



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CONSTITUTIONAL & JUDICIAL REVIEW DIVISION**

**CONSTITUTIONAL PETITION NO. 63 OF 2016**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010 (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2013 ARTICLE 22, 23, 159, 165 AND 53 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF: THE SEXUAL OFFENCES ACTS AS REVISED 2007 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: DEFILEMENT CAP 92 AT NO. 8 (3) OF 2001 LAWS OF KENYA**

**AND**

**IN THE MATTER OF ZC.....MINOR**

**CLS (Suing as Guardian/Father and next Friend of the Minor).....PETITIONER**

**VERSUS**

**1. GEORGE MWANGI**

**2. CHILDREN OFFICER LIKONI SUB-COUNTY MOMBASA**

**3. DIRECTOR OF NATIONAL REGISTRATION BUREAU**

**NAIROBI.....RESPONDENTS**

**FURTHER ORDERS PURSUANT TO JUDGMENT HEREIN DATED 30/4/2019 AND NOTICE OF MOTION DATED 28/9/2020**

1. The Judgment in the petition herein was rendered on 30/4/2019. In the said Judgment the Court, *inter-a-lia* made the following further orders:

- (i) The DCI and the DPP to carry out investigations on how the minor secured national identity card.
- (ii) The DCI and the DPP to investigate the role of the 1<sup>st</sup> Respondent in how the minor secured identity card.
- (iii) The DCI to arrest and charge the 1<sup>st</sup> Respondent with relevant offences revealed in their investigations, if any or at all.
- (iv) The minor to be arrested and brought to this Court at any time for directions on the matter.
- (v) Mention on 30<sup>th</sup> May, 2019.

2. These orders are a follow-up on the above Judgment.

3. However, subsequent to the said Judgment, the Court ordered that a DNA examination be carried out to establish whether or not the Petitioner is the biological father of the minor herein. It was alleged by the DPP, the Attorney General and the Respondent that if the Petitioner is not the father of the minor herein then by that fact alone the Petitioner has no *locus standi* to bring this petition.

4. Further, the Petitioner also filed a Notice of Motion application on 28/9/2020 seeking the following orders:

1. That the orders given by this court ON 30/4/2019 have been disobeyed in totality by the DCI and the DPP and therefore they should be cited for contempt of court orders and action should be taken against them under the applicable law under the Civil Procedure Act of the Laws of Kenya.

2. That the DNA report which has been put on record in this matter was done through a flawed process and should be disregarded in the absence of the DCI's report on how the minor obtained the national identity card when she was underage.

3. Cost of the application be provided for.

5. The motion is premised on the grounds that this Court has the teeth to deal with people or individuals who have defied and or broken the law by punishing them heavily; that this Court issued orders on 30/4/2019 to the DCI and the DPP to do some tasks and file the same in this Court, which they have not done, and thereby disobeying this Court's orders; that the Petitioner came across a DNA report in this file on 31/8/2020 when he was perusing it; that this DNA report was placed on court file unprocedurally, and should be expunged from record.

6. From the outset it is clear that the Petitioner's aforesaid Notice of Motion application arose from the Judgment of this Court delivered on 30/4/2019, and the said DNA Report.

7. The results of the said DNA was filed in this Court on 27/7/2020. The conclusion is that the Petitioner herein, Cornel Shisanya, is EXCLUDED as the biological father of ZN, the minor herein.

8. Although the Petitioner has challenged the result of the aid DNA, this Court believes that the result of the DNA is not material consideration in the issues raised herein. Granted that the Petitioner is not the father of the said minor, the Petitioner is still, being a person *pari-parentus*, and the only known care giver of the minor, the Petitioner has the right to bring any proceedings to protect the minor. Therefore, the allegations by the DPP, the AG and the respondent that because the Petitioner is not the biological father of the minor he cannot bring these proceedings is not correct. The Petitioner is rightfully in this Court.

9. Further, the Petitioner has alleged certain apparently criminal conduct of the Respondent pertaining to the said minor. Indeed, the Court at paragraph 14 of the said Judgment found out that the Zainab was a minor, and that the Respondent purported to marry a minor and has even had a child with the minor. It is clear that the 1<sup>st</sup> Respondent married a minor in violation of the law. Paragraphs 14, 15, 16, 17, 18, 19 and 20 of the said Judgment manifest criminal conduct on the part of the 1<sup>st</sup> Respondent. Indeed, these are the conduct the Court directed under paragraph 23 to be investigated and appropriate action taken.

10. While it is clear that the 1<sup>st</sup> Respondent now live as husband and wife with the minor – who has since come of age – this Court cannot close its eyes to the clear violation of the law by the 1<sup>st</sup> Respondent. While some of the orders given in the said Judgment have been overtaken by events, for example a declaration that the minor be put in a Children home for counseling or declaration that the 1<sup>st</sup> Respondent should not be seen near the minor at all times – this Court directs full compliance with the Judgment by the AG and the DPP to ascertain the circumstances under which the minor secured the national identity card, and circumstances leading to her under age marriage. Although the 1<sup>st</sup> Respondent and the minor are now living together in a marriage, the said issues must be investigated, and appropriate action, which takes all factors into consideration, taken.

11. Mr. Fedha, learned prosecutor had submitted that they are carrying out investigations as directed by the Court. That should be done and completed within 90 days from the date hereof, and a report filed in this matter to make a formal closing of these proceedings. The matter will be mentioned on 2/11/2021 for formal closure of this matter.

**Dated, Signed and Delivered in Mombasa this 29<sup>th</sup> day of July, 2021.**

**E. K. OGOLA**

**JUDGE**

In the presence of:

Petitioner in person

Ms. Wanjohi for DPP

Ms. Peris Court Assistant