REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CONSTITUTIONAL PETITION NO. 10 OF 2017

IN THE MATTER OF ARTICLES 19(2), 20(1), 21(1), 22, 23, 25(c), 28,31,

45(1), 47(1) & (2), 50 AND 53 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS

AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 19(2), 20(1),

21(1), 22, 23, 25(c), 28,31, 45(1), 47(1) & (2), 50 AND 53 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE CHILDREN'S ACT NO. 8 OF 2001, LAWS OF KENYA

BETWEEN

1. ANM

2. RMM

(suing in their own behalf and on behalf

of AMM (MINOR) as parents and next friend).....PETITIONERS

VERSUS

FPA.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

IN THE MATTER OF CHILDREN'S CASE NO. 5 OF 2017 AT MAVOKO

COURT AND THE RULING AND ORDER DATED 14TH, AUGUST 2017

BY J.A AGONDA, SRM, IN THE SAID MAVOKO CHILDREN'S CASE NO. 5 OF 2017

BETWEEN

FPA (suing as the father and

next friend of the minor).....PLAINTIFF

AND

ANM.....DEFENDANT

JUDGEMENT

Parties

1. According to the petition, the Petitioners are husband and wife, lawfully married initially under Kamba customary law and later under the ***African Christian Marriage and Divorce Act*** in 2010 and they have lived harmoniously together since their marriage.

2. It was their case that the minor, the subject of these proceedings, was born to the Petitioners on 14th March, 2015 and the Petitioners have since the birth of the child been living with the child in their family home, providing for him and discharging all other parental responsibilities towards the minor.

3. The 1st Petitioner herein, **APA**, was the Respondent in Mavoko Childrens Case No. 5 of 2017 in which the 1st Respondent sued the 1st Petitioner. Together with the Plaint the 1st Respondent filed an application dated 21st June, 2017, both premised on claims *inter alia* that the 1st Respondent fathered the minor herein, that he (1st Respondent) has been providing for the minor's upkeep and that he ought to be given access to and custody over the minor.

4. It was however contended in opposition that the 1st Respondent had illegally, fraudulently and through forgery procured an invalid birth certificate with a number CA.[……] /C of 24/1/2017 in which he wrongfully and irregularly re-named the minor as **"AP"** yet the minor had a valid birth certificate No.CA [……]/B of 6/7/16 issued on the basis of the notification of birth of the minor by the [Particulars Withheld] Hospital, Nairobi, where the minor was born at the medical expense of the Petitioners' family as is expected. It was contended that the 1st Petitioner and the 1st Respondent had worked together as employees of the [Particulars Withheld] and on diverse occasions the 1st Respondent made improper advances to the 1st Petitioner, advances which the 1st Petitioner repeatedly turned down. However, the 1st Respondent did not take the rejection by the 1st Petitioner kindly and he vowed to wreck the Petitioners' marriage in order to have the 1st Petitioner for himself and in pursuit thereof he filed the said suit and application.

5. When the said application came up for hearing on 14th August, 2017, an oral application was made by the 1st Respondent herein that "the parties" undergo a DNA testing which application was opposed by the 1st Petitioner herein. However, the Court after hearing the parties instantaneously granted the oral application by the 1st Respondent compelling the 1st Petitioner and presumably the minor and the 2nd Petitioner to undergo compulsory DNA testing by the government chemist.

6. This petition therefore arises out of the said ruling.

Petitioners' Case

7. According to the Petitioners, in issuing the said orders, the rights of the minor enshrined in the Bill of Rights were contravened and or threatened. They contended that the interest of the minor is best served in the family unit of the Petitioners, the minor's parents, and it was never at stake as the Petitioners have the financial and moral ability and willingness to discharge their parental responsibility to the minor and have indeed been discharging the responsibility fully.

8. It was further contended that by granting the oral application, by the 1st Respondent, in utter disregard of the contents of the replying affidavit, the court denied the 1st Petitioner the right to administrative action that is lawful, reasonable and procedurally fair. It was contended that the court unnecessarily limited the 1st petitioner's right to a fair trial by failing to apply itself properly on the oral application by the 1st Respondent for compulsory DNA testing and the matters and issues surrounding the 1st Respondent's application dated 21st June, 2017 and the 1st Petitioner's Replying Affidavit sworn on 4th August, 2017 and filed in reply to the application.

9. According to the petitioners, the orders for compulsory DNA testing it issued would serve only the selfish interest of the 1st Respondent who has no legal obligation to provide up-keep of the minor and who, going by the documents he had filed in his said application, does not in any event even have the financial ability to provide for the upkeep of the minor and is married and has his own family and is of a questionable moral character in view of his conduct of procuring a purported birth certificate for the minor contrary to the law (see the case of **F.K.K vs K.L.M Nairobi High Court (Family Division) Suit No.2 OF 2014, [2015] eKLR**.

