

**JGM v CNW, Civil Appeal No. 40 of 2004
(Kenya, High Court at Nakuru)**

Summary of Facts

The Appellant, JGM, and the Respondent, CNW, began a conjugal relationship in October 2000. In January 2001, they signed a sworn statement declaring that they had married in 1996 under customary law. Some time thereafter, when the Respondent gave birth to twins in February 2003, the Appellant chased her out of his house and she moved to another house owned by the Appellant. When the Appellant failed to provide the Respondent with maintenance and child support, the Respondent filed a suit in a Magistrate Court. The Appellant denied the existence of a marriage and consequently denied his obligation for child support. He argued that since the children were born out of wedlock, he did not have any parental obligation to support them. Under Section 24(1) of the Children Act, if a child is born out of wedlock, the mother is the primary person responsible for taking care of the child, until a court determines, in accordance with Section 25(1) of the Act, the father's parental responsibility. The Magistrate held that the combination of the documents, including the sworn affidavit of marriage, and the birth certificates of the children, submitted by the Respondent, plus the fact that the Appellant and the Respondent had lived together as husband and wife for years and had had children, amounted to marriage. The Magistrate also held that the Appellant had a duty to support his children. The Appellant then appealed the decision of the Magistrate.

Issues

Whether a marital relationship existed between the Appellant and the Respondent, and whether the Appellant had parental responsibility towards his children.

Summary of the High Court's Discussion

The marriage laws, which had been enacted during the colonial period, did not recognize mere cohabitation as a valid marriage. In reality, however, many Kenyans cohabit and have children. In times of conflict or when a partner dies, it is usually the women who shoulder the burden of raising the children and so need to turn to the courts for justice. Precedent case law has established that the courts normally presume the existence of a marriage if the partners have cohabited for a considerable period of time. For example, in *Machani v. Vernoor* [1985] KLR 859, the Court of Appeal held that courts "can presume existence of a marriage where there has been a ceremony of any form followed by cohabitation or under customary law and the respondent has to show their marriage fits in any of the laws". Moreover, in cases involving a child, the best interest of the child is of supreme importance. Therefore, the Magistrate was correct in holding that the Appellant had parental responsibility towards the children because there was a valid marriage between the couple, and the best interest of the children calls for the Appellant's parental responsibility.

Conclusion

There existed a marital relationship between the Appellant and the Respondent and the Appellant had a duty to support his children.

Commentary

The case reveals the shortcoming of Section 24(1) of the Children Act, which relieved fathers from an immediate parental obligation to support their children born out of wedlock. The High Court held that such a law is discriminatory against children born out of wedlock and called for the legislature to consider amending the law. Advocates may utilize the Court's position to challenge that Section and insist upon the amendment of the law.

by Kibrom Isaak-Teklehaimanot