where paternity is not an issue. Where paternity is denied a different approach must be employed. In my view one of the approaches would be to call for scientific evidence in the form of DNA sampling to establish paternity. To my mind it would be perfectly in order for the court to order for this evidence and where necessary to compel a party who is not willing to undergo this test to take it, all in the best interest of the child.
9. In this case, the appellant had pleaded in paragraph six of his defence dated 18th August 2011 thus **"Further to paragraph five above, (in paragraph five, he had denied negligence and paternity) the defendant petitions this honourable court to order for the DNA test to establish the biological father of the alleged minor (sic)."** To my mind, the trial magistrate ought to have ordered for the DNA test given that by this statement the appellant was willing to undergo the test. The court ought to, with the interest of the child in mind, have taken this initiative even if the appellant had not pleaded it in his statement of defence.

10. Another area of concern to this court is the award of maintenance granted by the lower court given that the paternity is unresolved issue. It is stated that the appellant earns between Kshs 15,000 and 25,000 per month. This was not supported by documentary evidence such as a payslip given that the appellant works in the informal sector where payslips are not issued. The respondent's earnings too are subject to confirmation. Taking her word for it leaves a lot to be desired.

11. I fault the trial court for not ascertaining paternity and what each party earned. In my view the failure to deal with all the issues raised before the lower court and give reasons for believing a witness amounted to mistrial. For this reason it is my considered view that this case must be remitted to the lower court for retrial. As pointed out by the appellant once paternity is established and what each 'parent' earned per month the court will be better placed to make appropriate orders with the best interest of the minor being of paramount importance. I therefore order that this case be remitted to the Senior Resident Magistrate's Court at Mwingi for mention with a view to setting it down for retrial in accordance with the orders of this court. I order accordingly.

Stella N. Mutuku, Judge

Dated, signed and delivered this 6th day of November 2012.