



**PKM v Senior Principal Magistrate Children's Court at Nairobi; JW
(Interested Party) (Petition 138 of 2012) [2014] KEHC 7488 (KLR)
(Constitutional and Human Rights) (21 March 2014) (Judgment)**

P K M v Senior Principal Magistrate Children's Court at Nairobi & another [2014] eKLR

Neutral citation: [2014] KEHC 7488 (KLR)

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

PETITION 138 OF 2012

I LENAOLA, J

MARCH 21, 2014

BETWEEN

PKM PETITIONER

AND

**SENIOR PRINCIPAL MAGISTRATE CHILDREN'S COURT AT
NAIROBI RESPONDENT**

AND

JW INTERESTED PARTY

An order for DNA testing should be made if it is in the best interests of the child and if a prima facie case had been made to justify such an order

The petition challenged the order of the trial court directing the petitioner to subject himself for DNA testing at Kenyatta National Hospital in order to prove paternity of a child. The court pointed out that parental care could only be an obligation if paternity could be ascertained and that was done through a DNA test. The court held that the petitioner's unwillingness to undergo a DNA testing in the furtherance of his right to dignity was not sufficient enough to override the best interests of the child. the court further held that an order for DNA testing should be made if it was in the best interests of the child and if a prima facie case had been made to justify such an order.

Reported by Kakai Toili

Constitutional Law - fundamental rights and freedoms - enforcement of fundamental rights and freedoms - right to dignity - whether subjecting a person to a DNA test in order to determine the paternity of a child violated his right to dignity - under what circumstance should an order for DNA testing be made when seeking to determine the paternity of a child - Constitution of Kenya 2010, article 28 and 53.



Brief facts

The petition was filed to challenge the order of the Senior Principal Magistrate, Children's Court directing the petitioner to subject himself for DNA testing at Kenyatta National Hospital. The petitioner submitted that there was no reasonable cause as to why he should undertake DNA testing and that the order was a violation of his constitutional rights

Issues

- i. Whether subjecting a person to a DNA test in order to determine the paternity of a child violated his right to dignity.
- ii. Under what circumstance should an order for DNA testing be made when seeking to determine the paternity of a child?

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 28 - Human dignity

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

Article 53 - Children

(1) Every child has the right-

(e) 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, and

Held

1. In a matter where paternity of a child was in issue, the issue of DNA testing was an extremely sensitive matter for all parties. A balance had to be struck between the right to privacy of a person not to be submitted forcibly to medical examination and that of a child to know its parents, by considering the effect of such an order and the test of eminent need, that was whether the court could be able to make a decision without having to order for a DNA test.

2. Parental care could only be an obligation if paternity could be ascertained and that was done through a DNA test.

3. The petitioner's unwillingness to undergo a DNA testing in the furtherance of his right to dignity was not sufficient enough to override the best interests of the child who could be denied constitutional rights to parental care as set out in article 53(2) of the Constitution. An order for DNA testing should be made if it was in the best interests of the child and if a *prima facie* case had been made to justify such an order.

4. Between the petitioner's inconvenience at being subjected to DNA testing and the need to conclusively determine the paternity of the child, in the child's interest and certainly in the petitioner's interest, the child's interest ought to prevail. It would be a minor inconvenience for the petitioner if he attended to DNA testing once but for a child not to know its parents and benefit from their protection and care, the damage could linger for years to come. It would be very different if the person seeking DNA testing was another adult for the sake of knowing his parentage but the Constitution specifically protected a child.

Petition dismissed.

Orders

DNA testing ordered, both parties to bear costs equally.

