



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. E13 OF 2020

ANM.....APPELLANT

VERSUS

FPA (Suing as the father and next friend of the minor).....RESPONDENT

(Being an appeal from the Ruling and Orders of the Hon. Benard Kasavuli,

Principal Magistrate, delivered on the 28th day of September, 2020

in Mavoko Children’s Court Case No. 5 OF 2017

BETWEEN

FPA (suing as the father and next friend of the minor).....PLAINTIFF

VERSUS

ANM.....DEFENDANT

JUDGEMENT

1. This arises from proceedings conducted before Mavoko Chief Magistrate’s Court in Mavoko Children’s Court Case No. 5 of 2017. Unfortunately, the parties did not bother to pace before me the pleadings before the trial court. However, from the ruling appealed from I glean that the proceedings in question were initiated by the Respondent herein against the Appellant seeking in the main an order compelling the Appellant to grant the Respondent reasonable access to the subject minor and physical custody thereof. With the plaint, the Respondn sought an order that he be granted reasonable access to the said minor and to provide maintenance for him.

2. That application was allowed but being aggrieved by the same, the Appellant filed before this Court Constitutional Petition No. 10 of 2017 which was heard and determined on 28th May, 2019. By its decision, this Court set aside the said decision and gave directions on what ought to have been considered by the trial court and remitted the matter back to the trial court for hearing along the directions issued.

3. The application was eventually heard and by her decision made on 28th September, 2020, the application was allowed.

4. The cause of action, according to the Respondent is that as a result of an intimate relationship between the Appellant and the Respondent, the subject matter was born. It is contended that at the time, the Appellant and the Respondent were colleagues at a work place, both having separated from their spouses and that an affair blossomed leading to the birth of the subject minor. The Appellant however contends that the minor was conceived from a relationship between her and her current husband.

5. In arriving at her decision, the learned trial magistrate found that the final prayers sought before the trial court are solely dependent on whether the Respondent is the biological father of the minor or not. Apparently the parties exhibited two birth certificates allegedly for the minor but bearing different names with the Appellant alleging that that exhibited by the Respondent was a forgery.

6. The learned trial magistrate then considered the provisions of Sections 4(2) and (3), 6(1) and (2) as well as Article 53(2) of the Constitution and found that a child has a right to know who his/her biological parents are. Taking into account the foregoing the court was of the view that the outcome of the DNA would finally determine the fate of the Respondent's case. She proceeded to allow the application in question. It is that decision that has triggered this appeal.

7. In this appeal, the Appellant relied on a whopping 12 grounds of appeal. The said grounds are that the learned trial magistrate:

(1) Grossly erred in law and in fact in allowing the Respondent's application dated 9/7/2019 and holding that the Appellant be compelled to submit the minor to a DNA test.

(2) Grossly erred in law and misdirected himself in failing to consider and appreciate that in the circumstances of the matter before it where the minor has since his birth in 2015 been in the care, maintenance and protection in a closely knit family unit of his mother, the Appellant and his father, the Appellant's husband, who unlike the Respondent, have both exhibited the financial and moral ability and willingness to discharge their parental responsibility to the minor and have ably discharged the responsibility to-date, an Order for compulsory DNA testing of the minor in favour of the Respondent who a stranger to the family of the minor, on the basis of interlocutory proceedings in the said application dated 9/7/2020, would NOT serve the best interest of the minor.

(3) Grossly erred in law and misdirected himself in failing to consider and appreciate that in the circumstances of the matter before it the best interest of the minor would have been best served by a dismissal of the said application dated 9/7/2019.

(4) Grossly erred in law and fact in holding that the application dated 9/7/2019 was not res judicata view of the ruling of this honourable Court in constitutional Petition No. 10 of 2017.

(5) Misdirected himself and erred in law and in fact by failing to appreciate that the matter before it was not an appropriate case for it to direct a compulsory DNA test at an interlocutory stage and that it required to be heard and determined on its merits in the normal manner as per the holding of this honourable Court in the said constitutional Petition No. 10 of 2017.

