

ORDER SHEET
IN THE LAHORE HIGH COURT, LAHORE
(JUDICIAL DEPARTMENT)

Case No. Writ Petition No.75322 of 2022

Kaneez Fatima, etc Versus *Senior Civil Judge etc.*

Sr. No. of order/ Proceedings	Date of order/ Proceedings	Order with signatures of Judge, and that of parties or counsel, where necessary.
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15.05.2024 Mr. Babar Bilal Awan, Advocate for the petitioners.
Mr. Muhammad Jawad Yaqoob, Additional Advocate
General with Majeed, SI.
Mr. Fahad Ahmad Siddique, Advocate for
respondents No.02 & 03.

Through this writ petition, the petitioners have assailed the order dated 17.10.2022 passed by learned Senior Civil Judge (Family Division), Hafizabad whereby the learned Judge has directed DNA analysis of minor Umme Mabad alias Maryam in order to settle the claim between two parties about the paternity of such minor and that order was result of a direction by this Court passed in Writ Petition No.16871-H of 2022 on 21.03.2022.

2. Learned counsel for the petitioners contends that DNA examination for the purpose of paternity is always subject to consent of the parties and the learned Judge should have attended to this aspect of the case because direction of this Court for DNA examination cannot ipso facto override the legal position. In order to fortify his arguments, learned counsel for the petitioners has referred case reported as “MUHAMMAD NAWAZ versus ADDITIONAL DISTRICT AND SESSIONS JUDGE and others” (PLD 2023 Supreme Court 461).

3. On the other hand, learned counsel for respondents No.02 & 03 initially argued that the judgment relied upon by

learned counsel for the petitioners is on different legal premise whereas in the present situation, when two parties are claiming paternity over a minor, the DNA would be a best course to ascertain such fact. However, later conceded that evidence of the parties before the lower Court is almost complete, therefore, an appropriate direction in this regard be passed to the learned trial Court.

4. Arguments heard. Record perused.

5. Determination of paternity of a minor has been dilated upon in different cases by this Court and the Supreme Court of Pakistan as well. The pro and contra judgments are necessary to be made part of this order for guidelines to the trial Court to pass an appropriate order. Case reported as *"ABDUL LATIF Versus ADDITIONAL DISTRICT JUDGE, KASUR and 4 others"* (2016 CLC 1553), focused upon the necessity of DNA test as under;

".....it is not a case of legitimacy of the petitioner but it is claimed that he was born out of the wedlock of some other known spouses and he was adopted son of the parents of respondents Nos. 3 and 4, who at that time were issueless. Here the objects are known and in case of any ambiguity or doubt in the veracity of the report, the parties will be at liberty to file objections and the same will be resolved keeping in view the direct evidence likely to be produced by the parties."

6. The judgments which prohibit conducting DNA without the consent of parties are referred below with reasoning. The Supreme Court of Pakistan in a recent case reported as *"MUHAMMAD NAWAZ versus ADDITIONAL DISTRICT AND SESSIONS JUDGE and others"* (PLD 2023 Supreme Court 461) observed as under:

"We find that both the revisional court and the High Court have failed to consider that the conducting of the DNA test of a person, without his consent, infringes his fundamental rights to liberty and privacy guaranteed by Articles 9 and 14 of the Constitution of the Islamic Republic of Pakistan"

A court order for the DNA test of two persons as a means of identifying their genetic relationships interferes with their right

to privacy and liberty. This test can be ordered only either with the consent of the persons concerned or without their consent if permissible under a law. We are aware of certain provisions of criminal law which permit the DNA test of an accused person without his consent, but no civil law has been brought to our notice which allows this test in civil cases without the consent of the person concerned.

It may be pertinent to mention here that in a civil case, if the person upon whom the onus to prove his genetic relationship with another person lies, does not give consent for his DNA test, and thus withholds such evidence, the court may draw an adverse presumption against the claim of such person and presume that such evidence, if produced, would be unfavourable to him, as per Article 129(g) of the Qanun-e-Shahadat 1984.

In another case reported as “Mst. LAILA QAYYUM Versus FAWAD QAYYUM and others” (PLD 2019 Supreme Court 449), The Supreme Court of Pakistan says as under:

“Learned Mr. Awan is also right in referring to the case of Salman Akram Raja wherein it was held that a free lady cannot be compelled to give a sample for DNA testing as it would violate her liberty. If a sample is forcibly taken from Laila to determine her paternity it would violate her liberty, dignity and privacy which Article 14 of the Constitution of the Islamic Republic of Pakistan (“the Constitution”) guarantees to a free person”

In case reported as “SALMAN AKRAM RAJA and another Versus GOVERNMENT OF PUNJAB through Chief Secretary, and others” (2013 SCMR 203), the observations of Supreme Court of Pakistan were to the following effect;

“It is well settled that the consent of victim is necessary and she/he cannot be subjected to DNA or other medical test forcibly for prosecution purposes because that would amount to infringement of personal liberty of such persons”

We are in agreement with the learned counsel to the extent that DNA samples etc. should be preserved for make use of it at the appropriate stage whenever is required. However, the legislature is free to regularize the procedure by making appropriate legislation in this behalf”

Same was the view of this Court in case reported as “Mst. SAFIA BIBI and another Versus MUHAMMAD AKBAR and others” (PLD 2018 Lahore 758) that:

