DNM v JK (Petition 133 of 2015) [2016] KEHC 3180 (KLR)
(Constitutional and Human Rights) (7 September 2016) (Ruling)

D N M v J K [2016] eKLR

Neutral citation: [2016] KEHC 3180 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 133 OF 2015

JL ONGUTO, J

SEPTEMBER 7, 2016

BETWEEN

DNM ..... PETITIONER

AND

JK ..... RESPONDENT

The connection of a biological relationship has to be established to warrant an order for a DNA Test
The petitioner sought an interlocutory order directing the respondent to submit and subject himself to a DNA test for the purposes of determining whether he was his biological father. The court held that for a DNA testing order to be issued, an applicant had to establish that some right recognized by the Constitution had been violated or infringed. The applicant had to have also established biological relations with the respondent. The court while dismissing the petition found that besides the alleged admission, there was no other nexus biologically connected, even by the slightest imagination, the petitioner and the respondent or the petitioner's mother and the respondent. Further, the petitioner was also not a child to warrant any special circumstances being invited.

Reported by Teddy Musiga and Mercy Cherotich

Family Law *– paternity – determination of paternity – DNA testing – DNA testing at interlocutory stage - circumstances in which orders for DNA testing could be issued at an interlocutory stage - whether it was mandatory to establish a connection of a biological relationship to warrant the order of a DNA test at the interlocutory stage.*

Constitutional Law *– fundamental rights and freedoms – right to privacy – DNA testing – claim that the respondent's right to privacy would be violated by an order for DNA test – whether an order for DNA testing would equate an intrusion into the respondent's right to privacy – Constitution of Kenya, article 31.*

Brief facts

The petitioner sought an interlocutory order directing the respondent to submit and subject himself to a Deoxyribonucleic Acid (DNA) test for the purposes of determining whether the respondent was the petitioner's biological father. The petitioner alleged that in 1980, the respondent had an intimate relationship

with his mother and as a result, he was born. The petitioner stated that she was informed that the respondent was her father and that he had over the years assisted her financially including partly meeting her expensive medical treatment for breast cancer. In the main petition, the petitioner claimed that her rights were being violated as the respondent had continued to treat the petitioner in a discriminatory manner on grounds of birth contrary to article 27(4) and (5) of the Constitution. The petitioner also alleged that her rights to dignity under article 28 and to a family under article 45 of the Constitution had also been violated by the respondent in so far as the respondent had made it difficult and impossible for the petitioner to relate and identify with the respondent as her father.

The respondent filed a replying affidavit where he denied that there had been any relationship between himself and the petitioner's mother or ever supporting the petitioner financially or otherwise. Additionally, the respondent denied being the biological father of the petitioner.

Issues

i. Whether it was mandatory to establish a nexus of a biological relationship to warrant the order of a DNA test at the interlocutory stage.
ii. Whether an order for DNA testing would equate an intrusion into the right to privacy.
iii. What were the circumstances in which orders for DNA testing could be issued at an interlocutory stage.

Held

1. The court ought not to issue mandatory orders at an interlocutory stage of the proceedings especially where the same or similar orders were sought in the main petition. The court had, under article 23 of the Constitution of Kenya an almost unlimited power to fashion orders or relief as may be appropriate. The jurisdiction was unlimited as to what and when orders could be issued.
2. The court had to exercise caution especially when the orders sought were mandatory in nature and where they could also end up being an intrusion of another individual's constitutionally guaranteed rights or freedoms. The approach by the court when faced with an application for a mandatory interlocutory order should be, prior to granting such an order, satisfied that there were special circumstances, which warranted such an order being issued.
3. The court had to be satisfied that the case was a clear and straightforward one, which ought to be dealt with at once, and that at trial the court would be vindicated for having issued the order in the first place. Where there was any slight doubt, then such an order could not be issued. The standard would therefore certainly not be the equivalent of a *prima facie* case being established. The rationale ought to be that acts performed pursuant to mandatory orders may not be easily remedied if the claimant's case was ultimately a flop at trial. Mandatory orders may be issued by the court at an interlocutory stage even where it appeared to fragment the petition and dealt with or granted only one or some of the reliefs sought in the main petition.
4. The law on the topic of compulsory blood or DNA testing in paternity disputes, which was also partly an issue in the petition, was yet to be completely and satisfactorily developed locally. There was no express legislative framework, which specifically regulated the position in civil cases. The few judicial pronouncements on the topic did not appear unanimous in approach or principle. Whereas in relation to children, the courts had occasionally been quick to act in the child's best interest and ordered DNA testing, with regard to non-consenting adults, the jurisdiction had been left hazy.
5. For a DNA testing order to issue, an applicant had to establish that some right recognized by the Constitution had been violated or infringed. The applicant had to have also established the biological relations with the respondent. While one set of case law suggested that the burden was to be discharged on a *prima facie* basis, the other suggested that the burden was to be discharged through the ordinary standard of civil litigation, that of a balance of probabilities.
6. The court had an inherent jurisdiction to order or not to order DNA testing both where a child was involved and where there was no child but only a non-consenting adult. The court ought to be mindful to protect bodily security and integrity as well as the privacy of individuals to be subjected to such tests.

