



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. GM

2. CHILDREN OFFICER LIKONI SUB-COUNTY MOMBASA

3. DIRECTOR OF NATIONAL REGISTRATION BUREAU NAIROBI....RESPONDENTS

JUDGMENT

The Petition

1. By Amended Petition herein dated 19th March, 2018 the Petitioner prays for the following orders:

(a) A declaration that the minor's fundamental rights to equal protection from child abuse, child molestation and to early sexual harassments be exercised administratively and the court to order the minor be brought to this court and be detained by the court until further orders.

(b) A declaration that the minor be put in a well-established children's home for counselling from where she will be staying while going to school at the same time until she completes her education to university level.

(c) A declaration that the OCS INUKA POLICE STATION be ordered to track the minor on phone No. 0704 44 xxx and the Respondent on phone No. 0714 458 xxx for the purpose of causing the arrest of the Respondent and be brought to this court until further orders of this court and pending the hearing and determination of this petition.

(d) A declaration that the minor's fundamental rights against being treated in a discriminatory manner as guaranteed by Articles 19, 20, 27 and 50 of the Constitution of Kenya have been and are likely to continue being violated as placing the minor in a questionable room or house, treating her as being a wife of the Respondent and by removing the minor from continuing with her education the subject of this petition.

2. The Petitioner is the father and guardian and next friend of ZC, who the Petitioner alleges to be a minor and on whose behalf the petition has been filed.
3. The 1st Respondent is a male adult working and living in Mombasa and who is alleged to have unlawfully married the said minor.
4. The 2nd Respondent is the Children's Office for Labour and Social Protection Department of Children Service based in Likoni Sub-County, Mombasa.
5. The 3rd Respondent is the Registrar of Persons based in Molo District who is also alleged to have unlawfully processed a national identity card for the said minor and forged her age status and giving her an identity card when the said minor was underage.
6. The petition is supported by affidavit sworn by the Petitioner on 19th March, 2018. The said affidavit has annexure of academic institutions attended by the minor, as well as pictures of the said minor at different stages in life.

The Response

7. The petition is not opposed. None of the Respondents have filed a response.
8. However, vide a Ruling delivered on 5th April, 2017 on an application dated 12th January, 2017, this Court ordered the 1st Respondent to come to the Court to explain why he had purportedly married a minor. On 12th April, 2018, the said minor came to Court accompanied by her own child and she informed the Court that she is married and lives in her own house and that she was not a minor. On that basis this Court declined to order the minor to be taken into a children home, since the alleged minor had her own husband, child and home. However, the Court granted the Petitioner the prayer seeking to establish the circumstances under which the alleged minor secured a national identity card.
9. The Petitioner's case is that the 1st Respondent has unlawfully taken, and sexually abused his daughter ZCS, the said minor, who was born on 14th February, 2006 at the Coast General Hospital.
10. The mother of the minor, who was married to the Petitioner, died on 19th June, 2014 while the minor was in class 8 at [particulars withheld] Primary School in Kwale County. The Petitioner's case is that he and his deceased wife were all living in their Likoni rented house as a family of 6 members. The minor was attending the same school with her brother in the same class at [particulars withheld] PRIMARY SCHOOL, and went upto form two in [particulars withheld] Secondary School in Kwale County.
11. The 1st Respondent was the Petitioner's neighbor in the Likoni rented house and he works for gain as a long distance transport driver in Mombasa. The Petitioner's case is that the 1st Respondent secretly eloped and escaped with the minor herein immediately after the death of the minor's mother and rented another house where they started staying together as wife and husband in a hide out. The 1st Respondent knew very well that the minor is a girl who is under age but convinced the minor that he is the man to marry her and make her future life appear better by using false promises which acts has damaged the minor's future and her right to education which is paramount under the Children's Act and the Constitution. The Petitioner's efforts to talk to the minor and to give her parental guidance hit a deadlock but the Petitioner was able to convince her to sit for her class 8 examination in 2014 which she did and obtained 243 marks. (The Petitioner annexed the school leaving Certificate marked "C.L.S. 2" and a Certificate marked "C.L.S. 3" and the schools which were willing to admit the minor collectively marked "C.L.S. 4"). However, the Petitioner's efforts to convince the minor to join form 1 did not yield any fruits due to the influence of the 1st Respondent, who eloped with the minor and denied the minor the right to quality education. The Petitioner reported the matter to INUKA POLICE STATION on 8th March, 2015 and was booked as OB NO. xx/xx/3/2015. However, the 1st Respondent, on learning that he was being sought by police officers, shifted to Nairobi area of Dandora and their phone numbers are 0704 044 xxx (which the minor is using) and 0714 458 xxx (for the 1st Respondent). The Petitioner states that the minor is now 15 years and due to the illegal acts of the 1st Respondent, she is having a baby girl, and she is in need of protection. The Petitioner's case is that the 1st Respondent has committed an offence under the Sexual Offences Act Laws of Kenya and has used the advantage of the minor's under age to do the same and therefore is liable for prosecution. The Petitioner urges this Court to uphold the minor's right to education, and to have the 1st Respondent face legal charges necessary under the laws of Kenya.
12. The Petitioner states that many times he has talked to the 1st Respondent to release the minor but the Respondent has treated the Petitioner with contempt, hence this petition.

