



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. 17 OF 2012

IN THE MATTER OF ARTICLE 22 AND 23 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF AN ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27 AND 35 OF THE CONSTITUTION ARTICLE 9 OF THE AFRICAN (BANJUL) CHARTER ON HUMAN AND PEOPLES' RIGHTS, AND ARTICLES 6 AND 7 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

BETWEEN

E W G.....PETITIONER

AND

J M N.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

Before this Court is the Petition dated 3rd May, 2012 in which the Petitioners **EWG** sought the following orders

- (a) A declaration that the 1st Respondent has violated the Petitioner's rights to access information about her paternity.*
- (b) An order compelling the 1st Respondent to provide DNA samples to be used to ascertain that he is the biological father of the Petitioner and to provide any information that is in his possession regarding the Petitioner's paternity;*
- (c) A declaration that Section 12 of the Births and Deaths Registration Act Chapter 149 Laws of Kenya is discriminatory and unconstitutional to the extent it provides that no person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married in accordance with some recognized custom;*
- (d) An order directing the Registrar to Births and Deaths to enter the name of the 1st Respondent as the father of the Petitioner upon being furnished with the DNA results confirming the fact that the 1st Respondent is the biological father of the Petitioner;*
- (e) A declaration that the Petitioner's right to dignity inherent in a human being and to the recognition and protection of her human and legal rights have been violated by the 1st Respondent;*
- (f) A declaration that the Petitioner's rights to respect as a person and to the free development of her personally have been violated by the 1st Respondent;*
- (g) An order that the costs of this Petition be borne by the Respondents; and*
- (h) Such orders as this Honourable Court shall deem just to grant*

The Petition was supported by the affidavit of the Petitioner sworn on 3rd May, 2012.

The 1st Respondent **JMN**, by way of a Replying Affidavit sworn on 24th August 2012 opposed the petition whilst the **Hon. Attorney General** being the 2nd Respondent, filed Grounds of Opposition dated 3rd September, 2012 in which it was argued that the Petition does not disclose any cause of action against the 2nd Respondent.

BACKGROUND

The brief facts of this matter are that the Petitioner herein alleges that she is a biological child of the 1st Respondent arising out of a liaison which the 1st Respondent had with her mother. The Petitioner's belief is premised on information given to her by both her mother and the 1st Respondent. The Petitioner's mother one **'MWG'** in her affidavit sworn on 30th June, 2014 averred that she was involved in an intimate relationship with the 1st Respondent between 1980 and 1988. Their relationship however was never formalized. The said **MWG** further avers that her daughter the Petitioner, who was born on 5th January, 1982 was an issue of this intimate relationship.

The Petitioner claims that the 1st Respondent has severally admitted to her that he is her biological father, and has proceeded to prove his commitment to her by providing financial support during her childhood. The 1st Respondent paid her school fees at [particulars withheld] Secondary School, at [particulars withheld] College, and at [Particulars Withheld] University. Upon completion of her studies the 1st Respondent gave the Petitioner the sum of Ksh 170,000/= to enable her start a business. The two have all along enjoyed a cordial relationship.

However despite his love and support for the Petitioner, the 1st Respondent is not listed as her father in her birth certificate because their circumstances do not satisfy any of the two circumstances under which the name of the biological father will be included in a birth certificate as set out in Section 12 of the **Registration of Births and Deaths Act, Cap 146 Laws of Kenya**. These are firstly the 1st Respondent has not given his consent to be named in the birth certificate as the Petitioner's father, nor was he married to the Petitioner's mother at the time of her birth in January 1982. The Petitioner has therefore used her mother's maiden name **'G'** throughout her lifetime and indeed the name that appears on her National Identity Card is **'EWG'**.

Despite his assurances to the Petitioner that he is her biological father. The 1st Respondent had declined to undergo a DNA test to order to confirm the fact of his paternity with certainty. This refusal has caused the Petitioner much stress and trauma as she had been left in doubt regarding her true identity. She has been denied a sense of belonging and identity and is not able to enjoy her full rights as the biological child of the 1st Respondent.

In his response to the Petition the 1st Respondent in his Replying Affidavit dated 24/8/2014 denied that he had never been in any union with the Petitioner's mother at all. The 1st Respondent also denied having ever admitted to the Petitioner that he was her biological father. He conceded that he had maintained and educated the Petitioner but averred that he had only accorded to her such support on humanitarian grounds.

