JAK v SWW (Constitutional Petition E532 of 2024) [2025] KEHC 5232 (KLR) (Constitutional and Human Rights) (8 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5232 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E532 OF 2024

AB MWAMUYE, J

APRIL 8, 2025

IN THE MATTER OF ARTICLES 10,22,23,27,28,45,53,159,258 & 259 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 27,28 & 45 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTIONS 8,9,11,17,32,35 & 111 OF THE CHILDREN ACT 2022

BETWEEN

JAK .... PETITIONER

AND

SWW .... RESPONDENT

JUDGMENT

1. The Petitioner approached this Court vide Petition dated 20th September, 2024 seeking the following orders:

    a. This Honourable Court be pleased to issue a declaration that the Respondent be ordered to take or undergo DNA test in an independent facility under strict supervision of this Honourable Court.

    b. A declaration that the Respondent's conduct of denying him as his own biological son has violated the provisions of Article 45 of the *Constitution* of Kenya 2010, the provision that guarantees everyone to have a family.

c. A declaration that the continuous conduct of the Respondent denying the paternity test has violated the right of the Petitioner under Article 53 of the *Constitution*, the provision of which allows every child to be given parental care between the parents whether married or not.

d. A declaration that the conduct of the Respondent towards the Petitioner has adversely violated the right of the Petitioner provided under Article 28 of the *Constitution* which guarantees the inherent dignity of every person.

e. A declaration that the Respondent's conduct has violated the right of the Petitioner by subjecting him to discrimination and ridicule by members of the society, this conduct has violated the provision of Article 27 of the *Constitution* that guarantees the principle of non-discrimination.

f. Costs of the Petition to be borne by the Respondent.

g. Such other orders that this Honourable Court may deem fit.

2. In support of the Petition, the Petitioner filed a Supporting Affidavit sworn by himself on 20th September 2024 where the Petitioner outlined the grounds for the Petition. In the Affidavit, the Petitioner avers that he was born in 1975 and is identified as the biological son of SWW, the Respondent herein and MAW from their relationship in the past.

3. He further avers that the Respondent has been an absentee parent from the time of his birth to date despite his mother's diligent efforts to communicate with him.

4. The Petitioner states that a DNA test was conducted from his uncle who is the biological brother to the Respondent and the result established a confirmed relation of 99.95% however despite the conclusive test, the Respondent has denied acknowledging the Petitioner as his son.

5. The Petitioner further indicates that no prejudice or harm will be suffered by the Respondent if the orders sought are granted since every person has a right to know their biological parents.

6. The Petitioners equally attached an affidavit for confirmation of DNA report sworn by WW on 20th September 2024 to which he states that he is the uncle of the Petitioner herein and the brother to the Respondent, who is the biological father of the Petitioner.

7. He further avers that a paternity test was conducted on 3rd December, 2023 using his sample at the Northwest (DNA Testing LLC Centre) in Seattle City, United States of America and the DNA test yielded a 99.95% relation with the Petitioner.

8. The Respondent on the other hand filed a Replying Affidavit sworn by himself on 18th October 2024 in response to the Petition to which he averred, that he has never known or heard of the Petitioner or his mother prior to July 2024 and is therefore not the biological father of the Petitioner herein.

9. According to the Respondent, he received a letter dated 23rd January 2023 from one MAW informing him that he has a son who was born in the year 1975 and is currently residing in the United States of America. This is 50 years after the child was born.

10. He states that according to the Petitioner's birth certificate number 02XXX37 registered on 16th January 1975, four days after the Petitioner was born on 12th January, 1975 the Petitioner's father is indicated as ESW and the mother as MAWM details that were supplied voluntarily by the Petitioner's parents at his birth.

11. The Respondent contends that the alleged DNA report allegedly taken between the Petitioner and one WW should not form the basis of the reliefs sought since it was taken outside this court's jurisdiction hence its authenticity is not guaranteed, the said WW is his step brother and not his biological brother as alleged and finally if the DNA report is authentic, then WW is the Petitioner's biological father since a DNA report is strictly personal and binding to the persons tested.

