



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Petition 235 of 2011

S.W.M.....PETITIONER

AND

G.M.K.....RESPONDENT

JUDGMENT

Petitioner's Case

1. By way of a petition dated the 24th of October, 2011 the petitioner moved this court seeking the following orders;
 - (1) *That a D.N.A. test be carried out on the Respondent and the petitioner so as to ascertain whether the respondent is the biological father of the petitioner i.e. establish biological paternity.*
 - (2) *A declaration that the Respondent is the Petitioner's biological father.*
 - (3) *That costs be in the cause.*
2. The petitioner's case as set out in the petition and her Supporting Affidavit sworn is straight forward. She believes that the respondent is her biological father as he has intimated to her this fact and in fact influenced her to change her late son's name from S.M to G.M.
3. The petitioner further contends that the respondent interrupted and interfered with the petitioner's way and means of livelihood after identifying her by urging her to abandon her humble business upon the promise that the respondent, a civic leader and a man of means, would provide for her maintenance. The respondent did this for a season only to neglect her leaving her desperate with no means to sustenance.
4. According to material before court, the petitioner was born out of a union by the respondent and the petitioner's mother in the 1978. The respondent abandoned the petitioner's mother during the petitioner's childhood and the petitioner's mother got married to another man. It is the petitioner's submission that she has been teased, traumatised and shunned during her upbringing which caused her emotional stress.
5. In the light of the petitioner's upbringing, her childhood and her whole past, the petitioner feels highly obligated to ascertain her heritage as rumours and hearsay cannot suffice as there ought to be a conclusive scientific exercise to tally her DNA with that of the respondent which she pleads this court to assist her actualize.
6. The petitioner's claim is hinged on **Article 33(1) (a)** on the freedom to seek, receive or impart information or ideas, in this case information relating to her biological father and heritage. Towards this

end, she prays that this court do order for a DNA test to help her establish paternity.

Respondent's case

7. The respondent opposes the petition on the basis of his replying affidavit sworn on the 24th February 2012.

8. He admits to having had a short affair with the petitioner's mother, way back in the year 1976, whilst still a student and in fourth form at a Secondary School Nairobi and that the said affair did result in her conceiving. The issue of the pregnancy was settled under Kikuyu Customary law in 1976 by the respondent paying pregnancy compensation according to customary law.

9. Shortly thereafter, the petitioner's mother dropped out of school as a result of the pregnancy and then married another man in early 1977. The respondent states that he did not hear much from her as she moved from their rural area in Murang'a District and went to settle elsewhere with her husband.

10. The respondent further depones that the petitioner was born on 4th November, 1978 which is almost two years after her mother had been married to her present husband and that therefore, no legal presumption could arise that he was her father.

11. According to the respondent, the petition is only geared towards embarrassing him and the petitioner's motive was to secure the assistance of court so that upon his demise, she could then claim rights of inheritance over his property.

12. The respondent, admits to meeting the petitioner's mother in late May 2010, when she went to his offices in Ruiru, where he is the *[particulars withheld]*, accompanied by her husband. She explained to him that they wanted his assistance in a fundraising for their grandson who suffered from a heart problem and who required funds to send him to India for treatment. He accepted the invitation and was able to conduct a fundraising towards the medical expenses. The respondent depones that in late September 2011, the petitioner's mother called him seeking for funeral assistance as the child had passed on but declined.

13. The respondent denies that he had anything to do with the petitioner's son change of name.

Determination and disposition

14. It is an established principle that where a party alleges a breach of fundamental rights and freedoms, he or she must state and identify the right infringed and how it is infringed in respect to him. (See the case of **Anarita K Njeru v Republic (No. 1) [1979] KLR 154**). This principle is well founded and as was explained in **John Kimani Mwangi v Town Clerk Kangema Nairobi Petition 1039 of 2007 (Unreported)** the court said this about the requirement of specificity, *"Our courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights, they must state the provision of the Constitution allegedly infringed in relation to them, the manner of infringement and the nature and extent of that infringement.The reason for this requirement is two fold; first the respondent must be in a position to know the case to be met so as to prepare and respond to the allegations appropriately. Secondly, the jurisdiction granted by section 84 of the Constitution is a special jurisdiction to enforce specific rights which are defined by each section of the bill of rights. It is not a general jurisdiction to enforce all rights known to man but specific rights defined and protected by the Constitution. It is not sufficient to rely on a broad notion of unconstitutionality but rather point to a specific provision of the Constitution that has been abridged."*

15. The gloss put on the **Anarita Case (Supra)** by **Trusted Society of Human Rights Alliance v Attorney General and Others Nairobi Petition No. 229 of 2012 (Unreported)** is that it goes further to recognise the obligation of the court, particularly in light of the Constitution, in dealing with the manner of presenting claims for the enforcement of fundamental rights and freedoms. The Court observed that, *"a person claiming constitutional infringement must give sufficient notice of the violation to allow her*

adversary to adequately prepare her case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

16. It is light of these principles that I will consider the petitioner’s claim.

Freedom of Expression

17. The petitioner has pleaded her case squarely on the basis that her freedom of expression has been violated. **Article 33(1)(a)** which the petitioner invokes provides as follows:

33. (1) Every person has the right to freedom of expression, which includes—

(a) freedom to seek, receive or impart information or ideas;

(b) freedom of artistic creativity; and

(c) academic freedom and freedom of scientific research.

18. A plain reading of **Article 33** shows that the provision is concerned about seeking and receiving of ideas, communication and information. I do not see how compelling a person to undergo a DNA test falls within the scope of **Article 33**. The petitioner has not demonstrated that its right to freedom of expression has been violated by the petitioner.

Violation of the petitioner’s fundamental rights and freedoms

19. But in light of the sentiments in ***Trusted Society of Human Rights Alliance v Attorney General and Others (Supra)***, I think the question then is what other violation of the petitioner’s rights under the Bill of Rights is disclosed for which this court can give relief to the petitioner under the provisions of **Article 23** and which the respondent can reasonably said to have had notice.

20. I am afraid that apart from reciting the facts, the petitioner’s case, in so far as the enforcement of the Bill of Rights is concerned, is really unclear but what is clear is that the petitioner is aggrieved by the fact that she does not know her father and believes that the respondent is her father. What article or articles in the Bill of Rights must this court address itself to in order to vindicate the petitioner’s rights? I am not sure nor will I suggest an answer. For if I do, the respondent will have no opportunity to respond.

21. 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.

22. I cannot go any further without serious prejudice to the respondent. The petition must therefore fail and it ought to be struck out and it is hereby struck but with no order as to costs.

DATED and DELIVERED at **NAIROBI** this 5th day of October 2012.

D.S. MAJANJA

JUDGE

Mr Nguring'a instructed by P. M. Kahiga and Company Advocates for the petitioner.

Mr Njenga instructed by Njenga Muchai and Associates Advocates for the respondent