10. On behalf of the Petitioners, it was submitted that this petition raises fundamental questions on human rights under the Bill of Rights, Chapter IV of the Kenya Constitution, 2010, for consideration by this Court, namely:

a. Is it constitutional, lawful, proper and justifiable for a Court to order a party to undergo compulsory DNA testing"

b. Can a Court lawfully compel a party to under-go a DNA on an oral application in any suit pending before the Court, without prior notice to the party and without affording the party adequate opportunity of being heard"

c. What constitutes the principle of the best interest of the child"

d. Is it lawful and justified for a third party to demand to take parental responsibility of a child born to a lawfully married couple on claims of having fathered the child or any other claims whatsoever and when the parents of the child are ably and willingly discharging their parental responsibility to the child"

11. According to the petitioners, the petition is brought under the Bill of Rights in Chapter IV of the Constitution and seeks a redress for violation, breach and threatened contravention of human rights and is specifically premised on Articles 1**9(2),** 2**0(1),** 2**1(1),** 2**2(1),** 2**1(2),** 2**3(1),** 2**5(c),** 2**8,** 3**1(a) and (c),** 4**5(1),** 4**7(1) and (2),** 5**0,** and 5**3** of the Constitution.

12. It was the Petitioners' humble submission that by issuing the said Orders for compulsory DNA testing in the circumstances and in the manner it did, the Court violated, contravened and or threatened the constitutional rights of the minor and the Petitioners in that;

i. The orders for compulsory DNA testing amount to an intrusion and or invasion of the person and bodily security, privacy and dignity of the Petitioners and the minor; a contravention of their right not to have their person searched against their wish and their right not to have information relating to their family and private affairs unnecessarily required or revealed. Therefore, the execution of the Orders would violate the inherent dignity of the Petitioners and of the minor as appreciated in **RMK vs AKG, Nairobi High Court Constitutional Petition No 18 of 2013, [2013] eKLR** pages 2-3; **R.K vs H.J.K, Nairobi High Court Petition No 143 of 2012 [2013] eKLR** pages 2-3 and **S.W.M vs G.M.K [2012] eKLR** page 4).

ii. In the circumstances of the application dated 21st June, 2017 by the 1st Respondent and the 1st Petitioner's Replying Affidavit thereto the Court misapplied the principles of the best interest of the child and issued Orders which have the effect of threatening the best interest of the minor instead of protecting it since the best interest of the minor is served best in the family unit of the Petitioners, the minor's parents, and it was never at stake as the Petitioners have the financial and moral ability and willingness to discharge their parental responsibility to the minor and have indeed been discharging the responsibility fully.

iii. In the oral application for compulsory DNA testing the 1st Respondent did not establish any of his rights in the Bill of Rights that would be breached if the minor and the Petitioners were not to be subjected to the compulsory DNA testing nor did he demonstrate that he had any constitutional rights which could override the rights of the minor and the Petitioners in the Bill of Rights.

iv. By issuing the said orders for compulsory DNA testing in the circumstances of the 1st Respondent's application dated 21/6/2017 and the 1st Petitioner's Replying Affidavit, the Court threatened the right to recognition and protection by the State of the family of the Petitioners and the minor in addition to putting by the right to peace and harmony of the family into jeopardy.

v. The Court did not exercise its discretion properly in relation to the oral application by the 1st Respondent or compulsory DNA testing and thereby failed to balance the interests of the parties and the constitutionally protected rights of the minor and the Petitioners in view of the fact that compulsory DNA testing is an extremely delicate and sensitive matter which would result into an invasion of the right to privacy, bodily security and integrity of the Petitioners and the minor with a likely devastating long lasting effect on the Petitioners and an innocent minor (see case of **Bhabani Prasad Jena vs. Convenor Secretary Orissa Este Commission For Women & Anr, Civil Appeal No 6222-6223 of 2010 [2010] 9 S.C.R 457***)*.

vi. Further, the Court failed to appreciate that the compulsory DNA testing that it granted the 1st Respondent was not eminently necessary in the context of the suit and hence to consider the diverse aspects of the suit (see ***Bhaban*** case, supra).

vii. The Court further failed to appreciate that it was possible for the Court to reach the truth of the suit and the 1st Respondent's application dated 21/6/2017 without subjecting the parties and the minor to a compulsory DNA test.

viii. The order for compulsory DNA testing granted on a mere oral application by the 1st Respondent breached the 1st Petitioner's right against self-incrimination as the 1st Respondent would use the same in the suit as against the 1st Petitioner (see case of **P.M vs. J.K Nairobi High Court Constitutional Petition No 159 OF 2009, [2010] eKLR**, *page 4)*.

ix. On the whole the Court breached its fundamental duty to observe, respect, protect, promote and fulfil several rights of the minor and the Petitioners set out in the Bill of Rights.

x. That further, the Court undertook an administrative action that adversely affected rights of the minor and the Petitioners in the Bill of Rights by undertaking an administrative action without making a proper record of and without giving written reasons for the action.

