REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 6 of 2009

(ORIGINAL NAIROBI CHILDRENS COURT CASE NO. 278 OF 2006)

M.S.A. …….....…….. PLAINTIFF

VERSUS

P.K.A. ..... …… DEFENDANT

J U D G M E N T

The plaintiff filed a plaint dated 2nd June, 2006 against the defendant at the Children's Court Nairobi on 2nd June 2006. He sought, inter alia, an order that the legal custody, care and control of their son, referred to herein as A.S.A, for the purpose of protecting the child's identity, be awarded to him. He also sought for an order permanently restraining the defendant, the mother of the child, from withdrawing the said child from the jurisdiction of the court and the Republic of Kenya, until the suit is finally determined. He finally sought costs and any other or further order that the court would deem fit and just.

At the same time as the Plaintiff filed the above mentioned plaint, he simultaneously filed a Chamber Summons dated the same date. It sought interim orders of the main orders sought in the plaint. The latter included orders restraining the Defendant from withdrawing the child from Banda School or from taking him out of the jurisdiction of the court. He also sought interim orders of custody, care and control pending the hearing and final determination of the application.

The Defendant through M/s A.F. Gross and Company, Advocates filed her defence dated 30th June, 2006, on 3rd July, 2006. She denied most of the major claims made against her in the plaint and prayed that the suit be dismissed with costs.

On 2nd June, 2006 the child aforementioned was made a ward of court.

On 14th July, 2006, the custody, care and control of the said child was by consent of the parties, given to the plaintiff, M.S.A until the completion of the hearing of the suit intended to start on 14th June, 2006.

On 29th June 2006 a consent order to the following effect was made: -

1. That the child would remain ward of court and would not be removed from jurisdiction of this country without leave of the court.

2. That the Plaintiff would provide for the child in relation to education, health, food, accommodation and extra curricular activities.

3. That both the Plaintiff and Defendant would have a shared responsibility of taking the child to and collecting him from school, every alternate week.

4. That the plaintiff and defendant would together spend time with the child every alternate week.

5. The Defendant would have full access to the child while within the parties residence.

6. That both parties had liberty to assist the child with his homework as per the school time table.

On 8th July, 2008 upon complaint to the court by the defendant that she was not getting adequate court-ordered access, the child was produced in court and interviewed by Mrs. Mbugua, the Senior Resident Magistrate. The Honourable Magistrate recorded: -

"The child A.S.A has been produced before the court. This court talked to the child. The child loves his parents but of late, he tells the court, the mother has been shouting at him and even (in) one instance, hit him leaving him with injuries. He would want to continue seeing his mother but only twice a week and she should stop talking to him about his father…."

On the same date the court ordered a one week access to the Defendant between 20th July and Monday 29th July, 2008, without interference from the plaintiff.

On 28th July, 2008 the lower court ordered that the child be assessed by a child Psychologist Doctor at Gertrude Children's Hospital and both parents were given liberty to take the child to an independent Child Psychologist for evaluation with reports to be filed in court before 5th August, 2008; this was later extended to 15th August, 2008. The court however in its discretion, decided to and altered the mode of the Defendant's access. The Defendant would thereafter temporarily access the child for four hours, twice a week, with effect from 12th August, 2008 to 8th September, on Tuesdays and Thursdays. Apparently, this latter access was not itself obtained smoothly by the Defendant because the child was purportedly not willing to visit his mother.

On 22nd September, 2008 an application for contempt of court was filed by the Defendant's advocate M/s Thongori against the plaintiff. It was the defendant's assertion that the plaintiff had deliberately failed to comply with the lower court's order to give access of the child to her in compliance with the lower court's order. The Plaintiff then took the position that it was the child himself who refused to be seen by his mother, and not the plaintiff who refused to give access. Several appearances took place before this court in persuit of getting a reasonable middle ground. It was during these appearances before this court, that it became clear that the parties relationship was hostile and acrimonious. They could barely see each other. They could even lose control in court and shout at each other using harsh words against each other.

As little progress was being made in any issue that arose, the parties realized that they were wasting valuable time. Meanwhile the parties themselves from time to time, sought interim orders to govern access of the child. It also became apparent that little or no progress in the hearing of the case was being made at the lower court due to one reason or another. This was the time when the parties became interested in having the custody, care and control case transferred to the High court for a further but speeded hearing and determination.

The record of this court in High Court Misc. Application No. 54/08 shows that several interim orders were made at the instance of both parties. They include orders to have the minor medically and psychologically examined and reports be filed. Unfortunately the latter exercise did not go far as both sides rejected reports being made and filed by the other side's doctors. The final stroke came when the parties dropped the idea of psychological experts' reports.

On 5th January, 2009 both parties agreed between them that they would sign a written consent to transfer the Nairobi Children court case No. 278 of 2006 from the lower court to this court for speeded hearing

and final determination before 7th January, 2009. However on 7th January, 2009 the Plaintiff decided to retract stating that matters under the Children Act, Cap 8 of 2001 cannot be heard by this court. Mr. Oduol argued that this court hath no jurisdiction to hear the issue of custody, care and control. M/s Thongori replied that this court's jurisdiction included jurisdiction to hear such cases. The two sides made full submissions over the issue.

By a considered ruling of this court delivered and dated the 15th January, 2009, this court ruled that it has jurisdiction to hear and determine matters under the Children Act aforementioned. The court accordingly, on the grounds shown in the ruling transferred the Nairobi Children Court Civil Case Number 278 of 2006 to this court for speeded hearing in the best interests of the child and the parties.

On 28th January, 2009 the hearing of the custody, care and control case started before me. Both counsel agreed that since a hearing de novo had once or twice taken place at the lower courts in vain before various magistrates, this court would start from where it was left by the Honourable Mrs. Ndungu, Senior Resident Magistrate. Counsel adopted the evidence earlier recorded and proceeded with the hearing by tendering further oral evidence.

The summary of the Plaintiff's evidence is as follows: - he sought custody, care and control of their child, A.S.A. He testified that while he might wish that the Defendant should not have access to the child due to her adverse conduct to the child, nevertheless she should have such access, because she is the mother. However, she should be limited to some days in alternative weeks. That the access should be under supervised terms and conditions so that while the child can see her and vice versa, she should not be allowed to be a constant influence on the child. The plaintiff claimed that a defendant's dominant and uncontrolled access to the child will not be in the best interest of the child. This, the plaintiff claimed, is because the defendant has in the past, been cruel to the child. That during the court-given access, the Defendant mentally and psychologically abused the child. That the defendant also tried to brainwash and influence him against the plaintiff, which hurt and confused the child. That the child, after visitations with his mother, returned home very disturbed and so confused that he would not easily explain what his mother told him or did to him. The plaintiff in conclusion on this point testified that these visitations by the child's mother, tormented and stressed the child to a point where he did not want to see her again. This, he testified, tore the child between the two parents and made him afraid.

Asked how he knew and experienced these things or came to the conclusions above, the plaintiff said that he got them from the child who would tell him, sometimes with difficulty. That although he indeed realized the important part mothers play in the development of their children, nevertheless, the defendant in particular, was not helpful to the growth of their child because of her hurtful conduct towards the child. So much so that the plaintiff sought to take A.S.A to a boarding school where contact from the defendant would possibly be minimized, and where A.S.A would be cut off from contacts with other harmful aspects of life.

The plaintiff further testified that his stand against Defendant's prolonged access to A.S.A arose from plaintiff's frustration arising from how he saw the child suffering. He said that his position was not really trying to shut the Defendant out but to express the fear he had developed over the child. That the child had because of these frustrations caused by the Defendant, become so stressed that he had began to show limited signs of rebellion, during the period ending in October, 2008. The plaintiff admitted that the child's mild rebellion will have started long before the parties herein separated in the year 2006. This, the plaintiff explained, was due to the defendant's harmful behaviour which caused open misunderstandings and fights between the parties of which the child gained knowledge. That it accordingly became necessary for him to seek the help of Dr. Kirundi, a child psychologist, as early as 2002 which psychological treatment lasted all through to the year 2008.