The Petition was disposed of by ways of written submissions which were duly filed by the parties and on 28/6/2016 counsel for the parties appeared before the court to highlight those written submissions.

MR. KONOSI Counsel for the Petitioner filed his written submissions on 1st July, 2014. He told the court that prayer 3 of the Petition has now been fully settled and to their satisfaction in the decision rendered by my learned sister **Hon. Lady Justice Mumbi Ngugi** in the case of **LNW Vs Attorney General & 3 Others [2016] eKLR**. Counsel submitted that the adamant refusal by the 1st Respondent to undergo a DNA test had infringed on the Petitioner's right to dignity inherent as a human being and has denied her full recognition.

It was further submitted that the Petitioner had the right to access information about her paternity. Although this right was apparently in conflict with the 1st Respondent's right to privacy, there exists just cause to limit the 1st Respondent's rights as the Petitioner required the information sought to enable her amend her birth certificate and other identification documents and in order for her to establish and enjoy her full rights as a biological daughter up to and including the right to inherit the property of her father.

Counsel submitted that this Petition has met the **'eminent needs tests'** set out in the case of **PKM Vs SENIOR PRINCIPAL MAGISTRATE – NAIROBI [2014] eKLR**, as the Petitioner has provided sufficient evidence to prove that the 1st Respondent might be her father, having received reliable information from both her mother and the 1st Respondent that this is in fact the case. In the circumstances the continued refusal by the 1st Respondent to undergo a DNA test to determine the truth has caused the Petitioner mental and emotional anguish.

Mr. Konossi finally submitted that Section 12 of **The Registration of Births and Deaths Act** contravened Article 27 of the **Constitution of Kenya, 2010** in that it discriminates against a child whose father admits paternity but the father or mother refuses to make the request for registration, a child whose paternity is determined through science but the mother or father declines to have his name entered in the register and a child whose mother is unable to prove the fact of marriage, and the father is not available to make that request.

The Petitioner submitted that each child whose paternity is conclusively proved has the right to have the father's name entered into the register even without the consent of the mother or father. This ought not to be a right accorded only to children who are borne within a provable marriage. In any event the 1st Respondent has not shown what, if any, prejudice he stood to suffer if the orders sought were granted.

The 1st Respondent who was represented by **MR. LANGAT** Advocate filed his written submissions on 12th March, 2014. Counsel submitted

that under Section 25 of the **Children Act, 2001**, the father of the child whose parents are not married will only be recognized as such in three situations

- (1) Upon the application of the father
- (2) If the father in such a union enters into a parental responsibility agreement with the mother of the child, or
- (3) Where, subsequent to the birth of such child, the parents have cohabited for a period of not less than twelve months, or where the father has acknowledged paternity of the child or has maintained the child.

In the present case none of the above three conditions have been met.

The 1st Respondent finally submitted that the Petitioner has not given any valid reason to warrant his submission to a DNA test. It was submitted that the Petitioner has failed to establish any nexus between herself and the 1st Respondent to warrant to grant the orders being sought.

The Petitioner has not demonstrated how she had suffered from her failure to access the information regarding her biological father, how such information would be useful to her and precisely which constitutional right she is seeking to enforce. The 1st Respondent submitted that one's right to know ones biological father is not a right enshrined in the Bill of Rights. Finally it was submitted that to order the 1st Respondent to undergo a DNA test would violate his rights to privacy, dignity and security of his person.

It was further submitted that to compel the 1st Respondent to undergo a DNA test, then his rights to inherent dignity under Article 28 of the Constitution as well as his right not to be subjected to any torture whether physical or psychological under Article 29(d) of the Constitution would be infringed. The 1st Respondent urged the court to dismiss the Petition in its entirety.

The 2nd Respondent the Hon. Attorney-General was represented by the learned State Counsel **MR. KIRUI**. The 2nd Respondent merely relied on their written submissions dated 4th September, 2014. Counsel for the 2nd Respondent told the court that they support and fully associate themselves with the submissions of the 1st Respondent. Additionally they sought to rely entirely upon the Grounds of Opposition filed dated 3rd September, 2014 and submitted that the present Petition disclosed no cause of action at all against the 2nd Respondent. Counsel submitted that there was no demonstration that the 2nd Respondent has in any way violated, denied, or infringed any of the Petitioner's Constitutional Rights, nor has the Petitioner shown that the 2nd Respondent had unfairly discriminated against her in the application of the provisions of Cap 149.

