



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 21 OF 2016

PC.....APPELLANT

VERSUS

JMZ.....RESPONDENT

(Being an appeal against the Ruling delivered at Kilifi on 14.6.2016 by Hon. L. N. Juma (RM))

Coram: Hon. Justice R. Nyakundi

Odhiambo S. E. Advocates for the appellant

Nyang'au T. O. Advocates for the respondent

JUDGMENT

In this appeal **PC** and **JMZ** are contesting paternity of **TMC** a minor allegedly born out of a cohabitation or an intimate relationship involving both of them at one time or another.

The trial court faced with the difficult task of deciding whether indeed **PC** is the biological father to **TMC** ordered 14.6.2016 for a DNA test to array any fears that there is on the part of **PC**.

Being aggrieved with the decision the appellant has approached this court to have the decision quashed on the following grounds:

- (a). That the Learned Magistrate erred in both in Law and infact in finding that the appellant should subject himself for DNA test in order to determine paternity of the child.*
- (b). The Learned Magistrate erred in both in Law and in fact in considering matters which ought to have considered during the trial of the main suit.*
- (c). That the Learned Magistrate failed to give any reasons for allowing the respondents application and thus ordering for the DNA test.*

The appellants case

Mr. Odhiambo Learned counsel for the appellant submitted that paternity and an order for DNA should be determined at the main suit and not at the interlocutory stage. He relied on Section 22 (1) and (3) of the Childrens Act.

As for the case for the respondent **Mr. Nyang'au**, Learned counsel challenged the appellant counsel in his submissions on grounds that appellant has been in denial of paternity and the only avenue open was to have subject his samples for DNA test to settle this long outstanding paternity dispute.

Mr. Nyang'au, therefore submitted and supported the trial court directions in the Ruling determined on 14.6.2016. **Mr. Nyang'au** argued that the resolution of the paternity issue by having it done at the earliest opportunity did not occasion any prejudice to the appellant

Mr. Nyang'au making reference to Article 53 (2) of the Constitution, the principles in the cases of **Petition No. 138 of 2012 J.A.O v G.M. & Another {2013} eKLR** very strongly urged the court not to grant the appeal because it would be both contrary to the constitution and the

Childrens Act on the welfare and best interest of **TMC**.

Analysis

In order to consider the validity or otherwise of the appellant's guidance it is necessary to restate the Law briefly.

For the purposes of and incidental to the hearing and determination of this appeal in as first appellate court, I shall be guided by the principles in the case of **Abok James Odera T/A A. J. Odera & Associates v John Patrick Machera** as to the power and jurisdiction vested on the 1st appellate court.

The Law

The Article 53 of the constitution specifically deals with children rights in regard with their welfare and best interest.

Because of the importance of those rights and the danger of the likely contravention of the Article, parliament enacted a comprehensive **Childrens Act No. 8 of 2001**. The peculiar setting and with due regard to its aims and objects, the Act is understood and geared at safeguarding the children rights and their welfare as a paramount consideration in any claim involving 'a child'. The constitution of this principle was considered. The **House of Lords in JVC {1969} 1ALL ER 788** in consideration the scope and meaning of the words shall regard the welfare of the infant child as the first and paramount consideration stated:

“Reading these words in their ordinary significance and relating them to the various classes of proceedings which the section has already mentioned, it seems to me that they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, membership, claims and wishes of parties, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interest of the child's welfare as the term has now been understood.”

In the earliest century this concept did not escape the mind of jurists as exemplified by the decision of the court in **Re McGrath {1893} 1Ch Lindley 143** stated:

“The dominant matter for the consideration of the court is the welfare of the child. But the welfare of the child is not measured by money only or physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well being, nor can the ties of affection be disregarded.”

Further, the Learned Authors of **Bromley's Family Law 8th Edition Chapter 11 Pg 385 – 390** to state as follows:

“Another key to understanding the decision making process is to appreciate that essentially the court's function is to determine which of the opinions set before it best accommodates or at any rate is least detrimental to the child's interests.”

Thus, I pause the question was the respondent right in seeking paternity test against the appellant. In challenging the decision of the court it appears to me that appellant's view is that the respondent altogether is committing paternity fraud by incorrectly identifying him as the biological father of **TMC**.

The basic feature of this dispute can only be traceable to the fact, whether **PC** and **JZ** were in relationship at one time or another even if it has now become strained is sufficient to establish the product of that intimacy. The rationale being the unassailable provisions on the best interest of the child rights expressly enacted in Article 53 of the Constitution followed by Part (11) on provisions in the Childrens Act.

