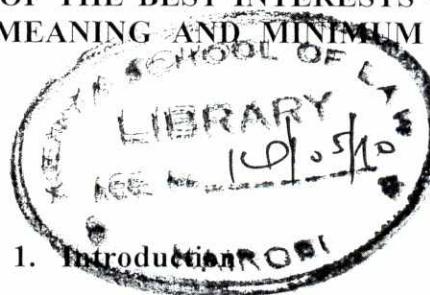


REVISITING THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD: ITS LEGAL PRESCRIPTION, MEANING AND MINIMUM OPERATIONAL STANDARDS

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1. Introduction

The United Nations Convention on the Rights of the Child, arguably an instrument codifying rules of customary international law due to its near universal acceptability, defines a child as every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. This leaves room for different national legal regimes to set their own municipal standards on the maximum age at which one enjoys childhood or one is to be regarded as a child. The African Charter on the Rights and Welfare of the Child defines a child as every human being below the age of 18 years.

Whereas the ceiling of 18 years has presented lesser controversy as the mark for the end of childhood, the controversy surrounding the commencement of life has culminated in many municipal and international regimes of law refraining from venturing to prescribe when childhood commences. The United Nations General Assembly Declaration on the Rights of the Child of 1959 attempted to venture into this controversy albeit without precision by stating in the Preamble that a child “needs special safeguards and care, including appropriate legal protection, before as well as after birth”. The hint is clear, the subject of protection under the Declaration, the child, pre-exists his/her birth.

By their very nature children have special needs. This arises out of their vulnerability and state of dependency on account of their physical and mental immaturity. Children are physically vulnerable. They cannot be expected to defend themselves and provide for their needs compared to their adult counterparts. Mentally, emotionally and spiritually, children are impressionable. If the environment in which they are brought up is not

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regulated, children can be exposed to and influenced by negative and even destructive ideas. The malleability of children can on the converse be tapped into so that they are brought up in a manner that is definitive of the ideal society that we all aspire to have.

It is now appreciated that there is a danger of creating laws of universal application without due regard to the relative differences between the peculiar needs and characteristics of the subjects of the law in society. Such an approach would inevitably place minority groups in a position of relative disadvantage. The trend has, therefore, been to make laws or legal provisions that have specific provisions to specific categories of minorities and people or groups of people with special needs in society. One such group with special needs is the category consisting of children. Both at international, regional and municipal levels, the trends have been to make laws that specifically govern matters touching on children.

To realize a proper upbringing of the child, certain principles have been evolved to guide manner in which we treat children wherever situated. These principles, in order to be binding and of benefit to their subjects, the children, have been expressed through legal instruments. One of the most cross-cutting principles is the principle of the best interests of the child.

The best interests of the child, the regulating principle regarding children's rights is based on the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development, making full use of their potential. The basic dictate of this principle is that the best interests of the child should be the paramount consideration in making any decisions and the taking of any actions in respect of children.

2. The Best Interests of the Child as Prescribed by International Legal Instruments

A number of legal instruments have made provision for the principle of the best interests of the child in the realm of international law. The language of these instruments has been as follows;

The 1924 Geneva Declaration of the Rights of the Child¹ arguably the oldest international instrument on the rights of the child commences with a recognition that “mankind owes to the Child the best that it has to give”.

Taking cue, the Declaration of the Rights of the Child of 1959,² declares, among other things, that “the child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. *In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.*”³

In its prescriptions on dealing with juvenile offenders, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")⁴ require that the juvenile justice system should emphasize the well-being of the juvenile⁵ and further that the well-being of the juvenile shall be the guiding factor in the consideration of her or his case.⁶ All these instruments would constitute what in international law is called “soft law” since being Declarations, they are not binding. The exception is where the declarations evolve into norms of customary international law hence binding.

