FKN v LKU (Sued as the mother and next friend of EN - Minor) (Civil Appeal E245 of 2023) [2024] KEHC 8412 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8412 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E245 OF 2023

FROO OLEL, J

JULY 11, 2024

BETWEEN

FKN ..... APPELLANT

AND

LKU (SUED AS THE MOTHER AND NEXT FRIEND OF EN - MINOR) ..... RESPONDENT

(Being an appeal from the judgement of Hon R.W.Gitau (SRM.) in Mavoko Chief Magistrates Court Children Case No. E028 of 2022)

JUDGMENT

A. Introduction

1. This Appeal arises from the Judgement/decree of Honorable G.W Gitau (SRM) delivered in Mavoko CMCC Children's Case No E028 of 2022, where she granted both parties joint custody of the Minor herein, but physical custody was to remain with the respondent. visitation rights during the weekends and school holidays were specified and further the trial court directed that the respondent would cater for shelter and utilities, food and clothing, while the Appellant herein would cater for school fees and related expenses, entertainment as well as pay the domestic worker.

B. The pleadings

2. The respondent filed the primary suit where she averred that she had co habited with the Appellant herein as husband and wife and they had been blessed with one child E.N.K born on 23rd September 2019. They later got estranged as from 23rd December 2021, due to the fact that the Appellant had started abusing Alcohol and also became physically/emotionally abusive towards her. In September 2022, the Appellant requested to see the minor and hold his third birthday, which request she acceded to, only for the Appellant to turn his back and refused to return the minor to her custody. She reported

this incident at Athi River police station and followed up by filing this suit, where she requested to be granted physical/actual custody of the minor and for the Appellant to be compelled to contribute to the child's upkeep.

3. The Appellant filed his statement of defence and counter claim, categorically denying all the allegations made as against him and averred that the respondent had deliberately distorted the truth to favor her side of the story. Their marriage had broken down due to immense psychological torture and cruelty melted out on him by the respondent, who had also further desecrated their marriage by engaging in Adulterous relationships. The respondent had further re-introduced him to drinking (alcoholism), but he had since stopped and had been sober for 15 months. He confirmed that in September 2022 he had taken the child, but it had been agreed that from hence forth the child would stay with him and start school under his custody as the respondent had no time to attend to the minors needs and had no fixed abode.

4. The Appellant further averred that the minor was happy under his custody and he was ready to meet all of the minors expense's including school fees and medical expenses as need arose. The Appellant reiterated these facts in the counter claim and sought for orders that he be given custody of the minor, the respondent be barred from removing the minor from his custody and/or interfering with his schooling.

5. Pending trial, the parties reluctantly and after numerous discussions, consented to both of them having joint legal custody of the minor, who would have physical custody during the week, terms of access over the weekend and shared custody of the minor during holidays. The matter proceeded for trial and upon considering all the evidence adduced, the learned trial Magistrate in her judgement delivered on 19th September 2023 decreed that;

    a. Both parties, were granted, joint legal custody of the minor.

    b. The respondent was granted actual physical custody of the minor.

    c. The Appellant, would have access to the minor every alternate weekend starting from Friday 5pm and ending on Sunday 5pm, half the school holidays and alternating special days like Christmas and New Year. (Pick up and drop off point would remain at signature Mall along Mombasa Road.)

    d. The respondent would cater for shelter and utilities, food and clothing for the minor.

    e. While the Appellant too was to cater for school fees and related expenses, entertainment as well as domestic servant.

    f. This being a family matter, each party was to bear their own costs.

6. The Appellant wholly being dissatisfied by the said Judgment/decree issued, opted to file this Appeal and raised several grounds of appeal namely: -

    a. That the learned trial Magistrate erred in law and in fact in failing to find that the plaintiff was completely not suited to have physical custody of the minor herein.

    b. That the learned trial magistrate erred in law and in fact in failing to find that the plaintiff having failed to comply with the previous court orders to get a house or a shelter of her own had no place to keep the child and was thus undeserving of physical custody.

c. That the learned trial magistrate erred in law and in fact in failing to note that the best interests of the minor child will be served if he was to stay with the father(appellant) and the mother having access.

d. That the learned trial magistrate erred in law and in fact in failing to note that the appellant would be overburdened by ordering him to pay the domestic servant while denying him physical custody of the child.

e. That the Honorable Magistrate erred in law and in fact by making wrong conclusions not supported by law and evidence presented before her.

f. That the Honourable Magistrate erred in law and in fact by failing to allow the appellant's counterclaim.

