



**LNW v Attorney General & another; Kenya National Commission on Human Rights (KNCHR) (Amicus Curiae); Law Society of Kenya (Interested Party) (Petition 484 of 2014) [2016] KEHC 7266 (KLR) (Constitutional and Human Rights) (26 May 2016) (Judgment)**

*L.N.W v Attorney General & 3 others [2016] eKLR*

Neutral citation: [2016] KEHC 7266 (KLR)

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

**PETITION 484 OF 2014**

**M NGUGI, J**

**MAY 26, 2016**

**BETWEEN**

**LNW ..... PETITIONER**

**AND**

**THE HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**THE REGISTRAR OF BIRTHS AND DEATHS ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS (KNCHR) ..... AMICUS CURIAE**

**AND**

**THE LAW SOCIETY OF KENYA ..... INTERESTED PARTY**

**The consent of a father of a child born out of wedlock is not required before the inclusion of his name into the birth register and the child’s birth certificate**

*The petition concerned the rights of children born outside marriage with the main issue revolving around the registration of their births and the circumstances under which the name of the biological father should be inserted in the birth certificate of the child. The court held that section 12 of the Registration of Births and Deaths Act which required that the name of the father of a child born outside marriage should be entered in the register of births only with the consent of the father was unconstitutional and in violation of articles 27, 28 and 53 of the Constitution. In addition, its effect of imposing an unfair burden on women, the mothers of children born outside marriage, was to that extent discriminatory on the basis of sex.*

Reported by Kakai Toili



**Constitutional Law** - *Bill of Rights - rights of a child born out of wedlock - requirements of consent from fathers before child registration of birth - whether a child born out of wedlock was entitled to have the name of his or her father into the certificate of birth without the father's consent - Constitution of Kenya, 2010, article 53(1)(e).*

**Statutes** - *interpretation of statutes - constitutionality of statutory provisions - requirements of consent of the father before entering his name in the child's certificate of birth- whether section 12 of the Registration of Births and Deaths Act contravened the bill of rights of the child and those of the mother under the Constitution by requiring that the consent of the father should be sought before his name was included in the child's birth certificate - Constitution of Kenya, 2010, articles 27 and 53; Registration of Births and Deaths Act(cap 149) section 12.*

### **Brief facts**

The petition concerned the rights of children born outside marriage with the main issue revolving around the registration of their births and the circumstances under which the name of the biological father should be inserted in the birth certificate of the child.

The petitioner, a single mother of a child born out of marriage, filed a petition on her own behalf and for her child and other children born out of wedlock, challenging the constitutionality of section 12 of the Registration of Births and Deaths Act, which provided that the only time that the name of the father of a child born outside marriage can be entered in the register of births was upon the joint request of the father and mother, or upon proof of marriage.

The petition was brought against the Attorney General (AG), the chief legal advisor and legal representative of the National Government and the Registrar of Births and Deaths whose mandate was outlined under the Registration of Births and Deaths Act, and included, *inter alia*, the registration of all births and deaths in Kenya and the keeping of appropriate records in respect thereof.

### **Issues**

- i. Whether a child born out of wedlock was entitled to have the name of his or her father entered into the certificate of birth without the father's consent.
- ii. Whether there was any possible risk of entering false information in the Register by unscrupulous women if consent was not sought from the father.
- iii. Whether section 12 of the Registration of Births and Deaths Act contravened equality clause under articles 27, and aspects of the best interest interests of children under article 53 of the Constitution by requiring that the consent of the father should be sought before his name was included in the Child's birth certificate.

### **Relevant provisions of the Law**

#### **Registration of Births and Deaths Act (cap 149)**

##### Section 12

*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 according to law or, in accordance with some recognized custom.*

### **Held**

1. The effect of section 12 of the Registration of Births and Deaths Act was that if a father of a child born outside marriage was not willing to have his name entered in the register as the biological father, then his name would never be entered in the register since, if the mother and father were not married to each other, there would never be any proof of marriage between them as would satisfy the Registrar.
2. The equality provisions in article 27 of the Constitution required that there should be no legislation that afforded different treatment to children on account of their birth. Thus, the rights guaranteed to children under article 53, as well as all the other rights contained in the Constitution, ought to be accorded to all children, whether born within or outside marriage.



3. Every child was entitled to a name and a nationality. In a patriarchal society such as Kenya, that implied the father's name.
4. In addition to being a limitation on the right to non-discrimination and dignity, the provisions of section 12 of the Registration of Births and Deaths Act had a deleterious effect on other rights of the child as well. Article 53(1)(e) of the Constitution provided *inter alia* that a child was entitled to parental care and protection, which included equal responsibility of the mother and father to provide for the child, whether they were married to each other or not. In order to access the said right, a child ought to have in its documentation, the name and identity of its father. That, however, was unlikely to happen if the inclusion of the name of a person as the father of a child was dependent on the willingness of that person to be included in the birth register.
5. Article 53(1) (e) of the Constitution therefore meant that the question of inheritance do turn on identity and recognition of children by both their mothers and fathers. Consequently, a provision in legislation that denied a child such recognition ought to derogate from the entitlement of the child to inherit.
6. Article 24 of the Constitution required that the importance of the purpose of the limitation be considered, as well as the relationship between the limitation and its purpose, and whether there were less restrictive means of achieving the purpose.
7. Article 10 of the Constitution on national values and principles read together with article 27 of the Constitution, which guaranteed the right to non-discrimination and article 28 of the Constitution which guaranteed to all, inherent dignity, and article 53(2) of the Constitution which emphasised on the paramount importance of the the best interest; all sought to transform society, to recognize the inherent dignity and worth of all persons; to protect those who had hitherto been marginalized and to ensure that they enjoyed the human rights guaranteed to all on the same basis as others. The best interests of the child, whatever its status of birth, ought to be the primary consideration in every matter concerning the child.
8. Constitutional aspirations, in so far as they applied to children born outside marriage, far outstripped in importance the need to keep official records, or the desire to "protect" men from "unscrupulous" women, assuming that, that was the purpose that section 12 of the Registration of Births and Deaths Act was intended to serve. That was more so given the fact that there were less restrictive means of achieving those purposes.
9. Section 12 of the Registration of Births and Deaths Act which required that the name of the father of a child born outside marriage should be entered in the register of births only with the consent of the father was unconstitutional and in violation of articles 27, 28 and 53 of the Constitution. In addition its effect of imposing an unfair burden on women, the mothers of children born outside marriage, was to that extent discriminatory on the basis of sex.
10. Parental responsibility for children, whether born within or outside marriage, was the responsibility of both the father and the mother. Where the identity of the father was not known, or his particulars were not included in the birth register or the child's birth certificate, then a single mother had the burden of pursuing the father for support, and having first to establish the question of his paternity. However, with legislation that provided for inclusion of the particulars of fathers in the birth certificates of all children, whether born within or outside marriage, the burden imposed on women was lessened, and it was possible for men to take up their responsibilities with respect to children sired outside marriage.
11. Section 22 of the of the Registration of Births and Deaths Act, provided clear safeguards to prevent the entry of false information in the Register. Indeed, the correctness of information submitted to the Registrar could be protected by making use of other provisions or methods for establishing the correctness of the data.
12. The law ought to demand that fathers of children born outside marriage step up to the plate and take parental responsibility for their children. That should begin with the provisions in respect of



registration of the birth of such children. A situation in which such children and their mothers are discriminated against on the basis of the law could not be allowed to continue under a transformative constitution

13. Section 12 of the Registration of Births and Deaths Act, which contained the requirement of the consent of a father of a child born out of wedlock to have his name entered in the births register and the child's birth certificate, was unconstitutional and in violation of articles 27, 28 and 53 of the Constitution. The section could not be justified under article 24 of the Constitution.

