ABUBAKAR KARAMI MASAMA v. RUWA TUFARA MAGAMA

(2018) LPELR-46486(CA)

In The Court of Appeal of Nigeria

On Friday, the 7th day of December, 2018

CA/S/39S/2016

Before Their Lordships

HUSSEIN MUKHTAR Justice of The Court of Appeal of Nigeria

AMINA AUDI WAMBAI Justice of The Court of Appeal of Nigeria

FREDERICK OZIAKPONO OHO Justice of The Court of Appeal of Nigeria

Between

Text

ABUBAKAR KARAMI MASAMAAppellant(s)

AND

RUWA TUFARA MAGAMARespondent(s)

Other Citations

RATIO DECIDENDI

1. ISLAMIC LAW AND PROCEDURE - PATERNITY OF A CHILD: How a child's paternity or affinity is determined under Islamic Law

"It is pertinent that under Islamic Law paternity of child may be proved by: (a) admission of the father, or (b) By presumption of law The first case under (a) above hardly occasions since admission of father usually avoids litigation. The second case under (b) is the commonest in paternal disputes. In the instant case, the Appellant has vehemently denied the paternity of child in question barely two months after the marriage and approached the trial Court to declare that he was not the one responsible for the Respondent daughter's pregnancy. However, the respondent alleged that before the marriage was contracted between the appellant and his daughter in accordance with the Islamic rites, the appellant had an affair with his daughter and impregnated her. A Court applying the principles of Islamic Law and faced with this sort of scenario would have analysed the marriage between the Appellant and the Respondent's daughter to first ascertain if there was valid marriage before invoking the principle of minimum period of gestation and drawing any presumption there-from. This is because such presumption is always predicated upon a valid marriage. From the facts and evidence adduced at the trial right through the appellate proceedings, the parties in the instant case were on common ground that the pregnancy was conceived before the marriage because the Appellant had paid dowry and was allowed to go into seclusion with the Respondent's daughter freely as good as if he had married her. It must be stressed here that the essentials of a valid marriage must, except one or two, coexist to constitute a valid marriage under Islamic Law. These are: (1) The parties to the marriage i.e. husband and wife, must be competent (free from any impediment whether of a permanent or temporary nature). (2) The consent of the parties, or of their guardians must be free. (3) Payment of dowry to the wife by the husband. (4) The marriage contract (Siegha) that is seeking the hands of the wife by the husband followed by the offer and the acceptance. (5) Presence of witnesses (a minimum of two male unimpeachable witnesses). (6) Intention of permanency (under Sunni school of thought but permissible by the shi'aites). (7) Marriage guardian for the wife (under some Sunni schools of thought except the Hanafi school). The absence of any of the foregoing essentials of a valid marriage, other than 6 and 7, which are not of general application, renders any purported marriage null and void. In the instant case, the Respondent alleged that the Appellant and his daughter commenced matrimonial life because dowry was paid. I must stress very strongly here that payment of dowry is only one of the essentials of a valid marriage and is paid at the time of a marriage contract or subsequently thereafter. If the Appellant gave what he called dowry, it was, at best for safe keeping pending the marriage as he could not have paid dowry before marriage. It was rather kept in preparation of the impending marriage contract, which it forms part of. If as admitted by the Respondent and his daughter, there was an illicit relationship that led to pregnancy before the marriage, it was capable of rendering the Respondent's

daughter incompetent to be a party to a valid marriage until she observes istibraa'i just like iddah period under a legal relationship. The period for a pregnant woman lasts until she delivers, while a non-pregnant woman observes three tuhur that is three menstrual periods or three months for a young girl or old woman who does not menstruate. ?Applying this principle, the marriage contracted during the pregnancy was null and void as the Respondent's daughter was then under a temporary impediment that bars her from contracting a valid marriage under Islamic Law. Even supposing the time when the pregnancy was conceived has not been established by evidence or admission, the Court below would have resorted to the presumption of law under the principle of ?? (al-walad lil firash) meaning the child is for the (marriage bed). By this principle the legal paternity of a child born in lawful wedlock is presumed if born within the minimum or maximum period of gestation. The minimum period is applicable where the couple are still together as in the instant case. This is a period of six months from the date of marriage and consummation thereof to the date of birth. A mere glance at these two dates reveals a period of five months and four days. However, calculating by the lunar Hijri calendar shows 8-2-2014 is equivalent to 7 Rabi' II 1435 Hijri, while the date of birth is 12-7-2014 that is equivalent to 14 Ramadhan 1435 Hijri, which is exactly 5 months and 7 days. This falls short of the required minimum period of gestation of 6 months that supports a legal presumption of paternity under Islamic Law. It was wrong for the lower Court to compute time from the day the Appellant brought money for dowry. That was not marriage under Islamic Law. There was no dispute about the date of the marriage being Saturday 8th February 2014 (7 Rabi' Thani 1435 A.H) and the date of birth being Saturday 12th July 2014 (14 Ramadhan 435 A.H). The period within which the child was born was therefore less than six months as appraised above. The foregoing analysis shows that the Court below was clearly wrong in its decision of attributing paternity to the Appellant on the basis of presumption of law." Per MUKHTAR, J.C.A. (Pp. 8-12, Paras. A-F) (...read in context)

