



**ZAK & another v MA & another (Petition 193 of 2011) [2013] KEHC 6007 (KLR)  
(Constitutional and Human Rights) (24 May 2013) (Judgment)**

*ZAK & another v MA & another [2013] eKLR*

Neutral citation: [2013] KEHC 6007 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION 193 OF 2011**

**M NGUGI, J**

**MAY 24, 2013**

**BETWEEN**

**ZAK ..... 1<sup>ST</sup> PETITIONER**

**MPE UWEZO FOUNDATION ..... 2<sup>ND</sup> PETITIONER**

**AND**

**MA ..... 1<sup>ST</sup> RESPONDENT**

**HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**Section 23(4) and 25, 90(a) and (e) of the Children Act declared unconstitutional.**

*The main issue before the court was whether the provisions of section 23(4), 25 and section 90 of the Children Act which placed parental responsibility solely with the mother with regard to children born outside marriage contravened the constitutional principle of equal parental responsibility. The High Court held that sections 23(4) and 25, 90(a) and (e) of the Children Act were unconstitutional, null and void for breach of Articles 27(1), (2) and (4), and Article 53(1)(e) of the Constitution. The court also held that a step - parent would be held to have an obligation recognized in law to exercise parental responsibility as defined in section 23 of the Children Act over his or her step-child. It would be an affront to morality and the values of the Constitution for a party who had had a relationship with a child akin to that of a father or mother, to disclaim all responsibility and duty to maintain the child when he or she falls out with the parent of the child.*

Reported by John Ribia

**Constitutional Law** - children - rights of a child - right to be cared for and maintained - where the petitioner claimed that he had provided for food for his children and therefore had fulfilled his parental responsibility - scope of parental responsibility - where parental responsibility was beyond the provision of food and involved other areas that contributed to provision and care for the child - whether the 1<sup>st</sup> Petitioner could be said to have fulfilled



*his parental responsibility to the children in the circumstances - Constitution of Kenya, 2010, article 27, and 53; Children Act, sections 24(3), 25 and 90(a)(e).*

**Statutes** - Interpretation of statutes - Children Act - scope of parental responsibility - where the children were born out of wedlock - provision by the Children Act that parental responsibility for children born out of wedlock rested with the mother in the first instance - whether provisions of the Children Act were ultra vires the Constitution - Constitution of Kenya, 2010, article 53; Children Act, sections 24(3), 25 and 90(a)(e).

**Family Law** - parental responsibility - parental responsibility of a stepparent over a stepchild - whether a step-parent had an obligation recognized in law to exercise parental responsibility over the step-child - Constitution of Kenya, 2010, article 27, and 53; Children Act, sections 24(3), 25 and 90(a)(e).

### **Brief facts**

The 1<sup>st</sup> petitioner, a step - father to the children of the 1<sup>st</sup> respondent, instituted a petition alleging that sections 24(3), 25 and 90(a) (e) of the Children Act which placed parental responsibility on a mother in the first instance had threatened his right to equal protection of the law as provided for in article 27 of the Constitution. The petitioner alleged that the threatened violation arose from the fact that he had been compelled to provide for children who were not his biological children whereas article 53 of the Constitution had provided that any person who sired a child would be responsible for that child.

### **Issues**

- i. What is the scope of parental responsibility by a parent over the children?
- ii. Whether the provisions of section 23(4), 25 and section 90 of the Children Act which placed parental responsibility solely with the mother with regard to children born outside marriage contravened the constitutional principle of equal parental responsibility.
- iii. Whether a step - parent had an obligation recognized in law to exercise parental responsibility over the stepchild.