*Petition allowed.*

### **Orders**

- i. *Section 12 of the Registration of Births and Deaths Act was declared inconsistent with articles 27, 53(1)(a) and (e) and 53(2) of the Constitution and was therefore null and void.*
- ii. *The court directed that section 12 of the Registration of Births and Deaths Act be construed with the necessary alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with articles 27, 53(1)(a) and (e) and 53(2) of the Constitution.*
- iii. *The court declared that all children born out of wedlock shall have the right and or liberty to have the names of their fathers entered in the births registers.*
- iv. *The Registrar of Births and Deaths was directed to within 45 days thereof put in place mechanisms to facilitate the entry into the birth register of the names of the fathers of children born outside wedlock in compliance with order (iii) above.*
- v. *Each party bears its own costs of the petition.*

### **Citations**

#### **East Africa**

1. *Coalition for Reforms & Democracy & 2 others v Republic of Kenya & 10 others* Petition No 628 of 2014 – (Considered)
2. *Gaturu, Edward Mwaniki & another v Attorney General & 3 others* Petition No 72 of 2013– (Explained)
3. *Ndyanabo v Attorney General of Tanzania* [2001] EA 495 – (Considered)
4. *Njoroge, Bernard & another v Independent Electoral and Boundaries Commission (IEBC) & 2 others* Election Petition No 14 of 2013 – (Followed)
5. *Tinyefuza v The Attorney General of Uganda*, Constitutional Appeal No 1 of 1997 (1997 UGCC3) – (Followed)
6. *Zak and another v Attorney General & another* Petition No 193 of 2011- (Followed)

#### **South Africa**

1. *Bhe & others v Khayelitsha Magistrate & others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) - (Affirmed)
2. *Peterson v Maintenance Officer & others* (6541/03) [2003] ZAWCHC 61; [2004] 1 All SA 117 (C) – (Explained)

#### **United States of America**

1. *Clark v Jeter*, 486 US 486, 461 (1988) – (Mentioned)
2. *Gomez v Perez*, 409 US 535, 538 (1973) – (Mentioned)
3. *Handley, By and Through Herron v Schweiker*, 697 F.2d 999, 1002 (11<sup>th</sup> Cir 1983) – (Mentioned)
4. *In re Snook 2 Hilt* [NY] 566 – (Explained)
5. *Lalli v Lalli*, 439 US 524 (1978) – (Mentioned)
6. *Mills v Habluetzel*, 456 US 91, at 97 (1982) – (Mentioned)
7. *Trimble v Gordon*, 430 US 762, 768-772 (1977) – (Mentioned)
8. *US v Butler*, 297 US 1 (1936) – (Considered)



### **Canadian**

1. *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 – (Followed)

### **European Courts of Human Rights**

1. *Marckx v Belgium*, Application No 6833/74 – (Mentioned)
2. *Merger and Cross v France*, Application No 68864/01- (Mentioned)
3. *Mazurek v France*, Application No 34406/97 – (Mentioned)

### **United Kingdom**

1. *Matadeen and another v Pointu & others* [1998] 3 WLR 18; [1998] UKPC 9; [1998] 1 AC 98 - (Approved)

### **Statutes**

#### **East Africa**

1. Constitution of Kenya, 2010 articles 2(6); 10; 14(1); 23; 24; 27(4); 28; 35(1) (b);40 (1);43; 45; 53 (1) (a) (2); 156 ; 259; section 7(1) sixth schedule – (Interpreted)
2. Children Act, 2001 (Act No 8 of 2001) section 11 – (Interpreted)
3. Registration of Births and Deaths Act, (cap 149) sections 7, 10, 11, 12, 22, 28, 26 (2) (3) – (Interpreted)
4. Registration of Births and Deaths Act, (cap 149) section 12 – (Unconstitutional)

#### **South Africa**

1. South Africa Constitution, 1993 section 9(3)

### **International Instruments**

1. Convention on the Rights of Children (CRC) 1989 articles 7, 8
2. International Covenant on Civil and Political Rights (ICCPR) 1966 article 24
3. Universal Declaration on Human Rights (UDHR) 1948 articles 2, 25(2)

## **JUDGMENT**

### **Introduction**

1. This petition concerns the rights of children born outside marriage. In this case, the issue revolves around the registration of their births and the circumstances under which the name of the biological father should be inserted in the birth certificate of the child.
2. The petitioner, LNW, is a single mother of a child born outside marriage. She states that she has filed the petition on her behalf, for her child and other children born out of wedlock, and on behalf of other affected persons of her class as single mothers.
3. She has lodged her claim against the Attorney General (AG), the chief legal advisor and legal representative of the national government in civil matters pursuant to article 156 of the *Constitution*. The 2<sup>nd</sup> respondent is the Registrar of Births and Deaths (the Registrar), whose mandate is outlined under the Registration of Births and Deaths Act, chapter 149 of the laws of Kenya and includes, as the name suggests, the registration of all births and deaths in Kenya and the keeping of appropriate records in respect thereof.
4. The Kenya National Commission on Human Rights (KNCHR) applied and was joined to the proceedings as a friend of the court, while the Law Society of Kenya was permitted to participate in the proceedings as an interested party.



## The Petitioner's Claim

5. The petitioner has a fairly straightforward claim. She challenges the constitutionality of section 12 of the *Births and Deaths Registration Act* (hereafter “the Act”) which she alleges is unconstitutional and in contravention of several provisions of the *Constitution* and various international laws that form part of Kenyan laws by virtue of article 2(6) of the *Constitution*. Section 12 of the *Act* 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 the 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.” (Emphasis added)
6. She urges the court to find that the above provision is unconstitutional for, inter alia, being discriminatory against children born outside marriage, allow her petition dated October 2, 2014, and grant the following orders:
  - a. A declaration and an order that section 12 of the Registration of Births and Deaths Act, is inconsistent with articles 27, 53(1)(a) and 53(2) of the *Constitution* and is therefore null and void.
  - b. An order that section 12 of the Registration of Births and Deaths Act be construed with the necessary alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with articles 27, 53(1)(a) and 53(2) of the *Constitution*.
  - c. An order that all children born out of wedlock shall have the right and or liberty to have names of their fathers entered in the Births registers.
  - d. An order do issue compelling the 1<sup>st</sup> respondent to comply with order (c) above under article 23 of the *Constitution*.
  - e. Any other orders and or directions as to but not limited to advertisement of this petition.
7. The petitioner has made her averments of fact in her affidavit sworn in support of the petition on October 2, 2014, and legal arguments in submissions dated July 2, 2015. Her case was presented by her learned counsel, Mr John Chigiti.
8. According to Mr Chigiti, the gist of the petition is that the provisions of the Act are discriminatory in providing that the only time that the name of the father of a child born outside marriage can be entered in the register of births is upon the joint request of the father and mother, or upon proof of marriage. The petitioner's case is that this provision is the beginning of the journey of inequality that a child born out of wedlock has to travel.
9. The petitioner is the mother of a four year old child who was conceived and born out of wedlock. The child's birth certificate does not bear the name of the father. When the child was born, its father indicated to her in clear terms that his name should not feature in the child's birth certificate. She therefore complied with his request due to the provisions of section 12 of the *Act*.
10. The petitioner now avers that her child lives in the dark, with an incomplete name and/or identity, despite the fact that children are entitled to a name and an identity which helps them to connect with where they come from, who their family members are, and who their relatives and extended family are. The child's family tree has a loosely hanging dead branch as she does not know who her father is. As a result, the petitioner is troubled at all times by the thought that her daughter could one day fall in love with her sibling and get married as a result of the fact that she does not know who her father is.



