

**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM.**

**CIVIL APPEAL NO. 187 OF 2016**

**SWEETBERT LWABIZ .....APPELLANT**

**VERSUS**

**HAMAD ABDALLAH MWENDA ..... RESPONDENT**

*11/4/2018 & 25/4/2018*

**JUDGMENT**

**I.P.KITUSI, J.**

The facts of the case from which this appeal arises are legally unusual, and morally disturbing. One Gabon Zuberi Mkali a lady who is not a party to this appeal was the second defendant at the trial. In 1991 or thereabout, the lady Gabon was simultaneously dating Sweetbert Lwabizi the appellant and Hamad Abdallah Mwenda, the respondent as a result of which she conceived. Believing that the respondent was the one responsible for the pregnancy, she informed him about it, and the respondent took the woman's word for it.

The respondent followed customary and Islamic formalities to introduce himself to Gabon's grandfather with whom she was living, and he was accepted as the father of the would be child. On 2<sup>nd</sup> November 1992 Gabon gave birth to a baby girl whom she and the respondent named Rahma Hamad Mwenda. The respondent narrated

how he took it to be his duty to provide for both the mother and the child from then onwards.

In 1994 the respondent and Gabon were married subsequent to which Gabon had two other children with the respondent, born in 1995 and 2001 respectively. For some reason the marriage did not work, so in 2004 the couple divorced and Gabon went back to her grandfather, taking the three children with her.

There are two versions as to what happened during this time. According to Gabon she was the one fending for all the children assisted by her sister and the grandfather. Gabon was a salaried employee. According to the respondent however, he was the sole provider for the children including Rahma, and specifically stated that he was giving Rahma about Shs 10,000/= to 15,000/= per day as pocket money when attending Primary school.

In 2011 when Rahma had turned 19 years she was, according to the respondent, taken by the appellant who claimed to be the biological father of the girl. According to the appellant it occurred to him as a surprise when Rahma turned up at his residence in 2011 and announced to him that he was her father. The appellant who had five other children believed Rahma because of the girl's resemblance to those other children. He denied allegations that he was aware of him being the biological father well before. This was supported by Gabon who stated that she was not aware that the respondent was not the biological father of Rahma until a DNA test was done.

The respondent went to Temeke District Court where he sued the appellant and Gabon praying for a declaratory order that he is the biological father of Rahma or an alternative order that he be paid Shs 30 million as compensation for maintaining her.

The appellant's pleadings were that the respondent who married Gabon in 1994 should prove that he is the biological father of Rahma who was born in 1992. According to the appellant he had an affair with Gabon before she married the respondent. He averred that the respondent took care of Rahma out of his own will while he knew her not to be his daughter .

In her judgment the learned trial Magistrate( Hon Tarimo - SRM) concluded that Gabon was to blame for all this and ordered her to pay shs 10 million to the respondent for causing torture to him and the child Rahma. This was referred to by the trial court as punitive damages for her bad behaviour that caused the dilemma. Gabon was also ordered to pay Shs. 5,000,000/= to the respondent for providing for Rahma from childhood until she became of age. The court further ordered the appellant to pay the respondent Shs 15 million in compensation for the costs he incurred in providing for his child.

The appellant was dissatisfied and has appealed the decision of the District court raising three grounds which I may summarise as follows;

1. The court failed to analyze the evidence properly as a result of which it arrived at a wrong decision.

2. That the failure to properly analyze the evidence made the court to wrongly order compensation of shs 15,000,000/= against him in disregard of the fact that he had no prior knowledge of the existence of the child.
3. That the court erred in not taking into account the fact that the respondent was not the only provider of the child.

The appellant was represented by Mr. Mohamed Mkali and Mr. Kanti James learned advocates, while the respondent stood in person. It was Mr. Kanti James who made the submissions in chief.

The learned counsel submitted on the fact that the appellant who had no knowledge of the existence of the child as he was not informed by anyone about it cannot be said to have had the duty to maintain the child and that he refused to discharged that duty. He submitted that the appellant had no contract with the respondent. In further submissions, Mr. James stated that at some point from when she conceived until she gave birth to the girl and up until 1994, Gabon and the child were living with the former's grandparents. It is submitted that the court had no basis upon which to find that the respondent was single-handedly the provider nor was there basis to hold the appellant responsible.