### **Held**

1. According to section 23 of the Children Act, parental responsibility was beyond the provision of food. Where the child would live and what the child would wear, his education and health care among others were all the responsibility of both parents. Therefore, the Petitioner's assertion that he had provided for his two biological children by arranging for a shopkeeper to give them food provisions for which he paid at the end of every month could not hold.
2. According to the evidence in court, the 1<sup>st</sup> Petitioner who had come to court to seek protection of his rights was himself in breach of his obligations to his biological children and therefore in violation of their rights under the Constitution. It was strange that the 1<sup>st</sup> Petitioner sought compensation from the 1<sup>st</sup> Respondent for breach of his rights while he had abandoned her to fend for four children, two of whom aged below four years were his biological children and whom he readily acknowledged responsibility of.
3. In line with the provisions of section 7 of the Transitional and Consequential Provisions contained in the sixth Schedule to the Constitution, 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. The 2<sup>nd</sup> Respondent (Attorney General) had the responsibility to present the necessary amendments to Section 24(3) and 25 for enactment by Parliament. It ought to also have taken into account the provisions of section 90 of the Children Act and any other provisions in the Act that violated the Constitution, when presenting the Act for amendment to ensure conformity with the Constitution.
4. Sections 25(2) of the Children Act, when read together with article 53(1) (e) of the Constitution was unconstitutional. Under article 53(1) (e) of the Constitution of Kenya, a person who was not the biological parent of a child could acquire parental responsibility of the child through cohabitation with the father or mother of a child of whom he or she was not the biological parent.



5. The Kenyan society had evolved very rapidly from the traditional polygamous society to monogamous unions in which parties entered into marriage with children from previous unions. While the relationship between couples in a family where there were children from either of the parties' previous relationships was working, the question of parental responsibility for such children could not arise. They were deemed and were to be treated as children of the family, entitled to maintenance and all that appertained to the duties of parents to children. It was when the relationship fell apart that the question of parental responsibility for the children of the other spouse was likely to arise.
6. article 53(2) of the Constitution of Kenya required that the best interests of a child be of paramount consideration in any matter concerning a child. A step - parent would thus be held to have an obligation recognized in law to exercise parental responsibility as defined in section 23 of the Children Act over his or her step-child. It would be an affront to morality and the values of the Constitution for a party who had had a relationship with a child akin to that of a father or mother, to disclaim all responsibility and duty to maintain the child when he or she falls out with the parent of the child. Such responsibility however depends on the circumstances of each case and the relationship shown to have existed between the person in question and the children in respect of whom he or she was sought to be charged with parental responsibility for.
7. Taking into account the best interest of the child and the relationship that existed between the child and the step-parent against whom orders of maintenance were sought and the statutory provisions regulating matters on care, custody and welfare of the child, such a parent has an obligation to financially provide for a child even where the child has reached the age of eighteen years.
8. If there was sufficient evidence to show that the 1<sup>st</sup> petitioner was in *loco parentis* to the two other children of the 1<sup>st</sup> respondent, he would have an obligation to support them in the same way as he was under an obligation to support his biological children. However, that was not a matter that fell for determination in the case before court. Should the 1<sup>st</sup> respondent have deemed it fit to file a case for maintenance before the Children Court, the court seized of the matter would be able, taking into account all the facts and circumstances of the case, considered against the provisions of article 53 (2) and Section 94 of the Children Act, to determine whether and to what extent the 1<sup>st</sup> Petitioner should bear parental responsibility as defined in Section 23 of the Children Act for the two children of the 1<sup>st</sup> Respondent from her previous relationship.
9. There was no violation of the 1<sup>st</sup> petitioner's rights. If anything, if the averments by the Children's Officer were to be believed (noting that no affidavit to controvert them was filed), it was the Petitioner who had shown dereliction of his parental duty even to the children that he had acknowledged were his.

*Petition allowed in part to the extent that section 23(4) and 25, as well as section 90(a) and (e) of the Children Act were unconstitutional, null and void for breach of articles 27(1), (2) and (4), and article 53(1)(e) of the Constitution. Each party was to bear its own costs.*

#### **Citations**

##### ***South Africa***

*MB v NB* (2009) ZAGPJHC76; 2010(3) SA 220 - (Mentioned)

##### ***Australia***

*Keltie v Keltie & Bradford* [2002] FLC 93-106; [2002] Fam CA 421

- (Mentioned)

##### ***Canada***

*Chartier v Chartier* [1999] 1 SCR 242 - (Mentioned)