(6) Grossly erred in law and in fact by failing to appreciate that by ordering that the Appellant to submit the minor to a DNA test would serve only the selfish interest of the Respondent, a person of questionable moral character in view of his conduct of illegally and irregularly procuring a purported birth certificate for the minor through forgery and contrary to the law and procedure of issuance of birth certificates.

(7) Grossly erred in law and in fact in making Orders for compulsory DNA testing in favour of the Respondent when the Respondent had not presented any sufficient evidence or at all to demonstrate that such an Order was interlocutory and imminently necessary at that stage of the case.

(8) Erred in law and in fact in allowing himself to be influenced by irrelevant factors and in failing to consider relevant matters and the unique aspects of the matter before him before arriving at the impugned ruling/orders.

(9) Failed to properly apply his mind on the matter before him and the applicable constitutional and statutory provisions and further failed to exercise his discretion judicially and as a result thereof arrived at a ruling/Orders that amounted to a travesty of justice and are contrary to the best interest of the minor.

(10) Grossly erred in law and in fact by disregarding the Appellant's evidence and submissions on the said application dated 9/7/2019 and by failing to appreciate that the application and the suit upon which it was premised were not aimed at serving the best interest of the minor but for ulterior motive of punishing the Appellant by breaking her family for her having rejected the Respondent's sexual advances and that to serve the said ulterior motive, the Respondent in a clear case of forum shopping, filed the suit in the Mavoko Magistrates Court when the said subordinate Court lacked the necessary jurisdiction as both parties work and reside in Nairobi where the minor also resides.

(11) Grossly erred in law and in fact by failing to appreciate that in the circumstances of the case before it where there was no urgency as the minor is and has always been sufficiently cared and provided for and maintained by his parents, an Order for subjecting the minor to a DNA test in the current situation of the corona virus pandemic would amount to unnecessary exposure of the minor to a possibility of infection by the virus, hence a further compromise of the best interest of the minor.

(12) Exhibited gross misapprehension of the relevant law and principles of the best interest of the minor in the face of the facts of the case before it and instead issued Orders that are contrary to the best interest of the minor.

8. All those grounds can however be summarised into two: that the learned trial magistrate erred in finding that the matter was not caught up by res judicata; and secondly, that the learned trial magistrate erred in the exercise of her discretion in ordering that DNA undertaken in the circumstances of the case before her.

9. In the submissions filed on behalf of the Appellant, reliance was placed on MAA vs. ABS [2018] eKLR and it was contended that Article 53(2) of the Constitution specifically provides that a child's best interests are of paramount importance in every matter concerning the child. This principle is echoed in Section 4(2) and (3) (b) of the *Children Act* which provides for the paramountcy of the welfare of the child and binds Courts to safeguard and promote it. Based on MJC vs. LAC & Another [2020] eKLR, it was submitted that what constitutes the best interest of the child depends on the circumstances of each case.

10. In this case it was submitted that the circumstances are not as in usual children cases where a mother of a deprived child sues the father of

the child who has refused to provide for the child thus putting the welfare of the child at stake. According to the Appellant, the circumstances herein are different in that:

- a) The Appellant is lawfully married to one RMM firstly under Kamba customary marriage and later under the then African Christian Marriages and Divorce Act (Cap 151) on 3/4/2010.
- b) The Appellant is the mother of the minor born to the Appellant and her said husband on 14/9/2015, named AMM and issued with a Certificate of Birth on 6/7/2016 by the Agha-Khan Hospital where he was born and all the hospital charges on his birth were paid for by the Appellant and her said husband as it was their responsibility to do so.
- c) Since his birth in 2015, the child, who is now aged about 6 years and hence a minor under the provisions of Section 2 of the **Children Act**, has been under the care, maintenance and protection of the closely knit family unit of the Appellant and his father, the Appellant's said husband, who have exhibited the financial and moral ability and willingness to discharge their parental responsibility to the minor and have ably discharged the responsibility to-date.
- d) The Respondent who at the material time was and still is a work-mate of the Appellant at the Kenya Bureau of Standards (KEBS) Nairobi, has his own family, is a total stranger to the child and has never provided for the child as he is not obligated to do so neither has any demand been made to him for any support for the minor as there is no basis therefor.
- e) The Respondent has always harboured a sinister motive of breaking the Appellant's marriage after she spurned him for repeated sexual advances to her in pursuit of which he deposited an unsolicited sum of Kshs 30,200/= into the Appellant's Mpesa account on 11/3/2017 which amount the Appellant returned via the same mpesa account.
- f) Prior thereto, the Appellant and the Respondent and their other colleagues at work would offer each other social and financial support in times of need such as sickness or bereavement in their families as is a common practice at places of work and on the basis thereof each would make the requisite contributions via the *mpesa* platform but to advance his improper motives the Respondent misrepresented the same to the trial Court as purported support for the minor when it is evident on the *mpesa* statement that he exhibited that the sum that the Respondent had contributed to the Appellant over and above what the Appellant had contributed to the Appellant, was a paltry Kshs. 1,980/= which cannot pass the test of child support.
- g) The Respondent has on record exhibited a questionable character where, in pursuit of his ill motives towards the Appellant and in attempts to deprive the child of an identity, on or about 24/1/2017 he fraudulently and illegally procured a forged purported birth certificate for the child on which he wrongfully *inter-alia* re-named the child "AP".

11. In the light of the foregoing, it was submitted that the Respondent's suit in the trial Court and the application dated 9/7/2019 pursuant to which the Respondent procured the impugned Orders, are driven by displaced vengeance and self-interest on the part of the Respondent towards the Appellant and not the best interest of the minor. According to her, the Orders for compulsory DNA testing issued to the Respondent at an interlocutory stage of the suit before the trial Court, were not for securing and serving the welfare of the child but for serving the interests of the Respondent since in the circumstances of the case before the trial Court as set out above, the best interest of the child has never been and is not at stake or under any threat.

12. It was contended that using the objectivity test in consideration of the best interest of the child herein, it is clear that for the fact that the Orders appealed from sought to have the Respondent ascertain whether he had fathered the child, the Orders posed a real danger to the welfare of the child as they had the great potential of creating discord in and a break-up of the family of the child comprising the only close associations that the child has known and loved since his birth and which family dearly loves him and has ably catered for all his maintenance, protection, guidance, emotional and physical needs. Based on the decision in **MJC vs. LAC** (supra), it was contended that in the present case the Orders appealed from would be incompatible with or have adverse effect on the welfare of the child and ought not be allowed by this Court to stand.

13. Accordingly, the court was urged to vacate the Orders appealed from which in the circumstances of the case do not serve the best interest of the child but rather endangers them.

14. It was further submitted, based on **Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women and another (2010)**, that in the circumstances of the case before the trial Court, the Respondent did not present any sufficient evidence or at all to demonstrate that the Order for compulsory DNA testing was interlocutory and imminently necessary at that stage of the case hence the trial Court was in error in law and in fact in granting the Orders. It was submitted that there was no urgency in the matter that called for the issuance of such an Order at an interlocutory stage as the minor had been and is still is sufficiently cared and provided for and maintained by his parents, the Appellant and the father, her said husband, who cherish and love him as is expected of them and he has never lacked any provision, protection, care or affection.

15. In addition, it was submitted that it was indeed incumbent upon the trial Court to consider and appreciate the objections by the Appellant that the Order for compulsory DNA testing required the child to be removed from the safety of his home into the public space thereby exposing the child to a real possibility of infection by the corona virus pandemic which as at the time the Order impugned was sought and issued, was and is still to-date ravaging the population in the country and world-wide. Exposing the child to the likelihood of such an infection was a great compromise to the child's best interest and the Orders ought not have been issued more so when the child was not under any deprivation.