The learned advocate cited section 8 of the Law of the child Act 2009 for the submission that it is the duty of a parent or a guardian to take care of a child, so in his submission it was the respondent's duty to do so until when he appellant became aware that he was the

biological father of that child. He faulted the <sup>trial</sup> court for holding the appellant responsible while it had already found Gabon guilty of committing parternal fraud.

In arriving at its decision, the trial court had relied on customary laws. Mr. James challenged this approach submitting that the parties come from different ethnic groups so there was no basis for invoking customary law.

In response the respondent submitted that it was in 2010 that the appellant told him that he was the father of Rahma so he, respondent, went to court to confirm that suspicion in the course of which the appellant insisted a DNA test be <sup>taken?</sup> conducted. He submitted that he believed that the appellant knew well before that he was the biological father of Rahma. As regards the customary laws the respondent submitted that it must be taken to be Tanzania African customary laws. He prayed for dismissal of the appeal and also prayed that he be spared from paying costs.

In a short rejoinder Mr. Mkali, learned advocate submitted that proof of knowledge on the part of the appellant that he is the father of the child was key.

As I observed at the beginning, this case touches on same morals, but although it presents unusual facts, they are not totally novel. In the case of **Beatrice Njowaka V. Evaristus Nambuga**, [1988] TLR 67 with facts somehow similar to the instant, the woman (mother of the child) was quoted saying the following;

*"Huyu mdai namfahamu kama ni mfanyakazi mwenzangu tumefanya kazi pamoja. Katika madai hayo huyo motto wangu nimezaa na wanaume wengine. Mwanaume niliyezaa naye namjua mimi siyo yeye"*

This court, Kazimoto, J(as he then was ) concluded as follows, referring to **The Law of Person, GN 279/63**

*" Sections 183 and 184 clearly gives the final decision to a woman to nominate the man who made her pregnant even if she falsely accuses a man of making her pregnant. Her word carries the day and the man has the arduous duty to discharge the allegations"*

According to the ~~discharged~~ on record, the appellant came to know that he is the father of the child in 2011 when Rahma confronted him with that fact. Both the evidence and the position of the law as stated in **Beatrice Njowoka** (supra) do not support the respondent's contention that the appellant became aware of that fact much earlier.

The question now is whether upon becoming aware of the fact that he is the father, the appellant was under a legal duty to compensate the respondent for the expenses he had incurred in taking care of the child. There is no doubt that the respondent incurred

expenses some, perhaps most, of which are unquantifiable. Of this case I wish it could be said;

*" A country whose administration of justice did not afford redress in a case of the present description would not be in a state of civilisations"*

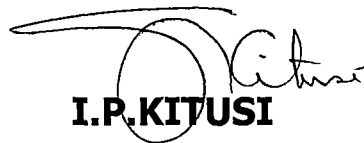
These words by Lord Denning , L.J in **Candler V. Craue Christmas & Co** [ 1951] 1 All E.R 426 were quoted with approval by His Lordship Samatta, J(as he then was), retired Chief Justice, in **Anjelo K. Mzali V. Alois M. Chalamila** [1980] TLR 83. However the facts of the present case, being so unique, are different from those in **Anjelo K. Mzali** (supra). In the latter case the respondent had committed adultery with the appellant's wife and sired a child. The appellant was awarded monetary compensation to be paid by the respondent.

In the present case where the appellant had an affair with Gabon when she had not married the respondent or anybody, just as the respondent also did, he (appellant) cannot be placed in the same position as the respondent in the case of **Anjelo K. Mzali**, who was an adulterer. The appellant in this case was and remained innocent until in 2011 when Rahma unveiled the truth to him, which Gabon seems to have confirmed.

My conclusion therefore is that although the respondent, a victim of Gabon's false decision, incurred expenses, the appellant's duty to compensate him for those expenses would, at most, be only moral.

There is no legal basis for holding the appellant responsible to compensate the respondent. With respect I agree with the appellant's counsel that having found Gabon guilty of what the trial court referred to as parternal fraud it was not open for it to punish the appellant who was innocent.

For the foregoing reasons I quash the decision of Temeke District Court in as far as the order of compensation against the appellant is concerned. To that extent the appeal is allowed. Given the disturbing facts of this case I make no orders as to costs for, such an order would add insult to the respondent's injury. The respondent, through no fault of his, has been denied both the child and compensation for bringing that child up. Let each party bear own costs.



**I.P. KITUSI**

**JUDGE**

**23/4/2018**