REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC. APPLICATION NO. 85 OF 2014

FKW (suing as the mother and next

friend of GDW (Minor)……..……..APPLICANT

-versus-

DMM……..…….....RESPONDENT

RULING

By a chamber summons dated 2nd December, 2014, the applicant has sought several prayers against the respondent the most pertinent of which are follows:-

1. That the respondent be ordered to submit to a DNA test in order to determine whether he is the biological father of the subject minor herein;

2. That the cost of the DNA be shared equally by both parties;

3. That in the event the test confirms the respondent to be the biological father of the subject child, the respondent be compelled to refund the applicant's costs of the DNA test in full;

4. That the respondent be compelled to swear an affidavit of means to ascertain his true financial status;

5. The costs of the application be awarded to the respondent.

The application is stated to have been filed under **sections 3A** and **63 (3)** and **(e)** of the **Civil Procedure Act (cap 21)** and **sections 4, 6 and 22** of the **Children Act, 2001**. Amongst the grounds upon which the application is based are:-

1. The applicant has sued the respondent in the Children's Court seeking, amongst other prayers, an order to compel him to assume his parental responsibility as the putative father of the subject child and pay for his upkeep and maintenance.

2. In the suit in the Children's Court, the respondent has denied that he is the father of the subject child and therefore not liable for the child's up-keep and maintenance yet he has declined to yield to a paternity test whose result would conclusively determine whether he is the biological father of the child in issue.

3. Without the paternity test, the Children's Court may not conclusively and fairly determine all the issues arising in the suit before it, in particular, the respondent's parental responsibility towards the subject child and the latter's interest and welfare will be left in limbo.

4. In the same suit in the Children's Court, the respondent has declined to declare his financial status which information is necessary for the court's determination of the extent of the respondent's contribution towards the maintenance of the subject child.

In the affidavit sworn in support of the application, the applicant says that she is the biological mother of the child who was born on 19th December, 2013. This child, so she has sworn, was conceived at or around the time she cohabited with the respondent and therefore he is presumed to be the child's biological father.

Since the respondent has declined to take up his parental responsibilities towards the child, the applicant has deposed that she moved to court in **Nyeri Children's Court Case No. 40 of 2014** to have the respondent compelled to assume his obligations as the child's father and provide all that is required of him in that capacity.

The applicant has sworn that in response to the suit against him, the respondent denied paternity of the child but at the same time he has declined to be subjected to a paternity test which, in the applicant's view, should lay to rest the question whether the respondent is indeed the child's father.

In the face of the respondent's conduct, so the applicant has sworn, the child's welfare is at risk since in effect, the respondent is running away from the obligation to care, protect and provide for the child as is required of him under the **Children's Act** and under the Constitution; this, the court should not allow him to do and the applicant is prepared to go to any extent, including sharing part of the cost of the paternity test in order to remove any doubt that the respondent is the biological father of the child.

In reply to the applicant's application, the respondent swore and filed a replying affidavit in which he acknowledged that he has been sued in the Children's Court as alleged by the applicant but reiterates that he is not the child's father. The respondent has denied having cohabited with the applicant or having sired the child in question. He has referred to the child's birth certificate which does not specify who the father of the child is as a proof that he is not the child's father.

The respondent has also referred to a text message apparently sent to him by the applicant on 22nd March, 2014 to support his contention that the applicant had a boyfriend at the material time and who has taken over the parental responsibility of the child and therefore the applicant's attempt to have him assume the child's parental responsibility is actuated by malice and bad faith. It is again for this reason that the respondent has sworn that the paternity test is unnecessary, because the applicant's boyfriend is likely to be the child's putative father.

As far as the question of declaring his financial status is concerned, the respondent states that the Children's Court in which he has been sued has the requisite jurisdiction to determine that issue and it is premature to raise it in this application as if this court was sitting in its appellate jurisdiction.

When the application came up for hearing both counsel for the applicant and that of the respondent made forceful submissions largely reiterating the positions their respective clients have taken in their affidavits respectively sworn in support of and in opposition to the application. In his remarks, Mr Makori who represented Mr Okiror for the applicant argued that the DNA test the applicant was seeking would help determine the Children's Court case against the respondent. Counsel urged that the interest of the child is paramount and in that regard **article 53** of the **Constitution** which, in the counsel's view, is replicated in **section 4** of the **Children's Act** imposes parental responsibility on both parents of a child regardless of whether they are married or not. Counsel cited the decision in the **Nairobi High Court Misc. App. No. 108 of 2013, ZW versus MGW** in which Justice William Musyoka held that the most modern and effective way of determining whether one is the father of a child and thus whether he should bear the responsibility of maintaining such a child is to subject him to a DNA test.

