IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 89 OF 2014

BETWEEN

A.K.M.M. …… APPELLANT

AND

E.M.K.K. ……..…….1ST RESPONDENT

J.M.K. ……..…….....2ND RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nairobi (Majanja, J.) dated 6th day of March, 2014

in

Petition No. 37 of 2014)

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JUDGMENT OF THE COURT

With respect, we agree with the opening statement of **Majanja, J.** in the judgment from which this appeal has been brought, that the dispute leading to the filing of the original suit is most unfortunate, and in our view most unusual. Courts have resolved more or less on a daily basis family disputes involving children and their parents but none has had the unique features like this one.

The appellant, **A.K.M.M.** petitioned the High Court pursuant to numerous provisions of the Constitution alleging violations of his rights and fundamental freedoms, and prayed that the following orders be issued;

> ***"a. Interlocutory injunctions including EMERGENCY COMPENSATION for the petitioner and counseling for the respondents and to bar actions going; (sic)***
>
> ***b. Orders necessary to facilitate jurisprudence of this matter including.***
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> ***i. Disclosures of biological, financial and phone records;***
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> ***ii. Investigations by Director of Public Prosecution (DPP), Criminal Investigation***

Department (CID) or National Intelligence Service (NIS)

iii. Amicus curiae and expert opinions by Kenya Counseling and Psychologists Association, Kenya Psychiatrists Association; Marketing Society of Kenya (MSK), Commission of High Education (CHE), Institute of Human Resource Management (IHRM), Judicial Service Commission (JSC), Ministry of Planning Vision 2030, Ministry of Foreign Affairs (American, Australian, British, Canadian, German and South Africa Embassies);

c. Compensation of KES 1 Million cash and KES 20 Million collateral;

d. Recommendation of a Constitution Re-orientation Course for all Law Society of Kenya (LSK) Members and streamlining of legal aid government agencies including Kenya National Commission on Human Rights (KNCHR) and National Legal Aid & Awareness Programme (NALEAP);

e. Any other remedy the Court deems fit for the petitioner in particular and society in general."

The petition was premised on the grounds which are contained, not only in the petition but also in various other pleadings and correspondence, and, in considering the appeal, we shall bear in mind, as the learned Judge did, that the appellant is a lay person, acting in person, although he struck us as fairly intelligent. We shall excuse any procedural missteps he may have committed in presenting the petition.

The grounds upon which he brought the petition are many and scattered but the combined effect was that his parents, **E.M.K.K.** and **J.M.K.**, the respondents have subjected the appellant, since the age of 12 years, to psychological torture and post-traumatic stress disorder arising from allocation of excessive domestic and other family chores as well as from physical abuse. According to the appellant his relationship with his parents took a turn for the worse when, against their wish he "converted" from the Catholic denomination to pentecostal church. Prior to this, the appellant's education and health were adversely affected. For instance, he explained that his school grades dropped from 91% to 50-60%, and while at the university he only obtained a second class honours, (upper division) of 75%, as a result of which he did not qualify for a scholarship for further education; that after completing his education his parents abandoned him forcing him to seek accommodation in an informal settlements, (Ghetto Slum) where he continued to face difficulties in raising rent and, would sometimes be locked out on account of failure to pay rent.

He also complained that his standard of living dropped to one and half dollar meal a day; that he lacked bus fare and, on many occasions was forced to cycle long distances in search of work. From his tribulations and the treatment from his parents, like his friends and acquaintances, he wondered whether he was indeed their biological child.

The second respondent, swore a replying affidavit in which he explained how, as a parent, within his humble means, he has, over the years provided for the appellant, bringing him up in good, christian environment, giving him better education than his siblings, upto university level, treated him with love and affection, and got him a job in church. He denied accusations of torture or any form of mistreatment. However in 2010, he noticed that the appellant had some underlying psychological and psychiatric issues, for which he enlisted the help of counsellors, church elders and friends. He became more alarmed when the appellant accused him and the 1st respondent of practicing witchcraft and other personal allegations, which greatly hurt their feelings. The second respondent further contended that the appellant had, at some point insisted on being given land or title to land in order to obtain a loan, a request which was declined. The allegations of torture and witchcraft were published on the appellant's website, ***www.infoyote.com*** and communicated to relatives, friends and the public at large.

Majanja, J. heard oral evidence in support of and opposition to the petition, at the end of which, weighing the alleged violations contained in the appellant's petition against the cited Articles of the Constitution, came to the conclusion that none of them was demonstrated to exist; that what was apparent

from the totality of the affidavit and oral deposition was that the appellant had strong feelings on his perceived mistreatment by his parents; and that he believed they denied him certain opportunities. But there was no proof of torture as understood under the Constitution. On the other hand, the learned Judge found that the respondents had demonstrated that they had provided a loving and caring environment for the appellant, where he was able to go through the English GCE system of education, then to the university where he graduated with a Bachelors Degree in Applied Business Computing and subsequently obtained a Higher National Diploma.

