



Organization for National Empowerment v Principal Registrar Birth and Deaths & another; Kenya National Human Rights and Equality Commission (Interested Party) (Petition 289 of 2012) [2013] KEHC 6005 (KLR) (5 April 2013) (Judgment)

ORGANIZATION FOR NATIONAL EMPOWERMENT v PRINCIPAL REGISTRAR OF BIRTH AND DEATHS & another [2013] eKLR

Neutral citation: [2013] KEHC 6005 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

PETITION 289 OF 2012

I LENAOLA, J

APRIL 5, 2013

BETWEEN

ORGANIZATION FOR NATIONAL EMPOWERMENT PETITIONER

AND

THE PRINCIPAL REGISTRAR BIRTH AND DEATHS 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

AND

KENYA NATIONAL HUMAN RIGHTS AND EQUALITY COMMISSION INTERESTED PARTY

Whether adopted children are entitled to birth certificates as opposed to adoption certificates only
Adopted children in Kenya were registered under the adoption register and not the register of births. After registration of the children, for each child an adoption certificate and not a birth certificate was issued. The court held that the denial of a birth certificate to an adopted child was discriminatory. The court also held that there was nothing patently unconstitutional about sections 169 and 170 of the Children Act or section 11 of the Registration of Births and Deaths Act, which dealt with the register known as the adoption register and the duty to give notification about a child's birth, respectively. Additionally, the court issued orders for the Principal Registrar of Births and Deaths to issue birth certificates to adopted children without making reference in the certificates to the fact that the children were adopted.

Reported by Kakai Toili

Constitutional Law - fundamental rights and freedoms - freedom from discrimination - right of every child to a name and nationality from birth - whether the denial of a birth certificate to adopted children was discriminatory and therefore unconstitutional - Constitution of Kenya, 2010, article 27.



Statutes - interpretation of statutes - whether sections 169 and 170 of the Children Act and section 11 of the Registration of Births and Deaths Act were contrary to article 27 of the Constitution of Kenya, 2010, in that they provided for the registration of adopted children in the adoption register and not the births register, and after registration the adopted children had adoption certificates and not birth certificates - Constitution of Kenya, 2010, articles 27, 53 (1), (2); Children Act, sections 169, 170; The Registration of Births and Deaths Act, section 11; The African Charter on the Rights and Welfare of the child, article 3.

Brief facts

The petition before Court sought the determination of the question as to whether children who were adopted under the Children's Act No 8 of 2011 were entitled to a birth certificate as opposed to an adoption certificate only.

Issues

- i. Whether children adopted under the Children Act No 8 of 2001 were entitled to a birth certificate as opposed to an adoption certificate only.
- ii. Whether the system where adopted children were registered in an adoption register as opposed to registration under the births register was discriminatory and contrary to article 27 of the Constitution and the African Charter on the Rights and Welfare of the child.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 27(1)

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

Article 27(4)

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

Article 53(1)(a)

53. (1) Every child has the right—
(a) to a name and nationality from birth;

Article 53(2)

(2) A child's best interests are of paramount importance in every matter concerning the child.

Children Act, No 8 of 2001 (Repealed)

Section 169(1)

169. Adopted children register

(1) The Registrar-General shall maintain a register, to be called the "Adopted Children Register", in which shall be made such entries as may be directed to be made therein by adoption orders, but no other entries shall be made therein.

Section 170(1)

170. Registration of adoption orders

(1) Every adoption order made by the court shall contain a direction to the Registrar-General to make an entry in the Adopted Children Register in the prescribed form.

Births and Deaths Registration Act (Cap. 149)

Section 11

Duty to notify births where registration compulsory

Upon the birth of any child the registration of whose birth is compulsory, it shall be the duty of the father and mother of the child, and, in default of the father and mother, of the occupier of the house in which to his knowledge the child is born, and of every person present at the birth, and of the person having charge of the child, to give notice of the birth, within such time as may be from time to time prescribed, to the registrar of the registration area in which the birth occurs:



Provided that, in the case of births in prisons, hospitals, orphanages, barracks or quarantine stations, the duty to give such notice shall lie on the officer in charge of the establishment in which the birth took place.

