



P.M v J.K [2010] KEHC 2905 (KLR)

P.M v J.K [2010] eKLR

Neutral citation: [2010] KEHC 2905 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CASE 159 OF 2009
MM KASANGO, J
MARCH 12, 2010**

BETWEEN

PM APPLICANT

AND

JK RESPONDENT

JUDGMENT

1. The application for consideration in this judgment is Chamber Summons dated 26 October 2009. The application is brought by a minor through her mother and next of friend P.M. The minor seeks that an order be made compelling the respondent J.K to submit to Deoxyribonucleic Acid DNA) test with a view to the determination of the minor’s paternity. She also sought that the respondent would be ordered to pay for the expenses of that test. That application is brought on the ground that:-
 - (a) The respondent has expressly refuted being the father of the said minor.
 - (b) That the minor has a right to know her biological father.
 - (c) That once paternity of the minor is ascertained, Meru Children’s Magistrate Case Number 36 of 2009 will be disposed off expeditiously and justly.

3. The said K has been sued by the minor through her mother in the magistrate court where she has claimed that custody be given to her mother and that K be ordered to pay her monthly maintenance. K has filed a defence in that case and he has denied that he is the father of the minor. That denial has prompted the present action in the High Court. In other words, the minor wishes to have the DNA tests done in order to force K to acknowledge paternity and in order for K to acquire the parental responsibility. Parental responsibility is defined under Section 23 (1) of the Children’s Act.

“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.”

4. The duties referred in that sub section relates to amongst other things to adequate diet, shelter and clothing and even guardianship in religious moral and social culture. Section 24 (2) provides how a person such as K who is not married to the mother of the child acquires parental responsibility. Section 24(3) (a) and (b) provides as follows:-

“24

(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.”

5. Under Section 25 where the parents of the child are not married it is provided that the court, on an application by the father, may order the father to have parental responsibility. A father in such an union under that section may also acquire parental responsibility by entering into parental responsibility agreement with the mother of the child. Then Section 25(2) provides as follows:-

“25.

(2) 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 period 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.”

6. It is clear from that subsection that if the father does not approach the court to give him parental responsibility and if he does not enter into an agreement with the mother of the child he can acquire parental responsibility if he acknowledges paternity of the child or if he maintains the child or cohabits with the mother for 12 months after the birth. As stated before, K in his defence in the children’s matter in the lower court has denied paternity. He therefore has not acknowledged paternity as required under that subsection. He has also denied any maintenance of the child and cohabitation with the mother. It is in that background that the present application was argued before me. K although served with the application did not attend. This matter proceeded ex parte.

7. Learned counsel Mr. Mbaabu for the applicant relied on two authorities. In the case *Idah Gakii Micheni (Suing as a next friend of Risper Kendi a minor) Vs. Justus Riungu Misc. Application No. 55 of 2008*. In this case, Justice Ouko faced with a similar application stated:-

“It follows that Section 6 (The Children’s Act) creates a right of the child to be cared for by parents while Section 22(1) cloths the High Court with jurisdiction to determining any alleged contravention of that right amongst others the main issue before the court below is the paternity of the child. The respondent has categorically denied being the father of the child while the applicant maintains that he is. In the normal course of things, there are no witnesses to the making of children. It is a matter between two people away



from the public glare. Thanks to scientific development which now makes it possible to determine whether or not one is the father of the particular child.”

8. In that case, Justice Ouko proceeded to allow the respondent to submit himself for DNA test and the result to be filed in court within 30 days. The applicant also relied on the case *Mary Wamboi Vs. Kiarie Chege*
9. Misc. Application No. 105 of 2004. In this case, there was intimation that the father and mother of the child cohabitated and that the respondent maintained the child prior to the application for DNA test to be done on the respondent. The DNA was requested for because the respondent denied the child’s paternity. The applicant argued that the child had a right to be cared for by both parents. She therefore sought that DNA test be done to confirm whether or not the respondent was the child’s father. The learned Judge had this to say in this case:-

“Besides the provisions of Section 6(1) of the Act which give the child the right to live with and be cared for by his parents, the child is also entitled to education, health and medical care. In tandem with this, Article 25 of the United Nations Universal Declaration of Human Rights to which Kenya is privy requires that “All children whether born in or out of wedlock shall enjoy the same social protection.” Article 26 of the Covenant on Civil and Political Rights which Kenya ratified on 1st May, 1972 affords all persons including the child equal protection of the law. Article 7 of the United Nations Universal Declaration of Human Rights in particular affords the child and all persons equal protection of the law. Protection of the law in my view includes the right of the child to realize the benefits conferred by the Act which are specifically set out in Part II (of the Act). If the child cannot enjoy proper parental upbringing, health care, and good education because the child was born out of wedlock, and because the putative father has denied paternity (even where the parties have lived in a “come we stay relationship” and is therefore not legally bound to meet his parental responsibility then the provisos of the Act affording the child protection become a dead letter unless the courts are prepared to compel putative fathers to undergo a DNA test to determine paternity.”

10. In our present application, the mother of the minor sworn in her affidavit in support that K had refuted paternity of the minor. That the question of paternity in respect of the minor needed to be resolved in order to establish whether the respondent was the biological father of the minor. The results of the DNA tests according to the mother of the child would help to resolve the question of the respondent’s parental responsibility towards the minor. That is the crust of the matter. As stated before, the Children’s Act provides where the mother and father of the child are not married 3 circumstances under which a father can be saddled with parental responsibility. Just to repeat for better understanding, the first is where the father makes an application for the court to give him the parental responsibility. The 2nd is where the father and mother of the child enter into an agreement recognizing the father’s parental responsibility. The third is where the father either acknowledges paternity of the child or where he had maintained the child. That being the case, unless those three circumstances takes place, the court cannot order a man who is not married to a woman to acquire parental responsibility. In that regard, I respectfully disagree with the learned judges in their decision in the cases that were cited before me. In my humble view, to order K to undertake DNA examination would not only go contrary to the Childrens Act but against our adversarial system of justice as opposed to quisitorial system. Such system as ours cannot compel a party to submit to a test whose results will be used against him. Not all. If the application was allowed, it would supersede the conditions that are put by the Children’s Act on how parental responsibility is acquired. The application therefore for DNA to be made is against



the law. For that reason alone, I decline the prayers that are sought and Chamber summons dated 26th October 2009 is dismissed with no orders as to costs.

DATED AND DELIVERED AT MERU THIS 12TH DAY OF MARCH 2010.

MARY KASANGO

JUDGE

