



**BN & 3 others (Suing through their mother and next friend VMM) v Otachi
(Civil Appeal 40 of 2021) [2024] KEHC 5996 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5996 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 40 OF 2021
PN GICHOHI, J
MAY 23, 2024**

BETWEEN

**BN, SB, JHM EK & EK (SUING THROUGH THEIR MOTHER AND NEXT
FRIEND VMM) 1ST APPELLANT
SB 2ND APPELLANT
JHM 3RD APPELLANT
EK 4TH APPELLANT
SUING THROUGH THEIR MOTHER AND NEXT FRIEND VMM**

AND

TIMOTHY OTACHI RESPONDENT

(Being an Appeal from the ruling of Senior Resident Magistrate Hon. S.K. Onjoro delivered on 26/3/2021 in Kisii Children’s Case No. 47 of 2010 between Baraka Nene, Sylvia Bitutu, Junior Hillary Monda & Emmanuel Kelly(Suing through their mother and next friend) Vennih Moraa Munga vs Timothy Otach)

JUDGMENT

1. This appeal arises from the Ruling delivered on 26/3/2021 in Kisii Children’s Case No. 47 of 2010 where trial court made the following orders:-
 - a. The children herein who are still minors be subjected to a DNA test as earlier ordered by court. The cost of the DNA be catered for by the applicant.
 - b. The defendant to continue making monthly payments of Kshs. 5,000.00 pending the outcome of DNA results.



- c. Mention on 12.4.2021 to confirm compliance.
2. Being aggrieved, the Appellant filed this through the firm of Asati , Anyona and Company Advocates and on the following grounds:-
 1. That the learned trial magistrate erred in law and fact in directing the minors for a D.N.A Test without taking into account that the consent order that was done between the parties compromised the issue of DNA Test.
 2. That the learned trial magistrate erred in law and fact ordering the respondent to pay Kshs.5000/= without minding that the respondent has arrears of unpaid maintenance since 2013.
 3. That the learned trial magistrate erred in law and fact when he did not give any directions as to the notice to show cause to the satisfaction of the decree.
 4. That the learned trial magistrate erred in law and fact in ignoring the welfare of the children who are still dependants and in the hands of the appellant.
 3. The Appellant therefore prayed that “the court be pleased to allow the appeal and set aside the ruling of the lower court dated 26/3/20219 and substitute it with orders that the appeal be allowed and the lower court orders be quashed.”
 4. In the submission filed on behalf of the appellant reliance was placed on the fact that the matter was concluded by consent of the parties and decree executed. That the decree was conclusive and therefore the trial court misdirected itself when it ordered for the DNA test.
 5. Further, it was submitted that at once a decree was issued the whole suit was compromised and therefore any other order obtained before the decree cannot supersede it unless an order is issued to review the decree and/or order and vary the same.
 6. It was further submitted that the children are suffering at the expense of this case dragging in court as the parents are fighting at the expense of the children.
 7. On his part, the Respondent filed his submissions on 25/2022 through the firm of Samuel N. Mainga Advocates and placed reliance on the case of LNW vs AG & 3 others (2016) eKLR where it was held that the significance of a minor knowing his/her biological parents is part and parcel of what is called “best interest of a child”. Further reliance was placed in the case of ZW vs MGW (2014) eKLR where the court observed that the most effective and modern way of determining paternity and if thus one should bear responsibility of maintaining the child is to subject the child to a DNA Test.
 8. The Respondent further submitted that he is willing to pay the amount quoted in the notice to show cause subject to the minors being subjected to a paternity test. That should the outcome of the DNA test come out positive then the he is willing to pay maintenance arrears but should the test come out negative then he should not be subjected to make such payment.
 9. The Respondent therefore urged this Court to uphold the trial court’s ruling and subject the children to a DNA Test for determination of their paternity.

Determination

10. This Court has perused the lower court record, the findings of the learned trial magistrate thereon and the submissions by the parties herein. The main issue for determination is whether trial magistrate



- erred in making the order that the children be subjected to a DNA Test when the Respondent had compromised the issue by entering into a consent with the Appellant on 16/10/2013.
11. While dealing with any issue touching on a child, it is imperative to appreciate the constitutional and legal provisions dealing with the rights of children. Indeed, Article 53(1) (e) and (2) of the Constitution provides that:-
- (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.
 - (2) A child's best interests are of paramount importance in every matter concerning the child.
12. Further, section 4 (2)(3) of the Children's Act provides that:
- (2). In all actions concerning children whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.
 - (3) All judicial and administrative institutions and all persons acting in the name of these institutions, where they are exercising any powers conferred by this act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to –
 - i. Safeguard and promote the rights and welfare of the child.
 - ii. Conserve and promote the welfare of the child.
13. Further and in regard to the welfare of a child, the Court in PC v JMZ [2020] eKLR held that:
- “In the earliest century this concept did not escape the mind of jurists as exemplified by the decision of the court in Re McGrath {1893} 1Ch Lindley 143 stated:
- “The dominant matter for the consideration of the court is the welfare of the child. But the welfare of the child is not measured by money only or physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical wellbeing, nor can the ties of affection be disregarded.”
14. In this matter, it is noted that the subject of the impugned ruling was an application dated 20/11/2020 which was seeking that the minors be subjected to a DNA test and that the decree and consent dated 16/10/2013 be reviewed and or set aside .
15. It is also noted that vide a ruling dated 29/10/2010, the trial court had ordered that a DNA test be conducted but it was not done. It is therefore clear that the dispute in regard to of paternity did not arise in 2013. In this Court's view, the issue of paternity should not be wished away or taken or taken causally.
16. If a mother is so certain that the children whose interest she is defending, including seeking maintenance, were sired by the man from who she claims such support and maintenance, this Court sees no reason for any resistance from her. The issue is not about her interests. It would be in the best interest of the children to know their biological father.



17. This Court is persuaded by the decision in *FKW (suing as the mother and next friend of GDW (Minor) vs. DMM [2015] eKLR* where Ngaah J. held:-

“What all these decisions point to is that where it is in the best interests of the child that a paternity test should be undertaken; where there is no other means of determining the father of a child other than by means of a paternity test and therefore where such a test is necessary in the circumstances and, where, in any event, the applicant has made out a prima facie case for such a test, then a court of law will ordinarily make an order for such a test.

Looking at the applicant’s case from this perspective, there is no doubt that it is in the best interests of the subject child that the DNA test should be taken. It is the child’s constitutional right and he is better of growing up with the knowledge of who his parents are. As noted earlier there is no other way of determining who the father of the subject child is apart from conducting a DNA test and therefore this test is necessary in the circumstances of this case.”

18. In the Ruling, the trial court was also alive to dispute and the earlier orders given for paternity test. In the circumstances herein, this Court finds no err in law or fact when the trial magistrate ordered for a DNA test in the ruling dated 26/03/2021.

19. In conclusion, this Court makes the following orders:-

1. The Appellant’s appeal is dismissed for lack of merit.
2. The trial court’s orders made on 26/03/2021 be are hereby upheld.
3. Due to the nature of this matter, each party to bear his own costs.
4. The lower court file being Kisii Children’s Court Case No. 47 of 2010 be placed before the Chief Magistrate Kisii to proceed before the trial magistrate, if still in the Station, or before any other magistrate of competent jurisdiction.

Dated, signed and delivered at Kisii (virtual) this 23rd day of May, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of;

Mr. Anyona for the Appellant

Mr. Mainga for the Respondent

Ruto /Aphline - Court Assistant