The split between a couple or a man and woman who have been in a relationship and there was presumptive evidence of a child born during the survivorship of the intimacy should not deny ex-girlfriend or wife to confirm paternity via DNA evidence.

Perhaps the contradiction strongest provision under Article 53 though not expressly stated, impliedly demands that the parents responsible for the existence of children provide for their care and best interest.

In such a setting the appellants assertion right to privacy cannot veto the respondents right to compel a DNA testing to answer the critical question as to the constitutionally protected interest in the care, welfare, custody and best interest of **(TMC)**.

This contentious issue typified by the marital family must be deemed to extend to the unmarried relationship so long as there is existence of a child born out of that union.

The constitutional significance under Article 53 (1) (E) forcefully provides the right of the child to parental care and protection which include equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.

At the outset with this provision, where in the circumstances of the case one parent disputes paternity, the court will be at liberty to order for DNA test which determines with certainty the issue.

Finally, eminent judges of this Republic have ruled on this issues in the following cases **Constitutional Petition No. 147 of 2018 {2019} eKLR**, In **JAO v GGM & Another {2013} eKLR**, **PKM v JN & Another {2014} eKLR**. In addressing their minds to the missing piece in the aspect of disputed paternity the courts restated the issue under the doctrine on the welfare and best interest of the child to order for DNA

testing purposed to protect this overriding interest being of paramount importance to the children of Kenya.

In Article 27 of the Constitution on equality and freedom from discrimination and Article 28 on Human dignity in the court in **MV v KC Kakamega HC MISC APPLICATION NO. 105 OF 2004** and **FKW Suing as a mother and next friend of GDW minor v DMM {2015} eKLR** provided in the dicta a yardstick by which to gauge any limitation imposed on the rights in defence of the cardinal principle **“in Article 53 (2) in matters such as this, the paramount consideration is the best interests of the child.”**

Keeping in view the holding in these authorities and the reading of Article 27 and 28 of the Constitution was not meant to be used as a shield to destroy the enforcement of Article 53 (2) of the same constitution.

There is also the salutary principle laid out in **R v Knight {1988} INZLR 58 CA** where the court stated that:

“The overall interest of justice in a particular case may call for a balancing the wider interest of society. In the finality of decisions against the interests of the individual appellant in having the ruling on DNA testing reviewed.”

The practicability of the remedy sought on appeal by the appellant notwithstanding the existence of Article 53 (2) of the Constitution deny **TMC** protection and guaranteed rights under the broad conceptual framework of the “welfare and best interest of the child.”

In any event by its very nature, the appellant is a claimant of rights in **HCCC NO. 21 OF 2016** against the respondent seeking for declaratory orders to have his name deleted from the birth certificate of **TMC**.

The primacy of the order in the court below is to determine paternity conclusively through forensic means during the period under review which would give each party to the dispute access to medical evidence incidental to statutory provisions to which to have recourse in dealing with the pending claim before court.

Outside the bounds of such submissions made by the appellant there is no intrusion on right to privacy as constitutional safeguard against the appellant to challenge DNA testing.

Given this position, there is no risk any infringement of the fundamental rights and freedoms under the constitution to warrant intervention by the court. Additionally, the nature of the subject matter called for the trial Magistrate to deal with the issue of paternity at the interlocutory stage; is an exercise of judicial discretion.

Most importantly, there was no error on the face of the record or excess of jurisdiction and or application of wrong principles by the trial Magistrate to order for DNA test to be carried out on the basis of the prima facie evidence before the court.

The truth, is as I conclude the appellant presumably might have had a presumptive relationship with the respondent and in such conditions he has been identified as the biological father of **TMC**. He has vehemently denied any such presumptive paternity.

For these reasons to pass this hurdle he ought to submit himself to a DNA testing so that courts rightly draw an inferences as to protection of the welfare and best interest of **TMC**.

In the premises the appeal is dismissed subject to the following orders:

- 1. That the proposed DNA test be undertaken at the Government Chemist on a date agreed with costs being shared by both the appellant and the respondent.***
- 2. On the question of compliance, the Deputy Registrar to serve this order upon the Senior Principal Magistrate, Kilifi Law Courts to monitor compliance with the order for the above reasons pending proceedings in HCCC NO. 21 OF 2016 remain stayed to await the outcome and determination of Childrens Case No. 29 of 2014 at Kilifi Law Court.***

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 24TH DAY OF FEBRUARY 2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Atyang for Nyang’au for the respondent