11. The petitioner argues that a child's father's name should appear in the register of births and in the birth certificates in order to create an avenue through which children born out of wedlock can enjoy their rights. It is also her contention that during hospital visits, the child's medical history cannot be fully known unless the identity of its father is known.
12. The petitioner deposes that children born out of wedlock are disadvantaged on many fronts in matters like health, marriage, and inheritance amongst others as a result of the inability or the restriction set out in the impugned section of the Act. Further, many single mothers like her find themselves victims of indirect discrimination on the basis of their status.
13. The petitioner has relied on the definition of the word "name" in *Black's Law Dictionary* and on *Re Snook 2 Hilt* [NY] 566 in which it was noted that

"a man's name is the mark or indicium by which he is designated from other men."

In her view, by dint of section 11 of the *Children Act*, articles 7 and 8 of the *Convention on the Rights of Children*; and article 2 of the *Universal Declaration on Human Rights*, birth registration is an important process in the life of every human being. She submits that it is through registration that a child acquires identification and legal recognition in the eyes of the law, and that registration is achieved through the entry of the name of the person to be registered in the register of births.

14. It is her submission further that registration creates the foundation on which rights are reckoned with and/or enjoyed, protected, promoted and/or fulfilled; that registration creates the content that comprises the births register of all the people in any country; and that registration helps everybody and the state to identify, distinguish and protect the people born in a country. It is her contention that while the process of registration of names of children born in marriage is usually automatic and straight forward under the Act, the same process does not apply to children born outside marriage.
15. According to the petitioner, registering the birth of a child is a duty for parents in particular, to legally acknowledge that they have a responsibility for their child. With registration, the parents become the legal representatives of the child and are thereby clothed with the duty to safeguard and promote their child's health and development, and provide them with direction and guidance throughout childhood. In her view, having a father's name on a child's birth certificate guarantees the child that he or she shall be cared for by both parents, assures the child that it shall be officially recognized by the government, creates a bridge to access and enjoyment of a host of rights and privileges which cannot be enjoyed by a child who does not know who the father is, and creates a foundation for a nationality and citizenship for the child. It also forms and underscores a legal basis for family ties and helps in the distinction of one person from others.
16. It was the petitioner's further submission that the fabric of one's identity is woven by the surnames of individuals, more so the father's name. In her view it is by having a name, which is the source of one's identity, that the history, lineage and origin of an individual is given. It was further submitted on her behalf that in establishing the extraction, lineage, ancestry or origin of a human being, we are guided by the surnames of individuals as they show relations that people have with one another. It was her submission therefore that a child deserves to know as much as possible about both parents but also to know the identity of his/her father in order to fully bask in the comforts and benefits of lineage and pedigree, and to have a sense of identity and personal history.
17. The petitioner contended that children born out of wedlock have been denied the right to have their father's name by dint of section 12 of the *Act*. They walk around with incomplete names as a result, and some are forced to adopt their mother's surnames or have "XXXX" marks on their registration



- documents. Her submission is that this amounts to indirect discrimination which is a violation of article 27(4) of the Constitution and is further against the best interest of the child under article 53 of the Constitution.
18. The petitioner further took the view that a child who is born out of wedlock cannot enjoy the right to dignity without an identity and a name; that such a child cannot escape the taunts and ridicule of society due to the lack of a father's name and the existence of "XXXX" abbreviations as the alleged initials of the father's name. Additionally, in her view, such children may not have the avenue to enjoy the right to citizenship as guaranteed under article 14(1) of the Constitution. Accordingly, the benefits that one enjoys as a citizen are unsure for children born out of wedlock, and statelessness is never too far for such a child.
  19. The petitioner asserts that most states have today addressed the issue of discrimination against children, relying in support on the decisions in Marckx vs Belgium, Application No. 6833/74, Mazurek vs France, Application No. 34406/97, and Merger and Cross v France, Application No 68864/01.
  20. It is also the petitioner's contention that a child born out of wedlock who does not know the identity of the father is likely to miss out on rights of inheritance and the right to property under article 40(1) of the Constitution. She submitted that it is easier for children with their father's name on the birth certificates to enjoy the right to inherit property from both parents as it is easier to prove parentage.
  21. The petitioner also alleges violation of the right to information under article 35(1) (b) of the Constitution with respect to children born out of wedlock. This is because such children cannot easily know who their father is if the impugned section remains as it. She maintained that it is not just her child but also other children born out of wedlock and their descendants who have the right to access such information. Furthermore, in her view, children deprived of their genetic identity and their descendants are harmed physically and psychologically, and such harm impacts upon and affects generations.
  22. It is also the petitioner's contention that the lack of medical information about one's parents affects the child's right to the highest attainable standard of health. Her submission was that a child who does not know its father will obviously not know the father's medical history, and as a result, the child's right to health and life are threatened. This is because, in her view, doctors cannot conclusively ascertain the child/children's future health conditions, including the chances of suffering from terminal illnesses, high blood pressure, diabetes or other chronic illnesses which could stem from the parents' medical condition if the child is unaware of the parents' identity. It was her submission therefore that section 12 of the Act violates article 43 of the Constitution.
  23. The petitioner further submitted that children born out of wedlock run a risk of getting married to their siblings as a result of denial of the information about their fathers. Her view was that such children are, as a result, more exposed to matrimonial offences such as entering into prohibited marriage relationships, than other children. There was thus a threat of violation of articles 43 and 45 of the Constitution with respect to them. Her submission was that consanguineous relationship can increase the risk of serious genetic diseases in resultant children born out of relationships between children who do not know their fathers.
  24. The petitioner relied on High Court Petition No 193 of 2011-Zak and Another vs The Attorney General and Another [2013] eKLR for the proposition that the Children Act must be read as imposing parental responsibility for children on both of their biological parents, whether they were married to each other or not at the time of the child's birth. She averred further that there is no justification in the inequality imposed by the impugned section herein and that limiting the rights of single mothers in the way the section intended is outdated and excessive.



