



FOA v RAO & 2 others (Miscellaneous Civil Application E195 of 2023) [2024] KEHC 6844 (KLR) (10 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6844 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E195 OF 2023**

**RE ABURILI, J
JUNE 10, 2024**

BETWEEN

FOA APPLICANT

AND

RAO 1ST RESPONDENT

HON ATTORNEY GENERAL 2ND RESPONDENT

REGISTRAR OF BIRTHS AND DEATHS DEPARTMENT OF CIVIL

REGISTRATION IN KISUMU WEST 3RD RESPONDENT

A child has the right to correction or deletion of untrue information in their birth certificate regarding the father's identity

The applicant sought orders that his name, as the father, be struck out from the birth certificate belonging to a child and that the child be issued with another birth certificate which did not bear his name. The court held that article 35 of the Constitution guaranteed every person the right to the correction or deletion of untrue or misleading information that affected that person. The child in the instant case equally had the right to the correction or deletion of untrue or misleading information that affected the child as stipulated in article 35(2). The information contained in the child's birth certificate dated April 27, 2023 on the father of the child was untrue and misleading.

Reported by Kakai Toili

Constitutional Law – fundamental rights and freedoms – children rights – children rights vis-a-vis parental rights - paternal rights - claim that the name indicated in a child's birth certificate as his biological father was not the actual father - whether children had the right to the correction or deletion of untrue or misleading information contained in their birth certificate as to the identity of their father - whether a person indicated in a child's birth certificate as the biological father was entitled to have his name deleted upon discovering that he was not the child's father – Constitution of Kenya, article 35; Births and Deaths Registration Act (cap 149), sections 12 and 28.

Family Law - paternity - claim that the name indicated in a child's birth certificate as his biological father was not the actual father - whether a person indicated in a child's birth certificate as the biological father was entitled



to have his name deleted upon discovering that he was not the child's father – Constitution of Kenya, article 35; Births and Deaths Registration Act (cap 149) sections 12 and 28.

Brief facts

The applicant filed the instant application seeking orders that his name be struck out from the birth certificate belonging to a child and that the child be issued with another birth certificate which did not bear his name. The applicant deposed that he and the 1st respondent, the latter being the biological mother of the child, had a romantic relationship in 2014 and that during that period, the 1st respondent conceived and made the applicant believe that he was responsible for the pregnancy and that he was the father to the child.

The applicant further deposed that after the birth of the child, a birth certificate was processed which included the applicant's name as the child's father. The applicant averred that he privately took the child for DNA to confirm his paternity and that to his surprise, he received results showing that he was not the child's father hence the instant application.

Opposing the application, the 1st respondent deposed that herself and the applicant were workmates and during their work session, they got to know each other upon which an intimate relationship developed and the birth of the child whose paternity the applicant acknowledged. The applicant and the 1st respondent agreed to have a second DNA test at the Government Chemist Laboratory at Kisumu which results indicated that the applicant was not the child's father.

Issues

- i. Whether children had the right to the correction or deletion of untrue or misleading information contained in their birth certificate as to the identity of their father.
- ii. Whether a person indicated in a child's birth certificate as the biological father was entitled to have his name deleted upon discovering that he was not the child's father.

Held

1. The UN Convention on the Rights of the Child protected the economic, social, cultural, civil and political rights of children. Among the twelve rights of children, children had the right to be registered when they were born. The National Government must recognize a child's name and national identity and children must be informed of their identity. Further, children had the right to receive, access and transmit documents of their own identity. Official records should include their name, place and date of birth and family relations. The Convention further guaranteed that children, whenever possible, should know their parents and be looked after by them.
2. The child had a right to have a name and know his parents. The child bore no fault. The decision to give him the name of the applicant as his father was made by the applicant and the 1st respondent. The proceedings had nothing to do with child maintenance or child support, the instant court not being a children's court as defined under the Children's Act, 2022.
3. There was evidence adduced beyond reasonable doubt from the two DNA reports filed in the court that the applicant was not the biological father to the minor and he had no interest in the child having or using his name on the birth certificate which was only issued on April 27, 2023 despite the child being born on February 10, 2015.
4. Section 12 of the Births and Deaths Registration Act, Chapter 149 of Laws of Kenya provided for entry of the father's details in the register. Where wrong entries had been made into the register of births or deaths, section 28 of the Act provided for correction of such errors or omissions. Article 35 of the Constitution guaranteed every person the right to the correction or deletion of untrue or misleading information that affected that person. The child in the instant case equally had the right to the correction or deletion of untrue or misleading information that affected the child as stipulated in article 35(2).



5. The information contained in the child's birth certificate dated April 27, 2023 on the father of the child was untrue and misleading.