Held

1. Whereas adopted children had to be registered in the adoption register, there was absolutely no reason why, a certificate of birth could not be issued to them even if the adoption register was maintained for record purposes.
2. Persons should be uniformly treated unless there was some valid reason to treat them differently. The reasons for not treating people uniformly often involved questions of policy. The policy question involved ought to be one that ensured that the child was not reminded of the adoption at every stage of their lives and to assure a child of a normal like life without being stigmatised by fact of adoption.
3. Looking at the Kenyan Society in its evolutionary context, denial of a birth certificate to adopted children had no meaning at all and any legislation that purported to do so was contrary to article 27 of the Constitution, to that extent only.
4. There was nothing patently unconstitutional about sections 169 and 170 of the Children Act or section 11 of the Registration of Births and Deaths Act.
5. [*Obiter*] “Other countries in the world have moved away from denial of birth certificates and New Zealand for example grants a “per-adoptive birth certificate” and then a birth certificate with particulars of the adoptive parents given after adoption. Kenya needs to move in that direction.”

Application allowed.

Orders

i. Principal Registrar of Births and Deaths to issue all adopted children appearing in the register for adopted children with birth certificates based on the particulars appearing in that register but with no reference to the parents as “adopter” or “adopters” and with no reference to the child as “adopted”.

ii. The Principal Registrar of Births and Deaths shall maintain the register of adopted children for record purposes and for future use by either the adopted child or adopter parents.

Citations

East Africa

1. *Ngarangi & 3 others v Attorney General* [2008] KLR 688 - (Explained)
2. *Mwai, John Kabui & 3 others v Kenya National Examination Council & 2 others* Petition No 15 of 2011- (Explained)

Canada

Republic v Turpin [1989] I S C R 1296 - (Explained)

Mauritius

Matadeen & others v Pointu & others [1999] AC 98; [1998] 3 WLR 18; [1999] 1 AC 98; [1998] UKPC 9 - (Followed)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 2(5)(6); 6, 21, 27(3);53(1) (2) - (Interpreted)
2. Children Act (cap 141) sections 169,170 - (Interpreted)
3. Births and Deaths Registration Act (cap 149) sections 10, 11 - (Interpreted)

International Instruments and Covenants

African Charter on the Rights and Welfare of the Child (ACRWC) 1990 articles 3,



JUDGMENT

Introduction

1. The petition dated July 9, 2012 raises the issue whether children who are adopted under the *Children's Act* No 8 of 2001 are entitled to a Birth Certificate as opposed to an Adoption Certificate only. Further a question is raised as to whether the present system where adopted children are registered in an Adoption Register as opposed to registration under the Births and Deaths Register is discriminatory and contrary to article 27 of the *Constitution* and the African Charter on the Rights and Welfare of the Child.

Petitioner's Case

2. It is the case for the petitioner that whereas article 53(1) and (2) provide that every child has the right to a name and nationality from birth and that a child's best interests are of paramount importance in every matter concerning the child, non-registration aforesaid amounts to discrimination on the grounds of social origin contrary to article 27(3)(b) of the *Constitution*.
3. Regarding the applicability of the African Charter on the Rights and Welfare of the child, the Petitioner states that articles 3 and 6 of the Charter provide that a child shall not be discriminated against on the grounds of "social origin, fortune, birth or other status" and every child shall thus have a right, from birth, to a name, immediate registration upon birth and to acquire a nationality.
4. That therefore sections 169 and 170 of the *Children's Act* as well as section 11 of the *Registration of Births and Deaths Act* to the extent that they create a separate register for adopted children and deny them a birth certificate, are discriminatory and ought to be declared as being unconstitutional.
5. In submissions by counsel for the petitioner, it is the petitioner's further case that in the decisions of *James Nyasora Ngarangi & others v Attorney General*, HC Petition No 298/2008 as well as *John Kabui Mwai & 3 others v Kenya National Council & 2 others* [2011] eKLR, discrimination was defined as;

"any distinction, exclusion, restriction or preference which is based on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, dress, culture or birth"
6. Applying the above definition, it is the Petitioner's argument that where a distinction is created as to who should be given a birth certificate, then discrimination has clearly been evidenced. In addition reference was made to the decision in *Republic vs Turpin* [1989] I SCR 1296 at 1331 where Wilson, J explained that;

"In determining whether there is victimization on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger, social, political and legal context"
7. The final prayers sought in the petition are the following;

"1) A declaration that section 169 & 170 of the *Children Act* No 8 of the 2011 and section 11 of the Registration of Births and Deaths, cap 149 of the of the



Laws of Kenya breach the fundamental rights of adopted children not to be discriminated against and that the said Sections are unconstitutional.

- 2) A declaration that in so far as section 169 & 170 of the *Children Act* No 8 of 2001 and Section 11 of the Registration of Births and Deaths provides for a separate register for adopted children and denies them a birth certificate, it infringes on the right not to be discriminated against on grounds of social origin guaranteed under article 21, 27 and 53 of the Constitution.
- 3) A declaration that the denial of a birth certificate to adopted children is discriminatory on the basis of social origin and hence unconstitutional and void.
- 4) Writs of *mandamus* compelling the Principal Registrar of Births and Deaths (1st respondent) to issue all adopted children appearing in the special register for adopted children with birth certificates and to henceforth issue adopted children with birth certificates.
- 5) Any other further orders, directions, declarations and remedies as this honourable court may deem fit and just in the circumstances.”

Respondent's Case

8. I have seen no formal response to the Petition but I have seen submissions filed by Mr Moimbo, learned Litigation Counsel on behalf of the the Attorney-General and his answer to the petition is that the creation of a Birth Register and an Adoption Register has not in any way disadvantaged, hurt or prejudiced any adopted child. That government must necessarily differentiate and classify its people for purposes of regulating and managing their affairs and classification of children in the manner complained of is not patently unlawful.
9. It is also urged on behalf of the respondent that birth certificates provide accurate date and place of birth, and the names of parents but such information would be impossible to know in an adoption situation which is mainly left to the estimation of the adoption court.
10. Mr Moimbo then went into great lengths to address the principle of differentiation as opposed to discrimination and his conclusion was that the allegations by the Petitioner amount to a complaint against differentiation as opposed to discrimination. That differentiation between children in the manner complained of is rational and cannot attract the sanction of this court. That therefore the petition should be dismissed.

Determination

11. I have elsewhere above reproduced the prayers in the petition and it is obvious that prayers 1, 2 and 3 revolve around the issue whether the denial of a birth certificate to adopted children is discriminatory and therefore unconstitutional. Prayer 4 is a consequence of a favourable answer to that issue.
12. What is the law regarding discrimination? article 27 of the *Constitution* provides as follows;
 - “(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
 - (2) Equality includes the full and equal enjoyment all rights and fundamental freedoms.



- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (4) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
- (6) To give full effect to the realisation of the rights guaranteed under this article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
- (7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.”

13. In his submissions, the advocate for the Petitioner has urged the point that adopted children are being discriminated against on account of their social status and that article 53(1) and (2) of the Constitution specifically provide that every child has the right to a name and a nationality. That by being denied a birth certificate, all these rights have been violated.
14. I expected counsel to address me on the reason why a birth certificate is issued and the difference between it and an adoption registration. None did.
15. In the schedule to the Registration of Birth and Deaths Act, cap 149, a sample of the Register of Birth and a Certificate of Birth are given. The contents of both relate to the particulars of a birth and they include;
 - i) Full name of child
 - ii) Date of birth
 - iii) Full name of father
 - iv) Full name of mother
 - v) Exact place of birth
16. In his Submissions, counsel for the Respondent argued that such particulars are impossible to know in the case of a child who has been adopted. In that regard I have also seen a certificate of entry in the Adopted Child Register annexed to the affidavit in support of the petition. The particulars thereof are;
 - i) Date and country of birth of child
 - ii) Name and surname of child
 - iii) Sex of child
 - iv) Name, and surname, address and occupation of adoption order and court which made the order
17. It is clear to me that an entry in the adoption register is not too different from an entry in the register of birth and a certificate of birth is merely an extract of the information contained in the register. This