25. In response to the respondents' contention that the rights of fathers of children born outside marriage will be affected if the orders that she was seeking with respect to section 12 of the Act were granted, the petitioner argued that the respondents have not demonstrated how the fathers of such children will suffer if the children's birth certificates carry their names. In her view, fathers in such circumstances will not suffer any prejudice or hardship if such children know their identity. She referred to the position in law in Costa Rica with respect to fatherhood and responsibility to argue that there are less restrictive means, such as those adopted in Costa Rica, to safeguard the rights of children born out of wedlock and at the same time give the fathers an opportunity to defend themselves and enjoy the rules of natural justice and protection of the law.
26. While strongly urging the court to find in her favour and grant the orders sought so that the names of the fathers of children born outside marriage could be inserted in their birth certificates, the petitioner conceded that there may be instances in which this is not desirable. She cited in particular cases of children born as a result of sexual and gender based violence or crimes under the *Sexual Offences Act*.
27. The petitioner proposes that whenever a child is born outside wedlock, the acknowledgement of birth slip must capture the name of the father if known, and the Registrar shall thereafter invite the father to state whether or not that is his child, and if he is agreeable to the name being entered on the Register. If the father of the child is not agreeable, then the Registrar can call for a DNA test to establish paternity. If the results are positive, the Registrar shall enter the name of the father in the register. If the father is dissatisfied with the decision, he shall have a right of appeal to the High Court. Learned counsel for the petitioner submitted that such a process would protect both the father and the child, and will additionally cater for the interests of fathers who may be suffering, presumably due to exclusion from a child's life.

### **The Interested Party's Case**

28. LSK filed submissions dated May 27, 2015 in support of the petitioner's case. Its submissions were that the right to a name is a fundamental right for everyone as it is the very essence of one's identity. In its view, the entry of the names of the parents of a child into the birth registry is what gives identity to a child. In Kenya, which is a patriarchal society, a child derives his or her surname from the names of his parents as entered in the register of births.
29. LSK takes the position that the wording of section 12 of the Act denies a child born out of wedlock the automatic entitlement to the name of his or her father. In its view, the section discriminates against such children and it is therefore in violation of article 27 of the *Constitution*.
30. According to LSK, the fear of being named as the father of a child one has not sired can be dealt with effectively without the discriminatory tones in the section. However, in its view, the right of every child to be cared for by both parents, to a name and nationality, and to information, far outweighs such fear. LSK further submitted that where a father's name is forwarded for entry into the register and there is doubt as to whether he is the biological father, there ought to be a provision to enable him an opportunity to confirm that he is indeed the father.
31. Its submission was that the process of DNA sampling may be used to confirm the putative father, and the issue of costs can be addressed when such circumstances arise. Where a mother of a child born outside marriage alleges that a certain man is the father and he denies paternity, if the DNA process proves that he is indeed the father, he should be condemned to pay the costs of the DNA. However, if the DNA turns out negative, the mother should pay the cost of the test.



32. LSK further submitted that the practice of placing the “XXXX” marks on the birth certificates of children born outside marriage should be discouraged and done away altogether. In LSK’s view, the placing of such marks obliterates the genesis and background of a child and gives incorrect information. According to the LSK, even children born of technology assisted methods such as IVF have fathers. In its view, a provision such as section 12 of the Act, which perpetrates the possibility of obliterating a child’s history and background information, flies in the face of constitutional provisions on the right to information and health.
33. Additionally, the section presupposes that each child will have both his mother and father alive and available to make a joint application for such child’s birth certificate. According to the LSK, in the case where the mother dies at child birth, such a child would not be able to meet the criteria to have his father’s name on the birth certificate. LSK’s argument was that in such event, there is no possibility of a joint application by his parents, and no evidence of any marriage. Such a child would therefore stand disadvantaged as he/she is locked out and discriminated against on the basis of the marital status of his/her parents, which discrimination is compounded by the death of the unwed mother.
34. LSK therefore concluded that the wording in the section must be altered, amended and qualified so that it can be inclusive of all children regardless of the marital status of their parents. In its view, the section must be worded in such a way that it facilitates the possibility of factual information being placed in every person’s birth certificate.

### **The Respondents’ Case**

35. Both the respondents opposed the petition and filed an affidavit in reply sworn on their behalf by Mr Mutua George, the Senior Registration Officer in the Civil Registration Services at the Ministry of Interior and Coordination of National Government, on November 3, 2014. They also filed submissions dated August 14, 2015 which were highlighted by learned state counsel, Ms Wawira.
36. Mr Mutua deposes that the Director of Civil Registration is empowered under section 7 of the Act to keep a register of births with the prescribed particulars of every birth being notified for registration. Sections 10 and 11 of the Act provide the modalities of capturing the prescribed particulars of the child’s birth, including information regarding its parents. His deposition is that it is the duty of the child’s parents or occupier of the house in which a child is born to give notice of the birth of the child.
37. The information required in the prescribed notice includes the particulars of the child as well as those of its mother and father where applicable. Under section 26(2) and (3) of the Act, the Principal Registrar furnishes a certified copy of the entry of the register in his custody, while the birth certificate consists of the details of one or both parents as declared at birth by the person responsible.
38. According to the Registrar, where a mother does not declare the particulars of the child’s father at birth because they are not married and she would like the father’s name to appear in the Register, the Registrar invokes the provisions of section 12 where the alleged father is required to give consent. Where the notification register is surrendered to the Registrar without the father’s name, the Registrar has no other way of ascertaining the authenticity of a declaration being made thereafter except by the consent of the alleged father. Mr Mutua deposes at paragraph 12 of his affidavit that section 12 of the Act is

“meant to protect unscrupulous mothers from vindicating any man of their choice for personal reasons.”

The respondents take the position that the Act should be read as a whole, and that section 12 should not be read on its own.



39. According to the respondents, if there are any constitutional breaches, they have been occasioned by the petitioner for her failure to include the father's particulars in the birth notification as required under the Act.
40. In their written submissions, the respondents contended that a statute ought to be read as an integrated whole with no one particular provision destroying the other but each sustaining the other, as was held in Bernard Njoroge and another v Independent Electoral and Boundaries Commission (IEBC) and 2 Others [2013] eKLR and Edward Mwaniki Gaturu and another v Hon Attorney General and 3 Others [2013] eKLR. They argued that sections 10 and 11 of the Act give an opportunity to the mother or the person notifying a birth to enter the name of the child's father in the register.
41. While conceding that indeed the entry of names of a child's parents into the birth registry is what gives identity to a child and that article 53 of the Constitution reiterates the need for a child to have a name and identity, it was their submission that the state, in a bid to discharge its constitutional mandate to observe, protect and fulfill the rights under the said article, enacted the impugned Act. The respondents maintained that the Act has a laid down procedure that regulates the registration of births, and it is the responsibility of the mother or the person notifying a birth to ensure that the birth is properly registered with the prescribed particulars.
42. According to the respondents, in a case where a person notifying the birth in the first instance does not include the name of the child's father, the Registrar has no other way of ascertaining the authenticity of a declaration made afterwards except by seeking the consent of the alleged father. In their views, allowing the names of fathers to be inserted in the register at any point without verification would open a platform of confusion as unscrupulous mothers would have a leeway to "vindicate" any man of their choice at any time for personal reasons.
43. It was submitted on behalf of the respondents that the responsibility of the mother or the person notifying the birth is to ensure that the child is properly registered, and to ensure that all the particulars, including the name of the father, are entered in the Register. The respondent reiterated that section 12 comes into play when the name of the father is not provided at birth and it requires that if a father's name was not entered at birth, and a mother comes up many years later and purports that any person is the father of the child and wants it entered in the Register, the section requires that the person's consent must be taken into consideration.
44. Ms. Wawira further submitted on behalf of the respondents that the Registrar has no other way of ascertaining the authenticity of an afterthought declaration except by seeking the consent of the father. In her view, the section is important and is meant to keep the registration system safe. In the respondents' view, if names are allowed to be inserted in the Register at any point, a platform of confusion which will allow unscrupulous persons to enter any person's name in the Register at any point in their lives for personal reasons will have been opened. Further, in their view, such a situation will also open a window for unending litigation, and it is not in the best interests of the child that the name is entered in the Register at any stage, is contested, and then is struck out.
45. The respondents argued further that the mere fact of having a father's name on a certificate does not guarantee that a child will enjoy the rights alleged to be infringed by the petitioner. In any event, according to the respondents, the section only comes into play where an application to include the name of the father is made long after the birth of the child. In their view, there was nothing that prevents a mother from inserting the name of the father of a child, whether or not they were married to each other, in the Register.



