ER v MW (Appeal E010 of 2022) [2025] KEHC 647 (KLR) (Family) (31 January 2025) (Judgment)

Neutral citation: [2025] KEHC 647 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

APPEAL E010 OF 2022

H NAMISI, J

JANUARY 31, 2025

BETWEEN

ER ..... APPELLANT

AND

MW ..... RESPONDENT

(Being an Appeal from the Ruling of Hon. G. N. Opakasi delivered on 29 December 2021 in Nairobi Children's Case No. E373 of 2021)

JUDGMENT

1. This appeal arises from a matter in the Children's court, in which the court was faced with two applications. The Appellant herein filed Chamber Summons dated 8th November 2021 seeking the following orders:

    i. That the court be pleased to strike out the Plaintiff's suit;

    ii. That the cost of the application and the suit be borne by the Plaintiff.

2. The Appellant's application was premised on the following grounds:

    i. That the Plaintiff (Respondent herein) has instituted proceedings against the Defendant (Appellant herein) seeking, among other prayers, an order to compel him to assume his parental responsibility as the father of the subject child and to pay for his upkeep and maintenance;

    ii. That the Defendant (Appellant herein) believing he is not the father of the minor applied and obtained orders directing DNA testing;

    iii. That the Plaint discloses no reasonable cause of action against the Defendant as the DNA test results have excluded him as the minor's father;

iv. That the Defendant having not assumed responsibility for the minor in any way no cause of action lies against him under the law;

v. That the interest of justice commends the grant of the orders sought.

3. On her part, the Respondent filed Chamber Summons dated 11 November 2021 seeking the following orders:

i. That the Honourable Court be pleased to order the Defendant/Respondent to submit himself to a DNA test at KIBS located at Block 4, Viraj Complex. Mombasa Road opposite JKIA Junction, Nairobi on a date to be agreed by the parties to the suit;

ii. That costs of the application be provided for.

4. The Respondent's Application was supported by Affidavit and premised on the following grounds:

i. That the Plaintiff (Respondent herein) and the Defendant (Appellant herein) sired the said minor sometime in January 2020 when they were in active relationship;

ii. That prior to the minor being conceived, the Plaintiff and Defendant had an active romantic relationship, for about two years, where the Defendant provided for her needs and from time to time they spent time together;

iii. That the romantic relationship began sometime in October 2019 and ended sometime in October 2020 after the minor was conceived;

iv. That during the time the minor was conceived, which was on 13 January 2020, the Plaintiff told the Defendant that she was pregnant and immediately the Defendant terminated the relationship and blocked the Plaintiff;

v. That on 3 October 2020, the minor was born and the Plaintiff reached to the Defendant through his friends to assist in the provision of the child basic needs. They met on three occasions after which the Defendant again closed connections with the Plaintiff, despite acknowledging that the minor was his child;

vi. That prior to closing tabs with the Plaintiff, the Defendant on some occasions supported the Plaintiff however he claimed he did not want his wife to know about the minor and asked the Plaintiff to be secretive about it on condition that he will provide for the minor;

vii. That for certainty and considering the timelines that the Plaintiff had an active romantic relationship with the Defendant, the Plaintiff was crystal sure that the Defendant is the father of the minor;

viii. That the Plaintiff never had any other relationship with any other person save for the Defendant at the time the minor was conceived;

ix. That the Plaintiff is very apprehensive that should the results of the DNA submitted in court be used to defeat her suit, the minor's best interest will be in jeopardy as the Defendant will be abdicating his parental responsibility;

x. That the Plaintiff is fearful that the DNA results submitted in court may have been compromised and /or interfered with since the Defendant has on occasional times talked at her and told her that she will never head anywhere with this suit and that he will ensure he does anything possible to make good his words;

xi. That the minor is currently about one year, one month old and in dire need of basic needs;

xii. That the Plaintiff, who is jobless, has been solely taking care of the minor save for few occasions when the Defendant sent her some money towards the case of the said minor and the same has been stated hereinabove;

xiii. The Defendant has since abdicated his parental responsibilities by neglecting both the Plaintiff and the minor herein hence the need for the DNA test so that this matter can proceed;

xiv. That it is in the interest of justice and in the best interest of the minor and his guaranteed welfare that the Defendant subject himself to the DNA paternity test as the Plaintiff is certain that the Defendant is the father of the minor and should take responsibility.