#### **Statutes**

##### ***East Africa***



1. Children Act, 2001 (Act No 8 of 2001) sections 24(3); 25; 38(2)(m) - (Interpreted)
2. Constitution of Kenya, 2010 articles 27(1)(2)(3); 53(1)(e) - (Interpreted)

## JUDGMENT

### Introduction

1. The petition before me challenges the demand by a Children's Officer that the 1<sup>st</sup> petitioner provides maintenance for four children, two of whom he sired with the 1<sup>st</sup> respondent and two whom the 1<sup>st</sup> respondent had from a previous relationship. The 1<sup>st</sup> petitioner alleges that requiring him to support children of whom he is not the biological father is a violation of his rights under the Constitution.
2. In the petition dated October 11, 2011 and supported by two affidavits, one sworn by the 1<sup>st</sup> petitioner and the other by one MA who describes herself as one of the founders of the 2<sup>nd</sup> petitioner, the petitioners seek the following orders:
  - a. A declaration that section 24(3) of the Children Act is inconsistent with article 53(1)(e) of the Constitution of Kenya therefore void.
  - b. A declaration that section 25 of the Children Act, 2001 is also inconsistent with article 53(1)(e) of the Constitution of Kenya therefore void.
  - c. A declaration that section 24(3) and 25 of the Children Act, 2001 does violate the 1<sup>st</sup> petitioner's human rights to equality and freedom from discrimination as provided in article 27(1), (2), (3) of the Constitution of Kenya.
  - d. An order for compensation against the 1<sup>st</sup> respondent for the breach of the fundamental rights and freedoms of the 1<sup>st</sup> petitioner.
  - e. Costs for this petition.
  - f. Any further relief or orders that the honourable court shall deem just and fit to grant.

### The Facts

3. The events leading to the filing of this petition are set out in the affidavit of the 1<sup>st</sup> petitioner sworn on October 11, 2011. In his affidavit, the 1<sup>st</sup> petitioner states that he is employed as a Security Guard by [particulars withheld]. He met the 1<sup>st</sup> respondent, MA in 2009. At the time they met, she had two children aged 7 and 10 whom the 1<sup>st</sup> petitioner avers were being provided for by their biological father.
4. The 1<sup>st</sup> petitioner and the 1<sup>st</sup> respondent started cohabitation, which they did for a period of two years during which time they had twins. He alleges that they agreed that he would be contributing to the upkeep of the twins whom he sired, which he did by allowing the 1<sup>st</sup> respondent to collect foodstuffs from a local shop, for which he would pay at the end of the month. He avers that he later disagreed with the 1<sup>st</sup> respondent after she had taken foodstuffs from the shop for only two months as she was only interested in money and did not want to collect foodstuffs from the shop as he had wanted her to.
5. The 1<sup>st</sup> petitioner claims that following the disagreement with the 1<sup>st</sup> respondent, he was served with summons in March 2011 from the District Children's Officer, Langata; that upon presenting himself at the Lang'ata Children's Office, the District Children's Officer insisted that he needed to provide for all the four children. He states that he indicated to the officer that he was providing for his biological children but that he was not willing to provide for the others who were not his children.



