



**KMH v LAI (Civil Appeal E002 of 2024)  
[2025] KEHC 14202 (KLR) (9 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14202 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CIVIL APPEAL E002 OF 2024  
JN ONYIEGO, J  
OCTOBER 9, 2025**

**BETWEEN**

**KMH ..... APPELLANT**

**AND**

**LAI ..... RESPONDENT**

*(Being an appeal against the judgment of Hon. R. Aganyo (PM) delivered  
on 07-08-2025 in Wajir law courts children case No. E043 of 2023)*

**JUDGMENT**

1. The respondent herein moved the trial court via a plaint dated 29.11.2023 seeking for the following orders:
  1. That the defendant be compelled to contribute to the monthly maintenance for the children totaling to Kes. 55,000 -.
  2. That the plaintiff be granted the custody of the children as some of them are of tender ages and they are currently in her physical custody and therefore they are in need of the plaintiff's care.
  3. Cost of this case.
  4. Any other relief that this Honourable Court may deem just and fit to grant.
2. The respondent's suit was hinged on the fact that the appellant is her husband despite them currently living separate lives and that their union was blessed with seven children namely: H and M who are over 18 years, I aged 16 years, A aged 7 years, A aged 5 years, M aged 3 years and Y aged 1 years. It was her case that despite H and M being adults, they were still in college hence the need for them to be paid for fees and not to mention the school fees for the other children and general providence.



3. She accused the appellant for his failure to provide for the family despite him being in a gainful job. She thus urged the trial court to allow her prayers as cited in the plaint noting that the appellants had failed to heed from the elders and children department on the need to provide for his family.
4. The appellant entered appearance and filed his defence together with witness statement thus denying the allegations by the respondent. He instead implored the court to allow the parties explore an alternative dispute resolution mechanism in solving the matter.
5. Noting that the alternative dispute resolution had failed, the court set the matter for hearing:
6. PW1, LAI testified that she is a business woman eking a living by way of selling clothes. That the appellant being her husband, had failed to provide for the family. She stated that despite the many attempts in solving their differences, the same had failed for the reason that the appellant didn't want to support the children despite being in a gainful employment. She thus adopted her statement dated 29.01.2023 and further urged the trial court to allow her prayers as cited in the plaint. On cross examination, she stated that she owned the capital that she used in starting her business and further, that the appellant did not include them in his NHIF medical cover.
7. PW2, A Ahmed Issack, an assistant chief at Hadado adopted his statement as part of his evidence and further stated that PW1 previously appeared in his office seeking that the appellant be compelled to provide for his family. That the appellant is an employee of the county government hence a person in a gainful job. It was his evidence that having failed to convince the appellant to provide for his family, the matter was referred to Childrens' department and consequently the court. He urged the court to compel the appellant to perform his parental obligations.
8. DW1, KMH testified that he works as a law enforcement officer in the County Government of Wajir and that the respondent was his wife. He denied failing to provide for his family and that his family was doing quite well.
9. The court after considering the matter before it, ordered that:
  1. The legal custody of the children is hereby awarded to the parents jointly while actual or physical custody is awarded to the mother, who is the plaintiff herein as she has demonstrated her willingness and ability to live with and raise the children who I note are of tender years who need their mother's care, noting the great lengths she has undertaken to try to resolve the dispute with the defendant to no avail.
  2. The defendant being a parent father of the children in the matter, is granted access and visitation rights of the said minors at their respective place(s) of residence at reasonable times, most preferably during the weekends and school holidays, on condition that the said access does not interfere with the children's well-being (with support and proper supervision and monitoring by the children's office).
  3. The defendant to remit monthly maintenance monies of Kes. 15,000 - only in this matter, which amount shall be deposited into an account that the plaintiff shall provide to the defendant, to serve this purpose with respect to the children herein as I find the amount to be reasonable in the circumstances of this case, to be paid by the 5<sup>th</sup> date of every month henceforth by the defendant to the plaintiff.
  4. For avoidance of doubt, the defendant shall also provide for the clothing, dugsi and school fees for the minors without fail; and shall include the said children herein in his medical cover.



