MW v KC (Miscellaneous Application 105 of 2004)
[2005] KEHC 3172 (KLR) (29 September 2005) (Ruling)

MW v KC [2005] eKLR

Neutral citation: [2005] KEHC 3172 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

MISCELLANEOUS APPLICATION 105 OF 2004

GBM KARIUKI, J

SEPTEMBER 29, 2005

BETWEEN

MW ..... APPLICANT

AND

KC ..... RESPONDENT

Circumstances in which a court may compel a putative father to take a DNA test
The application sought an order that the respondent be ordered to attend a DNA test. The court highlighted the circumstances in which it could order for a DNA test and the safeguards to be applied in making such an order.

Reported by Kakai Toili

Constitutional Law *– fundamental rights and freedoms - rights of the child - right to live with and be cared for by its parents - right to the protection of law - procedure for safeguarding the rights of the child - power of the children's court to issue orders to safeguard the welfare of the child - whether the High Court had jurisdiction to compel a putative father to take a DNA test to determine the paternity of a child and what were the principles that a court should apply in considering whether to make such an order - United Nations Universal Declarations of Human Rights articles 7 and 25; Covenant on Civil and Political Rights, article 26; Constitution of Kenya, section 70; Children Act 2001 Part II, sections 6 and 22.*

Evidence Law *– evidence - DNA evidence - power of a court to order for a DNA test to establish the paternity of a child – what were the circumstances in which a court may compel the carrying out of a DNA test and what safeguards should be applied in making such an order.*

Brief facts

In 2002, the applicant gave birth to a boy child for whom she obtained a certificate of birth in 2004. In that certificate, it was indicated that the child's father was the respondent. The applicant filed proceedings in the Children's Court against the respondent seeking orders for the custody and maintenance of the child. After the respondent denied paternity, the applicant moved the High Court under sections 6 and 22 of the Children Act, 2001, seeking an order that the respondent be ordered to attend a DNA test.

In her grounds for the application, the applicant alleged that the respondent had abandoned her after he had made her pregnant with the child and that the child had a right to be cared for by both its parents. The DNA test, she affirmed, would be necessary to confirm whether the respondent was the child's father. The respondent opposed the application. He argued that the court did not have jurisdiction to hear it, that the application infringed on his rights and that it was incompetent and misconceived. The court considered whether the law could compel the respondent to take a DNA test.

Issues

i. Whether the High Court had jurisdiction to compel a putative father to take a DNA test to determine the paternity of a child and what were the principles that a court should apply in considering whether to make such an order?

ii. What were the circumstances in which a court may compel a DNA test and what safeguards should be applied in making such an order?

Held

1. Amongst the rights of the child set out the Children Act, 2001, Part II was the right to live with and be cared for by his parents. Section 22(2) of the Act empowered a person who alleged that that the provisions of sections 4 to 19 had been, were being or were likely to be contravened in relation to a child to apply to the High Court for redress on behalf of the child.
2. In order to succeed, the applicant must show;
    a. that there was sufficient cause for seeking the order by showing that in the circumstances of the case there was a likelihood that the respondent could be the father of the child;
    b. that the respondent's refusal to submit to a DNA test had violated the child's right to know his father;
    c. that the respondent's refusal to take the DNA test was unreasonable because it had deprived the child of the possible enjoyment of the rights and benefits enshrined in sections 4 and 19 of Part II of the Children Act, 2001; and
    d. that the court had jurisdiction under the Act to compel the respondent to take the DNA test.
3. The United Nations Universal Declarations of Human Rights in articles 7 and 25, the Covenant on Civil and Political Rights in article 26 and the Constitution of Kenya in section 70 afforded the child and all persons the protection of the law. That protection included the right of the child to realize the benefits conferred by the Children Act, 2001, which were specifically set out in Part II.
4. Law must not be interpreted in a manner that would render it meaningless or scandalous. It must be interpreted to give meaning to the intention of the Legislature. The Children Act, 2001, and the international conventions showed that the paramount intention was to ensure that the best interest of the child whether born in wedlock or out of wedlock, was safeguarded.
5. By virtue of section 22(2) of the Children Act, 2001, the court had jurisdiction to issue orders to compel the determination of the child's paternity by DNA testing. To ascribe a contrary interpretation would be to render meaningless both the protection of the child under the Constitution and the rights of the child enshrined in the Children Act, 2001, and the international covenants to which Kenya was privy.
6. Because of the likelihood of abuse, the court, in exercising its discretionary power to grant or not to grant that relief, ought to ensure *sine quo non;*
    a. that the application under section 22 of the Children Act, 2001, was made in good faith;
    b. that there were good grounds for making it, that was to say, sufficient cause shown; and
    c. that the application was not actuated by malice or designed to economically exploit or embarrass or was otherwise an abuse of the process of the court.
7. The respondent having had a brief relationship with the applicant during which the child was conceived, there was a likelihood that the respondent could be the father of the child. The child was