7. The appellant prayed that, he be awarded physical custody of the minor, legal custody of the minor be vested jointly on both parents, the terms of access of the minor be maintained as proposed by the trial magistrate, he be allowed to cater for the major expenses of the child, namely, medical, school and school related expenses, while the respondent be directed to ensure she has a house of her own and each party to meet expenses of the minor while the minor was under their respective custody.

D. Facts of the case

8. PW1 Lucia Kalondu Ukungi adopted her witness statement, where rehashed the particulars of the plaint. She explained how their courtship with the Appellant had started, they had eventually stayed together and were blessed with baby E.N.K born on 23rd September 2019. Later due to their irreconcilable differences they had parted ways and continued to co parent. In September 2022, when the Appellant picked the minor to go celebrate his 3rd birthday, he refused to return him back to her, which act was reported to the police and this eventually lead to the filing of the primary suit.

9. Upon cross examination, the respondent stated that, she met the Appellant in 2018, and opted to co habit, though they were not formally married. She was a real estate agent and did not have an employment contract. Currently she was residing with her sister at Syokimau and earned Kshs 25,000/ = monthly. The Appellant on the other hand worked at their family business. The minor herein E.N.K was schooling in Kindaville within Sabaki area of Athi River, and it was the Appellant who was paying school fees and school related expenses of the child, while the child's grandfather provided for his medical cover.

10. The current custody arrangement as agreed upon, was working and it was the paternal grandfather of the minor, who would pick and dropped him to and from school as the Appellant was always drunk. She had no problem with the Appellants mother and only had altercations with her once, when the minor was injured and the Appellant was nowhere to be seen. Finally, she objected to having the minor stay with his paternal grandmother, when she is still alive. She also confirmed that since their separation with the appellant, she had always catered for and meet the needs of the minor.

11. DW1 Francis Kingori Nderitu testified that he resides at Sabaki – Athi River, and was engaged as a marketing manager of their family business. He adopted his witness statement as evidence in court and produced his claim supporting documents as Exhibits in support of his case. He averred in his witness statement that he had custody of the minor herein, and had allowed the respondent to have access to him. He no longer par-took alcohol and had refocused his life in Christ. Currently he was residing within their family residence/fathers' compound, which was an ideal/safe place to bring up the minor as he had other children to play with within the compound.

12. The Appellant further denied ever abusing and/or assaulting the respondent and had never been summoned before any police station on allegations of assault. To the contrary it was the respondent and her brother who had assaulted him and caused him grievous harm, a matter which he reported to the police for action. The respondent had been over indulging in drinking and had been engaged in several promiscuous/adulterous relationships to which she had confessed.

13. Finally, the appellant averred that he had actual custody of the minor, who was always happy to be under his custody and he was capable of sustaining all of the minors needs from his salary and allowances. On the other hand, he alleged that the respondent was a violent person, who was emotionally unstable and was not a suitable person to raise the minor. He urged the court to find that the minor was in a better and more suitable environment at his grandfather's compound and that this arrangement be maintained.

14. Upon cross examination, the Appellant stated that he had met the respondent in Nakuru, at a rehabilitation Centre and at that time he had a problem of alcohol abuse, which he had overcame. The alcohol abuse had an impacted on their marriage and the respondent had constantly disrespected and abused his mother. His job entailed travelling within East Africa region, where he would travel for a day or two, and had enlisted the help of his parents to help him take care of the minor. This did not mean that he was unavailable continuously to attend to his needs and given that the minor lived at their family home at Sabaki, he was in a safe and conducive environment which ought to be maintained. He had filed his affidavit of means, stating how much he earns monthly and proving his capability of maintaining the Minor.