HUSSEIN MUKHTAR, J.C.A. (Delivering the Leading Judgment): This appeal was triggered by the judgment of the Kebbi State Sharia Court of Appeal, Argungu Division delivered on the 11th day of June 2015, wherein the Court Below dismissed the Appellant's appeal and affirmed the decision of the Trial Court (i.e. Upper Sharia Court, Gwandu).

On the 7th day of April 2014, the Respondent herein instituted this suit against the Appellant before the Upper Sharia Court, Gwandu in Suit No. USC/GD/CV/F1/27/2014, seeking for an order of the trial Court

against the Appellant for the paternity of the child (a baby girl) born by his daughter named Zalihatu, the Appellant's former wife.

The Respondent alleged that before the wedding was officially solemnized between the Appellant and his daughter in accordance with the Islamic rites, the Appellant had an affair with his daughter and impregnated her. After seven weeks of the wedding, when the Appellant realized that his wife was pregnant, he returned her back to her elder sister's house. (See page 1 of the English version of the records of appeal).

1

When the substance of the complaint was read to the Appellant, he denied the allegation that he ever had an affair with the Respondent's daughter before the marriage was officially solemnized. The Appellant further stated that it was his mother who informed him that the Respondent's daughter was pregnant and he took her to a hospital in Yauri where she was confirmed to be seven (7) months pregnant and later she was taken to another hospital and the result showed she was five (5) months pregnant and later went to another hospital in Tambuwal for the third medical opinion and the Respondents daughter was confirmed to be five (5) months and five (5) days pregnant. The Appellant further stated that their marriage was only two (2) months old.

The Respondent as well admitted the fact that the marriage was then two months old as stated by the Appellant, but that the dowry was paid about seven (7) months before the marriage and the Appellant was the only person who used to see her and that they used to isolate themselves, that is why they suspect the Appellant to be responsible for the pregnancy because she was prevented from going anywhere.

2

The trial Court adjourned the matter sine die pending when the Respondent's daughter puts to bed. After delivery, the Court invited both parties, conducted I'izar and entered judgment against the Appellant confirming the paternity of the child on the appellant relying on the authority in Tuhfatul Hukkam Vol. 1 page 346.

Being aggrieved, the Appellant appealed to the Court Below. On the 11th day of June 2015, the Court Below delivered its judgment by dismissing the appeal and affirming the judgment of the trial Court.

Still dissatisfied, the Appellant lodged another appeal to this Court by filing a Notice of Appeal on the 12th of June 2015 predicated upon three grounds as reproduced hereunder less their particulars:

1. The lower Court erred when it affirmed the decision of the trial Court (Upper Sharia Court, Gwandu) which ordered the Appellant to perform naming ceremony of the baby given birth to by the Appellant's wife without justification.
2. The lower Court erred in law and thereby occasioned a serious miscarriage of justice when the learned Kadis denied the Appellant his fundamental right of fair hearing.
3. The decision of the trial Court is against the weight of evidence.

The Appellant distilled two issues for determination in this appeal thus:

(a) Whether the Court below was right to have affirmed the decision of the trial Court which confirmed the paternity of the child to the Appellant? (Distilled from grounds one and three)
(b) Whether the Appellant was denied fair hearing. (Distilled from ground two)

The first issue is wide enough in scope to cover the second one or at least both issues are intertwined.

Arguing the issues, the learned counsel for the Appellant A. A. Fingilla, Esq. submitted that the trite position of Islamic Law is that he who asserts must prove by calling evidence to establish his case.

Reference was made to the book titled Thamarud-Dani page 608.

