**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CIVIL APPEAL NO. 36 OF 2019**

**Coram: HON. R.E.ABURILI J**

**JA.....APPELLANT**

**VERSUS**

**AA.....RESPONDENT**

***(Appeal from the Ruling and order of the Senior Resident Magistrate at Siaya in Siaya PM***

***Children's Court Case No. 4 of 2017 delivered by Hon T.M. Olando delivered on 24th July 2019)***

**JUDGMENT**

1. This appeal is in respect of Children's matter. Vide a Plaint dated 27/4/2017, the Appellant herein **JA** sued the Respondent **AA** claiming for legal and actual custody of two minors **FO** and **LA** and reasonable maintenance of contribution from the Respondent towards the maintenance of the two minor children.

2. The appellant who was the Plaintiff claimed that the Respondent/Defendant was cruel to him and the two minors. He also claimed that albeit he was not the biological father to F.O the Minor, he provided full parental responsibility to the child **FO.**

3. The Respondent filed defence dated 8/2/2018 denying all particulars of cruelty levelled against her towards her two minor children. She however conceded that the Appellant provided Parental Responsibility to FO a minor.

4. On the allegation that she withdrew (FO) from a well performing school to a poor school, the Respondent claimed that she had lost her job hence she could not afford the school and that the minor could not cope with life in the school after one year.

5. What clearly emerges from the pleadings is that the 2 parties never solemnized their union. Further it is clear that the appellant had another family of wife and children whereas the Respondent was a single parent when she met the appellant in 2008.

6. When the Appellant and Respondent disagreed, their love towards one another went sour and that is when the appellant filed suit seeking for custody of the two minor children and reasonable maintenance for them from the Respondent. This was in 2017.

7. According to the Respondent, their relationship with the appellant broke up when the appellant could not marry her as he was legally married to IA who used to abuse her.

8. In his judgment dated **7th March 2018** after hearing the Main suit, Hon. T.M. Olando granted joint custody of the two minors to the appellant and the Respondent. He further ordered that the Defendant/Respondent herein would have the actual physical custody of both the children and the Plaintiff/ appellant herein would have unlimited visitation rights during school days so long as it did not interfere with the children's education.

9. Regarding the 2nd minor, LA, the trial court ordered that the Plaintiff/Appellant herein would be responsible for the payment of the school fees and all other educational needs. For FO, the Respondent was ordered to be responsible for the school fees – but the Appellant would be free to assist.

10. On the issue of school, parties were to agree on the school and in the event of disagreement, the children were to remain on their current (then) school.

11. The orders above did not stop either parent from doing anything for the children or assisting each other for the benefit and in the best interest of the two children.

12. After the judgment of **7.3.2018,** on **2.5.2018,** the Appellant filed an application or contempt of court against the Respondent claiming that she had denied him visitation rights of the children contrary to the judgment and orders of 7.3.2018.

13. Later, vide an application dated **10/5/2019** and subject of the appeal herein and vide a ruling delivered on **24/7/2019,** the Respondent had sought for variation of the judgment delivered on **7/3/2018** which granted joint custody of the children (minors) **FO** and sought sole custody of the said child. She also sought for variation for orders of maintenance of **LA** by ensuring that the Appellant contributes to daily maintenance of the minor whilst she was in actual custody of the Respondent.

14. The Respondent also sought orders that the Appellant pays forthwith arrears of maintenance as ordered being Kshs. 145,000/=. The Respondent further sought for variation of orders for access and visitation of **LA** to exclude residing with the Appellant for two weeks during school holidays but instead, the appellant to access the minor LA. limited to daily (day) exercise during the school holidays and from 10.00 am to 2 pm within Siaya town organized through the Children's Officer at Siaya.

15. In the impugned Ruling, the trial magistrate found that the Appellant had not demonstrated that he was willing to support or provide for the minor children hence, the order reviewing the judgment of 7/3/2018 granting joint custody of FO to both parties being revoked and substituting it with an order granting custody to the mother who 'had been taking full responsibility of the child. The Respondent was also free to introduce the child FO to his biological father and seek for financial assistance from the biological father.

16. Concerning child **LA,** the trial court ordered the Appellant to refund to the respondent Kshs. 145,000/= which the Respondent had allegedly proved to have spent on the Education of the child since **7/3/2018**.