15. In reexamination, the Appellant confirmed that he met the respondent at a rehabilitation center in Nakuru and had recovered from his addiction, though while co habiting with the respondent he had relapsed once, but again had since completely recovered and had not touched Alcohol for the last 15 months. At the family home there were two houses both detached. He resided in the detached house, but within the compound where both his parents resided, together with 2 house helps, the minor E.N.K and two other children. He reiterated that the respondent had exhibited hostility towards his mum and would constantly insult her. He had also filed his affidavit of means, which was accurate and covered all his expenses.

E. Parties Written Submissions.

(i) Appellants Submissions

16. The appellant in his submissions dated 1st February 2024 stated that the issue for determination was whether there was a basis for setting aside the judgement and who should bear the cost of the appeal. The court had the duty to re- evaluate, re assess and reanalyze the evidence on record to determine if the conclusion reached by the trial Magistrate could hold or not. Reliance was placed on Abok Jmaes Odera T/A A. J Odera & Associates Vs Johm Patrick Machira T/A Machira & Co Advocates (2013) eKLR & Peters Vs Sunday Post Ltd (1958) EA 424.

17. Section 3A of the *Civil Procedure Act* 2010 gave the court inherent and discretionary powers to make orders necessary for the ends of justice to be met and one of the ways that this court could exercise its discretion was by setting aside the judgment of the trial Magistrate in whole or in part. On the issue of physical custody of the reliance was placed on Section 2 of the Children's Act No 29 0f 2022 and the case of Re S (an infant) [1958] All ER 783, and M A A Vrs BS (2018) EKLR, where it was held that the physical custody of the children of tender age should be given to the mother except in exceptional circumstances, the same could be placed on the father, where sufficient reason was given to exclude the prima facie rule.

18. It was submitted that the exceptional circumstances leading to the appellant strongly opposing the respondent having actually custody were that the minors mother/respondent did not have fixed home as she lived at her sister's matrimonial home, the respondent constantly travels out of town with her friends and new lovers under the guise of her new venture Camillan Tours and Travels, which was evidenced by extract of communication between the parties herein and this raises the question of who took care of the minor when the respondent travelled. These reasons qualified to be considered as sufficient exceptional circumstances, which the trial court ignored and constituted an error which ought to be corrected by granting the Appellant physical custody of the minor.

19. Reliance was placed on Article 53(1)(e) and(2)of *the constitution* of Kenya 2010, which provided that best interest of the child were paramount in every matter concerning the child, and this provision of *the constitution* had been further fortified by Section 4 (2) (3) of the Children's Act, which emphasized on the same principle. Reliance also was made to the case of H.O.O vs M.G.O [2021] and MAA vs ABS [2018] eKLR, where the same principle was espoused.

20. The court had earlier found that the environment, where the respondent leaved, with her sister at Syokimau was not conducive for the minor, as the child was exposed to pornography and other adult content videos and as a result ordered the respondent to get her own place, which orders she never acted on. Additionally, the minor attended school at Sabaki, which was close to the appellant's home as opposed to Syokimau which was about seven (7) kilometers from the school. This had negatively created a bigger burden on the Appellant ho was paying school transport and drastically destabilized the child, which was not good for his physical and mental health. The respondent had admitted in cross examination that the custody arrangement worked well and it was therefore unreasonable for the court to give her physical custody.

21. The appellant further submitted, that he had no issue sharing legal custody of the minor and the respondent could have access to the minor every two weeks as earlier arranged, which arrangement had worked during the proceedings, when the matter was being heard before the trial court. On the issue of maintenance it was submitted, that "parental responsibility" was joint responsibility of both parents as defined by Section 31, 32 and 110(a) of the Children's Act, No 29 of 2022 and emphasized in the citation of PMK vrs ANM (2020) eKLR.

22. It was submitted that both parents should thus have equal responsibility to contribute towards the maintenance of the child. The appellant was willing to cater for school fees and school related expenses together with the medical expenses and the respondent ought to cater for food, clothing and shelter. There was no reason advanced, why the appellant should be burdened in paying a domestic servant in the respondent's sister's house.