46. The respondents urged the court to be guided by the decision in *Tinyefuza v Attorney General of Uganda*, Constitutional Appeal No 1 of 1997 and adopt a holistic interpretation of the Act. They further urged the court to dismiss the petition with costs to them as the impugned section is necessary to prevent the abuse of the registration process under the Act.

#### Submissions by the *Amicus Curiae*

47. KNCHR filed submissions dated September 17, 2015 which were highlighted by its Learned Counsel, Mr Wasia.
48. According to the *amicus*, the differentiation between children born in marriage and those born out of wedlock amounts to discrimination on the ground of birth. It argued that there was no way that a child born out of wedlock can know his/her health condition and background if he/she does not know the parent's medical background. Further, that the discrimination against mothers on the ground of marital status is founded upon the fact that a married mother shares parental responsibilities and rights with the father of the child while an unmarried mother has to bear the burden on her own.
49. KNCHR submitted that children born out of wedlock suffer ridicule and stigmatization in school and in social platforms whenever the questions of the name and identity of the father arises. In its view, to deny such children the opportunity of ever knowing their father is dehumanizing treatment and is undignified in that it terminates any connection of the child to the father and is therefore in contravention of article 28 of the *Constitution*.
50. KNCHR went on to highlight the practice in other jurisdiction with regard to parental care and responsibility. It relied on the decision in *Bhe and Others vs Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005(1) SA 580 (CC); 2005(1) BCLR 1 (CC) to submit that no distinction should be made between marital and extra-marital children with regard to intestate succession. Further, that in *Peterson v Maintenance Officer and others* (6541/03) [2003] ZAWCHC 61; [2004] 1 All SA 117(C) the court overturned a common law rule that allowed paternal grandparents to refuse to maintain children born out of wedlock, but required maintenance of grandchildren born in wedlock.
51. The Amicus further observed that the United States Supreme Court imposes two tests for determining whether laws that discriminate against illegitimate children violate the *Constitution*'s equal protection clause of the 14<sup>th</sup> Amendment. The submission by the Amicus is that the test set out is that laws that act as an impenetrable barrier to children born out of wedlock to vindicate their rights violate equal protection and are unconstitutional, and secondly, that under the 'substantial relationship' test, a statute discriminating on the basis of illegitimacy may be upheld as constitutional when the statute is substantially related to an important governmental objective. For the foregoing propositions, KNCHR relied on *Gomez vs Perez*, 409 US 535, 538 (1973); *Handley, By and Through Herron vs Schweiker*, 697 F 2d 999, 1002 (11<sup>th</sup> Cir. 1983); *Mills v Habluetzel*, 456 US 91, at 97 (1982); *Clark v Jeter*, 486 US 486, 461 (1988); *Trimble vs Gordon*, 430 US 762, 768-772 (1977) and *Lalli v Lalli*, 439 US 524 (1978).
52. The *amicus* asked the court, in making a determination in the present case, to take into account the practical effects of the discrimination against children born out of wedlock in the Act and not simply legal and formulistic outcomes. In its view, if the discrimination inherent in the Act practically results in denial of constitutional or common law rights to children born out of wedlock and not within marriage, the Act would very likely be found to violate equal protection of the law. Further, that if sufficient evidence is presented in this petition to prove that the impugned section establishes an insurmountable barrier for children born out of wedlock to enjoy rights granted to children generally, the court's inquiry would end there and a violation of equal protection would be found. However,



- should the court not find an insurmountable barrier, it would next apply the substantial relationship test.
53. Under the latter test, according to the *amicus*, the court would first ascertain whether the government interest in the impugned section in treating children born out of wedlock differently than other children is important. If the purported government interest is ensuring accurate birth records or protecting against false paternity and inheritance claims, the objective may be deemed important by the court. It was its submission that the language of the section does protect against record falsification by mothers as they cannot unilaterally register a father's name on the birth certificate. If the mothers were empowered to register such names without consent, accuracy of birth certificates could be threatened in at least two ways: a mother could knowingly commit fraud by registering the name of a man whom she knew could not be the father; and secondly, a mother could mistakenly register the name of a man whom she, in good faith, believed to be the father, but who was not. In its view, the Act protects against these possibilities.
  54. Mr Wasia further contended that on an analysis of article 24 of the *Constitution*, the court should ask itself whether giving fathers of children born out of wedlock the leeway to veto the inclusion of their names in the register/certificate of births will guarantee accurate records, and if there would be any other way of meeting the objects of the Act without subjecting the child to the trauma that the petitioner spoke of.
  55. According to Mr Wasia, were the South African courts seized of the matter and it applied the test in the two cases, it would have reached the conclusion that section 12 violates the *Constitution* and other provisions of international law.
  56. The *amicus* further took the view that the section empowering men to unilaterally exclude their name from the birth record does not protect against all inaccuracies because men who believe they have fathered a child born out of wedlock may deny the registration of their name, and a man who may not believe he has fathered a child out of wedlock, who, in fact, has done so, may prevent his name from being included in the birth certificate. Further, that the Act does not allow for the father's name to be added later, even after the legal establishment of the paternity by Kenyan courts or proof of paternity through DNA testing. Further, even though section 28 of the *Act* does allow for the Principal Registrar to correct errors and omissions, he/she must do so subject to the rules of the *Act*. As a result, additions and corrections with regard to the father's name would still require the father's consent.
  57. The conclusion by the *amicus* was that if the important governmental objective for treating children born out of wedlock differently in the Act is the accurate record of births, it is likely that the court would not find a substantial relationship between that objective and the policy adopted by the Act because of the various ways fathers can unilaterally create inaccuracies and the inability for birth certificates to be altered after a court judgment establishing paternity.

## Determination

58. I have read the pleadings and submissions of the parties, and I observe that there are no factual disputes to contend with. In addition, I believe that the question of law before the court is fairly straightforward: is section 12 of the *Births and Deaths Registration Act* unconstitutional and in violation of, amongst other provisions of the *Constitution*, articles 27, 53(1)(a) and (2)?
59. In determining this question, I note and bear in mind that the Registration of Births and Deaths Act was enacted in 1928. It has a commencement date of June 9, 1928. The last amendment to the Act was in 1990. The Act therefore predates the 2010 Constitution by eight decades. Indeed, it also predates the *Universal Declaration of Human Rights*, the *Convention on the Rights of the Child*, as well as the



Children Act. It must therefore be looked at against the backdrop of several decades of development in the human rights field, which have seen attitudes towards women and children born outside marriage change considerably, as well as substantial changes in equality and non-discrimination jurisprudence.