17. The court also ordered that **LA** be maintained by both parents, and he ordered the appellant to, besides providing for school fees and education needs, to be paying Kshs. 20,000/= to the Respondent as monthly maintenance for the minor LA from 1.8.2019 and on the 1st day of subsequent month until the minor attains the age of majority.

18. The trial court also suspended custodial visitation rights granted to the Appellant to **LA** until the child is interviewed and her opinion is recorded on request. The Appellant was however granted visitation rights to the minor during school holiday during the day between 10 am and 4 pm within Siaya to be arranged by the Children's, Siaya. The visitation orders to last until LA is interviewed and her opinion obtained as she was of tender years.

19. That is the Ruling that prompted this appeal vide Memorandum of Appeal dated **15/8/2019.** The Memorandum of appeal sets out the following 9 grounds of Appeal:

> ***(1) That the learned Magistrate erred in law and in fact in reaching his decision on the respondent's application for review of a judgment without analyzing the entire evidence on record and abiding to the requirements for a successful application to review a judgment.***
>
> ***(2) That the learned Magistrate erred in law and in fact in holding that the respondent was entitled to a review of the judgment without sufficient new matter being placed before the Honourable court to justify such an order.***
>
> ***(3) That the learned Magistrate erred in law in supplanting the judgment of March 7, 2018 with another on July 24, 2019 without setting aside the earlier judgment, which amounts to a misdirection and miscarriage of justice as there are now two judgments on record in the same matter.***
>
> ***(4) That the learned Magistrate erred in law and in fact in not holding that the respondent was engaged in an abuse of the court process by flagrantly disobeying the decree of March 7, 2018 and instead believed unsubstantiated matter from the respondent in support of a review of judgment.***
>
> ***(5) That the learned magistrate misdirected herself in law and in failing to consider and make a finding on the issue of Appellant's parental responsibility, contradicting himself with regard to the issue of upkeep of a minor and refund of undocumented expenses without recourse to the grounds for a review.***
>
> ***(6) That the learned magistrate erred in his analysis of the evidence in holding that the appellant was to make payment of refunds, maintenance and have limited controlled access to one minor, and no access to another minor and in the same judgment reiterate the shared parental responsibility.***
>
> ***(7) That the learned magistrate erred in making a determination on a question that was not raised by the Respondent in her pleadings.***
>
> ***(8) That the learned Magistrate erred in law and in fact in relying on untested and unprocedural interviews of the minors subject of the suit in the absence of the appellant and also disregarded the appellant's need to be present during any court process to ensure transparency.***
>
> ***(9) That the learned magistrate proceeded on demonstrably wrong principles in reaching his decision.***

20. The appeal was admitted to hearing on 26/2/2020 but because of covid-19 outbreak, directions could not be taken as it was not until

6/10/2020 that a record of appeal was filed and directions given on 7/10/2020.

21. The appeal was canvassed by way of written submissions. The appellant's counsel filed submissions on 21/10/2020. The appellant's counsel submitted that the trial court in reviewing the judgment of 7.3.2018, 17 months later on 24/7/2019, imposed a view unsupported by pleadings, yet the Respondent was in contempt of the decree issued pursuant to the judgment and orders of 7.3.2018.

22. In his view, there were clearly no new evidence or material to justify review of the judgment of 7.3.2018, 17 months later. It was submitted relying on **Kamau James Gitutho & 3 Others Vs Multiple 1ed (K) Ltd & Another [2019] eKLR** that a court cannot be seen to be reviewing or varying a judgment yet that review is an appeal to the same court, in disguise.

23. In his view, the trial court was already *functus officio* hence the appeal must be allowed and the judgment of 7.3.2018 restored. Reliance was placed on **Ushago Diani Investments Ltd V Jalseen Manan Abdulwahab [2019] eKLR** where it was held that delivery of a judgment was an end to the matter under trial.

24. On whether the Respondent departed from her pleadings filed, it was submitted that the Respondent's pleadings giving rise to the judgment of 7.3.2018 were specific and that the trial court made an award at pages 224, 225-226 of the Record of Appeal that was neither pleaded nor proved during the trial.