6. He claims that he was informed that he had acquired parental responsibility for the other children under section 25 of the [Children Act 2001](#), and was threatened with arrest if he did not provide money for the children's upkeep to the 1<sup>st</sup> respondent. He therefore sought advice and legal assistance from the 2<sup>nd</sup> petitioner as a result of which this petition was filed to safeguard his rights.
7. The Children's Officer, Langa'ata, Ms Harriet Kihara, has sworn an affidavit on September 28, 2012 on the matters giving rise to this petition. She states that she is stationed at Kibera in Langata District, and that her duties under section 38(2) (m) of the [Children Act](#) are to mediate in family disputes involving children and their parents or those having parental responsibility over them.
8. According to Ms Kihara, on March 21, 2011, the 1<sup>st</sup> respondent reported to the Langata District Children's Office that she had been married to the 1<sup>st</sup> petitioner for a period of 3 years and they had two children, but that in May 2010, the 1<sup>st</sup> petitioner left with their housegirl, leaving the 1<sup>st</sup> respondent to fend for the children by herself; that the 1<sup>st</sup> respondent sought legal advice from CREAW, a legal aid agency, following which an agreement was reached and the 1<sup>st</sup> petitioner undertook to deposit a monthly stipend for food with a shopkeeper, which he did for only two months then stopped, as a result of which the 1<sup>st</sup> respondent sought assistance from the Children's Office to compel the 1<sup>st</sup> petitioner to take up his parental responsibilities.
9. Ms Kihara avers that the 1<sup>st</sup> petitioner has acquired parental responsibility as a result of his cohabitation with the 1<sup>st</sup> respondent as provided under section 25(4) of the [Children Act](#), and is therefore bound under section 90 of the Act to provide for all the children of the 1<sup>st</sup> respondent, including those that are not his biologically; that he insisted that he would only contribute to the maintenance of his biological children, and that only to the tune of Kshs 500 per month; that the 1<sup>st</sup> respondent declined the offer to contribute Kshs 500 only and was therefore referred to a legal aid organisation to seek assistance in filing for maintenance in court. It appears that the 1<sup>st</sup> respondent did not file a claim for maintenance, nor did she participate in these proceedings.

### **The Case for the Petitioners**

10. The case for the petitioners as presented by their counsel, Mr Odera, is in two limbs. The first is that sections 24(3) and 25 of the [Children Act](#), cap 141 Laws of Kenya, are inconsistent with article 53(1) (e) of the [Constitution](#) and should therefore be declared null and void. The second limb is that the said sections 24(3) and 25 of the [Children Act, 2001](#) violate the 1<sup>st</sup> petitioner's right to equality and freedom from discrimination guaranteed in article 27(1), (2) and (3) of the [Constitution of Kenya](#).
11. Mr Odera submitted that section 24(3) of the [Children Act](#) is unconstitutional as it vests parental responsibility on the mother in the first instance, and provides that the father shall subsequently acquire parental responsibility, the manner of which is provided in section 25. He argues that at article 53(1)(e), the [Constitution](#) provides that both the mother and father of a child have equal responsibility to a child whether or not they were married to each other.
12. Mr Odera notes that the State has conceded the unconstitutionality of section 24(3) and 25 and submits that their continued existence in the statute has led to the threatened infringement of the 1<sup>st</sup> petitioner's rights under article 27 to equal protection of the law. The threatened violation arises because he is allegedly being compelled to provide for children he has no parental responsibility over. Mr Odera argues that declaring the two sections unconstitutional is in the best interests of the child and will promote article 53 of the [Constitution](#) as any person who sires a child will be aware that he is responsible for that child.



13. In his reply to the 2<sup>nd</sup> respondent's submissions, Mr Odera conceded that, as argued by the respondent, article 53(1) (e) creates an open responsibility and is not pegged on whether children are biological, adopted, fostered or otherwise. He conceded also that the 1<sup>st</sup> petitioner has parental responsibility for the two children of the 1<sup>st</sup> respondent whom he did not sire, but submitted that he does not have that responsibility as long as the biological father of those children is meeting that responsibility.

### **The 2<sup>nd</sup> Respondent's Case**

14. The respondent relies on the affidavit in opposition to the petition sworn by the Children's Officer, Langata, Ms Harriet Kihara, the contents of which I have summarised above, and written submissions dated February 28, 2013. The 2<sup>nd</sup> respondent concedes that the impugned sections of the *Children Act* are inconsistent with article 53(1)(e) and are therefore unconstitutional.
15. Mr Opondo for the state submitted, however, that the petitioners had failed to address themselves to the issue of parental responsibility as used in the *Children Act*; that the 1<sup>st</sup> petitioner has been cohabiting with the 1<sup>st</sup> respondent for some two years before 2010, when they fell out; that since the 1<sup>st</sup> petitioner had acknowledged parental responsibility for both the children he sired and those he did not, there was no reason for the turn around and denial of responsibility.
16. He asked the court, in interpreting the words 'equal responsibility' as used in article 53(1)(e), not to interpret the provision, as suggested by the 1<sup>st</sup> petitioner, to cover only biological children. In his view, this would leave out adopted children, which would be a mockery of article 27. According to Mr Opondo, once one acquires parental responsibility as a result of living under the same roof and providing for sustenance of a child, one cannot run away from that responsibility.

