



**JNA v SA (Petition 281 of 2015) [2016] KEHC 7267 (KLR)
(Constitutional and Human Rights) (22 April 2016) (Judgment)**

JNA v SA [2016] eKLR

Neutral citation: [2016] KEHC 7267 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 281 OF 2015**

**I LENAOLA, J
APRIL 22, 2016**

BETWEEN

JNA PETITIONER

AND

SA RESPONDENT

The act of a parent moving a child from one school to another without informing the other parent is objectionable but does not amount to a violation of the Bill of Rights.

The main issue before the court was whether the act of moving a child from one school to another without the consent of one of the parents was a breach on the constitutional provisions of parental care. The High Court held the act of a parent moving a child from one school to another without informing the other parent was objectionable, but it did not amount to a violation of the Bill of Rights.

Reported by Njeri Githang'a & Winnie Matiri

Constitution law - fundamental rights and freedoms - children's rights - parental care and responsibility - whether the refusal by a parent to bear equal parental responsibility where a consent order existed was discriminatory against the other parent and violated article 53 (e) of the Constitution on parental responsibility - whether the decision of one parent to move a child from one school to another, without the consent of the other parent, was a violation of constitutional rights - Constitution of Kenya 2010, article 53(e).

Jurisdiction - consent orders - varying of consent orders - jurisdiction to vary consent orders - whether the constitutional court had jurisdiction to make a finding that could vary a consent order initially entered into by the parties prior to the case regarding parental responsibility - whether issues pertaining to enforcement or violation of terms of a consent order could be handled by the constitutional court or the court in which the consent was adopted.

Brief facts

The petitioner filed the present case against his ex-wife alleging that constitutional provisions, specifically article 53 which dealt with parental care and responsibility, had been breached. Their marriage was lawfully dissolved



due to irreconcilable differences and they went through litigation to resolve issues relating to custody, access and parental responsibility over their children. The litigation ended with a compromise and a consent order was voluntarily recorded between them.

The petitioner voluntarily agreed to foot the children's education expenses and that agreement was reflected in the consent order. The petitioner said that he agreed to those terms because he honestly believed that the respondent had a lower income than him and he had wanted to cushion the children from any disruptions in their education.

The petitioner averred that the respondent moved the children from one school to another and those moves came with additional costs, which the petitioner claimed was a violation of his constitutional rights.

The respondent filed a cross-petition together with an Affidavit of Means stating that all the decisions which had been made were made with the full knowledge of the petitioner.

Issues

- i. Whether the refusal by a parent to bear equal parental responsibility, on the basis of the existence of a consent order which provided for each parent's responsibilities, was a violation of article 53 (e) of the Constitution on parental responsibility and was discriminatory against the other parent.
- ii. Whether the constitutional court had jurisdiction to make a finding whose effect was to vary a consent order entered into by the parties in a prior and concluded suit.
- iii. Whether issues pertaining to interpretation and compliance with terms of a consent order were constitutional issues that could be handled by the constitutional court.
- iv. Whether parties who consciously entered into a consent setting out the limits of their parental responsibility could claim violation of the bill of rights with respect to the terms of that consent.

Held

1. A plain reading of the consent order indicated that the order primarily addressed the issue of parental care and responsibility of the parties in the petition in relation to their children, N and W.
2. Under article 22 (1) as read with article 23 (1) of the Constitution the petition was properly before the court. The High Court had jurisdiction to declare whether a right or fundamental freedom had been denied, violated or infringed.
3. Although the petitioner submitted that he was not seeking a review or setting aside of the consent order, if any prayers in the petition were granted, the effect would be that the consent order would be directly affected and would stand reviewed and set aside. The consent order was entered into voluntarily by the parties and they understood the parental obligations conferred upon them. Of importance were the orders that the petitioner "*shall continue to cater for the children's school fees and education related expenses.*"
4. Evidence was required to support the allegation that the respondent had a much higher income than the petitioner had imagined and was capable of partly paying for the education of the children. Evidence was important as a basis for ascertaining the veracity of the allegations made and in line with the principle that he who alleges must prove. It was also important to meet the criteria that a party alleging violation of fundamental rights and freedoms was expected to, at the very least, show in what manner such a violation was done. The said principles were important to weed out merely academic and speculative claims.
5. The respondent had a much lower income as compared to the petitioner as each attached their pay slips as evidence of income. No other evidence had been tendered to show that the respondent had a huge income and that by living in a '*posh*' estate and driving pristine motor vehicles, she earned much more than she had openly declared.
6. Moving one child from one school to another without informing the petitioner was objectionable but it did not amount to a violation of the bill of rights.