16. The sum effect of the aforesaid, it was submitted, is that by granting the impugned Orders as and when granted, the trial Court put the best interest of the child into jeopardy instead of giving them prominence and protecting them.

17. On the basis of the aforesaid, it was submitted that in the circumstances of the case before the trial Court, it was not appropriate for the Court to order a compulsory DNA testing on the child at an interlocutory stage of the proceedings for the Respondent to ascertain whether he had fathered the child as doing so subjected the best interest of the child to the interests of the Respondent with the effect of putting the welfare of the child to stake.

18. According to the Appellant, it is not the law and it ought not be the norm that in every children case, a compulsory DNA testing must be ordered at an interlocutory stage and without hearing the parties on the merits of the case, but rather, the question of an Order for compulsory DNA testing before the suit is heard on its merits, should be determined by the circumstances of each case.

19. It was therefore submitted that there are basis herein upon which this honourable Court can interfere with the exercise of the discretion of the trial Court as the Learned Principal Magistrate clearly misdirected himself on the relevant law and principles of the best interest of the minor in the face of the facts of the unique case before him and failed to apply the objective test in considering the legal and factual effect of the pleadings on record for both parties, specifically the matters that would advance and protect the best interest of the minor in the circumstances of the case before him.

20. It was further submitted that looking at the judgement of the Court in the said Constitutional Petition No. 10 of 2017, the Respondent's application dated 9/7/2019 was *res judicata* as it again sought compulsory DNA testing with the effect of finalising the suit via interlocutory proceedings instead of the parties being heard and the case determined on its merits. According to the Appellant, the law that provides for the procedure of hearing and determining a matter such as the case before the trial Court is the Civil Procedure Rules which has elaborate provisions on hearing of matters on their merits where each party is given the opportunity of presenting its case before the Court and being cross-examined by the other party before the Court renders its mind on the case.

21. It was submitted that under the Civil Procedure Rules interlocutory proceedings are usually for purposes of preserving the subject matter of the suit or to alleviate any hardship or prejudice on any of the parties pending the hearing and determination of the suit and not for determining the suit finally as was sought by the Respondent and granted by the trial Court through the Orders appealed from.

22. It was submitted that the issue of the Orders for compulsory DNA testing issued at an interlocutory stage in the case before the trial Court was a matter in the said Constitutional Petition No. 10 of 2017 between the same parties and the constitutional Court heard and determined the matter and directed that the case be heard and determined as provided for under law. However, instead of having the case heard and determined as directed by the constitutional Court, the Respondent again rushed to the trial Court for fresh Orders for compulsory DNA testing, again through interlocutory proceedings in the said application dated 9/7/2019 where the parties and the principal subject matter were the same.

23. It was the Appellant's case that it is manifest in the totality of the forgoing that it is in the best interest of the child herein that this Appeal be allowed and the impugned Orders be vacated.

24. On behalf of the Respondent, it was submitted that under Article 53(1)(e) of the Constitution every child has a 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 and reliance was placed on Section 4(2)(3) of the Children's Act. According to the Respondent, the significance of a minor knowing his biological fathers is part and parcel of what is called "the best interests of the child" defined in Article 53(2) as was held by **Mumbi Ngugi, J** in **L.N.W vs. Attorney General & 3 Others [2016] eKLR** and **Ngaah, J** in **FKW (suing as the mother and next friend of GDW (Minor) vs. DMM [2015] eKLR**.

25. A child's best interests, it was argued, are not only limited to being provided for as argued by the Appellant but as was held in **In FKW (suing as the mother and next friend of GDW (Minor) vs. DMM** [supra], it is a child's constitutional rights to know his parent and he is better off growing up with the knowledge of who his parents are and reference was made to **PC v JMZ [2020] eKLR**.