13. The petitioner also took issue with the contents of the replying affidavit in which the 1st Respondent alleged that he had fathered the minor and that he had been providing for him. To the petitioners, the said allegations are unfounded and that the annextures thereto are fabrications and/or do not in any way render support to the 1st Respondent's allegations, for instance:

i. The mpesa statements attached indicate that the 1st Respondent also received money payments from the 1st Petitioner, a fact that the 1st Petitioner explained to the effect that both parties are colleagues at work and that they used to assist each other socially as was the norm with all other colleagues at their place of work. Indeed, when the payments that the 1st Petitioner made to the 1st Respondent are set off against the payments that the 1st Respondent made to the 1st Petitioner, the difference is a paltry 1,900/= or thereabouts which cannot be said to be maintenance for the minor prior to his birth and after in September 2015 to June 2017 when the 1st Respondent filed the suit in the Mavoko Children's Court. The 1st Respondent is clearly misleading this Court and being dishonest in exhibiting the *mpesa* statements as evidence that he had been providing for the minor;

ii. It has not been stated and certified where, when and by whom the photographs attached were taken neither have they been demonstrated to relate to the 1st Petitioner and the minor;

iii. The bulk of the receipts attached bear the names of the 1st Respondent or are without any names and none of them have any indication whatsoever that they were purchasing goods for the minor or for the 1st Petitioner and for the 2 receipts in the name of the 1st Petitioner it has not been demonstrated that it was the 1st Respondent who made the purchases and the 1st Respondent must have taken possession of them from their place of work for ulterior motive.

iv. Some of the alleged email correspondence are principally by/to third parties whose role has not been explained by the 1st Respondent while others are routine correspondence at the Place of work of the 1st Respondent and the 1st Petitioner which is not unusual for people working in the same organization and on the whole the email correspondence do not in any way render support to the claims by the 1st Respondent.

v. The production of the purported email correspondence and the photographs is not in compliance with the provisions of the ***Evidence Act*** as relates electronic evidence and are thus inadmissible.

14. It was further submitted by the petitioners that contrary to the averments of the 2nd Respondent, every person has the right under the Constitution 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 and it can never be the position in law that the Petitioners' recourse on account of the impugned ruling/Order lay in a review of or appeal and the constitutional Court may grant Orders on declaration of rights, an injunction, a conservatory order and an order for compensation.

15. It was reiterated that in the circumstances in which the impugned ruling and Order impugned was issued, the trial court went contrary to the law and in excess of its jurisdiction of as the Order contravened and or threatened the best interest and rights of the minor and of the Petitioners enshrined in the Bill of Rights and misapplied the principle of the best interest of the child as stipulated in Article 53 of the Constitution and Section 4(3) of the ***Children's Act*** as in the circumstances herein the best interest of the minor was never and is not endangered. In this regard the petitioners relied on the case of **In re DM (Minor) [2017] eKLR** where the Court while holding that the best interest of the minor is served best in the family unit said:

"… it is not in dispute that the minor will benefit from the continuity of the family set up he has been used to since birth. This same environment is the one he has known and formed close family ties and attachment. As provided for under Article 45 (1) the family is the natural and fundamental unit of society and the necessary basis of social order…"

16. It was submitted that the 1st Respondent has no legal or moral obligation to the minor and indeed does not even have the financial ability to make such provision nor has he made any. According to the petitioners, the trial court breached the rights of the minor and the Petitioners in Article 47 of the Constitution as the Petitioners were subjected to a trial by ambush as they had any notice of the oral application for compulsory DNA prior to the court attendance of 14/8/2017 as no application of the nature had been filed and served to give the Petitioners time to respond and as such the Petitioners were denied their right to fair administrative action. Instead, the trial court proceeded to issue the ruling and Order impugned which threatened the best interest of the child, breached the Petitioners' constitutional rights to a fair trial and administrative action that is lawful, reasonable and procedurally fair; and the minor' and the Petitioners' right to the privacy of their person and of information relating to their family and private affairs; right to their bodily security, dignity and integrity and to recognition and protection by the State of their family.

17. It was also contended that the trial court failed to appreciate that the 1st Respondent was just an intruder into the family of the minor and the Petitioners who is abusing the court process to further his ill motives and selfishness to breach the peace and harmony in the family and that in any event he did not demonstrate that he had any constitutional right that would override the rights of the minor and of the Petitioners as set out in the Petition herein. In the petitioners' view, the best interest of the child would be best served by discharging the impugned Order of the trial court and permanently restraining the 1st Respondent from accessing the minor and the Petitioner for the purposes stated in the Order or any other purposes similar and of the same intent, purpose and purport and further from interfering with them in any manner whatsoever.

18. It was therefore contended that on the whole the opposition by the 2nd Respondent to the Petition is grossly misconceived and without any merits; is frivolous, vexatious and scandalous and an abuse of the process of the Court; is suspect and regrettably intended to defeat and or breach the rights of the minor and of the Petitioners enshrined in the Bill of Rights in the Constitution as cited herein and indeed the position taken by the 2nd Respondent has the effect of endangering the best interest of the minor.

19. In the Petitioners' view, decisions cited by the 2nd Respondent allegedly in support of their position in the Petition do not aid the 2nd Respondent's case as:

i. **J v. C (1970) AC 668** merely states the principle of the best interest of the child which as stated above is not at stake herein. Indeed, any Order issued to disturb the current state of the minor would work against the said principle.

ii. The decision in **Z.W vs. MGW Misc. Case No. 108 of 2013** cited by the 2nd Respondent is distinguishable in that it is about the rights of a woman seeking to have a man take Responsibility for maintenance, which is not the case herein.

iii. The decision in **M.V vs. K.C Kakamega HC Misc Application No. 105 of 2004** as cited by the 2nd Respondent is distinguishable and not applicable in the present as it was about a man who was denying parental responsibility which is not the case herein. None of the Petitioners nor the minor are seeking to have the 1st Respondent shoulder any parental responsibility over the minor herein.

iv. The 2nd Respondent has misapplied the provisions of Article 28 and 53 and Section 4 (2) (3) of the ***Children's Act*** in the circumstances of the matter herein as the best interest of the child is not an issue.

