REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIRBI

CIVIL CASE NO. 1351 2002 (O.S.)

RM (Suing thro'

Next friend) **J K.....PLAINTIFF**

CRADLE (The Children fund) MILLIE

G.A. ODHIAMBO.....INTERESTED PARTY

VERSUS

THE ATTORNEY GENERAL.....DEFENDANT

JUDGMENT

This is an application brought by way of an Originating Summons dated and filed on 12th August 2002. It has been brought by R.M. (a minor through next friend J K her mother) and CRADLE, a Non Governmental Children Foundation as the 1st Interested Party. The 2nd Interested party is COVAW (Coalition on Violence Against Women). The 3rd Interested Party is FIDA (Federation of Women Lawyers Kenya). The application was brought for the determination of the following questions.

1. Is Section 24(3) of the Children Act an abrogation of the Plaintiffs' human right; to wit, protection from discrimination to the extent that it negates the Constitution, International Conventions and Charters of which Kenya is a signatory, in particular, Articles 2 and 3 of the convection on the Rights of the Child and Articles 2 and 3 of the African Charter on the Right and Welfare of the Child by expressly discriminating against children born out of wedlock and failing to take into account the best interest of the child"
2. Is section 24(3) of the Children Act either of itself or in its effect discriminatory to the extent that it expressly or constructively prescribes that a father of a child who is neither married to nor has subsequently married the child's father bears no parental responsibility in relation to that child"
3. Is Section 24(3) of the Children Act inconsistent with section 82(2) of the Constitution of Kenya concerning a child whose parents were not married to each other at the time of the child's birth to the extent that it permits a father of such child to discharge parental responsibility to the child

by virtue of its provision"

4. HAS the applicant been treated in a discriminatory manner by his father who, acting by virtue of Section 24(3) of the Children Act has refused to assume parental responsibility on her behalf"
5. DOES Section 24(3) of the Children Act impose a statutory criteria which discriminates upon children whose parents were not married to each other at the time of their birth as against all other children; which criteria is inconsistent with Section 82(1) and (2) of the Constitution of Kenya making the same therefore null and void"
6. WHO shall pay costs of this summons

The factual background is that RM was born on 16th September, 2000 through a relationship between the mother and another man. It is alleged that the father worked with a local company as a mechanic. At the time of birth the mother depones that she was cohabiting both before the date of birth and up-to 3rd January 2001 with the alleged father who duly paid hospital expenses at the hospital where RM was born. On 3rd January 2001 the alleged father disappeared or avoided the mother completely in April 2001.

On 16th September, 2000 the mother depones that the alleged father came to the matrimonial home and named the child after his mother (RM) and shaved her head after one week as per his tribe's customary law ie Kisii.

She depones that he has failed to give any parental support to both the mother and the child and that both entirely depend on good Samaritans for their upkeep.

She laments that the law does not place any parental responsibility on the plaintiff's father since she is not married and had she married him the plaintiff's father would have had parental responsibility towards the plaintiff just like the mother.

She finally depones that she has been advised that the law ie S 24(3) of the Children Act is discriminatory as it puts the plaintiff at a disadvantaged position vis-à-vis other children whose fathers have married or subsequently married their mothers. Such children do not therefore have to contend with the question of who will take responsibility on their behalf. And therefore the plaintiff should be accorded equal treatment with those children whose parents are married or have subsequently married by placing parental responsibility or both the father and mother.

Counsel for all the parties including Interested Parties hereinafter called IPs have since filed affidavits and have also filed and relied on written skeleton arguments with lists of authorities which we have duly considered in preparing this judgment

ANALYSIS

According to the format of the Originating Summons s 82 of the Constitution of Kenya has been mentioned in prayers 3 and 5 of the Originating Summons and because the Constitution is the supreme law of the land, we consider it important to start with it by setting out relevant parts in extenso Section 82(1) (2) (3) (4) and (6) read:-

"82 (1) Subject to subsections (4) 5 and (8), no law shall make any provision that is discriminatory either of itself or in its effect

(2) Subject to subsections (6),(8) and (9) no person shall be treated in a discriminatory manner by

a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.

(3) In this section the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race or tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) shall not apply to any law so far as the law makes provision –

(a) with respect to persons who are not citizens of Kenya;

(b) with respect to adoption, marriage, divorce, burial devolution of property on death or other matter of personal law;

(c) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applies in the case of other persons; or

(d) whereby persons of a description method in subsection (3) may be subjected to a disability or restriction or may be accorded a privilege or advantage which, having regard to its nature and special circumstances pertaining to those persons or to persons of any other such description is reasonably justifiable in a democratic society

(6) Subsection (2) shall not apply to:

(a) anything which is expressly or by necessary implication authorized to be done by a provision of law referred to in sub section (4); or

(b) ------- not relevant

We also consider it important to set out in full the relevant sections of the Children Act 2001 of Kenya, that is the sections which have given rise to this suit.

"24 (1) Where a child's father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have superior right or claim against the other in exercise of such parental responsibility.

(2) Where a child's father and mother were not married to each other at the time of the child's birth and have subsequently married each other, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in the exercise of such parental responsibility

(3) Where a child's father and mother were not married to each other at the time of the child's birth and have not subsequently married each other

(a) the mother shall have parental responsibility at the first instance;

(b) the father shall subsequently acquire parental responsibility for the child in accordance with the provisions of section 25

(4) More than one person may have parental responsibility for the same child at the same time.

(5) A person who has parental responsibility for a child at any time shall not cease to have that responsibility for the child."

(6) ..... not relevant

(7) ..... not relevant

(8) ..... not relevant

The marginal note to sector 24 states

"Who has parental responsibility"

Section 25 states:

"S 25 (1) here a child's father and mother were not married at the time of birth –

(a) the court may on application of the father, order that he shall have parental responsibilities for the child; or

(b) the father and mother may by agreement ("a parental responsibility agreement") provide for the father to have parental responsibility for the child

(2) Where a child's father and mother were not married to each other at the time of his birth but have subsequent to such birth cohabited for period or periods which amount to not less than twelve months or where the father has acknowledged paternity of the child or has maintained the child, he shall have acquired parental responsibility for the child, notwithstanding that a parental responsibility agreement has not been made by the mother and father of the child."