The essence was that the court ought to be ready to assert its role of resolving disputes fairly and one way of doing so was by discovering the truth, even through compulsion.

7. Paternity tests were known to have a high degree of accuracy. Statistics showed that though not absolute, the percentage of accuracy to the family tree was a staggering 99.9%. They revealed the truth and generally courts had accepted their overall accuracy and value.
8. Even though the court's core role was to determine disputes, the courts often deployed methods of compulsion not necessarily to get to the truth but to help determine disputes fairly. It was thus common to see witnesses being summoned and also being compelled at the risk of jail, to answer questions. In all instances, the party which sought the court's assistance ought to lay a firm legal and factual foundation for his case. It was not different where DNA testing was sought.
9. In the case of DNA testing, the basis ought to be laid even where a child was involved, as ordering DNA testing was not a mere procedural matter but was substantive enough given that an individual's constitutional rights may have been limited through such testing.
10. The evidential basis of the petitioner's case was the affidavit sworn in support of the application. The respondent largely denied the affidavit evidence. When facts averred in an affidavit had not been admitted, they could not be taken on their face value to be creditworthy and tenable. Without disregarding them, such facts ought to be subjected to challenge and in light of the circumstances of the case.
11. The respondent had himself sworn a detailed affidavit in response to both the petition as well as the instant interlocutory application. The only admission to any of the petitioner's averments was that the respondent once helped the petitioner by settling part of the petitioner's medical bill. The help was stated to have been out of humanitarian grounds. The admission was not made under oath. The admission was also not made directly by the respondent. It was made by the respondent's counsel. Its probative value could consequently be subjected to question.
12. Besides the alleged admission, there was no other nexus biologically connecting, even by the slightest imagination, the petitioner and the respondent or the petitioner's mother and the respondent. The petitioner was also not a child to warrant any special circumstances being invited. The petitioner sought to know the truth through a scientific determination of paternity. The petitioner also sought to establish the violation of her constitutional rights.
13. A determination of paternity (or more correctly, non-paternity) put to rest nagging questions or doubts. A basis however needed to be set for such a test. Such a basis could be set in the preliminary stages of the suit where there was clear and irrefutable conduct pointing towards paternity. Such a basis could be found to have been established after trial.
14. The matrix of the competing interests which involved the petitioner's right to have the dispute adjudicated fairly and the respondent's interests to have his constitutional rights to bodily integrity and privacy protected, would dictate that the level of certainty to be achieved was not simplified. Rather the court had to be satisfied that an appropriate basis had been laid out.
15. The petitioner's affidavit evidence had to be subjected to appropriate challenge and testing through cross-examination prior to any final orders being issued because an order for DNA testing made at an interlocutory was basically final. Once undertaken, it could not be undone though it could be ignored.
16. Where paternity was in dispute, then within reasonable limits and in appropriate cases DNA testing of non-consenting adults could be ordered even at an interlocutory stage. The bid to establish the truth through scientific proof should not be generalized and should never so lightly prevail over the right to bodily integrity and right to privacy until it was clear that such rights ought to be limited. The clarity was only established where an undoubted nexus was shown as well as a specified quest to protect or enforce specific rights. Untested and controverted affidavit evidence may not suffice.
17. The court could not make the orders sought at that stage of the proceedings, as the petitioner on the basis of the untested affidavit evidence had failed to do enough to establish the requisite nexus.

Application dismissed with no orders as to costs.