7. Article 53 (e) of the Constitution needed no more than the simple and literal interpretation apparent in its language: parents of any child bore equal responsibility in the upbringing of their child. The parties in the case were in that category but where, consciously, before the High Court in its appellate jurisdiction, they crafted a consent order setting out the limits of their responsibilities as parents, there would be no violation of the bill of rights as they clearly understood the importance of article 53 (e). Therefore, their voluntary decision to craft an order before the High Court meant that they were deciding on how the said provision could be actualized in their circumstances.
8. The question on whether the respondent acted unlawfully by changing the school of one child and burdening the petitioner with extra cost, related to the issue on interpretation and compliance with the consent order and not to the constitutionality or otherwise of that action. The right forum to address that issue would be the court where the consent order was recorded by way of a review of that order and not a petition such as the one before the court.
9. The prayers by the respondent for the responsibilities to be discharged by the petitioner and the respondent in accordance with the affidavit of means and for the petitioner's contribution to the upkeep, schooling and grooming expenses of the children were an attempt at rewriting the consent order by introducing an affidavit of means and a new formula for undertaking parental responsibilities. The constitutional court was not the right forum for that.

Petition and cross-petition dismissed. Each party to bear its own costs.

Citations

Cases

1. Anarita Karimi Njeru v Republic (Miscellaneous Criminal Application 4 of 1979; [1979] KEHC 30 (KLR); [1976-1980] 1 KLR 1272) — Explained
2. VKK v PNO (Petition 339 of 2011; [2012] KEHC 1776 (KLR)) — Mentioned

Statutes

1. Children Act, 2001 (Act No 8 of 2001) — section 23, 24 — Interpreted
2. Constitution of Kenya, 2010 — article 22 (1); 23 (1); 53 (e) — Interpreted

Advocates

Mr Myawara for Petitioner

JUDGMENT

Introduction

1. The petitioner, JNA, describes himself as a judicial officer currently serving in the [particulars withheld] court and has filed the present petition against the respondent, SA, his ex-wife.
2. The facts giving rise to the present petition are largely undisputed. The petitioner got married to the respondent under Luo customary law in May, 1997 and they were blessed with two children namely, NGA and WTA, who at the time the present petition was filed, were aged 16 and 12 respectively. They all lived as a family until around September, 2009 when the marriage was lawfully dissolved due to irreconcilable differences and they went through litigation concerning custody, access and parental responsibility over the said children and which litigation was compromised by a consent order voluntarily recorded between them. I shall return to that litigation later.
3. The petitioner now alleges various breaches of the Constitution, specifically article 53 in regard to parental care and responsibility and hence the filing of the present petition.