60. With respect to the current constitutional dispensation, the Act must be considered in accordance with the provisions of section 7(1) of the sixth schedule to the Constitution, which requires that legislation enacted prior to the promulgation of the Constitution be read with the adaptations and exceptions necessary to bring it into conformity with the Constitution. Section 7(1) provides as follows:

(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

61. I am also cognizant of several principles that should guide the court when it considers a matter in which the constitutionality of legislation is impugned. One such principle requires that the court takes into consideration both the purpose and effect of the legislation. In the Canadian Supreme Court decision in R v Big M Drug Mart Ltd, [1985] 1 SCR 295, this principle was enunciated in the following terms:

“Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation’s object and thus the validity.” (Emphasis added)

62. The respondents have referred the court to the case of Bernard Njoroge & another v Independent Electoral & Boundaries Commission & 2 Others (*supra*) for the principle that legislation must be read as an integrated whole. The respondents have argued that in that case, the court emphasized the principle in Tinyefuza v Attorney General of Uganda, Constitutional Petition No 1 of 1997 (1997 UGCC 3) where the court held that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other. I fully agree with this submission.

63. I am also mindful of the words of the court in the case of Ndyanabo v Attorney General of Tanzania [2001] EA 495 in which the court observed that there is a general presumption that every Act of Parliament is constitutional, and the burden of proving the contrary rests upon any person who alleges otherwise.

64. However, one must bear in mind that with respect to provisions of legislation that limit or are intended to limit fundamental rights and freedoms, the Constitution itself qualifies the presumption. As the five-judge bench of the High Court observed in the case of Coalition for Reforms & Democracy & Others vs Republic of Kenya & 10 Others, Petition No 628 of 2014:

“[96.] However, we bear in mind that the Constitution itself qualifies this presumption with respect to statutes which limit or are intended to limit fundamental rights and freedoms. Under the provisions of Article 24 .... there can be no presumption of constitutionality with respect to legislation that limits fundamental rights: it must meet the criteria set in the said Article.”



65. Finally, I bear in mind the words of the court in *US vs Butler*, 297 US 1 (1936) which is to the effect that:

“When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the *Constitution* which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the *Constitution*; and, having done that, its duty ends.” (Emphasis added)

66. Article 24 of the *Constitution* sets the test to be applied in considering the constitutionality of legislation alleged to be in breach of, or to threaten, fundamental rights. It states as follows:

24.

- (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
  - (a) the nature of the right or fundamental freedom;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
  - (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
- (2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—
  - (a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;
  - (b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and



(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

....

67. Section 12 of the *Births and Deaths Registration Act*, which I have set out fully elsewhere in this judgment, states that no person shall be entered in the register of births as the father of a child “except either at the joint request of the father and mother” or upon proof to the Registrar that the father and mother of the child were married to each other in accordance with the law or some recognized custom. This provision, according to the petitioner, is discriminatory against children born outside marriage.
68. *Prima facie*, and it is evident, from their submissions, that the respondents tacitly concede this, the provisions of section 12 accords different treatment with respect to registration of birth and the entry of the particulars of the father to children born outside marriage as against those born within marriage. While it does not say so expressly, the effect of section 12 is that if a father of a child born outside marriage is not willing to have his name entered in the register as the biological father, then his name will never be entered in the register. This is because, since the mother and father are not married to each other, there will never be any proof of marriage between them as would satisfy the Registrar.
69. The petitioner has asserted that the section violates articles 27, 53(1)(a) and (1) (2). article 27 of the *Constitution* provides that:
1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.
  2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
  3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
  4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
  5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
  6. ...
70. Article 53 of the *Constitution* contains specific guarantees with respect to children. It provides that:
1. Every child has the right-
    - a. To a name and nationality from birth;
    - b. ....
  2. A child’s best interests are of paramount importance in every matter concerning the child.
71. The equality provisions in article 27 require that there should be no legislation that affords different treatment to children on account of their birth. Thus, the rights guaranteed to children under article 53, as well as all the other rights contained in the *Constitution*, must be accorded to all children, whether



born within or outside marriage. Every child, therefore, is entitled to a name and a nationality. In a patriarchal society such as Kenya, that implies the father's name. Yet, under the provisions of section 12, unless the father consents, a child born outside marriage will never have, let alone know, its father or his name. As the petitioner and LSK submit, where the father's name should be is a row of XXXs, yet no child is born without a father.

72. The rights guaranteed to children under article 53 are reflective of the rights guaranteed to children under various international instruments to which Kenya is a party. The [\*1989 Convention on the Rights of the Child\*](#) recognizes the right of a child to a name. Article 7 thereof provides that:
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. States 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, in particular where the child would otherwise be stateless.
73. Article 8 further states that:
1. States 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 of the elements of his or her identity, states parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.
74. Article 25(2) of the [\*Universal Declaration of Human Rights\*](#) also contains clear provisions intended to protect children born outside marriage from discrimination. It provides as follows:
1. ....
  2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.
75. At Article 24, the [\*International Covenant on Civil and Political Rights\*](#) states that:
1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
  2. Every child shall be registered immediately after birth and shall have a name.
  3. Every child has the right to acquire a nationality.
76. One may ask: what is the importance of a name to a child? And what is the mischief to be prevented by treating children, regardless of their status at birth, equally? The petitioner attempted to draw a word picture of the treatment that children born outside marriage, who do not know their father's identity or bear their names, are subjected to. She talked about the taunts they receive in school; the questions about their fathers in the classrooms; the indignity they experience as a result of the xxxs in their birth certificates.



77. The South African case of *Bhe and others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004), which the amicus curiae referred the court to, captures well the plight of such children:

“[57] Historically in South Africa, children whose parents were not married at the time they were conceived or born were discriminated against in a range of ways. This was particularly true of children whose family lives were governed by common law. Much of the stigma that attached to extra-marital children was social and religious in origin, rather than legal, but that stigma was deeply harmful. The legal consequences of extra-marital birth at common law flowed from the Dutch principle that “een wijf maakt geen bastaard”, the implications of which were that the extra-marital child was not recognised as having any legal relationship with his or her father, but only with his or her mother. The child therefore took the mother’s name, inherited only from his or her mother, and the father of the child had no parental obligations or rights vis-à-vis the child. The law and social practice concerning extra-marital children without doubt conferred a stigma upon them which was harmful and degrading.”

78. The situation in Kenya does not differ significantly from what is described in the South African case above. The petitioner has alluded to the stigma and discrimination that children born outside marriage are subjected to. They have no relationship with their, often unknown, fathers, and cannot expect parental care from them. She notes the ridicule and stigma that such children suffer when the question of their fathers’ names or identity comes up. This is what our article 27 and 28, on non-discrimination and right to dignity, seek to avoid in according children born outside marriage the same right to equality and dignity as children born within marriage. In the *Bhe* case cited above, the court went on to observe as follows with respect to these two constitutional guarantees:

[59] The prohibition of unfair discrimination on the ground of birth in section 9(3) of our Constitution should be interpreted to include a prohibition of differentiating between children on the basis of whether a child’s biological parents were married either at the time the child was conceived or when the child was born. As I have outlined, extra-marital children did, and still do, suffer from social stigma and impairment of dignity. The prohibition of unfair discrimination in our Constitution is aimed at removing such patterns of stigma from our society. Thus, when section 9(3) prohibits unfair discrimination on the ground of “birth”, it should be interpreted to include a prohibition of differentiation between children on the grounds of whether the children’s parents were married at the time of conception or birth. Where differentiation is made on such grounds, it will be assumed to be unfair unless it is established that it is not.”