26. **On whether the Orders for DNA test could be issued at the interlocutory stage, it was submitted that** orders directing for DNA tests have been issued by courts at interlocutory stages through oral and written applications in numerous instances. The significance of these interlocutory orders are that they not only help to secure the best interests of the child at an earlier stage, but that they also help the court to determine the main suit after having obtained credible information and evidence to give orders.

27. On the threshold for granting such an order, it was submitted that Courts have held that the prayer for DNA test in the interlocutory is akin to seeking a mandatory injunction where one has to simply make out a *prima facie* case and reliance was placed on **DNM vs JK [2016] eKLR**, as well as **MW versus KC Kakamega High Court Misc. Application No. 105 of 2004**. Similarly, it was submitted that in **CMS versus IAK (suing through mother and the next friend CAO). High Court Constitutional Application No. 526 of 2008**, **Mumbi J.** held that in determining such matters, the court must of necessity weigh the competing rights of the child and the petitioner who is alleged to be the biological father and that the right of the child to parental care takes precedence in the light of article 52(2) of the Constitution that in matters such as this, the paramount consideration is the best interests of the child and held that an order for DNA testing should be made if it is in the interests of the child and if a *prima facie* case has been made to justify the order.

28. In this case it was submitted that the Respondent demonstrated to the lower court that there was a sufficient cause for seeking the order, and that there is a likelihood that the Respondent could be the father of the child. He demonstrated in his supporting affidavit sworn on 9/7/2019 that he had been in an intimate relationship with the respondent, a relationship that led to the conception and birth of the minor in question. The Respondent demonstrated that he had been providing and taking care of the minor until March 2017, when the respondent suddenly denied him access to the minor. The Respondent produced MPESA statements that proved he had been giving support for the minor (see pages 20-30 of the Record of Appeal). He further produced an original copy of the birth certificate which they had obtained for the minor as a statutory requirement.

29. Having produced MPESA statements to prove he had been giving child support, and a copy of the minor's birth certificate, the Respondent established a *prima facie* case with high chances of success and the Orders directing for a DNA test were therefore justifiable in

the circumstances. It was submitted that by ordering that the minor be produced for a DNA test, the Learned Magistrate did not in any way make a final determination of the suit. The DNA test would only assist the Court to determine whether the Orders sought in the Plaintiff could be granted or not.

30. On the issue of *res judicata*, it was submitted that the Appellant has misinterpreted this Court's direction in **ANM & another (suing in their own behalf and on behalf of AMM (Minor) as parents and next friend) vs. FPA & Another [2019] eKLR, Constitutional Petition No. 10 of 2017** to mean that the Respondent was to abandon his application for DNA and wait for the main suit to be concluded. This Court's orders, it was contended, were clear that the lower court was to hear parties and determine the application as required by the law. The formal Application dated 9/7/2019 was Responded to by the Appellant hence her earlier contention that the Orders had been issued following an oral application was effectively addressed. Hence the question of *res-judicata* does not therefore arise in the present case. In support of this line, the Respondent relied on **Mathias Dzombo Jumaa & another Suing as the Personal Representative of the Estate of Patrick Kwesha Dzombo (Deceased) v Crispin Mwangolo Sanga & 2 others [2017] eKLR** and **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR** and submitted that whereas the law on *res judicata* is settled as stated above, the Applicant seems to have ignored an all-important point that all the elements above must be proved for a case to be said to be *res judicata*. It was the Respondent's submission that the Application dated 9/7/2019 that came before the Learned Magistrate is not *res judicata* as it does not satisfy ALL the tests in section 7 of the ***Civil Procedure Act***. The matter was rightly before the court and it was in furtherance of this Court's directive in Constitutional Petition No. 10 of 2017. We submit that whereas the parties in both suits were the same, the previous decision was not a final determination of the issues before the court.

31. It was therefore submitted that the learned magistrate correctly applied the law in giving orders to compel the Appellant to submit the minor to a DNA test to determine paternity. Without the paternity test, the court cannot not conclusively or fairly determine all the issues arising in the suit, particularly the minor's right to know his father and the minor's best interest.