It is strongly contended that s 24(3) of the Children Act also violates the Convention on the Rights of the Child and in particular its preamble which provides:

"Recognising that the United Nations has in the Universal Declaration of Human Rights and in the International Covenants on Human Rights proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind such as race, colour, sex, language religion, political or other opinion national or social origin property, birth or other status."

It has been argued that s 24(3) of the Children Act is discriminatory against children born out of wedlock whose parents are not married to each other either at the time of the child's birth or subsequently thereafter. The argument is that the discrimination is on social origin, birth or other status which is that the child cannot benefit and enjoy parental responsibility from both the mother and father because of the status of the mother, a single mother. For this reason the court is urged to hold that s 24(3) is inconsistent with the United Nations Convention on the Rights of the Child which Convention was intended to be domesticated by the passage of the Children Act. It is submitted that the section

should be declared discriminatory and null and void.

Article 2(1) of the United Nations Convention on the Rights of the Child has also been relied on by the applicant. It states:

"States parties shall respond and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind irrespective of the child's or his or her parents or guardian's race, colour, sex language, religion, political or other opinion, national, ethnic or social origin property, disability birth or other status.:

The argument presented to court on the above is that excluding children born out of wedlock from automatically receiving support from their fathers is discriminating them on the grounds of their social origin, birth and status. Status here being that the child's parents were not married to each other at the time of the child's birth and or subsequently thereto. Reliance has also been placed on Article 18(1) of the same Convention which reads:

"States parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. The best interests of the child shall be their basic concern."

The argument by the applicant is that Article 18(1) envisages the principle that both parents have joint primary responsibility for bringing up their children. There should be no distinction that the child is born within or out of wedlock. Thus children born out of wedlock are being victimized for something they have no control over, the children cannot decide whether they want to be born either within or out of a subsisting or subsequent marriage of their parents. Kenya should therefore as a State implement the provisions of the Convention without any reservations because she did not seek any when she ratified the Convention.

The applicant and the IPs have also reinforced their argument by citing Article 3 of the African Charter on the Rights and Welfare of the child which provides:

"Every child shall be entitled to the enjoyment of the rights and freedom recognized and guaranteed in this charter irrespective of the child's or his/her parents or legal guardian's race, ethnic group colour, sex, language, religion, political or other opinion, national ethnic or social origin birth or other status.

Article 4 of the same Charter states:

"In all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration."

Article 18(3) of the same Charter declares:

"No child shall be deprived of maintenance by reference to the parents marital status."

And finally on the Charter Article 20(1) provides:

"Parents or other persons responsible for the child shall have the primary responsibility of their upbringing and development."

The applicant has also relied on the provisions of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)1979. Discrimination against women is defined as:

...**"any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition enjoyment or exercise by women, irrespective of their marital status on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."**

It has been submitted that the States by ratifying the Convention undertook to incorporate the principle of equality of men and women in their legal systems and to abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women. For this argument the court's attention has been drawn to Article 2 of CEDAW which reads:

"To take all appropriate measures including legislation, to modify or abolish existing laws regulations, customs and practices which constitute discrimination against women."

Article 16(1)(d) provides:

"The same rights and responsibilities as parents irrespective of their marital status in matters relating to their children; in all cases the interests of the children shall be paramount."

POSITION OF INTERNATIONAL CONVENTIONS AND THE STATE CONSTITUTIONS

Having set out above, the relevant Conventions and the constitutional provisions including the challenged sections of the Municipal law we consider it important to touch on the relationship between the two – namely the Conventions and the state law including the Constitution.

The general principle unless there is a provision in the local law of automatic domestication of a Convention or Treaty is that a Convention does not automatically become Municipal law unless by virtue of ratification.

The position has been very ably articulated in the Bangalore Principles 1989 as follows:

"It is within the proper nature of the Judicial process and well established Judicial functions for National courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purposes of removing ambiguity or uncertainty from national constitutions, legislation or common law."

On the other hand where the national law is clear and inconsistent with the international obligation, in common law countries, the national court is obliged to give effect to national law. And in such cases the court should draw such inconsistencies to the attention of the appropriate authorities since the supremacy of the national law in no way mitigates a breach of an international legal obligation which is undertaken by a country. From this analysis the court does adopt the reasoning of Justice Musumali of the Zambian High Court in his holding in the case cited by the applicants and Interested parties counsel namely *SARA LONGWE v INTERNATIONAL HOTELS* (1993) 4 LRC 221, where held:

"Ratification of such (instruments) by a nation state without reservations is a clear testimony of the willingness by the State to be bound by the provisions of such (a Treaty). Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by International Instruments, I would take judicial notice of that Treaty or

Convention in my resolution of the dispute."

We shall shortly revert to analysis of the Kenyan position vis-à-vis the relevant Conventions with particular reference to the Bangalore Principles as set out above, after analyzing the respondents submissions on the issue of parental responsibility, what discrimination is, and what the Kenyan Constitution stipulates. Before we turn to the respondents arguments however it is important to reproduce the definition of parental responsibility as per the Children Act.

S 23(1) defines parental responsibility as under:

"In this Act, parental responsibility means all the duties rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child."

S 23(2) sets out the actual responsibilities.

It is also significant to ascertain who is a parent. CONCISE OXFORD ENGLISH DICTIONARY 11th Edition Oxford University press defines the word "parent" as under:

" (1) a father or mother, an animal or plant from which younger ones are derived - derivatives – parental (adj) and parenthood (n)

The Attorney General who is the respondent has put forward the following arguments:

1. The application does not set out in precise terms the actual provisions in the Constitution which are violated by s 24(3) of the Children Act
2. No specific grievance or injury, specific to the infant has been demonstrated. The court cannot pursue a matter which is of academic value only,
3. The applicant has no cause of action
4. An applicant in an application under s 84(1) of the Constitution is obliged to state his complaint the provision of the constitution he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of this Court under the section. It is not enough to allege infringement without particularizing the details and the manner of infringement see
    a. *MATIBA v ATTORNEY GENERAL NB HC MISC 613 of 19990*
    b. *ANARITA KARIMI NJERU v R (NoI) 1979 K.LR 154*
    c. *CYPRIAN KUBAI v MWENDA NBI H C MISC 615 of 2002 UR*

The respondent argues that no specific prayer has been sought against him or any violation attributable to the Attorney General and that no case can stand without any particular grievance. The respondent further contends that Loci Standi of a party need not be assumed. Under s 84 of the Constitution the violation of the right must be personal to the applicant, which he has suffered over and above others. On the contrary in this case the alleged contravention is only in respect of the parents and their marital status and it is not the parents who have brought the Originating Summons but the child. Sections 23, 24 and 25 deal with parents and not the child. A person must sue on his own behalf.