ANALYSIS

Having set out the facts of the case and having summarized the submissions of Counsel, I will now proceed to analyze the material presented before this court. I have carefully perused the written submission filed by all counsel as well as the authorities annexed thereto. I find that two main issues emerge for determination in this matter as follows

- (i) Whether Section 12 of the Registration of Births and Deaths Act, Cap 149 is unconstitutional.
- (j) Whether an order compelling the 1st Respondent to undergo DNA testing for purposes of establishing paternity should issue,

I propose to deal with each issue individually

(1) Constitutionality of Section 12 of the Registration of Births and Death Act Cap 149

As stated by Mr. Konossi in his submissions this is a matter which has now been resolved by case law and as such all that is required is to restate the present position.

Section 12 of Cap 149 provides as follows

“No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon production to the registrar of such evidence as he may require that the father and mother were married according to law, or in accordance with some recognized custom”.

The effect of this provision was that without evidence of marriage, the name of child's father would not be entered into the register of births, unless the father makes a request jointly with the child's mother so to be registered. On the other hand a child born of married parents had the right to have the name of the married father entered into the register without the Registrar obtaining any evidence of consent from the father or mother.

In the case of a child not born within a provable marriage (a child born out of wedlock), registration could only be done at the instance of the father and mother. Irrefutable evidence of paternity would not be sufficient unless both mother and father gave their consent to the

registration of the unmarried father. If the unmarried father did not wish to be registered then his name would not appear as the only acceptable evidence being proof of marriage, could never be availed to the Registrar.

Hon. Lady Justice Mumbi Ngugi in **LNW Vs Attorney General & 3 Others [2016] eKLR**, considered the Constitutionality of Section 12 against Articles 27, 53 (1) (a) and (e) and Article 53 (2) of the Constitution of Kenya, 2010. In that case the court held that Section 12 contravened the cited Provisions of the Constitution and was therefore null and void in so far as it required that an unmarried father could be registered under the Act only with his consent. Two reasons were given for this finding. Firstly Section 12 was found to differentiate on the prohibited basis of birth between children born within wedlock and those born outside wedlock, which amounted to an unjustified limitation on the rights of equality and freedom from discrimination under Article 27 of the Constitution. Secondly Section 12 was found to infringe on a child's right to recognition and identity as guaranteed by Article 28 of the Constitution.

Needless to say I am in full agreement with the court's decision in the '**LNW Case**', whose import is that the Registrar may now; upon acceptable evidence of the paternity of an unmarried father enter his name in the Register. Such registration will no longer be predicated on the consent of the unmarried father or mother. Any acceptable evidence of paternity e.g a DNA test may form the basis upon which the name of an unmarried father may be entered in to the Register.

2. DNA Test

The Petitioner avers that the 1st Respondent had previously acknowledged her as his biological child. However he later back tracked and has now denied paternity and has refused to grant his consent to be registered as the Petitioner's father. As a result the Petitioner now prays that the court do compel the 1st Respondent to undergo a DNA test so that the question of her paternity can be resolved with certainty. The Petitioner also prays that the court therefore direct the Registrar to enter the Petitioner's name as her father in the register. The law regarding compulsory DNA testing in this country is at the present time unsettled. There exists no statutory framework in place to regulate it. Secondly judicial pronouncements on this issue from our courts have not been unanimous. Having said that there do exist certain basic principles which have been agreed upon by the court in considering whether to issue an order directing a non-consenting adult to submit to a DNA test.

The courts have unanimously held that to compel a non-consenting adult to submit to a DNA test, against his will amounts to an intrusion of his right to bodily integrity and privacy, as secured by Article 28 and 31 of the Constitution [see **RMK Vs AKG and Attorney General [2013] eKLR**]. However a court may exercise its inherent jurisdiction and direct that a party submit to a DNA test in order to determine the truth of paternity where such determination will serve the interests of justice, similarly where the case concerns a minor it is in the best interests of the child to make such an order, then a DNA test may be ordered.