It was the further testimony of the Plaintiff that it was the stress and torment caused by the Defendant upon the child that in turn caused the child migraine and migraine related effects. These often brought about headaches and stomachaches and upsets in the body, he added. He said that he relied on the advice of the child's doctors.

The Plaintiff tried to explain the child's other frequent illness and visits to doctors. He said that A.S.A. had a knee injury which led Plaintiff to seek the best medical treatment he could get. This took them even to Dubai for surgery. He said he did not need the Defendant's permission to authorize him to give their son the best possible medical treatment. He admitted that he often did not consult nor inform the Defendant of these treatments, believing that it was good enough to make sure the child got the necessary treatment, especially since the Defendant was disposed against giving such consents earlier on.

The plaintiff however insisted at one point that he consulted the defendant on local doctors over local medical treatments. He was however of the view that the need to consult or be seen by the doctor usually arose suddenly and could not wait for consultations between him and the Defendant.

The plaintiff also testified that in June 2007 he and the child, A.S.A., moved to a new Residence away from the matrimonial home where the Defendant remained living to date. At the time he had filed and obtained restraint orders against the defendant preventing her from taking the boy out of the jurisdiction or even out of Banda School where the boy was attending school. The child was also already made a ward of court. Plaintiff also said that his main reason for moving out to a new residence was to save the child from the physical and mental abuse coming from the defendant. He said this occurred as she brought the child home from school while they lived together in the matrimonial house. The defendant in this respect is said to have punched the boy on the back, and hip and whacked him on the face using her hand/or at other times, using the TV remote control. He did not himself witness the incidents but that the child confirmed so to him when he became curious about the source of the child's injuries.

On the other hand, the Plaintiff testified that on one occasion the Defendant carried a knife and threatened with it. That the incident was so serious that it made the child become so frightened that he went into asthma-induced seizures. That the plaintiff had to use an inhaler to resuscitate the child. That in one occasion as the plaintiff stood in the sitting room he noticed the child who was on the first floor come out of her mother's room rushing down and crying. That the child fell at the door step of his ground floor bedroom as he saw the Defendant came out of her bedroom pulling her own hair violently as if she was drunk or out of control. That she appeared to hit her shagged head on the ground as she screamed. The plaintiff admitted that he was not always present when the Defendant allegedly abused the child but that he occasionally witnessed mild ones. He also stated that some of the injuries inflicted upon the child were witnessed and recorded by various doctors who treated the child soon after the incidents and that the relevant medical reports are in the evidence record of the court.

The Plaintiff also testified that after this case had been filed, the Defendant for some reason administered more abuse on the child. He said that the injuries became frequent and so serious that he was forced to report to the police and later have criminal charges preferred against the Respondent at Kibera. That he had later to drop the charges because he realized they might negatively impact on him and the wife in their community and more importantly the child. He thought also that it might impact adversely against the bigger family and the Hindu community.

It was also testified by the Plaintiff that soon after separation the court made orders that custody and care and control should be shared weekly between the parties alternately. However, this arrangement failed to work, said the Plaintiff, because that was part of the time when the Defendant intensified her effort to turn the boy against the Plaintiff. That she used even physical force which caused the child injuries apart from mental torture. That as a result the child refused to go to stay with the Defendant during her weekly access.

The Plaintiff also testified that when he first tried to push the child to join the Defendant in compliance with the court order, the child got so alarmed that he collapsed and ended in Hospital for treatment. That this was later diagnosed as stress at the hospital.

The Plaintiff also testified that he knew the Defendant wanted to take the child out of the jurisdiction. That she used an advocate to try to steal out of court the boy's and Defendant's passports and that the Defendant had herself confirmed so. The Plaintiff gave that as one of the reasons why he had kept watch to prevent such occurrence.

The Plaintiff admitted frequently moving the child from one school to another. He said he did so because he was anxious to give the child the best education he could manage as well as keep him close enough to prevent the Defendant whisking him out of Kenya. That he was also determined to remove the child from any place where he thought the child was likely to be exposed to wrong influence, including alcohol or drugs. That all he wanted was to keep the child safe and progressive and to prevent anything that threatened the child's welfare.

It is the Plaintiff's further evidence that he loves his son and that he has all along acted in the child's best interests. He testified that he will always provide anything within his reach towards the well being of the child. That he would provide for the child whether the child will be in his custody or in the custody of another. It is his belief that the child is 80% well-balanced and that that is so due to his efforts. He has and is prepared to provide for food, education, health, recreational activities, travel and any other necessity which the child will need.

The plaintiff also in his concern expressed disappointment when, as he claimed, he saw the child being depressed after each visitation with his mother. He expressed a wish that the mother would treat the child well before the child came back home after mother's visitations. He felt it was what the Defendant did or said to the child that caused the child's sadness. He pointed to some happy photographs which child's mother produced in court but dismissed them as not full explained to confirm where and when they were taken.

As to the evidence that he was formerly a drug addict, the Plaintiff admitted that he was so indeed up to some nine to ten years ago. He said he totally recovered and sees no possibility of relapsing. That while falling back cannot be ruled out, it would be totally, unlikely. That he often advised the child over the problems of making the mistake to fall into the bad influence of alcohol and drugs. He then asserted that the Defendant herself is a heavy drinker although not a drunkard.

The Plaintiff rounded up his evidence by saying that he did what he did during he relevant period of their marriage to protect their child A.S.A. That that is why he filed this case; moved out of the matrimonial home to avoid A.S.A.'s abuse from his mother and moved the child from one school to another when he felt the child was threatened. He said that he obtained court orders of security and protection and also provided for the child and the defendant as ordered by court.

The Plaintiff upon the above evidence then seeks the custody, care and control order of their son A.S.A. He thinks and believes he deserves it more than the Defendants does.

The Defendant in her amended defence to the Plaintiff's plaint filed a Counter-Claim dated 17th November, 2006 seeking the following orders: -

1) That the custody, care and control of the minor, A.S.A. be granted to her.

2) That reasonable access be granted to the plaintiff.

3) That an order requiring the Plaintiff to provide maintenance for the child in terms of education, health, food, accommodation and daily upkeep be made.

4) That costs of the suit be awarded to her.

To support her case and responding to the testimony given by the Plaintiff, the Defendant in summary gave the following evidence – That she never at any relevant time whether in the vicinity or away from their son A.S.A., tried to or brainwashed the child. That she never used or tried to use abusive language either against the minor or against the Plaintiff in A.S.A.'s presence or vicinity. Instead, the Defendant urged, she always taught or tried to teach their son not to use foul or abusive language at all times. She also denied kicking the child out of the house at any time, let alone at night.

The Defendant also categorically denied that she ever intended to spirit their son A.S.A out of Kenya nor

did she know that the child suffered from migraine, migraine headaches or stomachaches. This, the Defendant explained, is because the child has not lived with her after the Plaintiff and the child left the matrimonial home to another house. She said that she did not get information about their son's sickness from Dr. Kirundi.