5. The parties are ordered to respect and co-operate with the children's office towards compliance of these orders, as they shall attend guidance and counselling sessions therefrom, and for psychosocial support services to facilitate family members herein, in promoting safeguards and welfare of the minors in the best interest of the children.
6. Each party to bear own costs.
10. The appellant being aggrieved with the said judgment filed an amended memorandum of appeal dated 20.11.2024 citing the following grounds:
  1. The Honourable Magistrate misapprehended the best interest of the minors thereby arriving at an erroneous decision.
  2. The Honourable magistrate erred in law by failing to conduct court proceedings in the language understood by the appellant.
  3. The Honourable magistrate erred in law and fact in arriving at conclusions that were perverse based on misapprehension of the evidence on record and or unsupported by established facts.
  4. The learned magistrate erred in law and fact by ignoring and therefore failing to consider the appellant's income before arriving at her decision.
  5. The learned magistrate erred in law in disregarding the principle of stare decisis and binding decision of the High Court and Court of Appeal on the best interest of the minors being a binding governing principle on the questions issues that were before her.
  6. The Honourable magistrate erred in law and fact by awarding monthly maintenance of Kes. 15,000 - as the same is beyond the means of the applicant.
  7. The Honourable magistrate erred in law and fact by giving adverse maintenance orders against the appellant without considering that the subject minors are and have always been in the custody of the appellant.
  8. The Honourable magistrate erred in law by making a finding that the defendant should solely cater for the minors needs.
  9. That the judgment is manifestly erroneous as it violates the provisions of the *akn ke act 2001 & Children Act* and the *akn ke act 2010 constitution constitution*.
11. Reasons wherefore the appellant prayed for orders that:
  1. The appeal be allowed.
  2. The judgment delivered by Honourable R. Aganyo be set aside and be substituted with a proper judgment of this court.
  3. This Honourable court be pleased to issue any other further alternative orders as justice of the case may require to be made and in the best interests of the minors.
  4. That each party to bear their own cost.
12. The appellant having sought leave, filed a supplementary record of appeal dated 24.10.2025 in which his pay slip was annexed.
13. Directions were made that the appeal be canvassed by way of written submissions which directions parties complied with.



14. The appellant in his submissions dated 12.05.2025 coined a single issue for determination to wit; whether the appeal is merited. The appellant urged that child maintenance orders ought to be made in the best interests of the children and the same ought not to be oppressive or punitive to any party. Reliance was placed on the case of SKM vs MWI [2015] eKLR where Musyoka J. expressed himself thus:

Maintenance orders are not meant to punish or oppress any party. They should be designed to provide for the needs of the child or children in question, while at the same time respecting the financial status of the parent. A child can only be maintained within the means of the parent in question”.

