



REPUBLIC OF KENYA



KENYA LAW
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**Schwing v Nalugala (Family Appeal E055 of 2024)
[2025] KEHC 13064 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13064 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E055 OF 2024
G MUTAI, J
SEPTEMBER 19, 2025**

BETWEEN

HANS DIETER WILHELM SCHWING APPELLANT

AND

CAROLINE ADETI NALUGALA RESPONDENT

JUDGMENT

1. The Court below delivered its judgment on 4th October 2023, vide which it ordered as follows: -
 1. The appellant is to pay Kes.35,000.00 for one year to cater for the shelter of the baby and the Respondent;
 2. The appellant is to pay the rent arrears for the house the respondent and the child were residing in prior to the judgment, so as to allow them to relocate to the new residence;
 3. The appellant to supply the respondent and the child “the necessary household items to facilitate the comfortability of the child in their new residence”;
 4. The appellant to continue to pay Kes.50,000.00 per month for the upkeep and child’s medical cover;
 5. The appellant is to cater for the child’s education needs fully once the child attains school-going age;
 6. The respondent to pay for the child’s clothing, utility bills, and househelps wages; and
 7. Each party is to provide entertainment while with the child.
2. The court also ordered as follows:-
 1. That both parties have parental responsibility for the subject minor herein;



2. Legal custody to be joint between the parties;
3. Actual/physical custody, care, and control of the child reverts to the Defendant.
3. Regarding costs it was ordered that each of the parties shall bear their own costs.
4. The Court found as follows regarding the relocation of the respondent:-

“It is also on record, in evidence that is not denied, that it is the Plaintiff who caused the defendant to move from Nairobi, where he had settled her and was paying rent, to come to Mombasa so that he can resettle her and the baby. He instead took over the household items, causing her and the baby to be destitute.”
5. The appellant was dissatisfied with the said decision and filed the appeal before the Court. The appeal is based on four grounds, to wit that:-
 1. That the Learned Magistrate misdirected herself and erred in fact in finding that the Appellant confiscated the Respondent's household items and rendered her destitute, amidst the overwhelming evidence that the Respondent was the author of her misfortunes and disposed of the household items by herself;
 2. That the Learned Magistrate misdirected herself and erred in fact in finding that the Appellant failed to resettle the Respondent, all against the evidence that the Appellant on several occasions secured apartments and paid the rent, only for the Respondent to abandon them to hop into expensive temporary accommodations in Airbnbs at the expense of the Appellant;
 3. That the Learned magistrate erred in law and in fact in ordering that the Appellant resettles the Respondent, purchase her household items, and pay her rent for a whole year, a decision not backed by evidence or law; and
 4. That the Learned Magistrate erred in law and in fact in disproportionately apportioning the financial burden in the upbringing of the minor to the Appellant by directing him to bear the future burden of school fees and educational expenses, without apportioning any meaningful expenses to the Respondent, despite parental responsibility being shared.
6. The Appellant prayed that the decision of the Court below be set aside and substituted with the orders that:-
 1. The appellant pays Kes.50,000.00 per month for the child's upkeep as directed by the lower Court;
 2. The respondent is to provide the child with shelter and bear the house help expenses;
 3. Once the child attains the school-going age, the appellant and the respondent are to share the school fees and educational expenses on a 50:50 basis; and
 4. Custody of the minor and access orders as directed by the lower Court.
7. This is the first appeal. As the first appellate Court, this Court has the duty to reevaluate, reanalyze, and reconsider the findings of the Court below on the issues of fact and law. In the case of Mursal &



another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) [2022] KEHC 282 (KLR), Mativo, J, as he then was stated that: -

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first-hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others*¹ and in *Peters v Sunday Post Limited*.”

8. In the said decision, the Court went on to refer to the decision of the Supreme Court of India in the case of *Santosh Hazari vs. Purushottam Tiwari (Deceased)* by L.Rs {2001} 3 SCC 179 and stated as follows:-

“A first appellate court is the final court of fact ordinarily, and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust.⁴ The first appeal has to be decided on facts as well as on law. In the first appeal, parties have the right to be heard on both questions of law and also on facts, and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of the *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion.”

9. I will look briefly at the pleadings of the parties in the court below.

10. In the plaint dated 6th February 2023, the appellant sought the following orders:-

1. Joint custody to be vested in both the defendant and the plaintiff;
2. Physical custody, care, and control of the minor do vest in both the defendant and the plaintiff when the plaintiff is in the Country;
3. A declaration that both the plaintiff and the defendant have equal parental responsibility for the minor, herein, an order giving effect as follows:-
 - i. Plaintiff does pay to the defendant the sum of Kes.50,000/- on the 5th day of each month to cater for the shelter and medical expenses as they arise; and
 - ii. The defendant is to provide the minor's food and clothing.
4. The plaintiff does have access to see the minor without any condition when in Kenya.
5. The plaintiff does have joint rights over decision-making with regard to the minor's needs;
6. The minor, being a German citizen, is permitted to visit the plaintiff in Germany together with the plaintiff;
7. Costs of this suit and interests therein at Court rate; and
8. Any other relief that this honourable Court may deem fit.