23. The appellant therefore prayed that this appeal be allowed with costs.

(ii) Respondents Submissions

24. The respondent did file her submissions on 28.02. 2024, opposing this appeal. Reliance was made to the case of Wonder Company Limited and another vs Kalondu Monguti & another 2018 eKLR to define, the role of the first appellate court. On whether the Respondent was suited to have custody of the minor, reliance was placed on Section 81 of the Children's Act and it was submitted that the minor was 7 years old, was of tender age and that the general principle was that children of tender age should be with the mother unless special and peculiar circumstances existed to disqualify her from being awarded custody. Reliance was placed in the case of KMM vs JIL [2016] eKLR, where Judge M.W Muigai stated that case law lent credence that a child of tender years, less than 10 years as defined under Section 2(1) of the *children Act*, 2001, custody would be granted to the mother.

25. It was submitted that the appellant had merely alleged that exceptional circumstances exist to wit; the respondent did not have a fixed abode or residence and had constantly travelled out of town with her friends and new lovers. These were mere allegations that had not been proved by any tangible evidence. The Appellant too under cross examination had confirmed that he too travelled a lot within East Africa Region due to his work and had to leave the minor under the care of his parents. This was unfair to the child who was better off, getting attention from his biological mother, who had not been proved to be unfit to warrant being denied custody of the minor. The court was also urged to note that the minor was at the most vulnerable state (during infancy) and needed nurturing and care of the mother.

26. The respondent further summited that, the trial court did consider the minor's best interest and could not be faulted for the decision arrived at. The party's personal differences could therefore not get into the way of ensuring that the best interest of the minor was observed. Reliance was made to Article 53 of *the Constitution* of Kenya and Section 83(1) of the Children's Act and the case of MAA vs ABS [2018] eKLR, which espoused what the court had to consider while determining this question. The Appellant had confirmed to court that he was an alcoholic who was struggling with addiction and had undergone rehabilitation. This made him aggressive and unfit to have custody of the minor. The respondent had further by her replying affidavit of 3rd October 2023, confirmed that she had a fixed abode, within Syokimau and the allegations that the child would be exposed to pornography were unfounded and/or uncalled for.

27. The court orders as to maintenance too, could not be faulted as the trial magistrate had considered each parties capability pursuant to Article 53 of *the Constitution* of Kenya. Parental responsibility was a joint effort and the court having considered the affidavit of means filed by both parties had arrived at the right decision. Reliance was placed on the case of CIN vs JNN (2014) eKLR. The appeal in its entirely was a waste of court's time and the respondent urged the court to dismiss the same, with costs to the respondent.

F. Determination

28. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See Santosh Hazari Vs Purushottam Tiwari (Deceased) by L.Rs (2001) 3 SCC 179.

29. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See Kurian Chacko Vs Varkey Joseph AIR 1969 Keral 316.

30. I have considered the entire record of appeal, the pleadings that were filed in the primary suit, the Judgment of the trial magistrate, submissions filed both at the trial court and before this court and condense the issues raised in the grounds of appeal and which arise for determination as follows;

    i. Whether the trial magistrate made an error in granting the respondent physical custody of the Minor.

ii. Whether the trial Magistrate erred in issuing maintenance orders.

iii. Who should bear the costs of this Application.

i) Whether the trial magistrate made an error in grant the respondent physical custody of the Minor.

31. As I consider this the matter, I am mindful of the constitutional and statutory imperative that the best interests of the child is paramount. Article 53(2) of *the Constitution* of Kenya, 2010 provides that:

> A child's best interests are of paramount importance in every matter concerning the child.

32. Further Section 4(2) and (3) of the *Children Act* (the Act) also provides that :

> (2)) In all actions concerning children, whether undertaken by public or private social welfare institutions, 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 and promote the welfare of the child;
>
> (c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.

33. Section 83 of *Children Act* , 2001 stipulates the principles to be applied in making a custody order as follows:

> " 83
>
> (1) In determining whether or not a custody order should be made in favour of the applicant, the court shall have regard to—
>
> a. the conduct and wishes of the parent or guardian of the child;
>
> b. the ascertainable wishes of the relatives of the child;
>
> c. the ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;
>
> d. the ascertainable wishes of the child;
>
> e. whether the child has suffered any harm or is likely to suffer any harm if the order is not made;
>
> f. the customs of the community to which the child belongs;
>
> g. the religious persuasion of the child;

h. whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;

i. the circumstances of any sibling of the child concerned, and of any other children of the home, if any;

j. the best interest of the child."