25. The Appellant urged this court to allow this appeal with costs.

26. On 21/10/2020 Mr. Qeu, counsel for the Respondent promised to file his submissions expeditiously and was granted 7 days to do so, with parties agreeing that a judgment date be given.

27. In the written submissions dated 29th October, 2020, the Respondent's counsel framed 2 issues for determination.

> ***(1) Whether the Children's court had power to review its orders in the best interest of the children.***
>
> ***(2) Whether the applicant proved her case on a balance of probability to warrant the review orders as granted by the Children's court.***

28. Counsel cited Article 53(2) of the Constitution on the child's best interest being of paramount important in every matter concerning the child. He also cited Section 4(2) and 3(b) of the Children's Act.

29. It was submitted that as circumstances of the parents, and that of the children change as they grow and attain the age of majority, the stringent rules for review of orders and judgment do not strictly bind the Children's court and that Section 98 & 99 of the Children's Act give the Children's court lawful and wide discretion to make and vary orders in the best interest of the child. Reliance was placed **on MKN Vs JC & Children court at Kericho [2019] eKLR** where the court underscored the argument above that the Children's court had jurisdiction to review judgment.

30. On parental responsibility, it was submitted that the Minor's daily needs must be met and that the Respondent had in her application, demonstrated that LA had more than just educational needs hence the award by the trial court was reasonable.

31. On custody, reliance was placed on **Githunguri Vs Githunguri [1979]eKLR & J.O Vs SAO [2016] eKLR** and a submission made that children of tender years should be placed in custody of their mother except in exceptional circumstances. It was submitted that FO was not a biological child of the Appellant and neither was he and adoptive parent of the child hence his custody can only be placed into the Respondent and that FO should be given the opportunity to get financial support from his biological father.

32. Further that joint custody of FO would hamper his bonding with his paternal relatives concerning LA, it was submitted that the court having interviewed the minor, had to limit access and visitation owing to the conditions under which the Minor lived for 2 weeks when she visited the Appellant and that the Appellant did not refute allegations that he was not capable of taking care of the minors in his custody and house them in his normal place of residence in case of any eventuality.

33. It was submitted that custody orders can be reviewed if circumstances change and that the order impugned was made in the best interest of the child to ensure her safety.

34. The Respondent urged this court to dismiss this appeal with costs.

**DETERMINATION**

35. I have considered the grounds of appeal, the evidence and all material before the trial court and the rival written submissions filed by the parties' respective counsel on record.

36. In my humble view, the main issues for determination in this appeal are:

> ***(1) Whether the trial court had jurisdiction to review or make orders varying its judgment of 7.3.2018.***
>
> ***(2) Whether the Respondent placed before the court sufficient material to warrant review/variation of the judgment/orders of 7.3.2018.***

***(3) What orders should this court make?***

***(4) Who should bear costs of this appeal?***

***(1) On whether the trial (Children's) Court had jurisdiction to review its judgment/orders made on 7.3.2018, the appellant was emphatic that the court was functus officio, having pronounced itself on 7.3.2018 hence it could not vary its own orders 17 months later.***

37. The Respondent contends that a Children's court can vary/review its orders/judgment as situations of children and parents change, as they grow.

38. According to the appellant, the application to vary the judgment, even in a children matter, under Order 51 was made very late in the day, 17 months after the judgment and not procedurally. In his view, Order 51 of the Civil Procedure Rules is merely a procedure for making of applications, yet the application for Review is governed by Order 45 of the Civil Procedure Rules and that under the said provisions, the applicant must establish or satisfy the 4 conditions for review namely, Discovery of a new and important matter, that material could not be availed at the time of the trial; that there was mistake or error and other sufficient cause.

39. As correctly stated by the Appellant's counsel, Order 51 of the Civil Procedure Rules is merely the mode of filing applications in matters governed by the Civil Procedure Act and Rules. In the same vein, Section 80 of the Civil Procedure Act as supplemented by the Procedural Order 45 of the Civil Procedure Rules govern Review of orders or judgment as the case may be.

40. In addition, a review should not be intended to sit on appeal against the court's own judgment as that is beyond the court's mandate.

