



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CIVIL APPEAL NO. 17 OF 2015

P. N. M. APPELLANT

versus

P. N. K (suing for and on behalf of A. W. (Child) RESPONDENT

(Being an appeal from the Ruling and decision in Nanyuki Chief Magistrate’s Court Children’s Case No. 15 of 2013 by Hon. E. Bett, Senior Resident Magistrate on 22nd August 2014).

JUDGMENT

1. **P.N.K (respondent)** filed a suit before the children’s court at Nanyuki against P.N.M. (**Appellant**) whereby she pleaded that she was in the year 2004 in a relationship with the appellant. That that relationship led to the conception and the birth in the year 2005 of A.W (**the child**). The respondent in her pleadings before the children’s court stated that the appellant had given her financial support for the child up to June 2013 when he stopped that support. The respondent sought for an order in her plaint before the children’s Court for actual and legal custody and care and control of the child to be granted to her and for an order that the defendant be compelled to maintain the child on a monthly basis.

2. The respondent filed an interlocutory application seeking the following prayers.

1. That the defendant/respondent herein be compelled to avail himself at the Government Chemist in Nairobi for purposes of availing specimen for DNA test to establish the paternity of A. W. (minor).

2. That the court do give directions on the party to bear cost of the DNA test.

3. The children’s court by its ruling of 22nd August 2014 granted the following orders:

(a) The respondent is hereby ordered to avail himself for DNA testing at the government chemist in Nairobi at a date to be agreed by the parties in court.

(b) That the two sides shall each contribute half the cost of the test and in the event the test turns out to be positive, the respondent shall compensate the applicant this cost and in the event the test turns out to be negative the applicant shall compensate the respondent.

4. The appellant has filed this appeal against that ruling. I am aware of the duty of this court as the first appellant court which duty was stated in the case of **KENYA PORTS AUTHORITY**

versus **KUSTON(KENYA) LIMITED (2009)2EA 212** wherein the Court of Appeal held inter alia that :-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it had neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

5. The memorandum of appeal highlights the following issues for determination:-

- a. **Did the children’s court have jurisdiction to entertain the chamber summons and issue the orders of 22nd August 2014 and;-**
- b. **Did the learned magistrate err in not abiding with the decision of the High Court?**

6. A court of law does not cloth itself with jurisdiction. Jurisdiction is either given by the law or the constitution. The importance of a court proceeding with a matter only where it has jurisdiction was the discussion of the following cases. In the case of **Lilian S (1989)KLR 1** the Judge had this to say:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”

The issue of a court having to determine whether it has jurisdiction in the first instance was discussed in the case **Diana KethiKilonzo& Another –vs- Independent Electoral & Boundaries Commission & 10 Others (2013)eKLR** where the court said:-

“Jurisdiction is indeed comparable to a driving licence, for no motorist can lawfully embark on a journey without a valid driving licence. Once a judicial body establishes that it has no jurisdiction to handle a dispute, then it has no business proceeding further with the matter. What also emanates from the Supreme Court decisions is that jurisdiction emanates from express terms of the law.”

7. With above in mind did the learned magistrate lack jurisdiction when he entertained the application?

The application as it is indicated in its title was brought under **Section 4(3)** and **94** of the Children’s Act **Cap 141**.

8. The submissions made by the appellant before the magistrate’s court was that that court lacked jurisdiction. That court by its ruling cited the cases I have referred to above which speak about jurisdiction. After citing those cases the learned magistrate proceeded to find that it had jurisdiction. In so finding the court found that the respondent had erred in premising the application on section 4(3) and 94 of Cap 141. The court cited the case **H.K.O vs R.R.A. (2011)eKLR** where the court said that Justice Kimaru of the high court had held that an application for test of Deoxyribonucleic Acid (DNA) ought to be filed before the children’s court and that the power to grant orders for such an application were to be found under **section 76 of Cap 141**. I must admit that I have not been able to trace that authority cited by the children’s court.

9. My take on the issue of jurisdiction is that the children's court had jurisdiction to entertain the application. In my view the appellant erred to submit that an application for testing of DNA could only be brought under **sections 6(1)22(1) and 22(2) of Cap 141**. The appellant submitted that it was only the high court that had jurisdiction to hear the matters under the aforesaid sections. **Section 73** provided for the creating of the children's court. Section **73(d)(ii)** provides that the chief justice may by notice in the gazette appoint magistrates to preside over cases involving children. Section **73(a)** provides that the children's court magistrate in a civil case can issue orders as provided in parts **(III), V, VII, VIII, IX, X, XI and XIII of Cap 141**. Part III covers **section 23 to 29**. That part III is entitled "**parental responsibility**". The parental responsibility under those sections include the duty to maintain a child and in particular to provide adequate diet, shelter, clothing, medical care and education guidance. Section 44 under part III provides how a party can acquire parental responsibility. Firstly a party acquires responsibility where there is a marriage and if there was no marriage a party can acquire responsibility as provided under section 25. **Section 25** provides that where there is no marriage a party acquires parental responsibility when he or she maintains the child. In this case there was evidence produced by the respondent which indicated that the appellant was making payment to the respondent on a monthly basis. The respondent deposed in her affidavit in the magistrates court that the amount sent to her through the *Mpesa* money transfer was for the maintenance of the child. The learned magistrate made a finding that indeed that payment was for the maintenance of the child. The appellant either acquired parental responsibility by providing maintenance for the child or he can acquire responsibility by a determination that he is the father of the child. The child's paternity can only be determined through the DNA testing.

