



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CONSTITUTIONAL PETITION NO. E001 OF 2021

IN THE MATTER OF ARTICLES 19(2), 20(1), 20(2), 22, 23, 25(c), 27, 28, 35(1)(b), 45(1), 47 AND 53 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED INFRINGEMENT OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27, 28, 33(1)(a), 35(1)(b), 45(1), 53(1)(e) AND 53(2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF THE CHILDREN'S ACT NO. 8

OF 2001, LAWS OF KENYA

AND

IN THE MATTER OF SI (A MINOR)

BETWEEN

AYS (Suing on behalf of SI as parent and next of friendPETITIONER

VERSUS

PKT.....RESPONDENT

RULING

1. The petitioner AYS is the mother of SI who was born on 23rd December 2006. Her case is that the child was conceived and born when she and the respondent PKT had a love relationship spanning the years between 2003 and October 2008. She stated that when the child was born the respondent admitted paternity and begun to provide maintenance, although sporadically. However, since about January 2009, he stopped maintaining the child, or even paying school fees. He even claimed that he was not the father of the child. This led to the petitioner filing **Children Case No. 269 of 2012** at Nairobi Milimani seeking that the respondent avails himself for DNA Test and to provide adequate and constant maintenance to the child. The respondent filed a defence denying paternity and denying that he was entitled to maintain the child. The case was withdrawn by the petitioner. She stated that the withdrawal was occasioned by agreement by the respondent to take care of the child.

2. This petition was subsequently filed alleging the infringement of the child's constitutional rights and fundamental freedoms under **Articles 19(2), 20(1), 20(2), 22, 23, 25(c), 27, 28, 33(1)(a) 35(1)(b), 45(1) and 53(1)(e) and 53(2)** of the Constitution and under the provisions of the

Children Act (Cap. 141). Filed along with the petition was a notice of motion seeking that pending the hearing and determination of the petition, the court be pleased to compel the respondent to undergo a DNA Test at Lancet Laboratories for the purpose of determining the biological paternity of the child; that the cost of the DNA be shared equally by the parties; that, if the DNA Test reveals that the respondent is the father of the child, he be compelled to refund the petitioner's costs; that, pending the hearing and determination of the petition, the respondent be ordered to provide adequate and reasonable maintenance for the child.

3. The respondent filed a replying affidavit to the petition and notice of motion. He stated that the case was a replica of the **Children Court Case No. 269 of 2012** which the petitioner withdrew on 6th August 2013 after he had applied to have it struck out. He denied that the petitioner's claim had any constitutional, legal or factual basis. Further, he pleaded that this court did not have the jurisdiction to hear and determine the dispute because of the following four reasons: -

- (a) the children court was the one with the jurisdiction to hear and determine the dispute,
- (b) the dispute did not qualify to be brought as a constitutional petition;
- (c) the child's matter having been compromised, the petitioner had not demonstrated a basis for re-opening the same; and that
- (d) the petitioner, being a married woman, could not seek parental responsibility outside marriage.

4. The respondent deponed that the petitioner was a married woman with three children, and was a part time volunteer in his Foundation. During the marriage, he deponed, the petitioner had a relationship with his best friend, a Professor MM. At all times, he further deponed, the petitioner represented that the said MM was the father of her child. Lastly, he stated that the petitioner was a Director for [Particulars withheld] with a gross monthly salary of Kshs.897,570/=, while the child's termly fees was Kshs.100,000/=. She was therefore able to maintain and educate the child. According to the respondent, the petition and motion had been filed for the purposes of blackmail and extortion.

5. The petitioner was represented by Mr. Kemboi and the respondent by Mr. Kipkorir. They agreed that the court determines the preliminary issue whether it had the jurisdiction to hear and determine the dispute, and then the issue whether or not DNA Test should be ordered. They filed written submissions on the two issues. I will make reference to the submissions in the course of this ruling.

6. The first question is whether this court has the jurisdiction to hear and determine the petition.

7. The petitioner alleged that the child's constitutional rights and freedoms under **Articles 27, 28, 33(1), 35(1)(b), 45 and 53(1)(e)** had been infringed and/or violated. In regard to **Article 35(1)(b)** she stated that:-

“In this case, information relating to the minor's biological father for the purpose of ensuring that her legitimacy as his child is appropriately recorded. The Respondent's refusal to be subjected to DNA testing is unreasonable as it deprives the Minor the possible enjoyment of rights and benefits enshrined in Sections 4 to 19 of Part II of the Children's Act.”

8. In submitting that the court does not have the jurisdiction to deal with the petition, the respondent's counsel stated that the dispute belonged to the Children Court created under **section 73** of the **Children Act**. He stated that the **Act** was enacted –

“to make provisions for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection institutions; to make provision for the administration of children's institutions; to give effect to the principles of the Convention of the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes.”

