



REPUBLIC OF KENYA



JNW v SKW Minor Suing Through Mother and Next Friend EWW (Civil Appeal E023 of 2024) [2024] KEHC 11978 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11978 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E023 OF 2024
DKN MAGARE, J
SEPTEMBER 26, 2024**

BETWEEN

JNW APPELLANT

AND

**SKW MINOR SUING THROUGH MOTHER AND NEXT FRIEND
EWW RESPONDENT**

JUDGMENT

1. This appeal arises from the order of Hon. E.N. Angima Principal Magistrate delivered on 16/5/2024 in Nyeri Children Case No. E014 of 2024.
2. The Ruling arose from the application dated 19/2/2024 and filed by the Respondent under urgency seeking interim reliefs pending the hearing of the main suit.
3. The Respondent materially sought for maintenance orders against the Appellant for Kshs. 12,000/- being school fees and Kshs. 2,000/- per month as transport cost as well as Kshs. 6,000/- for uniform.
4. The Appellant filed defence together with a replying affidavit in response to the suit and the application in which he denied paternity and therefore parental responsibility.
5. On 16th May 2024, the lower court having considered the submission by the parties directed that DNA test be done within 28 days to determine the paternity of the minor and that the Appellant meets the full cost of the DNA.
6. Aggrieved, the Appellant lodged a Memorandum of Appeal dated 20/5/2024 on the ground that the impugned order was against his right to a fair hearing and therefore seeking that the order be set aside.



Analysis

7. The issue for determination is whether the lower court erred in directing the parties to conduct DNA test and the Appellant to meet full costs thereof and in doing so infringing on his right to a fair hearing.
8. The court notes that indeed the Appellant's main defence was that he was not the biological father of the minor.
9. The order dated 16/5/2024 was also made in the presence of and upon hearing the Applicant and the Respondent. There was counsel for the Appellant and counsel holding brief for counsel for the Respondent. The Appellant also filed a response to the application in which he was clear that the minor was not his biological child.
10. I will consider whether the DNA test was necessary, to meet ends of justice.
11. The High Court in Kakamega High Court Misc. Application No. 105 of 2004, M.W. v K.C. where Justice G.B.M Kariuki (as he then was) set down the conditions one must satisfy before a DNA test is ordered;-
 - a) The applicant must show that there is sufficient cause for seeking the order and there is a likelihood that the defendant could be the father of the child;
 - b) The respondent's refusal to submit to the DNA test violates the child's right to know his father;
 - c) The respondent's refusal to take a DNA test is unreasonable because it deprives the child of the possible enjoyment of the rights and benefits enshrined in sections 4 to 19 of Part II of the *Children Act*;
 - d) The court has jurisdiction to compel the defendant to undertake a DNA test.
12. Further, under Article 53(1) of the *Constitution* it is provided as follows;

“Every child has a right-

...

 - (e) to parental care and protection, which includes equal responsibility of the mother and the father to provide for the child, whether they are married to each other or not.”
13. I note that the Respondent sued the Appellant seeking amongst other prayers, an order to compel him to assume his parental responsibility to the minor as the biological father of the child and pay for the upkeep and maintenance.
14. The defendant on the other hand denied paternity. In this case, the Appellant provided no plausible evidence that his privacy or dignity would be violated by allowing the paternity test as ordered by the lower court. As was held in *PKM v Senior Principal Magistrate Children's Court at Nairobi & another* (2014) eKLR:

There is no doubt that he is entitled to that right and the question therefore is whether his unwillingness to undergo a DNA testing in furtherance of his right to dignity is sufficient to override the interests of the child who may be denied the constitutional right to parental care. As stated above, a general principle emerging from case law is that an order for DNA testing should be made if it is in the interests of the child and if a prima facie case has been



made to justify such an order -See MV v KC Kakamega HC Mise Applic No 105 of 2004. In that regard, Mumbi J in CMS v IAK (supra) stated as follows;“In determining a matter such as this, the court must of necessity weigh the competing right of the child and the Petitioner who is alleged to be the biological father. The right of the child to parental care takes precedence, in my view, particularly in light of the cardinal principle set out in article 53(2) that in matters such as this, the paramount consideration is the best interests of the child.” I agree and while I would be averse to classifying rights in order of priority, there is no doubt in my mind that between the petitioner’s inconvenience at being subjected to DNA testing and the need to conclusively determine the paternity of the child, in the child’s interest and certainly in the petitioner’s interest, the child’s interest must prevail. For the Petitioner, it would be a minor inconvenience if he attends to DNA testing once but for a child not to know its parents and benefit from their protection and care, the damage may linger for years to come. I choose to protect the baby as opposed to the petitioner in such circumstances. It would have been very different if the person seeking DNA testing is another adult for the sake of knowing his parentage but the Constitution specifically protects a child and I am upholding that principle.

Conclusion

In the instant case, I am aware that the petitioner has argued that he has presented himself DNA testing. However, having found that the best interests of the child is the paramount principle in all matters involving children and noting that on the two prior occasions the DNA testing was not carried out, the remedy that would attract my mind is to order the petitioner, the interested party (and the child) to avail themselves for the DNA testing at the Government Chemist at a date to be agreed upon them and in any event within 14 days of this Judgment and thereafter to conclude Children’s Cause No 1020/2012 as soon as possible.

15. Similarly, in my view, the DNA test was necessary in the welfare and best interest of the minor to establish paternity and did not infringe on the Appellant’s rights. As the Appellant did not demonstrate how it would be prejudicial for him to shoulder the full DNA cost, I do not see the need to venture into this detail.
16. In the circumstances, the appeal is devoid of merit and is dismissed.

Determination

17. In the upshot, I make the following orders: -
 - a. The appeal is dismissed.
 - b. To fast-track the lower court case, the lower court file shall be placed before the learned magistrate on priority basis for further directions.
 - c. Each party to bear their own costs in the Appeal.
 - d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 26TH DAY OF SEPTEMBER, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE



In the presence of: -

Mr. Nganga for the Appellant

Respondent in person – present

Court Assistant – Jedidah