79. It should be observed that section 9(3) of the *South Africa Constitution* is mirrored in our article 27.

80. In addition to being a limitation on the right to non-discrimination and dignity, the provisions of section 12 have a deleterious effect on other rights of the child as well. Article 53(1)(e) provides that a child is entitled “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.” In order to access this right, a child must know, and have in its documentation, the name and identity of its father.



This, however, is unlikely to happen if the inclusion of the name of a person as the father of a child is dependent on the willingness of that person to be included in the birth register.

81. Finally, I need not belabour the arguments made by the petitioner with respect to the importance of the identity of a father for enjoyment of other rights such as the right to health and the right to inherit. With respect to the right to health, one's genetic make-up can only be established if there is information with respect to both parents, which will not happen if the identity of the father is missing from a child's birth records. I have not heard the respondents dispute these contentions by the petitioner and interested party.
82. The petitioner has also raised questions related to the child's right to inheritance and to property under article 40. I note that under article 53(1)(e) of the Constitution, a child is entitled to parental care and protection from both parents, whether they were married to each other or not. It seems to me that question of inheritance do turn on identity and recognition of children by both their mothers and fathers. Consequently, a provision in legislation that denies a child such recognition must derogate from the entitlement of the child to inherit.
83. What I understand the respondents' case to be is that the provisions of section 12 of the Act are intended, first, to protect the accuracy of the records kept by the Registrar of Births and Deaths. Secondly, they contend that the section is necessary to protect men from "unscrupulous" women who may "vindicate" any man falsely as the father of their children. I believe the word intended was "implicate", and the intention behind the Act therefore, in the respondents' view, is to protect men from being implicated by unscrupulous women as the fathers of their children.
84. Article 24 of the Constitution and various judicial precedents, including the decision in R vs Big M Drug Mart Ltd (*supra*) and in the Coalition for Reform and Democracy (*supra*) emphasise the importance of considering the object, purpose and effect of legislation. Article 24 further requires that the importance of the purpose of the limitation be considered, as well as the relationship between the limitation and its purpose, and whether there are less restrictive means of achieving the purpose.
85. Admittedly, it is important to keep proper birth records. It is also important to prevent unscrupulous women from claiming that a man is the father of their child(ren). However, are these purposes achieved by giving the father of a child born outside marriage the veto power, so to speak, on whether or not the birth records indicate that he is indeed the father of the child in question? Do these purposes justify the limitation of the rights of children born outside marriage to non-discrimination, dignity, the right to parental care, amongst others?
86. I consider these questions from a purposive interpretation of the Constitution which, as Article 259 enjoins, is to be interpreted in a manner that:
- (a) promotes its purposes, values and principles;
  - (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
87. Article 10 provides the national values and principles as including "human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized." I have already set out elsewhere in this judgment the provisions of article 27 of the Constitution which guarantee the right to non-discrimination and equality of all persons before the law. At article 28, the Constitution guarantees to all "...inherent dignity and the right to have that dignity respected and protected." Section 53(2) contains a further core principle of our Constitution: "A child's best interests are of paramount importance in every matter concerning the child."



88. What I read from these provisions is a desire to transform society, to recognize the inherent dignity and worth of all persons; to protect those who have hitherto been marginalized and to ensure that they enjoy the human rights guaranteed to all on the same basis as others. Further, that the best interests of the child, whatever its status of birth, must be the primary consideration in every matter concerning the child.
89. In my view, these constitutional aspirations, in so far as they apply to children born outside marriage, far outstrip in importance the need to keep official records, or the desire to “protect” men from “unscrupulous” women, assuming that one accepts that this was the purposes that section 12 was intended to serve. This is more so given the fact that there are less restrictive means of achieving these purposes.
90. Thus, in my view, in so far as the section requires that the name of the father of a child born outside marriage shall be entered in the register of births only with the consent of the father, that provision is unconstitutional and in violation of articles 27, 28 and 53 of the Constitution.
91. In addition, I take the view that it has the effect of imposing an unfair burden on women, the mothers of children born outside marriage, and is to that extent discriminatory on the basis of sex. the Constitution and the Children Act have set out various rights of children, and the obligations of parents to ensure that children have access to these rights.
92. Where the father of a child born outside marriage refuses to contribute to the upbringing of his child, the mother is compelled to seek the court’s assistance in the form of a maintenance order, which often requires establishing paternity through a DNA test. As this court underscored in the case of *Zak and another v Attorney General and another (supra)*, parental responsibility for children, whether born within or outside marriage, is the responsibility of both the father and the mother. Where the identity of the father is not known, or his particulars are not included in the birth register or the child’s birth certificate, then a single mother has the burden of pursuing the father for support, and having first to establish the question of his paternity.
93. However, with legislation that provides for inclusion of the particulars of fathers in the birth certificates of all children, whether born within or outside marriage, the burden imposed on women is lessened, and it is possible for men to take up their responsibilities with respect to children sired outside marriage.
94. I also take the view that section 12 of the Act affords different treatment to women who are not married compared to those who are not. Women who get children outside marriage have the burden of obtaining the consent of the father of their children in order for their names to be entered in the register of birth. In this regard, I note the words of the court in the case of *Matadeen and another v Pointu and others* [1998] 3 WLR 18 where Lord Hoffman in addressing differential treatment of persons stated that:
- “of course, persons should be uniformly treated unless there is some valid reason to treat them differently. The reasons for not treating people uniformly often involve questions of policy.”
95. I have not been able, in this case, to see any valid question of law or policy for treating children born outside marriage, or the mothers of such children, differently.
96. The respondents argue that section 12 should not be read in isolation, but must be read together with section 10 and 11 of the Act. Their submission was that if the mother of a child born outside marriage does not supply the information with respect to the father in the notification of birth, then she has no one to blame but herself, and she should not be allowed later to ask for that information to be included in the birth certificate of the child.



97. Section 10 of the Registration of Births and Deaths Act provides that:

Every person notifying the birth of a child shall, to the best of his knowledge and ability, give the prescribed particulars, which shall be entered forthwith by the registrar in the register, and the person notifying the birth shall certify to the correctness of the entry by signing or, if he is illiterate, by fixing his mark to the register.

98. At section 11, the Act states that:

Upon the birth of any child the registration of whose birth is compulsory, it shall be the duty of the father and mother of the child, and, in default of the father and mother, of the occupier of the house in which to his knowledge the child is born, and of every person present at the birth, and of the person having charge of the child, to give notice of the birth, within such time as may be from time to time prescribed, to the registrar of the registration area in which the birth occurs:

Provided that, in the case of births in prisons, hospitals, orphanages, barracks or quarantine stations, the duty to give such notice shall lie on the officer in charge of the establishment in which the birth took place. (Emphasis added)

99. The position today, I believe, is that all births must be registered. Under the provisions of the Act, it is correct that there is a duty on the mother or father of a child, or, failing them, the occupier of a house in which a child is born, and every person present at the birth and any such persons having such knowledge of the child's birth, to give notice of the birth to the relevant Registrar of Births. The notice is required to be given in a prescribed form provided under the Act. In the prescribed form for the birth certificate is an entry requirement for the name of the father to be inserted. Where the mother and father of the child are married to each other, there is no problem: the names of the parents will be entered as a matter of course.