The Petitioner's Case

4. The petitioner's case is contained in his petition dated July 2, 2015, supplementary submissions dated January 20, 2016, reply to cross-petition dated October 14, 2015 and skeleton submissions dated August 10, 2015.
5. The petitioner contended that the respondent, after their divorce, has embarked on a scheme to frustrate him financially by consistently remaining obstinate and obstructive towards any discussions or suggestions concerning the management of the children's education expenses which earlier, he had voluntarily agreed to foot a bigger share of. When he did so, he honestly believed that the respondent had a comparatively less income than himself and had wanted to cushion the children from any disruptions in their education.
6. It was his further contention that the respondent has unilaterally and whimsically moved the children from schools that he enrolls them in, to her preferred schools without due regard to the financial implications and transport logistics such changes would have on him as the one that consented to meeting their education expenses.
7. According to the petitioner, he assumed that in catering for the school fees and related expenses, while he would take into account the respondent's views, he would have the final decision on which school the children would attend while taking into account his financial situation as well as other personal commitments from time to time. That he never understood that school fees and related expenses included transport costs since that item was a significant component of expenditure and depended on which of them stayed with the children, distance from school and the ability to provide alternative means of transport (such as the use of his or the respondent's car among others).
8. The petitioner further stated that he has over time, and naturally consistent with his customs and traditions, taken the responsibility of taking care of his ageing mother as well as his siblings whenever they or their children were in want. As such, his contention was that these commitments have significantly impacted on his only source of income, which is his government salary, and he has been forced from time to time to review how he manages his expenses including the children's fees and related expenses.
9. He added that at the end of the April 2015 school holiday, the respondent unilaterally decided to enrol the elder child at Makini Secondary School, a day school, thereby deregistering her from Mt Kenya Academy, Nyeri which was a boarding school. That to his surprise, he was informed that the child had performed dismally at the enrolment interview at Makini and so the respondent made a decision to enrol her in Form 2 which, implied that he had wasted a whole year of school fees totalling approximately Kshs 400,000 which he had paid during the child's 3rd year at Mt Kenya Academy.
10. The petitioner also contended that he was never given a chance to engage the management of Makini Secondary School and assess the circumstances under which the interview his daughter failed was conducted and whether she was given adequate time to prepare for the same. Accordingly, that in order not to let the child become a victim of the push and pull between him and the respondent, he opted not to resist the abrupt relocation of the child to the said school. However that the said decision notwithstanding, he assumed that since the decision to move the child was taken by the respondent, she was going to be responsible for at least the child's initial admission items such as uniform and stationery but to his surprise, the respondent took the child to his house with the list of items needed as well as the school fees invoice claiming that under the terms of their agreement, he was supposed to pay fees and education related expenses with transport inclusive.



11. The petitioner asserted that with a lot of difficulties and for the sake of the child, he reorganized his finances, thereby compromising some of his scheduled expenses by shopping for the child and paying the required school fees too. Further, that he requested the respondent to consider letting the child stay with him because he lives near Makini Secondary school in order to avoid paying unnecessary transport costs but the respondent declined that offer.
12. According to the petitioner, the registration to the new school therefore included shopping and school fees which costed him approximately Kshs 210,000 exclusive of about Kshs 50,600 required for transport costs which he alleged the respondent has adamantly refused to pay. She has further refused to discuss with him how the transport costs can be mitigated or avoided all together.
13. In any event, that the respondent is no longer a person of modest means, as she is now a Resource Mobilization Director at KCA University, sits in the University Senate and is a Board Member of Mhasibu Sacco which positions are handsomely remunerative. She also lives at Riverside in Nairobi and drives a pristine Mercedes Benz and a Subaru Forester which are by no means expressions of the lifestyle of a person with modest income.
14. The petitioner's further assertion was that Makini Schools charges tuition fees for both children at Kshs 190,050 per term exclusive of transport for both at Kshs 50,600 the total thereby amounting to Kshs 240,650. In that regard, his averment was that his current net pay after deductions at source for Co-operative savings, loans with the Sacco and Kenya Commercial Bank stands at Kshs 311,734 and a further deduction of Kshs 91,000 to Barclays Bank on account of a personal loan taken much earlier leaving him with Kshs 220,734 which amount he alleged cannot sufficiently meet his and the children's expenses without causing him great financial hardship.
15. Lastly, that whereas the respondent is financially capable, as a parent, she is obliged by law to share equally parental responsibility with him, but she has wilfully refused to shoulder any expenses relating to the children's education including ridiculous expenses such as pens and other stationery and that her attitude is solely intended to crowd him with financial commitments over their common children with a view to perpetuating, in a subtle way, their long dead marital differences which in any event were resolved through divorce, and stunt any financial wellbeing on his side while she enjoys a lavish life.
16. Based on the foregoing, the petitioner therefore prays for the following orders:
 - a) The court declares that the refusal by the respondent to bear equal parental responsibility is discriminatory against the petitioner, and violates article 53(e) of the *Constitution* and sections 23 and 24 of the *Children Act*.
 - b) The court declares that the petitioner and respondent do bear equal parental responsibility over their common children namely NGA and WTA.
 - c) The court declares that the decision as to who shoulders a bigger responsibility be left to the volition of either party and or mutual agreement depending on his or her own financial circumstances from time to time but without prejudice to their constitutionally protected equal parental responsibility.
 - d) The court orders that this being a family dispute, each party bears their own costs.