9. Relying on **Kemrajh Harrikisson –v- the Attorney General of Trinidad and Tobago [1980] C. 265**, which many Kenyan courts have referred to with approval, the respondent's counsel submitted that it is not always the case that whenever there is a failure by a person to fulfil an obligation the offended party will invoke the Bill of Rights claiming that his fundamental rights or freedoms have been infringed. Further, now that the petitioner has the **Children Act** that she can rely on for recourse it was not necessary for her to file this constitutional petition when all that she was fighting for was to have respondent to undergo DNA Test to establish whether he was the child's father and, following that, he be made to take responsibility to maintain and educate the child.

10. Counsel referred the court to the decision in **Godfrey Paul Okutoyi –v- Habil Olaka & Another, Nairobi HC Petition No. 457 of 2015** where it was observed that:-

“65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute is redressed through a Court of law in the manner allowed by that particular statute or in an ordinary suit as provided for by procedure. It is not every failure to act in accordance with a statutory provision or where an action is taken in breach of a statutory provision that should give rise to a constitutional petition. A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum and in the manner allowed by the applicable law and procedure.”

11. The last case that the respondent's advocate referred to was **Francis Gathungu Waithaka –v- Kenyatta University [2012]eKLR**, in which the petitioner and his employer (the respondent) were in a labour dispute. The petitioner was suspended from employment for alleged theft. He sought to be paid his salary and benefits during the period of suspension. He claimed that he had not been afforded a fair hearing

during the labour proceedings; he had been held in servitude for the period he was under suspension; he had been subjected to inhuman and degrading treatment; he had been denied the right to disciplinary proceedings being heard and determined within reasonable time; that he had been subjected to arbitrary and capricious exercise of public power; and that he had not been paid his salary and other benefits for the period of his suspension. He argued that all these actions had been undertaken in contravention of **sections 73, 74, 75, 77(a) and 82** of the **Repealed Constitution** and was entitled to stated reliefs. The court went over various decided cases and held that the dispute was a mere industrial dispute that ought to have been filed in the ordinary civil court to determine whether the petitioner was entitled to be paid his salary and benefits during the period of suspension. The court concluded that –

“Parties should not use the sacrosanct Bill of Rights in our Constitution to pursue ends that do not meet its expectations. This Court will grant Orders to deserving litigants but will in equal measure turn away those that abuse its processes and the limits set by the Law.”

12. On the question of jurisdiction, it was the submission by counsel for the petitioner that the High Court under **Article 165(3)** of the Constitution had unlimited original power to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. He argued that under the **Article** there was no limit to the jurisdiction of the court, other than what was set out in **Article 165(5)**. It was submitted that the petitioner had with clear specificity narrated the alleged threatened and/or denial and infringement of the child’s fundamental rights and freedoms in the **Bill of Rights**. Making reference to **sections 3 to 22** of the **Children Act** that sets out the safeguards for the rights and welfare of the child, counsel emphasized that under **section 22** of the **Act** the court was vested with jurisdiction to enforce or secure the enforcement of any of the provisions of **sections 4 to 19** of the **Act**.

13. On the powers of the Children Court under the **Act**, counsel argued that the jurisdiction of the court was limited under **section 73** to Parts IV, V, VII, VIII, IX, X and XIII, and yet the child’s complaint was grounded on Part II. He submitted that if **Articles 23 and 165(3)(a) and (b) and (e)** of the Constitution are read together with **section 22** of the **Act**, it was certain and evident that the court had power to exercise unlimited original jurisdiction on matters dealing with the enforcement of children rights.

14. There is no dispute that under **Article 165(3)(a) and (b)** of the Constitution, the High Court has: -

“a) unlimited original jurisdiction in criminal and civil matters;

b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.”

15. It is also not in dispute that the **Children Act** was enacted to deal with all disputes and matters relating to children. All matters in Parts III, V, VII, VIII, IX, X, XI, and XIII are under **section 73(a)** of the **Act** supposed to be handled by the Children Court set up under the **Act**. For the avoidance of doubt, Part II deals with parental responsibility. It defines what parental responsibility is, indicates who has parental responsibility and how parental responsibility is acquired, among other things. The children court, guided by the **Act** and **Article 53** of the Constitution, will ordinarily deal with disputes relating to a child under Part III to determine how a father and a mother will contribute towards the upbringing of the child. The court will apportion responsibility, depending on the facts of the case. Where the mother of the child says that a named man is the father of the child, and the man disputes, the court will determine the issue of paternity, and may order that a DNA Test be conducted to determine the question.

16. Part VII deals with the question of custody and maintenance of the child. The children court will determine who should have legal and/or actual custody using the principles in the **Act**. On maintenance, the court will operate on the basis that both parents of the child have a joint responsibility to maintain it.

17. **Section 22** of the **Children Act** provides as follows:-

“(1) Subject to subsection (2), 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.

(2) The High Court shall hear and determine an application made by a person in pursuance of 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).

(3) 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.”

The **section** is made under Part II of the **Act** that deals with **“Realization of the rights of the Child.”** The Part opens up as follows:-

“The Government shall take steps to the maximum of its available resources with a view to achieving progressively the full realization of the rights of the child set out in this Part.”

