



**HLP v RW (Children's Appeal Case E012 of 2024)
[2025] KEHC 8359 (KLR) (12 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8359 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CHILDREN'S APPEAL CASE E012 OF 2024**

**RB NGETICH, J
JUNE 12, 2025**

BETWEEN

HLP APPLICANT

AND

RW RESPONDENT

*(Being an Appeal against the judgment (Hon. Edwin Mulochi,
S.R.M) delivered on 10th September,2024 at Kabarnet Chief
Magistrate's Court, Children Case No. E016 OF 2024, RW -VS- HLP)*

JUDGMENT

1. The appellant herein filed suit in the subordinate court seeking orders for the Respondent to support two minors by paying school fees and other items. By Judgment delivered on 10th September 2024 besides other orders in respect to custody the court ordered the appellant to remit Kshs. 7,000/= to the Plaintiff monthly for maintenance of the minors.
2. The Appellant herein being dissatisfied with the judgement of senior Resident Magistrate, Hon. E. Mulochi delivered on 10th September,2024 Children Case No. E016 OF 2024, RW -Vs- HLP has appealed to this court based on the following grounds;
 - i. That the Honourable Magistrate erred in law and fact by discriminately apportioning the children's needs between the parents.
 - ii. That the Honourable Magistrate erred in law and fact by not considering that the Appellant has other children he is taking care of.
 - iii. That the Honourable Magistrate erred in law and fact by not considering that the Appellant's financial status cannot sustain payment of Kshs 7,000/= for the maintenance of the two minors.



- iv. That the Honourable Magistrate erred in law and fact by disregarding and/ or failing to consider the Appellant's defence and evidence during trial.
 - v. That the Honourable Magistrate erred in law and fact by failing to apportion the parental responsibilities equally between the parents.
3. The Appellant prays for judgement of this court in the following terms:
- a. The Appeal herein be allowed.
 - b. The trial court's judgement dated and delivered on 10th September, 2024 be set aside and or quashed.
 - c. The parental responsibilities be apportioned equally between the Appellant and the Respondent.
 - d. That in the alternative, the Honourable Court orders for a retrial.
4. When the matter came up mention on the 13th November,2024, counsel for the Appellant/Applicant informed the court that they had filed a record of appeal and also supplementary list of documents which were not produced before the trial court. Following this, the court directed the Appellant/Applicant to file a formal application in respect to documents which were not produced before the trial court.
5. The Appellant/Applicant in compliance with the directions issued by the court filed an application dated 27th January,2025 brought under the provisions of Rule 1A,1B & 3A of The *Civil Procedure Act* (Cap21) Laws of Kenya and under Order 8 Rules 3 of the Civil Procedure Rules, 2010 seeking for the orders;
- i. Spent.
 - ii. That the applicants be granted leave to introduce new list of documents/evidence at Appellate stage.
 - iii. Costs be in the cause.
6. The application is supported by the affidavit of the Applicant HLP who avers that he is the Appellant/Applicant in the High Court Children Appeal No. E012 of 2024 and that he was sued by the Respondent for parental care, maintenance, provision and support of Caleb Lesayon Parkolwa and Lemmytyon Leshan Parkolwa.
7. He avers that he also has ELP,PSL, SJP, ELP and TLP who are his children with his other wife.
8. He avers that when the matter was mentioned severally before the trial court, he was not informed of the procedure but the court proceeded to hear the evidence presented orally thus denying him the chance to file documents that he would have relied on during trial.
9. That the trial court decided to hear the parties on a date fixed for mention and proceeded to give a ruling date without considering that he had not filed a response or documents to be adduced at the time for hearing. That in doing so, the trial court did not consider that by relying only on the Respondent's evidence, it failed to share parental responsibilities equally.
10. That he was tasked to pay the school fees and cater for all the school related expenses, cater for medical needs by enrolling them in the National Health Insurance Fund, remit Kshs 7,000/= monthly to the plaintiff by 6th of every subsequent month for the two minors.



11. He further avers that ELP, PSL, SJP, ELP and TLP also depend on him, which evidence he intends to tender in appeal for consideration.
12. That he did not also tender his pay slip in evidence and despite it indicating that he is earning net pay of Kshs 30,285/=, it does not indicate that he service loan at Boresha Sacco Limited thus reducing his net pay to meagre earnings.
13. That he caters for the needs of the other children who are in various institutions and their fee structures needs to be considered and that the trial court did not consider that his contribution of Kshs 7.000/= for monthly maintenance of the two children, paying for their school fees and school related expenses and needs is impractical and unsustainable.
14. That he is willing to support the children but the same ought to have been apportioned between them equally and not discriminatively and going per the trial court's judgment, it means that the other children will suffer irreparably at the expense of maintaining these other two.
15. That had the trial court had an opportunity to see his documents in support of his evidence, he believes that parental responsibilities would have been shared equally and indiscriminately by looking at his capability and in consideration of the needs of the other children.
16. That it will be just and fair that his application to introduce new evidence at this stage will help the court to determine parental responsibilities proportionately and that the Respondent shall not suffer any prejudice should the orders sought are granted.
17. The application was canvassed by way of written submissions but only the Applicant filed written submissions.