5. The Supporting Affidavit was a repetition of the grounds on the face of the application.

6. Prior to the two applications, the Appellant had been subjected to two DNA tests in two different facilities, that is Lancet Laboratories and the Government Chemist. Both results were negative.

7. In its Ruling of 29 December 2021, the trial court considered the guiding principle in determination of any issue concerning a child, which is the bet interest of the child principle. The court opined that it is in the best interest of the child to give the parties one final opportunity to do another test. The court was of the view that no harm or prejudice would be occasioned to the Appellant if the test is repeated. Therefore, the Appellant's application to strike out the suit should await the outcome of the third DNA test.

8. The trial court made the following orders:

i. That the Defendant together with the minor shall undertake the third and final DNA at a facility to be agreed upon by parties in the best interests of the minor;

ii. The Plaintiff shall cate for the costs of the test;

iii. The Defendant's application to strike out the Plaintiff's suit shall await the outcome of the third DNA test;

iv. No orders as to costs

9. Aggrieved by the Ruling of the trial court, the Appellant lodged this appeal on the following grounds:

i. That the Honourable Magistrate erred in law in failing to fully appreciate and clearly find the legal reason and the lawful need for the conduct of DNA test in the proceedings as were before her;

ii. That the Honourable Magistrate erred in law in failing to consider the provisions of Section 23, Section 24 and Section 25 of the *Children Act* and hold that the primary need before the court was establishing the paternity of the minor subject of the proceedings so as to apportion parental responsibility, but not confirming the Respondent's opinion on that paternity;

iii. That the Honourable Magistrate erred in law and in fact in failing to uphold the principle of eminent need in the conduct of DNA;

iv. That the Honourable Magistrate erred in law and in fact in failing to appreciate that in directing the conduct a third DNA test, the court was directing the Appellant to forcefully undergo a medical examination;

v. That the Honourable Magistrate erred in law and in fact in finding and holding that the only consideration before her was the best interest of the minor subject of the proceedings and failed to appreciate that in the circumstances of the case the interest of the minor should have been balanced with the Appellant's right to privacy;

vi. That the Honourable Magistrate erred in law and in fact in failing to appreciate the submissions by the Appellant and the compelling legal arguments advanced therein on the need to decline the orders sought and in that failure the court completely arrived at a wrong conclusion of the law;

vii. That the Honourable Magistrate erred in law and in fact in failing to ding that the Respondent had failed to establish a prima facie need for the grant of orders for the conduct of a third DNA test;

viii. That the Honourable Magistrate erred in law in directing that the Application by the Appellant seeking the striking out of the suit should await the outcome of the DNA test yet it had comprehensively heard that Application by the Appellant and therefore the court could only defer the outcome thereof;

ix. That the court so misdirected itself on matters of both law and fact as to occasion a miscarriage of justice against the Appellant

10. Parties were directed to canvass the appeal by way of written submissions. Whereas the Appellant filed his submissions dated 9 October 2024, I note that the Respondent did not participate in these proceedings, despite evidence of service.

Analysis and Determination

11. I have keenly reviewed the Record of Appeal and read the submissions by the Appellant. The Appellant has identified four issues for determination by this Court. In my considered view, there are only two issues for determination:

i. Whether the trial court erred in directing that a further DNA test be conducted; and

ii. costs

12. The constitutional and legal matrix in our jurisdiction upholds the rights of children as paramount. Article 53 (1) (e) and 2 of *The Constitution* provide 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.

13. Further, Section 8 (1) and (2) of the *Children Act*, 2022 provides that:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—(a) the best interests of the child shall be the primary consideration;

(b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.

2. All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, 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—

   (a) safeguard and promote the rights and welfare of the child;

   (b) conserve and promote the welfare of the child; and

   (c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.

14. The best interest of the child was emphasized in the case of MJC v. LAC AC & Another [2020] eKLR where the Court 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."

