Judgment No. HB 120/05
Case No. HB 1805/05

ALBERT MTSHINGWE

Versus

JAPHET MOYO

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 24 NOVEMBER AND 15 DECEMBER 2005

Miss N Dube for applicant
Respondent in person

Paternity Test

CHEDA J: This is an application for the delivery of a minor child currently in the custody of respondent.

Applicant was married to Eustina Nyika (herein referred to as Eustina) under customary law. According to him a child Diana Mtshingwe was born on 5 November 1997 and a birth certificate number BDH 1607/98 was obtained by both applicant and Eustina on 20 January 1998. Their union was however, fraught with problems resulting in its mutual dissolution in 1998. On her departure from the matrimonial home she successfully applied for maintenance contributions from applicant.

Eustina, found a new relationship with respondent whom she eventually settled in as his wife under customary law. She took Diana with her.

During her marriage to respondent she together with him obtained another birth certificate on 23 March 2004 being birth

certificate number 08-2108767 J 53. Eustina, however, died in July 2005.

Upon her death applicant approached respondent with a view of taking custody of Diana. It is at this stage that he was advised by respondent that in fact Diana was not his daughter but respondent's.

An attempt to settle this dispute failed resulting in this application.

Applicant stated that he had always believed that Diana was his daughter as Eustina had never mentioned respondent as a possible father. He further stated that he had never heard of him as anything else other than the fact that he was customarily married to Eustina.

On the other hand respondent is of the firm view that Diana is his daughter as he was in love with Eustina apparently at the same time with applicant. He also, had never heard of applicant until after Eustina's death. That is the reason why he did not ask him about Diana's custodianship after Eustina's death. It is quite possible that respondent had sexual relations with Eustina at the relevant time.

We have a situation where both parties claim fatherhood of the child. The real natural father can not be determined from the mere facts presented before the courts in the present matter.

These courts indeed on many occasions determine paternity on the basis of presumption based on the facts where the dispute is between the mother and the father. However, where both men claim fatherhood, the presumption is not enough, as the determination of paternity then requires the aid of scientific methods.

It is, however, clear that fraud was committed by Eustina by obtaining two different birth certificates registering both parties as natural

fathers of this child. It is unfortunate that she has since passed away leaving this problem which is not easy to disentangle.

The certainty of paternity is beyond legal principles and therefore can only be determined by scientific analysis of the child's blood after matching it with that of the natural mother and the disputed father(s).

Our courts have always accepted and ordered that the parties involved submit themselves for blood group tests. The court's understanding is that the procedure has always required the mother's blood sample too, however, due to the advancement of medical technology it is now possible to determine the issue of paternity accurately without the mother, by analysing the blood of the child and father.

The analysis is based on set laws of heredity which can not be changed see David Harley, *Medico Legal Blood Group*

Determination: Theory Technique Practice Heinemann 1944 at page 29 where the learned author stated,

> "The application of blood group tests in medico- legal problems involving disputed blood relationship is based on the fact that the blood group of her parents in accordance with the laws of heredity discussed above (Chapter II and III) hence if the blood group of individuals alleged to be blood relations are at variance with the laws, the alleged relationship is disproved."

The courts, therefore, have no alternative but to rely on medical evidence to establish parenthood.

Questions as to the correctness of ordering the child to submit itself for blood tests has been raised in some instances. Those who are against this procedure argue that the child should not be subject to this procedure

as it is an assault on the individual's privacy. In fact in *W* v *W* [1963] 2 ALLER 841 at 845, the learned English Judge stated

> "To compel persons to submit to a blood test without their consent seems to me a very serious interference with personal liberty and rights. **Very convincing reasons would have to be shown before I could conclude that such a power was within the interest jurisdiction of the court."** (The emphasis is mine)

While accepting that any infliction of wound or prick on an individual is *per se* an assault, I am of the view that the courts should adopt a robust approach in dealing with such matters, particularly when minors are concerned. It is trite that the courts will always relax its rules and practice in the interest of the children.

Respondent has suggested that all parties should submit to a paternity blood test. Applicant is agreeable to this suggestion save that he wants costs of such tests to be borne by respondent as he is the one who is seeking to establish paternity. Consent in relation to the blood tests therefore is not an issue for the two parties.

The question therefore, is that of the minor child. I am of the view that in as much as it can be said that an infliction of a wound, even though forensically small is an assault on an individual there has to be a distinction in as far as children are concerned for two reasons.

Firstly, the courts will do all they can in the furtherance of the interest of a minor child. Where two men both claim to be natural fathers of the child, it is in the child's best interest that its correct biological father be determined.

Secondly, the fact that these courts are upper guardians of minors stands to reason that they have an inherent authority to order that such a child be subjected to a blood test which necessitates an infliction of its body as long as it is in its best interest.

Costs

Applicant firmly believes that respondent should bear the costs of this application on an attorney and client scale. Costs on this scale are punitive. This is a matrimonial matter. These courts are not keen to award such costs unless respondent's defence has

been dishonest or unreasonable, the list is inexhaustive. An award of costs as between attorney and client is unusual in matrimonial cases see *Genn* v *Genn* 1948(4) SA 430 (c) 432 and *Sopher* v *Sopher* 1957(1) SA 598 (W) 601 Respondent also firmly believes that the child is his. Both parties were deceived by Eustina and therefore in my opinion it would be unfair to penalise respondent when his belief was reasonable.

This court does not possess the knowledge, expertise and equipment of determining the question of paternity. Such is possessed by the medical personnel. Applicant has an earlier birth certificate obtained in 1998 while respondent obtained his in 2004. *Prima facie* respondent's birth certificate was obtained fraudulently at least by Eustina. In my view
respondent has the onus of proving on a balance of probabilities that Diana is his child. In any event he has already stated that he would like the parties to undergo blood tests. He should therefore be saddled with the costs of this medical procedure.

The following order is therefore made:

1. Applicant, respondent and the minor child Diana (date of birth 5 November 1997) are and hereby ordered to undergo blood tests to establish the fatherhood of either applicant or respondent.
2. Each party to pay its own costs.

3. Respondent to pay the costs of all the blood tests in this matter.

Marondedze & Partners, applicant's legal practitioners