"If a person does not give consent for such test, he/she cannot be compelled for the test. It amounts to interference with personal liberty of a person. It was finally concluded that the Court has power to order for DNA Test or any blood test in order to ascertain the truthfulness of allegations but such order must be passed with the consent of a party, the order cannot be made in routine. Compelling a person to undergo a DNA Test can have serious consequences. It is the duty of a court to safeguard and protect personal liberty of every citizen"

In case reported as "Mst. RUBINA KAUSAR Versus ADDITIONAL SESSIONS JUDGE and others" (PLD 2017 Lahore 604) this Court has held that:

"The Indian Supreme Court in the case of Goutam Kundu v. The State of W.B. (AIR 1993 SC 2295) held that before the blood test of a person is ordered, his consent is required, as, that test is concerned with his personal liberty and cannot be carried out without his consent. The Court went to an extent to order that even if there is legislation which can compel the blood test, then also, unless and until there is consent of the concerned person, he cannot be compelled to go to the hospital for giving blood test."

In the United States, paternity testing is fully legal, and fathers may test their children without the consent or knowledge of the mother. Paternity testing take-home kits are readily available for purchase, though their results are not admissible in court, and are for personal knowledge only. Only a court-ordered paternity test may be used as evidence in court proceedings.

Thus, for what has been discussed above, it is not safe to resort to DNA testing in Civil matters of inheritance as a matter of routine, the paternity issue could be proved by oral and documentary evidence already recorded by the trial Court."

Case reported as "NASEER AHMED Versus Mst. AZRAH and another" (PLD 2010 Karachi 61) says that:

"As far as, application for DNA test is concerned, since the question whether the applicant before the trial Court is father of the child or not has to be decided on the basis of evidence available, it is obviously for the Family Court to decide whether it needs DNA tests or not. Obviously costs of such DNA test should be borne by the person who made the application for such test"

7. An Article on "Islamic Law of Paternity and DNA Evidence" by Ayman Shabana, posted on June 28, 2021 throws light on the issue that for paternity verification, two main approaches can be identified for the incorporation of DNA evidence: 'comprehensive and limited'. While the

former seeks to recognize DNA evidence as a new and almost an independent method, which can ensure the achievement of the sharī'a objectives in the domain of paternity and lineage, the latter insists that DNA evidence should be treated as a type of circumstantial evidence, which can be compared to the classical method of qiyāfah. While the first approach has been pursued by some jurists, the second approach has been adopted by the overwhelming majority of contemporary Muslim scholars, as reflected in both individual as well as institutional fatwās, statements, resolutions, and recommendations. The information in this respect is as follows;

This is best illustrated by the resolution of the Islamic Fiqh Council of the Muslim World League, which was issued in its 16th session, held in Mecca in January 2002. The resolution acknowledges DNA testing as an effective scientific method, which can yield certain or near certain results. However, while the resolution indicates that it should be considered more effective than the traditional method of physiognomy, it specifies certain stipulations that should govern its implementation. For example, according to the resolution, DNA testing for paternity verification should be used to support sharī'a-based methods but not to verify already existing and established paternity relationships. Moreover, it should be used mainly in contested and disputed cases. [1]

Some of the jurists are of the view that DNA testing can provide almost certain results while other see its results as probabilistic, therefore such testing is always subject to statutory regulations. Even otherwise DNA results are only corroborative evidence which are to be accepted or rejected in the light of evidence of the parties and in case of dispute the expert can also be summoned to justify his opinion.

8. After attending the above cases, it is clarified that consent of the parties is essential to decide claim of the

[1] <https://islamiclaw.blog/2021/06/28/islamic-law-of-paternity-and-dna-evidence/>

parties with respect to paternity of the child. If the parties do not give consent for such DNA examination, then learned trial Court can draw adverse inference as per Article 129 (g) of Qanun-e-Shahadat Order, 1984 and shall proceed to decide the question of paternity on the basis of evidence produced by the parties. In this respect, Court can also take help from Quranic verses and Hadith of Holy Prophet. One of the examples is quoted in a judgment of Federal Shariat Court titled “*Mst. RAJO MAI versus THE STATE*” (1992 P Cr.LJ 1011) wherein it was held that for tracing the origin of the child the male member of the affair could be traced out by evidence particularly by ascertaining the origin and blood grouping of the child, origin of child could also be ascertained by comparing features and limbs of child with alleged claimant.

9. The above referred article on “*Islamic Law of Paternity and DNA Evidence*” by Ayman Shabana also throws light on such method. According to the tradition, it is a form of circumstantial evidence which is called physiognomy (qiyāfah), and was quite popular in the pre-Islamic Arabian culture. The word is derived from the Arabic root (qāfa), which stands for the act of following or tracing. It conveys the ability to follow marks on the ground, mainly in the desert. It also denotes the ability to examine resemblance in bodily and physical features for the purpose of confirming family relationships, especially in paternity disputes. Most jurists, justify the possibility of resort to physiognomy in contested cases by arguing that verification of lineage relationships is an important personal and social need. Sharī‘a seeks to provide means to enable establishment of paternity whenever possible even on the basis of probable evidence.

10. The net result of above discussion is that writ petition is allowed and consequently order dated 17.10.2022, impugned herein is set aside. Learned trial court can resort to DNA testing only with the consent of the parties or otherwise competent to decide the matter on the basis of evidence produced by the parties including resort to physiognomy (qiyāfah) as highlighted above.

Muhammad Amjad Rafiq
Judge

Approved for reporting:

Judge

Signed on 21.05.2024.

*M. Azhar**