12. The Respondent further contends that the Petition has failed to meet the set threshold for a constitutional petition since he has failed to demonstrate by adducing evidence what and how his rights have been violated.

13. The Respondent went further to file a Notice of Motion application seeking that the Petitioner's Petition and Notice of Motion application dated 20th September 2024 be struck out based on the grounds that the Supporting Affidavits of JAK and WW clearly state that the deponents reside and work in the United States of America however, the Affidavits indicate that they were sworn at Nairobi on 20th September 2024 before one Vannessa Esther Okwiri, Commissioner for Oaths.

14. The Respondent states that vide email sent on 15th October 2024 to the Petitioner herein, Ms. Okwiri Advocate confirms that whereas the deponents were in the United States of America, she commissioned the affidavits in Nairobi and the interaction was done virtually.

15. He further states that the face of the said affidavits state that they were sworn before the said commissioner in Nairobi which was not the case making the filed documents non-affidavits. In addition, they state that it is a mandatory requirement by law that any affidavits taken in countries require proof by affidavit or otherwise to have been taken by a Notary Public in the country of domicile for them to be admissible in Kenya. They aver that since the United States is not Commonwealth and the subject affidavits are not notarized, the affidavits should be struck out and expunged from court's record.

16. The Respondent made reference to Order 50 Rules 1-4 and stated that the rules are couched in mandatory language thus without valid and proper supporting affidavits to the Petition, the Petition and Notice of Motion cannot stand on its own and must fall ex debito justitae. The Application was accompanied by the Supporting Affidavit sworn by SWW on 6th November 2024 to which he reiterated the grounds outlined above.

17. The Petitioner filed a Replying Affidavit sworn by JAK on 29th October 2024 in response to the Respondent's Notice of Motion application to which he averred that he has no malice towards the Respondent but is only seeking justice since he has a right under the law to know who his biological parents are.

18. The Petitioner stated that the Respondent knew his mother as they had cohabited until he ran away in January 11th 1975 and the Respondent's brother took the DNA test because it was the honourable thing to do.

19. He indicated that his birth certificate was issued on 30th July 2018 and the said ESW is his foster father and is well known to the Respondent. Further, that the DNA report and the emails by Sarah Kelsey, a Washington State certified phlebotomist and DNA testing specialist, concludes that the match for the DNA is for an uncle/nephew relationship.

20. The Respondent filed a further Affidavit sworn by SWW on 3rd December 2024 and reiterated the contents of his Replying affidavit dated 18th October 2024.

21. The Petition was canvassed by way of written submissions. In compliance, both parties filed and served their submissions.

The Petitioner's Submissions.

22. The Petitioner filed his written submissions dated 20th and 21st November, 2024. In his submissions dated 20th November 2024, he submitted on one issue being whether the DNA test is to be conducted to conform the paternity test. He argued that the Respondent has gravely violated his rights by denying him an opportunity to be raised in a family unit as guaranteed under Article 45 of the *Constitution*.

23. He submitted that the conduct of the Respondent, denying him as his biological son amounts to discrimination and the DNA test will bring to rest the question of whether the Respondent is the biological father of the Petitioner and the same will be able to commence the healing process.

24. The Petitioner relied on the cases of S.W.M vs G.M.K [2012]eKLR, R.M.K vs A.K.G & Another [2013] eKLR and R.K vs H.J.K & Another[2013] eKLR which established that for an order of DNA to be issued, a party ought to first clearly establish that his or her constitutional rights have been violated by the person to be ordered to provide DNA.

25. Reliance was equally placed on the case of MW vs KC (2005) eKLR which identified the conditions to be satisfied before an order can be made to compel a putative father to undergo a DNA test as follows: that there is a likelihood that the respondent could be the father of the child; that the respondent's refusal to submit to the DNA test has violated the child's right to know his father; that the respondent's refusal to take a DNA test is unreasonable because it deprives the child of the possible enjoyment of the right and benefits of enshrined in sections 4 to 19 of Part II of the *Children Act* and that the court has jurisdiction to order of the test."