The Respondent's Case and Cross-Petition

17. Her case is contained in her written submissions dated October 23, 2015 and cross-petition dated September 14, 2015.
18. She stated that she has been faithful and has dutifully complied with the terms in the consent order and that any adjustments to the consent order only affected the budget in terms of reducing it to the petitioner's advantage.
19. She contended that despite the petitioner's commitment to helping his extended family members, the same should not compromise the best interests of his own children to whom he has a mandatory statutory obligation. That, all the decisions she made were done with the full knowledge of the petitioner and were in the best interest of the children as the petitioner was never there for the children and his presence was a source of distress for the children, that required remedial steps taken to redeem their esteem, which had started affecting their performance in school.
20. According to the respondent, she has been solely catering for the basic and grooming needs of the minors and the petitioner has been erratic in carrying out the parental responsibility of paying school fees and meeting other education related expenses and that has considerably strained her financially as she has been stepping in to ensure the children remain in school.
21. She contended further that she has suffered loss and deprivation as a result of the conduct of the petitioner and the children have suffered indignity, psychological torture and low esteem due to the conduct of the petitioner thereby resulting to their being sent away from school and being denied their end term report cards as a result of the petitioner's failure to pay the full required school fees, and to contribute to the basic and grooming needs of the children.
22. She asserted further that she, together with the petitioner, have equal parental responsibility without discrimination and that the equitable, fair and just way for them to contribute to the upkeep, care and exercise of their respective parental responsibilities is by the two of them sharing equally the items contained in the affidavit of means as set out in her cross-petition.
23. For the above reasons therefore, she urged the court to dismiss the petitioner's petition with costs and judgment be entered in her favour and the following orders be granted:
 - a) A declaration that both parents have equal parental responsibility for the children's care and upbringing.
 - b) That the responsibilities be discharged by the petitioner and the respondent in accordance with the affidavit of means hereinabove set out.
 - c) The petitioner's contribution to the upkeep, schooling and grooming expenses of the children be directly deducted and;
 - (i) For school fees and related educational expenses, be paid to schools and relevant institutions.
 - (ii) For upkeep, food, shelter and grooming expenses, to be deposited in a bank account opened and operated by the Respondent on behalf of the children."