41. However, it is important to note that the matter before the trial court and before this court is a Children's matter and therefore the question that I must pose is whether the trial court should have followed the procedure for Review in Civil matters or should have applied the principles for variation of court orders in Children's matters.

42. I must however point out that bringing an application under the wrong provisions of the law or failure to cite relevant provisions under which an application is predicated is not fatal to an application as it is a mere procedural technicality which does not go to the root of the matter and is conveniently curable under Article 15(a)(2) of the Constitution which abhors procedural technicalities at the behest of substantive justice.

43. Accordingly, the mere fact that the application whose ruling is impugned was brought under Order 51 of the Civil Procedure Rules and not Section 80 of the Civil Procedure Act and Order 45 of Civil Procedure Rules is not fatal.

44. I now proceed to determine whether the trial court had jurisdiction to review/vary the judgment/orders of 7/3/2018 and if so, under what provisions of the law or whether the trial court was bound by the procedural requirements of Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.

45. Children's matters are special matters governed by Article 53 of the Constitution and the Children's Act, 2001. Section 99 of the Children's Act provides for power to impose conditions and to vary orders. It stipulates:

***"The court shall have power to impose such conditions as it thinks fit to an order made under this section and shall have power to vary, modify or discharge any order made under Section 98 with respect to the making of any financial provision, by altering the times of payments or by increasing or diminishing the amount payable or may temporarily suspend the order as the whole or any part of the money paid and subsequently review it wholly or in part as the court thinks fit."***

46. In **MKN V. JC & Children Court Kericho [2019] eKLR,** the Court persuasively and rightly held:

***"More importantly, however, the application for review can only be made in the court which determined the matter, not in another court. This matter having been determined by the Children's court, the application for review of judgment, if any can only be made in that court….. The parental responsibility is equal between the two parents. The parent responsibly does not cease because of separation or divorce. However, circumstances and means of parents change, and the best course of action is either for the two parents to agree or go to the Children's court and report any charged circumstances for decisions. E ach of the parents has to be reasonable because one cannot pay or bear that he or she has no ability to."***

47. From the above decision, it is clear that the Children's court which rendered its decision on 7/3/2018 had the necessary power and jurisdiction to review or vary the orders of 7/3/2018.

48. In addition, section 98 of the Children's Act provides:

**"Other maintenance provisions**

***A court shall have power to make an order and to give directions regarding any aspect of the maintenance of a child, including but not limited to, matters relating to the provision of education, medical care, housing and clothing for the child; and in this behalf may make an order for financial provisions for the child.***

49. From the above provisions, no doubt, the trial court had the power and jurisdiction to vary or make further orders in the proceedings notwithstanding the judgment of 7.3.2018 which had not been appealed against.

50. The question to be answered in issue No. 2 is whether the Respondent satisfied the trial court that she was entitled to a review of the judgment of 7/3/2018 and if so, on what terms.

51. It must be noted that the suit and orders impugned involved children who are governed by special legislation. Section 4(2)(3) and (4) of the Children's Act stipulates:

> ***"(2) In all actions concerning children, whether undertaken by public or private social welfare institution, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.***
>
> ***(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to:***
>
> ***(a) safeguard and promote the rights and welfare of the child;***
>
> ***(b) conserve the welfare of the child;***
>
> ***(c) secure for the child such guidance and correction as necessary for the welfare of the child and in the public interest;***
>
> ***(4) In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity."***

52. Further, Article 53(2) of the Constitution requires that in all matters concerning children, the best interest of the child shall be of paramount importance. It states:

> ***"53(2) a child's best interests are of paramount important in every matter concerning the child."***

53. In **MAA Vs ABS [2018]eKLR**, the Court observed:

> ***"What is stated in Section 4(3)(b) of the Act is the Paramouncy principle which is vital in all matters concerning children and must be given prominence. While considering this matter; this court was alert to the welfare of the child herein who is of tender years. The matter is not about the appellant and the Respondent and their interests are secondary to those of the child.***
>
> ***The foregoing provisions require this court to treat the interests of the child as the first paramount consideration and must do everything to inter alia safeguard, conserve and promote the rights and welfare of the child herein."***

54. From the pleadings and evidence adduced before the trial court, the Respondent sought for actual and legal custody of the two minors, FO and LA together with reasonable maintenance from the Respondent. He also sought for surrender of the minors to him and asked the court to order the Respondent to give reasonable contribution to the upkeep of the minors.