### **Determination**

17. The petitioners have come to this court seeking declarations with regard to sections 24(3) and 25 of the *Children Act*, and alleging violation of the 1<sup>st</sup> petitioner's rights under the *Constitution*. While the petitioners focus on the rights of the 1<sup>st</sup> petitioner and the petitioners have a duty to show in which manner the provisions of the *Constitution* have been violated in regard to him, in my view, the critical issue in this matter relates to the welfare of the children with regard to the maintenance of whom the dispute arises.
18. The determination of this matter therefore revolves around the provisions of article 53 of the *Constitution*, which provides, at article 53(2) that;

“ A child's best interests are of paramount importance in every matter concerning the child.”

19. While the rights of the 1<sup>st</sup> petitioner are important, I believe that the issue that should be uppermost in the consideration of the parties, especially the 2<sup>nd</sup> petitioner which states that it is a human rights organisation that deals with issues for marginalised groups, particularly children, is the rights and interests of children who are the most vulnerable members of society.
20. Article 53(1)(e) of the *Constitution* which the petitioners allege that section 24(3) and 25 of the *Children Act* violate provides as follows:

53(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.’



21. There is no dispute that the 1<sup>st</sup> petitioner has parental responsibility for the two biological children that he had with the 1<sup>st</sup> respondent. Parental responsibility is defined in section 23 of the [Children Act](#) as follows:

“23(1) In this Act, “parental responsibility” means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child’s property in a manner consistent with the evolving capacities of the child.

(2) The duties referred to in subsection (1) include in particular—

(a) the duty to maintain the child and in particular to provide him with—

(i) adequate diet;

(ii) shelter;

(iii) clothing;

(iv) medical care including immunization; and

(v) education and guidance;

(b) the duty to protect the child from neglect, discrimination and abuse;

(c) the right to—

(1) give parental guidance in religious, moral, social, cultural and other values;

(ii) —.”

22. As can be noted from the above provisions, ‘parental responsibility’ goes over and above the provision of food. Where the child will live and what he will wear, his or her education and health care, among others, are all the responsibility of both parents.

23. In this case, the petitioners argue that the 1<sup>st</sup> petitioner has provided for his two biological children by arranging for a shopkeeper to give the 1<sup>st</sup> respondent food provisions for which he pays at the end of every month. Which then begs the question: after providing them with food, what happens to their housing and shelter needs, clothing, medical care, education, among other needs that parents have a constitutional and statutory obligation to provide? If, as the Children’s Officer depones, the 1<sup>st</sup> petitioner insists that he can only contribute Kshs 500 per month for the upkeep of his two biological children, even while considering that, given his employment as a security guard, he may not have high earnings, how does the 1<sup>st</sup> respondent provide for the rest of the children’s needs?

24. From the facts before me, it seems to me that the 1<sup>st</sup> petitioner, who has come to this court to seek protection of his rights, is himself in breach of his obligations to his biological children, and is therefore in violation of their rights under the [Constitution](#). I would agree with the 2<sup>nd</sup> respondent that it is strange that the 1<sup>st</sup> petitioner seeks compensation from the 1<sup>st</sup> respondent for breach of his rights while he has abandoned her to fend for four children, two of whom, now aged under 4 years, he is the biological father of, and responsibility for whom he readily acknowledges.



### Constitutionality of section 24(3) and 25 of the Constitution

25. The petitioners have contended that sections 24(3) and 25 of the Children Act are unconstitutional. Section 24 of the Children Act is in the following terms:

- (1)(1) Where a child's father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility.
- (2) Where a child's father and mother were not married to each other at the time of the child's birth and have subsequently married each other, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in the exercise of such parental responsibility.
- (3) Where a child's father and mother were not married to each other at the time of the child's birth and have not subsequently married each other—
  - (a) the mother shall have parental responsibility at the first instance;
  - (b) the father shall subsequently acquire parental responsibility for the child in accordance with the provisions of section 25.”

