IN THE COURT OF APPEAL

AT NAIROBI(Coram: Madan, Nyarangi JJA & Platt Ag JA

CIVIL APPEAL NO.86 OF 1983

NJENGA.....APPELLANT

AND

NJENGA.....RESPONDENT

(Appeal from the High Court at Nairobi, Porter J)

JUDGMENT

In this appeal, the first eleven grounds were disposed of by consent order which was suggested by the parties' advocates, approved and recorded by the court and signed by the advocates of the parties. The parties are husband and wife. The respondent mother moved the High Court (Porter J) by originating summons taken out under the Guardianship of Infants Act cap 144 (the Act) as a result of which she was given the custody of the four children including the child Njogu who is the subject matter of the remaining ground of appeal. The originating summons was filed on October 2, 1981 and on October 30, 1981 Hancox J (as he then was) in an *ex parte* application granted temporary custody of the four children to the respondent until further order. By the time the temporary order was made, the appellant had come to the matrimonial home and taken her three elder children out of the Jurisdiction to Addis Ababa on August 12, 1981. When the appeal came up for hearing we were informed that the child Waweru will be 17 years old in September and therefore by virtue of section 2 of the Act the court will cease to have jurisdiction and Kuria will be 16 in April. Because of the age of Waweru and Kuria and their welfare, despite non-compliance with the order made on October 30, 1981 the respondent had decided not to oppose the appeal as regards the first three children. The position regarding the child Njogu is however different. The court was addressed on the remaining ground which states: '

That the learned judge erred in holding that Njogu is a child of the marriage."

Mr. Kuria for the appellant argued that the parties did not have access to each other within the meaning of section 118 of the Evidence Act (cap 80) and that therefore the presumption which would be raised that Njogu is a child of the marriage doesn't apply. Mr. Kuria said the issue was who is to be believed and then referred to the respondent's evidence in chief about the position of Margaret Nyambura, to the episode relating to the length of period during which the three other children stayed in a hotel in 1981 and to the appellant's evidence on the two aspects of the case. Mr. Kuria submitted that the appellant was generally more truthful than the respondent, that adverse inferences on the appellant's case are not supported by evidence and that if the respondent could exaggerate or lie on the two matters, she would not be expected to tell the truth about the paternity of Njogu. She had made contradictory claims to the trial judge having stated on the one hand that she and the appellant sometimes shared a bed and that for a period she shared a room with her elder son to keep the appellant away. Mr. Kuria said the respondent's evidence on access was supported by Margaret Nyambura, a police woman who was a party to subterfuge designed by the respondent who was capable of initiating similar falsehoods about the paternity of Njogu.

Mr. Muite for the respondent contended that the appellant's own evidence is against his denial of paternity of Njogu. Mr. Muite referred to the appellant's evidence that even after he had filed the petition of divorce, he followed the respondent into the bigger house which he had been renting in Langata and which was away from the matrimonial home. Mr. Muite submitted that the appellant's explanation as to why he moved to the Langata house showed irrational conduct, provided opportunity of access and is some indication that the respondent told the truth about the paternity of Njogu. As regards the appellant's argument that on the normal gestation period of 270-280 days and bearing in mind the time he was away from Kenya Njogu could not be his child. Mr. Muite countered that it is normal for children to be born prematurely or overdue for days and that on the appellant's evidence, Njogu would have been born one day too early or two days too late. It was submitted that the burden of proof rests on the appellant to illegitimate, that here the presumption of legitimacy operates in favour of Njogu who was conceived and born during the subsistence of the marriage.

Section 118 of the Evidence Act provides:

> "The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after the dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