11. In a defence dated on 10th July 2023, the respondent opposed the suit and prayed that:-

1. The plaintiff is allowed supervised visits to see the minor;
2. Physical custody is vested in the mother, being that the child is of tender age and is still breastfeeding;



3. The plaintiff pays the defendant the sum of Kes 200,000.00 per month and medical insurance cover for the minor who is a toddler and that is prone to falling ill; and
4. The costs of this suit be provided for.
12. There was an attempt at mediation, which failed. On 5th June 2023, the Court ordered that the matter be heard on merit.
13. The case was heard on 12th July 2023 when both the plaintiff and the defendant testified. I shall briefly set out the evidence of each party below.
14. In his evidence, HDWS testified that he was then 60 years old. It was his evidence that he was in Kenya on a tourist visa. He is married to a Kenyan lady. Mr S testified that he works as a business coach for e-commerce shop systems and online marketing. He has been coming to Kenya since 2005. He testified that he filed the case as he wanted to have a positive influence on the subject minor.
15. Mr S accused the respondent of only being after money and of using the Baby L, their child, as a way of procuring money from him. He expressed a readiness to pay Kes.50,000/- to the Respondent as child maintenance. He prayed for custody of the baby, stating that he had the capacity to provide for her. Regarding accommodation, he said that he had wanted the respondent to get suitable accommodation, but accused the respondent of frustrating his efforts. He expressed a wish to teach the child the German language and to take her to school. It was his evidence that they had each moved on, as he has a wife, while the respondent has her own boyfriend.
16. When cross-examined by the respondent, the appellant accused the respondent of asking for different, varying amounts in respect of rent and making it difficult for him to settle the same. He admitted that since 1st June 2023, he had not paid maintenance. He had, however, paid for food. He admitted that he told her landlord to throw her out of the accommodation she was in, as she wanted “big things and money”. He testified that he was the one who bought the things she had.
17. Mr S denied that he made the respondent come to Mombasa, stating categorically that, “ I never made you come to Mombasa so that we live as a family.”
18. It was his evidence that once the respondent found a house for Kes 35,000/-, he paid immediately, but the respondent refused to move in.
19. On the other hand, the respondent testified that she then lived in Nyali, having relocated from Nairobi in August 2022. She first lived in Shanzu, then in Cowrie Shells. She testified that the appellant asked her to move to Mtwapa.
20. Ms N testified that she was made to sign a document vide which she agreed to payment of maintenance by the appellant in the sum of Kes.50,000/- and that she did so as she did not have money.
21. It was her evidence that the appellant asked her to look for a house and promised to pay the rent. Despite the promise, he did not pay whenever she identified a house. She testified that he had known the appellant since 2014 and had been in a relationship, although they were not married.
22. When questioned by the Court, she testified that she was staying in an Airbnb where the rent was Kes.60,000/-. Rent in respect of the said accommodation had not been paid for 2 months. It was her evidence that she could not go back to Nairobi, as he had taken all her household goods and was using them with another woman. According to her, her items were a master bed, carpets, a coffee table, balcony chairs, a rocking chair for the child, a washing machine and a chest of drawers. Regarding her