Further reference was made to the cases of Muhammad A. Aidami v. Bukar Kusumi (2007) 3 SLR (Pt. IV) Pg. 208 at 213 and Mafolaku v. Alamu (1990) 1 LR 60 at 73.

It was argued for the Appellant that paternity of a child under Islamic Law is presumed where: -

a. A marriage contract exists between the spouses either de jure or de facto.
b. There is actual consummation or possibility of consummation between the spouses without any legal hindrance. This includes seclusion between the husband and

the wife (khalwah): sleeping together (mabeet); letting loose the curtain (lrkhaus-sutuur) etc.
c. The child is born within the minimum or maximum period of gestation.
d. There is no legal denial, lian (mutual imprecation) by spouses.
Reference was made to the case of Rabiu v. Amadu (2013) 1 SQLR (Pt. 1) Pg. 1 at pp. 6 - 7.

It was further argued for the Appellant that even if the marriage was considered as having been solemnized from the day the sadaq (dowry) was paid and thus the Respondent's daughter became the Appellant's legal wife, by law, he is allowed to deny or disown the pregnancy or child if he has good reason to do so and one of the methods of proof to entitle a husband to disown a child is by way of subscribing to the oath of lian (mutual imprecation), that the child was not his own. Reference was made to the Glorious Qur'an Chapter 24 Verse 6, Allah (SWT) said: -
? ?? ?? ?? ?? ??

? ?? ? ??
Transliterated thus:
Waallatheena yarmoona azwajahum walam yakun lahum shuhadao illa anfusuhum fashahadatu ahadihim arbaau shahadatin biAllahi innahu lamina alssadiqeena.
Meaning:
And for those who launch a charge against their spouses, and have (in support) no evidence but their own, their solitary evidence (can be received) if they bear witness four times (with an oath) by Allah that they are solemnly telling the truth.
See also the case of Rabiu v. Amadu (supra).

It was submitted for the Appellant that from the facts of the case as presented by both parties and evidence adduced before the trial Court, the child in question was clearly born out of wedlock. This is because the Respondent's daughter by herself said that before the marriage was contracted, the Appellant had an affair with her five (5) months ago. For ease of reference she stated thus: -

"What I wish to say is surely, he is responsible because he deceived me and said I should have an affair with

6

him after payment of dowry. I told him that I am afraid but he said there is no problem. As such I agreed and he has an affair with me. This happened 5 months ago and it's the only time. This is what I wish to say."

It was submitted for the Appellant that paternity was not established to the Appellant by the respondent under Islamic Law. The Court was urged to resolve the issue in favour of the Appellant and allow the appeal.

The learned counsel for the Respondent Abdulwasiu Mohammed, Esq argued the same issue raised by the Appellant as to whether the Court (Kebbi State Sharia Court of Appeal) was right in affirming the judgment of the trial Upper Sharia Court Gwandu that gave the paternity of the controversial child to the Appellant. He submitted that a child of a legally valid marriage contract can only be disowned by lian "Mutual imprecation."

It was further submitted for the Respondent that both the two lower Courts were right in calculating the period between the date of the marriage (8-2-2014) and the date when the child was delivered (12-7-2014) and holding that it was within the minimum period of gestation of six

7

months but that it was less than 5 days. He urged the Court to affirm the paternity to the Appellant and dismiss the appeal.

It is pertinent that under Islamic Law paternity of child may be proved by:
(a) admission of the father, or
(b) By presumption of law

The first case under (a) above hardly occasions since admission of father usually avoids litigation. The second case under (b) is the commonest in paternal disputes. In the instant case, the Appellant has vehemently denied the paternity of child in question barely two months after the marriage and approached the trial Court to declare that he was not the one responsible for the Respondent daughters pregnancy. However, the respondent alleged that before the marriage was contracted between the appellant and his daughter in accordance with the Islamic rites, the appellant had an affair with his daughter and impregnated her.

A Court applying the principles of Islamic Law and faced with this sort of scenario would have analysed the marriage between the Appellant and the Respondents daughter to first ascertain if there was valid marriage before invoking the principle of minimum period of

8

gestation and drawing any presumption there-from. This is because such presumption is always predicated upon a valid marriage. From the facts and evidence adduced at the trial right through the appellate proceedings, the parties in the instant case were on common ground that the pregnancy was conceived before the marriage because the Appellant had paid dowry and was allowed to go into seclusion with the Respondents daughter freely as good as if he had married her.

It must be stressed here that the essentials of a valid marriage must, except one or two, coexist to constitute a valid marriage under Islamic Law. These are:

(1) The parties to the marriage i.e. husband and wife, must be competent (free from any impediment whether of a permanent or temporary nature).

