



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 535 OF 2012

BETWEEN

THOMAS NJUGUNA WAHOME

(Suing as next friend of CM(a Child)) **PETITIONER**

AND

THE COMMISSIONER OF POLICE **1ST RESPONDENT**

THE HON. ATTORNEY GENERAL **2ND RESPONDENT**

JUDGMENT

1. The petitioner is the father of a child, CM, who is alleged to have been sexually violated. The incident was reported at Embakasi Police Station. The petitioner is frustrated that proper investigations have not been carried out thereby violating the fundamental rights and freedoms of the child particularly having regard to the best interest of the child. He alleges that he has written to Ministry of Internal Security, the Commissioner of Police and Director of Public Prosecution (“DPP”) and no action has been taken to apprehend the culprits. In essence, the petitioner requires this court to call for the investigation file and order full investigation into the alleged incident and thereafter direct the DPP to institute criminal proceedings against the culprits.
2. The respondents’ request that I take into account the powers and authority of the DPP under **Article 157**. **Article 157(4)** provides, “*The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with such direction.*” Furthermore, under **Article 157(6)** the DPP has control over the institution of criminal proceedings. Mr Njogu, counsel for the DPP, informed the court that the incident was investigated and there was insufficient evidence to mount a prosecution.
3. In view of the nature of the case and in particular the fact that it involves a child I dealt with the matter summarily to ensure that the ends of justice are met and the position of the child is not prejudiced by any delay in the hearing and determination of the matter. I heard brief submissions from the parties and I now take the following view of the matter.
4. On the one hand, the case of the petitioner is hinged on protecting the rights of a child. The Constitution recognises children as vulnerable members of society and they are given special

recognition and protection under **Article 53**. **Article 53(2)** provides, ***“a child’s best interests are of paramount importance in every matter concerning the child.”*** On the other hand, I am alive to the fact that the Court cannot instruct the DPP or the Inspector-General of Police on the manner of conducting investigation. But it must always be remembered that the Court must act and give relief where rights and fundamental freedoms of an individual are violated and in giving such relief the High Court is empowered to grant appropriate relief.

5. Mr Ongoto, advocate for the petitioner, complained that the police investigating the matter failed to take statements from certain persons who would have shed light on the incident complained of. In light of the circumstances of this case, the best remedy I can give is one that takes into account the best interests of the child and the power and authority of the Director of Public Prosecutions.
6. I order and direct as follows;
 - a. **The Director of Public Prosecutions is directed to make further investigations and inquiries into the circumstances surrounding the allegations concerning the sexual violation of CM (a child) and in so doing to take statements of Leah Kasyoki, Stephen Kasyoki and Ann Kasyoki and any other persons and thereafter deal with the matter in accordance with the Constitution and the law.**
 - b. **There shall be no order as to costs.**

DATED and **DELIVERED** in **NAIROBI** this 30th day of January 2013

D.S. MAJANJA

JUDGE

Mr Ongoto instructed by C.M. Ongoto and Company Advocates for the petitioner.

Mr Njogu, State Counsel, instructed by the Director of Public Prosecutions for the respondents.