15. It was urged that the trial court erred in fact and law by failing to take into account the appellant’s income and or earning capacity thereby issuing maintenance orders that are excessive, exorbitant and oppressive. That despite the appellant informing the trial court that he earned a salary of Kes. 20,000 -, and the fact that he was self-representing, the court proceeded to order that he pays Kes. 15,000, cater for minors’ clothing, dugsi and school fees together with children medical cover. That the pay slip clearly demonstrated that the appellant earned a paltry Kes. 7,715.40 which was grossly inadequate for him to comply with the said orders of the court not to mention that the same was in consideration that he also has needs.
16. Reliance was placed on section 114(1)(a) and (b) of the *Kenya Children Act 2001* which mandates the court to consider the income, earning capacity and other financial resources of the person against whom an order is to be made. It was urged that the trial court placed the entire burden of maintenance and financial provision upon the appellant which misapprehension of fact materially influenced the outcome of the court’s determination thus occasioning miscarriage of justice. Reliance was placed on the case of C.I.N. vs J.N.N. [2014] eKLR where the court stated that:
- “It will not do for the respondent to say that she has uncertain source of income and therefore the responsibility of maintaining the children should only be borne by the appellant. The respondent must establish to the satisfaction of the court, that she has also made effort to provide for the upkeep of the children”.
17. It was urged that the respondent has a shop where she sells clothes and that the said shop was financed by the appellant. That despite the respondent being a woman of means, the court failed to consider the same and proceeded to impose the sole burden of providing for the subject minors upon the appellant.
18. The trial court was also faulted for reaching a determination that is contra the law and evidence for the reason that despite parental duty being joint and equal to both parents, the trial court failed to take into consideration that the minors herein were living with the appellant at all times. That the trial court in its judgment at page 10 noted that the appellant lived with one of the children but nevertheless disregarded the same while ordering the appellant to solely cater for the minors’ needs.
19. In the same breadth, the trial court was faulted for conducting court proceedings in a language not understood by the appellant. That the court proceedings of the trial court did not indicate the language that the court conducted its proceedings. It was urged that courts have consistently held that failure to indicate the language of the court record and to confirm whether interpretation was provided renders the trial fundamentally flawed. That the appellant was denied his constitutional right to fair trial and thus was condemned unheard as he did not meaningfully participate in the hearing process. In the end, this court was urged to allow the appeal as prayed.



20. The respondent in her submissions dated 09.06.2025 submitted that the court in granting custody of the minors to the respondent considered *inter alia*; that the appellant had failed to seek for custody of the minors and that in granting the said orders, the court observed that the appellant lacked a place of abode as he had relocated to his mother's house. Further, that the appellant did not demonstrate that there were exceptional circumstances which disproved the respondent from being a good mother. To that end, reliance was placed upon the case of *J.O. vs S.A.O.* [2016] eKLR where the court emphasised that matters to do with custody of children, and especially of tender age, except where exceptional circumstances exist, the custody of such children should be awarded to the mothers.
21. On the allegation that court proceedings were conducted in a language unknown to the appellant, this court was urged to take judicial notice of the fact that the appellant is a civil servant working with the county government of Wajir as a security warden (2) and for him to qualify for the same he must be literate.
22. He further contended that his pay slip was also in English, implying that he understood what the proceedings were all about. Equally, that noting that the appellant was acting in person, upon being served with pleadings, he filed a response in English and at that time did not allege that he did not follow the court procedure. That he attended the court proceedings from the beginning till the end and at no time did he inform the court that he did not understand what was going on. It was urged that he even cross examined witnesses during the hearing and therefore, the allegation that he did not receive a fair hearing was far from the truth.
23. The respondent submitted that the allegation that the appellant had been ordered to cater for the minors single handedly was far from the truth as the respondent prior to filing this matter, had single handedly provided for the minors. That the needs of children buds as the children grow and therefore the amount of Kes. 15,000 was fair considering that the children herein are five in number not to mention the other adult children who still depends upon their parents.
24. It was further urged that the pay slip presented was meant to hoodwink the court in keeping the appellant off his parental duties. That in as much as the pay slip showed that there was a loan, the same was not a genuine innocent act but meant to negate and or frustrate the execution of the order. In support of the need for the minors herein to be provided for, the respondent relied on the case of *M.A. vs R.O.O.* [2013] eKLR where it was held that:

... what is the best interest of the child has not been defined in law. This is as it should be because the best interest of each particular child will depend on the circumstances of each particular time. What is not in dispute, however, is that there are certain minimum requirements that have universally been accepted to constitute the best interest of the child. This includes the right of a child to be provided with shelter, food, clothing and education. The child is entitled to medical care. The child's welfare should be taken care of under the best possible circumstances. The child is also entitled to parental guidance to be given a suitable conducive and loving environment in which to grow up".
25. In the end, the respondent urged this court to dismiss the appeal herein for want of merit.
26. It is trite law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court, both on points of law and facts, and come up with its findings and conclusions. As the court re-evaluates the evidence, it must bear in mind that it has neither seen nor heard the witnesses. This



principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123 where the court held that:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

27. I have considered the appeal herein and the written submissions by both parties. The only Issue for determination is whether the appeal herein is merited.