34. The Court of Appeal in J.O. v S.A.O. [2016] eKLR stated:

> " There is a plethora of decisions by this Court as well as the High Court that in determining matters of custody of children, and especially of tender age, except where exceptional circumstances exist, the custody of such children should be awarded to the mother, because mothers are best suited to exercise care and control of the children. Exceptional circumstances include: the mother being unsettled; where the mother has taken a new husband; where she is living in quarters that are in deplorable state; or where her conduct is disgraceful and/or immoral."

35. In KMM Vs JIL (2016) eKLR, Judge M.W Muigai also emphasized this principal and stated that;

> " ..... a child of tender years best interest and welfare are where legal custody is awarded to the mother barring extenuating circumstances that would prevent the mother from protection and care of the child. Case law lends credence to the proposition that cases of child of tender years less than 10 years old as defined under section 2(1) of the children's Act 2001, custody is granted to the mother."

36. In this case, it is not in dispute and it is proven by evidence that the couple/parties herein cohabited and are the biological parents of the minor herein E.N.K, born on 23rd September 2019 and currently was schooling at Kiderville Junior School. Both parents have a history of at one point being persons abusing Alcohol and initially meet at a Alcohol recovery center within Nakuru town and after their separation leaned in on family support to help them move on with their lives. The appellant affirmed that he stays with his parents in the same compound, was engaged in family business and his parents helped him raise the minor. The respondent too on the other hand also confirmed that she too stayed with her sister at Syokimau. Both parties also proved that they were in lawful employment and contributed towards maintaining the minor herein.

37. The Appellant averred that the respondent was not well suited to have physical custody of the minor because she did not have a permanent abode of her own but rather stayed with her sister in Syokimau. He further alleged that she would always travels to party with her friends and therefore did not have time to raise the minor herein, who was better off in a safer environment, which was at his home, which was within their family compound at Sabaki. The court had directed the respondent to find her own place/ abode, but she had failed to do so. The appellant averred that these constituted exceptional circumstances, which the trial court over looked and should have considered to find that physical custody of the minor was best left in the custody of the Appellant hence the need to reconsider the same.

38. Issues concerning custody of children are truly emotive and both parents undeniable would wish to have physical custody of the child. In an ideal world, the parties should be able to work out

on an arrangement which suits all parties as they honestly and truly known in their hearts, which partner is better placed to take care of the child at any given time, considering the constantly changing economic opportunities dynamics, which dictates that both parents work to put bread on the table and considering social/family support environment they have in place to help them raise the child.

39. These are factors that do not remain constant and as they change necessary adjustment ought to be made in the best interest of the child. Unfortunately, many a times, like in this instant Appeal, that is not the case and the court are faced with two sets of circumstances and is duty bound to make a determination thereon however difficult the circumstances are. In Githunguri Vrs Githunguri (1979) eKLR , Miller J.A echoed these sentiments and observed that;

> These are difficult cases to decide; and I for one, do not look forward to the task of making decisions in them; because on the basis of assuming as I confidently do that there is and should be parental love for the children by both the parents, it is almost inevitable that whichever way a court decides, one parent must be dissatisfied if he does not obtain his personal wishes against those of the other parent. As I see it, resort to the courts by married parents in a case such as this, is generally nothing short of a battle between the parents themselves calling upon courts to decide who is victor, and what is more, it is an almost certain result that the courts whether of first instance or on appeal are blamed for deriding in favour of either parent when decision there must be. Courts are conscious of this; and as I have already intimated, I believe that this is expected because of that natural common parental love for the children. Indeed, the legislature appears to have also contemplated the existence and the continuity of parental love and interest despite an order in guardianship already made, by conferring on mother and father alike similar powers to apply to the court 'in respect of any matter affecting the infant' (Section 6 of the Act), and also by providing for the making of orders even where mother and father are residing together (Section 7(2) of the Act)

40. I do find and hold that the Appellant did not prove to the courts satisfaction, and did not bring in independent evidence, which would enable the trial court to form an opinion of adverse inference as to the character and suitability of the respondent as a parent, and also which could hinder her from being given physical custody of the minor herein. The fact that the respondent was residing at her sister's house, did not mean that she was unsettled and she confirmed otherwise, through her replying affidavit filed on 3rd October 2023, that she had her own fixed place of Abode also situated within Syokimau.