The rights are in **sections 4 to 19** of the **Act**. They are survival and best interests of the child (**section 4**), non-discrimination (**section 5**), right to parental care (**section 6**), right to education (**section 7**), right to religious education (**section 8**), right to health care (**section 9**), protection from child labour and armed conflict (**section 10**), name and nationality (**section 11**), disabled child (**section 12**), protection from abuse, etc (**section 13**), protection from harmful cultural rights, etc (**section 14**), protection from sexual exploitation (**section 15**), protection

from drugs (section 16), leisure and recreation (section 17), torture and deprivation of liberty (section 18), and right to privacy (section 19).

18. It is reiterated that it is the government that is mandated to make sure that these rights under Part II of the Act are realized in relation to children. The responsibility has not been given to private individuals.

19. The question is whether, under section 22 of the Act, the petitioner can come before this court to claim that the respondent has failed to make sure that any of the child's rights under sections 4 to 19 in the Act have been realized in relation to the child in question.

20. What brought the petitioner to this court was to get an order for the respondent, whom she alleged was the father of the child but had since denied paternity, to undergo a DNA Test to show that he was the father. The other reason was that the respondent had refused to maintain the child. She sought a maintenance order against him. The respondent denied that he was the father of the child, and therefore was saying he could not be ordered to undertake a DNA Test. He further denied that he was entitled to maintain the child. However, this is how the petitioner framed her case in the petition: -

(a) the refusal by the respondent to afford the child parental care and protection in the same manner as he does his other children amounts to unlawful discrimination on the ground of birth (Article 27);

(b) the obnoxious insistence by the respondent that he was not the biological father of the child and his deliberate actions to shun the minor and treat her like a pariah has undoubted deleterious effect on her human dignity (Article 28);

(c) the respondent's denial that he was the father of the child denied the child the freedom to seek, receive or impart information or ideas (Article 33(1)(a));

(d) the respondent's refusal to undertake a DNA Test was denying the child the right to legitimacy and denying her the right to information (Article 35(1)(b));

(e) the respondent was by his above actions denying the child right to parental care and protection (Article 45); and

(f) by refusing to maintain the child, the respondent was denying the child the right to receive protection and equal parental responsibility from him (Article 53(1)(e)).

21. It is clear that the jurisdiction of this court is regulated by the Constitution, by statute and by principles laid down by judicial precedents (**In the Matter of Interim Independent Electoral Commission [2011] eKLR**). It is further accepted that the mere allegation by an applicant that his right or freedom under the Bill of Rights has been denied or infringed or violated or is threatened is in itself not sufficient to entitle him to invoke the jurisdiction of the constitutional court under **Article 165(3)(b)** of the Constitution, if it appears that his claim involves an alleged breach of a particular statute, and therefore he can find a remedy if he filed an ordinary suit in a civil court.

22. The Court of Appeal of Trinidad and Tobago in **Damian Delfonte –v- The Attorney General of Trinidad and Tobago C.A. 80 of 2004** stated as follows:-

“Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint made include some feature which makes it appropriate to take the course. As a general rule, there must be some feature, which at least arguably, indicates the means of legal redress otherwise available would not be adequate. To seek constitutional reliefs in the absence of such a feature would be a misuse or abuse of the court's process. A typical but by no means exclusive example of such a feature would be a case where there has been arbitrary use of state power. Another example of a special feature would be a case where several rights are infringed. Some of which are common rights and some of which protection is available only under the Constitution, and it would not be fair, convenient or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file spate actions for the vindication of his rights.”

This authority fortifies my belief that, the petition before the court does not carry the hallmarks of a constitutional petition for the violation or infringement or threatened violation or infringement of rights and fundamental freedoms under the Bill of Rights. The question whether or not the respondent should take a DNA Test to determine whether he is the father of the child, and the question whether he should be ordered to maintain the child, are matters which can find redress under the **Children Act** through a normal civil claim.

23. Lastly, in prayers 2, 3 and 5 of the Petition, the petitioner sought the following declaratory orders against the respondent: -

“2. A declaration that the Respondent is the biological father of the Minor and further that his name be included in the Child's Birth Certificate and official documents;

3. A declaration that the Respondent is obligated to provide parental protection and care of the Minor.

4.

5. A declaration that the Petitioner is entitled to reimbursement from the Respondent of 50% of all school fees expended thus far on the Minor in the sum of Kshs.2,935,677.30.”

Under **section 22** of the **Children Act**, the duties imposed by the **Act** under **sections 4 to 19** are owed by the government. If that is the case, I do not find that the petitioner can maintain an action seeking declaratory orders against the respondent who is a private individual.

24. In conclusion, I find that this court lacks the jurisdiction to hear and determine the petition. The petition as framed is a misuse, and an abuse, of the process of the court. The same is consequently dismissed with costs.

25. In view of this finding, I determine that the consideration of the question whether or not the respondent should be ordered to undergo a DNA Test would be an academic exercise in which I would not like to engage.

DATED and DELIVERED NAIROBI this 13TH day of MAY 2021.

A.O. MUCHELULE

JUDGE