On the issue that she intended to spirit the child out of jurisdiction, she answered that the plaintiff's fear was unfounded as there was no evidence produced by the Plaintiff to that end. She had never herself indicated so to the Plaintiff or to anyone else. Much more, she had no plans to leave Kenya with intention to reside anywhere else. That is why, she added, she had visited the United Kingdom yearly sometimes with A.S.A. but promptly returned him to Kenya. She said that A.S.A. is a child with mature views and that he would not easily be influenced or be forced by her. That the child is a wonderfully good child who enjoys the Defendant's company when the two get access to each other. She further said that she was, however, aware that A.S.A. is a torn child as between her and the Petitioner but that that did not prevent the child from enjoying her company. That the child is happy with her except when the Plaintiff is present when the child appears to prefer his company. That the child was not emotionally or physically abused or harmed by her as claimed. She denied ever speaking unspeakable things to the child as claimed. She asserted that if the Plaintiff took the child to Dr. Kirundi, then he did so not because of Defendants abuse on the child mentally or physically. The Defendant further said that she did not know that the child was being taken to Dr. Kirundi from the year 2002 or even later. She did not understand why the child needed Dr. Kirundi in 2002 when the parties lived without friction between them.

The Defendant then turned her attention to recent periods. She testified that the Plaintiff failed to inform her about the child's medical treatment generally or the treatment concerning the child's teeth problems. She only got any little information she could get about it from the child.

Defendant also testified that when the Plaintiff moved out of the matrimonial home on 23rd May, 2007 in her absence from home, he never consulted her; not even about taking the child with him to his new residence in May 2007. This forced her to make a report at Kileleshwa Police Station about it. That the Defendant alleged thereafter that he left with the child to protect the child from mental and physical abuse purportedly coming form the Defendant which allegation was unfounded.

The Defendant admitted that she had indeed been criminally charged at Kibera Magistrate court of assault contrary to Section 251 of the Penal Code and cruelty and Neglect contrary to Section 127 of the Penal Code in relation to the child, A.S.A. She however felt that it was the Plaintiff who instigated the charges which had no foundation. That the charges were therefore finally withdrawn under section 87A of the Criminal Procedure Code, after some witnesses gave evidence, but before the child who had been shown as the complainant, gave his evidence. The Defendant produced a certified copy of the Criminal proceedings of that court. She recalled that Plaintiff had withdrawn the case because he admitted that preferring it in the first place was a mistake which was hurting the child.

The Defendant further testified that the child A.S.A., was made a ward of court while the parties still lived together. She was however, given an order of access since the Plaintiff tried to keep the child away from her. This made the Plaintiff take over duties related to the child's welfare and needs contrary to the existing court orders that either party was to have full care and control of the child. She then narrated the case of 5th June, 2007 when the child was left with her. She said that the child appeared distraught and made rude and filthy comments against the Plaintiff which she encouraged, because she wanted to know more about it with a view to discourage it later. The Defendant took the child for dinner but when after dinner she wanted to discuss the matter, the child became unhappy and disappeared to the house of the paternal grandparents where he reported that the Defendant had beaten him. She denied beating the child.

The Defendant further testified that when she later saw her lawyer over the issue, the child had inexplicably once more complained that she had beaten him. As a result the Plaintiff had taken him to hospital. She further testified that she did not follow the child to the Aga Khan Hospital immediately because she was afraid the situation might not end well between her and the Plaintiff. However, she went to see the child at the hospital the next day and found that the child was fine although he had fainted at his grandfather's bed before being taken to hospital. That as the child started narrating the incident to her he

became distraught suddenly and began shouting calling for the Plaintiff. That the Plaintiff rushed in to the child's bed. The Defendant again denied having brutalized the child the day before to make the child run away to grandfather's house. That the child was telling lies against her.

The Defendant further testified that she followed the matter closely to know the reason why the child was admitted in the Hospital on 6th June, 2007 because she had not beaten him. She finally got a report exhibit D2 after an investigation was conducted by the Hospital on orders of the Hospital Board. The medical report showed that the child was suffering from "**trauma – related stress symptoms and adjustment disorder"**

The Defendant however testified that there were no signs of assault as claimed by the child and the Plaintiff against her.

Touching on the evidence that she was a heavy drinker, the Defendant denied it, stating that all she could drink might be two glasses of alcohol at any given time.

Referring to her access to the child, the Defendant testified that she has not spent even a full single night with the child since the child moved out with his father in May, 2007. She also testified that although the child has a good relationship with the maternal side of the family members, he has not had good and free time to communicate with his uncles or maternal uncle with whom he however talked with on 6th March 2009 through her telephone.

Answering again to the accusation that she wanted to spirit A.S.A. out of Kenya and that she had hired United Kingdom lawyers to assist her on that issue, she again denied the allegation. She said she never paid ?15000/- to lawyers in the United Kingdom to file suit. She only wanted advice about the child and no more.

Defendant also testified that she seeks custody, care and control of their child A.S.A. because she is the mother and most qualified and entitled to have the child. She said that the Plaintiff is least qualified because he has been solely and seriously exposed to alcohol and drugs before and he may relapse despite his rehabilitation. She further testified that in the period the child has been in the sole custody of the Plaintiff, he has been denied of her nurturing love, care and other natural values of a mother including values and disciplines which only a mother can give. That she had been denied full control and care of her child during the period after the child was torn away from her by the Plaintiff while the child was of tender age. She complained that although she was given access to the child by court, the same failed to materialize because the Plaintiff interfered and restricted the same.

The Defendant further testified that before the child was taken away by the Plaintiff in May, 2007, she was his carer daily as the Plaintiff lived at Naivasha most of the time. She accordingly used to drive the child to and from school and participated in his school and home social activities including preparing his food and feeding him. Presently however, she complained, she has been denied that care. The child has now become father's child, with little room for the mother.

The Defendant also testified that the child has become or is becoming an adult while living apart from her after being torn away. She however, believed that she still has a part to play in A.S.A.'s life, especially now when the child is in a sensitive age of his life. She does not believe that the child does not want her or that he refuses to join her. She believes that the tearing away of the child from her when he was only 10 years old and the staying apart solely with the Plaintiff during that period, has made the child have the present adverse attitude towards her. She believes that the father influenced the child against her by giving everything the child asked for. But, she added, the child still loves her and recognizes her as his mother and will be happy if custody was transferred to the Defendant. That the child has never really refused to live with the Defendant as claimed. That it is the Plaintiff who failed to consult the Defendant in matters concerning the child which influenced the child to have an impression that she is not part of his life.

The Defendant also testified that the Plaintiff did almost everything concerning the child without

consulting her. He took A.S.A. to see doctors who treated the child without her knowledge or consent, even took A.S.A for surgery in Dubai. That her failure to know when the child became sick or contracted certain illnesses like Asthma and migraine, arose due to Plaintiff's failure to inform and consult her. She was surprised and did not understand how and why the child is suffering from numerous illnesses like asthma and migraine arose due to plaintiff's failure to inform and consult her. She was surprised and did not understand how and why the child is suffering from numerous illnesses.

The Defendant stated that the Plaintiff as well acted without consultation in matters of education of the child. That he moved the child from Banda to Braeburn, to Pembroke and back to Braeburn, without good reasons or proper consultation with her. That his actions were impudent, although she was away in United Kingdom when the Plaintiff uplifted the child from Banda to Braeburn. However, neither herself nor her lawyers were being consulted on the child's transfers. That means that she did not give consents.

The Defendant further testified that the child presently lives under conditions unknown to her and that the child has occasionally complained of bad food although the chef is known to her to good and is an Indian. That if the Defendant had control over the child she would have earlier discouraged the use of the crutches by the child. She is totally unsatisfied with the conditions the child is living presently, because he should have motherly tender care and love which he does not presently have. The child should be given back to her, she said.

The Defendant also testified that the Plaintiff is too soft to the child. This has made the child lack discipline. The child's attendance at school is not impressive, and this adversely affected his termly academic results. That the Plaintiff's lack of a strong will to discipline the child has made the child to believe that he can get everything he wants. That this encourages the child to blackmail the Plaintiff into doing anything the child calls for.