28. The law relating to maintenance of a child is contained in the *kenya constitution 2010* and in the *kenya children act 2001 & Children Act*. Article 53 of the *kenya constitution 2010* provides that:

1. Every child has the right-

a ...

b ...

c ...

d ...

(e) to parental care and protection which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.” Maintenance is an aspect of parental care and is the responsibility of both parents of a child.

29. Article 53(2) of the *kenya constitution 2010* provides that:-

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

30. Equally, section 8 (1) of the *kenya children act 2001 & Children Act 2022* provides 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) ....

31. Under section 31 of the Children’s Act, parental responsibility has been provided for to be equal and therefore, each parent is required to provide for the upkeep of the child. Though parental responsibility is to be shared, it may not always be equal depending on case by case as the court has to take into account the financial capability of each parent.



32. In the case of M.K. vs C.K.K HCA 51 2015; MNM vs SNK (Civil Appeal E008 of 2022) [2023] KEHC 3915 (KLR) the court held thus.

“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.”

33. Therefore, each parent is obliged to make provision for the maintenance of the child and such provision will be dependent upon the financial capacity of the said parents.

34. The above is buttressed by Section 114(1) of the *akn ke act 2001 & Children Act 2022* which sets out the considerations, which should guide the court in making an order for financial provision for the maintenance of a child. These considerations include:

“(a)the income or earning capacity, property and other financial resources which the parties or any other person in whose favour the Court proposes to make an order, have or are likely to have in the immediate future;

(b) the financial needs, obligations, or responsibilities which each party has or is likely to have in the immediate future;

(c) the financial needs of the child and the child’s current circumstances; (d) the income, if any, derived from the property of the child;

(e) any physical or mental disabilities, illness or medical condition of the child;

(f) the manner in which the child is being or was expected to be educated or trained;

(g) whether the respondent has assumed responsibility for the maintenance of the child and, if so, the extent to which, and the basis on which, he or she has assumed that responsibility, and the length of the period during which he has met that responsibility;

(h) whether the respondent assumed responsibility for the maintenance of the child knowing that the child was not his child;

(i) the liability of any other person to maintain the child;

(j) the liability of that person to maintain other children.

35. In the instant case, the appeal turns on the allegation that the amount of money ordered for monthly maintenance was not only against the law but also the facts. The appellant urged that he was condemned to pay Kes. 15,000 - yet his pay slip shows that he earns only Kes. 7,715.40 -.

36. A look at the said pay slip denotes that the appellant earns an amount of 29,560 and after deductions, takes home Kes. 7,715. 40. Thus, apart from the statutory deductions, the appellant also services two huge loans. It was argued that the respondent also earns a stable income and should bear an equal share of the financial responsibility. But what came from the evidence before this court is the fact that the respondent owns a shop in which she sells clothes and therefore, her earnings could not be quantified despite urging that she had been independently taking care of the minors’ needs.

37. As already noted, the well-being of the minors is a responsibility placed upon both parents and having in mind the number of the children herein, it would be proper that applying the best interest of the



said children, the earnings of the parties herein be weight carefully. No parent is superior to the other in terms of parental care or responsibility. See S.A.K vs Z.D.N.P

38. In the case of M.O.A Vs H.A.O[2021]eKLR this court held:-

“Although parents may not have equal financial ability for the court to demand equal contribution, one must at least exhibit some sense of seriousness in making some contribution as a sign of good will that he or she is not geared towards overburdening the other parent for the sole purpose of punishing him or her using the best interest of a child principle or as a ground to settle scores out of marital differences.”