32. In the Respondent's view, the Respondent's claim that the order for compulsory DNA testing will expose the minor to COVID-19 pandemic is untenable since DNA tests are conducted by professionals in the medical field who are aware of the risks and know how to handle their patients.

33. It was therefore submitted that the Appellant has not done enough to justify the interference of judicial discretion by the Learned Magistrate in this case and that a grant of the prayers sought in this appeal would defeat the ends of justice as it would deny the minor his right to belong and to know his parent, and to be taken care of by him. It was therefore urged that the appeal lacks in merit and should be dismissed with costs.

Determination

34. I have considered evidence that was adduced by the Respondent, the findings of the learned trial magistrate thereon and the submissions on record.

35. Before dealing with the merits of the appeal, it was contended that the learned trial magistrate erred in not finding that the matter before her was *res judicata* in light of the decision in Petition 10 of 2017. In that decision, this Court found that:

“in appropriate cases, the court is empowered to direct parties before it to undergo DNA test and that there is nothing unconstitutional about that power, in the exercise of this court's supervisory powers, which is a constitutional power, I hereby set aside the orders made in Mavoko SPM's Court Children's Case No. 5 of 2017 on 14th August, 2017 directing the parties to undergo DNA test. I further direct that the matter be referred back to the trial court to hear the parties and determine the same as provided under the law.”

36. According to the Appellant the court directed that the matter proceeds to the hearing of the main suit and not vide an application. Nothing can be further from the truth. The Court did not direct the mode of disposal of the suit. It only directed that the disposal be in the manner provided by the law. It is not in doubt that one of the modes of disposal of suits can be by applications. Accordingly, as the submission of *res judicata* is based on misapprehension of the said decision, the grounds touching on *res judicata* cannot be sustained and are disallowed.

37. The constitutional and legal provisions dealing with the rights of children are not in doubt. 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.

38. On the other hand, 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.*

39. These provisions have been the subject of legal proceedings both in this country and in other jurisdictions. **Lord McDermott**, for example, in **J vs. C (1970) AC 668**, while dealing with the issue of paramountcy of the child's interest being an overriding factor as:

“A process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices, and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare. That is...the paramount consideration because it rules upon or determines the course to be followed.”

40. **PC v JMZ [2020] eKLR** the Court 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 well being, nor can the ties of affection be disregarded.”

41. On his part, **Musyoka J.** in **Z.W VS MGW Misc. Case No. 108 of 2013**, observed at paragraph 10 that:

“The Children Act was designed to afford protection to children, whether born within or outside marriage. The spirit of the Children Act is that parents shall care, protect and provide for the children that they have been responsible for bringing into this world. The broad objective of the Act is not that protection should be afforded only for those children born within wedlock or where the father has assumed parental responsibility. Adopting such an approach to the matter would be discriminatory of children born outside wedlock where the putative father declines to assume parental responsibility. Even children who are products of what is called “a one night stand” deserve protection.”

42. **Mumbi, J** on her part in **C.M.S vs. I.A.K HC Misc. Application No. 526 of 2008** stated that:

“In determining a matter such as this, the court must of necessity weigh the competing right of the child and the Petitioner who is alleged to be the biological father. The right of the child to parental care takes precedence, in my view, particularly in light of the cardinal principle set out in Article 53(2) that in matters such as this, the paramount consideration is the best interests of the child.”