Mr Muu for the respondent contested the applicant's application and more particularly urged this court to find that there is no evidence that the applicant and the respondent ever cohabited. Counsel urged that an order for paternity test should not be issued 'in a vacuum' or 'automatically' but that there must be a prima facie case and further, the court should not lose sight of the likelihood of the abuse of the order. In support of these arguments counsel cited the decisions in the cases of **Kakamega High Court Misc. App. No. 105 of 2004 MW versus KC** and **Nairobi High Court Constitutional Petition No. 526 of 2008.**

On the question of jurisdiction of this court as far as the issue of the affidavit of the respondent's means is concerned, counsel cited the decision in **Nairobi Misc. App. No. 81** of **2013 JAO versus CGM and MM** in which it was held that the Children's Court has special jurisdiction under **section 73** of the **Act** to hear and determine all matters relating to children including the question whether a putative father has the means to support the child. As this question was pending for determination before the children's court, counsel submitted that it would be premature for this court to take it on board in this application.

I have duly considered the respective counsel's submissions and I need to state at the outset that the only issue that should concern this court at the moment is whether the respondent should submit himself to a paternity test for purposes of resolving the question whether the subject child is his offspring. Any other issue including whether the respondent has the means to support the child should he be found to be the child's father is properly before the Children's Court which, for all intents and purposes, is a court of competent jurisdiction appropriately seized of that matter. I therefore agree with counsel for the respondent that, in view of the pendency of the suit before the magistrates' court, it will not be lawful for this court to venture into issues that are due for determination in the Children's Court. For this same reason, I am cautious not to make any conclusive remarks in this ruling on matters in dispute between the parties in the subordinate court.

The pleadings in the Children's Court suggest that the parties were not complete strangers; they were acquaintances who, prior to the birth of the subject child socialised together at what the respondent described in his statement as 'social and entertainment venues'. To quote the respondent:-

> ***"…F K W is an acquaintance that I met in or about the year 2011 in a bar within Nyeri town.***
>
> ***That subsequent to that first meeting, we met randomly in various entertainment venues where she was occasionally intoxicated. I have never at any time cohabited in any form or been in a relationship with her.***
>
> ***Sometime in February 2014, I was summoned to the Children's Office in Nyeri, on the instigation of the plaintiff herein, allegedly to discuss with the Children's Officer the welfare of one G D W. I was immensely shocked as we had not cohabited or lived together with the plaintiff's mother and we had never been in a relationship with her. I also had not at any point known that she was pregnant. I responded to the Children's Officer's summons by attending the meeting on the appointed day. During the meeting the Children's Officer informed me that the plaintiff's mother claimed that I was the father of the minor herein and that she required me to take parental responsibility over him. I denied the claims before the Children's Officer. We were requested to take a paternity test, the results of which we were to submit to the said officer on 5th of May, 2014. A week after the meeting, the plaintiff's mother communicated to me via phone call and informed me that she had changed her mind and that she wanted to take full parental responsibility with her boyfriend and further requested me to ignore the paternity test…I thought of the matter as settled until the 2nd day of September, 2014 when I received the plaint in this matter together with summons to enter appearance."***

That the applicant and the respondent were friends is also clear from the applicant's plaint in which she averred that they met in 2011 and became mutual friends and that it was during the subsistence of their union that the subject child was born, more particularly on 19th December, 2013. She contended that the respondent abandoned her while she was expectant and declined to take responsibility for any of the expenses associated with her pregnancy and later the maintenance and upkeep of the child.

Although the respondent has disputed having cohabited with the applicant, it is clear from the parties' pleadings in the Children's Court and in particular the respondent's own statement, the excerpt of which I have reproduced above, that the two of them were in some sort of relationship. How close that relationship may have been or whether it graduated into cohabitation at any one point is a question whose answer may only be known after the determination of the case in the subordinate court.

The only question that this court is bound to answer is whether it can facilitate vide an appropriate order the means of knowing whether the relationship between the applicant and the respondent may have been that intimate as to result to the conception of the subject child. In the face of one party's word against the other, no one else apart from either party can tell with any certainty whether the subject child's conception was as a result of this relationship. And indeed it may be almost impossible to tell unless one takes the unusual step of prying into the parties' private lives at the material time; certainly this course is not open to this court and even if it was, I doubt it would yield any satisfactory answer since, ordinarily, whatever a couple immerses itself into in their privacy may only be known to themselves. It is only when conception results and eventually a child is born, as is the case here, that inferences are drawn and presumptions are made that a particular couple may have been up to something more than just a tête-à-tête in their private excursions.