The first legally binding international instrument on the rights of the child is the United Nations Convention on the Rights of the Child (CRC). Owing to the number of state parties that have ratified and acceded to the CRC and the number of countries that have adopted the prescriptions of the CRC into their domestic legal systems, the CRC has, arguably, assumed the status of customary international law. On the principle of the best

¹ Adopted Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924)

² G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959)

³ Declaration Number 2 to the Declaration of the Rights of the Child of 1959.

⁴ G.A. res. 40/33, annex, 40 U.N. GAOR Supp. (No. 53) at 207, U.N. Doc. A/40/53 (1985)

⁵ Rule No. 5

⁶ Rule 17.1(d).

interests of the child, the CRC prescribes that “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.”⁷

The General Assembly of the United Nations in adopting the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts⁸ expressed its adherence to the principle that the best interests of the child are to be a primary consideration in all actions concerning children.

The recent International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities⁹ provides, among others that “in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.”¹⁰

The justification of the best interests of the child, as indeed all other guarantees for children, is the recognition that children have peculiar needs and they face peculiar challenges attendant to their very state of being children.¹¹

From a regional front, regional human rights instruments with a bearing on the rights of the child have captured the principle of the best interests of the child in the following manner:

The European Convention on the Exercise of Children's Rights¹², in its preamble expresses the conviction of the Member States of the Council of Europe that the rights and best interests of children should be promoted.

⁷ Article 3 to the Convention on the Rights of the Child.

⁸ G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000), *entered into force* February 12, 2002

⁹ G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), *entered into force* May 3, 2008

¹⁰ Article 7.

¹¹ See the following Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10)

¹² (ETS No. 160), *entered into force* January 7, 2000

The African Charter on the Rights and Welfare of the Child at Article 4 dictates that in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

In its prescription of nationality rights, states parties to the League of Arab States, Arab Charter on Human Rights¹³, are obligated to take such measures as they deem appropriate, in accordance with their domestic laws on nationality, to allow a child to acquire the mother's nationality, having due regard, in all cases, to the best interests of the child.¹⁴

From the Inter-American Human Rights System, Article 19 of the American Convention on Human Rights obligates the States Parties to develop legal norms to ensure protection measures required by children as such.

It is apparent from all these instruments that children have been identified as subjects of special protection by law and its instruments.

3. The Recognition of the Best Interests of the Child in the Jurisprudence of International Judicial/Quasi Judicial Tribunals

The United Nations Convention of the Rights of the Child establishes a Committee on the Rights of the Child as a monitoring and therefore enforcement institution of the treaty. Regionally, the African Charter on the Rights and Welfare of the Child creates the African Committee of Experts on the Rights and Welfare of the Child. Both bodies, mandated to supervise the implementation of the respective treaties by member states have quasi juridical status. Children, as human beings, are subject to other judicial tribunals created under the diverse human rights treaties.

The Human Rights Committee has laid emphasis on the principle of the best interests of the child in a number of its General Comments. It has identified various facets of situations in which children find themselves and provided broad guidelines on how to secure the best interests of the child in its General Comments.

¹³ 12 Int'l Hum. Rts. Rep. 893 (2005), *entered into force* March 15, 2008

¹⁴ Article 29.

In its General Comment Number 10 the Committee on the Rights of the Child opined that:

In all decisions taken within the context of the administration of juvenile justice, the best interests of the child should be a primary consideration. Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.¹⁵

In General Comment Number 1, the Committee on the Rights of the Children while addressing state parties on the best interests of the child in the context of educational systems that they put in place stated thus:

(On) the obligations of State parties in relation to the establishment of educational systems and in ensuring access thereto, article 29 (1) underlines the individual and subjective right to a specific quality of education. Consistent with the Convention's emphasis on the importance of acting in the best interests of the child, this article emphasizes the message of child-centred education: that the key goal of education is the development of the individual child's personality, talents and abilities, in recognition of the fact that every child has unique characteristics, interests, abilities, and learning needs. Thus, the curriculum must be of direct relevance to the child's social, cultural, environmental and economic context and to his or her present and future needs and take full account of the child's evolving capacities; teaching methods should be tailored to the different needs of different children. Education must also be aimed at ensuring that essential life skills are learnt by every child and that no child leaves school without being equipped to face the challenges that he or she can expect to be confronted with in life. Basic skills include not only literacy and numeracy but also life skills such as the ability to make well-balanced decisions; to resolve conflicts in a non-violent manner; and to develop a healthy lifestyle, good social relationships and responsibility, critical thinking, creative talents, and other abilities which give children the tools needed to pursue their options in life¹⁶

Commenting on the role of independent national human rights institutions in the promotion and protection of the rights of the child, the Committee on the Rights of the Child has advised that:

In accordance with article 3 of the Convention requiring that the best interests of children should be a primary consideration in all actions concerning them, ensure that the impact of

¹⁵ Committee on the Rights of the Child, General Comment No. 10, Children's rights in juvenile justice (Forty-fourth session, 2007), U.N. Doc. CRC/C/GC/10 (2007)

¹⁶ Committee on the Rights of the Child, General Comment No. 1, The Aims of Education, U.N. Doc. CRC/GC/2001/1 (2001)

laws and policies on children is carefully considered from development to implementation and beyond;¹⁷

The question of HIV and AIDS has been central in conversion of children to Orphans and Vulnerable Children. In its General Comment No. 3, on HIV/AIDS and the right of the child, the Committee in the Rights of the Child's advice to state parties was:

Policies and programmes for the prevention, care and treatment of HIV/AIDS have generally been designed for adults with scarce attention to the principle of the best interests of the child as a primary consideration. Article 3, paragraph 1, of the Convention states "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". The obligations attached to this right are fundamental to guiding the action of States in relation to HIV/AIDS. The child should be placed at the centre of the response to the pandemic, and strategies should be adapted to children's rights and needs¹⁸

C The Committee in its General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child, addressed the principle of the best interests of the child states that:

The principle requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions - by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.¹⁹

In the context of displacements of persons owing to natural and human factors and other calamities, situations of unaccompanied children are inevitable. How do we address the best interests of the child in such circumstances? The Committee on the Rights of the Child, in its General Comment No. 6, on Treatment of Unaccompanied and Separated Children Outside their Country of Origin advices that:

In the case of a displaced child, the principle must be respected during all stages of the displacement cycle. At any of these stages, a best interests determination must be documented

¹⁷ Committee on the Rights of the Child, General Comment No. 2, The role of independent national human rights institutions in the promotion and protection of the rights of the child, U.N. Doc. CRC/GC/2002/2 (2002)

¹⁸ Committee on the Rights of the Child, General Comment No. 3, HIV/AIDS and the right of the child, U.N. Doc. CRC/GC/2003/3 (2003)

¹⁹ Committee on the Rights of the Child, General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), U.N. Doc. CRC/GC/2003/5 (2003)

in preparation of any decision fundamentally impacting on the unaccompanied or separated child's life.

A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. Consequently, allowing the child access to the territory is a prerequisite to this initial assessment process. The assessment process should be carried out in a friendly and safe atmosphere by qualified professionals who are trained in age and gender-sensitive interviewing techniques.

Subsequent steps, such as the appointment of a competent guardian as expeditiously as possible, serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child. Therefore, such a child should only be referred to asylum or other procedures after the appointment of a guardian. In cases where separated or unaccompanied children are referred to asylum procedures or other administrative or judicial proceedings, they should also be provided with a legal representative in addition to a guardian.