5. A child cannot effectively claim that the effect of a parents classification would discriminate her or him, as the criteria under s 82 does not include "age" and marital status see *ATTORNEY GENERAL v LAWRENCE (1985)* LRC 921 at page 930 D. The test is whether the applicant has been directly affected by the impugned statute

6. That issues against the respondent have not been adequately or properly addressed or the jurisdiction of the court properly invoked
7. When considering whether or not s 24(3) is discriminatory the court must take into account, the history and social economic context of the legislation or in other words the environment in which the legislature enacted the statute. Thus the Act repealed and consolidated all statutes on child legislation - The Children and Young Persons Act The Adoption Act and the Guardianship of Infant Act. In addition principles in the International Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child were taken into consideration. In children matters the tendency is to define what is good for the child by reference to the parents. Generally the Act views a child as an individual member of the family. The Children Act achieved this principle by giving the Child the right to protection from discrimination child labour, abuse, economic and sexual exploitation, to live and be cared for by his parents to basic education and identity.
8. It is quite clear that s 24(3) merely states that such responsibility for a child born out of wedlock shall vest in the mother in the first instance. The essential feature of s 24(3) is that it does not prohibit a father of a child born out of wedlock from claiming parental responsibility. The steps to be followed by the father to achieve the status of a parent with responsibility over that child are set out. By following the outlined steps the uncertain status of the father is changed.
9. The respondent has identified three issues related to the above for determination namely:
    a. Whether s 24 (3) of the Act is discriminatory of itself and
    b. Whether s 24(3) has introduced discriminatory statutory criteria to illegitimate children against all other children
    c. Whether the national law is subject to the International Convention or Charters

The respondent has powerfully argued that if the court were to hold that s 24(3) affords different treatment for the children in its effects then the criteria .. which that alleged differential treatment arises has to be one of those provided for under section 82 (3) of the Constitution in order to be discriminatory in terms of the constitution. Discrimination is defined in the Kenya Constitution and the court must be guided by this in its determination

10. Even if the court were to find that there is discrimination as per the definition in the Constitution it has been argued that should not be the end of the matter. The court should go a step further and consider the whether the difference in treatment has an objective and reasonable justification and for such justification to be established it has to be shown that the difference in treatment:

    i. pursues a legitimate aim
    ii. bears a reasonable relationship of proportionality between the aim sought to be realized and the means used to achieve it – see the case of *R v THE WESTMINISTER CITY COUNCIL AND FIRST SECRETARY OF STATE 2004* EWHC 2191

It has been argued for the respondent that s 82(3) does not prohibit Kenya from adjusting its legislation to differences or forbid classification at all. It only requires that the classification be reasonable, justifiable and necessary. It has also been stressed that s 82 of the Constitution does not demand that things that are different be treated as though they were the same. What is forbidden is the differences based wholly or mainly on race, colour or as specified in s 82 of the Constitution. The respondent has with a touch of humour given two illustrations why not every difference in fact violates s 82 of the Constitution. Thus, it cannot be unconstitutional when employing nurses to observe that women appear to have a natural advantage over men in this area. Similarly one would be entitled to classify people on the basis that there are more night-guards than women in real life. This kind of thinking would not be unconstitutional or discriminatory because you are not treating the classification on

account of one of the specified descriptions or classification mentioned in s 82. The additional reason is that although in the humorous examples on sex as illustrated above "sex" is one of the forbidden classifications, the employer is not wholly employing on the basis of sex. There is a justifiable and objective reason for the difference – there are situations where nature must have an edge in real life. By analogy a child born out of Wedlock is not being addressed in the Children Act only in the capacity of an illegitimate child rather he is being treated as one at whose birth it is likely that the father might not be known or immediately available to fend for him yet the child's immediate needs parental responsibility which is absolutely necessary at the moment of birth and the needs cannot reasonably be expected to await for example a Legitimacy Act suit or await a Paternity suit under the Children's Act or any other law that regulates the maintenance of children. Reason demands that the law apportions parental responsibility in the first instance because parental responsibility can in certain situations vest on only one parent because of the overriding interest of the child and this is what it has done. The mother or any other person with the loci standi can thereafter cause the parental responsible to be shared thereafter and the child would be at par in terms of parental responsibly with the child born within wedlock. In other words the law places parental responsibility on un married mother because she is the only one immediately available at birth where there is no marriage and the needs of the child have to be paramount or overriding at any given time. The differentiation is not wholly or mainly on her status or that of the child. It is the mother who in the first instance has a clear and undisputed linkage to the child. The respondent has also contended that it is the opposite situation which would be unreasonable and unconstitutional – which is to allow a mother to point at the nearest man in the street and baptize him a father of the child without according him the right of hearing or producing proof of paternity.

The respondent concludes that the exclusion of marital status or age in s 82 is clear proof that any legislation that provides for such classification is not and cannot be unconstitutional.

The applicant has on the other hand urged the court to adopt a broad and purposeful interpretation of s 82 and find that although marital status is not specified in s 82 we should all the same, hold that it is so included, because the framers of the Constitution could not have contemplated or foreseen all possible categories on which discrimination ought to have been forbidden at the time the Kenyan Constitution was being drafted. Alternatively, we have been urged to adjudicate in terms of the Conventions reproduced above, and which have specifically included the terms "other status". In support of this the applicants have quoted the Canadian case of *ANDREWS v LAW SOCIETY OF BRITISH COLOMBIA* (1989) I SCR 143 where it was held that the enumerated heads of discrimination in Article 15(1) of the Canadian Charter "race, national or ethnic origin, colour, religion, sex, are or mental or physical disability were not a complete listing of categories of discrimination. The invitation to the court is that we go beyond the categories set out in s 82 of the Constitution namely *race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex.* We shall be touching on this aspect later on in this judgment. Wilson J in the ANDREW case (supra) defined discrimination as follows:

"Distinction which whether intentional or not but based on grounds relating to personal characteristics of individual or group has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society."