43. It is therefore clear 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, it follows that a child has a right to know who his or her father is. I agree with **Ngaah, J** in **EKW (suing as the mother and next friend of GDW (Minor) vs. DMM [2015] eKLR**, that it is the child's constitutional right and he is better off growing up with the knowledge of who his parents are. This was the position taken by **Mumbi Ngugi, J** in **L.N.W vs. Attorney General & 3 Others [2016] eKLR** where she expressed herself as hereunder:

“72. The rights guaranteed to children under Article 53 are reflective of the rights guaranteed to children under various international instruments to which Kenya is a party. The 1989 Convention on the Rights of the Child recognizes the right of a child to a name. Article 7 thereof provides that:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

80. In addition to being a limitation on the right to non-discrimination and dignity, the provisions of section 12 have a deleterious effect on other rights of the child as well. Article 53(1)(e) provides that a child is entitled “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.” In order to access this right, a child must know, and have in its documentation, the name and identity of its father. This, however, is unlikely to happen if the inclusion of the name of a person as the father of a child is dependent on the willingness of that person to be included in the birth register.

81. Finally, I need not belabour the arguments made by the petitioner with respect to the importance of the identity of a father for enjoyment of other rights such as the right to health and the right to inherit. With respect to the right to health, one's genetic make-up can only be established if there is information with respect to both parents, which will not happen if the identity of the father is missing from a child's birth records. I have not heard the respondents dispute these contentions by the petitioner and interested party.

82. The petitioner has also raised questions related to the child's right to inheritance and to property under Article 40. I note that under Article 53(1)(e) of the Constitution, a child is entitled to parental care and protection from both parents, whether they were married to each other or not. It seems to me that question of inheritance do turn on identity and recognition of children by both their mothers and fathers. Consequently, a provision in legislation that denies a child such recognition must

derogate from the entitlement of the child to inherit.

44. Conversely, where a person has reasonable ground for believing that he or she is the biological father or mother of a child, nothing bars him or her from seeking a determination as to who are the biological parents of the child.

45. In this case, the main objection by the Appellant seems to be that the Respondent is not the biological father of the subject and that his claim is only driven by the desire to fight back the Respondent for having rebuffed his overtures and that the Respondent has no financial means of taking care of the child. The issue of financial ability of the Respondent however does not arise since a determination of paternity does not necessarily mean that the claimant must take custody of the child since the issue of custody must be determined based on where the best interest of the child falls. Therefore, the issue raised by the petitioners herein that the 1st Respondent does not arise in these proceedings. As appreciated in L.N.W vs. Attorney General & 3 Others (supra):

“...the entry of the name of the father of a child born outside marriage will not necessarily mean that the child will get the care and attention that it ought to get from its father. However, at the very least, it will give the child an identity, the knowledge that though its father does not support or care for it, it does have a father, and not a series of xxxs in its birth certificate. In any event, once the identity of a child’s father is established and documented, then it is possible to compel such reluctant fathers to support their children through appropriate court orders.”

46. It was argued by the petitioners that by issuing the said orders for compulsory DNA testing, the Court threatened the right to recognition and protection by the State of the family of the Petitioners and the minor in addition to putting the right to peace and harmony of the family into jeopardy. In other words, by determining the paternity of the minor, the family set up in which the minor is being brought up is likely to be disintegrated by the litigation. However as appreciated in L.N.W vs. Attorney General & 3 Others (supra):

“The respondents did argue that allowing a woman to insert the name of the father of her child at any time will lead to litigation. This may well be the case. However, I take judicial notice of the fact that even as matters stand today, there is quite a lot of litigation by children seeking to establish their identity and the identity of their fathers. It is, in my view, in the best interests of the children that such matters are sorted out early on in their lives when the parental support that they are entitled to can be obtained, and when the stigma and discrimination that they suffer from a lack of identity can be prevented from blighting their lives unnecessarily. We have made promises of equality and non-discrimination to our children in the Constitution. It is not too much to demand that we begin to effect these promises with respect to children born outside marriage.”