entitled to know if the respondent was his father and the respondent's refusal to take a DNA test was not only unreasonable but had also denied the child the possible enjoyment of the rights under the Children Act, 2001.

Application allowed.

Citations

Cases

None referred to

Statutes

Kenya

1. Children Act (cap 141) sections 2, 4(1)(2)(3); 6(1); 22(1)(2)(3); part 2 - (Interpreted)
2. Constitution of Kenya (Repealed) sections 70(a); 84 - (Interpreted)
3. Constitution of Kenya, 2010 article 70(a)- (Interpreted)

Instruments

1. International Covenant on Civil and Political Rights (ICCPR), 1966
   article 26
2. Universal Declaration of Human Rights (UDHR), 1948
   articles 7, 25

RULING

September 29, 2005, the following ruling was delivered.

1. The applicant, MW, gave birth to JN (the child) on 27.8.2002 in Kakamega Provincial General Hospital. She obtained a certificate of birth on 27.4.2004 in which she indicated the child's father as KC (the respondent). In August 2004, the applicant filed in the Children's Court at Kakamega Children's Case No 8 of 2004 against the respondent seeking from the respondent orders for custody and maintenance of the child. The respondent denied paternity. That suit is still pending.

2. The applicant then moved to this court and on 05.11.2004 filed an application against the respondent premised on sections 6 and 22 of the *Children Act 2001* in which she sought an order "that the respondent be ordered to attend a DNA test". The application was based on the grounds, inter alia, that the respondent had denied the child's paternity in Children's Case No 8 of2004 and that the respondent had cohabited with the applicant after which the respondent chased her away but not before he had made her pregnant. In addition, the applicant advanced the ground that the child had a right to be cared for by both his parents and the DNA test was necessary to confirm whether or not the respondent was the father of the child.

3. In the affidavit sworn on 1.11.2004 by the applicant in support of the application, the applicant averred that the child had a right to know his father and that that right was part of the human rights of every individual. The applicant was apprehensive that if the DNA test was not carried out, the child's right to be cared for by both his parents was going to be infringed. Mrs Osodo, learned counsel for the applicant, urged me to grant the application and give life to the provisions of the Act.

4. The respondent filed grounds of opposition in objecting to the application and submitted that the court lacked jurisdiction, that the application infringed on the respondent's rights, and that the application was incompetent and misconceived. Mr Fwaya, learned counsel for the respondent,

contended that the applicant was not entitled to the order to compel the respondent to take the DNA test. He urged me to dismiss the application.

5. I must confess that this matter has caused me some anxiety. This is new ground. There appear to be complete paucity of case law. In the circumstances of this case, is the applicant entitled to the order sought?

6. A parent of a child is the mother or father of a child and includes any person liable by law to maintain a child or is entitled to his custody (see section 2 of the *Children Act 2001*. Amongst the rights of the child set out in part II of the Act is the child's right to live with and be cared for by his parents (see s 6 [1] of the Act). Section 22(1) of the Act which is couched in terms similar to those of section 84 of the current *Constitution of Kenya* relating to enforcement of fundamental rights of the individual stipulates that subject to section 22(2) of the Act, 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".

7. S.22 (2) of the *Act* stipulates -

> The High court shall hear and determine an application made by a person in pursuance to subsection (1) and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 4 to 19 (inclusive).

8. S.22 (3) of the *Act* stipulates -

> The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it or under this section including rules with respect to the time within which applications may be brought and references shall be made to the High court.