20. According to the petitioners, they have made out a case for the grant of the prayers sought in the petition herein hence the Court ought to be pleased to issue the Orders sought.

1st Respondent's Case

21. In response to the petition the 1st Respondent averred that sometimes in February, 2014, he met with the 1st petitioner, a colleague of his at [Particulars Withheld] at South C Branch, within Nairobi County and they started an intimate relationship. The 1st petitioner however did not inform him that she was married. The said relationship culminated into the 1st petitioner consensually conceiving a baby in December, 2014 and during her pregnancy, the 1st Respondent supported her and upon determining the baby's gender, they agreed to give the child a Pokot name, **AP**. The 1st Respondent averred that he offered the 1st petitioner both financial and moral support both at the time of the birth of the baby and thereafter. At the end of the 1st petitioner's maternity leave, the 1st Respondent averred that they agreed that the 1st petitioner pursues her master's decree course for which the 1st Respondent made payment. The 1st Respondent went as far as furnishing the 1st petitioner's house. However, in March, 2017, the 1st petitioner's attitude towards the 1st Respondent changed and the 1st Respondent discovered that she had moved in with another man, the 2nd petitioner herein. Upon further inquiry, the 1st Respondent discovered that the two petitioners were married but had separated before they resolved their differences and resumed living together.

22. The 1st Respondent thereafter stopped visiting the 1st petitioner but requested access to the baby, a request which the 1st petitioner ignored. It was this state of affairs that led to the institution of the Children Case in Mavoko in which the 1st Respondent insisted that he was the biological father of the baby the subject of these proceedings. After hearing the parties, the court directed that a DNA test be conducted to establish the truth and in the best interest of the child.

23. According to the 1st Respondent the petitioners ought to have appealed the decision instead of instituting these proceedings. Accordingly, there is no cause of action disclosed by the petitioners and the petitioners have not demonstrated how the stand to be prejudiced if the DNA test is carried out. In his view, the Constitution provides that the minor's interests are paramount thus the petitioner cannot purport to put their interests first before those of the minor.

24. The 1st Respondent insisted that he was not intruding or interfering with the Petitioners' family but only wanted access to his child whom he has been taking care of.

25. It was submitted on behalf of the 1st Respondent that the Petitioners have not adequately set out the specific provisions of the constitution that are alleged to be violated by the 1st Respondent and the manner in which their rights have been violated and in this regard reliance was placed on **Miachel Mutuku Mulinge vs. Attorney General [2017] eKLR**, **Anarita Karimi Njeru vs. Republic [1979] KLR 154,** **Moile Yenko & 7 Others vs. National Land Commission & 5 Others [2016] eKLR** and **Trusted Society of Human Rights Alliance vs. Ag. & 2 Others [2012] eKLR**. It was submitted that the Petitioners have made generalized allegations, blanket averments and cited omnibus provisions of the constitution that do not allude to the rights violated by the 1st respondent. Ultimately the Petition discloses no cause of action against the 1st Respondent.

26. It was submitted that the prayers sought by the Petitioners as aforestated are largely premised on the orders of the court in *Children's Case No. 5 of 2017* and being dissatisfied by the orders of the court, the Petitioners cannot resort to a constitutional petition when there are prescribed procedures and avenues to resolve these issues; the petitioners should have appealed in the High Court or sought review of the order and the 1st Respondent relied on **Moile Yenko & 7 Others vs. National Land Commission &**

5 Others [2016] eKLR and **Minister of Home Affairs vs. Bickle & Others (1985) LRC.** He therefore submitted that the Petition and application are misconceived, incompetent and orders sought are not tenable against the 1st Respondent.

27. As to whether it is for the best interest of the child to allow the orders sought in the petition, the 1st respondent relied on section 4(2) of the ***Children's Act*** and submitted that the above provisions call upon the public/private welfare institutions, courts and other bodies to consider the best interest of the child in decisions concerning children which this Court was urged to similarly consider. He therefore relied on **FKW (suing as the mother and next friend of GDW (Minor) vs. DMM [2015] eKLR**.

28. The 1st Respondent also submitted that under Article 53(1) (e) of the Constitution every child has a right 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. According to him, it is not for the best interest of the minor to grant the reliefs sought in the petition as the same will amount to violation of Section 4(2) of the Children's Act and the rights of the minor enshrined in Article 53(1) (e) and (2) of the Constitution. He therefore prayed that the petition be dismissed with costs to the 1st respondent.

2nd Respondent's Case

29. In his opposition to the petition, the 2nd Respondent herein, the **Attorney General**, relied on the following grounds of opposition:

1. Recourse is to Review or Appeal against the impugned ruling and order as opposed to challenging the same through a Constitutional Petition.

2. No evidence has been adduced to the effect that the impugned ruling and order was made contrary to the law or in excess of jurisdiction by the trial magistrate.

3. Contrary to the allegations made in the Petition, the impugned ruling and order promotes and fulfils the rights and fundamental freedoms of the minor in the following manner:-

1. Article 53 1 (e) –right 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. Parental care can only be an obligation if paternity can be ascertained and one way of doing so is by DNA testing. For a minor not to know its parents and benefit from their protection and care.