In the South African case of **BOTHA Vs DREYER (now MULLER) (4421/08) [2008] ZAGPHC 395**, the court held that the correct approach was that as a general rule the discovery of the truth should prevail over any protection to the rights of privacy and bodily integrity. Many times the best interests of the child dictate that any doubts regarding paternity be resolved and put beyond doubt using the best available evidence which would be a DNA test. This is not however to denigrate the rights of an adult to privacy and dignity nor must these rights be sacrificed to the needs of the administration of justice. The principle is that such rights must yield to the needs of the proper administration of justice when it is reasonable and justifiable for them to do so. The importance of the purpose and necessity in getting to the truth must be taken into account. The court in that case stated

"The court is clothed inherently and constitutionally with jurisdiction to order parties to have blood tests where it finds that the competing rights and interests of the parties require the truthful verification by scientific methods. Truth is the primary value in the administration of justice and should be pursued if not for its own sake then at least because it invariably is the best means of doing justice in most controversies [own emphasis]."

Similarly in the Kenyan case of **BENJAMIN KIBIWOT CHESULUT Vs MARY CHELANGAT & ANOTHER [2015] eKLR**. **Hon. Justice Sila Munyao**, held that where the interests of justice in a matter will best be served by the establishment of the truth regarding paternity by way of a DNA test, then the courts should not hesitate to grant such an order. The Hon. Judge stated as follows

"Justice thrives in the establishment of the truth and I can put it no better than was put in the Indian Case of Re G (Parentage: Blood Sample) [1997] 1 F.L.R. 360 cited in the case of ROHIT SKEHAR VS NARAYAN DUTT TIWARI & ANOTHER ON 27 APRIL, 2012, HIGH COURT OF DELHI, IA NO. 10394/2011 IN CS (OS) NO. 700/2008, where it was stated as follows:-"

"Justice is best served by truth. Justice is not served by impeding the establishment of truth. No injustice is done to him by conclusively establishing paternity. If he is the father, his position is put beyond doubt by the testing, and the justice of his position is entrenched by the destruction of the mother's doubts and aspersions. If he is not the father, no injustice is done by acknowledging him to be a devoted stepfather to a child of the family. Justice to the child, a factor not to be ignored, demands that the truth be known when truth can be established, as it undoubtedly can. Whilst, therefore, I do not in any way wish to undermine the sincerity of the father's belief that contact is of a continuing good to the child and that it will be reduced if the mother's beliefs prevail, that contact is best when taking place against the reality of fact, and fact can be established by these tests being undertaken".

However, since an order compelling a non-consenting adult to submit to a DNA test, constitutes an infringement of some of his rights, such an order cannot be granted as a matter of right. A mere allegation that a man is a child's father will not on its own suffice. In exercising this discretion the court must balance the need to uphold and protect the rights of parties against the need to establish the truth. Each case must be determined on its own merits according to the circumstances of the case.

In **DNM Vs JK [2016] eKLR and RMK Vs AGK & ANOTHER** (Supra), it was held that in order to be granted such an order, the applicant must lay a basis for the grant of the order, they must state what rights they seek to enforce which will then be balanced against the Respondents rights. It must be shown that the fact of paternity is key to determining the issue between the parties and that this fact (paternity)

cannot be established by other less intrusive means. The applicant must finally show a nexus between himself and the Respondent.

In **YM Vs LB (465/09) [2010] ZASCA 106** the Supreme Court of South Africa reversed the decision of the judge in the **Botha Vs Preyer Case** directing the Respondent to submit to DNA testing, on the grounds that such an order was not necessary since the fact of paternity had not been denied and that the same may be proved on a balance of probability. The Supreme Court held that

“The paternity was determinable on a balance of probability and the party should not have been asked to submit scientific proof in the circumstances it is clear, in my view, that the rights to privacy and bodily integrity may be infringed b(by a procedure ordered by a court in the exercise of its inherent jurisdiction)if it is in the best interests of a child to do so. These rights, like others enshrined in the Constitution, may be limited where it is reasonable and justifiable, applying the criteria in Section 36 (1) of the Constitution. As I have said in this case it is not, but in others it might well be justifiable to order blood or DNA test.

However, whether the discovery of truth should prevail over such other rights is a matter that should not be generalized. In each case, the court faced with a request for an order for a blood test or DNA test must consider the particular position of the child and make determination for that child only. The role of the court, and its duty, is to determine disputes in civil matters on a balance of probability. It is not the court’s functions to ascertain scientific proof of the truth”.