26. He submitted that the Respondent will suffer no harm once this Court allows the DNA test to be conducted. Further, he submitted that under Article 23 of the *Constitution* this Court has been granted power to uphold and enforce the Bill of Rights which includes the power to hear applications for redress when a right or fundamental freedom is denied, violated or threatened and should grant reliefs such as a declaration of rights, injunction and compensation orders.

27. According to the Petitioner, his rights to dignity under Article 28 and to a family under Article 45 have been violated by the Respondent who has made it difficult and impossible for the Petitioner to relate and identify with the Respondent as his father, therefore it is only the court that has the judicial power to offer the remedy. Equally, he submitted that all children deserve and are entitled to protection and rights under Article 53 of the *Constitution* and denying him the opportunity to be with his father amounts to discrimination and in total violation of Article 27 of the *Constitution*.

28. In his submissions dated 21st November 2024, the Petitioner addressed the issue of whether the Petition is to be struck out. He stated that the Respondent's application seeking to strike out the application is an afterthought and the same is done in bad faith since the Petitioner has rectified the supporting Affidavit in question and the same is properly notarized and duly filed in court.

29. He argued that Article 159(2) provides that justice should be administered without undue regard to procedural technicalities therefore, since the Affidavits in question were regularized and the same are now properly placed before this Honourable Court. He also argued the grounds brought forth in the application are vague, internally inconsistent, unsubstantiated, legally unfounded and does not want grant of orders sought since the Respondent has failed and/ or refused to address the real issue before this court and has decided to engage in side shows.

30. The Petitioner submitted that it is trite law that a suit can only be struck out in the clearest of the cases where the suit looks hopeless and no life can be breathed into it. Reliance was placed in the case of Jubilee Insurance Company Limited v Grace Anyona Mbinda [2016] eKLR , the Court of Appeal case of Blue Shield Insurance Company Ltd vs Joseph Mboya Oguttu [2009] eKLR , the case of Crescent Construction Co. Ltd vs Delphis Bank Ltd (2007) eKLR and finally the case of D.T. Dobie & Company (Kenya) vs Muchina (1982) KLR 1. He finally concluded that it in the interest of justice that the orders sought through the Respondent's Application dated 6th November 2024 should be dismissed costs to the Respondents to avoid a further miscarriage of justice with.

The Respondent's Submissions

31. The Respondent, through his counsel, filed written submissions dated 5th December 2024 to canvass both his Notice of Motion application dated 6th November 2024 and the Petitioner's Petition dated 20th September, 2024.

32. In his Notice of Motion Application dated 6th November 2024, the Respondent submitted that the application seeks to strike out the Petitioner's Petition and Notice of Motion application under Order 2 Rule 151(b), (c) and (d). He reiterated contents of his supporting affidavit on the grounds sworn on 20th September 2024 on the validity of the Petitioner's affidavits filed before this Court.

33. The Respondent argues that it is settled law that you cannot amend, review or cure an otherwise bad or invalid affidavit. They cited the case of ELC No. 44 o 2018 [2022] eKLR , the case of Salim Alhamed Ali & another vs Emag Ag Nairobi (Milimani) HCC No. 1806 of 2000 (OS)[2000] LLR 1552 (CCK) and the case of HCC NO. 996 of 2000, Pastificio Lucio Garofalo Spa vs Security & Fire Equipment Company & another in support of the same.

34. According to the Respondent, the Petition is supported by the impugned affidavits of John Arthuer Kuria and WW as Order 50 Rules 1 & 4 of the Civil Procedure Rules make it mandatory for an application by motion to be accompanied by a supporting affidavit however since he has demonstrated that the two affidavits are non-affidavits and invalid, they urge this Honourable Court to strike them out. For this, reliance was placed on the cases of HCCC No. 86 of 2002[2005] eKLR and the case of HCCC NO.539 OF 2024, National Bank of Kenya Limited vs Muriu Mungai & Company Advocates [2009] eKLR

35. On the Petition dated 20th September 2024, the Respondent submitted that the 1st prayer in the petition seeks an order to compel the Respondent to take a DNA test but does not disclose to whom the DNA test will be compared neither is the purpose of the DNA disclosed to court. The other prayers (b) to (e) are all presumptive that the Respondent is the father which fact is strongly disputed by the Respondent and no evidence has been tendered to support the said assumption.