39. In NS vs JM (Family Appeal E031 of 2023) eKLR, the Court stated as follows in paragraph 21:

“On whether the learned Magistrate erred in law and, in fact, in ruling that the Respondent should not contribute towards the children’s maintenance and upkeep, in the sum of Kes.54,650 - per month, as prayed by the Appellant, I note from the court’s ruling that no such order was issued; instead, the learned magistrate enhanced the provision orders given to the Respondent by ordering him to continue catering for shopping and pocket money for the child in boarding school as well as transport during opening and closing day.”

40. In the present case, however, noting that the appellant earns Kes. 7,715.40, and noting that the appellant did not contest on custody having in mind the age of the children, it is clear that the appellant has no financial capacity to meet all the obligations imposed upon him. How can he budget for 7,700 = by paying 15,000 = monthly maintenance and pay school fee for all the children? There was no claim that the appellant has an alternative source of income to supplement the meagre salary he is earning. I believe that had the current pay slip of the appellant been presented to the trial court, it would have arrived at a different destination in terms of awarding maintenance expenses.

41. On the other hand, the respondent did not disclose how much she earns from her business of selling clothes per month. Whereas the best interest of a child to the rights of a parent are superior, a parent should not be condemned to oblivion simply because he or she is poor. Society should learn to live within their means and at the same time peacefully co-exist with their children.

42. The act of over glorifying the principle of the best interests of a child without caring how much stress a parent would undergo at the comfort of his or her child is to be naïve. If the appellant is not able to pay school fees in a private school for his or her child, such child should go to a public school.

43. In the instant case, the trial court literally imposed almost all responsibilities upon the appellant. It is almost impossible for the appellant to raise the amount of kes 15,000 =. In my view, the appellant should pay school fees for the children below 18 years. For those beyond 18 years and still in need of parental care, they can seek extension of parental responsibility beyond their 18<sup>th</sup> birthday. As regards medical care, the appellant should include all his children under the SHAH medical scheme.

44. As regards maintenance, the appellant can supplement the mother’s contribution by paying Kshs 3.000 per month until he completes paying his loans after which period, the maintenance fees shall be reviewed upwards. He is cautioned against taking any extra loan to circumvent the order. As to clothing the appellant can give a lump sum amount once per year to cater for that expense.

45. As regards court proceedings conducted in a language the appellant could not follow, the same is imaginary and unreasonable. From the record, he followed proceedings reasonably thereby cross examining without any complaint. This ground is untenable.



46. In a nutshell, the appeal herein succeeds to the extent that the lower court judgment is substituted with orders that;
- i. Joint Legal custody of the children be and is hereby awarded to the appellant and respondent
  - ii. Actual and or physical custody is hereby awarded to the respondent (mother) with visitation rights during weekends, school and public holidays granted to the appellant. Logistics to be worked out in conjunction with the area children officer.
  - iii. Both parents to enroll for counselling services.
  - iv. The appellant to pay to the respondent child maintenance of Kshs 3000 = per month and in any event not later than 5<sup>th</sup> of each month
  - v. That the said amount awarded above shall be subject to review upon the appellant completing payment of his current loans
  - vi. That the appellant shall not be allowed to top up or take any other loan unless approved by the court to avoid circumventing the award
  - vii. The appellant shall meet school fee and other school related expenses
  - viii. The appellant shall enroll all his children to SHAH or any other medical scheme for medical cover
  - ix. The respondent shall provide shelter and meet part of the maintenance expenses
  - x. That the appellant shall meet clothing expenses for the children by paying a lump sum amount of 15,000 = once per year. For avoidance of doubt, payment to be made on 15<sup>th</sup> of every December each year.
  - xi. Each party to bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9<sup>TH</sup> DAY OF OCTOBER 2025**

.....

**J. N. ONYIEGO**

**JUDGE**