100. We do not, however, live in an ideal world, and there will be those cases where children will be conceived and born outside marriage. In such cases, under section 12, the name of the father cannot be entered in the Register without his consent.

101. One may blame women, as the respondents do, for not giving the names of the fathers of their children at the notification stage. I observe, however, that the legislation in question has been in force for 80 years, and the practice appears to have developed, and been accepted, that where a father of a child born outside marriage does not wish to have his name entered in the register, that is what happens. His position, after all, is supported by section 12 of the Act. As the petitioner deposes at paragraph 4 and 5 of her affidavit in support of the petition:

4. When the child was born, the father indicated to me in clear terms that his name should not feature in the child's birth certificate.

5. I had to comply with his request and with the dictates of section 12 of the Registration of births and deaths Act which stipulates 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 according to law or, in accordance with some recognized custom

102. In my view, the petitioner's contention that the provision of the section is unconstitutional for violating various rights of children born outside marriage is well founded. Further, its provisions



cannot be justified on the basis of the purposes that, according to the respondents, it is intended to achieve.

103. To begin with, the contention that it is to keep records correct and accurate is not sufficient to justify the denial to a child of its name and the identity of its father and, therefore, its own identity. Indeed, the correctness of information submitted to the Registrar can be protected by making use of other provisions or methods for establishing the correctness of the data, which I shall come to shortly.
104. The second alleged purpose, protecting the putative father from the alleged machinations of unscrupulous women is, in my view, based on an unapologetic but unacceptable patriarchal mindset that wishes to protect men from taking responsibility for their actions, to the detriment of their children. In my view, balancing the two interests, that of the men and the rights of children, I see no contest. I need not add that such a stated purpose, the alleged protection of men from unscrupulous women, is premised on a negative, discriminatory stereotyping of women as dishonest people who will latch onto a man for child support with no basis.
105. In any event, there are clear safeguards in the Act to prevent the entry of false information in the Register. Section 22 of the Act provides that:

Any person who fails to give notice of a birth or death the registration of which is compulsory, or who refuses to furnish any of the prescribed particulars, or who contravenes section 21 of this Act, and any person who willfully gives any false information or particulars for the purpose of registration, shall be guilty of an offence and be liable to a fine not exceeding five hundred shillings or to imprisonment for a term not exceeding six months, or to both such fine and such imprisonment.
106. It appears to me that should the mother of a child born outside marriage name a person as the father of her child falsely, there is a remedy under section 22 of the Act.
107. Further, with the possibility of DNA testing, such false claims are likely to be limited, assuming they occur at all. What needs to be put in place are clear rules for applying for the name of the putative father to be inserted in the birth register and certificate, for notice to be given to the person concerned so that he can agree or object, and in the event of an objection, for DNA testing to be done.
108. The respondents did argue that allowing a woman to insert the name of the father of her child at any time will lead to litigation. This may well be the case. However, I take judicial notice of the fact that even as matters stand today, there is quite a lot of litigation by children seeking to establish their identity and the identity of their fathers. It is, in my view, in the best interests of the children that such matters are sorted out early on in their lives when the parental support that they are entitled to can be obtained, and when the stigma and discrimination that they suffer from a lack of identity can be prevented from blighting their lives unnecessarily. We have made promises of equality and non-discrimination to our children in the *Constitution*. It is not too much to demand that we begin to effect these promises with respect to children born outside marriage.
109. I appreciate that, as the respondents submit, the entry of the name of the father of a child born outside marriage will not necessarily mean that the child will get the care and attention that it ought to get from its father. However, at the very least, it will give the child an identity, the knowledge that though its father does not support or care for it, it does have a father, and not a series of xxxxs in its birth certificate. In any event, once the identity of a child's father is established and documented, then it is possible to compel such reluctant fathers to support their children through appropriate court orders.



110. The law must demand that fathers of children born outside marriage step up to the plate and take parental responsibility for their children. This must begin with the provisions in respect of registration of the birth of such children. A situation in which such children and their mothers are discriminated against on the basis of the law cannot be allowed to continue under our transformative constitution.
111. It must be obvious by now that in my view, this petition is merited, and a challenge to section 12 of the Registration of Births and Deaths Act is long overdue. My finding, and I so hold, is that section 12 of the Registration of Births and Deaths Act, which contains the requirement of the consent of a father of a child born out of wedlock to have his name entered in the births register and the child's birth certificate, is unconstitutional and in violation of articles 27, 28 and 53 of the Constitution. Given the submissions of the respondent with respect to what it is intended to achieve, my finding is that the section cannot be justified under article 24 of the Constitution.

### **Disposition**

112. In concluding on this matter, I must observe that the Office of the Attorney General has a duty to bring appropriate amendments to the Registration of Births and Deaths Act, cap 149 of the Laws of Kenya, to bring it into conformity with the Constitution. As it currently stands with respect to children born outside marriage, it is indefensible.
113. In addition, appropriate changes must be made to the rules and forms regarding notification of births, to allow for the entry of the names of fathers of children born outside marriage to be entered in the births register and the children's birth certificates. Needless to say, there needs to be provision for the time within which such applications are to be made, and for notice to the alleged fathers, as well as provision for DNA testing to be undertaken to establish paternity where it is denied.
114. I need also not add that such rules must provide for entry of the names of fathers and DNA testing in respect of minors, children as defined by law, not in respect of persons who have reached the age of majority.
115. In this regard, the petitioner referred to the legislation in Costa Rica known as "The Law of Responsible Fatherhood". She submitted that the said legislation gives the mothers of children born outside marriage, upon the birth of the child, the option of having a search conducted for the father of her child, and for the child to be registered and to bear his name.
116. In light of our very clear constitutional provisions of equality, non-discrimination and the rights of children to parental support from both parents, among other rights, such legislation is long overdue.
117. At any rate, I am satisfied that the orders sought by the petitioner are merited, and I grant the following orders and declarations:
  - a) I declare that section 12 of the Registration of Births and Deaths Act is inconsistent with articles 27, 53(1)(a) and (e) and 53(2) of the Constitution and is therefore null and void.
  - b) I direct that section 12 of the Registration of Births and Deaths Act be construed with the necessary alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with articles 27, 53(1)(a) and (e) and 53(2) of the Constitution.
  - c) I declare that all children born out of wedlock shall have the right and or liberty to have the names of their fathers entered in the births registers.



d) I direct the Registrar of Births and Deaths to, within 45 days hereof, put in place mechanisms to facilitate the entry into the birth register of the names of the fathers of children born outside wedlock in compliance with order (c) above.

118. With respect to costs, given the public interest nature of this matter, I direct that each party bears its own costs of the petition.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY 2016**

**MUMBI NGUGI**

**JUDGE**

Mr. Chigiti instructed by the firm of Chigiti & Co. Advocates for the petitioner.

Ms. Wawira instructed by the State Law Office for the respondent.

Mr. Wasia instructed by the Kenya National Commission on Human Rights for the *Amicus Curiae*.

