

IN THE HIGH COURT OF KENYA AT NAIROBI

HC CIVIL APPEAL NO. 31 OF 2010

CHILDREN CASE NO. 13 OF 2010

S.H.M. APPELLANT

versus

M. B. RESPONDENT

JUDGMENT

This is an appeal against the order of the Resident Magistrate made on 14th June 2010 in Nairobi Children's Court Case No. 13 of 2010 requiring the Appellant to take a DNA test to determine the paternity of Respondent's child. In the 14 grounds of appeal the Appellant rises five main issues; namely that the subordinate has no jurisdiction to order the paternity test; that the court erred in making the order *suo moto* that the Appellant should take a DNA test to determine the paternity of the Respondent's daughter without any basis at all and on a mention date; and that the Appellant was condemned unheard.

Citing the High Court decision in **MW vs KC [2005] eKLR**, Mr. Khan for the Appellant submitted that the subordinate court has no jurisdiction to determine the paternity of a child. He argued that even if it had there was no application, formal or informal, before court upon which the impugned order was based. What was before court was an application for maintenance in respect of which the Appellant had raised a preliminary objection. On 14th June 2010 when the matter was fixed for mention to take a hearing date, contrary to the rules of natural justice, the court out of the blues made the impugned order *suo moto* without giving the Appellant an opportunity of being heard. In the circumstance he prayed that the appeal be allowed with costs.

Mrs. Machio for the Respondent dismissed this appeal as frivolous. She submitted that though the order was made on a mention date, it is clear that the same was in the interest of the Child which the court should always bear in mind when dealing with such cases. She said it is the constitutional right of any child to know his or her father. She argued that the order was prompted by the Appellant's lawyer asserting that the Appellant was not ready to undertake a paternity test. In her view the subordinate court has jurisdiction under **Sections 4 and 22** of the **Children's Act** to make the order. She said the cases cited by the counsel for the Appellant are all distinguishable from this one. In the circumstances she urged me to dismiss this appeal with costs.

I have considered these rival submissions. A perusal of the record of appeal shows that the Respondent claimed in her amended plaint in Nairobi Children's Court Case No. 13 of 2010 that the Appellant is the father of her daughter, A.S.O. M.A. born on 12th July 2009 (the Child). She averred that for six years they had a relationship which developed into a love affair out of which the said child was born. Despite repeated requests the Respondent has refused to take parental responsibility to maintain the Child. In the circumstances she filed the said case in the Children's Court and claimed maintenance of Kshs.105,179/= per month. Contemporaneous with the filing of the plaint she filed an application and sought interim maintenance in the same figure.

In response the Appellant filed a replying affidavit in which, though admitting that he knew the Respondent, he said they were mere friends and he denied being the father of the Child. He claimed the Respondent has all along wanted to marry him but he refused as she was not the type of woman he would marry. Upon learning that the Appellant had gone to India and married his present wife, she maliciously came up with the said children's case to besmirch his reputation and cause problems for him.

On 10th June 2010 when the Respondent's said application was fixed for hearing, the trial court was not sitting and it was fixed for mention on 14th June 2010 to take a hearing date. On that day the court

ordered the Appellant to take a DNA test to prove or disprove the Child's paternity.

I disagree with Mrs. Machio that the subordinate court has jurisdiction under **Sections 4 and 22** of the **Children's Act** to determine the paternity of a child. **Section 4** simply requires the court and all persons and institutions handling children issues to treat the interest of the child as of paramount importance. It is **Section 22(1)** which deals with the issue of jurisdiction. It states:

“Subject to subsection (2), if any person alleges that any of the provisions of sections 4 to 19 (inclusive) has been, is being or is likely to be contravened in relation to a child, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress on behalf of the child.”

The issue before the court was the paternity of the Respondent's child. The determination of that issue would entitle the child to enforce his/her rights to parental care, education and health under **Sections 6, 7, 8 and 9** of the **Children's Act**. It is clear to me from **Section 22(1)** the determination of the paternity issue is the preserve of the High Court. In the circumstances I find that the subordinate court has no jurisdiction to issue the impugned order.

That in effect determines this appeal. I would, however, wish to add that much as the courts are supposed to consider the rights of the children as of paramount importance and expeditiously determine their cases, due process should nonetheless always be followed. In this case the impugned order was made on a mention date before the matter was heard. I agree with Mr. Khan that that was a breach of the rules of natural justice. Consequently I allow this appeal and set aside the trial court's order of 14th June 2010. If the Respondent is minded of pursuing the issue of the child's paternity she should be advised of the procedure to be followed. As the order giving rise to this appeal was made *suo moto* I direct that each party bear its own costs.

DATED and delivered this 30th day of June 2011.

**D.K. MARAGA
JUDGE**