55. The Respondent did not file any counterclaim. While at that, it was apparent and obvious that the appellant and Respondent were not married under any system of law albeit both had rightly assumed parental responsibility over the two minors. Thirdly, the minor FO was not the biological child to the Appellant and neither did the appellant adopt him as his adoptive son.

56. Forth, the 2nd Minor LA who was the biological daughter to the Appellant and Respondent, was of tender years.

57. Fifth, besides the visitation and access rights, which the appellant complained that the Respondent had breached orders of 7/3/2018, the appellant did not demonstrate that he was providing for any maintenance of the said children in any form after 7.3.2018. It follows, in my humble view, that the Respondent was entitled to apply for variation of orders of 7.3.2018, where circumstances had changed, with evidence being placed before the trial court.

58. In his testimony before the trial court on 14/2/2018, the appellant categorically stated that F.O & LA were then living with the Respondent in Siaya and that he had not accessed them since 2016 except twice. LA was then 7 years.

59. The Respondent in her application for review wanted the appellant excluded from the child FO as there was no blood relation between them but she was not against LA meeting the father. FO was then in class 8. He is now 16 years.

60. After the hearing of the Application for variation of the orders of 7.3.2018, the trial court interviewed LA who was in Class 4, on 30.7.2019 and she stated that she did not want to go back to Kakamega where the Appellant lives because they were not given food when they last visited, that there were no other children to play with and that there was nobody to help her with showering or dress or cook for them as she did not know how to cook or dress up. The trial magistrate vide his ruling on 31/7/2019 ordered that the appellant would visit the child at Siaya.

61. Concerning the child FO, the trial court was not shown any evidence of maintenance or intention to provide any support to the child by the appellant yet the court had granted the Appellant parental rights and responsibilities for FO.

62. Accordingly, I am persuaded that the trial magistrate was entitled to vary orders of joint parental responsibility of the child FO as it was not in the best interest of the child for the appellant to merely enjoy the presence of the child who was not his biological or adopted child without feeling obliged to maintain him in any way, taking into account the fact that the child had his biological father.

63. The appellant did not prove any support accorded to the child FO since 7.3.2018 and therefore he cannot claim that the Application for variation of orders of 7.3.2018 was filed late. In my humble view, it is the court that made the orders of 7.3.2018 that had jurisdiction to vary those orders notwithstanding the passage of time as the Appellant was not complying with the said orders which affected the welfare and best interests of the child. Neither did he prove compliance on his part even as he was claiming in the trial court that the Respondent had breached the orders of 7.3.2018.

64. I find no fault in the Orders of the trial magistrate varying his orders of 7.3.2018 on parental responsibility and custody of the child FO who was not the appellant's biological child.

65. Concerning the child L.A, the trial court had on 7.3.2018 ordered the appellant to take care of her educational needs, besides joint custody and visitation/access rights.

66. As at 24/7/2019, the appellant did not demonstrate that he had made any provision for the educational needs of LA. The Respondent annexed **AAS3** a schedule of educational expenses for LA for 2018 and 2019 1st and 2nd term. However, the document showing arrears of Kshs. 145,000/= which the trial magistrate awarded to the Respondent in the impugned ruling was in my humble view, not an authentic document of evidence of educational needs of the child LA as allegedly expended by the Respondent.

67. This is not to say that the child's education expenses had not been met by the Respondent mother, but he who alleges must prove with credible evidence.

68. There was no credible evidence that the Respondent had incurred the sum of Kshs. 145,000/= as the child's educational expenses for 4 terms in a public school, bearing in mind the fact that the Respondent had not quantified these expenses in her defence in the main suit and neither had she claimed for the stated expenses, for her to claim arrears amounting to Kshs. 145,000/=. For that reason, I find the order for refund of Kshs, 145,000/= unsupported by any credible evidence. I set it aside.