Citations

Cases

1. AK v RW Divorce Cause 56 of 2012; [2013] KEHC 1187 (KLR) – (Explained)
2. EK V DK & another Divorce Cause 141 of 2010; [2012] KEHC 4347 (KLR)- (Explained)
3. EMM v IGM & another Civil Appeal 114 of 2012; [2013] KECA 37 (KLR) – (Explained)
4. HCK v EJK Succession Cause 1129 of 2006; [2008] KEHC 3895 (KLR)- (Explained)
5. MMK v KW Civil Application 189 of 2007; [2008] KECA 225 (KLR) – (Explained)
6. PKM v Senior Principal Magistrate Children's Court at Nairobi; JW (Interested Party) Petition 138 of 2012; [2014] KEHC 7488 (KLR)- (Explained)
7. PM v JK Miscellaneous Case 159 of 2009; [2010] KEHC 2905 (KLR) – (Explained)
8. RMK v Republic Criminal Appeal 188 of 2011; [2015] KEHC 5058 (KLR)- (Explained)
9. SWM v GMK Petition 235 of 2011; [2012] KEHC 5512 (KLR) – (Explained)

Statutes

1. Constitution of Kenya — articles 23, 27(4)(5); 28; 45 — (Interpreted)
2. Evidence Act (cap 80) — sections 107-9 – (Interpreted)

Advocates

Mr E. Ongoya for Petitioner
Mr Ouma for Respondent

RULING

Introduction

1. The petitioner seeks an order directing the respondent to submit and subject himself to a Deoxyribonucleic Acid Test (DNA Test). The test is effectively for the purposes of ultimately determining whether the respondent is the petitioner's biological father. The petitioner also seeks orders by the court directing how the costs of the DNA test are to be borne. Both orders are sought through a notice of motion taken out by the petitioner on 11 December 2015.

2. The effect of the application is that in the event the DNA test establishes that the respondent is indeed the biological father of the petitioner, prayers 1 and 2 of the main petition which also seek orders for a DNA test and a declaration of paternity would have been issued.

Litigation history and background facts

3. The petition was filed on April 10, 2015. The petitioner alleged that in 1980 the respondent had an intimate relationship with one DNM and as a result the petitioner was born. Shortly thereafter the said DNM laboured under some measure of depression and disillusionment. She later developed a full-blown mental illness.

4. The petitioner states that she was informed that the respondent is his father and that the respondent had over the years assisted the petitioner financially including partly meeting the petitioner's rather expensive medical treatment for breast cancer. The petitioner states that the help though was with a lot of reluctance on the part of the respondent. Ultimately, the petitioner realized that the respondent did not want anything to do with the petitioner. The realization prompted the petitioner to issue a demand and later to file the petition.

5. In the main petition, the petitioner claimed that her rights were being violated as the respondent had continued to treat the petitioner in a discriminatory manner on grounds of birth contrary to article 27(4) &(5) of the *Constitution*. The petitioner also alleged that her rights to dignity under article 28 and to a family under article 45 of the *Constitution* had also been violated by the respondent in so far as the respondent had made it difficult and impossible for the petitioner to relate and identify with the respondent as her father. Declarations to like effect were consequently sought by the petitioner.

6. The respondent filed a replying affidavit on 3 July 2015. The respondent denied that there had been any relationship between himself and the petitioner's mother. The respondent also denied ever supporting the petitioner financially or otherwise. Additionally, the respondent denied being the biological father of the petitioner.

7. Following the filing of the replying affidavit, the proceedings herein were muted until November 3, 2015 when the court issued the petitioner with a notice to show cause why the petition could not be dismissed for want of prosecution. On 10 November 2015, the petitioner's counsel detailed the court of the petitioner's indisposition and the wish to file the instant application.

8. The application was filed on 1 December 2015 and supported by the petitioner's affidavit sworn on 10 December 2015. The grounds advanced in support of the application, though rather prolix, were effectively the same grounds stated and contained in the petition as well as the affidavit in support of the petition. Credit though that there were three new grounds which ran thus:

    a) That the interlocutory relief sought herein is an appropriate order in the circumstances of this case for purposes of determination of the substantive questions in controversy in this matter.

    b) That the respondent will not suffer any undue prejudice if the orders are granted.

    c) That the orders sought are necessary for the effectual, eventual and definitive determination of the petition herein.

9. The respondent filed an affidavit in opposition to the application on 28 January 2016.

10. The replying affidavit once again effectively reiterated the same grounds, which had earlier been advanced in opposition to the petition. Credit again though to the respondent who also now lamented that the orders sought by the petitioner in the interim were the same orders sought in the main.

11. Ultimately, both parties filed their respective written submissions on the interlocutory application and subsequently highlighted the submissions before me on 18 July 2016.