At page 127 in *BOTSWANA v UNITY DOW* the learned Judge held:

"I do not think that the framers of the Constitution intended to declare the categories mentioned in that definition to be forever closed. Other grounds or classes needing protection would arise. In that sense, classes or groups itemized in the definition would be and in my opinion, are by way

of example of what the framers of the Constitution thought worthy of membership as potentially some of the most likely areas of possible discrimination. Sex was not specified in the Constitution of Botswana."

Although the suit is filed on behalf of the child an argument has been presented on behalf of mothers as follows:

"A mother of a child born within wedlock on the other hand or one who subsequently marries the father of her child does not go through this process of proof. She enjoys obvious advantages, as the law imposes a duty on the father to have parental responsibility towards the child/children. She does not have to shoulder parental responsibility on her own. This means that the law on one hand treats unmarried mothers differently from married mothers and thereby discriminates on the basis of marital status and on the other hand discriminates on the basis of sex by making mothers of children born out of wedlock have sole parental responsibility in the first instance."

The case of *R v WESTMINISTER CITY COUNCIL AND FIRST SECRETARY OF STATE (2004) EWH* (291 (Admin) has been relied on by the applicant for the principle that when a State legislates on a Convention or domesticates it cannot do so discriminatively. The argument is that s 24(3) should be on all fours with the relevant Convention.

In determining whether or not the provisions under the Children Act are discriminatory when tested against the Conventions and the Constitutional provisions we were urged to consider the five questions posed in *LONDON BOROUGH COUNCIL v MICHALAK* (2003) 1 WLR 617, when Brooke L.J. posited that if the answer to any of the questions is "no" then, the claim is likely to fail. The questions are:

1. **"Do the facts fall within the ambit of one or more of the substantive Convention Rights (European Convention for the Protection of Human Freedoms)**
2. **If so, was there different treatment as respect that right between the complainant on the one hand and the other person put forward for comparison"**
3. **were the chosen comparators in an analogous situation to the complainants situation**
4. **If so did the difference in that treatment have an objective and reasonable justification" Did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship on proportionality to the aim sought to be achieved**
5. **If so was the difference in treatment on one or more of the prohibited grounds under Article 14.**

<u>Personal Law</u>

While conceding that discrimination or distinction is allowed in relation to matters of personal law, the applicant and counsel for the other Interested Parties (IPs) contends that the framers could not have allowed discrimination that encompasses the entire spectrum of a person's life. The applicant defines personal law, as the law of religion, tribe or other personal factors. The applicant again drew the Court's attention to the definition of personal law in the *BOTSWANA v UNITY DOW* where the learned judge observed that the words *"other matters of personal law in section 15(4)(c) of the Botswana Constitution referred to personal transactions determined by the law of his tribe religious groups or other personal factors as distinct from the territorial law of the country.* Thus at page 652, Amissah JP held that citizenship which is conferred by Statute on a statewide basis, is not a matter of personal law. Thus, if there is a matter that is legislated on a state-wide basis, the same cannot then be subject to personal law otherwise this would make mockery and nonsense of modern law. Tribal and religious laws have

clear provision in relation to women and children that are often inimical to written law and which encompass their economic, political social and cultural lives. It was therefore argued that parental responsibility is conferred by the Children Act on a state wide basis and for this reason it cannot be treated as a matter of personal law which deals with laws of tribe religions or communities. Children or women are not a homogenous group subject to the same personal law everywhere.

Conflicts in the Children Act

The applicant has argued that Part II of the Act and in particular s 5 prohibits discrimination on the basis of birth or other status among other grounds. This is in conflict with s 24(3) of the same Act. As the Act was meant to domesticate the Convention on the Right of the Child and the African Charter the court has been invited to hold that Part II must prevail in the face of the apparent conflict.

JUS COGENS

It has also been argued that discrimination against the child born out of wedlock or their mothers by the State through legislation forms part of jus cogens which is the technical name now given to the basic principles of international law, which States are not allowed to contract out of - otherwise known as "peremptory norms of general international law – and that there is such a general recognition of use of force, of genocide, slavery, gross violations of the right of people to self-determination and of racial discrimination and prohibition on torture as jus cogens.

A consistent pattern of gross violations of internationally recognized human rights if practiced encouraged or conducted by the government of a state as official policy – constitutes a violation in the category of jus cogens. It has therefore been argued that the court should regard the discrimination of the child in terms of parental responsibility as breach of customary international law.

FINDINGS

(a) Locus standi

We find that the applicant has locus in public law because he is affected by the subject matter of the suit namely parental responsibility but the mother had no locus to attempt in the course of the proceedings to articulate the position of mothers generally including herself. Any alleged violation of a Constitution has to be made personally unless the relevant right can be asserted by a corporate body or unincorporated association see s 84 and s123 of the Constitution for the definition of a "person." On this point we respectfully depart from that great judgment of Ringera J in the NJOYA case.

(b) Personal law

The court does not accept the definition of personal law as outlined by the applicant. They have only captured part of the definition and left out the rest BLACKS LAW DICTIONARY 18th Edition defines personal law at pg 1180 as follows:

"The law that governs a person's family matters usu regardless of where the person goes. In common law systems personal law refers to the law of the person's domicile. In civil law systems it refers to the law of the individuals nationality (and is sometimes called lex patriae) CF TERRITORIAL LAW"

"The idea of the personal law is based on the conception of man as a social being, so that

those transactions of his daily life which affect him most closely in a personal sense, such as marriage, divorce, legitimacy many kinds of capacity and succession, may be governed universally by that purpose ... Although the law of domicile is the chief criteria adopted by English courts for the personal law, it lies within the power of any man of full age and capacity to establish his domicile in any country he chooses and thereby automatically to make the law of that country his personal law".

In view of the above it is quite clear that the definition of personal law is wider than what the applicant has contended in this matter and we would not accept to restrict its meaning under the Constitution and we opt to give it its widest meaning as defined above. We are therefore unable to find for the applicant on this point in the face of the above definition and the Constitutional provision excepting personal law under s 82(4) of the Constitution. It is one field of law where the Constitution gives the Legislature some latitude to create suitable laws that are in keeping with the peculiar needs and values of the society at any given time.