The Defendant added that she is a British citizen who is on a visitor's visa for 3 months renewable and that her residency is under threat.

The Defendant also alleged extra marital affairs by the defendant which she alleged, started a long time ago. This lowered her and the child's esteem in the Hindu Community. She alleged misunderstanding about access to the child leading to restriction of such access since the year 2003 to the time later when they started open quarrels. At one time in October, 2006, he threw the defendant out of the matrimonial home, until the court ordered for her going back. The Plaintiff even once unreasonably felt that Defendant was so unfit that it was necessary to have an appointed guardian over their child.

However, the Plaintiff who alleged that the Defendant was having extra marital relations was not himself innocent. He also did the same, and as well exposed guns and adult magazines to the child. That the Plaintiff as well blackmailed the child to submission by telling him that the Defendant was trying to send the Plaintiff to jail by reporting him to the police. That he also falsely alleged to the child that the Defendant was married to one Inderjit and other men to make her look bad before the child.

The Defendant further testified in respect to her claim of maintenance from the Plaintiff for the child and herself which amounted to Kshs.3,403,131/- as shown in the exhibit D6. She however added the following further claims: -

1) Food p.m. Ksh.50,000.00 to 60,000.00

2) Alternative accommodation – either Kshs.200,000/- p.m. rent or a home purchase costing about 80 million

3) Furnishings befitting the house.

4) Water, electricity and service charge

5) Motor vehicle – BMW K[.....], 318: which should be fully maintained and serviced.

Under cross-examination, the Defendant added the following: - that Plaintiff is Kenyan and the child A.S.A. is Kenyan and was born in Kenya and has never lived in England. That she is British and her last formal employment in Kenya was in 2004. That she is and has always been maintained by the Plaintiff who as well, in every respect, maintains the child. That the child is very intelligent and mature boy and has a special relationship with his paternal grand-father and grandmother. That the child has a special and close relationship with his father, the plaintiff.

The Defendant further testified that she has no work permit in Kenya and entirely depends on what the Plaintiff gives her under the maintenance order. That she has not made any particular effort to get a job due to the pendency of her cases in court. That marital differences between her and Plaintiff started about 2004 but that their marriage irretrievably broke down in 2006.

The Defendant denied planning or even thinking of leaving Kenya and thought that Plaintiff's view that she intended to leave was unjustified. She also admitted engaging lawyers in the United Kingdom to merely advise her over the issue of her marriage and custody of the child herein.

The Defendant also testified that when she would stay away in England during their marriage, the child A.S.A., always remained with the Plaintiff in Kenya.

The said periods included: -

1. July to September 2002

2. May – July 2003

3. July – September 2004

4. December 2006

5. June to September 2006

6. July to September 2007

The Defendant further admitted that while she was away in England, the child remained in the custody, control and care of the Plaintiff. She asserted that her one time decision to live in England as shown in her diary entry of 3rd April, 2005 was because she realized that their marriage had broken down. Yes, she made a list of possible schools in England for their son, but she did so while being in Kenya.

The Defendant also stated that if she were given the custody of A.S.A., the latter's life standards would not fall or become catastrophic. She believes that the child's best interest can be met whether in Kenya or in England, although it will have to be the plaintiff who will have to pay for education, food, health and social life needs.

The Defendant also asserted that despite her not being a doctor and even not having filed any medical report from any doctor, she nevertheless believes that the medical treatment so far received by the child through the initiative of the Plaintiff both locally and abroad, was inadequate and below available standards. She agreed that the Plaintiff paid for the child's medical treatment and even for Defendant's treatment locally and abroad. She further said that although she always went for specialized treatment in England, the child's specialized treatment in Dubai was not necessary as the child could have obtained the same here in Kenya. She faulted the Plaintiff for the Dubai treatment. She criticized the idea of subjecting the child to anaesthesia during a minor surgery.

The Defendant speaking about the Plaintiff's moving away from the matrimonial home in May 2007, disapproved of it. Although the relationship between her and Plaintiff was then unhealthy, he should not have moved, especially when he took the child A.S.A with him. She did not think that court litigation was at the time adversely affecting the child, but now believes that it has affected him. She did not

remember whether the lower court warned her not to abuse the child by beating him. She thought the court only warned her not to discipline the child. The lower court did not give her a chance to build up or mend up with the child as suggested.

The Defendant stated that this case had started afresh before two magistrates and she wrote to the Chief Justice complaining of delay. If the Registrar of the High Court wrote back blaming her for delay, she did not receive the letter. She denied that her conduct relating to the prolonged hearing of this case is inconsistent with her expressed love, care and welfare of the child. She repeated that the best person entitled to custody, care and control of the child is not the Plaintiff but herself, the Defendant. Such order will not be detrimental but in the best interest of the child, she stated. The defendant concluded her testimony by stating that she will provide proper upbringing, give love, discipline and everything to the child if given custody. But to whoever is not given custody should be given sufficient access to the child, she concluded.

At this stage the court decided to hear and record some relevant views of the child A.S.A., so that the child's view may, in the interest of justice be known and where relevant or necessary, be applied. This was done on 27th March, 2009. Both counsel agreed that they and the parents should not be present when the child answers some questions on relevant issues incase such presence threatened to influence his answers.

The child stated, (without oath) that he knew that the dispute was about his custody, care and control as between his mother and father. He said he did not want to say whether he loved his parents or not but he respected both and that that amounted to love for them. However he loved his father more because his father respected him more and has all along shone more care. The child added that this was not so because he now lived with his father but that he knew that his father cared more. That even when the parents lived together, it was his father who showed greater care and concern.

The child in reference to his parent's relationship, said that his father never said anything against his mother in the child's presence while his mother never hesitated to speak ill of his father to him. That she called him bad names, and also said that father took drugs and that he ran after other women. That she also spoke bad of his grandparents whom she alleged, wanted to throw her out of the matrimonial home. That he loved and respected his grandparents because he knew that they are the ones who paid for the house and other things in mother's house.

The child also said that he left with his father to another house because his mother treated him badly. That his parents always got disappointed when he misbehaved but it was his father who most cared to correct or punish him than did his mother. That he would take away the TV, phone or any other gargets considered to be responsible for his mistake or failure and he would tell him to do his studies. That the father was more practical in correcting him than was his mother who would show disappointment but do nothing about it.

The child told the court further that in Banda School the Europeans showed discrimination against Asians and Africans. It was the same in Pembroke School where there was a lot of bullying. As a result he talked to his father about it to help him escape the bullying.

The child also recommended access or visitation of his mother to him only at school because, there, she cannot show him anger, or be able to use abusive language being a public place. That during her mother's visits he used to spend away the time by paying more attention to his dog or do some other social exercise to avoid giving her mother much time to talk to him. That was meant to avoid a possible clash with her.

The child said that if he had opportunity to choose who to live with, he would definitely choose his father because he treats him well and cares for him more. That his father also understands him more, being a man like him. He added that his father did not give him everything he asked for and that he was not lenient to him. That his father gave only what he thought was necessary and insisted that he, A.S.A., should behave well and do the right things. That his father would insist on things being corrected until

there is a correction or until the things are done right. That his mother as he knows her, did not insist on doing the right things until correction is achieved.

The child confirmed that he knew that the court has power to order him to live with his mother, but if the court did so, the order would not be good to him. That he has lived with his father for a long time and his father has looked after him very well, even better than earlier when the parents lived together. He expressed his clear wish to be left to live with his father because he is turning 13 years old in June, 2009. That if he is forced to live with his mother, he would want his father to visit him everyday. That on the other hand if he is left with his father, he would not bother if his mother visited him often or not.

The above is the evidence from the Plaintiff, from the Defendant and from their child, and is the basis upon which either party herein seeks legal custody, care and control of their child herein referred to as A.S.A.