Arguments in court

12. Mr E Ongoya urged the petitioner's case while Mr Ouma represented the respondent.

13. Mr Ongoya urged me to allow the application, as there was already before the court a detailed history of the relationship between the respondent and the petitioner. Counsel urged that there was admission on the part of the respondent that he had indeed financially assisted the petitioner. Additionally, counsel stated that a DNA test would bring to rest the question whether the respondent is the biological father of the petitioner. The test would also vindicate the petitioner's position that she had been treated in an undignified and discriminatory manner.

14. Counsel added that case law available established that a DNA test could be ordered and in the instant case a nexus between the parties had been clearly established.

15. On his part, Mr Ouma advocating for the respondent questioned the delay in the filing of the application whilst also stating that the petitioner was effectively seeking to determine the petition at an interlocutory stage. Counsel pointed out that an order for DNA testing would effectively equate an intrusion into the respondent's privacy.

16. The respondent's counsel additionally submitted that the petitioner needed to establish the rights, which had been violated prior to seeking any order for DNA testing. In the instant case, the court heard, the orders were not merited in the interim, as the petitioner was not a 'child' for the court to act in her favour.

17. Counsel concluded by stating that the application had been brought in bad faith and warranted a dismissal with costs.

18. The respondents counsel relied on the decisions of the High Court in *SWM v GMK* [2012]eKLR, RMK v AKG & another [2013]eKLR and RK v HJK & another [2013]eKLR all for the proposition that for an order for DNA testing to issue a party ought to first clearly establish his or her constitutional rights being violated by the person to be ordered to provide DNA and that additionally a proper legal and factual basis must be laid out before a respondent is ordered to undergo a DNA test to establish paternity at an interlocutory stage.

Discussion and Determination

19. I have considered the pleadings as well as the oral and written submissions by the parties. The sole issue for determination is whether the petitioner has made out a case to enable me order the respondent to undergo a DNA test at this interlocutory stage.

Mandatory interim orders

20. The respondent's counsel raised it and it would be important to note that I take cognizance of the fact that the order sought by the petitioner at this interlocutory stage is mandatory in nature. It is uniquely the sort of order that may not be undone once issued and observed even if the petitioner was to fail on the petition proper. I also take cognizance of the fact that I must and indeed cannot at this interlocutory stage make definitive and final findings especially on any disputed factual or legal points.

21. I must however immediately state that contrary to the respondent's submissions that the court should not issue such mandatory orders at an interlocutory stage of the proceedings especially where the same or similar orders are sought in the main petition, this court has under article 23 of the *Constitution* an almost unlimited power to fashion orders or relief as may be appropriate. The jurisdiction is unlimited as to what and when orders may be issued. The court must however exercise caution especially when the orders sought are mandatory in nature and where they may also end up being an intrusion of another individual's constitutionally guaranteed rights or freedoms.

22. The approach by the court when faced with an application for a mandatory interlocutory order ought to be that the court prior to granting such an order must be satisfied that there are special circumstances, which warrant such an order being issued.

23. Additionally, the court must be satisfied that the case is a clear and straightforward one, which ought to be dealt with at once, and that at trial the court would be vindicated for having issued the order in the first place. Where there is any slight doubt then such an order ought not to be issued. The standard would therefore certainly not be the equivalent of a prima facie case being established. The rationale must be that acts performed pursuant to mandatory orders may not be easily remedied if the claimant's case is ultimately a flop at trial.

24. I would consequently conclude that mandatory orders may be issued by this court at an interlocutory stage even where it appears to fragment the the petition and deal with or grant only one or some of the reliefs sought in the main.

Legal position of blood or DNA testing

25. The law on the topic of compulsory blood or DNA testing in paternity disputes, which is also partly an issue in the petition herein, is yet to be completely and satisfactorily developed locally. There is no express legislative framework, which specifically regulates the position in civil cases. The few judicial pronouncements on the topic do not appear unanimous in approach or principle. Whereas in relation to children, the courts have occasionally been quick to act in the child's best interest and ordered DNA testing, with regard to non-consenting adults the jurisdiction has been left hazy.

26. Much earlier in *MW v KC* [2005]eKLR, the court ordered DNA testing on the basis that it had been established that there was a likelihood that the Petitioner was the father of a child. The parties in the case were engaged in maintenance proceedings.