2. Article 53 (2) - right to have the best interests of the child realized which includes affording the opportunity to the minor to know who his real parents are failure to which the damage may linger for years to come.

3. Section 4 (3) of the Children's Act provides that:

"All judicial and administrative institutions and all persons acting in the name of these institutions, where they are exercising any powers conferred by this act 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 –

Safeguard and promote the rights and welfare of the child.

Conserve and promote the welfare of the child."

4. The impugned ruling was made in furtherance of the rule of law, that is, right of access to justice and fair hearing. Both parties were heard in court by the trial magistrate as expressly admitted by the petitioners in paragraphs 13 and 14 of the 1st Petitioner's supporting affidavit.

5. The instant petition is misguided, misconceived and legally untenable as it does not meet the criteria required of a

Constitutional petition and ought to be dismissed with costs to the 2nd Respondents.

30. It was submitted by the 2nd Respondent that this matter raises only one issue for consideration: *Should this Honourable court set aside the orders by Senior Resident Magistrate Court (SRM) in Mavoko Children's Case No. 5 of 2017 directing that the parties undergo DNA testing"* The said respondents relied on **J vs. C (1970) AC 668** and submitted that children's welfare trumps and outweighs all other considerations; no other interests or values may affect the decision; children's interests are the only ones that count. He also relied on **Z.W vs. MGW Misc. Case No. 108 of 2013**, paragraph 10 and submitted that in applying the paramountcy principle in children's cases, the question is whether the unwillingness by a party to undergo a DNA testing in furtherance of his right to dignity is sufficient to override the interests of the child who may be denied the constitutional right to parental care.

31. While appreciating that the petitioners are entitled to their right to dignity as provided for under Article 28 of the Constitution, it was submitted that one can only be obligated to provide parental care if paternity is ascertained and one way of doing so is by DNA testing. According to the said Respondent, a general principle emerging from case law is that an order for DNA testing should be made if it is in the interests of the child and if a *prima facie* case has been made to justify such an order. In this regard, he relied on **M.V vs. K. C Kakamega HC Misc Application No.105 of 2004** and **C.M.S vs. I.A.K HC Misc. Application No. 526 of 2008** as well as section 4 (2) (3) of the Children's Act and submitted that contrary to the allegations made by the petitioners, the impugned ruling and order, promotes and fulfils the rights and fundamental freedoms of the minor. This is, firstly, due to the fact that Article 531(e) protects the right 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 and for a minor to know its parents and rightly benefit from their protection and care and that the said parental care can only be an obligation if paternity can be ascertained and one way of doing so is by DNA testing. Secondly, Article 53 (2) provides for the right to have the best interests of the child realized which includes affording the opportunity to the minor to know who his real parents are, failure to which the damage may linger for years to come.

32. According to the 2nd Respondent, for the Petitioner, it would be a minor inconvenience for the Petitioners if they attend to DNA testing once but for a child not to know its parents and benefit from their full protection and care, the psychological and emotional damage may linger for years to come.

33. The 2nd Respondent therefore urged this court to uphold the ruling and order of the Senior Resident Magistrate Court (SRM) in Mavoko Children's Case No. 5 of 2017 made on 14/8/2017, dismiss this petition and order costs to the 2nd Respondent.

Determination

34. I have considered the issues raised herein. The constitutional and legal provisions dealing with the rights of children are not in doubt. Article 53(1)(e) and (2) of the Constitution provides 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.

35. On the other hand, section 4(2)(3) of the ***Children's Act*** provides that:

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

(3) All judicial and administrative institutions and all persons acting in the name of these institutions, where they are exercising any powers conferred by this act 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 –

i. Safeguard and promote the rights and welfare of the child.

ii. Conserve and promote the welfare of the child.

36. These provisions have been the subject of legal proceedings both in this country and in other jurisdictions. **Lord McDermott,** for example, in **J vs. C (1970) AC 668,** while dealing with the issue of paramountcy of the child's interest being an overriding factor as:

"A process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices, and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare. That is...the paramount consideration because it rules upon or determines the course to be followed."

37. On his part, **Musyoka J**. in **Z.W VS MGW Misc. Case No. 108 of 2013**, observed at paragraph 10 that:

"The Children Act was designed to afford protection to children, whether born within or outside marriage. The spirit of the Children Act is that parents shall care, protect and provide for the children that they have been responsible for bringing into this world. The broad objective of the Act is not that protection should be afforded only for those children born within wedlock or where the father has assumed parental responsibility. Adopting such an approach to the matter would be discriminatory of children born outside wedlock where the putative father declines to assume parental responsibility. Even children who are products of what is called "a one night stand" deserve protection."

38. **Mumbi, J** on her part in **C.M.S vs. I.A.K HC Misc. Application No. 526 of 2008** stated that:

"In determining a matter such as this, the court must of necessity weigh the competing right of the child and the Petitioner who is alleged to be the biological father. The right of the child to parental care takes precedence, in my view, particularly in light of the cardinal principle set out in Article 53(2) that in matters such as this, the paramount consideration is the best interests of the child."

39. In **FKW (suing as the mother and next friend of GDW (Minor) vs. DMM [2015] eKLR**, **Ngaah, J** held that:

"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."