I have carefully perused not only the testimonies of both parties but also the evidence of the child. I have similarly perused the legal authorities, inclusive of legislation, both local and English or Australian, cited by either party. I have carefully and painstakingly considered the principles of law in the cited legal authorities, comparing them as they became relevant and/or applicable. I have come to the initial conclusion that the principles upon which the issues of custody, care and control are decided in Kenya, England and Australia, aside of some minor local differences, are basically the same.

Before I start to analyse the evidence and the law applicable in this case, I should state that both parties each separately and independently claim for an order for legal custody, care and control of the minor, A.S.A. If the Defendant is granted the said custody, she in addition, rightly admits that there should be reasonable access to the child by other party. She also in those circumstances seeks a further order requiring the Plaintiff to provide maintenance for A.S.A. in terms of education, health, food, accommodation and daily upkeep. If accordingly, on the other hand she fails to get custody, orders for maintenance of the minor may not be an issue to be decided under this particular suit.

Jurisdiction of this court to make orders of legal custody, care and control of minors has been considered and determined in a ruling of this court dated 15th January, 2009 under this court's Misc. application No. 54 of 2008. In the said ruling this court decided that the court has jurisdiction to make such orders not only under the Matrimonial Cause Act section 30, under High Court Divorce or Nullity Cause No. 122 of 2006 in which the orders of custody, care and control are sought, but also under Section 73 proviso (iii), Section 76 (1), (2), (3) and (4) of the Children Act, Act No. 8 of 2001 as well as under 60(1) of the Constitution.

The basic statutory law governing custody, care and control of minors is found in the Children Act, Act No. 8 of 2001. Section 82 of the Act provides:

> **"A court may, on the application of one or more persons qualified under subsection (3) of this section, make an order resting the custody of a child in the applicant or, as the case may be, in one or more of the applicants."**

Section 81(3) prioritizes a parent as the best person to be granted custody, unless for good reason, disqualified. Section 83(1) of the Act provides for the factors or principles which the court should take into account in determining whether or not a custody order should be made in favour of the applicant. Under the provision above these factors include the following: -

a) the conduct and wishes of the parents or guardian of the child.

b) …….

c) ……

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 personal protection order ….. has been made in relation to the child concerned and whether the order remains in force

i) ……

j) the best interest of the child.

Proper but cursory examination of the above factors will confirm that they were all intended to consolidate the last factor i.e. "**the best interest of the child**." Indeed section 4(2) of the same Act summarizes the intention or purpose of the Act. It directs thus: -

> **"In all actions concerning children whether undertaken by public or private social institutions, courts of law or legislative bodies, the best interest of the child shall be a primary consideration."**

The Act then in subsection (3) of the said section 4 aforesaid, mandates thus: -

> **"All judicial and administrative 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"**

In adopting a course of action calculated to determine the child's best interest, the Act in Section 4(4) directs the following procedure to be followed as follows: -

> **"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."**

This court observes in addition to the provisions above that section 76(3) of the Act as well, stipulates matters which the court dealing with issues concerning a child, even if not necessarily in respect to custody, care or control alone, should consider or take regard of before making any such orders. The matters appear similar as those concerning custody under section 83(1) of the Act although more elaborated. Under section 76(3) they include the following: -

a) the ascertainable feelings and wishes of the child concerned with reference to the child's age and understanding.

b) the child's physical, emotional and educational needs…..

c) the likely effect on the child of any change in the circumstances.

d) the child's age, sex, religious persuasion and cultural background.

e) any harm the child may have suffered, or is at risk of suffering.

f) the ability of the parent, or any other person in relation to whom the court considers the question to be relevant, to provide for and care for the child.

g) the customs and practices of the community to which the child belongs.

h) …….

i) ……..

In my view, apart from describing the relevant factors which affect or will affect the child's welfare and best interests under section 76(3) of the Children Act aforementioned, the said provisions are really not any different from those enumerated under section 83 (1) for governing custody. Indeed, most of the factors in section 83(1) merely repeat in short-form the factors mentioned under section 76(3). They all stress the purport of section 4 of the Act which is that the best interest of the child shall be the primary consideration in orders made by the court or actions taken concerning a child.

It is therefore necessary to understand fully what the clause "**best interests of the child**" means so that the court will apply it from an informed position.

In Australian case of **U** vs **U** (2002-2003) CLR 238 at page 257, the court after deliberations, stated that in determining what is in the child's best interests, the court must take into account the following principles: -

a) Any wishes expressed by the child and any factors that the court thinks are relevant to the weight it should give to the child's wishes while all the time keeping in mind the child's age, maturity and/or level of understanding

b) The nature of the relationship of the child with each of the child's parents and with other persons.

c) The likely effect of any changes in the child's circumstances, including the likely effects on the child of any separation from the parents or either of them or any siblings of the child or any other person with whom the child has been and is living.

d) The practical difficulty and entailed possible expenses of the child to have contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relationships and direct contact with both parents on a regular basis.

e) The capacity of each parent to provide for the needs of the child including provision for emotional and intellectual needs.

f) The child's maturity, sex, and background …. And any other characteristics of the child that the court considers relevant

g) The need to protect the child from physical or psychological harm caused or to be possibly caused by being subjected or exposed to abuse, ill-treatment, violence or other behaviour that is directed towards the child….

h) The attitude to the child, and to the responsibilities of parenthood, demonstrated by each parent of the child.

i) Any family violence involving the child or a member of the child's family

j) Any family violence order that applies to the child or a member of the child's family

k) Whether it will be preferable to have an order that would be least likely to lead to the institution of further proceedings in relation to the child

l) Any other factor or circumstance that the court thinks is relevant.

Once more a careful examination of the above factors as listed in the case of **U** vs **U** aforementioned will confirm that they are very similar to those listed under our Children Act, sections 83(1) and 76(3). Interpretation of the factors in the **U** vs **U** case by the courts of Australia, a Commonwealth country, will therefore be very persuasive to this court.

It is my opinion accordingly that this court will be held to have upheld the best interests and welfare of the child, in this case of A.S.A. if and when it deliberates on and considers and applies, where applicable, the factors under sections 83(1) and 76(3) of the Children Act as for the time being, interpreted in **U** vs **U** case as well as other similar cases.

The collective purpose for these factors in my understanding, is to ensure that a child will receive adequate and proper parenting to help the child achieve his full potential, and to ensure that a parent or parents or those given custody, fulfill their parental duties and responsibilities concerning the care, welfare and development of their children.

Except when it would be contrary to the best interests of the child therefore, court orders made for custody, care and control will try to ensure that the child should know and be cared for by both parents regardless of whether the parents are married, separated, have never married or have even never lived together. The child should have a right of contact, on regular basis, with both parents and other people who are significant to the child's development, welfare and care. Where it is practical, the parents should be allowed to share duties and responsibilities concerning the child.

It is my understanding however the exercise of looking to and making orders for the future of a child is a difficult and peculiarly discretionary one. Difficult because the conditions or environment under which the court will usually make such orders will be stressful having been so brought about by the combative parents who often have come to court to claim custody in the framework of a fractured and emotional relationship. Under such atmosphere the court has to call for the Wisdom of Solomon, and even then, it may be unlikely that such a situation will admit of perfect solutions. In such circumstances, it is my view that the best interest and welfare of the child, which is paramount, would and should indeed, be viewed in the long term and not just a short term.

It is appropriate now to turn to the recorded evidence of the parties herein, to summarise and analyze the same before applying it to the circumstances of this case. In the process I will make my findings of fact and of law, while stating the reasons thereof.