10. Although the respondent did not cite at VII of the act which is entitled "**custody and maintenance**" the lower court had jurisdiction to invoke the sections under that part and to grant the orders as sought. In particular **section 91** is pertinent to the orders that were sought. That section provides as follows:-

"Any parent, guardian or custodian, of the child, may apply to the court to determine any matter relating to the maintenance of the child and to make an order that a specified person make such periodical or lump sum payment for the maintenance of a child, in this Act referred to as a "maintenance order", as the court may see fit."

11. The respondent in her suit before the children's court sought the determination of the maintenance of the child. For that court to make that determination there was need for determination on the parentage of the child. This again can only be done by DNA testing.

12. It is not a novel idea to find that the children's court has jurisdiction to entertain an application for DNA testing. The High court has previously pronounced itself in the case **J.A.O. vs C.G.M. & Another (2013)eKLR** as follows:-

"First things first. Section 73 of the Children Act establishes a court to be known as the Children's Court which shall, in the first instance, have jurisdiction to hear and determine all matters relating to children. This includes cases involving children in conflict with the law. Therefore, a case involving the determination of the paternity and parental responsibility in respect of a child shall, in the first instance, be determined by the Children's Court. This court has no jurisdiction, in the first instance, to hear a case concerning children because that jurisdiction is exclusively that of the Children's court."

13. It is true as submitted by the appellant that there are cases in the High Court that have pronounced themselves on the application for DNA testing. A case in point is **P.P.M. VS SENIOR PRINCIPAL MAGISTRATE CHILDREN'S COURT AT NAIROBI and ANOTHER (2014)eKLR**. However the children's court as stated before did not err in pronouncing itself on DNA testing.

14. I also find that the children's court did not err in not following the finding in **HCCC MERU 159 OF 2009 GATHONI KARUMBA vs JACK KARUMBA**. In that case the High Court declined to order DNA testing to be carried out on the basis that the respondent had not acquired parental responsibility either by marriage or by maintenance of the child. The High Court found in that case that in adversarial system sum as ours a party cannot be ordered to submit to attest whose results could be used against him.

15. It is however important to note that there were many other decisions that were cited to the learned magistrate which decisions were from the high court and were subsequent to the case of GATHONI KARUMBA case. In those subsequent cases the high court made findings that the interest of the child overruled that of the parent who wished not to incriminate him or herself by undertaking DNA testing. A case that perhaps captures all those holdings in the case P.K.M. vs SENIOR PRINCIPAL MAGISTRATE CHILDREN'S COURT AND ANO (SUPRA). In that case the court had this to say.

“Parental care can only be an obligation if paternity can be ascertained and one way of doing so is by DNA testing. But the petitioner claims that by being forced to undergo DNA testing, the Respondent would further violate his right to dignity as provided for under Article 28 of the Constitution. This Article states as follows:

“Every person has inherent dignity, and the right to have that dignity respected and protected”.

There is no doubt that he is entitled to that right and the question therefore is whether his unwillingness to undergo a DNA testing in furtherance of his right to dignity is sufficient to override the interest of the child who may be denied the constitutional right to parental care. As stated above a general principle emerging from case law is that an order for DNA testing should be made if it is in the interest of the child and if a prima facie case has been made to justify such an order – See M.V. v K. C. Kakamega HC Misc Application No. 105 of 2004. In that regard, Mumbi J in C.M.S. v I. A. K (Supra) stated as follows:-

“In determining a matter such as this, the court must of necessity weigh the competing right of the child and the petitioner who is alleged to be the biological father. The right of the child to parental care takes precedence, in my view, particularly in light of the cardinal principle set out in Article 53(2) that in matters such as this, the paramount consideration is the best interest of the child.”

I agree and while I would be averse to classifying rights in order of priority, there is no doubt in my mind that between the petitioner's inconvenience at being subjected to DNA testing and the need to conclusively determining the paternity of the child, in the child's interest and certainty in the petitioner's interest, the child's interest must prevail. For the petitioner, it would be minor inconvenience if he attend to DNA testing once but for a child not to know its parents and benefit from their protection and care, the damage may linger for years to come. I choose to protect the baby as opposed to the petitioner in such circumstances.

..... In the instant case, I am aware that the petitioner has argued that he has presented himself DNA testing. However, having found that the best interest of the child is the paramount principle in all matters involving children and noting that on the two prior occasions the DNA testing was not carried out, the remedy that would attract my mind is to order the petitioner, the interested party (and the child) to avail themselves for DNA testing at the Government chemist at a date to be agreed upon them and in any event within 14 days of this judgment.”

16. The learned magistrate in following the high court decisions that were contrary to the holding of the case GATHON KARUMBA (supra) did not err because the decisions that the learned magistrate followed were decisions of the high court. There was therefore no breach of the principle *stare decisis*.

17. In the end **there is no merit in the appeal. It is dismissed with costs to the respondent. The lower court file shall henceforth be returned to the children's court to enable that court conclude the case.**

DATED AND DELIVERED THIS 8TH DAY OF JUNE 2016

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Njue

Appellant:

Respondent:

For Appellant:

For Respondent:

COURT

Ruling read in open court.

MARY KASANGO

JUDGE