



**JLO v HKM (Civil Appeal E090 of 2024)
[2025] KEHC 10011 (KLR) (Family) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10011 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E090 OF 2024
PM NYAUNDI, J
JULY 10, 2025**

BETWEEN

JLO APPLICANT

AND

HKM RESPONDENT

RULING

1. The substantive application before Court was the Notice of Motion dated 2nd August 2024 seeking a stay of of the orders issued by the trial court on 30th July 2024.
2. This matter came up for hearing before me and I issued the following orders on 22nd August 2024;
 1. That the matter to proceed for hearing of the appeal.
 2. That the appellant will file and serve record of appeal within 60 days.
 3. That the respondent to have weekend access to the minors in a public place between 9:00 am and 5:00 pm every weekend pending the hearing and determination of the appeal effective from 24/8/2024.
 4. That mention on 31/10/2024 to confirm the record is prepared and to take further directions.
 5. That to facilitate the access the children will be picked and dropped at Acacia Mall, Green Park Estate, Athi River.
3. The Applicant has now filed a Notice of Motion dated 24th January 2025 seeking the following orders;
 1. That the Honourable Court be pleased to review and set aside the order issued on 22nd August 2024 with regard to access.



2. That upon review the court do set aside the order for access to the Respondent.
4. That the costs of this application be provided for.
4. The Application was premised upon Article 53 (1) (d) (2) of the *Constitution of Kenya (2010)*, Section 3, 3A and 63 (e) of the *Civil Procedure Act* Cap 21 & Order 42 r 1&2 of the *Civil Procedure Rules* 2020, Sections 22,23,24 and 141 of the *Children's Act* No. 29 of 2022 and all other enabling provisions of the law and was supported by the Affidavit of even date sworn by the Applicant. She filed a further affidavit dated 12th March 2025.
5. The applicant averred that the Respondent sent age inappropriate gifts to the children who study at {particulars withheld}. The school confirmed that it received and passed on gifts to the children.. When the children brought the gifts home, the applicant states, she discovered that he sent them Christmas cards, watches and a game labelled “never have i ever”. She opened the card game which according to her the contents in the card are inappropriate, immoral and obscene. That the rules of the game are that it urges the minors to play the games while away from their parents and ignore any calls or texts from their parents. She argued that the contents are offensive and contravenes Article 53(1) (d) (2) of the *Constitution of Kenya 2010* and Section 22 (b) of the *Children's Act* No. 29 of 2022 as they transmit or causes to be transmitted obscene materials.
6. The respondent denies sending the gift to the minor and insists that his gift were a watch for each child. The applicant avers that this action by the respondent disqualifies him from having interactions with the minors.
7. Owing to the gravity of the allegations made, on 13th March 2025 , I gave an order that the Directorate of Children Services, interview the minors especially on the allegations of exposure to age inappropriate material and provide a report to the court. A report dated 20th May 2025 was filed by Wilfred M. Ikinya , Assistant Director Child Services.

Report By Assistant Director Child Services.

8. The Assistsnt Director Child Services, Wilfred M. Ikinya interviewed the Applicant, the Respondent and the two minors.
9. She stated that she made the following observations;
 1. That the subject herein told a different story from what she said during the first intevieiw both at our office and with the DCI.
 2. That the subject on second interview at home and at the DCI offices later said that her father was not responsible for her behaviour.
 3. That the subjects have learnt to disrespect their father and kept referring to him as ‘that man’, ‘the human being’ and other disrespectful names.
 4. That the elder subject blames herself for what is happening between her parents.
 5. That they rarely socialize with other children. They are always indoors whenever they are with their mother.
 6. The subjects feel that their father is unfair to their mother since he has a girl friend and that he is happy while they are not.



7. That the appellant harbours a lot of bitterness after her divorce and because of the company that she feels they built together with her ex-husband that she is now not part of.
8. The respondent is willing to have the children and also provide for them. He is also willing to pay for them to undergo therapy.
10. The Assistant Director Child Services recommended as follows;
 1. That the subjects need to see a child therapist and report presented before court.
 2. That the parties be granted joint legal custody and actual custody be shared as their homes are next to each other.
 3. That the appellant also needs to see a therapist as the subjects cannot thrive when been taken care of by someone who is also emotionally drained and unsettled.
 4. That the parties to share maintenance of the subjects as court will direct though the respondent is willing to do everything to ensure his children are well taken care of.
11. The court interviewed the D.K.K who is aged 17 years years old. She told the court that she was in year 10 {school particulars withheld}. She told the court that the Directorate of Children Services imposed on her to change her story. Her evidence was that the Respondent introduced her to videos about sex during April holidays . He told her to touch her ‘boobs’ and her private parts. She refused to do it but he forced her and told her not to tell her mother. He told her to record the videos and not send them to anyone. He also showed her porn hub. He told her he was teaching her so she could do them when she grows up. Her mother found about the videos last year and she confessed to her that her father showed her. She told the court that her younger sister D.K is not aware of what transpired. She stated that she does not want anything to do with her father. She is happy with her school performance. That her mother showed her the report by the DCS and DCI. She stated that it is not true that she did not have friends. She told the court that she would like to go for counselling.
12. Both parties were ordered to file written submissions but none of them complied.