Respect for best interests also requires that, where competent authorities have placed an unaccompanied or separated child "for the purposes of care, protection or treatment of his or her physical or mental health", the State recognizes the right of that child to a "periodic review" of their treatment and "all other circumstances relevant to his or her placement"²⁰

In its General Comment Number 7 on the implementation of child rights in early childhood, the Committee on the Rights of the Child has sought to emphasize the principle of the best interests of the child in two contexts, to wit;

Best interests of individual children. All decision-making concerning a child's care, health, education, etc. must take account of the best interests principle, including decisions by parents, professionals and others responsible for children. States parties are urged to make provisions for young children to be represented independently in all legal proceedings by someone who acts for the child's interests, and for children to be heard in all cases where they are capable of expressing their opinions or preferences;

Best interests of young children as a group or constituency. All law and policy development, administrative and judicial decision-making and service provision that affect children must take account of the best interests principle. This includes actions directly affecting children (e.g. related to health services, care systems, or schools), as well as actions that indirectly impact on young children (e.g. related to the environment, housing or transport)²¹

Children, with disabilities, like other vulnerable children, has special needs. How do we address or secure their best interests? The Committee on the Rights of the Child, in its General Comment No. 9 on the rights of children with disabilities insists that:

²⁰ Committee on the Rights of the Child, General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside their Country of Origin (Thirty-ninth session, 2005), U.N. Doc. CRC/GC/2005/6 (2005)

²¹ Committee on the Rights of the Child, General Comment No. 7, Implementing child rights in early childhood (Fortieth session, 2005), U.N. Doc. CRC/C/GC/7/Rev.1 (2006)

Article 3 should be the basis on which programmes and policies are set and it should be duly taken into account in every service provided for children with disabilities and any other action affecting them.

The best interests of the child is of particular relevance in institutions and other facilities that provide services for children with disabilities as they are expected to conform to standards and regulations and should have the safety, protection and care of children as their primary consideration, and this consideration should outweigh any other and under all circumstances, for example, when allocating budgets²²

The Inter-American Court on Human Rights had occasion to address itself on the principle of the best interests of the child in its advisory opinion on **Juridical status and human rights of the child**²³.

This regulating principle regarding children's rights is based on the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development, making full use of their potential, as well as on the nature and scope of the Convention on the Rights of the Child. ... The need to adopt these measures or care originates from the specific situation of children, taking into account their weakness, immaturity or inexperience. .. In conclusion, it is necessary to weigh not only the requirement of special measures, but also the specific characteristics of the situation of the child

4. Best Interests of the Child in the context of Kenya's municipal law as interpreted and applied by the Courts

Prior to the enactment of the Children Act, matters of concern to children were provided for under a number of statutes, to wit; the Children and Young Persons Act, the Guardianship of Infants Act and the Adoption Act. All these statutes have since been repealed by the consolidating Children Act, 2001.

The Children Act of 2001 was enacted as an Act of Parliament to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institutions; to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes.²⁴

Regarding the principle of the best interest of the child, the Act, understandably, does not define what it means. This is understandable for two reasons, first, because none of the

²² Committee on the Rights of the Child, General Comment No. 9, The rights of children with disabilities (Forty-third session, 2007), U.N. Doc. CRC/C/GC/9 (2007)

²³ Advisory Opinion OC-17/02, August 28, 2002, Inter-Am. Ct. H.R. (Ser. A) No. 17 (2002)

²⁴ See the Long title to the Children Act, 2001.

international instruments that gave homage to the principle attempted a definition of the same. Secondly, a definition by its very nature is limiting to the scope of application and yet, what is in the best interest of the child is better left to the circumstances of the case and the sound judgment of the person applying the principle. Be that as it may, guidelines on ascertaining what is in the best interests of the child in dealing with various matters touching on the child are necessary. It is against this need that the statute lays down the factors to guide a decision maker or any other person vested with authority of matters with regard to children.

A number of court decisions have made reference to the concept of the best interest of the child in reaching a verdict one way or the other on matters where children are involved. It is one thing for a judicial officer to assert that he shall be guided by a particular principle of law and quite another to apply that principle in reaching the decision on the matters in issue. Whether upon critical analysis of the actual facts of the cases and the final verdicts of the court it can be said that the principle of the best interests of the child has, in fact, been applied has remained a debatable question. The debate turns on a case by case analysis.