The parties herein are a married couple. The child or minor who is the subject of this suit herein referred to as A.S.A is the couple's only child born during their marriage. Each party expressed a great love and affection for the minor. Evidence from both sides established that the parties lived together and cohabited as husband wife from 1995 until the end of the first half 2007. The minor always lived with them until May 2007 when he moved out with the Plaintiff-the father. It is not in dispute that since the minor and the Plaintiff moved away the Plaintiff has had custody, care and control of the child for a period now of just over three years. It is also clear that during the said period the Defendant had at first a shared custody at the shared matrimonial home, then had a weekly alternate access followed by a two hour weekly access to the minor. This was so despite some restrictions on the access allegedly imposed by the Plaintiff or as the latter stated, created by the unwillingness of the child who did not want to see his mother.

Be that what is may, this court is of the view that either parent is entitled to have custody, care and control of the child except where circumstances of the case will lead this court to make orders that the custody goes to one or the other of them in the best interest of the child. As was stated in the Court of Appeal case of **Joyce Muthoni Githunguri Vs Stanley Muguna Githunguri** (1982-88) KLR 9 at page 12,

"When dealing with the paramount consideration of welfare especially where young female children are concerned, there is a rule that the mother is normally the person who should have custody."

The appeal court at the same time quoted **Re S (an infant)** (1958)I AII ER, 783 at 786 and 787 which had laid the principle as follows: -

"I only say this; the prima facie rule (which is now quite clearly settled) is that, other things being equal, children of this tender age should be with their mother, and where a court gives the custody of a child of this tender age to the father it is incumbent on it to make sure there really are sufficient reason to exclude the prima facie rule."

Stressing the rule, the court in **Wambwa vs Okumu**, (1970) E.A. 578 stated: -

"I do not think it can be controverted that in the absence of exceptional circumstances, the welfare of a female infant aged 4 years …. demands that the infant be looked after by his mother rather than its putative father…."

The conclusion I make from the cited cases and others not cited which have applied the above principle, is that children of tender age should as rule be given to the mother rather than the father. If however the court finds that in a given case there are exceptional reasons why the custody cannot be given to the mother it can give the custody to the father. Such exceptional reasons, in my understanding, must be in the best interests or welfare of the child.

Turning to the evidence, I observe that the Plaintiff is a Kenyan citizen while the Defendant is a British citizen who has resided in Kenya throughout the two parties marriage period. It is not clear why the Defendant did not seek her husband's citizenship after the two married and settled in Kenya for good. However, the two begat the child now in dispute in Kenya during their marriage.

There was an issue raised as to whether or not the minor is a Kenyan or British citizen. The Plaintiff asserted that their son was Kenyan and has a Kenyan Passport. The Defendant did not deny the fact that the minor was born in Kenya and that he has a Kenyan Passport. At one time she said the child was Kenyan but at another she thought he was British. The conclusion I make is that since the minor, A.S.A. was born in Kenya and he has a Kenyan Passport, and there being no evidence that the child has British passport, prima facie, he is a Kenyan citizen.

I now turn to the principles stated under section 83(1) and and section 76(3) of the Children Act aforestated. These provisions are in a way, restated in the cited Australian case of **U** vs **U** earlier referred to.

Either parent feels entitled to the custody of their minor child, A.S.A. As earlier mentioned, each appeared to me to love and care for the child. Either parent tried to blame the other. For example, the Plaintiff asserted that he has always been there for the child. That he took the child to school and paid for all his aspects of education. That he took the child to the hospital and made sure that all the child's health needs were taken care of. He argued that the defendant did not really care for the child. That the defendant could during their marriage, go to the United Kingdom once or twice a year for the purported reason of medical check-ups but did not care as much for the child's health. That it was always him who cared and took him to hospital locally or even abroad.

On the other hand the defendant blamed the Plaintiff's conduct in relations to the boy. She said the plaintiff was unable to discipline the child; that he has always spoilt the child by giving him everything the child wanted. She also said that the Plaintiff was unfit to get custody because he was a past drug addict although she admitted that he has since then rehabilitated. She was not sure he could not relapse. Touching on the medical treatment which the Plaintiff asserted he has constantly enabled the child to get locally and abroad the Defendant testified that much of the treatment was unnecessary, or misdirected or even forced on the child.

I have carefully considered the evidence of both parties. The impression made in my mind, however, is that, while both parents love and care for the child A.S.A., the father has always been closer to the child than the mother. In my view this did not start in May 2007 when the two parties physically separated and the Plaintiff moved to another house with the child. The evidence suggested that this was always so even when the parents lived together at their River-Side's matrimonial home. There is evidence also that even in the house the father took a closer care and attention to the child by trying to know or follow on what the child was doing. He took him out for social escapades such as motocross, hunting and several others.

As compared to the Defendant the Plaintiff made an impression to this court of a more caring parent. It is not certain whether the Plaintiff's alleged softer approach to the child was a weakness, as asserted by the Defendant. The impression made was that he was indeed softer but not necessarily weaker. Indeed the minor confirmed to the court during the private session with him that his father was very firm on his decisions and that he insisted on the boy following instruction and discipline persistently, till the instructions given are followed.

On the same point the child expressed the view that his mother might shout at him to follow instructions, but did not have or show the patience to follow up to make sure her instructions are followed to the end. The child who looked quite mature and intelligent to me impressed me as one telling what he had observed for a considerable period. He impressed the court as one stating what he believed to be the state of things as he was then in his state as a child.

In conclusion, while either party would generally be entitled to have custody care and control. On the above issue as to who always cared for the child most, or better, or spent most of his/her time with the child, or cared for his social, educational and health aspects, however, it became evident from the record, that the Plaintiff, rather than the Defendant, did so. There is evidence also that the Defendant visited the United Kingdom once or twice a year for medical check-ups. She sometimes stayed away from Kenya and therefore from the child for two to three months at ago in each year. The Plaintiff's view was that the periods away by the Defendant were by her own choice because she liked staying away from the family. The Defendant denied this interpretation.

Whatever the truth may be, however, the fact remains that she remained away from her family and more so from her child who in the circumstances got closer and more attached to the Plaintiff. While it may not be fair to blame the defendant for being away yearly for medical grounds, nevertheless, the Plaintiff should not be to blame either if the child ended living closer to him more than he did to Defendant.

The next issue I will examine is the ascertainable feelings and wishes of the child, A.S.A., taking into account the child's age and understanding.

Both parents testified that A.S.A., is an intelligent, understanding and quite mature child for his age which is now 13 years. They both agreed that circumstances have placed the child closer to the Plaintiff than to the Defendant. As earlier noted, the closeness between the Plaintiff and the child developed due to the fact that the father stayed close to the child even before the parents physically separated. There is the factor also that fate threw the two together when the Defendant was from time to time away in England every year. This as far as the court can deduce, clearly influenced the child to trust and love his father more than he did his mother, a situation this court has no easy way of reversing without hurting the boy.

During the court interview with the child, the latter came out very clearly about his feelings and wishes. He said he loved and trusted his father more than he trusted his mother. He said he understood well that the two parents were fighting over his custody, care and control. He chose to reside with his father as has been the case since June 2007. He said he knew the court has power to order that he goes to live in the custody and control of his mother. He however implored the court not to make such an order as that would be contrary to his feelings and wishes. That he respected and loved both his parents generally but loved his father more because the latter loved and respected him more. He also said that this kind of relationship did not start just recently but has been there even when the parently lived in the same house. He further said that his mother spoke ill of his father and used abusive words against him even when he, the child, was present, while father did not abuse her nor refer to her in abusive language. He further

stated that his father made sure that he, the child, got corrected, even through punishment and was more practical in his approach so as to make sure that things are done. He would for example take away the TV or mobile phone until the child had done his homework or corrected a mistake. Not so his mother. He concluded that if the court nevertheless gave his custody to his mother, he would want his father to visit him daily probably to make him feel happy and secure.