Determination

24. Upon reading and considering the pleadings by the parties in the present matter, the key issue for determination is whether there has been any violation of the petitioner's constitutional rights as alleged. If the court answers the question in the affirmative, it shall proceed on to determine the remedies available to the petitioner, if any.
25. Before going into a substantive determination of the above issue, I must address the question of the jurisdiction of this court at this instance.
26. According to the petitioner, what is before this court is substantially a constitutional interpretation of article 53(1)(e) of the Constitution on the equality of parental responsibility. He argued that the consent order between the parties, particularly its enforcement or violation of its terms, which are indeed factual matters, can only be taken in the court in which the consent was adopted. He further submitted that it cannot be the duty of the High Court to apportion responsibility on the parties as to who will pay what and how much since the duty of this court is to interpret the constitutional provisions and declare the rights of the parties.
27. The petitioner also maintained that the matter is properly before this court and that the respondent cannot apply her own interpretation of the consent terms so as to impose a heavier burden on him. He argued that the interpretation by the respondent has twisted the consent arrangement to put an imbalance on the parental responsibility thereby resulting to violation of his constitutional right. Further, that an unequal share of the parental responsibility, where both parents are of more or less equal income is discriminatory and a violation of protected rights which cannot be left to merely continue because there is a consent order on sharing of parental responsibility.
28. He further argued that, while this court has the power to review or set aside a consent that is unconstitutional, he was not seeking a review or setting aside of that consent but rather a declaration of rights and obligations as captured in his petition.
29. The respondent in answer, submitted that the prayers sought herein as drawn and filed raise serious questions relating to procedure and boards on abuse of the court process. That the petitioner has proceeded without full disclosure of material facts in respect of previous court proceedings that culminated in the consent order that spelled out and/or apportioned responsibilities, the very responsibilities the petitioner is purporting to be discriminatory against him.
30. The respondent's further submission was that the present petition seeks to review the consent order through the back door, which she alleged amounts to an abuse of the court process and that the procedure regarding a review and/or setting aside of a consent judgment or order is clear and from the petition, no such grounds have been outlined and even if such grounds exists, they cannot be ventilated through such a petition.
31. She contended in addition that the petitioner is estopped from seeking the prayers sought herein since he was a willing participant, in his right frame of mind without duress, fraud, misrepresentation of facts, when he entered, signed and filed the consent order.
32. Further, that the jurisdiction of the subordinate court and the High Court has not been challenged and no application for review was even ever preferred in the said courts as required procedurally and that for him to approach this court through this petition then he is asking this court to review/sit in appeal in the judgment of another court with competent and parallel jurisdiction.



33. In that context, whereas the petitioner has maintained that the present petition revolves around the question of interpretation of article 53(e) of the Constitution in regard to parental responsibility, at the onset it will be noted that the petitioner's grievances stem from the consent order that was adopted on June 20, 2014 in *SAA v JNA*, High Court Civil Appeal No 65 of 2011.

34. The consent order was adopted in the following terms:

“The entire appeal and the appellant's application dated 06/06/2014 be and is hereby settled in the following terms:

1. The judgment of the lower court- Hon AK Mwicigi (SRM) given on September 15, 2011 be and are hereby confirmed and varied as follows:-
 - (a) Both appellant and respondent do have joint Legal Custody of the children NA and WA.
 - (b) Since NA has joined High School and is currently in Boarding at Mount Kenya Academy, Order Numbers 2, 3, 4, 5, 6 and 7 are therefore inapplicable and are overtaken by events. Both parties shall be at liberty to visit her in school at the school appointed times/days.
 - (c) The appellant will have actual custody and care of WA who has joined Compuera Academy in Nairobi and shall avail her to the respondent at the respondent's nairobi residence on alternate week-ends during school days.
 - (d) The appellant and respondent shall have and share equal time with the children during school holidays.
2. The respondent shall continue to cater for the children's school fees and education related expenses.
3. The appellant and the respondent being both on medical insurance covers by their employers shall jointly cater for the children's medical expenses.
4. The appellant and respondent shall jointly and separately cater for the clothing, entertainment, grooming and all incidental expenses for the children whenever they are with them.
5. Each party shall bear their own costs.”