36. The Respondent analyzed one issue for determination being, whether the Petitioner has sufficiently demonstrated any breach of his constitutional right which makes this case special, clear and straight forward to warrant the grant of the orders sought. Respondent contends that the Petitioner is moving this court after 49 years of having had no interaction and/or communication with the Respondent and he is not a child.

37. The Respondent avers that the allegations by the Petitioner that he violated his rights by denying the Petitioner as his own biological son thereby denying him a right to family lacks factual or legal basis as is evidenced in the Petitioner's own evidence that he has a father in the name of ESW. Also, the Respondent contends that the Petitioner cannot allege breach of constitutional rights reserved for children yet he is 49 years old. In support, he relied on the cases of High Court Petition No. 27 of

2019 (Nakuru)[2020] eKLR , High Court Petition No. 18 of 2013 [Nairobi] , Anerita Kaimi Njeru vs Republic (1979)eKLR and the Court of Appeal case in Civil Appeal No. 290 of 2012 (2013) eKLR . From the foregoing, the Respondent urged the court to dismiss the Petition with costs as the same is misconceived, lacks merit in fact and law and is anchored on non-existent hollow and unsubstantiated grounds.

Analysis and Issues for Determination

38. Having considered the Petition, the Notice of Motion applications from both the Petitioner and Respondent, the responses thereto both in support and in opposition, and the oral and written submissions by the parties, the Court has identified the following two (2) issues for determination namely:

    a. Whether the Petition and the accompanying Notice of Motion is fatally incompetent and defective

    b. Whether the Petitioner has established a prima facie case to warrant the order for DNA testing

39. On the first issue, the Respondent has objected to the Petition on the grounds that the Supporting Affidavits of JAK and WW clearly state that the deponents reside and work in the United States of America however, the Affidavits indicate that they were sworn at Nairobi on 20th September 2024 before one Vannessa Esther Okwiri, Commissioner for Oaths.

40. The Respondent states that vide email sent on 15th October 2024 to the Petitioner herein, Ms. Okwiri Advocate confirms that whereas the deponents were in the United States of America, she commissioned the affidavits in Nairobi and the interaction was done virtually.

41. The Respondent further states that the face of the said affidavits state that they were sworn before the said commissioner in Nairobi which was not the case making the filed documents non-affidavits. In addition, they state that it is a mandatory requirement by law that any affidavits taken in other countries require proof by affidavit or otherwise to have been taken by a Notary Public in the country of domicile for them to be admissible in Kenya. They aver that since the United States is not Commonwealth and the subject affidavits are not notarized, the affidavits should be struck out and expunged from court's record.

42. The Petitioner's Supporting Affidavit attached to the Notice of Motion application and Petition both dated 20th September 2024 is said to be commissioned by one Vanessa Esther Okwiri Advocate and Commissioner for oaths in Nairobi yet the deponents reside and work for gain in the United States of America. The affidavit was obviously drawn in Nairobi and signed by the Petitioner who sent it back to Nairobi to with instructions to have the same commissioned without his presence. The question therefore is what is the law relating to commissioning of affidavits and what is the significance of commissioning of affidavits.

43. The Black's Law Dictionary defines oath as follows:

    > " Oath is a solemn declaration accompanied by a swearing to God or a revered person or thing that one's statement is true or that one will be bound to a promise...The legal effect of an oath is to subject the person to penalties for perjury if the testimony is false."

44. Bearing the definition of what an oath is, the question I must answer is whether the Petitioner took an oath before the Commissioner of Oaths. Looking at his affidavit annexed to the petition, and which attached the annextures relied upon by the Petitioner, was sworn at Nairobi before Vanessa Esther Okwiri Advocate while the deponents were in the United States of America.