In the Indian Case of **BHABANI PRASAD JENA Vs CONVENOR SEC ORISSA Civil Appeal Nos 6222 -6223 of 2010** the Court established the ‘**eminent need test**’ under which an order for DNA testing will issue as a last resort. The party seeking such an order is required to establish a prima facie case in order to warrant the grant of such orders. The court held that

“The court must reach the truth; 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 the court as a matter of course or in a routine manner, whenever such request is made. The court had to consider diverse aspects pros and cons of such order and the tests of eminent need whether it is possible for the court to reach the truth without use of such tests..... It had been laid down that courts in India cannot order blood tests as a matter of course and such prayers cannot be granted to have a roving inquiry, there must be a strong prima facie case and the court must carefully examine as to what would be the consequences of ordering the blood test”.

In the **BENJAMIN KIBIWOT CHESULUT Case** (supra), the ‘**eminent need test**’ was expounded as follows

“I interpret this to mean that DNA, ought only be permitted where it is necessary for the determination of the issue before the court. Where it is not going to determine a key issue in the case, then DNA ought to be denied. This is because DNA is seem as an intrusive procedure that has the effect of invading ones right to privacy”.

The court in the **Benjamin Kibiwot Case** rejected the requirement that the party seeking the order must first establish a prima facie case. The learned Judge stated that

“It can be at times difficult to table facts that go beyond the mere statement that the Respondent is a parent. I find it hard to insist that on a wealth of other supporting material, for in some instances, there may be none at all, and there is a possibility of the truth being lost by insisting that the material be tabled, where the applicant does not have any such material. What is important in my view is for the court to give cogent reasons for the DNA, and the court must assess the request in light of the surrounding circumstances while, at the same time taking into consideration the rights of the Respondent. If the court is convinced that given the surrounding circumstances it will be fair, just and proportionate to have DNA conducted, then I do not see why DNA should be denied. I wouldn’t want to place the bar too high, or else, all applications for DNA testing will be bound to fail and this will make litigants lose out on the benefits of this test. The end result will be a failure of justice.

I think the core, though not in any way sole, impediment to giving an order for DNA for purposes of establishing paternity is where the paternity of a person cannot be an issue in the case ie. paternity is irrelevant or where the issue of parenthood in the circumstances of the case, can be proved by other less intrusive methods”. (Own emphasis)

Based on the case law cited above the law on DNA testing may be summarized as follows: the courts have an inherent jurisdiction to compel a non-consenting adult to submit to a DNA test for purposes of establishing the truth of paternity, where justice will be achieved by eliminating any doubts regarding paternity, and where if the matter involves a minor, the best interests of the child so dictate. Such an order may only issue where it is necessary in order to determine the underlying issue between the parties. The fact of the paternity must be in doubt and this doubt can only be resolved by way of DNA testing. The order will only issue where other less intrusive means of proving paternity are not sufficient and/or appropriate. The court must remind itself that in a civil case the fact of paternity need only be proved on a balance of probability not beyond reasonable doubt. Finally each case must be determined on its own merits as guided by the circumstances and the need to achieve justice whilst protecting the rights of individuals.

DETERMINATION

In order to establish a prima facie case, the Petitioner must show a link or nexus between herself and the 1st Respondent. It is not enough for the applicant to simply allege that the Respondent is his/her father. There must exist sufficient facts to support this allegation. No reasonable court will order a DNA test against a person in circumstances where there appears to be no link between the applicant and the Respondent. There must exist strong facts showing a nexus between the two. The court must also satisfy itself that the application is not activated by malice or designed to economically exploit or merely to embarrass the Respondent.

In this case the Petitioner has sought determination of her paternity in order to enable her realize her right to identity. The 1st Respondent has

countered that this is not a sufficient cause to warrant an intrusion of his privacy. In several court decisions knowledge of paternity where the application has been made by adult has been deemed an unsatisfactory reason for ordering a DNA test. Conversely where a similar application has been made on behalf of a minor, then the court's appear readily and willing to grant orders for DNA testing on the basis that the best interests of the child override the rights of the non-consenting adult.