[Obiter] "The serious lessons learnt in this case are that mothers, please, your children have the right to know who their biological fathers are. Do not include the name of a person who is not the biological father of your child in the child's birth certificate without that person's express written consent. Do not lie, as far as paternity of your child is. We live in a world where one can no longer lie as to paternity of a child."**[Obiter]** "Under section 4 of the Children's Act, 2022, parents must put the best interests of the child first. In this sense, any decision made by either parent has to foster the rights and welfare of the child. It is also the right of every child to know his father. In the premises, mothers are advised, that unless in extreme circumstances of abuse and neglect, to help their children know their fathers.

This is because the psychological benefits of having a father present far outweigh the negative effects his absence will have on the child now and in the future."

Application allowed.

Orders

- i. *The application dated November 16, 2023 allowed to the extent that the name of the applicant contained in the child's birth certificate as the father of the child shall be deleted.*
- ii. *The child's birth certificate issued on April 27, 2023 was recalled.*
- iii. *The 2nd and 3rd respondents were directed to reissue to the child a fresh birth certificate, subject to the provisions of section 28(1) and (2) of the Births and Deaths Registration Act with or without the name of the child's biological father.*
- iv. *Each party to bear their own costs of the application.*

Citations

Cases

None referred to

Statutes

Kenya

1. Births and Deaths Registration Act (cap 149) sections 12, 28- (Interpreted)
2. Children Act (cap 141) section 4 - (Interpreted)
3. Constitution of Kenya articles 28, 35, 53(2) - (Interpreted)

Instruments

Convention on the Rights of the Child (CRC), 1989

Advocates

None mentioned

RULING

1. Children are innocent. The innocence of children can be traced back to the work of Rousseau [1712-87] and the romantic writers and poets such as Blake, Wordsworth and Dickens. In their view, the child was pure, innocent and naïve, and only corrupted by contact with the world.
2. Children never apply to be born. They never choose who to be their biological parents. Yet, according to Rubie Miseda, a Psychologist, more often than not, children are subjected to trauma and psychological torture through acts and omissions, by the only people that they know to be their parents.



3. The serious lessons learnt in this case are that mothers, please, your children have the right to know who their biological fathers are. Do not include the name of a person who is not the biological father of your child in the child's birth certificate without that person's express written consent. Do not lie, as far as paternity of your child is. We live in a world where one can no longer lie as to paternity of a child.
4. Under section 4 of the *Children's Act*, 2022, parents must put the best interests of the child first. In this sense, any decision made by either parent has to foster the rights and welfare of the child. It is also the right of every child to know his father. In the premises, mothers are advised, that unless in extreme circumstances of abuse and neglect, to help their children know their fathers.
5. This is because the psychological benefits of having a father present far outweigh the negative effects his absence will have on the child now and in the future.

The Application

6. The applicant is FOA He is a male adult of sound mind residing within Kisumu County. He applies to this court vide his application dated November 16, 2023 seeking orders that his name be struck out from the birth certificate No 8355--53 belonging to the minor JMO and that the child be issued with another Birth Certificate which does not bear the name of the applicant.
7. The respondents are RAO the child's mother, who is a female Adult of sound mind; the Attorney General and the Registrar of Births and Deaths respectively.
8. The application by the applicant is by way of notice of motion and was brought under the express provisions of articles 53(2) and 28 of the *Constitution* and section 12 of the *Births and Deaths Registration Act*.
9. In the grounds and supporting affidavit sworn by the applicant FOA, it is asserted and deposed that the applicant and the 1st respondent, the latter being the biological mother of the minor had a romantic relationship in 2014 and that during the said period of romance, the 1st respondent conceived and she made the applicant believe that he was responsible for the pregnancy hence the father to her baby boy.
10. That after the birth of the child, a birth certificate was processed which included the applicant's name as the child's father.
11. That as time elapsed, the applicant became suspicious and stopped providing for the child whom he now believed was not his biological child and the 1st respondent reported him to the Children's Department for child neglect whereupon he was summoned to discuss the welfare of the said child.
12. That the applicant was given access to the child and he agreed to provide for his needs.
13. That it was during that time that he privately took the minor for DNA to confirm his paternity that to his surprise, he received results showing that he was not its father hence the application herein so that he can be delinked from the minor and his name be removed from the minor's birth certificate.
14. Copies of the impugned birth certificate and the DNA Report are annexed to the supporting affidavit.
15. Opposing the application, the 1st respondent filed a replying affidavit sworn on 3 January 2024 deposing that herself and the applicant were workmates and during their work session, they got to know each other upon which an intimate relationship developed and the birth of the minor whose paternity the applicant acknowledged and he named the minor after his late brother and even proposed the child's baptismal name.