(c) Jus Cogens

On this, a perusal of the authoritative sources and international jurisprudence reveals that although the applicants are correct in the definition of jus cogens as outlined above and its current classifications it has not yet embraced parental responsibility and the rights associated with it. The closest linkage is the right to life and we are not convinced that the challenged section(s) threaten the right to life. On the contrary the provisions endevour to provide for the gaps that have hitherto existed in the law so that the overriding interest of the child is satisfied even where the status of the parents is uncertain. The provisions have in our view been crafted in a fairly objective and reasonable manner. There is therefore nothing which we could apply to Kenya by way of jus cogens except the recognized classifications set out above. In enacting s 24 and 25 we find that the Legislature

invoked the provisions of s 82 of the Constitution.

(d) Conflict between the provisions of the Children Act

We accept that s 5 is worded in broader terms in terms of the definition of discrimination because it includes "birth" and status. However in so far as Part II purports to go contrary to s 82 of the Constitution (although this has not arisen for determination in this case because Part II and in particular section 5 have not been challenged) it would be void to the extent of the conflict. As held elsewhere we have a serious duty to uphold the provisions of the Constitution and nothing has been established to justify the invitation either to add to or to subtract from what appears to us to be very clear unambiguous, unequivocal provisions of the Constitution. Neither an Act of Parliament nor a provision in any ordinary Act of Parliament can alter the Constitution.

(e) Invitation to expand on the antidiscrimination categories set out in s 82 of the constitution

We reject the invitation to blindly follow the *ATTORNEY GENERAL OF BOTSWANA v DOW* (above) where the court unilaterally added "sex" to the Botswana Constitution. Firstly with all due respect we consider that if we did the same in Kenya it would amount to usurpation of the work of the Constitution framers. We would have no reason to add or to subtract in the face of what is to us, very clear provisions. Moreover in the context of Kenya, in 1997 the Country deliberately came up with a Constitutional Amendment to include the classification of "sex" to the section so as to bring in line the Constitutional provision, with the emerging jurisprudence contained in the relevant Convention. Failure

to expand to other categories was in our view deliberate and inter alia took into account the limitations already contained in s 82 and in particular subsection 4. Any other approach would amount to unacceptable judicial activism. Similarly the invitation that we call a woman's "womb" "a place of origin" strains the language or the wording used in the Constitution and we would have no reason to embark on such a course. In this regard while conceding that some of the reasoning in the case of *REPUBLIC v EL MANN 1969 EA* 357 have been substantially overtaken especially in the interpretation of the Constitution, one important principle remains intact, that the words of the Constitution or a statute should be accorded their natural and ordinary sense. This is the path we have chosen in the circumstances of this case. We further endorse Potter J's holding in *NGOBIT ESTATE LTD v CARNEGIE* (1982) KLR 137:

"The function of the Judiciary is to interpret the statute law not to make it where the meaning of a statute is plain and ambiguous no question of interpretation or construction arises. It is the duty of the Judge to apply such a law as it stands. To do otherwise, would be to usurp the legislative functions of Parliament."

(f) Other status etc

Even if we adopted the ANDREWS CASE or the WESTMINISTER or the DOW CASES (SUPRA) and expanded the Constitutional categories and definition we would still not find for the applicant because of what we have said elsewhere in this judgment concerning the non-restrictive approach adopted in by the United Nations monitoring bodies in interpreting the Universal Declaration and the Covenant on Civil and Political Rights. The additional reason for not taking the path of the cases relied on above is that in our view they fail to recognize "*the States margin of appreciation*" as defined in the ever expanding international jurisprudence – see the BELGIAN LINGUISTIC CASE 1968 (ibid) and ... THE CONSTITUTION OF COSTARICA case 1984 COC4/84 (ibid).

Finally we cannot uphold the applicant in the face of the Bangalore Principles concerning the position of the Conventions vis a vis the States Constitutions. Where there is no ambiguity the clear provisions of the Constitution prevail over the International Conventions.

Principles 6, 7 and 8 as per the Reprint Commonwealth Secretariat Developing Human Rights Jurisprudence Vol 3 151 read:

P6

"While it is desirable for the norms contained in the international human rights instruments to be still more widely recognized and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs

P7

It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law

P8

However, where national law is clear and inconsistent with the international obligation of the

state concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.

In *CHENEY v CONN* 1968 NWLR 242 at page 245 E and G-H it was held that the Conventions, Treaties and Charters need not bind its Legislature.

Returning to the EL MANN case we have great sympathy for the principle expressed in the case as under:

"We have said enough to show that in our opinion sub-section (7) of s 21 of the Constitution means no more and no less than it is to be gathered from the plain words of the provision and is not to be given an extended meaning which cannot be spelt out of the words used without doing violence to the language of the subsection."

Of course the El Mann principles have quite rightly been buffeted or shaken by the powerful winds of broad and purposive approach in interpreting the Constitution together with the living tree principle of interpreting the Constitution but except in exceptional cases where these two approaches apply the above principle still reigns supreme. The situation where a living spirit has to be injected into the Constitutional provisions, include, where the language used is likely to lead to unjust situations. Even where the living tree principle of construction is invoked the nourishment given must originate from the roots, the trunk and the natural branches. The court would not be entitled to disregard the roots, the trunk and the natural branches in the name of giving flesh to the Constitution, or to graft in, its own artificial branches. The living tree is sustained by the tree and any graftings are likely to be rejected. By all means let the courts be innovative and take into account the contemporary situation of each age but let the innovations be supported by the roots.

In this regard we endorse fully the presumption of constitutionality which was powerfully expressed by the Supreme Court of India in the *HAMDARDDAWAKHANA v UNION OF INDIA AIR* 1960 554 where the respected Court stated:

"In examining the constitutionality of a statute it must be assumed that the legislature understands and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore, in favour of the constitutionality of an enactment."

Nothing has been shown to us that can lead us to upset the presumption that s 24(3) and by extension s 25 were not enacted for a reasonable purpose and for a need the legislature felt had to be addressed. Indeed it has not been demonstrated to us by the applicant that the striking out or declaring the section unconstitutional would be in the interest of the intended beneficiary or the overriding interest of the child which is the aim of the legislation. On the contrary, the child's interest would be subverted by the prayers sought. In addition it has not been demonstrated how the contended equality could be achieved by law in a situation where parental responsibility is wholly shared by both parents in the case of married couples and split only where one of them is not available in the first instance because of the uncertain status of the father. In our view the legislature has provided for all possible situations in order to address the aim of parental responsibility. We would of course have agreed with the applicant's contention on inequality and discrimination if for example it is the government which was charged with parental responsibility and it dishes better treatment to a child born within wedlock and dishes out bad or

inferior treatment to that born out of wedlock. There would be an ironcast case for inequality and discrimination. However the definition of a parent includes both parents when immediately available or one of them when the other is not available– see the meaning of "parent" as set out above. The court in sustaining the constitutionality of the section must carefully analyse the relationship under scrutiny and all the underlying circumstances which necessitated differential treatment. We would therefore wish to associate ourselves with the holding in the HANDARD DAWAKHANA case supra where the court observed:

"that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation."