26. At section 25, the Children Act provides for the circumstances under which a father of a child born outside marriage may acquire parental responsibility. It provides as follows:

- “25(1) Where a child's father and mother were not married at the time of his birth—
- (a) the court may, on application of the father, order that he shall have parental responsibility for the child; or
  - (b) the father and mother may by agreement (“a parental responsibility agreement”) provide for the father to have parental responsibility for the child.
  - (c) Where a child's father and mother were not married to each other at the time of his birth but have subsequent to such birth cohabited for a period or periods which amount to not less than twelve months, or where the father has acknowledged paternity of the child or has maintained the child, he shall have acquired parental responsibility for the child, notwithstanding that a parental responsibility agreement has not been made by the mother and father of the child.”

27. The respondent has conceded that the provisions of section 24(3) are unconstitutional and violate the provisions of article 53(1)(e) with regard to children born outside marriage. Section 7(1) of the Transitional and Consequential Provisions contained in the sixth schedule to the Constitution is clear that:

- “7(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.”



28. The 2<sup>nd</sup> respondent has also conceded that in so far as the *Children Act* places parental responsibility for children born outside marriage only on the mother, it is unconstitutional. In this regard, the provisions of section 90(a) and (e) of the *Children Act* must be considered alongside the provisions of section 24(3) and 25 as offending against the *Constitution*. Section 90 is in the following terms:

“90. Unless the court otherwise directs, and subject to any financial contribution ordered to be made by any other person, the following presumptions shall apply with regard to the maintenance of a child—

(a) where the parents of a child were married to each other at the time of the birth of the child and are both living, the duty to maintain a child shall be their joint responsibility; (b)-;

(e) where the mother and father of a child were not married to each other at the time of birth of the child and have not subsequently married, but the father of the child has acquired parental responsibility for the child, it shall be the joint responsibility of the mother and father of the child to maintain that child.”

29. In line with the provisions of section 7 set out above, 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. The 2<sup>nd</sup> respondent has the responsibility, which I note, from its written submissions in this matter, it is fully alive to, to present the necessary amendments to section 24(3) and 25 for enactment by Parliament. It must also take into account the provisions of section 90 set out above, and any other provisions in the Act that violate the *Constitution*, when presenting the Act for amendment to ensure conformity with the *Constitution*.

### **Parental Responsibility for Step-Children**

30. The substance of the 1<sup>st</sup> petitioner’s case is that his rights are being violated because he is being required to provide maintenance for the children whom the 1<sup>st</sup> respondent had from another relationship prior to commencing cohabitation with him. The 2<sup>nd</sup> respondent counters that the 1<sup>st</sup> petitioner has acquired parental responsibility under section 25(2) of the *Children Act* by his cohabitation with the 1<sup>st</sup> respondent for a period of two years or more. I believe that the 1<sup>st</sup> petitioner is mistaken in his arguments, while the 2<sup>nd</sup> respondent is correct that the petitioner may be deemed to have parental responsibility for the children, but not for the reasons that the 2<sup>nd</sup> respondent cites.

31. Section 25(2) of the *Children Act*, which in light of article 53(1)(e) is unconstitutional, related to those situations in which a biological father wished to acquire parental responsibility for his child born outside marriage. The situation we are confronted with in this petition raises the question whether, under article 53(1)(e), a person who is not the biological parent of a child can acquire parental responsibility in the circumstances presented by the case before me. In other words, can a person who is or has been married to or has cohabited with the father or mother of a child of whom he or she is not the biological parent acquire parental responsibility towards that child?

32. A reading of article 53 together with sections 23 and 94 of the *Children Act*, in my view, provide an answer in the affirmative. Section 94 of the *Children Act* already permitted the court to make orders for financial provision for a step child by providing as follows:

94.(1) The court may order financial provision to be made by a parent for a child including a child of the other parent who has been accepted as a child of the family...