- prayer for Kes.200,000.00 as maintenance, she averred it was for rent, food, and everyday upkeep of the child. She testified that he had the means to pay the said amount.
23. When cross-examined by Ms Mwanyika. She testified that Mr S had been sending her abusive texts. She admitted that the appellant had been providing maintenance, although this was only after she pushed. She insisted that she was forced to sign the maintenance agreement.
 24. She testified that the appellant wasn't providing adequate care and was not available for the child. Whenever he was with the child, he would not pay her sufficient attention. It was her testimony that Mr S has a wife and child. She conceded that there was a time when she left the child at the residence of the appellant from 530pm to 830am the next day.
 25. She stated that she studied tourism management and had worked in different fields, did modelling for 4 years, worked in a restaurant as a cashier, and previously had her own hair business and a driving school.
 26. It was after the hearing of the case on the merits and upon consideration of the submissions of the parties that the Court below delivered the impugned judgment. I have already summarized the import and the effect of the said judgment.
 27. The appellant, being aggrieved, filed the instant appeal. The appeal was canvassed by way of written submissions. I shall set out the precis of the submissions below.
 28. Vide the submissions dated 4th September 2024, the appellant accused the respondent of abdicating her parental responsibility to the minor, despite being the biological parent, and of using the child instead to extort money from him.
 29. The appellant identified the issues for determination as being:-
 1. Whether the appellant confiscated the Respondent's household items;
 2. Whether the appellant induced the Respondent to relocate to Mombasa and or failed to subsequently resettle her; and
 3. Whether the learned magistrate disproportionately allocated future education expenses of the minor to the appellant.
 30. In respect of the first issue, it was urged that contrary to what was averred, the respondent abandoned the household goods in an apartment so that she could live in an Airbnb. Counsel relied on section 107 of the *Evidence Act* and stated that she had the burden of proof regarding her assertions, which she didn't discharge during the hearing in the court below.
 31. On the second issue, it was submitted that the respondent had a nomadic tendency which saw her more around inexplicably. Counsel for the appellant urged that the demands of the respondent were unreasonable and the Court could not close its eyes to the needs of the appellant. Counsel stated that the relocation expenses had not been pleaded and should not therefore have been allowed and that the court below was thus wrong to do so. The Court was hence urged to overturn the award of compensation for relocation/resettlement.
 32. On the third issue, it was submitted that the Court below left the total cost of future education to the appellant when the same should have been shared equally. The Court was therefore urged to allow the appeal.
 33. On the other hand, the respondents' counsel filed written submissions dated 15th January 2025.



34. The issues as identified by the respondent’s counsel are broadly similar to those of the appellant. They are that:-
1. Whether the learned magistrate misdirected herself and erred in fact by finding that the appellant confiscated the respondent’s household items and by ordering the settlement of the respondent?
 2. Whether the learned magistrate disproportionately imposed the maintenance and financial burden of the upbringing of the minor on the appellant? and
 3. Who should bear costs?
35. It was urged that, in respect of the first issue that it was the appellant who caused the respondent to leave Nairobi and relocate to Mombasa. Counsel for the Respondent contended that he induced her to relocate. The inducement, it was urged, was so that he could take away her furniture.
36. On whether the Court could grant the reliefs it did, it was urged that prayer (h) of the plaint sought “any other relief that this honourable Court may deem fit to grant.”
37. Regarding apportionment of maintenance, it was urged that equal provision in *the Constitution* did not mean that the parties had to provide a similar amount towards the upbringing of a child. In support of this contention, counsel relied on the case of GO & 2 others (Suing thru’ their mother and next friend) EMM v MOO [2016] KEHC 2325 (KLR).
38. Regarding costs, counsel submitted that the respondent should be awarded costs of the appeal.
39. I have considered the Memorandum of Appeal, the Record of Appeal, the submissions of the parties, as well as the applicable law. In my view, the issues for determination are broadly those identified by the parties, to wit:-
1. Whether the respondent’s items were confiscated by the appellant, and if the Court could determine the said issue;
 2. Whether appellant induced the respondent to relocate to Mombasa and failed subsequently to resettle her; and
 3. Whether the learned magistrate disproportionately allocated future education expenses of the minor to the appellant.
40. The appeal before me is against the decision of the Court below in exercise of its jurisdiction under the *Children Act*. The said Act is expressed as being:-
- “An Act of Parliament to give effect to Article 53 of *the Constitution*; to make provision for children rights, parental responsibility, alternative care of children including guardianship, foster care placement and adoption; to make provision for care and protection of children and children in conflict with the law; to make provision for, and regulate the administration of children services; to establish the National Council for Children’s Services and for connected purposes.”
41. It follows that a Court properly exercising its jurisdiction under the said Act would only decide those issues that fall within the ambit of the said Act.



42. Kenyan Courts are required, when hearing matters regarding children, to give effect to Article 53(2) of *the Constitution* of Kenya, 2010, which provides that:-

“A child’s best interests are of paramount importance in every matter concerning the child.”

43. The said Constitutional imperative is given effect by section 8(1) (2) & (3) of the *Children Act*, 2022, which states that:-

“(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies:-

- (a) the best interests of the child shall be the primary consideration;
- (b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.

(2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, 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; and
- (c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.

(3) In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases, having regard to the child’s age and degree of maturity.”

44. Section 32 of the *Children Act*, 2022 provides that:-

“(1) Subject to the provisions of this Act, the parents of a child shall have parental responsibility over the child on an equal basis, and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility whether or not the child is born within or outside wedlock.

(2) A person who has parental responsibility over a child shall at all times have the duties, powers and responsibilities as are prescribed in this Act or any other written law.

(3) A person with parental responsibility over a child shall not act in any way that contravenes any order of a court of competent jurisdiction made with respect to the child under this Act or any other written law.

(4) A person who has parental responsibility over a child may not relinquish or assign such responsibilities to another person.