9. To my mind, so as to succeed in securing the order sought, the applicant must show firstly that there is sufficient cause for seeking the order by showing that in the circumstances of the case there is a likelihood that the respondent could be the father of the child and secondly that the respondent's refusal to submit to DNA test has violated the child's right to know his father and thirdly that the respondent's refusal to take the DNA test is unreasonable because it has deprived the child of the possible enjoyment of the rights and benefits enshrined in sections 4 to 19 of part II of the Act and fourthly that the court has jurisdiction under the Act to compel the respondent to take the DNA test.

10. The nomenclature "the family" in section 4(1) of the *Act* refers to and includes the parents of the child. Section 4(2) of the Act requires courts to ensure that the best interest of the child is treated as a primary consideration and that such interest is the first and paramount consideration under section 4(3) of the Act to the extent that this is consistent with adopting a cause of action calculated to -

> 4 (3) - (a) safeguard and promote the rights and welfare of the child:
>
> (b) conserve and promote the welfare of the child:
>
> (c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.

11. 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.

12. 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 provisions 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.

13. Apart from the international instruments to which Kenya has subscribed, s 70 (a) of the current *Constitution of Kenya* affords the child "the protection of the law." Is it a valueless constitutional provision? I do not think so. Section 22(2) of the *Act* vests jurisdiction in this court to make such orders, issue such writs, and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 4 to 19 of the Act. To my mind this court has jurisdiction under section 22 of the *Act* to issue orders to compel determination of the child's paternity by DNA. This is a matter that falls within the purview of this court's jurisdiction. To ascribe a contrary interpretation would be to render meaningless both the protection of the child under s 70 of the *Constitution* and the rights of the child enshrined in the Act and in the articles of the International Covenants to which Kenya is privy. I refuse to render such rights a dream pipe. Law in my view must not be interpreted in a manner that would render it meaningless or scandalous. It must be interpreted to give meaning to the intention of the Legislature. The Act and the articles in the aforesaid Covenants all show that both in content and spirit the paramount intention was to ensure that the best interest of the child whether born in wedlock or out of wedlock was safeguarded.

14. In the present case, the respondent was in "a come we stay relationship" during which the applicant allegedly made her pregnant. In the circumstances, there is a likelihood that the respondent could be the father of the child. Having had a relationship with the applicant, albeit for a short span of time during which the child was conceived, it is unreasonable for the respondent to turn his back on the child and escew his parental responsibility merely because he was born out of wedlock and there is no DNA test to prove that he is the father. The child is entitled to know if the respondent is the father and his refusal to take a DNA test is not only unreasonable but has also denied the child the possible enjoyment of the rights under the Act. It would not be unreasonable in the circumstances to infer that perhaps the refusal by the respondent to submit to DNA test is borne out of fear on his part that he could be the father of the child. It is my view that sufficient cause has been shown why the respondent should be compelled to under go a DNA test so as to determine the paternity of the child.

15. But this interpretation can be open to abuse. Therefore, in exercising its discretionary power to grant or not to grant this relief, the court will not lose sight of the fact that there is a real likelihood of abuse and must therefore guard against it, but always ensuring that the imperative need to see that the best interest of the child is secured is not relegated.

16. In determining whether to grant the order sought, the court ought to ensure as a *sine quo non* firstly that the application under section 22 of the Act is made in good faith, secondly that there are good grounds for making it, that is to say, sufficient cause is shown, thirdly that the application is not actuated by malice or designed to economically exploit or embarrass or is otherwise is an abuse of the process of the court.

17. In the present application I am satisfied that these parameters have been met by the applicant. In the circumstances, the mother of the child is entitled to the order she seeks so as to ensure that if the result of the DNA test is positive, the child will be accorded the protection of the law by ensuring that the provisions of sections 4 to 19 of part II of the *Children Act 2001* are not a mirage and that the child can partake of the benefits to which he is entitled.

18. I allow the application and grant prayer (1) thereof. The costs of the DNA test shall be borne by both the respondent and the child's mother equally. An order for the costs of this application shall be made after the outcome of the DNA test.

DATED AT KAKAMEGA THIS 29TH DAY OF SEPTEMBER, 2005.

G. B. M. KARIUKI

JUDGE