41. Further no proof was also tabled to show that the respondent was an emotionally and psychologically unstable person, to the extent that she could not stay with the Minor. Finally, the allegations of the respondent, being a frequent traveller with her "lovers" too was not proved, and the Whatsapp/Sms extracts filed was inadmissible evidence not presented in line with Section 106B of the *Evidence Act*. Be that as it may, it was also admitted by the Appellant too, that he was the Marketing manager of their family business and he too would be travelling across the country and East Africa looking for new business. This therefore was a classical case where the "pot calling the kettle black".

42. Both parties herein are Acholic addicts and/or have recovered from its effects. Both are/were not socially stable and needed family support to help them recover and maintain a suitable environment where the child can be supported. Under the circumstances and considering the facts of this case, it was not be appropriate for either of them to point a finger at the others "inadequacies" without first seeking to remove the log in their eye.

43. The trial magistrate therefore cannot be faulted for arriving at the finding that no tangible evidence had been presented to substantiate/support the contention that the respondent was unable to take

care of the minor and/or did not offer a suitable environment to him, to warrant exercise of the courts discretion in the Appellants favor on issue of physical custody. The appeal as against this finding therefore has no merit and fails.

(ii) Whether the trial Magistrate erred in issuing maintenance orders.

44. The Appellant faulted the trial Magistrate for overburdening him by ordering him to pay for the house maid/ domestic servant of the respondent, yet he had been denied custody of the minor. He submitted that Article 53(1) (b), (c) and (d) of *the Constitution* of Kenya as read with, Section 31 and 32 of the Children's Act provided for "Equal parental responsibility". He averred that he was willing to cater for the minor's school fees and school related expenses. Further he would provide for the minor's medical cover and the respondent be left, with the responsibility to cater for food shelter and clothing. In the same spirit each party should meet the daily needs of the minor, while in their physical custody, including entertainment, food and clothing.

45. Maintenance is an aspect of parental care and is the responsibility of both parents of a child. Section 114(2) of the *Children Act* stipulates the considerations which will guide the court when making an order for financial provision for the maintenance of a child. These considerations include inter alia:

    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 immediate foreseeable future;

    c. The financial needs of the child and the child's current circumstances;

    d. The income, if any derived from the property 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. Liability of that person to maintain the child.

46. These considerations were taken into account by Judge G.V Odunga in RJM Vs CK (2019) Eklr where he stated that the factors the court had to consider, when assessing what contribution, a party had to make included:-

    a. The present and future assets, if determinable;

    b. Income and earnings potential of the parties considering their Ages; and professional qualifications;

    c. The financial needs and obligations of the parties;

    d. Their standard of leaving;

    e. The contribution or obligations of the parties to others for whom they are obliged to provide and the paramountcy of such obligations; and

    f. The conduct, where relevant, of each party.

47. Parental responsibility is a shared responsibility between the parents of a child. The learned Magistrate directed the Appellant to take care of school fees and school related expenses, entertainment and

domestic servant while Respondent on the other hand was directed to handle food, clothing and shelter for the child, looking at the financial capacities of both parties, I find that no good reason was advanced by the trial Magistrate, as to why the appellant should cater for the house help expenses, yet he will incur extra costs in covering for the minor medical expenses, which though not specified, based on the evidence adduced remains his responsibility. He shall also incur extra expenses for school transportation given the extra distance the school bus has to travel to pick and drop the minor.

F. Disposition

48. The upshot, having considered the merits of the grounds of Appeal as Raised, I do find that the appeal is partially successful.

    a. The Appeal against the finding of the trial Magistrate awarded physical custody of the minor to the Respondent lacks merit and the same is dismissed.

    b. The order/finding of the trial Magistrate directing the Appellant to pay the respondents house help is set aside and the Appellant is further directed to cater for the Minor Medical expenses/ Insurance.

49. Each party too shall bear their own costs of this appeal given that the parties herein are the parents of the minor and each has the best interest of the child at heart, though the positions conflict.

50. It is so ordered.

READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS ON THIS 11TH DAY OF JULY, 2024.

FRANCIS RAYOLA OLEL

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of: -

No appearance for Appellant

No appearance for Respondent

Sam Court Assistant