



**MWM v DG (Civil Appeal E064 of 2024)
[2025] KEHC 16111 (KLR) (Family) (7 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16111 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY
CIVIL APPEAL E064 OF 2024**

**H NAMISI, J
NOVEMBER 7, 2025**

BETWEEN

MWM APPELLANT

AND

DG RESPONDENT

*(Being an appeal against the Judgement of Hon. Festus Terer (RM)
delivered on 24 May 2024 in MCCHCC No. E1322 of 2023- Miliman)*

JUDGMENT

1. The Appellant herein, aggrieved by the judgement delivered by the Children’s Court, has preferred this appeal against the Respondent. The Appellant seeks to challenge the apportionment of parental responsibility, particularly regarding financial obligations, the issuance of restraining orders that were not sought by the Respondent, the failure to grant reimbursement of expenses, and the refusal to compel the release of the minor’s essential documents.
2. This Court, sitting as the first appellate court, is seized of the duty to reconsider and re-evaluate the evidence adduced before the trial court, analyse the same, and arrive at its own independent conclusion. In doing so, the Court is ever mindful that it did not have the advantage of seeing and hearing the witnesses testify, and must, therefore, make due allowance for that fact.

Background of the Case

3. The genesis of the dispute revolves around the parental responsibility for the child. The Respondent initiated the suit by way of Plaintiff dated 11 August 2023 seeking an order restraining the Appellant from transferring the child from [Name Withheld] Girls School, where the child was enrolled in Form 2, and for determination and apportionment of parental responsibility. The Appellant filed a Statement



of Defence and Counterclaim dated 15 September 2023, in which she did not contest the principle of shared responsibility, but proposed her own framework for its apportionment, seeking, inter alia, a monthly maintenance sum to cater for the child's shelter and the salary for the house help.

4. During the pendency of the proceedings in the trial court, a significant change in circumstances occurred: the child was transferred from the said [Name Withheld] Girls School to Regis School, a day school. This transfer, and the consequential relocation of the Appellant from Ruai to Ruiru to facilitate the child's daily commute, fundamentally altered the financial and logistical dynamics of the child's upbringing.
5. After hearing the parties, the trial court delivered a judgement apportioning parental responsibility as follows: the Respondent was to cater for the child's school fees, school related expenses and medical cover. The Appellant was ordered to provide shelter, food, clothing and utilities. The trial court expressly declined to grant the Appellant's prayer for a monthly maintenance contribution of Ksh 50,000/= towards shelter and Kshs 9,000/= towards the salary for a house help. The trial court also dismissed the Appellant's Counterclaim for reimbursement of certain expenses and issued an order restraining the Appellant from transferring the child from Regis School without the Respondent's consent or leave of Court.
6. Aggrieved by the judgement, the Appellant lodged the appeal herein, raising 11 grounds of appeal, which can be consolidated into 4 main areas. First, that the learned Magistrate erred in the apportionment of financial responsibility, thereby placing an inequitable burden on the Appellant. Second, that the trial court erred in dismissing the Appellant's claims for reimbursement of monies spent on school fees and relocation. Third, that the court erred in granting an order suo motu restraining the future transfer of the child from her current school. Fourth, that the court erred in failing to make orders regarding the release of the child's essential documents and was generally biased in its consideration of the evidence.
7. Parties canvassed the appeal by way of written submissions. The Appellant submitted that the trial court's decision was disproportionate and failed to account for the significant disparity in the financial capacities of the parties. It was argued that the Respondent's ability to pay high fees at the child's previous prestigious schools was clear evidence of a financial standing far superior to what he presented in court. The Appellant contended that with the child now in a day school, the costs of shelter and domestic assistance are no longer ancillary but are central to the child's maintenance and should be shouldered proportionally by the parent with the greater financial muscle.
8. Conversely, the Respondent urged this Court to uphold the trial court's decision, arguing that it correctly applied the constitutional and statutory principles of equal and joint parental responsibility. It was submitted that the Appellant is a business lady with her own source of income and cannot abdicate her duty to contribute to the child's upkeep. It was argued that the Respondent has dependents from his current marriage, a factor that trial court rightfully considered, and that the Appellant's demands for rent and a house help amounted to a veiled claim for personal maintenance, which the law does not permit.