40. It is therefore clear that an order that the parents of a child the subject of legal proceedings do undergo DNA test is not prima facie unconstitutional. In my view since every child has the right 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, it follows that a child has a right to know who his or her father is. Can one of the parents move the court for a determination of who the father of the child is" Article 22(1) and (2) of the Constitution provides that:

(1) 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.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its

members.

41. Therefore, where there exist reasonable grounds for believing that a child's right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened any person may institute proceedings seeking redress on behalf of such a child. In this case however, the 1st petitioner claims that he is the biological father of the child. Since, as was held by **Ngaah, J** in **F KW (suing as the mother and next friend of GDW (Minor) vs. DMM [2015] eKLR**, it is the child's constitutional right and he is better of growing up with the knowledge of who his parents are, there is nothing unconstitutional in the 1st Respondent moving the court for a determination of who between the petitioners and the 1st parents are the biological parents of the child. This was the position taken by **Mumbi Ngugi, J** in **L.N.W vs. Attorney General & 3 Others [2016] eKLR** where she expressed herself as hereunder:

"72. The rights guaranteed to children under Article 53 are reflective of the rights guaranteed to children under various international instruments to which Kenya is a party. The 1989 Convention on the Rights of the Child recognizes the right of a child to a name. Article 7 thereof provides that:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.

80. In addition to being a limitation on the right to non-discrimination and dignity, the provisions of section 12 have a deleterious effect on other rights of the child as well. Article 53(1)(e) provides that a child is entitled *"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."* In order to access this right, a child must know, and have in its documentation, the name and identity of its father. This, however, is unlikely to happen if the inclusion of the name of a person as the father of a child is dependent on the willingness of that person to be included in the birth register.

81. Finally, I need not belabour the arguments made by the petitioner with respect to the importance of the identity of a father for enjoyment of other rights such as the right to health and the right to inherit. With respect to the right to health, one's genetic make-up can only be established if there is information with respect to both parents, which will not happen if the identity of the father is missing from a child's birth records. I have not heard the respondents dispute these contentions by the petitioner and interested party.

82. The petitioner has also raised questions related to the child's right to inheritance and to property under Article 40. I note that under Article 53(1)(e) of the Constitution, a child is entitled to parental care and protection from both parents, whether they were married to each other or not. It seems to me that question of inheritance do turn on identity and recognition of children by both their mothers and fathers. Consequently, a provision in legislation that denies a child such recognition must derogate from the entitlement of the child to inherit.

42. Conversely, I believe that where a person has reasonable ground for believing that he or she is the biological father or mother of a child, nothing bars him or her from seeking a determination as to who is the biological parents of the child. Therefore, if the Constitution and the law places a responsibility on a father whether within or outside marriage to fulfil his parental obligation, it is only just that he be permitted the rights that go with that obligation. He is therefore entitled to demand where reasonable grounds are established that the paternity of the minor be established at an early point in time so that he can plan his affairs.

43. In my view such a determination does not necessarily mean that the claimant must take custody of the child since the issue of custody must be determined based on where the best interest of the child falls. Therefore, the issue raised by the petitioners herein that the 1st Respondent has no financial means of taking care of the child does not arise in these proceedings. As appreciated in **L.N.W vs. Attorney General & 3 Others** (supra):

"…the entry of the name of the father of a child born outside marriage will not necessarily mean that the child will get the care and attention that it ought to get from its father. However, at the very least, it will give the child an identity, the knowledge that though its father does not support or care for it, it does have a father, and not a series of xxxxs in its birth certificate. In any event, once the identity of a child's father is established and documented, then it is possible to compel such reluctant fathers to support their children through appropriate court orders."

44. It was argued by the petitioners that by issuing the said orders for compulsory DNA testing, the Court threatened the right to recognition and protection by the State of the family of the Petitioners and the minor in addition to putting the right to peace and harmony of the family into jeopardy. In other words, by determining the paternity of the minor, the family set up in which the minor is being brought up is likely to be disintegrated by the litigation. However as appreciated in **L.N.W vs. Attorney General & 3 Others** (supra):

"The respondents did argue that allowing a woman to insert the name of the father of her child at any time will lead to litigation. This may well be the case. However, I take judicial notice of the fact that even as matters stand today, there is quite a lot of litigation by children seeking to establish their identity and the identity of their fathers. It is, in my view, in the best interests of the children that such matters are sorted out early on in their lives when the parental support that they are entitled to can be obtained, and when the stigma and discrimination that they suffer from a lack of identity can be prevented from blighting their lives unnecessarily. We have made promises of equality and non-discrimination to our children in the Constitution. It is not too much to demand that we begin to effect these promises with respect to children born outside marriage."