(2) The consent of the parties, or of their guardians must be free.

(3) Payment of dowry to the wife by the husband.

(4) The marriage contract (Siegha) that is seeking the hands of the wife by the husband followed by the offer and the acceptance.

(5) Presence of witnesses (a minimum of two male unimpeachable witnesses).

(6) Intention of permanency (under Sunni school of thought but permissible by the shi'aites).

9

(7) Marriage guardian for the wife (under some Sunni schools of thought except the Hanafi school).

The absence of any of the foregoing essentials of a valid marriage, other than 6 and 7, which are not of general application, renders any purported marriage null and void.

In the instant case, the Respondent alleged that the Appellant and his daughter commenced matrimonial life because dowry was paid.

I must stress very strongly here that payment of dowry is only one of the essentials of a valid marriage and is paid at the time of a marriage contract or subsequently thereafter. If the Appellant gave what he called dowry, it was, at best for safe keeping pending the marriage as he could not have paid dowry before marriage. It was rather kept in preparation of the impending marriage contract, which it forms part of.

If as admitted by the Respondent and his daughter, there was an illicit relationship that led to pregnancy before the marriage, it was capable of rendering the Respondents daughter incompetent to be a party to a valid marriage until she observes istibraai just like iddah period under a legal relationship.

10

The period for a pregnant woman lasts until she delivers, while a non-pregnant woman observes three tuhur that is three menstrual periods or three months for a young girl or old woman who does not menstruate.

Applying this principle, the marriage contracted during the pregnancy was null and void as the Respondents daughter was then under a temporary impediment that bars her from contracting a valid marriage under Islamic Law.

Even supposing the time when the pregnancy was conceived has not been established by evidence or admission, the Court below would have resorted to the presumption of law under the principle of ? (al-walad lil firash) meaning the child is for the (marriage bed).

By this principle the legal paternity of a child born in lawful wedlock is presumed if born within the minimum or maximum period of gestation.

The minimum period is applicable where the couple are still together as in the instant case. This is a period of six months from the date of marriage and consummation thereof to the date of birth. A mere glance at these two dates reveals a period of five months and four days.

11

However, calculating by the lunar Hijri calendar shows 8-2-2014 is equivalent to 7 Rabi II 1435 Hijri, while the date of birth is 12-7-2014 that is equivalent to 14 Ramadhan 1435 Hijri, which is exactly 5 months and 7 days. This falls short of the required minimum period of gestation of 6 months that supports a legal presumption of paternity under Islamic Law. It was wrong for the lower Court to compute time from the day the Appellant brought money for dowry. That was not marriage under Islamic Law. There was no dispute about the date of the marriage being Saturday 8th February 2014 (7 Rabi Thani 1435 A.H) and the date of birth being Saturday 12th July 2014 (14 Ramadhan 435 A.H). The period within which the child was born was therefore less than six months as appraised above.
The foregoing analysis shows that the Court below was clearly wrong in its decision of attributing paternity to the Appellant on the basis of presumption of law. This leads me to the resolution of the lone issue for determination in favour of the appellant and this spells out the meritorious stance of this appeal. It undoubtedly deserves to be and is hereby allowed.

12

The judgment of the Kebbi State Sharia Court of Appeal, 66 Argungu Division delivered on the 11th day of June 2015, wherein the Court below dismissed the Appellant's appeal and affirmed the decision of the trial Court (i.e. Upper Sharia Court, Gwandu) being perverse is hereby set aside. In view of the relationship between the parties, there shall be no order as to costs.

AMINA AUDI WAMBAI, J.C.A.: I have read the judgment just delivered by my learned brother Mukhtar, JCA. I agree with his reasoning and conclusion that there is merit in this appeal. For the reasons stated in the lead judgment, I also allow the appeal and abide by the consequential order therein.

FREDERICK OZIAKPONO OHO, J.C.A.: I had the opportunity of reading the draft of the Judgment of my learned Brother HUSSEIN MUKHTAR, JCA just delivered and I am in agreement with his reasoning and conclusions in allowing the Appeal as meritorious. I abide by other consequential orders of Court.

13

Appearances:

A. A. Fingilla, Esq.For Appellant(s)

Abdul-Wasiu Muhd, Esq.For Respondent(s)>

Appearances

A. A. Fingilla, Esq.For Appellant

AND

Abdul-Wasiu Muhd, Esq.For Respondent