Conception and the eventual birth of a child may or may not have been the intended consequences of a particular relationship; however, regardless of a couple's intentions, the moment a life is conceived (**see article 26** of the **Constitution**) and a child is born, the law steps in to protect the life of the innocent being that has been brought into existence. This inevitably, imposes a legal obligation not only on the state but also on the parents of the child to ensure that the child is properly cared for, protected, maintained and his general welfare is well catered for. The Constitution itself provides under **article 53** that:-

> ***53. (1) Every child has the right—***
>
> ***(a) to a name and nationality from birth***
>
> ***(b) to free and compulsory basic education;***
>
> ***(c) to basic nutrition, shelter and health care;***
>
> ***(d) to be protected from abuse, neglect, harmful cultural***
>
> ***practices, all forms of violence, inhuman treatment and***
>
> ***punishment, and hazardous or exploitative labour;***
>
> ***(e) <u>to parental care and protection, which includes equal</u>***
>
> ***<u>responsibility of the mother and father to provide for the</u>***
>
> ***<u>child, whether they are married to each other or not</u>; and***
>
> ***(f) not to be detained, except as a measure of last resort, and when detained, to be held –***
>
> ***(i) for the shortest appropriate period of time; and***
>
> ***(ii) separate from adults and in conditions that take account of the child's sex and age.***
>
> ***(2) A child's best interests are of paramount importance in every matter concerning the child. (underlining mine).***

And in its preamble, the **Children Act, 2001,** emphasises that it is:-

An Act of Parliament to make provision for <u>parental responsibility</u>, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institutions; to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes. (Underlining mine).

Section 4 of that Act says:-

4. Survival and best interests of the child

(1) Every child shall have an inherent right to life and it shall be the responsibility of the Government and the <u>family</u> to ensure the survival and development of the child. (underlining mine).

The common thread that weaves through these provisions of the law is the notion of parental responsibility towards children; it is the responsibility of the father and the mother to provide for their child or children regardless of whether they are married or not and regardless of the circumstances under which the child or children may have been conceived and born.

It becomes imperative therefore, that where parentage is contested as is the case in the suit between the parties in the subordinate court, it has to be established who the parents of the child are before they or any of them is saddled with the burden that parental responsibility entails. This determination is even more necessary because the burden of parental responsibility does not come light; it is almost a lifetime burden and that is why a court of law must be absolutely certain that the person at whose door it holds the buck stops is none other than the parent of the child in issue. I do not see any other way that the court can come to this conclusion other than by subjecting the putative parent to a scientific examination of his deoxyribonucleic acid (DNA) and determine whether it is consistent with that of the child and therefore whether, as the case may be, he is the father of the child. I may be wrong on this, but I suppose that a man who thinks or is certain that he has, for some malicious or mischievous or for any other reason, been implicated into fatherhood that he has nothing to do with would readily embrace such an opportunity, if not for anything else, to prove his tormentors wrong.

The question is, where one is not willing to submit himself to a paternity test is there any threshold that the plaintiff must satisfy the court to have met before it can grant the order for a paternity test? This question has been asked and answered in several cases where this issue has arisen. Counsel for the parties cited some of these cases whose decisions, I must admit were quite useful in guiding my thoughts on this issue. While they are all decisions of courts of coordinate jurisdiction, I found them to be quite persuasive on this issue. The first of these cases is the **High Court Constitutional Application No. 526 of 2008, CMS versus IAK (suing through mother and the next friend CAO)**. In this case the petitioner petitioned this court to, *inter alia*, set aside an order made in the magistrates' court compelling the petitioner to undergo a DNA test on the ground that the order was unconstitutional. In dismissing the petition, Mumbi J, held that in determining such matters, the court must of necessity weigh the competing rights of the child and the petitioner who is alleged to be the biological father. The learned judge further held that the right of the child to parental care takes precedence in the light of **article 52(2)** of the Constitution that in matters such as this, the paramount consideration is the best interests of the child. While citing the decisions in **Kakamega High Court Misc. Application No. 105 of 2004, MW versus KC and the Indian case of Shri Rohit Shekhar versus Narayan Dutt Tiwari & Another IA No 4720 of 2008** the learned judge applied the principle that an order for DNA testing should be made if it is in the interests of the child and if *a prima facie case* has been made to justify the order.

In the **Nairobi High Court Constitutional Petition No. 138 of 2012 PKM versus Senior Principal Magistrates' Court at Nairobi** a similar order for DNA testing was made in the magistrates' court against the petitioner. Just like in the *CMS case*, the petitioner sought to have the order set aside on the ground that it was unconstitutional. The learned judge, Justice Lenaola, cited with approval the decision of Mumbi J in the *CMS case* and dismissed the appeal. The learned judge held:-

"…there must always be a balance between the right to privacy of a person not to submit himself forcibly to medical examination and the right of a child to know his parents. The balance is delicate and must be looked at in the specific circumstances of each case."

