



**FWM v EMM (Family Appeal E106 of 2022)  
[2025] KEHC 3400 (KLR) (Family) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3400 (KLR)

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

**FAMILY**

**FAMILY APPEAL E106 OF 2022**

**HK CHEMITEI, J**

**MARCH 20, 2025**

**BETWEEN**

**FWM ..... APPELLANT**

**AND**

**EMM ..... RESPONDENT**

*(Being an appeal from the judgement and order of the Children’s Court at Nairobi (Hon. R.O. Mbogo (Mr.) (SRM) dated 23RD September 2022 in Nairobi Children’s Case No. E871 of 2020)*

**JUDGMENT**

1. The Appellant and the Respondent are estranged husband and wife. Between them are three young children. The Appellant sued the Respondent at the Children’s Court which on 23<sup>rd</sup> September 2022 in Children’s Case No. EXXX of 2020 directed as hereunder:-
  - (a) They share joint legal custody of the children but the Appellant shall have actual custody.
  - (b) They shall have access on equal basis during school holidays.
  - (c) The Appellant shall take care of shelter clothing and nanny’s salary.
  - (d) The Respondent shall be responsible for school fees and medical requirements.
  - (e) The Respondent shall pay monthly sum of Kshs. 15,000 to cover food and utilities.
2. The Appellant was dissatisfied with the above and filed this appeal on the grounds inter alia that;
  - (a) The trial court failed to take into account the circumstances of the case within the Children’s Act 2022 in apportioning parental responsibility.



- (b) The court failed to analyze the financial capability of each of them based on the evidence presented.
  - (c) The court failed to appreciate the issues and rights of the minors in respect to their welfare which is a human rights issue.
3. The court directed the parties to file written submissions which they complied.

### **Appellant's Submissions**

- 4. The Appellant basically argued that the court failed to take into consideration the fact that the Respondent had other streams of income and that the amount of Kshs.15,000 which he was directed to pay was a paltry sum not commensurate to his earnings.
- 5. She submitted that based on the tabulation before this court the Respondent ought to be compelled to pay a sum of Kshs.148,000 per month.
- 6. That the children ought to enjoy the same lifestyle in which they enjoyed while they were living together and that what the court did was to lower their standards yet the Respondent was capable of sustaining them. She added that they should enjoy the adequate balanced diet and shelter with modern amenities previously enjoyed.
- 7. She submitted that the trial court failed to take into consideration her financial capacity and situation, to wit, that she was earning about Kshs.17,000 which was not sustainable and capable of putting the children in the same standard they enjoyed. She stated that she was living with the children in a single room and sharing a double decker bed.
- 8. She accused the Appellant who according to her was a man of means of failing to maintain the children based on the evidence at the trial court.
- 9. The Appellant relied among others on Article 53(1) of *the Constitution*, sections 8,31 and 32 of the Children's Act 2022.
- 10. She pleaded with the court to allow the appeal by ordering the Appellant to pay a monthly sum of Kshs.148,000 and a comprehensive medical cover for the minors.

### **Respondent's Submissions**

- 11. He submitted that what the Appellant has raised in her memorandum of appeal are issues which were raised at the trial court and the court took them into consideration and which ought to have been reviewed by the said court.
- 12. He submitted that he disclosed to the court his sources of income and the fact that his IT business had been badly affected by the Covid pandemic and was surviving among others from his new wife and his mother.
- 13. It was his case therefore that the trial court took note of his financial position and that the orders to pay fees and medical for the children was still a big responsibility besides paying the monthly sum of Kshs. 15,000 to the Appellant which he has done dutifully.
- 14. On the issue of medical it was his case that it is the Appellant who has failed to provide the birth certificates for the children so that he could register them with NHIF. He was however not disputing that this was his responsibility.



15. He submitted that the law does not envisage that the court will issue orders so as to punish one but what was of importance was the support and maintenance of the children. He urged the court to dismiss the appeal.

### **Analysis And Determination**

16. This being an appeal, it is now trite law that an appellate court shall not interfere with the trials courts findings unless it is of the view that the same was erroneous, unlawful and or it considered an irrelevant issue. The trial court always has the advantage of seeing the witnesses and their demeanor an issue which the appellate court does not enjoy.
17. I have perused the record of appeal herein, gone through the evidence presented by the parties and the trials courts judgement. I have also perused extensively the memorandum of appeal and the submissions I have summarized above by both sides.
18. What is germane in my view is whether the trials court orders directing on two issues, namely, monthly support of Kshs.15,000 and medical provision by the Respondent was based on the evidence presented. This is so because the issue of custody and access of the minors was not contested. Neither was the contribution by the Appellant.
19. This court shall not endeavor to deal with the new evidence presented by the Appellant dealing with the new issues specifically the earnings by the Respondent. I have for example pondered on the submissions which culminated into the prayer that the Respondent ought to pay a sum of Kshs.148,000 monthly.
20. I respectfully think that that ought to form an issue of review before the trial court and not a subject of an appeal. As regards his earnings by the time the parties testified at the trial court, it was evident that the Respondent earned something in the region of between Kshs.20,000 and Kshs.50,000 per month. There was no evidence of non-disclosure and I think that is what the trial court based its findings. These amount as testified by the Respondent kept on fluctuating depending on the business.
21. If indeed the Appellant thinks that the Respondent's financial position improved thereafter, then the Act clearly empowers her to make an application to review the judgement on that limb. Being a children's matter, nothing stops the court from undertaking further review of its judgment so as to ensure that the best interest of the minors is taken care of.
22. Consequently, I do not see any basis of altering the trials courts finding on this score. The evidence presented before it was taken into consideration by the trial court and that is why it directed that the Respondent pays a monthly sum of Kshs.15,000.
23. To invite this court to tamper with that finding based on new evidence at such an appellate level is tantamount to sitting as a trial court. That is untenable.
24. As regards the medical cover for the minors I find that the trial court covered the issue very well. The provision of medical care to the children was given to the Respondent. My understanding is that whether it is through the defunct NHIF or the current outfit, SHA, as the case might be is at the Respondent's discretion. Alternatively, he could as well take a private insurance cover for the minors if he so wishes.
25. The Appellant's contention that the Respondent must take the responsibility of medical care for the minors is simply regurgitating what the Respondent has been directed to do and has not refused, neither has he appealed against. I think that issue only becomes contentious in the event that he fails to meet the medical obligation. She is at liberty at that time to move the trial court.



26. There was no evidence that any of the children had missed any medical attention because of the Respondent's failure to fulfil his obligation.
27. I also note that the Appellant being well versed with parental responsibility being a shared task has not complained about her role. The Kshs.15,000 she gets monthly plus what she gets from her employment or any other source is sufficient to keep her afloat. The business environment was hit badly by the Covid pandemic which the trial court acknowledged and I find the orders of shared responsibilities by the said court reasonable.
28. Finally, I find that the issues raised as stated earlier could as well be tackled by way of a review before the trial court and not in an appeal process. Nothing is absolutely lost for the Appellant. The Respondent on the same note could still approach the trial court for a review of the judgement in the event he may deem necessary.
29. For the above reasons I do not find merit in this appeal and hereby dismissed it with no order as to costs.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 20<sup>TH</sup> DAY OF MARCH, 2025.**

**H K CHEMITEI**

**JUDGE**