45. Where an affidavit has been sworn in other countries other than common-wealth countries, the same ought to be notarized and accompanied by a certificate of Notarization showing it was sworn before a notary. In the case of Raccolta, Malnar & Greiner v Royal Trading Company Limited [2014] eKLR the court held as follows:

> " Affidavits taken in Countries other than commonwealth countries require proof by affidavit or otherwise to have been taken by a notary public, of the stamp and seal or the official position of the person taking the affidavit as opposed to affidavits taken in commonwealth countries. Otherwise, such affidavit is defective and struck out.

46. Similarly, in the case of Peeraj General Trading & Contracting Company Limited, Kenya & Another v Mumias Sugar Company Limited (2016) eKLR the court held thus:

> " In England by virtue of Order 41 Rule 12 of the Rules of the Supreme Court, affidavits taken in commonwealth countries are admissible in evidence without proof of the stamp, seal or the official position of the person taking the affidavit. The same position obtains in Kenya. As there is no such presumption in favour of documents made outside the commonwealth, it follows that the affidavit in the instant case, which was taken in Dubai, in the United Arab Emirates, would have to be proved by affidavit or otherwise to have been taken by a Notary Public in UAE and that the signature and seal of attestation affixed thereto was that of such Notary Public."

47. The Supporting Affidavit fails to conform to the requirements of Section 5 of the *Oaths and Statutory Declarations Act* Cap 15 Laws of Kenya which provides that every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and at what date the oath or affidavit is taken or made.

48. Those are no affidavits at all as they are not made under oath. In addition, the documents annexed to those affidavits are no annexture at all. The same are hereby struck out. It is my view that this is a defect that cannot be remedied by Article 159 (2) (d) of the *Constitution*. This is because the defects affect the veracity and probative value of the averments which go to the substance of the affidavit.

49. Article 159 of the *Constitution* was never intended to override the clear rules of Evidence as is contained under Article 88 of the *Evidence Act*, Cap 80 of the Laws of Kenya which dictates what documents are admissible in evidence in the Kenyan Courts as it may be in the English Courts of Justice.

50. Having established that under the Rules of the England Supreme Court, affidavits taken in commonwealth countries are admissible in evidence without proof of the stamp, seal or the official position of the person taking the affidavit and given that there is no such presumption in favour of documents made outside the commonwealth, the same position obtains in Kenya hence a document sworn and signed outside the commonwealth cannot be elevated to be admissible in evidence by invoking the provisions of Article 159 of the *Constitution* which was not intended to do away with the express provisions of the law.

51. Consequently, it is my considered view that the Affidavits sworn by the Petitioner and one WW had to proven by a Certificate of Notarization or otherwise so as to be taken to have been sworn before a Notary Public and that the signature and seal of attestation affixed thereto was that of such Notary Public. Without such proof, the documents were found to be unauthenticated and I proceed to strike then out of the record.

52. However, striking out of the affidavits does not invalidate the Petition as Rule 11 of the Mutunga Rules (the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013) which provide that it is not mandatory for the Petitioner to file any affidavit in support of the Petition and that if the Petitioner wishes to rely on any documents or evidence to support his petition, then it is expected that he annexes those documents either to the petition itself directly to those documents to an affidavit duly sworn. Having struck out the affidavit in support and the annextures attached, I will proceed to determine the Petition.

53. On the second issue, the issue of paternity disputes in our jurisprudence is not a well- trodden path when it comes to non-consenting adults. There is no express legislative framework which specifically regulates this position in civil cases and the few judicial pronouncements do not appear unanimous in approach or principle. Whereas in relation to children, the courts have occasionally been quick to act in the child's best interest and ordered DNA testing, with regard to non-consenting adults the jurisdiction has been left hazy.

54. Article 53 (1) (e) of the *Constitution* provides that every child has the right 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. This court has on occasion been forced to strike a balance between the right of litigant to privacy and not to be subjected to DNA testing against his will and the right of a child to parental care and protection.

55. In the case of S.W.M vs G.M.K [2012] eKLR the court declined to order DNA testing as such an order according to the court, would have resulted in the violation of the non-consenting adult's right to bodily integrity and privacy. There was no child involved and the court stated as follows:

> " Ordering the respondent to provide DNA for whatever reason is an intrusion of his right to bodily security and integrity and also the right to privacy which rights are protected under the Bill of Rights. The petitioner bears the burden of demonstrating to the court the right she seeks to assert or vindicate and which the court will consider as overriding the respondent's rights."