The learned judge further quoted the **Indian case of Bhabani Prasad Jena versus Convener Sec Orissa, Civil Appeal Nos. 6222-6223** of 2010 where the issue of forced DNA was addressed in the following terms:-

"The Court must reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed. DNA in a matter relating to paternity of a child should not be directed by court as a matter of course or in a routine manner, whenever such request is made. The court has to consider diverse aspects…pros and cons of such order and the test of 'eminent need' whether it is not possible for the court to reach the truth without use of such test…it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have a roving inquiry, there must be a strong prima facie case and court must carefully examine as to what would be the consequence of ordering the blood test."

Again in the **Nairobi High Court Miscellaneous Application No. 108 of 2013 ZW versus MGW** an application for an order for DNA test was allowed and in allowing the application Justice William Musyoka said that DNA test is imperative and is the most modern and effective way of determining whether one is a father of a child and therefore whether he should be ordered to maintain the child.

The application for a DNA test was again allowed in **Kakamega High Court Misc. Application No. 105 of 2004, MW versus KC where Justice G.B.M Kariuki** (as he then was) set down the conditions which he thought one must satisfy before a DNA test is ordered; these conditions are:-

a) The applicant must show that there is sufficient cause for seeking the order and there is a likelihood that the respondent could be the father of the child;

b) The respondent's refusal to submit to the DNA test violates the child's right to know his father;

c) The respondent's refusal to take a DNA test is an unreasonable because it deprives the child of the possible enjoyment of the rights and benefits of enshrined in **sections 4** to **19** of **Part II** of the **Children Act**;

d) The court has jurisdiction to compel the respondent to undertake a DNA test.

Of all the decisions that counsel cited, the only decision in which the application for an order for a DNA test was refused was in **SWM versus GMK (2012) eKLR** where Justice Majanja held that ordering a respondent in that case to undertake a DNA test for whatever reason was an intrusion of his right to bodily security and integrity and also the right to privacy which rights are protected under the Bill of Rights. The learned judge could probably have arrived at that decision because the circumstances in that case were somewhat peculiar; the petitioner in that case was not a child but an adult aged 33 who thought the respondent could be her father and therefore sought to have him subjected to the paternity test to ascertain her inclinations.

What all these decisions point to is that where it is in the best interests of the child that a paternity test should be undertaken; where there is no other means of determining the father of a child other than by means of a paternity test and therefore where such a test is necessary in the circumstances and, where, in any event, the applicant has made out a prima facie case for such a test, then a court of law will ordinarily make an order for such a test.

Looking at the applicant's case from this perspective, there is no doubt that it is in the best interests of the subject child that the DNA test should be taken. It is the child's constitutional right and he is better of growing up with the knowledge of who his parents are. As noted earlier there is no other way of

determining who the father of the subject child is apart from conducting a DNA test and therefore this test is necessary in the circumstances of this case.

Has the plaintiff made out a prima facie case that deserves this court's order against the respondent for a paternity test? I reckon she has. The respondent's own statement that the applicant, whom she met way back in 2011, was not only an acquaintance of his but also that two of them had *'met randomly in various entertainment venues where she was occasionally intoxicated'* impresses upon me the feeling that the applicant has established *a prima facie* case that it is more probable than not that the respondent must have had the opportunity, time and space to participate actively in the biological process that culminated in the conception and birth of the subject child; of course this is a presumption that is subject to the outcome of the DNA tests which should be conducted on the respondent together with the appellant and the subject child. According I am inclined to make the following orders:-

1. The applicant, the respondent and the subject child shall undergo a DNA test at the Government Laboratory within thirty days of the date hereof for purposes of establishing the subject child's paternity;

2. The applicant and the respondent shall bear equal share of the cost of the DNA test except that if after the test it turns out that the respondent is the subject child's father, the respondent shall refund the applicant's share of the cost. Similarly, if the test turns out in favour of the respondent, the applicant shall refund the respondent's costs.
3. The results of the DNA test shall be filed in **Nyeri Children's Court Case No. 40 of 2014** as soon as they are released and in any event within fourteen days of such release**.**

4. This ruling shall form part of the record in **Nyeri Children's Court Case No. 40 of 2014;** accordingly I direct the Deputy registrar to have it filed in the relevant court file.

Costs of this application shall abide the outcome of the suit in the subordinate court.

The applicant's application dated 2nd December, 2014 is allowed in the foregoing terms.

It is so ordered.

Dated, signed and delivered in open court this 13th day of March, 2015

Ngaah Jairus

JUDGE