REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MERU

MISC CIVIL APPL. NO.E007 OF 2020

IN THE MATTER OF THE CHILDREN'S ACT NO.8 OF 2001

AND

IN THE MATTER OF DM (A MINOR CHILD)

MKK.....APPLICANT

VERSUS

LGI.....RESPONDENT

JUDGMENT

1. The applicant in this matter moved the court on an application dated 20th September 2020. Her principal prayer is that the respondent be ordered to submit to a DNA test at the Government Chemist, Kenyatta National Hospital, on a day to be set, so as to determine the paternity of the child herein. She would also like an order that the cost of the DNA test be catered for by the respondent.

2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of the applicant sworn on 30/09/2020 which discloses that the child is a product of an affair between the respondent and her following which the respondent's abandonment and/or refusal to take parental responsibility. On such abandonment, the applicant reported the matter to Imenti North Sub-County Children's Office, the respondent was summoned to the said office on 29/09/2020 where he showed up with fake and/or fabricated DNA Test Report, showing that he was not the biological father to the minor. She denies being informed or involved in the said paternity test and she is confident that the respondent is the biological father to the minor. According to her, the respondent should cater for the DNA expenses because, unlike her, he is financially stable. Her intentions to move to the children's court to seek orders of maintenance of the minor from the respondent cannot be actualized, until the orders sought herein are granted.

3. When the application was served on the respondent, he filed grounds of opposition dated 27th October 2020 in which a case is set out that there is no basis for the court to grant the orders sought. He also frowns upon the application for being bad in law, devoid of merit and fatally defective. In his view, the orders sought will grossly contravene his rights, as enshrined under articles 24, 27(1) (2), 28, 31(c) and 33(3) of the Constitution.

4. The application was canvassed by way of written submissions, which were respectively filed on 28/01/2021 and 25/02/2021. For the applicant, it was argued that the orders sought ought to be granted on the basis of Sections 6 and 22 of the Children Act which it is contended, vests the High Court with jurisdiction to resolve issues of this nature. Counsel relied on the decision in **LNJ v GKM (2019) eKLR**, setting the conditions to be met before the order sought can be granted.

5. In response, the respondent argued that no evidence has been availed to show that there was a case in the children's court requiring DNA test. It was stated that the application was unsupported by any evidence that there was likelihood that the respondent could be a father. He also contests ever denying to take DNA test as wrongly alluded to by the applicant. The court is urged to dismiss the application for lacking merit as there is no substantive case. The decisions in **RMK v AKG & anor (2013) eKLR** and **RK v HJK & anor (2013) eKLR** were cited in support of his submissions that to order a testing of any kind against an individual amount to an intrusion to the right to privacy and can only be allowed when an applicant demonstrates a case that overrides such right.

6. The court in ***MW vs KC(2005)eKLR,*** identified the conditions to be satisfied before an order can be made to compel a putative father for undergo a DNA test as follows:

> **"that there is likelihood that the respondent could be the father of the child; that the respondent's refusal to submit to the DNA test has violated the child's right to know his father; that the respondent's refusal to take a DNA test is an unreasonable because it deprives the child of the possible enjoyment of the rights and benefits of enshrined in sections**

4 to 19 of Part II of the Children Act and that the court has the jurisdiction to order of the test."

7. The Children Act was designed to afford protection to children, whether born within or outside marriage. The spirit of the Children Act is that parents shall care, protect and provide for the children that they have been responsible for bringing into this world. The broad objective of the Act is not that protection should be afforded only for those children born within wedlock or where the father has assumed parental responsibility. Adopting such an approach to the matter would be discriminatory of children born outside wedlock where the putative father declines to assume parental responsibility. All children deserve and are entitled to protection and rights under article 53 of the Constitution and in the context here the subject child is entitled to parental care and protection from both parents equally.

8. It is not in doubt that this court is clothed by Section 22 of the Children Act with the requisite jurisdiction to hear applications as the one before it. It being alleged and asserted that the intention is to establish paternity with a view to enforcing parental responsibility, it becomes indubitable that it is the best interest of the child in issue and the court cannot abdicate duty as urged by the respondent.

9. To this court, the interest of the child overrides that of the parent who wishes not to incriminate himself by undertaking DNA testing. I am persuaded by the decision in ***P.P.M. v Senior Principal Magistrate Children's Court at Nairobi & anor (2014) eKLR,*** where the court had this to say:

> **"Parental care can only be an obligation if paternity can be ascertained and one way of doing so is by DNA testing. But the petitioner claims that by being forced to undergo DNA testing, the Respondent would further violate his right to dignity as provided for under Article 28 of the Constitution. This Article states as follows:**
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> > ***"Every person has inherent dignity, and the right to have that dignity respected and protected".***
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> **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 interest 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 interest of the child and if a prima facie case has been made to justify such an order – See *M.V. v K. C. Kakamega HC Misc Application No. 105 of 2004*. In that regard, Mumbi J in *C.M.S. v I. A. K (Supra)* stated as follows:-**
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> > ***"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 interest of the child."***
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> **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 certainty in the petitioner's interest, the child's interest must prevail. For the petitioner, it would be 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.**
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> **… 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 interest 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 DNA testing at the Government chemist at a date to be agreed upon them and in any event within 14 days of this judgment."**

10. In the **Indian case of *Bhabani Prasad Jena versus Convener Sec Orissa, Civil Appeal Nos. 6222-6223 of 2010***, the issue of forced DNA was addressed in the following terms:-

> ***"The court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed. DNA in a matter relating to paternity of a child should not be directed by court as a matter of course or in a routine manner, whenever such request is made. The court has to consider diverse aspects… pros and cons of such order and the test of 'eminent need' whether it is not possible for the court to reach the truth without use of such test."***

11. Having laid the above basis, I now come to the question whether the applicant has made out a prima facie case, which deserves the court's order against the respondent for a DNA test. The duty to convince the court on the need to order the test remained with the applicant and the standard was that on a balance of probabilities. It was never the duty to prove paternity at this stage. Here what needs proof to the satisfaction of the court is whether there is eminent need to establish paternity so that the claim on behalf of the child can be pursued.

12. On the materials availed, I am satisfied that the order for DNA testing of the respondent is deserved. I direct that the respondent and the child attend at Kenyatta National Hospital, on 15/7/2021 and in default within 21 days from today, and offer samples as required by the hospital, for the purposes of determination if the respondent is the biological father of the child.

13. On the costs of such tests, the law remains that the responsibility to the child is equal and therefore the applicant and the respondent shall share the costs equally.

14. On the basis that there is a possibility of the two adults continuing to be bound with the duty to bring up and care for the child jointly, I make no orders as to costs.

15. Mention on 05/08/2021.

DATED SIGNED AND DELIVERED AT MERU BY MS TEAMS THIS 29TH JUNE 2021

PATRICK J.O OTIENO

JUDGE

In presence of

Gikunda for applicant

Ouma for the respondent

PATRICK J.O OTIENO

JUDGE