69. On the order for Kshs. 20,000/= payable to the Respondent for maintenance of LA with effect from 1st August 2019 and on the 1st day of subsequent months until the minor attains the age of majority, I observe that the Respondent did not seek for this order whether in the defence to the main suit or in the application dated 10/5/2019 subject of the impugned Ruling. However, section 99 of the Children's Act is clear that a court can make such an order. The only question is whether the court can make such an order arbitrarily without inquiring into the income of the Appellant. In my humble view, before making such an order, the trial court should have inquired into the capacity of the Appellant and on his earnings for him to pay such an amount which had not been specifically pleaded anywhere. In my humble view, that order was arbitrary and an ambush to the appellant who was condemned unheard to pay Kshs. 20,000/= which was never specifically sought by the Respondent.

70. This court is aware of section 91 of the Children's Act which provides:

> **"91. Power to make maintenance order**
>
> ***Any parent, guardian or custodian, of the child, may apply to the court to determine any matter relating to the maintenance of the child and to make an order that a specified person make such periodical or lump sum payment for the maintenance of a child, in this Act referred to as a "maintenance order," as the court may see fit:***
>
> ***Provided that—***
>
> ***(a) on the making, varying, or discharging of a residence, guardianship or custody order, the court may make a maintenance order for a child even though no application has been made by any person;***
>
> ***(b) …….***

71. However, the above provision must be read together with sections 93 of the Act on Financial Provisions and section 94 which provides:

> ***93. Financial provisions***
>
> ***The court may order the person against whom a maintenance order is made to make a financial provision for the child by—***
>
> ***(i) periodical payments; or***
>
> ***(ii) such lump sum payment as the court shall deem fit, to the person in whose favour the order is made or to any other person appointed by the Court.***

***94. Financial provisions by step-parents and father of child born out of wedlock***

> ***(1) The Court may order financial provision to be made by a parent for a child including a child of the other parent who has been accepted as a child of the family and in deciding to make such an order the court shall have regard to the circumstances of the case and without prejudice to the generality of the foregoing, shall be guided by the following considerations—***
>
> ***(a) The income or earning capacity, property and other financial***
>
> ***resources which the parties or any other person in whose favour the***
>
> ***court proposes to make an order, have or are likely to have in the***
>
> ***foreseeable future;***
>
> ***(b) the financial needs, obligations, or responsibilities which each party***
>
> ***has or is likely to have in the foreseeable future;***
>
> ***(c) the financial needs of the child and the child's current circumstances;***
>
> ***(d) the income or earning capacity, if any, property and other financial resources of the child;***
>
> ***(e) any physical or mental disabilities, illness or medical condition of the child;***
>
> ***(f) the manner in which the child is being or was expected to be educated or trained;***
>
> ***(g) the circumstances of any of the child's siblings;***
>
> ***(h) the customs, practices and religion of the parties and the child;***
>
> ***(i) whether the respondent has assumed responsibility for the maintenance of the child and if so, the extent to which and the basis on which he has assumed that responsibility and the length of the period during which he has met that responsibility;***
>
> ***(j) whether the respondent assumed responsibility for the maintenance of the child knowing the child was not his child, or knowing that he was not legally married to the mother of the child;***
>
> ***(k) the liability of any other person to maintain the child;***
>
> ***(l) the liability of that person to maintain other children.*** (emphasis added).

Revisiting the orders of maintenance of LA, and the order for daily maintenance of other needs other than educational needs of the child, the trial court acknowledged that no such orders were sought in the defence but cited Article 53(1)(e) of the Constitution on Parental Care and responsibility of a child. Whereas the duty of parenting is a joint responsibility for both parents, the appellant was entitled to be heard on the amount to contribute for the daily maintenance of the child before the court makes a decision on the actual sum to be contributed as the Respondent did not even quantify the amount. The court did not assess ***) the financial needs, obligations, or responsibilities which each party has or is likely to have in the foreseeable future*** as required under section 94 of the Act.

72. For that reason, I set aside the order setting daily maintenance payable by the Appellant to the Respondent for the maintenance of the child LA at Kshs. 20,000 until further evidence is taken from the parties.