The Determination

13. I have carefully considered this petition. The same is not defended. Even then this Court is obligated to establish its merit. From the documents in support of petition it is clear that the said ZC is a minor and was at one time admitted to [particulars withheld] School in Mombasa in the year 2011. It is also clear that the Petitioner is the father and the only surviving parent of the minor Z. So the issue for the determination by this Court is whether or not the said Z is a minor as alleged, and if so whether the minor's right is being abrogated by the 1st Respondent as alleged.
14. This court has considered the petition and the documents in support thereof and has come to the conclusion that indeed the said Z is a minor. There is no controversy as to where she is. She is currently allegedly the wife of the 1st Respondent. I have seen the conversation between the Petitioner and the 1st Respondent at paragraph 15 of the supporting affidavit. That conversation, which is not challenged, reveals that the 1st Respondent does not care about his conduct, is arrogant and has taken the minor as his wife. That is a position which is

contrary to the law. The 1st Respondent cannot purport to marry a minor or to have sex with a minor. The said Respondent shall be arrested and brought to this court for doing illegal acts with the minor.

Office of the President

15. As the Court retired to write this Judgment, the Court received a letter from the Office of the President, Ministry of Interior and Co-ordination of National Government dated 18th February, 2019 addressed to this Court in the following terms:

“We refer to the above matter which is coming up for hearing on 20th February, 2019 in Mombasa High Court before Hon. Justice Ogola.

Enclosed herein please find a copy of register 136A serial number 948xxxx and an extract of the register with the particulars of ZNM ID/No. 3666xxxx for your further necessary action.”

16. The said letter enclosed an application for a national identity card by ZNM. The application gives the following as the particulars of the said minor:

Name: ZNM

Date of Birth: 14/02/1998

Gender: Female

Father’s name: J M K

Mother’s name: N N

Maritus status: Single

Tribe: Kikuyu

Clan: Mugaciku

Family: Mwangi

District: Molo

Division: Elburgon

Location: Turi-32923

17. The minor’s finger prints were taken. These were the details upon which a national identity card was issued to the minor.

18. From the said letter from the Office of the President it is clear that the information provided to the Registrar of Persons, if they relate to the minor herein, was false information. The information misrepresented the age of the minor and her family tree including false names of her mother and her father.

19. It is clear that the person who gave the information had the sole intention to hide the true age of the minor, and her family tree so as to hold out the minor as an adult who could be married.

20. The 1st Respondent claims to have married the said minor, and it is alleged that it is the 1st Respondent who helped out the minor to secure the said national identity card. It is clear to this Court that if this is true then the 1st Respondent has committed several offences ranging from giving false information to the Registrar of Persons, to marrying a minor. These are matters which this Court has no capacity to determine. Yet, this Court must take action not only to protect the said minor, but also to punish the crimes which may have been committed.

21. In order to establish the facts of these claims, this Court makes the following orders:

(a) A declaration that the minor’s fundamental rights to equal protection from child abuse, child molestation and to early sexual harassments has been violated by the 1st Respondent.

(b) A declaration that the minor be put in a Children’s home for counselling.

(c) A declaration that the OCS INUKA POLICE STATION be ordered to track the minor on phone No. 0704 44 xxx and the Respondent on phone No. 0714 458 xxx for the purpose of causing the arrest of the Respondent and be brought to this court

until further orders of this court and pending the hearing and determination of this petition.

22. A declaration that the minor is not capable of marriage, and that the 1st Respondent should not be seen near the minor at all times.

23. It is further ordered as follows:

- (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 1st Respondent in how the minor secured identity card.**
- (iii) The DCI to arrest and charge the 1st 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 30th May, 2019.**

Dated, Signed and Delivered in Mombasa this 30th day of April, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Petitioner in person

Mr. Isaboke for DPP

Mr. Kaunda Court Assistant