We further approve the holding in the same decision on what the function of the court is when an enactment is impugned on the ground that it is ultra vires and unconstitutional:

"As already stated when an enactment is impugned on the ground that it is ultra vires and unconstitutional what has to be ascertained is the true character of the legislation and for that purpose regard must be had to the enactment as a whole, to its objects, purpose and true intention and the scope and effect of its provisions or what they are directed against and what they aim at."

While there is no contention that the impugned section(s) are ultra vires it is contended that s 24(3) is unconstitutional and we as a court have the mandate as expressed above. As crafted the Children Act is a milestone in entrenching and securing the rights of the child and s 24(3) is in on view a big improvement of the uncoordinated laws which dealt with parental responsibility before its enactment. Scrapping it from our law would go against the objects of the Act and the State responsibility to endevour to create laws, aimed at securing the best interests of the child.

(g) Equal Protection of Laws

Equal protection of laws means subjection to equal laws applying to all in the same circumstances.

In the circumstances presented to us the child born within wedlock has the immediate support of the two parents. In the case of the child born out of wedlock there is only one parent available in the first instance. The difference in terms of the two otherwise equal situations arises because the status of the father in the latter case is not immediately ascertainable and the law goes on to provide for the process of ascertainment and to allow the sharing of responsibility upon ascertainment of status or acceptance by the father. The law does not prevent or frustrate Paternity or legitimacy suits. They are contemplated by the section or other applicable laws. The question is, does the right of equal protection under the Constitution, prevent the Legislature from legislating differently in the two situations. The answer in our view is "NO". The principle of equal protection of the laws does not prevent the legislature or the State from adjusting its legislation to differences in situations or forbid classification in that connection, but it does require that the classification be not arbitrary, but based on a "*real and substantial difference, having a reasonable relation to the subject or aim of the particular legislation*."

The equal protection provisions do not in our view require things which are different in fact or in law to be treated as though they are the same. Indeed, the reasonableness of a classification would depend upon the purpose for which the classification is made. There is nothing wrong in providing differently in situations that are factually different.

The intelligible differentia in the case before us is the uncertain status of the father in the first instance. The differentia is not arbitrary because it has a nexus to attachment of parental responsibility and it recognizes that the process of ascertainment of the status will take time. Surely there is a substantial distinction between the two situations and the law has handled the distinction in a reasonable manner and with the object of parental responsibility and the objects of the Act in view. By way analogy we wish to quote with approval the holdings of Mahajan J ad Das J respectively in the Indian case of *STATE OF W.B. v ANWARALI* 1952 SCR 284 AND 335.

"The classification permissible must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis. ... Thus the Legislature may fix the age at which persons shall be deemed competent to contract between themselves but no one will claim that competence to contract can be made to depend upon the stature or colour of the hair – such a classification for such a purpose would be arbitrary and a piece of legislative despotism."

And Das J put it:

"The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test two conditions must be fulfilled namely:

1. **that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and**
2. **that that differentia must have a rational relation to the object sought to be achieved by the Act.**

In this case, child born within wedlock etc and out of wedlock is the differentia and parental responsibility is the nexus. Unwedded mothers and their children are grouped together for the purpose of locating parental responsibility. This cannot be said be an arbitrary or unreasonable differentia – because how else can parental responsibility be located in the two situations." To reinforce this point permit us to quote from the American Supreme Court decision in *RIGNER v STATE OF TEXAS* (1940) 310 US 141:

"The Fourteenth Amendment enjoins the equal protection of the laws, and laws are not abstract propositions. They do not relate to abstract units, A,B, and C, but are expressions of policy arising out of specific difficulties addressed to the attainment of specific ends by use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."

And to answer the question we have posed above, as to whether the law could have handled or dealt with the situation in any other way, the decision in the American Supreme Court decision in *BUCK v BELL* (1926) 274 US 2000 (208) is to the point:

"The law does all that is needed when it does all that it can indicates a policy, applies it to all within the lines and seeks to bring within the lines all similarly situated so far and as fast as its means allow."

To conclude this important point we recognize that the American jurisprudence has extensively

covered the rule of equality since the case of *MAQOUN v ILLINOIS TRUST BANK* (1898) 170 US 283 to *BAYSINE FISH CO. v GENTRY (1936) 297 US* 422 (429) as follows:

"The rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental proposes, there cannot be any exact exclusion or inclusion of persons and things.

In other words, a classification having some reasonable basis, does not offend against the clause merely because it is not made with mathematical nicety, or because, in practice, it results in some inequality.

Government is not a simple thing. It encounters and must deal with the problems which come from persons in an infinite variety of relations. Classification is recognition of those relations and, in making it a legislature must be allowed a wide latitude of discretion and judgment."

'In applying the dangerously wide and vague language of the equality clause to the concrete facts of life, a doctrinare approach should be avoided.'

"When a law is challenged as offending against equal protection the question for determination by the court is not whether it has resulted in inequality, but whether there is some difference which bears a just and reasonable relation to the object of the legislation."

As the Supreme Court of India has observed in the case of *KEDAR NATH v STATE OF W.B.*(1953) SCR 835 (843):

"Mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary: that it does not rest on any rational basis having regard to the object which the legislature has in view."

Finally by analogy we turn to the American case of *LALLI v LALLI* 1439 us 259 (1978).

A state was permitted to condition an illegitimate's inheritance from his father on a judicial determination of parternity during the father's lifetime.

The Section recognizes the child right to parental support at all stages provided paternity is established and even where it is not an agreement of parental responsibility has been allowed. We find no unreasonableness in the way the legislation has provided for the situations which arise, in this personal law relationship.

We therefore conclude that the differentia in s 24(3) and 25 is not arbitrary and cannot be said to lack a rational basis having regard the objects of the Act and in particular locating parental responsibility.