There is no dispute that Njogu was born during the continuance of the valid marriage between his mother and the appellant. The appellant would succeed in his plea that he is not the father of Njogu only if he could show beyond reasonable doubt that he and the respondent had no access to each other. There was no dissolution of the marriage, indeed there has been none up-to-date, and so gestation period is not, in my judgment, a decisive factor in this case. But even if it were, the appellant's evidence as to when conception must have taken place means that Njogu would have been born prematurely or overdue by a maximum of three days. In *Preston-Jones v Preston Jones* [1951] 1 All ER 124, the husband was away from the UK from August 17, 1945 to September 2, 1946. On August 13, 1946 the wife gave birth to a normal child and the husband brought a petition for dissolution of marriage on the ground of adultery, the allegation being based on the fact that a period of 360 days elapsed and therefore that the child must have been conceived in adultery. It was held that the court was not entitled to assume judicial knowledge that a child born 360 days after the last coitus between the husband and wife was not the child of marriage. See also *Gaskill v Gaskill* [1921] page 425 where 331 days could not be regarded as impossible and *Hadlum v Hadlum* [1948] 2 All ER 412 where in the absence of medical evidence the same conclusion was reached in respect of 348 days. If an interval of 360 days between coitus and birth could not be regarded as a remote possibility, then *a fortiori* a gestation period of 270-280 days suggested by the appellant could not be said to be abnormal and so the judge could not have been entitled to assume as was urged that Njogu was not the child of the appellant.

Did the parties have access to each other at any time when Njogu could have been begotten? The respondent's evidence on access was that at about the time Njogu was conceived the appellant:

> "was not always living with me as man and wife. We did not share beds always" but that "when he (the appellant) came late at night he refused to go to the bedroom and that is when the child (Njogu) was conceived".

She said Njogu was conceived in 1979 and born on August 24, 1980. Margaret Nyambura the CID Police Officer and family friend who visited the respondent by private arrangement said that in November 1979 she was sleeping in the appellant's room with the respondent but that when the appellant went to join them, Margaret left. On another occasion, Margaret occupied the room which she normally shared with the respondent. The respondent came late. Margaret continued:

> "In the morning I saw Mr. Njenga and he was sleeping on the sofa set as was Mr.s Njenga."

The appellant did not rule out the visit of Margaret Nyambura in 1978 or 1979. The appellant told the judge that the respondent moved into a bigger house away from the mat

rimonial home. That was done while he was away. He said:

> "I also moved there. There were fights right through the period particularly in 1979."

The appellant added:

> "I indicated to applicant (the respondent) that I did not want sexual relation".

So, the parties lived in one house during the period when Njogu was conceived. The appellant found it necessary to indicate to the respondent that he did not want sexual relations which, notwithstanding the fights, strongly suggests that the respondent at times made advances to the appellant. On his own evidence, the appellant is no drunkard but did not mind a drink. There is no telling what effect a drink would have on the appellant and if he would not forget the hard feelings against the respondent, seize the opportunity which existed continuously and have sex with the respondent. That would fit in well with Margaret Nyambura's evidence that she saw the parties sleeping together on a sofa set one morning. On that evidence it cannot be said reasonably that the appellant had no opportunity of access to his wife. The evidence fails wholly to prove to satisfaction that sexual intercourse by which Njogu was begotten did not take place between the respondent and the appellant. The standard demanded of the evidence in rebuttal of paternity:

> "is high. The evidence... must be strong, distinct, satisfactory and conclusive"

See *Cross on Evidence*, 5th Edition page 132.

The presumption of legitimacy could be rebutted only by evidence which puts the matter beyond reasonable doubt. The consequences to a child and to its mother can be grave and life-long. It does not matter that the proceedings are civil. Allegations of adultery are treated as akin to a criminal offence because of the effect and consequences of adultery. I see no good reason why an issue about presumption of legitimacy whose effect and result is just as important should not be treated equally seriously.

There is no error in the finding by the judge that Njogu is the child of the family. I would dismiss the appeal with costs.

Madan JA. I am obliged to Nyarangi JA, for allowing me to read his judgment in advance. I agree with the conclusion reached by him. I wish to add only a few observations myself.

The appellant holds the post of the Director of Political Development in the Organisation of African Unity in Addis Ababa. The learned trial judge said that the evidence heard by him indicated that the appellant considered drinking to be a part of his job and a proper method of entertaining and he had a number of girl friends.

The judge added the following amorous anecdote:

> "There is no doubt that there are some jobs which demand late night drinking and even extra marital associations. There is no doubt that the respondent had one of these jobs."

It is important to understand clearly what the burden of proof is in a legitimacy case.