I have considered the wishes and feelings of the child expressed in his statement to the court with a lot of caution. As stated in the **Treatise *"Family Law"*** by P M Bromley, 6th Ed. At page 297: -

> **"… But it must be remembered that the child may have been coached by one parent and that sometimes the child's own wishes are so contrary to its long-term interests that the court may feel justified in disregarding them altogether"**

A court has to be very cautious before wholesomely accepting a child views or wishes.

In this case A.S.A. is about 13 years old. He appeared mature, intelligent and knowledgeable. His answers to the court questions did not appear as ones coached. Every time he was asked a question he carefully thought out an answer before he responded. He showed a high reasoning ability which suggested to the court that he had not kept ready answers to questions. While his answers did not bind the court which has discretion to reject them, the court was, however, positively impressed that the child spoke facts he had observed about his parents over some period. The court accordingly noted that the child's feelings and wishes were that he be allowed to continue living under the custody, care and control of his father.

The child's age is now 13 years. He is male. He is intelligent, understanding and appears mature even for his age. He comes from a Hindu background which is the religion of both parties herein. He also enjoys a similar cultural background.

It became clear from the evidence, however, that the influence of the father on the child was strong and could not be denied or downplayed. Clearly the Plaintiff guided the life of the child, A.S.A. than has the mother. Indeed the mother's influence appears to be disappearing unless this trend is reversed. This raises the question – how would the court reverse the trend without hurting the child and thus acting against his best interests? The court will revert to that issue in a moment.

Has the child suffered any harm so far? If so how and by whom? Both parties admitted that A.S.A. has in the past suffered mental and psychological torture. Both said that this came about when the parties started fighting over who should keep custody, care or control. But even before the parties separated there is evidence that all was not well. Evidence suggested that they scrambled over the child with his full awareness. It would appear to have started as far back as 2003, which then raised a need for the child to see a psychologist like Dr. Kirindi. Although the Defendant in her testimony denied being aware of such psychological medical treatment, the court did not believe her. This is so because 2002 to date is along period and if she lived closely to the child and cared about his health she could not miss to detect such a continuous adverse event. In any case if she could admit the fact that the child is disturbed by the two parents conduct, even if the causer was only the Plaintiff as she claimed, that fact alone would somewhat draw her attention to the child's need for such medical treatment. It is only if she paid too little attention to the boy's welfare that she could totally miss to notice or know the child's mental state.

The parents of the child blamed each other for the psychological and mental harm that apparently befell the child. The conclusion I make is this: that both are held responsible for such harm in so far as they openly exposed the child to their psychological and possibly physical warfare. But the Plaintiff did better in arranging for medical treatment from the time he noticed it while the Defendant did little on that score. It would have been adequate on her part to have tried to take the child for the specialized medical attention even if she might not herself have paid for it or she could have pushed the plaintiff to do so. There is no evidence however, that she tried either. Her answer that she did not know that the child was unwell is not in her favour as a mother who claimed closeness to the child.

On the other hand Plaintiff testified that the Defendant from time to time administered physical harm on

the child. He alleged that Defendant poked the child's nose with a pen. He further asserted that Defendant at another time pulled the child's hair or pinched him. There was evidence also that as a result of the probable physical assault the Plaintiff, at one time was forced to report the matter at a Police Station which soon after preferred a criminal charge against the Defendant. The Defendant however, denied physically assaulting the child and stated that the criminal charge preferred against her was done by the Plaintiff without reasonable cause. She said that the charge had to be withdrawn for the same reason while the Plaintiff explained that he withdrew the criminal charge to maintain better relationship with the Defendant because the Hindu Community wanted it withdrawn, to have it resolved by leaders.

The view the court takes is that the differences between the parties having arisen from a domestic quarrel, the police must have been convinced that it was more than such domestic affair before it preferred criminal charges against the Defendant. In those circumstances a decision to prefer charges must have arisen from the evidence raised on investigations by the police. Considering the fact that the child himself first complained of the assault, it will not be reasonable for the Plaintiff to have entirely ignored the child's complaints. This court cannot easily condemn the plaintiff for reporting the child's complaint to the police if as in this case it was done to protect the child in a persistent situation. Nor can it do so for his withdrawal of the charges when he realized it was affecting the child more adversely than earlier acknowledged, and in the best interests of the child.

In her evidence the Defendant described one incident which might throw some light to this issue of physical assault. She said that she took the child out for dinner during her dates of access to the child. That when they returned home at 9.30 p.m., the child ran to his grandparents crying and alleging that his mother had assaulted him. The child was rushed to Aga Khan Hospital for medical treatment. The Defendant denied assaulting the child. She could however not explain why in the absence of the Plaintiff and after a good dinner between her and the child, the latter could without any reasonable ground run screaming and alleging that she had assaulted him.

There is some further evidence recorded by the lower court by Honourable Mbugua, SRM on 17th July, 2008 in which the court recorded the child as complaining that his mother had been shouting at him and that she had at one time "**hit him leaving him with injuries**" The child then complained that while he would want to continue seeing her mother, the access days should be reduced from one week to two days. The child also wanted her mother to stop talking ill of his father to him.

Before this court the child on 17th March, 2009 stated that he went away from the matrimonial home in company of his father because "…**I feared that if I remained with her she would continue to treat me badly…"** And later he again said **"….. My mother would take away my phone and beat me."**

Taking into account all the available evidence over this issue of physical harm against the Defendant, the conclusion I came to, despite her denials, is that there is adequate convincing evidence to support the Plaintiff's and the child's assertion that the Defendant physically assaulted or harmed the child on the occasions alleged. In that respect and repeating the child's fear as expressed above, the court concludes that that there is a likelihood that the defendant might continue harming the child in the future. The Defendant did not anywhere in her evidence own up her actions and undertake not to repeat them. Such a conduct of beating or assaulting the child is and will not be in the best interests or welfare of A.S.A. In the circumstances this court has reason to remove the probability of harm happening again in the future.

The ability of the parent to provide and care for A.S.A., is among other factors to be considered in the issue as to who should be given custody. However, it is my understanding that the fact that one of the two parents is in a better financial or material position to give the child a better start in life than the other, does not give the first one a prior claim for custody. It is more the happiness of the child, not the material prospects which this court would be concerned with. Obviously however, a party's financial position cannot be ignored entirely. It follows that if a party is so poor that he/she cannot provide a home for the child or children, this in itself might be sufficient reason to refuse him/her custody, as was stated in **Re Story** (1961) 2 I.R 328, 345-346. And in **Re F**., (1969) 2 Ch 238, the same principle was restated that "**a parent who can offer a child good accommodation must, other things being equal, have the edge over one who cannot."**

At home here in Kenya the court in the case of **S.O** v **L.A.M** (2009) e KLR, 6 put the same principle thus: -

> **"It is our considered view that an order awarding custody to an unemployed mother of the child who has no means of getting reasonable accommodation for the child, will not be in the best interest of that child unless provisions are made for accommodation, more so if the father of the child, as the appellant herein, is able to provide such accommodation for him…… It is of course true, that by a side wind the mother will benefit from the provision of housing. That is because the court (came) to the conclusion that the interest of the child demanded that he live with his mother. The order for payment of rent flows from the order awarding the respondent the care and control of the child……."**

In this case before me the Defendant stated that she and the child, A.S.A. have all along depended on the Plaintiff for full maintenance inclusive of education health and other social amenities for A.S.A. She stated further that her last employment was in 2004 when also she had a work permit to work in Kenya. She said she presently does not have a work permit and did not see quick prospects of getting a job soon. She accordingly clarified that if the court gives her custody, care and control of A.S.A., it will also find it imperative to give orders against the Plaintiff, not only for the child's but also for her maintenance. If that happens so, this case will properly and suitably tie in with **S.O** v **L.A.M** case aforementioned.