27. In *HCK v EJK* [2008]eKLR, the court stated that prior to ordering any DNA testing even where a child is involved there was need to establish a link between the person claiming paternity and the one claiming non-paternity. The court stated and held as follows:

> " No reasonable court will order for a DNA test against a person in circumstances which do not appear to link the person with the child intended to be protected. There must therefore be facts strongly linking the respondent to the child. Otherwise an applicant will look at the richest person among those she generally associated with and claim him to be the putative father of her child to thereby entitle her to seek a DNA test against him.".

28. But in *PM v JK* [2010]eKLR, the court simply declined an application for DNA testing on the basis that it would go against the principle against self- incrimination. This was notwithstanding the fact that a child was involved.

29. Then in SWM v GMK[2012]eKLR, the court declined to order DNA testing as such an order , according to the court, would have resulted in the violation of the non-consenting adult's rights to bodily integrity and privacy. There was no child involved and the court stated as follows:

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

30. Subsequently, in *RK v HJK & another* [2013]eKLR, the court dealing with an interlocutory application for DNA testing to be ordered, declined to make the order. Once again the court held that compulsory DNA testing violated a person's bodily integrity as well as his privacy. The court however made it clear that if there was evidence to warrant an interference with the rights then the order could be issued, suggesting in the process that such an order could be made even at an interlocutory stage. So held the court

> " [12] ...an order of such finality should not be made at this stage of the proceedings particularly where the evidence does not surmount the threshold necessary to interfere with the 1st Respondent's rights. The necessity or

otherwise of granting this order will become evident once the petitioner has established the breach of constitutionally protected rights and fundamental freedoms..."(emphasis)

31. In *RMK v AKG & another* [2013]eKLR, the court returned the same verdict as in *SWM v GMK* (*supra*) that it would be a violation of an individual's right to bodily integrity and privacy if DNA testing was compelled. The court in *RMK v AKG & another* (*supra*) however stated that the applicant was under a duty to discharge the burden of first establishing a nexus between the applicant and the respondent in relation to the alleged paternity as well as the allegedly violated rights to persuade the court to grant the order for DNA testing.

32. Recently, in *PKM v Senior Principal Magistrate Children's Court at Nairobi & another* [2014]eKLR , the court adopted the test developed by the Supreme Court of India in *Bhabani Prasad Jena v Convener Sec Orissa*, Civil Appeal Nos 6222-6223 of 2010. According to the court ,the question was whether the test was "eminently needed" to establish the truth and reach a just conclusion in the matter absent any other form of evidence and a prima facie case warranting the order ought to have been established first. The case involved a child.

33. A similar approach of truth-finding was followed by the court in *WKG v JWM & another* [2016]eKLR where the court having alluded to sections 107-9 of the *Evidence Act* (cap 80) was of the view that in paternity cases where both parties were unable to prove paternity or non-paternity , the court could opt for a scientific method for conclusive results. The court seemed to give prominence to a truth finding mission than to the dispute resolution duty of the court in an adversarial system. The case involved two non-consenting adults. Sibling DNA testing was ordered to help establish paternity.

34. Much more recently in *RK v JK & another* [2016]eKLR, the court held that

> "(77) ... a DNA test will not be ordered unless there are clear circumstances that justify the making of such an order. It calls for a balance to be made in the circumstances of each case between the needs of a child and the emphasis is on "child", and the rights of the alleged father to privacy, bodily security and integrity. If the facts and circumstances of the case lead the court to believe that a prima facie case has been made out that the alleged father of the child in respect of whom orders of DNA are sought, as was the case in *MW v KC* [2005]eKLR relied on by the petitioner, where the mother of the child and the alleged father had been cohabiting, then the constitutional imperative in article 53 demand that the best interests of the child should be the paramount consideration, and would override the right to privacy of the putative father"
>
> (78) Taking the above factors into consideration in the present case, I am constrained to find that a case has not been made out by the petitioner that would justify the grant of the orders that she seeks. As noted before, she is an adult of 35, so the constitutional dictates of article 53 do not apply with respect to her. Secondly ,she has not , on a *prima facie* basis established any biological relations with the 1st respondent to warrant the grant of the orders for DNA testing that she seeks against him."(emphasis added)

35. It emerges from the case law that for an order for DNA testing to issue, an applicant has to establish that some right recognized by the *Constitution* has been violated or infringed. The applicant must also establish the biological relations with the respondent. While one set of case law suggests that this

burden is to be discharged on a *prima facie* basis the other suggests that the burden is to be discharged through the ordinary standard of civil litigation, that of a balance of probabilities.

