



**JMK v EMK (Civil Case 73 of 2019)
[2022] KEHC 12413 (KLR) (Family) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12413 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL CASE 73 OF 2019
AO MUCHELULE, J
JULY 28, 2022**

BETWEEN

JMK APPELLANT

AND

EMK RESPONDENT

(Being an appeal from the Judgment by Honourable H.M. Mbatia at Nairobi Children’s Court dated 28th June 2019 in Case No. 1212 of 2018)

JUDGMENT

1. The appellant JMK and the respondent EMK come from the same village in Kitui County. The appellant is a senior public servant whereas the respondent is self-employed as a domestic cleaner at Kenyatta Market. On November 7, 2011 the respondent delivered a baby girl DM whom she claimed was fathered by the appellant. She filed a suit before the Children Court at Milimani to seek that he be ordered to pay Kshs.115,600/= towards the child’s upkeep, and to pay its fees and fees related expenses. With the suit was a chamber application seeking an interim order for the payment of the monies pending the hearing and determination of the suit. Some ex parte interim orders were made, including the payment of Kshs.10,000/= monthly towards the maintenance of the child.
2. What, however, is subject of this appeal are the orders made by the trial court on June 28, 2019. What had happened on March 8, 2019 was that the trial court had ordered for DNA testing be done to determine the paternity of the child. This was because the appellant had filed a defence denying that he was the father of the child. The trial court ordered that the DNA testing be done by the Government Chemist. The parties went for the testing and the results came out that the appellant was the father. He



challenged the results. The court ordered for another testing by KEMRI. The testing was done and the results showed that he was not the father. On June 28, 2019 the trial court made the following order:-

“Parties are directed to send the conflicting DNA reports to the Chairman of Kenya Medical Laboratories, Technicians and Technologists Board for investigations. Mention on August 26, 2019 for the court to receive the Chairman’s report....”

3. The Chairman of the Board wrote back and essentially asked that there be:
 - a. an audit of the technical processes in the Government Chemist;
 - b. retest be done at –
 - i. The Government Chemist;
 - ii. KEMRI; and
 - iii. two other laboratories at the discretion of the Board; and
 - iv. the experts Alloys Makokha and John Nyamuni to supervise the testing.
4. In the Memorandum of Appeal, the appellant indicated that he was aggrieved by, and dissatisfied with, the orders of June 28, 2019 on the following grounds:-

- “1) That the Honourable Magistrate erred in law and in fact in directing and issuing orders contradicting the findings of the superior institution Kenya Medical Research Institute (KEMRI);
- 2) That the Honourable Court has demonstrated open biasness against the appellant contrary to the principles of administration of justice and fairness to all;
- 3) That the Honourable Magistrate erred in law and in fact in deliberately failing to address and ignoring all evidence and submissions of the appellant and failing to acknowledge that the appellant is not the father of the minor in question;
- 4) That the Honourable Court erred in law and fact in issuing substantive *ex parte* orders against the appellant without giving him the opportunity to defend himself contrary to the principle of natural justice;
- 5) That the Honourable Magistrate erred in law and practice in failing to discharge her *ex parte* orders after the DNA from a superior institute showed that the appellant is NOT the father of the minor.”

He sought that the *ex parte* orders issued on June 28, 2019 be set aside and be substituted with an order dismissing the respondent’s suit in the lower court.

5. There is no dispute that the parties voluntarily subjected them to the DNA testing at the Government Chemist and at KEMRI. It is clear that they each wanted to know if the appellant was the father of the child. Under article 53(2) of *the Constitution* and section 4(2) of the *Children Act*, it was of paramount interest for the paternity of the child be investigated and ascertained. On June 28, 2019 when the results of KEMRI were received each party’s advocate was present. The court made the order to refer the matter to the Chairman of the Board in their presence. The record does not indicate that either party sought to address the court on the matter. There was no attempt to seek the review of the order. In



other words, the record does not show that the trial court was being biased or unfair to the appellant when, as part of the inquiry to determine the paternity of the child, it ordered what was substantially a retesting by a third, and, hopefully, neutral party. The record does not show that the appellant, who was represented, sought to cross-examine either the Government Chemist or KEMRI. The question of whether KEMRI was superior to the Government Chemist had not arisen, as no evidence had so far been led in that regard.

6. In my consideration, the investigation by the trial court was still on-going when the appeal disrupted it. The appellant cannot anticipate the results of the retesting by the two bodies, and the two other independent bodies. When the results are received, he can seek to cross-examine all the bodies that will have been involved in the testing. The trial court will then determine the paternity of the child, and such determination shall be appealable.
7. It has to be recalled that it was within the jurisdiction of the trial court under section 73 of the *Children Act* to determine the paternity of the child in question, to be able to determine who would eventually maintain and educate it, in accordance with the law. This court does not, unless on appeal, share in that responsibility.
8. I hope I have said enough to show that the appeal has no merit, and is dismissed with costs.
9. Costs be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY 2022.

A.O. MUCHELULE

JUDGE