35. A plain reading of the above consent order indicates that the order primarily addressed the key issue of parental care and responsibility of the Parties in the present petition in relation to their children, N and W.
36. Can this court then address the petitioner’s complaints with that background in mind? To the extent only that the High Court has jurisdiction to declare whether a right or fundamental freedom has been denied, violated or infringed, then the petition is properly before me under article 22(1) as read with article 23(1) of the Constitution. As to whether in fact there has been such denial, violation or infringement is a matter to be determined based on the existing facts as set out elsewhere above.
37. I have reached this conclusion because prayer (a) of the petition is about a declaration whether ‘the refusal by the respondent to bear equal parental responsibility is discriminatory against the petitioner and violates article 53(e) of the Constitution which provides as follows:
- “Every child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.”
38. An interpretation whether there has been a violation of the above provision of the Constitution is a matter well within the mandate of this court and i agree with the petitioner’s submission in that regard.
39. Having disposed of the issue of jurisdiction, the next question to address is whether in fact the respondent has refused to bear equal parental responsibility as alleged by the petitioner.
40. Elsewhere above, I reproduced the consent order dated June 20, 2014. Although the petitioner submitted that he is not seeking a review or setting aside of that order, it is obvious that if i grant any of the prayers in the Petition, the effect would be that the consent order would be directly affected and would stand reviewed and/or set aside. If that be so, it cannot be denied that the consent order was entered into voluntarily by the parties and that they understood the parental obligation conferred upon them. Of importance were the orders that the petitioner “shall continue to cater for the children’s school fees and education related expenses.”
41. The petitioner has a problem with the above order because the respondent has allegedly moved one child to a more expensive school and where the cost of transport is much higher than he can reasonably pay. That he has also discovered that the respondent has a much higher income than he had imagined and is capable of partly paying for the education of the children.
42. What is the evidence to support the above allegations even before I determine whether there is a violation of article 53(e) of the Constitution? Evidence is important as a basis for ascertaining the veracity of the allegations made and in line with the principle that he who alleges must prove. It is also important to meet the criteria set out in Anarita Karimi Njeru v The Republic (1976-1980) 1 KLR 1272, that a party alleging violation of fundamental rights and freedoms is expected to, at the very least, show in what manner such a violation was done. I must add that the said principles are important to weed out merely academic and speculative claims - See also VKK v PNO Petition No 339 of 2011.
43. In that regard, I have read the petitioner’s and respondent’s affidavits where they have each attached their payslips as evidence of income. Without saying more, the respondent has a much lower income (Kshs 71,000 net) as compared to the petitioner. No other evidence has been tendered to show that she has a huge income and/or that by living in a ‘posh’ estate and drives pristine motor vehicles, she earns much more than she has openly declared.



44. Where then is the evidence that she has violated any constitutional right that the petitioner is entitled to? Movement of a child from one school to another without informing the petitioner may be objectionable but cannot amount to a violation of the Bill of Rights.
45. In addition, article 53(e) of the Constitution needs no more than the simple and literal interpretation apparent in its language: parents of any child bear equal responsibility in the upbringing of their children. The parties herein are in that category but where, consciously, before the High Court in its appellate jurisdiction, they craft a consent order setting out the limits of their responsibilities as parents, where is the violation of the Bill of Rights? I submit none. They clearly understood the import of article 53(e) hence their voluntary decision to craft an order before the High Court on how the said provision can be actualised in their common circumstances.
46. Having so said, there is still the question of whether, by changing the school of one child and burdening the petitioner with extra cost, the respondent has acted unlawfully. That question goes merely to the interpretation and compliance with the consent order and not to the constitutionality or otherwise of that action. The right forum to address that issue is High Court Civil Appeal No 65 of 2011 by way of a review of that order and not a petition such as this one.
47. Having answered the main issue arising, it is obvious that once prayer (a) of the petition is found wanting, none of the other prayers can be granted.

Cross-Petition

48. I have reproduced the prayers in the cross-petition and prayer (a) thereof is a reproduction of article 53(1)(e) which I have addressed elsewhere above.
49. Prayers (b) and (c) thereof are an attempt at rewriting the consent order by the introduction of an affidavit of Means and a new formulae for undertaking parental responsibilities. This court, I reiterate, is not the right forum to do so and the cross-petition lacks merit for that reason.

Conclusion

50. Lastly, it seems to me that the bad blood existing between the parties may have partly contributed to their inability to abide by the terms of the consent order. I have chosen not to reproduce the matters set out in the respondent's affidavit in support of the cross-petition or the petitioner's further affidavit sworn on October 14, 2015 as they are an expression of their emotional distaste for each other's personalities and private lives and have little to do with the issues germane to the petition before me. I implore them to focus on the best welfare and interest of their innocent children and not their separate lives with their present companions.

Disposition

51. For the above reasons, I shall dismiss both the petition dated July 2, 2015 and the cross-petition dated September 14, 2015.
52. As for costs, it is best that each party bears its own costs.
53. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF APRIL, 2016.

ISAAC LENAOLA

JUDGE