16. That though not married to the applicant, she has been co-parenting the child with the applicant without much issue and the child has grown up knowing the applicant as his father.
17. That when the child was joining school, the 1st respondent requested the applicant who provided his copy of National Identity card to enable her process the child's Birth Certificate, which he did supply. That the DNA report is not authentic and cannot be used to determine any legal dispute.
18. Further, that the purported DNA was performed on an autistic child without the 1st respondent's consent and in her absence, thereby violating the child's rights.
The 1st respondent urged this court to dismiss this application.
19. When the parties appeared before me on 19 December 2023, the 1st respondent sought for time to speak to the applicant as the two were in good talking terms, yet he never indicated that he was filing such an application and that she had seen the documents in support for the first time hence she wanted time to see whether they could agree as he had never told her about the DNA or Birth Certificate issue.
20. This court granted the parties time to negotiate for an amicable solution. When parties returned to court on 30 January 2024, they had not resolved the issues amicably and they both agreed to have a second DNA test at the Government Chemist Laboratory at Kisumu. The applicant agreed to meet the cost of the DNA.
21. After the second DNA report dated 14 February 2024 was filed in court, the 1st respondent and her advocate stopped attending court. The applicant was therefore heard orally on 23 May 2024 in the 1st respondent's absence. The applicant's counsel argued the application dated 16 November 2023 reiterating the prayers sought, relying on the two DNA reports.

Determination

22. I have considered the application and the opposition thereto as well as the oral submissions by the applicant's counsel. article 53 of the Constitution provides for Rights of Children. In addition, a child's best interests are of paramount importance in every matter concerning the child.
23. The *[UN Convention on the Rights of the Child \(CRC\)](#)* protects the economic, social, cultural, civil and political Rights of children.
24. Among the twelve rights of children, children have the right to be registered when they are born. The National Government must recognize a child's name and national identity and children must be informed of their identity. Further, children have the right to receive, access and transmit documents of their own identity. Official records should include their name, place and date of Birth and family relations. The Convention further guarantees that children, whenever possible, should know their parents and be looked after by them.
25. In the instant case, the applicant does not deny that he allowed his name to be used to register the child during the issuance of the Birth Certificate, albeit there is no evidence of joint request for inclusion of his name as the child's father in the register of births for the child as stipulated in section 12 of the Births and Deaths Registration Act.
26. He however denies paternity and he is vindicated by two DNA reports done at different times, places and independently, with the latest report being done at the Government Chemist Laboratories at Kisumu.



27. No doubt, the child has a right to have a name and know his parents. The child bears no fault. The decision to give him the name of the applicant as his father was made by the applicant and the 1st respondent.
28. For avoidance of doubt, these proceedings have nothing to do with child maintenance or child support, this not being a Children’s Court as defined under the *Children’s Act, 2022*.
29. There is evidence adduced beyond reasonable doubt from the two DNA reports filed in this court that the applicant is not the biological father to the minor and he has no interest in the child having or using his name on the Birth Certificate which was only issued on 27 April 2023 despite the child being born on 10 February 2015.
30. Section 12 of the *Births and Deaths Registration Act*, chapter 149 of Laws of Kenya provides for entry of father in register and it stipulates that:
- “ 12. No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognized custom.”
31. Where wrong entries have been made into the register of births or deaths, section 28 of the Act provides for correction of such errors or omissions. The section stipulates:
- “ 28. Correction of errors in registers
- (1) The Principal Registrar may, subject to the rules, and on payment of the prescribed fee (which he may in his discretion in any particular case remit), correct any error or omission in any register or index.
- (2) Corrections shall be made without erasing the original entry, and shall be authenticated by the signature of the Principal Registrar.”
32. Article 35 of the *Constitution* guarantees every person the right to the correction or deletion of untrue or misleading information that affects that person.
33. The child in this case equally has the right to the correction or deletion of untrue or misleading information that affects the child as stipulated in article 35(2) of the *Constitution*.
34. Therefore, as it is now clear that the information contained in the Birth Certificate Entry XXXX19 dated 27 April 2023 on the father of the child JMO is untrue and misleading, I hereby allow the application dated 16 November 2023 to the extent that the name of the applicant herein FOA contained in the child’s Birth Certificate Entry No XXXX as the father of the child JMO shall be deleted.
35. Accordingly, the Birth Certificate Entry No 123230xxx issued on 27 April 2023 in respect of the child JMO is hereby recalled.
36. The 2nd and 3rd respondents are hereby directed to reissue to the child JMO a fresh Birth Certificate, subject to the provisions of section 28(1) and (2) of the *Births and Deaths Registration Act* with or without the name of the child’s biological father.



37. Each party to bear their own costs of the application.

38. This file is closed.

39. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 10TH DAY OF JUNE, 2024

R. E. ABURILI

JUDGE