Some of the aspects in respect of which the best interest of the child is required to be considered are the following:

A. Best Interest of the Child as an Overall Primary Consideration.

Section 4 of the Children Act deals with the issues of survival and the best interests of the child. It expressly recognizes the principle as a defining principle in dealing with manners pertinent to the child in the following terms;

“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.²⁵

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

²⁵ Section 4(2) of the Children Act.

best interest 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.²⁶

In all matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity.²⁷.

It can be deduced from the foregoing that pure legalism for the sale of legalese is not permissible when dealing with matters regarding children. It is, therefore, arguable that when dealing with matters regarding children, departure from the strict legal dictates and guidelines may be necessary if, in the circumstances of a particular case, the interests and welfare of the child so dictate.

B. The Best Interests of the Child and the power of Courts to make orders regarding a child

Any consideration for or against the making of an order that has an effect on a child is expressed to be subject to Section 4 of the Act. Section 4 of the Children Act is the general principle on the best interests of the child provided above. In very specific terms, the court is called upon not to make any order in respect of a child “unless it considers that doing so would be more beneficial to the welfare of the child than making no order at all.”²⁸

The statute then proceeds to give an elaborate set of matters that the court must have regard to in considering whether or not to make an order with regard to a child. It is arguable that the elaborate list of considerations that must be borne in mind by the court are, themselves expected to secure the best interests of the child. The provision for consideration of the best interests of the child, in spite of these specific considerations, suggests that an indefinite margin of appreciation is left for the court to determine each case on its peculiar facts to the extend that such discretion provides the child with the best that the order of court can offer.

²⁶ Section 4(3) of the Children Act.

²⁷ Section 4(4) of the Children Act.

²⁸ Section 76(1) of the Children Act.

C. Best Interests of the Child and Child Custody

The issue of child custody is one of the many matters that are dealt with under the Children Act. Many factors and principles are prescribed in determining whether or not a custody order should be made in favour of an applicant. One of the principles provided for to guide the court in determining a custody question one way or the other is “the best interest of the child”.²⁹ There are nine other principles provided for under the material section of the Act resolving custody applications. On the face of it, these nine principles are structured to be the minimum operating standards guide the court to secure the best interests of the child. The addition of the tenth principle, that is, “the best interests of the child” again points to a discretionary margin left to the person/official determining the custody question to put into account any peculiar circumstances of the case.

In the case of **M.C & Another Vs P.K**,³⁰ the court had to confront a dispute between a child’s parent and a child’s grandparent for custody of the child where through the Act expressly recognized it as a right of the child to live with the parents, the facts of the case pointed to the interests of the child being better protected with the child being in the grand parent’s custody. The court dealt with the question as follows:

Be that as it may, section 6(1) of the Act clearly stipulates that “a child shall have a right to live and be cared for by his parents. It is my humble opinion, imperative that the court takes into account several issues in determining whether this application is meritorious; the most important being that the interest of the minor is paramount and that that of his parents is secondary. That being the case, such issues would be; the desirability of disturbing the minor’s life by allowing the respondent to take him away from his grandfather, with whom he has lived for the last forty six months. It is important to note that the Respondent has not been involved with the minor since the minor was six months old and that at fifty two months, the only adult whom the minor knows well and with whom he relates is the 1st appellant. It can therefore be safely assumed that that is the person whom he currently regards as his parent and to remove him from people whom he has lived with for the said period of his life, which period is the most important of his formative years would not in my view be beneficial to the minor.

Nonetheless, the decision that has made express reference to and attempted to interrogate the parameters of the concept of the best interests of the child in the context of child

²⁹ Section 83(1)(j) of the Children Act.