CONSTITUTIONAL POSITION TO PREVAIL AS PER THE BANGALORE PRICIPLES

After analyzing the case law cited to us by the applicants counsel including the Interested Parties counsel we prefer reinforcing the three relevant Bungalore principles set out elsewhere in this judgment to the effect that the States clear constitutional provisions should prevail over those of the Conventions. It follows that the clear provisions of s 82 and the limitations must prevail and we so hold. It is only where an Act intended to bring a Treaty into effect is itself ambiguous or one interpretation is compatible

with the term of the treaty while others are not that the former will be adopted. This is in recognition with a presumption in our law that legislation is to be construed to avoid a conflict with international law. In this regard we endorse as good law Lord Diplocks comments in the English case of *SOLOMON v COMMISSIONER OF CUSTOMS* (1967) 2 QB cited elsewhere in the judgment where he said:

"Parliament does not intend to act in breach of international law, including, specific treaty obligations.".

However where the words of Constitution or statute are unambiguous the courts have no choice other than to enforce the local law irrespective of any conflict with international agreements. Where not domesticated, Treaties may be taken into account in seeking to interpret ambiguous provisions in the municipal law see *R v CHIEF IMMIGRATION OFFICER, HEATHROW AIRPORT exp BIBI [1976] 3 ALL 843.*

POSITION AS PER INTERNATIONAL INSTRUMENTS – STATES PERMITTED TO TAKE INTO ACCOUNT SPECIAL CIRCUMSTANCES

The Universal Declaration of Human Rights 1948 Article 2 and 7 state the following about human rights, equality before the law and discrimination:

Article 1

"All human beings are born free and equal in dignity and rights"

Article 2

"Everyone is entitled to all the rights and freedoms set forth in this declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status"

Article 7

"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of the Declaration and against incitement to such discrimination."

It is strikingly clear that Article 2 of the Universal Declaration prohibits distinction of any kind. The obvious interpretation is that no differences at all can be legally accepted. However the situation on the ground does not support such a restrictive interpretation of the Declaration in that the monitoring bodies have not supported any such interpretation and in some of the constitutions of the member states including that of Kenya do not support the position as stated in Article 2. The Member States have claimed and have been allowed "***a margin of appreciation***" because differences in real life are inevitable and they are not necessarily negative. Indeed, international jurisprudence and supporting case law demonstrates that not all distinctions between persons and groups of persons can be regarded as discrimination in the strict sense or true sense of the term. Thus General Comment No. 18 in the United Nations Compilation of General Comments, p 134 para 1 lays what appears to be a peremptory international norm (jus cogens) in these words:

"non discrimination, together with equality before the law and equal protection of the law without any discrimination constitute a basic and general principle relating to the protection of human

rights."

The second principle which is now generally accepted and which does not support a restrictive interpretation is that *distinctions made between people are justified provided that they are, in general terms reasonable and imposed for an objective and legitimate purpose.*

To amplify on this we wish to borrow again from the Human Rights Committee General Comments (supra) at page 135 para 7 in its definition of "discrimination."

"that the term discrimination as used in the Covenant (International Covenant on Civil and Political Rights) should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing of all rights and freedoms"

The Human Rights Committee has commented that the enjoyment of rights and freedoms on an equal footing does not mean identical treatment in every instance. Taking the ICCPR as an example Article 6(5) prohibits the death sentence from being imposed on persons below 18 years of age and from being carried out on pregnant women. The other obvious example is affirmative action which is aimed at diminishing or eliminating conditions likely to perpetuate inequality or discrimination in fact. Such a corrective action constitutes or is termed legitimate differentiation under the ICCPR.

It is therefore an accepted international principle of law that differentiation based on *reasonable* and *objective criteria* does not amount to prohibited discrimination. A state which complies with this criteria would not be faulted in practice or in its formulation of a supporting law provided this criteria is adhered to. To explain the position further the universality of the 1948 Declaration of Human Rights is based on a common heritage of humankind which is the oneness of the human family and the essential dignity of the individual. It is from these two universally shared traits from which the notion of equality finds its stem or base

INTERDEPEDENCY AND INDIVISIBILITY OF HUMAN RIGHTS

In this particular case the court has deliberately declined to stretch the natural meaning of the words set out in s 82 of the Constitution of Kenya for the reasons given herein. However we must clarify that we are acutely aware that the role of the Court in determining the values and principles of our Constitution is vast in that in the hitherto neglected field of economic, social and cultural rights the courts have the critical role of harmonizing these rights with the civil and political rights. The reason for this is that the two sets of rights are interdependent and indivisible. A good recent example is this courts broad interpretation of the right to life in the case of *P.K. WAWERU v ATTORNEY GENERAL & OTHERS.* This was in the field of environmental law. And the court ruled that life was more than soul and body. In this decade and beyond one of the greatest challenges in the courts will be finding a lasting place for economic social and cultural rights in our jurisprudence.

The challenge in this case is however different and we decline to pave a new path – because the facts and the law have not sufficiently energized us to pave such a path in the circumstances.

NO DISCRIMINATION WHERE THE DIFFERENCE HAS A LEGITIMATE PURPOSE:

It is clear to the court that what s 24(3) and 25 are seeking to achieve is to have the parental

responsibility shared in the case of the married couples or where there is a consensual parental agreement or the responsibility split between individuals if there is no marriage and also to locate parental responsibility permanently where an unmarried father, has had a 12 month's history of giving maintenance to the child. In cases outside these situations the law initially locates the parental responsibility on the mother of the child because firstly there cannot be a gap in parental responsibility in the first instance and the best interests of the child is for the identified parent to take up the responsibility. The law assumes that the process of identifying the father outside marriage is likely to take time e.g. paternity or legitimacy suits are likely to take time where instituted, yet the needs of the child cannot be held in abeyance even for a moment. Taking the facts of the case before the court as an illustration the next friend of the child has claimed that the child's head was "shaven" by the father pursuant to the Kisii customary tradition. Yet she has not explained why she has not pursued this claim in a court of law. A Constitutional court is not the right forum for such a claim. Customary African marriages are recognized by our law. Thus in the event of a successful claim under the customary law s 24(3) could still be invoked to ensure that parental responsibility is shared between the two. The section is not tied to the statutory marriages only.

In the circumstances we have no hesitation in finding that the challenged subsection 24(3) on the mother's initial responsibility and the father in the situations described in the subsection and 25 have a legitimate purpose and are based on the realities of the relationships and the rights of all those concerned. A law that does not recognize the right of all concerned including those disputing paternity would be unrealistic and unreasonable and would be contrary to justice, to reason and to the nature of things.