Section 118 of the Evidence Act adopts the date of birth and not the date of conception as the test of legitimacy. The determining factor is birth during marriage, ie birth in wedlock. The section appears strongly to presume in favour of legitimacy but the presumption is rebuttable. The only way of rebutting the presumption, as the section itself states, is to show that the parties to the marriage had no access to each other any time when the child could have been begotten.

The appellant's case was that the boy Njogu born on August 24, 1981 was not his child, he could not be his child because he had not lived as man and wife with the respondent since 1977; he indicated to her that her sexual company was the last thing he wanted. The appellant pointed out that if the child was born on August 24, 1981 then conception must have taken place between November 18, 1980 and November 28, 1980 being 270 to 280 days before the date of birth. He proved by means of his passport that he was out of the country between those two dates.

The learned judge said that in such a case there is presumption of marriage which can be rebutted. He had not been provided with good evidence in the matter, and he had no evidence at all to indicate that the respondent had been sleeping with other men. She had provided evidence to show that there was access, which was corroborated by the evidence of the second witness Margaret Nyambura Mwaura that there was access actually. All that the appellant had done was to deny being involved in conception and to quote a gestation period of 270 to 280 days on no medical evidence. He had to decide on the balance of probabilities that Njogu was a "child of the family".

With respect the learned trial judge reached a right conclusion but he did not apply the right test, first, the following language illustrates the strength of the presumption where access is shown:

> "If it were proved that the wife slept every night with her paramour from the period of her separation from her husband, I must still declare the children to be legitimate" (Sir John Leach in *Bury v Phillpot*, 2 Myl & K 349)

Secondly, the presumption can yield only to positive proof of non-access at the relevant time (*Venkateswarlu v Venkatanayarena* A [1954] SC 176: *Jaganath v Chinnaswami*, 61 MLJ 878).

In *Gordon v Gordon and Granvile Gordon* [1903] page 141 the President said, at page 141:

> "The law says what has to be proved is that the husband did not have intercourse which might have led to the birth of the child. It does not allow the fact that another person had intercourse with the wife to be a material consideration. That is, I think, a proposition of the utmost importance in such cases as this. It was recognized in the opinion of the judges in *Banbury Peerage Case* (1812) 57 ER 64. In *Cope v Cope* Alderson B, said: "If once you are satisfied that the husband had sexual intercourse with his wife, the presumption of legitimacy is not to be rebutted by its being shown that other men also had sexual intercourse with the woman. The law will not, under such circumstances, allow a <u>balance</u> (underlining mine) of the evidence as to who is the most likely to have been the father".

Lord Lyndhurst said in *Morris v Davies*, 7 ER 404:

> "The presumption of law is not lightly to be repelled. It is not to be broken upon, or shaken by a mere <u>balance of probability</u> (underlining mine); the evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive. The question is, therefore, whether the facts of this case are sufficient to repel that presumption.

And it was said as far back as the year 1811, in the *Banbury Peerage* case (*supra*), it still reads heartening:

> "That in every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until the presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when, by such intercourse, the husband could, according to the laws of nature, be the father of such child.

That the presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce can only be legally resisted by evidence of such facts and

circumstances as are sufficient to prove, to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and wife, any time, when, by such intercourse, the husband, by the laws of nature, be the father of such child".

For these reasons I also agree that this appeal should be dismissed with costs. As Platt Ag JA also agree it is so ordered.

Platt Ag JA. I agree with the opinion of Madan and Nyarangi, JJA. Apart from observing that the period of time which had elapsed of 360 days in *Preston-Jones v Preston-Jones* [1951] 1 All ER 124 would seem to be unacceptably long without special medical evidence to support it; yet I agree that the evidence in rebuttal, permitted by section 118 of the Evidence Act (cap 80) should be strong, clear and conclusive. That seems to be appropriate to overturn the conclusive presumption of legitimacy referred to in the first part of section 118, and also as a practical necessity. It is so often a matter of highly conflicting evidence, once spouse against the other, without any great possibility of corroboration, that the court will instinctively look for evidence to satisfy itself clearly, that the presumption of legitimacy has been rebutted.

Dated and deliverd at Nairobi this 30th day of March , 1985.

C.B MADAN .....

JUDGE OF APPEAL

J.O NYARANGI

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JUDGE OF APPEAL

H.G PLATT

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Ag. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.