There is presently an interim order for custody care and control of A.S.A. made by the lower court in favour of the Plaintiff. It is this court's view that such order would have been made under section 88(1) of the Children Act and should have been reviewable every twelve months. Neither party however, appears to have sought such review. The order still remains in force in favour of the Plaintiff. There can be no doubt that the order which has lasted three years undisturbed must have allowed the child to adopt the Plaintiff's standard of life and life style. Unless the present life style and life standard can be shown to be of some disadvantage to the child in particular, it should not, in the best interests of the child be easily altered by moving the child from where he is presently.

The conclusion above calls for the examination of the possible or likely effect on A.S.A. of any change of the existing custody orders in favour of the Plaintiff. The child has lived in the Plaintiff's custody, care and control since 23rd June, 2006. Considering the circumstances of this case, in particular the hostility between the Defendant and the Plaintiff, the court finds no good reason to alter the interim order. The child was clearly hostile to living with the defendant. He confirmed so in the lower court and before this court, as well. The Defendant from the evidence, continued leaving Kenya for the United Kingdom for one to three months on end, every year since 2006 and even before. It would have been impossible for the child to live with any other person other than his father during such periods.

Furthermore the child attended school, mostly day school, except for a short period towards the end of 2008. Again it would not have been possible not to leave the child in the care and control of the Plaintiff.

Finally, the Plaintiff throughout their marriage remained the provider in all aspects for the child. Even if the defendant were continually in Kenya, the Defendant would, not withstanding everything else, go to the Plaintiff for financial support. The child would accordingly still find it necessary and more convenient to live with him.

It is my view that removing the child from Plaintiff's custody after such a long period of time, will adversely affect the child's well-being. It will likely make him angry or mix him up or confuse his mind. This will probably interfere with his settled way of living. The child expressed his feeling and wishes that he should be left under the control and care of the plaintiff. The court believes that his wishes have not only been expressed in very clear strong terms but that they in the present circumstances make much sense, taking into account the best interests of the child as defined in the case of **U** v **U** earlier considered.

The Defendant has no job and has no prospect for a job in Kenya soon since she does not have a work permit. She has no independent accommodation of her own and cannot presently nor in the near further easily afford one. She only hopes that the court will provide for her by an order in the child's and her

favour. She clearly expressed her belief that their marriage with the Plaintiff is irretrievably broken down, a view which was confirmed by the Plaintiff. This means that the likelihood of a divorce or possible, a nullification at the instance of either of the parties herein could be inevitable. If the marriage came to an end, the likelihood is that the Defendant may have no alternative but to leave for the United Kingdom where she is a citizen although she denied it. While no evidence was led by either party on such a prospect becoming a reality, to enable the court examine the issue and weigh the principles of law governing it, nevertheless, it is prospect which cannot be ignored by court. More so when considering the best place for the child when or if she decides or is forced by circumstances to leave Kenya. The conclusion I reach therefore is that the Defendant's incapacity to immediately provide for accommodation and maintenance for the child and the ability of the Plaintiff thereto, weigh against the Defendant in respect to custody, when taking into account the best interests and the welfare of A.S.A, there son.

Since I have already made a finding that there is evidence of physical and mental or psychological harm on the child by the Defendant, and that there is a likelihood that it may be repeated, I hereby further find that it might not be in the best interest of A.S.A. to be placed under the custody of the Defendant. The emphasis is laid on the fact that if the physical harm took place while the child was in the joint custody of the two parties or when he was in the sole custody of the Plaintiff, then it is more likely to even increase if full custody is granted to the Defendant . The court has obligation to remove any prospect that is likely to harm the child in future.

I have examined, acknowledged and accepted the legal principle that a child of tender age in respect to custody, care and control should be given to the mother in the absence of exceptional reasons. This is because a mother generally is best disposed to provide better quality care to such children than the father. This is a rule of paramount importance and consideration in these cases where the best interests of the child must be upheld.

A child of tender years is described under section 2 of the Children Act aforesaid as **"a child under the age of 10 years**". This means to me that A.S.A. who is presently 13 years old is not a child of tender years who will strictly be affected directly by the above **tender age rule**. Apart from this, and even if a 13 years old A.S.A were to be held as "**tender**", nevertheless the court, from the evidence, has established that he is mature, intelligent and understanding. Furthermore, he is a male child as the Plaintiff is male. The cases cited herein accordingly are easily distinguishable since the children described therein were younger than ten years and were female in cases where the applicant for custody was the father. Not so in this case.

The Defendant put much emphasis on the Plaintiff's past drug and alcohol addiction. Having carefully considered the same, I have come to the conclusion that it is not a live risk to the child presently. The Plaintiff appears to have successful been rehabilitated since nine years ago. The Plaintiff, who did not deny the addiction, categorically asserted that he was completely cured. The Defendant was not heard to deny the rehabilitation. I concluded that the drug and/alcohol risk from the Plaintiff to child, does not exist. It is therefore of little importance in this-case presently.

Taking into account all the evidence on the record and having considered all the factors listed and analysed in this judgment, it is my considered opinion that the person presently better suited to have custody, care and control of the minor A.S.A is the Plaintiff M.S.A.

Before making the final orders, it is important to note that it it not a light thing for the Defendant to completely lose custody, care and control of her only child. It is with great sadness that I will therefore make the adverse order against her. However, it is the best interests and welfare of the child that dictated this court's judgment and final orders. I found in the process that the child's wishes were genuinely his own and were not contrary or adverse to his long-term best interests. This court could not accordingly in its discretion, disregard them.

The concern that the child should grow and develop with the help of both his parents, will be taken into account in the issue of access which the Defendant will be given in respect of the child. The access will be in the best interests of the child in view of the fact that the court established the fact that A.SA. is

presently and in the recent past losing the close touch and contact with his mother. It will however be observed that the access to be given to the Defendant to keep contact with A.S.A. after the custody, care and control orders are given to the Plaintiff, will and should not in anyway hamper the Plaintiff's choices of his and the child's way of life. The Plaintiff would however be expected to reasonably choose a balanced kind of life because such life is bound to affect the child one way or the other. What remains clear however, is that so long as the Plaintiff in his freewill has or will choose such reasonable way of life, the Defendant who has not been given custody will well have to bear with the life-style the Plaintiff chooses, even though the court and the community offers her every sympathy. It is the interests of the child which are paramount, not the interests of the parents, let alone those of one of them.

ORDERS

1. the Plaintiff, **M.S.A**, is hereby authorized to have and keep the custody, care and control of his and Defendant's son, herein referred to as A.S.A. until the minor attains the age of eighteen years, subject however to the right of access herein granted to the Defendant, **P.K.A** as properly described in the order No. (2) following.

2. The Defendant, **P.K.A**, is, subject to the order No. (1) above, hereby granted an unrestricted visitation rights and access to her child, A.S.A, from 3.30 p.m. to 5.30 p.m. on Wednesdays and Fridays of every week except during A.S.A.'s school holidays when such visitation and access shall be increased to 3 days a week to include Mondays from 3.30 p.m. to 5.30 p.m. with liberty to the parties to apply to adjust the times to their joint convenience as well as to the convenience of the child.

3. The Defendant **P.K.A** is hereby permanently restrained by herself, her agents or by any other person acting on her behalf, from withdrawing of the child herein referred to as A.S.A. but otherwise fully known as **A.S.A** from the jurisdiction of this Hounourable Court and the Republic of Kenya.

4. Each party shall bear own costs.

Dated and delivered at Nairobi this 1st day of July, 2009.

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D A ONYANCHA

JUDGE