45. The question that arises is whether in these proceedings, the order in question was constitutional. In other words, was the decision arrived at in compliance with the Constitution" That Article 31 protects the right to privacy while Article 28 protects the right to dignity. **The right to privacy has also been expressly acknowledged in international and regional covenants on fundamental rights and freedoms. It is provided for under Article 12 of the *Universal Declaration of Human Rights,* Article 17 of the *International Covenant on Civil and Political Rights,* Article 8 of the *European Convention on Human Rights* (ECHR) and Article 14 of the *African Charter on Human and Peoples' Rights.***

46. B. Rossler in his book, *The Value of Privacy (Polity, 2005) p. 72,* explains the right to privacy as follows:

"The concept of right to privacy demarcates for the individual realms or dimensions that he needs in order to be able to enjoy individual freedom exacted and legally safeguarded in modern societies. Such realms or dimensions of privacy substantialize the liberties that are secured because the mere securing of freedom does not in itself necessarily entail that the conditions are secured for us to be able to enjoy these liberties as we really want to…Protecting privacy is necessary if an individual is to lead an autonomous, independent life, enjoy mental happiness, develop a variety of diverse interpersonal relationships, formulate unique ideas, opinions, beliefs and ways of living and participate in a democratic, pluralistic society. The importance of privacy to the individual and society certainly justifies the conclusion that it is a fundamental social value, and should be vigorously protected in law. Each intrusion upon private life is demeaning not only to the dignity and spirit of the individual, but also to the integrity of the society of which the individual is part".

47. The New Zealand Supreme Court in Brooker vs. the Police (2007) NZSC 30 at para. 252 stated as follows:

"Privacy can be more or less extensive, involving a broad range of matters bearing on an individual's personal life. It creates a zone embodying a basic respect for persons...Recognising and asserting this personal and private domain is essential to sustain a civil and civilised society...It is closely allied to the fundamental value underlying and supporting all other rights, the dignity and worth of the human person."

48. **In the Irish Supreme Court case of Kennedy vs. Ireland (1987) I.R 587, Hamilton, J made it clear that the right to privacy must ensure the preservation of the dignity and freedom of the individual in a sovereign, independent and democratic society. I am** alive to the fact that the right to human dignity is the foundation of all other rights and together with the right to life, it forms the basis for the enjoyment of all other rights. See **Francis Coralie Mullin vs. Administrator, Union Territory of Delhi (1981) SCR (2) 516.** Put differently therefore, if a person enjoys the other rights in the Bill of Rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated. In the circumstances, it is my view, as was held in **Charles Murigu Murithii & 2 Others vs. Attorney General [2015] eKLR** that:

"this right need not be pleaded for it to be enforced and even if pleaded, its application must be explained, a fact the Petitioners failed to address."

49. Therefore, as regards the position in **Anarita Karimi Njeru vs. The Republic (1976-80) 1 KLR 1283** regarding precise pleading, it is my view that the said decision must now be read in light of the provisions of Article 22(3)(b) and (d) of the Constitution under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the petitioner ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss an application merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which proceedings may even be commenced on the basis of informal documentation. This is not to say that the Court ought to encourage and condone sloppy and carelessly drafted petitions. As was appreciated by the Supreme Court in **Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR:**

"Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement."

50. What it means is that:

"the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out. But the new approach is not to say that the new thinking totally uproots all well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice."

See **Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2 Others Civil Appeal (Application) No. 152 of 2009.**

51. As was rightly put in **Trusted Society of Human Rights Alliance vs. Ag. & 2 Others [2012] eKLR**:

"We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment 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 too 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 require 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 the 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."

52. It must therefore be remembered that a High Court is by virtue of the provisions of Article 165 of the Constitution a Constitutional Court and therefore where a constitutional issue arises in any proceedings before the Court, it is enjoined to determine the same notwithstanding the procedure by which the proceedings were instituted. In my view where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and

the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the later ought to prevail over the former.

53. That the principle in ***Anarita Kirimi Case*** ought not to be religiously adhered to was appreciated by the Court of Appeal long before the promulgation of the present Constitution in **Peter M. Kariuki vs. Attorney General [2014] eKLR,** when it declined to adopt the ***Anarita Karimi*** (supra) position, line, hook and sinker by expressing itself, *inter alia* as follows:

"Although *section 84(1)* was, on the face of it, abundantly clear, it was, from the early days of post independence Kenya constitutional litigation, interpreted in a rather pedantic and constrictive manner that made nonsense of its clear intent. Thus in decisions like *ANARITA KARIMI NJERU V REPUBLIC (NO. 1), (1979) KLR 154,* the High Court interpreted the provision narrowly so as to deny jurisdiction to hear complaints by an applicant who had already invoked her right of appeal…The narrow approach in *ANARITA KARIMI NJERU* was ultimately abandoned in Kenya, in favour of purposive interpretation of *Section 84(1).*"

54. Therefore, my position is a lone voice shouting in the wilderness.

55. I associate myself with the decision in **Nation Media Group Limited vs. Attorney General [2007] 1 EA 261** to the effect that.

"A Constitutional Court should be liberal in the manner it goes round dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice...As long as a party is aware of the case he is to meet and no prejudice is to be caused to him by failure to cite the appropriate section of the law underpinning the application, the application ought to proceed to substantive hearing…Although the application may be vague for citing the whole of Chapter 5 of the Constitution, however the prayers sought are specific and they refer to freedom of expression guaranteed under the Constitution."