36. What is however clear is that the court has an inherent jurisdiction to order or not to order DNA testing both where a child is involved and where there is no child but only a non-consenting adult. The court though, in my view, must be mindful to protect bodily security and integrity as well as the privacy of individuals to be subjected to such tests. The essence, it appears, is that the court ought to be ready to assert its role of resolving disputes fairly and one way of doing so is by discovering the truth, even through compulsion.

37. Paternity tests are known to have a high degree of accuracy. Statistics tell us that though not absolute the percentage of accuracy to the family tree is a staggering 99.9%. They reveal the truth and generally courts have accepted their overall accuracy and value: see generally the Court of Appeal in *EMM v IGM & another* [2014] eKLR.

38. Even though the court's core role is to determine disputes, the courts often deploy methods of compulsion not necessarily to get to the truth but to help determine disputes fairly. It is thus common to see witnesses being summoned and also being compelled at the risk of jail, to answer questions. In all instances though, the party seeking the court's assistance must lay a firm legal and factual foundation for his case. It is not different where DNA testing is sought. In the case of DNA testing the basis must be laid even where a child is involved, as ordering DNA testing is not a mere procedural matter but is substantive enough given that an individual's constitutional rights may be limited through such testing.

39. In the instant case , with the caution that I need to be certain that I will be vindicated at trial if I have to make the rather final orders sought for DNA testing, the question is whether the petitioner has established a foundational basis of a biological relationship with the Respondent to warrant the orders sought? The burden, as this is an interlocutory application, ought to be satisfied on a prima facie basis.

40. The evidential basis of the petitioner's case is the affidavit sworn in support of the application. The respondent largely denies the affidavit evidence. Clearly, when facts averred in an affidavit have not been admitted they cannot be taken on their face value to be creditworthy and tenable. Without disregarding them, such facts must be subjected to challenge and in light of the circumstances of the case.

41. The respondent has himself sworn a detailed affidavit in response to both the petition as well as the instant interlocutory application. The only admission to any of the petitioner's averments is that the respondent once helped the petitioner by settling part of the petitioner's medical bill. The help is stated to have been out of humanitarian grounds. The admission was not made under oath. The admission was also not made directly by the respondent. It was made by the respondent's counsel. Its probative value may consequently be subjected to question.

42. Besides the alleged admission, there is no other nexus biologically connecting , even by the slightest imagination, the petitioner and the respondent or the petitioner's mother and the respondent. And the respondent firmly denies paternity.

43. The petitioner, as already indicated, is also not a child to warrant any special circumstances being invited. The petitioner however seeks to know the truth through a scientific determination of paternity. The petitioner also seeks to establish the violation of her constitutional rights.

44. It is true a determination of paternity (or more correctly, non-paternity) puts to rest nagging questions or doubts. A basis however needs to be set for such a test. Such a basis may be set in the preliminary stages of the suit where there is clear and irrefutable conduct pointing towards paternity. Such a basis may however be found to have been established after trial.

45. In the circumstances of the instant application, I am not satisfied that at this stage of the proceedings the petitioner has established the necessary biological and factual nexus with the respondent to warrant an intrusion of the respondent's right to bodily integrity and privacy and for me to make an order that the respondent submits to DNA testing at this stage.

46. The matrix of the competing interests which involve the petitioner's right to have the dispute adjudicated fairly and the respondent's interests to have his constitutional rights to bodily integrity and privacy protected, would dictate that the level of certainty to be achieved is not simplified. Rather the court should be satisfied that an appropriate basis has been laid.

47. Unfortunately, much of the petitioner's affidavit evidence, in my view, ought to be subjected to appropriate challenge and testing through cross-examination prior to any final orders being issued. I state so because an order for DNA testing made at an interlocutory is basically final. Once undertaken, it cannot be undone though it could be ignored.

Conclusion

48. In conclusion, I hold the view that where paternity is in dispute then within reasonable limits and in appropriate cases DNA testing of non-consenting adults may be ordered even at an interlocutory stage. The bid to establish the truth through scientific proof must however not be generalized and should never so lightly prevail over the right to bodily integrity and right to privacy until it is clear that such rights ought to be limited. The clarity is only established where an undoubted nexus is shown as well as a specified quest to protect or enforce specific rights. Untested and controverted affidavit evidence, may not suffice.

49. I would therefore in the circumstances of this case not make the orders sought at this stage of the proceedings as the Petitioner on the basis of the untested affidavit evidence has failed to do enough to establish the requisite nexus.

50. The result is that I dismiss the application but with no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF SEPTEMBER, 2016.

J.L.ONGUTO

JUDGE