73. On suspension of custodial visitation rights earlier granted to the appellant to LA, albeit the Appellant claims that the court erred in interviewing the child in the absence of the appellant, there was no evidence that the child was couched and there is no legal requirement that the child must be interviewed only in the presence of the Appellant. The Children's court reserves the right to interview the child in proceedings such as these to establish what would be in the best interest of the child and to get her opinion without expecting the child to be cross examined on the same. Section 4 (4) of the Act is clear on what the court can do. It provides that :

> ***"In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity."***

74. No doubt, as at the material time, the child LA was a child of tender years and physical custody of such a child should as established in law, be with the mother unless the mother is shown to be an unfit persons. In **B Vs M. (2008) 1 KLR 531,** the court held:

> ***"Section 83(1) of the Children's Act provides matters which the court shall have regard to in determining whether or not a custody order should be made in favour of the applicant. I have considered the same and I have called for and received a report***

***from the District Children's Officer Mombasa which ends by stating as follows:***

***"Your Lordship, the children do not seem to lack any basic needs other than the love of both parents as they both live with one parent each."***

***DW is living with the mother at their maternal grandparents' home. Each of them is comfortable according to the report. I did not feel in such a situation where all things seem to be equal, the age of the children is the deciding factor. The children are still within the ages that dictate that they live with their mother unless the mother is found to be hopelessly unable to take care of them and give them the moral upbringing required."***

75. In **DK Vs JKN [2011]eKLR**, it was held:

> ***"The general rule is that, where the custody of a child of tender years as defined by Section 2 of the Children's Act is in issue, the mother of the child should have the custody unless special circumstances are established to disqualify the mother from having the custody of such a child. The child that is the subject of those proceedings is a child of young and tender age. She is a girl of 9 years of age."***

76. In **Midiwa Vs Midiwa [2002] 2 EA 453 p.455** the court of Appeal stated:

> ***"It is trite law that, prima facie, others things being equal, children of tender age should be with their mother, and where a court gives the custody of a child a child of tender age to the father is incumbent on it to make sure that there really are sufficient reasons to exclude the prima facie rule. See Re S (an infant) [1985] 1 ALL ER 783 at 786 and 787 and Karanu Vs Karanu [1957] EA 18. The learned Judge, in our view, did not correctly direct herself on the principle that in cases of custody of the children the paramount consideration is their welfare. Moreover, as the record shows, there were exceptional circumstances shown to justify depriving the mother of her natural right to have her children with her."***

77. In the instant case, albeit the Appellant initially sought in his suit for surrender of both children to him, the trial court ordered for joint custody of the 2 children FO & LA and made an order that the Respondent have physical custody of the children while the appellant would have unlimited visitation rights during school days so long as it did not interfere with their education.

78. In the variation/review order, the trial court suspended custodial visitation rights granted to the Appellant on LA until LA is interviewed and her opinion is recorded.

79. The appellant was however granted visitation to the minor LA during school holidays during the day between 10 am and 4 pm within Siaya to be arranged by the Children's Officer, Siaya.

80. In my humble view, the review Order by the trial court was in the best interest of the child and did not prejudice the appellant in any way as he was free to request for variation thereof, after the child is re-interviewed and her opinion recorded. The Order was informed by the report by the child LA that there was nobody to cook for her, and no children to play with or any person available to assist her in dressing up and or showering. To that extend, the trial court cannot be faulted for reviewing its order on custodial visitations which was subject to further review, depending on the circumstances after the child is interviewed and her opinion obtained.

81. For the reasons above stated, this appeal only succeeds to the extent that:

> ***(1) The orders for refund of Kshs. 145,000/= being educational expenses allegedly expended on the minor LA is hereby set aside for want of proof.***
>
> ***(2) The order for daily maintenance of LA to the tune of Kshs. 20,000/= monthly is hereby set aside until further evidence is taken in accordance with section 94 of the Children's Act..***
>
> ***(3) All other grounds of appeal are found to be devoid of merit and are dismissed.***
>
> ***(4) The parties to appear before the trial court to be heard on quantum of daily maintenance and educational needs of the child LA by the Appellant.***
>
> ***(5) Each party to bear their own costs of this appeal.***

82. Orders accordingly and this file is hereby closed.

**Dated, signed and delivered in open court and virtually at Siaya this 25th Day of November 2020**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Mr. Siganga Counsel for the Appellant

Mr. QEU Counsel for the Respondent

The Appellant Joshua Ashioya

The Respondent Angela Sewe

CA: Brenda and Modestar