56. **It therefore follows that the right to privacy goes hand in hand with the right to dignity.** As expressed by **Albie Sachs** in ***The Strange Alchemy of Life and Law*** (OUP) at page 213:

"Respect for human dignity is the unifying constitutional principle for a society that is not only particularly diverse, but extremely unequal. This implies that the Bill of Rights exists not simply to ensure that the "haves" can continue to have, but to help create conditions in which the basis dignity of the "have nots" can be secured. The key question then, is not whether the unelected judges should ever take positions on controversial political questions. It is to define in a principled way the limited and functionally manageable circumstances in which the judicial responsibility for being the ultimate protector of human dignity compels judges to enter what might be politically contested terrain. It is precisely where political leaders may have difficulty withstanding constitutionally undue populist pressure, and where human dignity is most at risk, that it becomes an advantage that judges are not accountable to the electorate. It is at these moments that the judicial function expresses itself in its purest form. Judges, able to rely on the independence guaranteed to them by the Constitution, ensure that justice as constitutionally envisaged is done to all, without fear, favour or prejudice."

57. It is therefore clear both in the opinion of **Ngaah, J** opinion in **FKW (suing as the mother and next friend of GDW (Minor) vs. DMM [2015] eKLR** and **Majanja, J's** in **RMK vs. AKG, Nairobi High Court Constitutional Petition No 18 of 2013, [2013] eKLR** that before the Court can direct parties to undergo DNA testing a prima facie case must be established. This must be so since in **Majanja, J's** words in **S.W.M vs G.M.K [2012] KLR:**

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

58. Clearly, a direction that a party undergoes a DNA test is a limitation or restriction of the rights to privacy and dignity. It is

therefore clear that the right to privacy is one of the fundamental rights enshrined in the Constitution. For the said right to be limited the provisions of Article 24 of the Constitution must be satisfied. Article 24 (1), (2) and (3) provide as follows:

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) The nature of the right or fundamental freedom;

(b) The importance of the purpose of the limitation;

(c) The nature and extent of the limitation;

(d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) In the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) Shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) Shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

59. Therefore, for a limitation to be justified it must satisfy the criteria that it is "***is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".*** In dealing with these standards, the Supreme Court of Uganda while dealing with a similar provision in **Obbo and Another vs. Attorney General [2004] 1 EA 265** expressed itself as follows:

"It is not correct that the test of what is acceptable and demonstrably justifiable for the purposes of limitation imposed on the freedoms of expression and freedom of the press in a free and democratic society must be a subjective one. The test must conform with what is universally accepted to be a democratic society since there can be no varying classes of democratic societies for the following reasons:- (i). First Uganda is a party to several international treaties on fundamental and human rights, and freedoms all of which provide for universal application of those rights and freedoms and the principles of democracy. The African Charter for Human and Peoples Rights and the International Covenant on Civil and Political Rights are only two examples. (ii). Secondly, the preamble to the Constitution recalls the history of Uganda as characterised by political and constitutional instability: recognises the people's struggle against tyranny, oppression and exploitation and says that the people of Uganda are committed to building a better future by establishing through a popular and durable constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress. When the framers of the Constitution committed the people of Uganda to building a democratic society, they did not mean democracy according to the standard of Uganda with all that it entails but they meant democracy as universally known...It is a universally acceptable practice that cases decided by the highest courts in the jurisdictions with similar legal systems which bear on a particular case under consideration may not be binding but are of persuasive value, and are usually followed unless there are special reasons for not doing so."

60. Did the court below consider these factors before making a decision whose effect was a limitation of the rights of the

Petitioners" From the ruling exhibited to these proceedings, it would seem that the issue was never considered. This Court cannot in the circumstances determine whether the limitation or restriction of the rights of the petitioners was justifiable in the circumstances prevailing before the trial court. It is however for the trial court to consider the same and in the end determine the issue in accordance with the paramountcy principle in Article 53(1)(e) and (2) of the Constitution as read section 4(2)(3) of the ***Children Act.***

61. In the premises, while I find that in appropriate cases, the court is empowered to direct parties before it to undergo DNA test and that there is nothing unconstitutional about that power, in the exercise of this court's supervisory powers, which is a constitutional power, I hereby set aside the orders made in Mavoko SPM's Court Children's Case No. 5 of 2017 on 14th August, 2017 directing the parties to undergo DNA test. I further direct that the matter be referred back to the trial court to hear the parties and determine the same as provided under the law.

62. I directed the parties to furnish the court with soft copies with the documents filed herein. While the petitioners and the 2nd Respondent complied, the 1st Respondent only furnished the submissions but did not send the affidavit. Section 1A(3) of the ***Civil Procedure Act*** provides as hereunder:

A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

63. One of the overriding objectives of the ***Civil Procedure Act*** is the facilitation of expeditious resolution of the civil disputes governed by the Act. The direction that Advocates and parties do furnish the Court with soft copies of their pleadings and submissions is geared towards that same objective and where they fail to comply therewith, it amounts to a failure to comply with a statutory mandate which may call for a penalty in costs or deprivation of costs even where the same would have been granted. This Court has in fact warned counsel that since the duty to furnish soft copies falls squarely on the shoulders of counsel, the right person to take responsibility for such failure is the counsel and not the party who it cannot be contended instructed counsel not to comply with the court's directions in such circumstances. Accordingly, the 1st Respondent will bear the costs of this petition.

64. It is so ordered.

Read, signed and delivered in open Court at Machakos this 28th day of May, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Muoki for Ms Jeruto for the 1st Respondent

Mr Nthiwa for Mrs Mwangangi for the Petitioners

CA Geoffrey