47. In the appeal, the issue is whether it was proper for the learned trial magistrate to have directed that DNA be undertaken at the interlocutory stage. The decision whether or not to make such an order is clearly an exercise of discretion. As was held in Mbogo and Another vs. Shah [1968] EA 93:

“...this Court will not interfere with the exercise of...discretion by an inferior Court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

48. In the matter before me the issue before the court was paternity of the subject. That was the substantive matter in dispute. Should the Court have waited for that matter to be determined at the trial? The conditions precedent for the issuance of an order that DNA test be undertaken were set out by G.B.M Kariuki, J MW versus KC Kakamega High Court Misc. Application No. 105 of 2004, and these are:-

- a) The applicant must show that there is sufficient cause for seeking the order and there is a likelihood that the respondent could be the father of the child;**
- b) The respondent’s refusal to submit to the DNA test violates the child’s right to know his father;**
- c) The respondent’s refusal to take a DNA test is an unreasonable because it deprives the child of the possible enjoyment of the rights and benefits of enshrined in sections 4 to 19 of Part II of the Children Act.**

49. In my view whether or not the matter proceeded to trial, based on conflicting birth certificates exhibited by the parties, the issue of DNA being sought for even on court’s own motion was clearly inevitable. By postponing the matter to the hearing, the Court would have just postponed the day of reckoning.

50. As appreciated by Ngaah, J in FKW (suing as the mother and next friend of GDW (Minor) vs. DMM [2015] eKLR:

“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.”

51. As the authorities cited above indicate, in matters concerning a child the interests of the child are of paramount consideration and rank over and above those of the parents. In MJC v LAC (supra) the Learned Judge held that:

“What is stated in Section 4 (3) (b) of the Act is the paramountcy principle which is vital in all matters concerning children and must be given prominence. While considering this matter, this Court was alert to the welfare of the child herein who is of tender years. The matter is not about the Appellant and the Respondent and their interests are secondary to those of the child. The foregoing provisions require this Court to treat the interests of the child as the first and paramount consideration and must do everything to inter-alia safeguard, conserve and promote the rights and welfare of the child herein (emphasis added).

52. One of the overriding principles in children matters is that they ought to be handled expeditiously and without unnecessary delay. In my view where the only issue for trial revolves around a step that will inevitably be taken and which step is likely to resolve the dispute, it would be inimical to the interest of the child to postpone the same to another date. This was appreciated in L.N.W vs. Attorney General & 3 Others where the Court held that:

“It is, in my view, in the best interests of the children that such matters are sorted out early on in their lives when the parental support that they are entitled to can be obtained, and when the stigma and discrimination that they suffer from a lack of identity can be prevented from blighting their lives unnecessarily.”

53. To quote Omollo, JA in the case of J P Machira vs. Wangethi Mwangi & Another Civil Appeal No. 179 of 1997, although disputes ought to be heard by oral evidence in court, there is no magic in holding a trial and receiving oral evidence merely because it is normal and usual to do so since a trial must be based on issues; otherwise it may become a farce.

54. It is now appreciated that the overriding objective of litigation dictates that disputes be resolved without unreasonable delay. This is an imperative in Article 159(2)(b) of the Constitution. As appreciated by the Court of Appeal in Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010

“The “O2 principle” poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court’s view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day.”

55. In my view, there is no justification why a decision and the only decision for that matter, being the paternity of the subject ought to have been postponed to another day. In so holding I am not stating that any claim to paternity must of necessity call for DNA test. A basis must be laid upon which such a test would be undertaken. In this case in light of the conflicting information contained in the two certificates of birth and as there was no evidence as to which one was genuine, it was only fair, just and expedient that the DNA test be undertaken.

56. The learned trial magistrate cannot in those circumstances be faulted for arriving at the decision she did.

57. As regards the contention that the order for compulsory DNA testing will expose the minor to COVID-19 pandemic, it is my view and I hold that necessary safety measures may be put into place to ensure that the process is taken with minimal if any risks. After all the subject minor, if he was to fall sick, God forbid, would have to be attended to at a medical facility.

58. In the premises, I find no merit in this appeal which I hereby dismiss with no order as to costs.

59. It is so ordered.

Read, signed and delivered virtually at Machakos this 7th day of June, 2021

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Munyao for Mrs Mwangangi for the Appellant

Ms Jeruto for the Respondent

CA Geoffrey