This is why this Court agrees with UN General Comment supra pp 104-106 paras 55-57 and we take the liberty of reproducing:

57. Accordingly, the discrimination does not exist if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows, that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary capricious, despotic or in conflict with the essential oneness and dignity of human kind."

Thus we find that since the aim of the section is to provide for parental responsibility locating it initially in the mother and providing for a shared responsibility taking into account all possible relationships that spring from the birth the section has handled the situation with a reasonable proportionality between the difference of the one set of children (generally born within and those born out of wedlock since the aim is to provide for parental responsibility in both situations as far as it is practically possible in the later situation. We find that the balance struck by the challenged section cannot be said to be unreasonable or unjust. The difference between the two sets of situations cannot in our view be said not to have *an objective and reasonable justification.*

A MARGIN OF APPRECIATION IS IN CERTAIN SITUATIONS PERMITED

Although as is clear from s 82 of the Constitution of Kenya our Constitution does allow departure from the non discrimination rule, in cases of marriage and areas of personal law. The courts are obliged to apply the law as it is at the moment, even in those situations where birth, age or marital status are categories in the Constitution (or as we were being persuaded to agree with our brother Judges in

Zambia where the court appears to have extended the categories) because the Local legislation does not have to be on all fours with the Convention. We are persuaded to hold that even in these situations each State has a certain margin of appreciation which she can exercise in the legislating as has happened in Kenya as regards sections 24(3) and 25 by extension. In the case before us, we would be more inclined to agree with the finding of the Inter American Court of Human Rights in its advisory opinion on the case of *PROPOSED AMENDMENTS TO THE NATURALISATION PROVISIONS OF THE CONSTITUTION OF COSTARICA OC* 4/84 of January 19, 1984, series A No4 o 104 para 54 where it gave this opinion:

58 **"Although it cannot be denied that a given factual context may make it more or less difficult to determine whether or not one has encountered the situation described in the foregoing paragraph, it is equally true that, starting with the notion of the essential oneness and dignity of the human family, it is possible to identify circumstances in which considerations of public welfare may justify departures to a greater or lesser degree from the standards articulated above. One is here dealing with values which take on concrete dimensions in the face of those real situations in which they have to be applied and which permit in each case a certain margin of appreciation in giving expression to them."**

While the ideal situation may be holy matrimony or the other legally recognized marriage status, in terms of parental responsibility the law as crafted has gone beyond this in order to locate and provide parental responsibility so as to achieve it, this being a cornerstone of the overriding interest of the child. If a state or the courts were to blindly apply the rule of the thumb and hold that there cannot be legitimate distinction in the situation before us, then what is the case of the single mothers who would have nothing to do with the father by choice" Should the law wipe them from the face of the earth or should it not try and do social engineering by providing for each situation using the best criteria available to secure the rights and obligations of all in the interest of justice, reason and equity.

In interpreting our Constitution we consider ourselves bound by its provisions in the matter before us namely s 82 and its limitations. Perhaps it is important to point out at the outset, that following the great momentum of gender equity in the 80's and 90's, s 82 of the Kenya Constitution was amended in 1997 and the prohibited category expanded to include "sex". Age and marital status were not added. At the moment one can only conclude that the exclusion was deliberate and we do not consider that it is the function of the court to fill the gaps. It must not be forgotten that modern Constitution are being negotiated with the people directly or indirectly by way of Constituent Assemblies and Referendums and it would not be proper for the courts to take their places by filling in fundamental gaps in the Constitutions. The life of society has other important actors such as Parliament and other organs which must be left to play their role to the full. In this regard we would like to borrow from one of the holding by the European Court of Human Rights in the *BELGIAN LINGUISTIC CASE JUDGMENT* of 23rd JULY 1968 Series A, No6, p33 para 9 where they held:

"In attempting to find out in a given case, whether or not there has been an arbitrary distinction, the court cannot disregard those legal and factual features which characterize the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it cannot assume the role of the competent national authorities (in our case read the people, Constituent Assembly or Referendum and Parliament) because it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of those measures with the requirements of the Convention"

Thus, in the case of our Parliament it did address the measures set out in the cited Conventions and choose only those measures which are considered suitable to the local situation. Parliament had no obligation to adopt, line hook and sinker, the provision of the Conventions in formulating the Children Act. It had a margin of appreciation reserved to the State as defined above. On the other hand the role of the Court is to uphold the provisions of the Constitution by recognizing the prohibited categories in s 82. The situations which would justify a constitutional court in adopting a broad view or using the living tree principle of the interpretation of the Constitution is where there is ambiguity, inconsistencies, unreasonableness, lack of legislative purpose or obvious imbalance or lack of proportionality or absurd situations. In all these situations a court would be justified in breathing life into any such provisions in order to achieve situations which are not contrary to justice, to reason or to nature of things. Any other approach would in our view be usurpation of the role of the Constitution framers and other law makers. Any spirit or nourishment to constitutional provisions by the court must spring directly from the roots and cannot justifiably be grafted from outside the living tree.

To sum up we find and hold that s 23(4) and by extension 25 do not offend the principle of equality and nondiscrimination either by themselves or in their effect. We further hold that the principle of equality and nondiscrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful provided they satisfy the following:

1. **pursue a legitimate aim such as affirmative action to deal with factual inequalities; and**
2. **are reasonable in the light of their legitimate aim.**

The challenged difference does satisfy both criteria in our view. At the moment we find no other better option of dealing with the situation other than as set out in the sections. It must be recalled that the Act took the best provisions of the repealed Children and Young persons Act, Guardianship – Adoption of Infants Act and other laws affecting children and the relevant International Conventions among others and codified them as one. The Act including the challenged section(s) captures the issue of parental responsibility in a manner never done before in the history of the rights of the child in this country and it would be a great tragedy for the Court to accept the invitation to strike them out or to hold that the subsection is unconstitutional. If the court were to do so the gap in meeting the overriding interest of the child would be immediately retrogressive and unforgivable.

The suit is dismissed with no order as to costs as the suit had been brought on behalf of child.

We would like to thank all the advocates for their research and diligence in handling this important case.

DATED and delivered at Nairobi this 1st day of December, 2006.

J.G. NYAMU

JUDGE

M. IBRAHIM

JUDGE

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