15. When the trial court addressed its mind as to the parties availing themselves to conduct a DNA test, the trial court was alive to its role towards safeguarding the interest of the children in this case. On such an issue, Ngaah J. held in FKW (suing as the mother and next friend of GDW (Minor) v. 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."

16. In the instant case, however, the DNA test was conducted three times. I note from the Record of Appeal that in his application dated 10 June 2021, the Appellant sought orders to have DNA testing conducted at Lancet Laboratories. From the proceedings, I discern that due to the Respondent's apprehension about the Appellant's interests at Lancet Laboratories, the Court directed that parties appear at both facilities for DNA testing. The results from the first test at the Government Chemist were inconclusive, as per the letter dated 23 July 2021 by the Government Chemist. A second test was conducted at the same facility. The results from both facilities excluded the Appellant as the father to the minor.

17. In her application for a fourth DNA test, the Respondent stated that she is fearful that the DNA results submitted to the court may have been compromised and/or interfered with since the Appellant has on occasional times told her hat she will never head anywhere with this suit and he will ensure that he

does anything possible to make good his words. Needless to say, other than this statement, there was no evidence presented before the trial court to support the suspicion of interference with the results. Not even a letter of complaint against the two facilities, which included the Respondent's facility of choice, was presented to demonstrate the Respondent's allegations of malpractice by the facilities.

18. The Appellant submitted that the Respondent had a duty to lay a prima facie basis for the need of another test. No such basis was laid and none found by the court, thus in that, the court erred. The Appellant relied on the case of PKM -vs- Senior Principal Magistrate Children's Court at Nairobi & Anor [2014] eKLR in which the Learned Justice Lenaola, sitting at the Constitutional and Human Rights Division was faced with a question of balancing the rights of the child over the right to privacy of the supposed parent.

19. In summary, in the cited case, the petition challenged the order of the trial court directing the petitioner to subject himself for DNA testing at Kenyatta National Hospital in order to prove paternity of a child. The court pointed out that parental care could only be an obligation if paternity could be ascertained and that was done through a DNA test. The court held that the petitioner's unwillingness to undergo a DNA testing in the furtherance of his right to dignity was not sufficient enough to override the best interests of the child. the court further held that an order for DNA testing should be made if it was in the best interests of the child and if a prima facie case had been made to justify such an order.

20. I also note that with regard to the balance of interests, the Learned Judge opined thus:

> " I agree and while I would be averse to classifying rights in order of priority, there is no doubt in my mind that between the petitioner's inconvenience at being subjected to DNA testing and the need to conclusively determine the paternity of the child, in the child's interest and certainly in the petitioner's interest, the child's interest must prevail. For the Petitioner, it would be a minor inconvenience if he attends to DNA testing once but for a child not to know its parents and benefit from their protection and care, the damage may linger for years to come. I choose to protect the baby as opposed to the petitioner in such circumstances. It would have been very different if the person seeking DNA testing is another adult for the sake of knowing his parentage but *the Constitution* specifically protects a child and I am upholding that principle."

21. In distinguishing the cited case from the appeal herein, in this instance, the Appellant submitted himself for the DNA testing on every occasion required. One result was inconclusive, two were negative. The Respondent then demanded a fourth test based on unsubstantiated claims that the Appellant interfered with the results.

22. Much as I agree that the rights of a child are paramount and must prevail, the Respondent did not present anything to the trial court to justify why a fourth DNA test ought to be conducted. Based on the evidence before the trial court, it is my considered view that the issue of paternity has been determined. Whereas I would be averse to classifying rights in order of priority as the Appellant has invited this Court to do, I am alive to the need to conclusively determine the paternity of the child, which has already been done, not once but twice, with a third test being inconclusive.

23. Based on the evidence presented before the trial court, it is my considered view that the trial court erred in directing that a further DNA test be conducted. Accordingly, the appeal is allowed and the Ruling of the trial court rendered on 29 December 2021 is hereby set aside. The Respondent's application dated 11 November 2021 is hereby dismissed. The Appellant's Application dated 8 November 2021 is allowed as prayed. Each party will bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 31 DAY OF JANUARY 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

.Masinde hb Wanjiku Ndauti.....for the Appellant

N/A ..... for the Respondent

Libertine Achieng..... Court Assistant