is because it is the particulars and identity of a child that both are meant to show. On the other hand, what is extracted from the Adoption Register is a “certificate of entry in the adopted children register” and that is where the issue of discrimination is raised. And I will pose the question, why can’t an adopted child have a birth certificate issued out of the information contained in the Adoption Register? Section 10 of the Act provides that every person who gives notification of a birth shall “to the best of his knowledge and ability give the prescribed particulars” of the child and the import of this is that the particulars may not always be accurate and estimates of time and date may well be placed in the register. That answers the argument that abandoned children who are later adopted may not attract exact timings and place of birth.

18. The African Charter on the Rights and Welfare of the child to which Kenya is a signatory in article 6 thereof grants every child the right to be registered immediately after birth and there is no discrimination created against adopted children since they too are entitled to the said registration.
19. Reading article 27 of the Constitution together with article 2(5) and (6) thereof against the Charter aforesaid, I am convinced that whereas adopted children must indeed be registered in the adoption register, there is absolutely no reason why, a certificate of birth cannot be issued to them even if the adoption register is maintained for record purposes. To that extent therefore, I agree with the decision in Matadeen & another v Pointu & others [1998] 3 WLR 18 where Lord Hoffman in addressing differential treatment of persons stated thus:-

“of course, persons should be uniformly treated unless there is some valid reason to treat them differently. The reasons for not treating people uniformly often involve questions of policy”
20. What is the policy question involved in denial of a birth certificate when there is no doubt that an adopted child was indeed born and is not a ghost? What is the policy question involved when the adopted parent(s) are indeed to all intents and purposes of the law, the parents of the child who has been assigned a surname, particulars of dates and place of birth by the court? What is the policy question involved when an adopted child is given the comfort of growing up with loving adoptive parents only to be saddled and stigmatized with a certificate of adoption whenever their identity is required?
21. In fact, the policy question involved ought to be one to ensure that the child is not reminded of the adoption at every stage of their lives and to assure that child of a normal like life without the stigma of being stigmatised by fact of adoption.
22. Wilson J in Republic v Turpin (*supra*) captured the issue well when he stated that it is important to look at the impugned legislation in the context of the political, social and legal circumstances obtaining. I agree, and looking at the Kenya Society in its evolutionary context, denial of a birth certificate to adopted children has no meaning at all and any Legislation that purports to do so is contrary to article 27 of the Constitution, to that extent only. I will give appropriate orders shortly.
23. Other countries in the world have moved away from denial of birth certificates and New Zealand for example grants a “per-adoptive birth certificate” and then a birth certificate with particulars of the adoptive parents is given after adoption. Kenya needs to move in that direction and whereas I see nothing patently unconstitutional about sections 169 and 170 of the Children’s Act nor section 11 of the Registration of Births and Deaths Act, the Petition before me has merit and the orders that must be issued are the following;
 - i) An order is issued directed at the Principal Registrar of Births and Deaths to issue all adopted children appearing in the Register for Adopted Children with birth certificates based on the particulars appearing in the said Register but with no reference to the parents as “adopter” or “adopters” and with no reference to the child as “adopted”.



- ii) The Principal Registrar of Births and Deaths shall maintain the Register of Adopted Children for record purposes and for future use by either the adopted child or adopter parents
- iii) Any party at liberty to apply.
- iv) Each party shall bear its own costs, this being a public interest litigation.

24. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 5TH DAY OF APRIL, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court Clerk

Mr. Gitonga for Petitioner

No appearance for Respondent's

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE

5/4/2013