³⁰ Eldoret High Court Civil Case Number 62 of 2006

custody disputes is the case of **M. S. A. Vs P. K. A.**³¹. First, the court had to interrogate the statutory guidelines in matters of custody. In this regard, the court noted;

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.

In its evaluation of these factors as spelt out under the Act, the court took the position that:

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: -

³¹ High Court Civil Case Number 6 of 2009

“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.”

The court then proceeded to attempt an analysis of the concept of the best interests of the child and to unpackage its constitutive elements. Guided by the common law position on the subject, the court argued thus;

“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.”

This elaborate list would appear to be, in the court’s estimation, the catalogue of the minimum standards that the court has to consider in giving effect to the child’s best interests in custody matters. It is curious to note that even then, the last standard remained “any other factor or circumstance that the court thinks relevant”.

D. Best Interests of the Child in Adoption Matters

Under its provisions on Adoption, the Act empowers the court to dispense certain requisite consents that would otherwise have been required to accompany an application for an adoption.³² The circumstances under which the said consents may be dispensed with are spelt out under the Act and the Act demands that in considering whether or not to dispense with the consent, the court should regard the interests of the child as paramount and subject thereto, the interests of the parents, guardians or relatives of the child then finally, the interests of the applicants.³³

Equally, after setting out the preconditions that must be made for one to qualify to adopt a child, the Act, nonetheless provides that the court may refuse to make an order in respect of any person or persons if it is satisfied “for any reason that it would not be in the best interests of the welfare of the child to do so”³⁴

In the case of *In the Matter of CC (Infant)*,³⁵ T.E.M and H.C.M made an application seeking order to adopt C.C. The child’s mother B.C had passed away on February 17, 2005 and the child’s grandmother NS had been taking care of her. The second applicant HCM was the sister to the later BC. The applicants, the court established, had complied with all the pre-requisites for adoption as set out under the Children Act, 2001, except the requirements stated in the proviso to Section 157(1) of the Act requiring the child concerned to have been in continuous care and control of the applicant within the Republic of Kenya for period of three consecutive months preceding the filing of the application.

The applicants admitted that they had not been having continuous care and control of the child within the Republic for a period of three consecutive months preceding the filing of the application. Indeed, the applicants had traveled to Kenya from the United States of

³² The power to dispense with the consents is spelt out under Section 159 of the Act. The consents that may be dispensed with are: (a) the consent of every person who is a parent or guardian of the child or who is liable by virtue of any order or agreement to contribute to the maintenance of the child; (b) in the case of a child born out of wedlock whose mother is a child, the consent of the parents or guardian of the mother of the child; and, in the case of a child born out of wedlock whose father has acquired parental responsibility in respect of the child under the Provisions of the Act, the consent of the father.

³³ Section 159(4) of the Children Act.

³⁴ Proviso to Section 158 of the Children Act.

³⁵ [2004] 2 KLR 433

America for purposes of the application. The applicant's counsel urged the court to waive the mandatory provisions of law by use of the inherent powers of the court under Section 3A of the Civil Procedure Act. She further cited the case of *I. W and B. N. (Infants)*³⁶ where the same judge had waived the requirements of Section 157(1) of the Children Act and allowed the uncle of the infants to adopt them. The court held thus:

All I can say with regard to the above cited case is that I now believe that I should not have waived a mandatory provision of the law because the legislature must have had a proper objective in using such strong language in wording the said section. ... I must, therefore, decline to grant the adoption order sought.

The latter position taken by the court would appear to be sound. What advised the same court to take the previous court is not clear. The inconsistency on the part of the court, suffice to say, was not good for the sake of the evolution of jurisprudence under the Act

Re LA (A Child)³⁷ was an adoption cause where the applicants had failed to meet the strict requirements for an international adoption as required by the Act. The Court, nonetheless, considering the interests of the child as reflected in the peculiar facts of the case, granted the applicants an adoption order reasoning as follows:

I have given due consideration to the adoption application before me. It emerges from the evidence on record that all other factors, except regulation 19(d) weigh heavily in favour of the application. Viewed from the perspective of the regulation, the applicant's, as a couple, which married 2 and 2 thirds years ago does not meet the 3-year marriage requirement to qualify to adopt the child.