The learned Judge was further of the mind that at 30 years of age, the appellant was expecting more than he deserved or was entitled to from his parents. His parents, he went on to explain, no longer had any legal responsibility over him. In trying to understand the appellant the learned Judge concluded that he needed "**assistance of another kind"** which only he, his parents or family members could provide. Because the appellant's website ***infoyote.com*** contained scurrilous material about the respondents, the learned Judge ordered the appellant to remove, from the website, any reference to the respondents.

With that the petition was dismissed with no orders as to costs.

The determination by the learned Judge, that the petition lacked substance and its ultimate dismissal aggrieved the appellant who now brings this appeal before us complaining, in the main, that the learned Judge improperly interpreted the meaning of psychological torture under **Article 29 (c-f)** of the Constitution and thereby arrived at the wrong decision; and that the learned Judge exceeded his jurisdiction by directing the appellant to exclude, from his website, any material concerning the respondents.

The appeal was argued before us with the appellant presenting a three-page written "*statement*" which raises many issues not related to the decision appealed against. For instance the appellant submitted that, after the judgment of **Majanja, J.** which, in his view required the parties to find a common ground for the resolution of the dispute, he approached the 2nd respondent and told him that the only thing he required from him was an apology. The respondent instead dismissed him telling him that they are not equals and that he should communicate only to his lawyers. He further submitted that, contrary to claims by the respondents, he is not interested in their property and wish to have nothing to do with them in his lifetime or death; that he has stated as much in his last will; and that in furtherance to that wish he has sworn a deed pool No. 2629 of 4th April 2016 adopting a new identity and names divorced from those his parents. He concluded by a prayer that the Court orders a DNA test to put to rest the question of his paternity.

Mr. Wokabi, learned counsel for the respondents urged us to ignore the submissions and dismiss the appeal as no material has been placed before us to warrant interference with the decision of the court below; that the learned Judge properly considered the petition and found no substance in the many allegations of violation of the appellant's rights and freedoms by the respondents; and that the negative reference of the respondents in the appellant's website had created considerable discomfort to the two, family members and friends and as such the learned Judge was justified in directing the appellant to exclude the material from the website.

We said at the beginning of this judgment that the dispute is unusual, and since the appellant has made reference to many verses in the Bible, we are ourselves reminded of a few lessons on parenting and parent-child relationship from the all-time honoured world-renowned playwright **William Shakespeare's Henry IV** (Part 1 Act 3, scene 2) and from the book of Ephesians in the Holy Bible.

In Henry IV, Shakespeare depicts a tumultuous relationship between King Henry IV and his eldest son, Prince Henry, nicknamed Prince Hal or Harry, the Prince of Wales, the heir to the throne, as a result of the latter's conduct which was viewed as unbefitting royalty; spending most of his time in taverns on the seedy side of London, carousing with vagrants, criminals and such like commoners; always in conflict with his father, the King; taking every opportunity to thumb his nose at authority.

Expressing his deep sorrow and anger at his son's behavour, and wishing Prince Hal was not his son, King Henry would frequently denounce his son, suggesting they are not of the same blood. He exclaimed

of Prince Hal as follows:-

> **"Whilst I, by looking on the praise of him see riot and dishonour stain the brow of my young Harry,**
>
> **O, that it could be proved that some night-stripping fairy had exchanged in cradle clothes our children where they lay."**
>
> (Act 1, scene 1).

But Prince Hal made a turn-around of his lifestyle, transformed and redeemed himself in the lifetime of the King, protecting the Kingdom and the King by defeating the enemies. He demonstrated, in the end, his ability to govern and lived a more honourable life, a true story of the biblical parable of the prodigal son.

It is a story and a lesson that strict parenting methods may produce undesired results; of how a parent's expectation may have an influence on a child; and of how the child can transform and achieve his goals alone without relying on others.

> In Ephesians 6:4, we are taught that:
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> **"Children, obey your parents in the Lord, for this is right. „*Honour your father and mother?* which is the first commandment – with a promise – „*that it may go well with you and that you may enjoy long life on earth"*…. Fathers, do**
>
> **not exasperate your children, instead, bring them up in the training and instructions of the Lord."**

A perfect lesson to children and parents alike. We shall return to these two lessons as we conclude.

Back to the appeal, and our primary duty in considering it is to re-evaluate the evidence afresh so as to arrive at our own independent conclusion. As we do so, we must give allowance to the fact that we do not have the advantage of the learned Judge who received the evidence and had the opportunity of seeing the demeanour of witnesses. See **Selle & Anor. Vs. Associated Motor Boat Co. Ltd Others** [1968] EA 123.