- (5) Nothing in subsection (4) prevents a person from making temporary arrangements, during his or her absence, to allow a fit person to exercise his or her parental responsibilities over a child for and on his or her behalf.
- (6) The making of the temporary arrangements referred to in subsection (4) by a person shall not affect or limit that person's liability arising from his or her failure to exercise his or her responsibility under this section."

45. Having looked briefly at what *the Constitution* and the statutes provide, I must now address the issues that were identified and determine if a basis for interfering with the decision of the Court has been laid.

46. The Court in the case of *Mbogo & another v Shah* [1969]EA 93 stated as follows:-

"A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

47. In her judgment, the learned magistrate questioned that:-

"It is also on record in evidence, which is not denied, that it is the plaintiff who caused the defendant to move from Nairobi, where he had settled her and was paying rent, to come to Mombasa so that he can resettle her and the baby ..."

In my view, this statement would appear to be incorrect. As a matter of fact, and as is evident from the proceedings, the appellant denied inducing the respondent to come to Mombasa. It is on the basis of that finding that she awarded her resettlement expenses of Kes.35,000/-.

48. This issue is tied to the related issue as to whether the respondent's goods were confiscated. The respondent, in her submissions, urges that the Appellant induced her to come to Mombasa so that she could take her items and use them with his wife or girlfriend. This appears to me to be far-fetched. Going by the Respondent's own testimony, she is unemployed and in need of support, while the Appellant is a person of means with businesses in Germany and the Czech Republic. Inducing the respondent to come to Mombasa, and presumably paying the moving expenses, so as to take away her few early possessions, does not appear to me to be a likely occurrence.

49. In any case, in my view, the issue of personal property of the respondent and whether or not she was induced aren't things that the Children's Court rightly could consider, nor give a remedy. I say so as the private property questions between the appellant and the respondent aren't. The jurisdiction of the court below lay with protecting the welfare of the child, not adjudicating the drama between her parents.

50. It is also my view that the Court below could consider only those matters that had been pleaded and not anything else. To the extent that the Court below entertained unpleaded matters, it was wrong. Its decisions cannot stand to that extent.

51. I am guided by the decision of the Court in the case of *Elizabeth O. Odhiambo v South Nyanza Sugar Co. Ltd* [2019] eKLR where the Court stated as follows:-

"15. It is indeed a well-settled principle of law that parties are bound by their pleadings and that, unless amended, the evidence adduced shall not deviate from the pleadings. This legal position was reaffirmed by the Court of Appeal



in the case of David Sironga Ole Tukai v Francis Arap Muge & 2 others Civil Appeal No. 76 of 2014 [2014] eKLR thus:-

“In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other’s case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.”

16. The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties, as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to a denial of justice.”
52. Did the Court make an unreasonable finding on future education? I do not think so. I agree with the Respondent that “equal” as used in the Kenyan children law context does not mean that both parents must provide the same amount of money for the upkeep of the children. That would be bizarre and not possibly in the best interest of the child, as the quantum of maintenance would thereby depend on what the parent with the least ability is able to afford, regardless of the condition in life, the parent with better financial muscle had made the child get used to.
53. I agree with the decision of Meoli J in GO & 2 others (Suing thru’ their mother and next friend) EMM v MOO [2016] KEHC 2325 (KLR) where she stated that:-
- “However, equal responsibility does not mean equal and similar contribution, as the income of each parent and other non-monetary contributions must be borne in mind.”
54. A similar finding was made in the case of EWM v RKK [2019] eKLR, where the court observed as follows:-
- “It is also true that though parental responsibility is to be shared, it can never be equal. The court must take into account the financial capability of each parent. This position was stated in MK vs CKK HCA.51/2015 where the court said: “Parental responsibility is shared and not equal based on the financial position of each parent. The mother as the resident parent has a nurturing role to the children and the father to provide maintenance and upkeep of the children.”
55. The upshot of the foregoing is that the appeal succeeds in part. I set aside the orders that the appellant pays for the costs of resettlement of the respondent to the tune of Kes.35,000/- per month for a period of one year. I also set aside the orders that he pays her rent arrears and buys household items for her.



I uphold the order for the appellant to pay Kes.50,000/- per month as maintenance, and order that all arrears in respect of the said amount be paid forthwith. I also uphold the orders in respect of the education of the child and her custody.

56. This being a children's matter, the parties will bear their own costs.

57. It is so ordered.

DATED AND SIGNED AT MOMBASA THIS 19TH DAY OF SEPTEMBER 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

Gregory Mutai

JUDGE

In the presence of:-

Mr Mitugo, holding brief for Mr Muteti, for the Appellant;

Ms Malombo, holding brief for Mr Malombo, for the Respondent;

Arthur - Court Assistant.