On the other hand, the 2nd applicant as elder sister to the child's deceased mother is a blood relative and aunt of the child. The 2nd applicant did not physically live with the child for a period of three consecutive months preceding the adoption application as required by the proviso to section 157(1) of the Children Act. However, there is evidence, which I accept that the said 2nd applicant raised the child during the child's first five years of childhood. The 2nd applicant and the 1st applicant have kept in touch with the child, e.g, through email and paying her fees. The evidence contained in exhibit 1 points to the 2nd applicant having bonded with the child when she was raising her during her first five years of life. A year before she died, the child's mother requested the 2nd applicant vide exhibit 1 to adopt the child and take care of her and thereafter the 2nd applicant and her husband, the 1st applicant, took to educating the child. Subsequently, they initiated these adoption proceedings to formally assume the responsibilities they had already undertaken over the child. But as a couple, they have hit a technical hitch in the nature of regulation 19(a). There is no doubt in my mind that in the peculiar circumstances of this case, the adoption sought would be in the best interest of the child.

³⁶ Adoption Cause No. 2 of 2005.

³⁷ [2006] eKLR

E. Best Interests of the Child in respect of child offenders.

In addition to the many guarantees that are prescribed for dealing with a child offender under the Children Act, the law requires that every court dealing with a child who is brought before it should have regard to the best interests of the child and should in a proper case take steps for removing him from undesirable surroundings and for securing that proper provision is made for his maintenance, education and training.³⁸

5. Conclusion - What are the Operating Standards in Ascertaining what is in the best interest of the child?

The Children Act, and the relevant international instruments on the rights of the child, have elaborate provisions on how various aspects regarding children should be handled. The Act, in particular, has set out elaborate considerations that should be born in mind under every conceivable action that needs to be taken regarding children. For instance, the Act spells out the preconditions that the court must satisfy itself on making custody order, adoption orders, maintenance orders, orders for foster parentage, orders in respect of child offenders etc.

The basic assumption is that the best interests of the child are guaranteed upon a strict adherence to the preconditions to taking any action regarding a child as spelt out under the respective relevant parts of the law. The nudging question here is this; what has to be done when the pre-conditions established under the Act would, in the circumstances of a particular case, plainly appear to be against the child's "best interests"? This second scenario justifies the supposition that whereas the preconditions to taking a particular action are presumed to guarantee the best interests of the child, there is a margin of discretion left for the court, institution, person or any other entity taking an action or making a decision regarding a child, to depart where the best interests of the child so demands.

The *Implementation handbook* on the Convention on the Rights of the Child takes a critical note of the phraseology on the best interests of the child. It notes thus:

The fact that the best interests of the child "shall be a **primary** consideration" in the decision affecting the child is an indication that the "best interests of the child will not always be the single, overriding factor to be considered", but that "there may be

³⁸ Section 187 of the Children Act.

competing or conflicting human rights interests, for example between individual children, between different groups of children and between children and adults". However, the child's interests "must be the subject of active consideration", and "it needs to be demonstrated that children's interests have been explored and taken into account as a primary consideration"

From the foregoing, it is apparent that there is inevitable need for minimum operating standards on the application of the best interest principle. The standards should be fashioned to meet the specific aspect regarding children that is under consideration. Indeed, that is what the Children's Act of Kenya has, by and large, tried to do. Be that as it may, some margin of judicious discretion should be left to the decision maker's sense of sound judgment to factor in unforeseen circumstances.

The cross cutting measure that should remain uncompromised is the need to hear and give due respect and consideration to the opinion of the child. This cross cutting measure is, however, applicable in circumstances where the child is of such age and intelligence as to be able to hold and express sound opinions.