There cannot be any debate today as to who can petition the High Court claiming a violation or threatened violation of a right or fundamental freedoms under the Constitution. **Article 22(1)** stipulates that;

> **"Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened"**

In **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others,** Civil Appeal No 290 of 2012 five members of this Court explained the right to access the courts thus;

> **"(28) It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of the Constitution in 2010 by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to Article 22 (3) aforesaid, the Chief Justice has made rules contained in Legal Notice No. 117 of 28th June 2013 – The Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013-which, in view of its long title, we take the liberty to baptize, the "Mutunga Rules", to**

inter alia, facilitate the application of the right of standing. Like Article 48, the overriding objective of those rules is to facilitate access to justice for all persons. The rules also reiterate that any person, other than a person whose right or fundamental freedom under the Constitution is allegedly denied, violated or infringed or threatened has a right of standing and can institute proceedings as envisaged under Article 22 (2) and 258 of the Constitution.

(29) It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation or any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reason of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 22 and 258 of the Constitution".

See also **Randu Nzai Ruwa & 2 Others vs. Secretary, IEBC & 9 others** Civil Appeal No. 9 of 2013.

It is equally trite that a claim alleging breach of constitutional rights and fundamental freedoms may not only be instituted against the State or its organs, but also against individual persons, natural or juristic. See **Articles 3 (1), 19 and 20 (1)** of the Constitution, **Rose Wangui Mambo & 2 Others vs. Limuru County Club** High Court Constitutional Petition No. 160 of 2013 and the South African Constitutional Court decision in **Motala & Another vs. University of Natal** [1995] 3 BCLR 374.

Thirdly, the party alleging the violation has the evidential burden, by a preponderance of the evidence, to prove the violation. See **Anarita Karimi Njeru v R** (1979) KLR 154. See also **Mumo Matemu (**Supra). **Rule 10 (1) (2) (d)** and **(3)** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013,** (the Mutunga Rules) requires an application, a letter or any other informal documentation alleging violation of rights and fundamental freedoms to disclose the nature of the violation or the injury caused or likely to be caused to the petitioner, confirming the aspect of **Anarita** case that the violation must be specified, except that so long as, from the totality of the pleadings it is apparent, the requirement will have been met.

From the petition itself and from what we can make out from the record as well as the decision of the trial court the appellant was complaining of having been physically tortured by the respondents from the time he was 12 years old. He said he suffered, a fractured skull, was subjected to excessive domestic labour, denied further education, denied financial support to start a business and forced to live in poverty. There was nothing in form of proof of assault resulting in a fractured skull or of denial of parental support. To the contrary, the evidence presented before the learned Judge does point to a favoured child. While being cross-examined, the appellant admitted that;

"I admit that my parents paid for my education but did so reluctantly. They discriminated against me. I have two younger brothers…..My parents brought me up and met most of my needs…. I have good education catered for by my parents. I underwent GCE system. None of my brothers underwent the British system….My father sent me money by m-pesa last year on 19th December. He sent me money on 5th November. This was for my rent. He paid rent directly to my landlady ….My father assisted me get a contract from St Gabriel Catholic Church….I got the contract out of my father's goodwill……My parents have called me home several times. My father has tried his best. It is my mother who is manipulative"

Regarding allegation of torture, he said:

"I have brought this case because I was subjected to torture by mother with the help of my father. This has been over a span of two decades…. I accused my parents of 60 counts of torture. I had a fractured skull….. I forgave my parents."

By its very nature torture is a grave transgression, that is why both the Constitution of Kenya and the UN

Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, ratified by Kenya in 1997, in no uncertain terms outlaw it. The definition of *'torture'* under **Article 1** of the Convention restricts torture to acts by which severe pain or suffering, physical or mental is inflicted intentionally on a person by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity but does not include pain or suffering arising from, inherent in or incidental to lawful sanctions. In contrast to **Article 29** of the Constitution which protects every person from torture in any manner, whether physical or psychological, the convention restricts torture only to those inflicted by public officials or persons acting in an official capacity.

Corporal punishment or treatment or punishment in a cruel, inhuman or degrading manner are also outlawed in the Constitution.

Because of its seriousness, where torture is alleged, as a violation of fundamental freedom, it must be proved, not on the traditional preponderance of evidence, but on a scale higher than that but below proof beyond any reasonable doubt. We cannot find fault in the decision of the learned Judge for, without proof, the petition was unsupported. From his own acknowledgment of the support he has been receiving from his parents, even as an adult, we do not see how the appellant can blame the respondents. We think strongly that the appellant requires psychosocial support, which he and he alone can initiate by engaging the respondents. Like Prince Hal, who despite his initial not so royal lifestyle, finally, through personal transformation ascended to the throne as King Henry V, the appellant as the first born must seek help, in a respectful manner, from the respondents.

The appeal, like the petition and for the reasons we have given, lacks merit and we dismiss it with no orders as to costs.

Dated and delivered at Nairobi this 4th day of November, 2016

ASIKE-MAKHANDIA

…….……

JUDGE OF APPEAL

W. OUKO

……

JUDGE OF APPEAL

K. M'INOTI

……

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR