REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL CASE 1 OF 2016

(FORMERLY PETITION 139 OF 2016)

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM OF FKA (MINOR)

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2(1), 3(1), 10, 20, 21, 22, 23, 25, 27, 28, 19, 43, 45, 53, 159(2)(b), (b), OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTIONS 3, 4, 5, 6, 7, 8, 9, 13, 21, 22, 23, 26, 81, 82, 84, 85, 87, AND 90 OF THE CHILDREN'S ACT NO. 8 OF 2001 LAWS OF KENYA, THE PROVISIONS OF THE CONVENTION ON THE RIGHTS OF THE CHILD AND THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

BETWEEN

MAK ....PETITIONER

VERSUS

RMAA ....1ST RESPONDENT

THE CABINET SECRETARY,

MINISTRY OF FOREIGN AFFAIRS AND

INTERNATIONAL TRADE...2ND RESPONDENT

THE CABINET SECRETARY,

MINISTRY OF INTERIOR AND COORDINATION OF

NATIONAL GOVERNMENT..3RD RESPONDENT

INSPECTOR GENERAL

NATIONAL POLICE SERVICE....................................4TH RESPONDENT

HON. ATTORNEY GENERAL.......................................5TH RESPONDENT

JUDGMENT

1. The petitioner MAK and the 1st respondent RMAA got married on 2nd August 2002 at [particulars withheld] at Runda in Nairobi under

the **African Christian Marriage and Divorce Act (Cap. 151 – repealed).** They lived in a matrimonial home in Nairobi. The petitioner was an advocate working at the Central Bank of Kenya, and the 1st respondent was a hotelier and hailed from the Ismailia Community. On 12th February 2004 in Nairobi the marriage was blessed with a son F.K.A. who is in school in York in the United Kingdom. The petitioner lives in the United States of America while the 1st respondent works as the general manager at the [particulars withheld] Hotel in Dar-es-Salaam in Tanzania.

2. By 2008 the marriage relationship had broken down. The petitioner petitioned for the dissolution of the marriage in **Chief Magistrate's Divorce Cause No. 75 of 2008** at Milimani Commercial Courts. The marriage was dissolved on 9th October 2008. The parties had signed a parental responsibility agreement on 15th May 2008 at the Children Court at Nairobi in **Misc. Application No. 36 of 2008**. The terms of the agreement were that:-

(a) both parents had joint legal custody over the child;

(b) the petitioner was to have actual custody of the child, with the 1st respondent having unlimited access rights to the child with notice, and such access not being unreasonably denied;

(c) the 1st respondent was to secure the schooling needs of the child and be responsible for the child's school fees and all school related expenses, and the decision as to which school was to be agreed upon after mutual consultation;

(d) the 1st respondent was to provide the child with a medical cover with a reputable medical provider for both in-patient and out-patient, and was to further deposit Kshs.300,000/=being security to cover any medical and emergency and incidental case, and such money was to be in the petitioner's account;

(e) the 1st respondent was to pay Kshs.115,000/= monthly for maintenance, beginning 1st July 2008;

(f) the 1st respondent was to cause the transfer of a Flat at Zenith Gardens, Brookside LR No. [particulars withheld] into the petitioner's name and complete the payment by the remaining instalments of the loan on the said property to Central bank of Kenya; and

(g) the parties agreed to abide by the terms of the agreement and act in the best interests of the child.

There is no indication that the 1st respondent has failed to provide for the child's fees, school related expenses, medical needs or maintenance.

3. It is not in dispute that in 2014 the petitioner was living with the child in Kenya. She went to the United Kingdom to pursue a Masters degree in Law at the University of York. The 1st respondent provided consent for her to be accompanied by the child. The 1st respondent was in Dar-es-Salaam. While in the United Kingdom, the petitioner invited the 1st respondent to visit them. It was during this period that they enrolled the child at [particulars withheld] School in York.

4. By application in the High Court at Nairobi in **Misc. Suit No. 124 of 2015**, the petitioner got the High Court to adopt the parental responsibility agreement on 17th December 2015. Armed with the order, the petitioner went to the High Court at Dar-es-Salaam in Tanzania in **Civil Application No. 494 of 2016** and registered it on basis of **Reciprocal Enforcement of Foreign Judgments Act (Cap. 8, R.E. 2002).** She obtained an *exparte* order on 3rd August 2016 to register the order for the purposes of enforcement against the 1st respondent who was living in Tanzania. Following an application by the 1st respondent in the High Court at Tanzania **(Civil Application No. 516 of 2016),** the Court found that, in order for a foreign judgment to be enforced in Tanzania under **section 3(1)** of the **Reciprocal Enforcement of Foreign Judgments Act (Cap 8)** of the Laws of Tanzania as read with **Order 2** of the **Reciprocal Enforcement of Foreign Judgments (Extension of Part II) Order, G.N. No. 9 of 1936,** the country from which the said judgment is coming must be a country which is listed in the first column of the schedule of the **Order** as one of the countries which have one agreement of enforcing their judgments with Tanzania, and that Kenya did not have such an agreement with Tanzania. Secondly, that the judgment from the High Court of Kenya or its subordinate courts which their decrees can be executed in Tanzania under **section 2** of the **Judgment Extension Act (Cap 7, R.E 2002)** of the Laws of Tanzania are judgments which its decrees relate only to debts, damages or costs, and that the parental responsibility agreement order did not fall in that category. In short, the High Court of Tanzania set aside the *exparte* order that had registered the paternal responsibility order from Kenya. The decision was rendered on 22nd July 2017.

5. When the child moved to the United Kingdom with the petitioner he stayed with her. When he joined [particulars withheld] School he was a day scholar. From the proceedings in the **Family Court Cause No. YO14P00779 at York,** following a Child Arrangement Application dated 22nd January 2014 by the petitioner that the child lives with her, it is clear that, following Police and Children Services investigation into the child's disclosure that he was being physically and emotionally assaulted by the petitioner, the child became a boarder at [particulars withheld] School and spent holidays in the care of the 1st respondent, who travelled to the United Kingdom from Tanzania for this purpose. Upon inquiry, the petitioner accepted that the child continues to be habitually resident in the United Kingdom. The petitioner was then living in Kenya. The petitioner accepted in court that she had at least on one occasion hit the child and caused him physical harm. The child claimed that the petitioner had repeatedly hit him. By this time, owing to the complaint by the 1st respondent on behalf of the child, the petitioner had been charged with cruelty to the child. She was bailed. She jumped bail and there is a warrant of arrest against her issued on 2nd July 2015. The 1st respondent filed a Child Arrangement Application and in May 2017 commenced guardianship proceedings in the High Court Family Division London. The petitioner was represented by counsel. She had, among other things, challenged the jurisdiction of the United Kingdom court over the child.

6. In short, the Family Court declared on 11th May 2017 that it had jurisdiction to determine the 1st respondent's application over the child; that the child was habitually resident in England and Wales, and not habitually resident either in Kenya or Tanzania; that the parental responsibility agreement reached between the parents in Kenya on 15th August 2008 was no longer reflective of the child's legal or factual position; that the 1st respondent should have care and control of the child and the petitioner should have no direct contact with the child, both orders having been issued on 7th August 2015 by the Family Court in the United Kingdom; and that the petitioner was prohibited from removing the child from the care and control of the 1st respondent, or anyone to whom he delegates the care of the child, including any school which the child attends, or from the jurisdiction of England and Wales without prior written consent of the 1st respondent or order of the court in line with the order of 7th August 2015.

7. The orders of 7th August 2015 by the Family Court sitting at York were the ones confirmed by the Family Court in London on 11th May 2017. The details of the orders of 7th august 2015 were that –

(a) the child lives with the 1st respondent;

(b) the child shall not have direct contact with the petitioner unless it is agreed by the 1st respondent in writing or as ordered by the court;

(c) the 1st respondent is permitted to decide where the child shall be educated including in which country and at which school, the 1st respondent having indicated that the child shall remain at his present school;

(d) the petitioner's contact with the child shall be via phone or any form of social media and in accordance with the child's own wishes and feelings and the same shall be initiated by the child and not the petitioner;

(e) any letters, cards and gifts from the petitioner to the child shall be sent via the petitioner's sister EN to the child's paternal court NJ;

(f) the 1st respondent shall provide the petitioner with details of any school attended by the child and shall request the school to provide her with a written term report in respect of the child; and

(g) the child's passport shall be kept by the 1st respondent but may release it to the school.

8. It is not in dispute that the petitioner applied to stay the proceedings of 11th May 2017. The application was refused. The court emphasised that it retained the wardship of the child until he was 18, or until further orders; that the child was protected by the Court of England and Wales and that no important step in his life could be taken without permission being granted by the High Court of England and Wales.

9. This petition was filed on 11th April 2016 and amended on 14th January 2020. In the amended petition, the petitioner complained that the allegation made to the Family Court in the United Kingdom that she had assaulted the child, the subsequent proceedings over the child, the resultant orders giving the child's exclusive custody to the 1st respondent and declaration that the Family Court retained the wardship of the child until he was 18, were all due to the influence that the 1st respondent had over the court and the authorities in the United Kingdom. She claimed that the orders by the United Kingdom Court were malicious and in total disregard of the sovereignty of the Kenyan legal system over its nationals, and consequently it was just that this Court intervenes to remedy the situation and return the matter to the parental responsibility arrangement orders that had been given by the Children Court in Kenya following their divorce. The serious allegation that the 1st respondent had influenced the Family Court into giving him favourable orders were not substantiated at all.

10. The petitioner complained that she had been denied access to the child, that the 1st respondent had abandoned the child in the boarding school in the United Kingdom and returned to Tanzania and that the child had been denied access to all maternal family and the friends that he knew prior to the present circumstances. She stated that the 1st respondent had stopped all communication channels and that he only availed an update four times in a year by attaching the child's school academic report. She complained that the child's school was remotely situated in rural United Kingdom, and that the child was in the school, being subjected to racist acts with no person or close relative to rescue him.

11. The 1st respondent swore an affidavit to deny the amended petition and the allegations in the supporting affidavits by the petitioner. His case was that it was the petitioner who had taken the child to the United Kingdom in 2014 and, together with him, had enrolled the child at [particulars withheld] School as day scholar. The child had become a boarder following his (the child's) complaint that he had been assaulted by the petitioner. He stated that the petitioner had failed to disclose to the Court that she had instituted proceedings in the Family Court at York in the United Kingdom in which the Court had delivered a judgment on 7th August 2015 ordering that the child should not be removed from the control and care of the 1st respondent. He further stated that after the child had complained to him that he had been assaulted by the petitioner, he had contacted the National Society for Prevention of Cruelty to Children in the United Kingdom who had investigated the complaint and as a result formally charged the petitioner who had on 2nd July 2015 failed to appear in court to answer the charges and a warrant of arrest had been issued against her, information she had failed to disclose in her amended petition.

12. The 1st respondent's further case was that it was the child who had informed the Family court in the United Kingdom the he did not want any direct contact with the petitioner following persistent acts of cruelty to him by her. He stated that the child was happy in his school which had no racist history, and neither was the child being discriminated against. He stated that it was the Court in United Kingdom that had taken up wardship over the child and found that the parental responsibility agreement reached by the parties in Kenya was no longer

applicable given the prevailing circumstances over the child. It should be pointed out that the Family Court found, upon inquiry, that the child was in a school which he liked; a school that had no racist or discriminatory tendencies.

13. Lastly, the 1st respondent stated that the petitioner was a fugitive trying to avoid arrest in the United Kingdom, that there was no legitimate constitutional issue that the amended petition sought to deal with. Otherwise, he stated, the minor wished to remain in the United Kingdom, close to his friends and away from physical and emotional harm from the petitioner.

14. The 2nd respondent (the Cabinet Secretary, Ministry of Foreign Affairs and International Trade), the 3rd respondent (the Cabinet Secretary, Ministry of Interior and Coordination of the National Government), the 4th respondent (the Inspector General of Police Service) and the 5th respondent (the Attorney General) were, according to the petitioner, enjoined in the proceedings since they were the relevant state agencies and officers who would be tasked with the responsibility of intervening to ensure respect for and enforcement of the fundamental rights and freedoms of the petitioner and the child. They responded to the petition by filing grounds of opposition dated 25th February 2020. The grounds were that the petitioner had not demonstrated how the respondents had violated her constitutional rights; that the issues raised were purely between her and the 1st respondent concerning the custody of the child; and that the amended petition was frivolous, vexatious, incompetent and improperly before the court; and an abuse of the process of the court.

15. I will bear in mind the prayers in the amended petition which were:-

> **"1. A declaration that the child's rights to a compulsory basic education, basic nutrition, shelter and healthcare, to be protected from abuse and inhumane treatment, to parental care and protection as guaranteed by Article 53 of the Constitution have been violated by the 1st respondent;**
>
> **2. A declaration that the child's rights to social and economic rights including right to highest attainable standard of health and to education as guaranteed by Article 53 of the Constitution have been violated by the 1st respondent;**
>
> **3. A declaration that the child's and the petitioner's rights to have his inherent dignity protected, right to freedom and security of the person including not to be subjected to torture in any manner whether physical or psychological, not to be treated or punished in a cruel, inhumane and degrading manner as guaranteed by Article 28 and 29 of the Constitution have been violated by the 1st respondent;**
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> **4. A declaration that the child's and the petitioner's rights to be treated equally before the law, not to be discriminated on the ground of colour, race and gender as guaranteed by Article 27 of the Constitution have been violated by the 1st respondent;**
>
> **5. An order that following the numerous violations of the child's and petitioner's rights as above by the 1st respondent and the violation of the custody order granted by the High Court, the 1st respondent shall no longer have the legal custody or unlimited access to the child and both legal and actual custody of the child be granted to the petitioner;**
>
> **6. An order compelling the 1st respondent to deposit the maintenance amount in court monthly as the court may direct pursuant to the parental responsibility agreement;**
>
> **7. A declaration that the child is a Kenyan and is entitled to the protection and respect of his nationality;**
>
> **8. A declaration that the child is entitled to full enjoyment of all fundamental rights and freedoms available to all Kenyans and the same can only be limited to extent permissible by law as set out in Article 24 of the Constitution;**
>
> **9. A declaration that the 1st respondent has violated the child's right to nationality as provided under Article 53 of the Constitution;**
>
> **10. A declaration that the child is entitled to parental care and protection as provided under Article 53 of the Constitution;**
>
> **11. A declaration that the 1st respondent has violated the child's right to parental care and protection by denying the child access to his mother and thereby violating Article 53;**
>
> **12. A declaration that the 1st petitioner is entitled to the right of access to justice and that the right of access to justice entails the right to enjoy the fruits of a successful litigation and orders issued by the court.**
>
> **15. A declaration that the 1st respondent has violated the petitioner's Article 48 right of access to justice by failing to adhere to and honour the terms of court orders that have been issued by courts within the Republic of Kenya;**
>
> **14. An order that the minor is entitled to the rights granted under the Convention on the rights of the child including the right to a nationality, parental care and to have contact with both his parents;**
>
> **15. An order directing the State to initiate diplomatic interventions with the United Kingdom authorities to ensure that the child's rights are protected and the child is granted parental care and protection by the mother;**

16. An order directing the State to initiate diplomatic intervention with the United Kingdom authorities to ensure that the child is granted access to his mother, the petitioner;

17. An order for compensation of the petitioner and the child for violation of their fundamental rights by the 1st petitioner respondent;

18. An order directing the 2nd, 3rd 4th and 5th respondents to facilitate and ensure compliance with the above orders."

16. Basically, the petitioner complains that the 1st respondent has denied him the right to participate in the upbringing and wellbeing of the child; that the parties are still bound by the parental responsibility agreement filed in the Children Court and adopted by the High Court; that the 1st respondent caused the child to be admitted as a ward of the United Kingdom Court which infringed on the child's right to Kenyan's nationality and citizenship; that the petitioner has consequently been denied access to the child, and the child denied access to the petitioner and her family members and friends; that the child has been kept away from his native land and from the social customs and contacts that he was accustomed to; that the child has been kept in a remote school in the United Kingdom where he is being discriminated against and abused on account of race and without being accessed by the petitioner, all these being an affront to his dignity as a human being; and, lastly, that all these acts, and the fact that the petitioner has no knowledge of that is happening to the child, amount to the petitioner being indignified and dehumanised. In all, the petitioner has alleged that her, and the child's, constitutional rights and freedoms have been contravened. Also allegedly contravened are provisions of the **Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child** and the **Children Act No. 8 of 2001**. The relevant provisions of these instruments have been specified. By dint of the **Act** and **Article 2(6)** of the Constitution, the **Convention** and the **Charter** have become part of Kenyan law.

17. When the parties crafted the parental responsibility agreement which the court adopted they were basically relying on **sections 23, 24** and **26** of the **Children Act**. Under **section 23(1)** of the **Act** parental responsibility is defined as: -

> **"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."**

Section 23(2) provides as follows: -

"(2) The duties referred to in subsection (1) include in particular—

(a) the duty to maintain the child and in particular to provide him with—

(i) adequate diet;

(ii) shelter;

(iii) clothing;

(iv) medical care including immunisation; and

(v) education and guidance;

(b) the duty to protect the child from neglect, discrimination and abuse;

(c) the right to—

(i) give parental guidance in religious, moral, social, cultural and other values;

(ii) determine the name of the child;

(iii) appoint a guardian in respect of the child;

(iv) receive, recover, administer and otherwise deal with the property of the child for the benefit and in the best interests of the child;

(v) arrange or restrict the emigration of the child from Kenya;

(vi) upon the death of the child, to arrange for the burial or cremation of the child."

18. **Section 24(1)** and **(2)** of the **Act** provides that:

> **"(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 a 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."

19. Lastly**, section 26(2)** and **(3)** of the **Act** provides that:-

"(2) A parental responsibility agreement may only be brought to an end by an order of the court made on application by—

(a) any person who has parental responsibility for the child; or

(b) the child himself with the leave of the court.

3) The Court may only grant leave under subsection (2)(b) if it is satisfied that the child has sufficient understanding to make the proposed application."

20. It is important to mention that the **Act** was enacted to, among other things, give effect –

"to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child."

21. In **Part II** of the **Children Act**, the rights and welfare of the child have been safeguarded. The rights of the child include survival and best interests of the child **(section 4)**, right to non-discrimination **(section 50)**, right to parental care **(section 6)**, right to education **(section 7)**, right to religious education **(section 8)**, right to health care **(section 9)**, right to a name and nationality **(section 11)** and protection from abuse, physical or otherwise **(section 13). Article 53** of the Constitution has elevated these rights to constitutional rights to be enforced under it.

22. **Section 22** of the **Act** provides that if any person alleges that any of the provisions under **Part II** has been, is being or is likely to be contravened in relation to a child, he may apply to the High Court for redress on behalf of the child. I guess that, because the petitioner is not a child, over and above coming to this court on behalf of the child under **section 22**, she has on her own behalf come under the provisions of the Constitution because she alleges infringement of her rights and freedoms. But did she have a legitimate constitutional complaint?

23. This court has jurisdiction under **Article 165(3)(b)** of the Constitution to hear and

"determine the question whether a right or a fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened."

Article 22 of the Constitution deals with enforcement of the **Bill of Rights** in the following terms:-

"(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

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

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

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

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

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

24. Courtesy of the decision in **Anarita Karimi Njeru –v- The Republic [1976-1980] KLR 1272** (as reiterated in **Mumo Matemu –v- Trusted Society of Human Rights Alliance & 5 Others [2013]eKLR** and in other cases) a petitioner is required to be reasonably precise in the framing of issues in a constitutional petition like the present one. The petition is required to be specific as to the provisions of the constitution violated and the acts or omissions complained of. The 2013 Constitution of Kenya **(Protection of Rights and Procedure Rules),** specifically in **rule 10(2),** provide that a constitutional petition of this nature shall contain the facts relied upon, the constitutional provision violated, the nature of the injury and the relief sought. Such precise pleading enables the respondent to know the case he was to meet and to enable him to appropriately respond to it. It enables the parties to define the issues, and to diminish expense and delay.

25. The primary subject of this dispute is a child. The case involves the protracted dispute between the petitioner and the 1st respondent over the custody, upbringing and welfare of their child. Under **Article 53(2)** of the Constitution and **section 4(3)** of the **Act**, this court is commanded to treat the best interests of the child as the first paramount consideration. In **M.A –v- R.O.O. [2013]eKLR**, the High Court was dealing with the question of what the term **"best interest of the child"** means. It cited with approval the Supreme Court of England's decision in **Z.H. (Tanzania) (F.C.) –v- Secretary of State for the Home Department [2011]UKSC4** in which at paragraph 46 of the judgment, Lord Kerr held as follows:-

"It is a universal theme of the various international and domestic instruments to which Lady Hale has referred that, in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interest. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result."

26. The best interests of the child herein will be served where the court adopts a course of action that safeguards and promotes his rights and welfare. The court will ensure that he has shelter, food, clothing, education and medical care. His best interests will be served where he has parental guidance, and where such guidance is provided by, as much as it is possible, both parents. The child is entitled to be allowed a suitable, conducive and loving environment in which to grow and develop.

27. Lastly, under **section 4(4)** of the **Act**, this child is of such an age that he should be allowed to express his opinion on what he considers to be appropriate and suitable for him, and such an opinion should be taken into consideration in determining this case.

28. It is on the basis of the foregoing circumstances and provisions of the law that I shall determine this dispute.

29. The petitioner lives in the United States of America, the 1st respondent lives in Tanzania and the child schools in the United Kingdom. The child has unlimited access to the 1st respondent. The petitioner has no direct access to the child. In **S.A.J. –v- A.O.G. & Another [2019]eKLR** Justice W. Musyoka made reference to **Article 9(1**) of the **Convention on the Rights of the Child** which provides that:-

"Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence."

30. The petitioner and the respondent are divorced. They had agreed that legal custody of the child be joint, but that actual custody be with the petitioner with the 1st respondent having unlimited access with notice. It is while the petitioner had actual custody of the child that she decided to move to the United Kingdom to pursue further studies. She moved to the United Kingdom with the child. The 1st respondent provided consent. He also consented to the child being enrolled as a day scholar at Terrington Hall School in York. Trouble begun when the child complained that the petitioner had assaulted him. This is how he went to board in the school and begun to spend holidays with the 1st respondent. This set of circumstances were as a result of the petitioner's Arrangement Application in the Family Court at York that the child lives with her. Police and Children Services investigations into the child's condition disclosed that he was being physically and emotionally assaulted. When the Court inquired into the matter, the petitioner accepted that the child continues to be habitually resident in the United Kingdom. She was then living in Kenya. She accepted in Court that she had hit the child and caused him harm. The 1st respondent formally complained to the United Kingdom authorities on behalf of the child. The petitioner was charged with assaulting the child. She was bailed. She jumped bail. She is on a warrant of arrest. Subsequent proceedings at the instance of the 1st respondent in the Family Court in London led to the child finally being removed from the care and control of the petitioner, both of which were granted to the 1st respondent. The child was declared habitually resident of the United Kingdom with the Family Court having exclusive jurisdiction over him. The petition was denied direct control, and access was to be through two parties. She was to be in touch with the child only at his instance. It is material that the Family Court made these orders after hearing both parties, and after hearing the child. The child expressly refused to have anything to do with the petitioner. This was because of the physical and emotional assault he had suffered in her hands.

31. In summary, it was the petitioner who took the child to the United Kingdom. She is the one who first invoked the jurisdiction of the United Kingdom Court over the child. She joined in the 1st respondent's complaint of assault. She challenged jurisdiction and lost. She has been charged in the UK with assaulting the child and causing it actual harm. She is on a warrant of arrest after jumping bail. The Family Court has found true the complaint by the child that he was abused physically and emotionally by the petitioner. The finding has not been reviewed or set aside. The petitioner participated in the proceedings leading to the findings. She did not appeal.

32. The petitioner seeks to rely on the parental responsibility agreement. The agreement was the subject of the proceedings in the Family Court. The Court found that the agreement was no longer reflective of the child's legal or factual position. The argument by the petitioner is that this is a Kenyan child over whom this court has jurisdiction, notwithstanding the proceedings or findings or orders of the Family Court in London. However, unlike the cases in **R. –V- S.R.M. Mombasa *exparte* H.L. & Another [2016]eKLR** and **A.O.G. –v- S.A.J. & Another**, the child herein is not in Kenya. He is in the United Kingdom where he is studying. The parties herein subjected themselves to the jurisdiction of the Court and obtained orders which, I find, they are obliged to obey.

33. More important, and in line with **Article 9(1)** of the **Convention on Rights of the Child**, the child has been separated from the petitioner because she physically and emotionally abused him. When she assaulted the child she lost her right to actual custody as was provided in the parental responsibility agreement signed in the Children Court in Nairobi.

34. I reiterate that the child was heard by the Family Court in London. He was categorical that he had been physically and emotionally abused by the petitioner, and did not want any contact with her. I find that, in the particular circumstances of this case, the best interests of the child will be best served by the parties obeying the orders that were granted by the Family Court in London in the United Kingdom on 11th May 2017. These orders, I find, were in line with the protection afforded to a Kenyan child under the Constitution, the **Children Act** and the international instruments that Kenya is a party to.

35. The question I have been asking myself is whether the amended petition raised any constitutional questions. In **Harrikissoon –v- Attorney General of Trinidad & Tobago [1980]A.C 265**, the Privy Council stated as follows:-

> **"The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of the administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the Court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the Court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."**

This legal preposition was endorsed by the Court of Appeal in **Gabriel Mutava & 2 Others –v- Managing Director, Kenya Ports Authority & Another [2016]eKLR**. I am not satisfied that the amended petition was precisely framed to disclose the facts relied on, and the injury suffered, to support the constitutional provisions alleged by the petitioner as having been violated and infringed.

36. Wasn't this a child custody dispute between the petitioner and the 1st respondent that could have been resolved under the provisions of the **Children Act**?

37. I find that the petitioner, while aware that she had physically and emotionally abused her child who had consequently persuaded the Family Court in the United Kingdom to find that she was not a fit parent to participate in the upbringing of the child, and while aware that she had run away from the Court in the United Kingdom where she had been charged with assaulting the child, brought this amended petition to avoid accounting for these acts against the child. I find that, the 1st respondent has not infringed or violated any of the fundamental rights and freedoms pleaded, either against her or against the child. Neither has it been shown that any of such rights and freedoms are likely to be infringed or violated against her or against the child.

38. The result is that the amended petition filed on 14th January 2020 is dismissed for want of merits.

39. Given the nature of the dispute, including the fact that the petitioner and the 1st respondent are parents to the child, I order that each party shall bear own costs.

DATED and DELIVERED at NAIROBI this 27TH JULY 2020

A.O. MUCHELULE

JUDGE