



**RLSJ v CAM (Family Appeal E038 of 2024)  
[2025] KEHC 14612 (KLR) (15 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14612 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY APPEAL E038 OF 2024**

**G MUTAI, J**

**OCTOBER 15, 2025**

**BETWEEN**

**RLSJ ..... APPLICANT**

**AND**

**CAM ..... RESPONDENT**

**RULING**

1. The application before the court is dated 29<sup>th</sup> May 2025. Vide the said application, the appellant/ applicant seeks to adduce additional evidence by way of an affidavit, and to file a supplementary record of appeal to which the said affidavit shall be annexed.
2. The additional evidence sought to be produced at the appellate stage is a video of the minor, the subject of these proceedings, being allegedly beaten by a caregiver. It is claimed that the caregiver hit the child using a charger cord.
3. In his supporting affidavit, Mr RLSJ averred that he informed the respondent about the incident and that she did nothing about it. He also deposed that the order issued by the court below for the social inquiry to be conducted was not effected, nor was a requisite report made. He stated that it was necessary to produce the alleged evidence as it would assist the honorable court in arriving at a decision that is fair, just, and in the best interest of the child.
4. The application was opposed. The respondent filed a replying affidavit sworn on 25th June 2025. Vide the said affidavit, she averred that the application was frivolous and vexatious and meant to delay the hearing of the appeal. She further averred that the application was a ploy by the appellant/applicant to take away their daughter, having sworn that he would use his resources to ensure that the child never calls another man “daddy”.



5. Ms M denied that the court below ordered a social enquiry to be conducted. In her view, what the appellant/applicant was trying to do was to procure a social inquiry report at the appellate stage, which is impermissible.
6. While admitting that there was an incident at her house, the respondent deposed that the person who caned the child was a niece, a lady she identified as “Rhoda”. The incident occurred on the 7<sup>th</sup> May 2025, long after the appeal was filed. She contended that what triggered the incident was an alleged deletion by the child of the academic work of her niece, which frustrated Ms Rhoda and made her hit the child. The respondent had since sent the niece away. Ms M prayed that the application be dismissed.
7. In a supplementary affidavit sworn on 12<sup>th</sup> July 2025, the appellant /applicant denied the averments in the replying affidavit, and in particular, the allegation that he bragged that he would frustrate the respondent. He reiterated his earlier contention that the court below ordered a social inquiry to be conducted, but it was never done. As proof of the said allegation, he attached to his affidavit an extract of the court proceedings, which appears to show that the Hon Green Odera ordered that a social inquiry report be supplied by the children officer. The order in question was said to have been made on 5<sup>th</sup> December 2023.
8. The parties submitted before me on 16<sup>th</sup> September 2025.
9. I have considered the application and the responses thereto and the oral submissions that the parties made before me on 16<sup>th</sup> September 2025.
10. In my view, the sole issue for determination is whether this court, in exercise of its appellate jurisdiction, should permit the adduction of fresh evidence, in particular, of an incident that happened long after the judgment was delivered. To answer this question, I shall look briefly at the provision of statute and the Rules of the court.
11. Section 78 of the [Civil Procedure Act](#) provides that:-
  - “(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.”
12. If the appellate court decides that it would be in the interest of justice to take additional evidence, it may do so itself, or it may require the court below to do so on its behalf.



13. The statutory provision is given effect by Order 42 Rule 27 of the [Civil Procedure Rules](#), which provides that:-

- “(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 judgment, 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.”

14. It would appear to me that under the rules additional evidence may only be in respect such evidence as was in existence at the time the court rendered the impugned judgment and which was not produced either because the court refused to admit them, when it should have done so, or the document was not availed despite due diligence on the part of the applicant and the same could have been determinative had been produced.

15. In the case of the [Attorney General v Torino Enterprise Ltd](#) [2019] eKLR, the Court of Appeal held a follows:-

“Before this Court can permit additional evidence under rule 29, it must be shown, one, that such evidence could not have been obtained by reasonable diligence before and during the hearing; two, the new evidence would probably have had an important influence on the result of the case if it was available at the time of the trial, and finally, that the evidence sought to be adduced is credible, though it need not be incontrovertible.”

16. The Supreme Court of Kenya had this to say in the case of [Mohamed Abdi Mabamud v. Ahmed Abdullabi Mohamed & 3 others](#) [2018] eKLR:-

“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.

(80) We must stress here that this Court even with the Application of the above-stated principles will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution.”

- 17. This court is required by Article 53(2) of the *Constitution* and Section 8 of the *Children Act* to act in the best interest of the child when making its decision. That said, parties involved in litigation have a right to a fair trial. The right to a fair trial is a non-derogable right in our constitutional architecture.
- 18. It is clear to me that the evidence that is sought to be produced is of an incident that took place after the hearing in the court below had been concluded. The impugned judgment was delivered on 20<sup>th</sup> May 2024 by the Hon Green Odera in MCCHC No E184 of 2023 between the parties hereto. The incident is said to have taken place on 7<sup>th</sup> May 2025, almost a year after the judgment.
- 19. The said evidence cannot be said to have been capable of production during the hearing, nor was it suppressed by the court below. As such, it cannot be evidence capable of adduction at the appellate stage.
- 20. In my view, it is only the evidence that was in existence before the delivery of the judgment, and not that which arose after the judgment, that can be produced at the appellate stage. This court is sitting as an appellate court and not in the exercise of its original jurisdiction.
- 21. On the want of a social inquiry report, the same is a proper subject for submissions during the hearing of the appeal, and I need not say more in regard to the stated subject.
- 22. The upshot of the foregoing is that the application has no merit; the same is dismissed. The parties shall bear their own costs.



23. Orders accordingly.

**DATED AND SIGNED AT MOMBASA, THE 15<sup>TH</sup> DAY OF OCTOBER 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of: -

Mrs Maina, for the Appellant/Applicant;

Ms Christine Ajiambo Marabi (*pro se* litigant); and

Arthur - Court Assistant.