The right of a child to know its parents is provided for by the 1989 Convention on the Rights of the Child. Article 7 of the CRC States

Article 7

- 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.***
- 2. State parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, and in particular where the child would otherwise be stateless***

Article 8 of the same convention goes on to provide as follows

- 1. State parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.***
- 2. Where a child is illegally deprived of some or all the elements of his or her identity, state parties shall provide appropriate assistance and protection, with a view of re-establishing speedily his or her identity.***

It has been acknowledged that establishing ones real parental identity forms the basis upon which a child is able to exercise all its other rights up to and including the right to health which is realized by having knowledge of one's genetic make up, the right to inheritance as well as the right to parental care and protection. In the Indian Case of **ROHIT SHEKHAR Vs NARAYAN DUTT TIWAR** the court found that there was a legitimate interest of a child in knowledge of his true parentage and held that such a child had the right to know and to be afforded the company of his true parents unless such knowledge was detrimental to his interests.

Likewise in the South African case of **D Vs M & OTHERS 30619/20 ZAG P SHC 288** the court was persuaded to compel a party to undergo DNA testing based on the finding that

“...it is in the minor child's interest that the issue of his paternity be resolved as the uncertainty of his disputed paternity will follow him for the rest of his life. He is fast approaching the age where knowing and being accepted by the paternal side of his family will be important to his emotional well-being as a pubescent and later as an adult, if it turns out that SD was indeed his father, then he will get the chance to interact with his paternal blood relatives. If the tests prove to the contrary, then it is just as important that Z no longer labour under the impression that his father is deceased. He can then hopefully with his mother's assistance cultivate a relationship with his father”.

In the previously cited case of **LNW Vs ATTORNEY GENERAL** one of the reasons given for the courts finding that Section 12 of the Registration of Births and Death Act, was unconstitutional was that the provision denied a child his right to an identity and a name. The court noted that children who do not know their fathers identity or bear their father's names are often stigmatized and discriminated against. In order to enable a child access its rights to health, and to inheritance a child must know the name and the identity of his/her father.

The Petitioner has averred that the 1st Respondent had severally told her that he was her father. He acted towards her in the way that a father would to his child by maintaining her and financing her education up to university level. The Petitioner's mother has also averred that the 1st Respondent was the father to her child. It is only when the Petitioner requested the 1st Respondent to give his consent to have his name appear in the register of births that the 1st Respondent recanted his earlier admission that he was in fact the father. I am satisfied that sufficient nexus exists between the two. The Petitioner has not made this claim out of the blue. There exists sufficient basis to warrant the making of the order sought.

How important is the Petitioners claim to a right to identity? In my view it is very important for her social, physical (health) and psychological well being. This right to know ones parentage which courts have severally asserted in respect to minors, does not come suddenly come to a screeching halt once one becomes an adult. Psychologists have severally asserted that a human being requires a full knowledge of their true identity in order to function as useful and well adjusted members of society. It is only through DNA testing that any lingering doubts may be removed and the Petitioners paternity can be proved with a certainty. The right of one to know ones parentage does not in my view diminish once one reaches the age of majority. Form the circumstances in this particular case I am satisfied that the Petitioner has established a prima facie case. This is one situation where the Petitioners right to identity outweighs the 1st Respondent rights. In order to establish the truth and in order to determine once and for all the issue of Paternity between the parties, a DNA test is necessary. I therefore allow this Petition and I make the following orders:

- (a) A declaration be and is hereby issued that the 1st Respondent has infringed the Petitioners right to information about her paternity under Article 35 of the Constitution.
- (b) A declaration be and is hereby issued that the Petitioner's right to identity under Article 28 of the Constitution has been curtailed by the uncertainty regarding the paternity of the 1st Respondent;
- (c) An order is issued that both the Petitioners and 1st Respondent to undergo DNA testing within 60 days from the date hereof to

determine if the 1st Respondent is the father of the Petitioner. The cost of that testing shall be borne by the Petitioner.

(d) An order is hereby issued directing the Registrar of Birth and Death to enter the name of the 1st Respondent as the father of the Petitioner upon being furnished with the DNA results confirming that the 1st Respondent is the biological father of the Petitioner;

(e) Prayer (c) has been overtaken by events in light of the decision in **L. N. W Vs Attorney General & 3 Others [2016] eKLR**;

(f) Each party to meet its own cost for this petition.

Dated and Delivered in Nakuru this 18th day of April, 2017

MAUREEN A. ODERO

Judge

Mr. Muchiri holding brief Mr. Konosi for Petitioner

Mr. Ochang holding brief for 1st Respondent