56. Similarly in the case of R.K vs J.K & Another [2016] eKLR the court held that:

> " (77) ...a DNA test will not be ordered unless there are clear circumstances that justify the making of such an order. It calls for a balance to be made in the circumstances of each case between the needs of a child and the emphasis is on "child", and the rights of the alleged father to privacy, bodily security and integrity. If the facts and circumstances of the case lead the court to believe that a prima facie case has been made out that the alleged father of the child in respect of whom orders of DNA are sought, as well as the case in MW vs KC [2005] eKLR relied on by the petitioner, where the mother of the child and the alleged father had been cohabiting, then the constitutional imperative in Article 53 demand that the best interest of the child should be the paramount consideration, and would override the right to privacy of the putative father.
>
> (78) taking the above factors into consideration in the present case, I am constrained to find that a case has not been made out by the petitioner that would justify the grant of the orders that she seeks. As noted before, she is an adult of 35, so the constitutional dictates of Article 53 do not apply with respect to her. Secondly, she has not, on a prima facie basis established any

biological relations with the 1st Respondent to warrant the grant of the orders for DNA testing that she seeks against him."

57. It is clear that the court has an inherent jurisdiction to order or not to order DNA testing both where a child is involved and where there is no child but a non-consenting adult. The court must however be mindful to protect the bodily security and integrity as well as the privacy of individuals to be subjected to such tests. The Petitioner must establish a nexus between him and the Respondent in relation to the alleged paternity as well as the alleged violated rights to persuade the court to grant an order of DNA testing.

58. There is no evidence placed before me that the Petitioner and the Respondent had any relationship. There is also no evidence placed before me that the Petitioner's mother and the Respondent had any relations. The Respondent has contested all the facts in this Petition as he depones that he has never been approached by the Petitioner in any way at all to introduce himself as his biological son.

59. Even in the year 2018, when the Petitioner alleges that the name of ESW was entered in his certificate of birth as his father, he has not demonstrated that the Respondent was approached and he refused. No explanation has been given as to why ESW's name had to be entered in the Petitioner's certificate of birth as opposed to the name of the Respondent. The Petitioner has equally not demonstrated the reason for the delay both by himself and his mother to approach the courts for an order of DNA test against the Respondent whom they allege is his biological father till almost 50 years later. I am therefore guided by the authorities above that the Petitioner being an adult of 49 years, Article 53 of the *Constitution* does not apply to him and he is no longer a child.

60. I am also guided by the Supreme Court of India case of Bhabani Prasad Jena vs Converner Sec Orissa, Civil Appeal Nos 6222-6223 of 2010 which held as follows with regards to forced DNA testing:

> " The court must reach the truth, the Court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed. DNA in a manner relating to paternity of a child should not be directed by court as a matter of course or in a routine manner, whenever such request is made. The court has to consider diverse aspects...pros and cons of such order and the test of "eminent need" whether it is not possible for the court to reach the truth without the use of such test...it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have a roving inquiry, there must be strong prima facie case and courts must carefully examine as to what would be the consequence of ordering the blood test...

61. An order compelling a person to supply samples for a DNA test is a state intrusion on that person's right to privacy and to autonomy. Such an intrusion can only be justified where there is a prima facie case established and it is just and proper that privacy and autonomy be subordinated in favour of the Applicant's stated objectives. The Petitioner has not laid the proper basis, and thus the Petition cannot succeed.

62. Consequently, I find that the Petitioner has not established a prima facie case to warrant on order for DNA samples from the Respondent and the same is hereby denied.

63. In light of the foregoing, this Court therefore makes the following orders:

    a. The Petition is hereby dismissed

    b. Each party to bear their own costs

It is so ordered. File closed accordingly.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 8TH DAY OF APRIL, 2025.

BAHATI MWAMUYE

JUDGE

In the presence of: -

Counsel for the Petitioner – In Person

Counsel for the Respondent – Mr. Mureithi h/b Mr. Thangei

Court Assistant – Mr. Jared Agara