Citations

East Africa

1. *CMS v IAK (Minor suing thro' Mother and Next Friend CAO)* Constitutional Application No 526 of 2008 -(Followed)
2. *MV v KC* Miscellaneous Application No 105 of 2004 - (Mentioned)
3. *SWM v GMK* Petition No 235 of 2011 - (Explained)



India

Bhabani Prasad Jena v Convener Sec Orissa Civil Appeal Nos 6222 6223 of 2010 - (Explained)

Statutes

East Africa

Constitution of Kenya, 2010 articles 28, 31, 53(1)(e) - (Interpreted)

JUDGMENT

Introduction

1. The petitioner, PKM, is the Defendant in Nairobi Children Civil Cause No 1020 of 2012, *JW v PKM* which suit was instituted for orders of maintenance and welfare of a child, Baby JM His position in that cause has been that he is not the father of the said child and that no evidence had been tendered to establish, on a prima facie basis, that he was the father of the child as alleged by the plaintiff in that matter (the interested party herein).
2. In the cause of those proceedings, the petitioner was on February 11, 2012, directed by the respondent, The Senior Principal Magistrate, Children’s Court Nairobi, to present himself at the offices of the Government Chemist at the Kenyatta National Hospital for DNA testing to ascertain whether or not, he was the biological father of the child, subject of Cause No 1020 of 2012.
3. The petitioner dissatisfied with that order, filed the present petition dated February 27, 2013 seeking the following orders;
 - “(a) A declaration that the respondent’s actions and directions in Children’s Civil Cause No 1020 of 2012, *JWW v PKM* in directing that the Petitioner attends DNA testing on the February 19, 2013 at the Kenyatta National Hospital for no reasonable cause or at all constitutes breach of the petitioner’s constitutional rights.
 - (b) An order staying and setting aside the respondent’s order of February 11, 2013 directing the petitioner to attend DNA testing on the February 19, 2013.
 - (c) General damages.
 - (e) Costs of the Petition.”

The Petitioner’s Case

4. The petitioner’s case as set out in the petition and his affidavit sworn on February 27, 2013 is straight forward; that the respondent’s actions and orders constitute clear breach of his right to privacy under article 31 of the Constitution for reasons *inter alia* that he had already submitted himself to DNA testing on two previous occasions being December 7, 2012 and January 7, 2013 but the interested party had failed, without any reasonable cause, to do the same as was required of her. For that reason, the petitioner now claims that he is being subjected to a process that appears biased towards the interested party and also claims that the respondent’s directions are further intended and calculated to harass and intimidate him into conceding to the interested party’s claims made in Cause No 1020 of 2012 aforesaid.



5. The petitioner further claims that the respondent's actions and directions constitute a clear breach of his right to human dignity under article 28 of the Constitution, for reasons that; they amounted to;
- “(i) Subjecting the petitioner to a humiliating process without any basis for the same in law and in the facts obtaining.
 - (ii) Using a judicial process for political expediency where the humiliating act of being subjected to DNA testing is calculated to portray the Respondent as an irresponsible leader at this point of heightened political activities and campaigns.
 - (iii) Making drastic orders and directions without consideration of all material facts that would inform such a decision.
 - (iv) Admitting on record annexures on purported air travel tickets which cannot be verified and purported documents from one Dr Gondi who is long deceased.
 - (v) Summoning the petitioner by way of an order made in Children's Civil Cause No 1020 of 2012, *JW v PKM* to personally attend court for no reason whereas he is represented in the suit by counsel and had made sufficient compliance of the directions initially made by the court and whereas the Respondent had failed to comply.”
6. The petitioner thus alleges that as a result of the respondent's actions, he has suffered loss, damage, mental anguish, stress and anxiety and seeks that the respondent's order and directions made in Children Civil Cause No 1020 of 2012 be declared unconstitutional to the extent that he is required to attend DNA testing for a third time for no lawful reason. He relies on the case of *SWM v GMK* Petition No 235 of 2011 where Majanja J held that ordering a respondent to submit to DNA testing is an intrusion of his rights to bodily security and integrity. He also relies on *CMS v LAK* Constitutional Application No 526 of 2008 where Mumbi Ngugi, J held that DNA testing should be done if it is in the best interests of a child and if a prima facie case has been made to justify such an order.

The Respondent's and Interested Party's Case

7. Sadly, neither the respondent nor the interested party filed any response to the petition despite this court's clear directions made on January 13, 2014. Indeed the record confirms that the parties by consent had agreed that the court should retire to write this judgment although the respondent and the interested party had not filed any responses to the petition.