APPELLANT/APPLICANT'S SUBMISSIONS

18. The applicant submits that when the case came up for mention severally before the trial court, he was not represented and procedure was explained to him and the court proceeded to hear the matter on the date the matter was fixed for mention without giving him a chance to adduce evidence and that he had not filed a response or documents to be adduced at the time for hearing and the court therefore failed to share parental responsibilities equally and by its ruling, the trial court ordered him to pay school fees and cater for all the school related expenses, medical needs, pay Kshs 7,000/=monthly to the plaintiff by 6th of every subsequent month in support of the two minors without considering that the applicant had 5 other children he was supporting out of the meagre earnings.
19. The Applicant wishes to introduce the birth certificates for the other children, his payslip, Telepost DT Sacco Society LTD member loan statement, fee structures for his other children in various learning institutions. That the additional evidence to be introduced is so directly relevant to the matter before the court and will serve the interest of justice, it will influence or impact the result of the verdict.
20. The applicant submit that had his new evidence been presented in the trial court, parental responsibilities would have been shared equally, proportionately, indiscriminately and within the means of the parents and it will be just and fair that the Applicant's application to introduce new evidence at this stage be allowed to assist the court to determine parental responsibilities proportionately. He relied on the case of Sharon Mwendu Ndolo-versus-rahab Nyangima John & Nelson Mwangi Nduki, In The High Court Of Kenya At Kiambu.civil Appeal No. 136 Of 2021.



Analysis And Determination

21. I have considered the averments and submissions herein and wish to consider whether the applicant has made a case for introduction of new evidence as prayed in this application.

22. Section 78 of the [Civil Procedure Act](#) provides that;

“Powers of appellate court.

1. Subject to such conditions and limitations as may be prescribed, an appellate court shall have power –
 - a. to determine a case finally;
 - b. to remand a case;
 - c. to frame issues and refer them for trial;
 - d. to take additional evidence or to require the evidence to be taken;
 - e. to order a new trial.
2. Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

23. Order 42 Rules 27, 28 and 29 of the Civil Procedure Rules provide as follows:-

“(1) the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if

- (a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
- (b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgement, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred, the court shall record the reason for its admission.

Wherever additional evidence is allowed to be produced, the court to which the appeal is preferred may either take such evidence or direct the court from whose decree the appeal is preferred or any other subordinate court to take such evidence and to send it when taken to the court to which the appeal is preferred.

Where additional evidence is directed or allowed to be taken, the court to which the appeal is preferred shall specify the limits to which the evidence is to be confined and record on its proceedings the points so specified.”



24. The Supreme Court in the Case of Mohammed Abdi Mohamud Vs. Ahmed Abdullahi Mohammed & 3 Others (2018) eKLR laid down the following principles;

“79 We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

- a. the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
- b. it must be such that, if given, it would influence or impact upon the result of the verdict although it need not be decisive;
- c. it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
- d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
- e. the evidence must be credible in the sense that it is capable of belief;
- f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively.
- g. Whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
- h. where the additional evidence discloses a strong prima facie case of willful deception of the court;
- i. The court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The court must find the further evidence needful;
- j. A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case;
- k. The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.”

25. The applicant argues that the trial magistrate proceeded with hearing of this matter on the day the matter was scheduled for mention and that he had not filed failed documents and being unrepresented the procedure was not explained to him. I have perused the trial court proceedings and note that the Respondent did not produce documents on his earnings to form a basis for shared parental



responsibility. From the foregoing, I find merit in this application and allow the applicant to introduce additional documents.

26. Final Orders: -

- a. The applicant/appellant is hereby granted leave to file additional documents.
- b. The matter is remitted back to the trial court for hearing.
- c. The applicant to comply with orders of maintenance by trial court pending further directions by the trial court upon taking into consideration new evidence to be introduced by the applicant herein.
- d. Costs to be in cause.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT ELDAMA RAVINE HIGH COURT (SUB-REGISTRY) THIS 12TH DAY OF JUNE 2025.

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RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kipkulei for Appellant.

Respondent present.

CA, Karanja.