Analysis And Determination.

13. I have considered the application before me, the Reply filed by the Respondent as well as the written submissions filed by each party. She seeks review of orders allowing the respondent access to the minors. Grave allegations have been made to support this allegation.
14. The principles for granting review are well settled Order 45 Rule 1 of the *Civil Procedure Rules, 2010* provides as follows:-
 - (1) Any person considering himself aggrieved-
 - (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.



15. From the above provisions, it is clear that section 80 of the [Civil Procedure Act](#) gives the power of Review while Order 45 of the [Civil Procedure Rules 2010](#), sets out the rules. The rules limit the grounds applicable for Review as follows:-
- a. The discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the Decree was passed or the Order made.
 - b. On account of some mistake or error apparent on the face of the record.
 - c. Any other sufficient reason and that the Application has to be made without unreasonable delay.
16. Regarding the discovery of new and important matter or evidence, the Court of Appeal in [Rose Kaiza v Angelo Mpanju Kaiza](#) [2009] KECA 422 (KLR), held:-
- Applications on this ground must be treated with great caution and as required by r 45(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.
17. Similarly, the Court of Appeal in [Tokesi Mambili and others v Simion Litsanga](#) (2004) eKLR held:-
- In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time
18. The guiding principle on all matters touching on children is found under Article 53(2) which provides that:
- A child's best interests are of paramount importance in every matter concerning the child.
19. Sec 103 of the [Children's Act](#) provides for considerations to be had in making a custody order; it states
- In determining whether or not a custody order should be made in favour of an applicant, the Court shall have regard to—
- a. the conduct and wishes of the parent or guardian of the child;
 - b. the ascertainable wishes of the relatives of the child;
 - c. the ascertainable wishes of the child taking into account the child's evolving capacity;
 - d. whether the child has suffered any harm or is likely to suffer any harm if the order is not made;



- e. the customs of the community to which the child belongs;
 - f. the religious persuasion of the child;
 - g. whether a care order, supervision order, personal protection order or an exclusion order has been made in relation to the child concerned, and whether those orders remain in force;
 - h. the circumstances of any sibling of the child concerned, and of any other children of the home, if any
 - i. any of the matters specified in section 95(2) where the court considers such matters to be relevant in the making of an order under this section; and
 - j. the best interest of the child.
20. This court is guided by the above principles in considering what is in the best interest of the minors. On account of the age of the 1st minor I am obligated to consider her views. At the time of presenting the application, the charge against the respondent was that he had delivered at the school of the minor age inappropriate material. However at the time of the interview by the Directorate of Children Services and the Directorate of Criminal Investigations it was alleged that the respondent had exposed the minor to pornographic material and had even encouraged her to record and share sexually explicit videos of her self with him.
21. The Directorate Child Services filed a report which I have considered. Both the Directorate of Children Services and the Directorate of Criminal Investigations interviewed the child twice. Both report that whereas at the initial interview the minor stated that her father introduced her to the pornographic material, on further questions she changed her story and stated she had discovered this on her own. The Child had not seen the gift that the father is alleged to have sent to her.
22. I am persuaded by the report of the Directorate of Children Services. The Directorate is an independent government agency with the mandate to conduct interviews and assessments such as I requested for. The allegation as to the gift that was delivered at the school was not proved. The allegations as to exposure to pornographic material, were not considered grave enough to have been included in the application. The report of the Directorate of Children Services is triangulated with the interviews with the Directorate of Criminal Investigation and at the School.
23. I interviewed the first child who is seventeen years old and she was categorical that she does not want to have a relationship with her father who is the applicant. The younger child does not have an issue visiting the father. The orders that I issued on 22nd August 2024 are sufficient to address the concerns that there may be regarding the safety of the 2nd minor, in the interim. In the circumstances, I decline to review my orders. In my view no evidence has been placed before me to bar the father from interacting with his children. The minor D.K.K has expressed her opinion I am obligated to respect it as she is 17 years old. The orders will remain as earlier directed with regard to the minor, D.K (the younger daughter)
24. Accordingly, the following orders to issue;
- i. That the Appellant will facilitate weekend access by the respondent to the minor, D.K. who is aged 8 years old in a public place between 9:00 am and 5:00 pm every weekend pending the hearing and determination of the appeal effective from 18/7/2025.
 - ii. The child will be picked and dropped at Acacia Mall, Green Park Estate, Athi River.



- iii. The Appellant to file and serve record of appeal within 45 days.
- iv. The minor D.K.K at liberty to arrange directly with the respondent if she decides to visit and spend time with him.
- v. No orders as to costs.

It is so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 10th DAY OF JULY, 2025.

P .M NYAUNDI

HIGH COURT JUDGE

In the presence of:

Nyamwaro for Respondent

Omondi holding brief for Ochanda for Appellant

Fardosa Court Assistant