Determination

8. The only issue for consideration in this petition is therefore whether this court should set aside the respondent's orders directing that the petitioner undergo DNA testing. To paraphrase it, can this court order the petitioner to undergo the DNA testing as ordered by the respondent”
9. The petitioner in that regard claims that the orders of the Children's Court directing him to undergo a DNA testing violate his rights to private as provided for under article 31 of the Constitution. This article provides thus;

“Every person has the right to privacy, which includes the right not to have—



- (a) their person, home or property searched;
- (b) their possessions seized;
- (c) information relating to their family or private affairs unnecessarily required or revealed; or
- (d) the privacy of their communications infringed.”

10. In a matter where paternity of a child is in issue, such as this one, the use of DNA is an extremely sensitive matter for all parties. One view held by some Judges has been that while modern science has the means of ascertaining the paternity of a child, such scientific advances and tools result in invasion of the right to the privacy of an individual and may be prejudicial to the parties and also have devastating effects on the child. Majanja J in *SWM v GMK* (*supra*) for example stated as follows;

“Ordering the respondent to provide DNA for whatever reason is 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 petitioner bears the burden of demonstrating to the court the right she seeks to assert or vindicate and which the court would consider as overriding the respondent’s rights”

11. While I am in agreement with the learned Judge, to my mind, there must always be a balance between the right to the privacy of a person not to submit himself forcibly to medical examination and the right of a child to know its parents. That balance is delicate and must be looked at in the specific circumstances of each case. The Supreme Court of India in *Bhabani Prasad Jena v Convener Sec Orissa*, Civil Appeal Nos 6222-6223 of 2010 stated as follows with regard to forced DNA testing;

“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 strong prima facie case and court must carefully examine as to what would be the consequence of ordering the blood test.”

12. I am in agreement and the “eminent need test” is a good guide in determining the present petition and i note that the petitioner has claimed that there is no prima facie case against which the respondent formed the basis for ordering him to undergo DNA testing. In that regard, I have seen the affidavit sworn by the interested party in support of an application dated August 7, 2012 in the Children’s Cause. Paragraph 4 of that affidavit states;

“That initially for the first one year, the Defendant provided financially for the infant. Upon birth, he did shopping in the sum of Ksh 50,000 and provided cash Ksh 20,000 every two weeks when he suddenly stopped the same in August 2010. Sometimes before he stopped, he would send his driver Njoroge or himself when he came visiting.”

I have seen no express denial of that fact by the Petitioner and I think that the said sworn statement of the interested party makes a sufficient allegation that establishes a prima facie basis to believe



the Interested Party's assertion and there is a rebuttable presumption that the Petitioner may have maintained the child prior to the filing of proceedings before the Children's Court.

13. Further, a casual look at the pleadings in the Children's Cause availed to this court as an annexure by the petitioner would show that Baby JM was born on August 9, 2009 and therefore her right to parental care is a continuing right. Article 53(1)(e) of the Constitution provides as follows;

“Every child has the right-

- (a) ...
- (b) ...
- (c) ...
- (d) ...
- (e) 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,”

14. 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”.

15. 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 interests 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 interests of the child and if a prima facie case has been made to justify such an order -See MV v KC Kakamega HC Misc Applic No 105 of 2004. In that regard, Mumbi J in CMS v LAK (*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 interests 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 determine the paternity of the child, in the child's interest and certainly in the petitioner's interest, the child's interest must prevail. For the Petitioner, it would be a minor inconvenience if he attends 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. It would have been very different if the person seeking DNA testing is another adult for the sake of knowing his parentage but the Constitution specifically protects a child and I am upholding that principle.



Conclusion

16. 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 interests 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 the DNA testing at the Government Chemist at a date to be agreed upon them and in any event within 14 days of this Judgment and thereafter to conclude Children's Cause No 1020/2012 as soon as possible.
17. The petitioner and interested party will each bear equally the cost of the DNA testing and each shall bear its costs of this petition.
18. Copies of this judgment shall be availed to the respondent in the Children's Civil Case No 1020 of 2012 by the Deputy Registrar of this Division.
19. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF MARCH, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Sekwe for respondent and Interested Party

No appearance for petitioner

Order

Judgment duly delivered

Mention on 4/4/2014 for directions.

ISAAC LENAOLA

JUDGE