33. The section then provides that the court should have regard to the circumstances of each case and sets out the factors that the court should consider in making such an order as including:
- (a) the income or earning capacity, property and other financial resources which the parties or any other person in whose favour the court proposes to make an order, have or are likely to have in the foreseeable future;
  - (b) the financial needs, obligations, or responsibilities which each party has or is likely to have in the foreseeable future;
  - (c) the financial needs of the child and the child's current circumstances;
  - (d) ...
  - (i) whether the respondent has assumed responsibility for the maintenance of the child and if so, the extent to which and the basis on which he has assumed that responsibility and the length of the period during which he has met that responsibility;
  - (j) whether the respondent assumed responsibility for the maintenance of the child knowing the child was not his child, or knowing that he was not legally married to the mother of the child.”
34. Our society has evolved very rapidly, from the traditional polygamous society to monogamous unions in which parties enter into marriage with children from previous unions. While the relationship between a couple in a family where there are children from either of the parties' previous relationships is working, the question of parental responsibility for such children may not arise. They are deemed and may be treated as children of the family, entitled to maintenance and all that appertains to the duties of parents to children. It is when the relationship falls apart, as in the present case, that the question of parental responsibility for the children of the other spouse may arise.
35. Looked at through the prism of the Constitution, particularly article 53(2) which requires that the best interests of the child be the paramount consideration in any matter concerning the child, I believe that a step-parent in such circumstances must be held to have an obligation recognised in law to exercise parental responsibility as defined in section 23 of the Children Act over his or her step-child. It would be an affront to morality and the values of the Constitution for a party who has had a relationship with a child akin to that of a father or mother to disclaim all responsibility and duty to maintain the child when he or she falls out with the parent of the child. Such responsibility would, however, depend on the circumstances of each case, and the relationship that is shown to have existed between the person in question and the children in respect of whom he or she is sought to be charged with parental responsibility for.
36. I am fortified in my view of this matter by a consideration of decisions from other jurisdictions. Taking into account the best interests of the child and the relationship that existed between the child and the step-parent against whom orders of maintenance are sought and the statutory provisions regulating the matters on the care, custody and welfare of the child, courts in other jurisdictions have held that such a parent has an obligation to provide financially for the child, even where the child has reached the age of eighteen years. See in this regard the decisions of the South Gauteng High Court, South Africa, in MB v NB (2008/25274) (2009) ZAGPJHC 76; 2010(3) SA 220 (GSJ) (25 August 2009); the decision of the Family Court in Australia in Keltie & Keltie & Bradford (2002) FamCA 421 (21 June 2002) and the decision of the Supreme Court of Canada in Chartier v Chartier (1999) 1 SCR 242.
37. Looked at from the above perspective, should there be sufficient evidence to show that the 1<sup>st</sup> petitioner was in *loco parentis* to the two other children of the 1<sup>st</sup> respondent, he would have an obligation to



support them in the same way as he is under an obligation to support his biological children. This, however, is not a matter that falls for determination in this petition. Should the 1<sup>st</sup> respondent deem it fit to file a case for maintenance before the Children Court, the court seized of the matter would be able, taking into account all the facts and circumstances of the case, considered against the provisions of article 53(2) and section 94 of the *Children Act*, to determine whether and to what extent the 1<sup>st</sup> petitioner should bear parental responsibility as defined in section 23 of the *Children Act* for the two children of the 1<sup>st</sup> respondent from her previous relationship.

38. Suffice to say that in light of the foregoing matters, I can find no violation of the 1<sup>st</sup> petitioner's rights. If anything, if the averments by the Children's Officer are to be believed (noting that no affidavit to controvert them was filed), it is the petitioner who has shown dereliction of his parental duty to even the children that he acknowledges are his. However, the petition succeeds to the extent that I do find, as prayed by the petitioners and conceded by the 2<sup>nd</sup> respondent, that section 23(4) and 25, as well as section 90(a) and (e) of the *Children Act* are unconstitutional, null and void for breach of articles 27(1), (2) and (4), and article 53(1)1(e) of the *Constitution*.

39. Each party shall bear its own costs of the petition.

**DATED DELIVERED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF MAY, 2013.**

**MUMBI NGUGI**

**JUDGE**

Mr. Odera instructed by the Kibera Centre for Legal Aid and Human Rights for the petitioners

Mr. Opondo instructed by the State Law Office for the 2<sup>nd</sup> respondent.