Analysis & Determination

9. Having carefully considered the Record of Appeal and the submissions by the parties, the following issues lend themselves for determination:
 - i. Apportionment of maintenance for the child;
 - ii. Whether the Appellant is entitled to a reimbursement;



- iii. Whether the learned trial magistrate erred by granting an order suo motu restraining the Appellant from transferring the child from Regis School without consent or leave of the court.
 - iv. Whether the learned trial magistrate erred in failing to make an order compelling the Respondent to release the minor's birth certificate and expired passport to the Appellant
10. This being a first appeal, this Court is not merely undertaking a review of the trial court's decision; it is vested with the duty to re-evaluate and re-examine the evidence on record and draw its own conclusions. In *Selle & another v Associated Motor Boat Company Ltd & others EA 123*, it was held that a first appellate 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.
11. This principle has been consistently affirmed by the Court, including in the case of *Ephantus Mwangi and Another vs Duncan Mwangi Wambugu [1982-88] IKAR 278*, which was cited by the Respondent. An appellate court will not lightly interfere with a finding of fact by the trial court. However, it is duty-bound to do so if it is evident that the trial court failed to take into account particular circumstances or probabilities material to an estimate of the evidence, or if the findings are based on no evidence or on a misapprehension of the evidence. It is with this legal lens that this Court shall proceed to analyse the issues at hand.

Apportionment of Parental Financial Responsibility

12. The cornerstone of the law on child maintenance is the principle of equal and joint parental responsibility. This is enshrined in Article 53(1)(e) of *The Constitution*, which provides that every child has a right 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. This constitutional imperative is given legislative effect by sections 31, 32 and 110 of the *Children Act*.
13. However, the Court has clarified that equal responsibility does not translate to a mechanical 50:50 split of financial obligations. The responsibility is to be shared proportionately, according to the means and financial capacity of each parent. In *G. O. & 2 others (Suing thru' their mother and next friend) E. M. M. vs M. O. O. [2016] KEHC 2325 (KLR)*, the Court opined that equal responsibility does not mean equal and similar contribution as the income of each parent, and other non-monetary contribution must be borne in mind.
14. The Court must take into account the financial capability of each parent. This position was stated in *M.K. vs C.K.K. 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.”
15. In *KMM v MMO [2022] KEHC 1381 (KLR)*, the Court reiterated that in making an order for financial provision, the trial court is obligated to take into account the income or earnings capacity, property and financial resources of the parties. Section 114 of the *Children Act* provides a detailed list of factors the Court must consider, paramount among them being the income and earning capacity of the parties and the financial needs of the child.
16. In the instant case, the trial court was faced with conflicting evidence regarding the parties' financial capacities. The Respondent testified that he earns a net monthly salary of Kshs 87,000/-. However, this assertion is starkly contradicted by the evidence on record. The fee statements from Nova Pioneer



School show that he was comfortably paying school fees in excess of Kshs 200,000/= per term. Furthermore, in text message exchanges adduced in evidence, the Respondent himself advised the Appellant to look for an alternative school within a budget of Kshs 220,000/= to Kshs 250,000/= per term. This demonstrated spending capacity is irreconcilable with a stated net income of Kshs 87,000/=. When a party fails to make a full and frank disclosure of their income, especially when confronted with contradictory evidence, the Court is entitled to draw an adverse inference and make a determination based on the available evidence of their lifestyle and expenditure.

17. On the other hand, the Appellant's evidence that she is a small-scale vendor of second-hand shoes with a meagre and unstable income was not seriously challenged or controverted. While this Court is mindful of the principle articulated in *C.I.N vs J.N.N* [2014] KEHC 8285 (KLR), that a parent cannot use an uncertain income as a basis to evade their responsibility, the issue here is not one of evasion but of a demonstrable and significant disparity in earning capacity. The most critical factor that the learned trial magistrate appears to have given insufficient weight to is the change in the minor's schooling arrangement. The transition from a boarding school to a day school is a material change in circumstances. In boarding school setting, the fees paid by the Respondent were largely all-inclusive, covering tuition, accommodation, meals and utilities. With the child now attending a day school and residing with the Appellant, these daily, non-discretionary costs have been transferred to the Appellant. Shelter, as provided for under section 31 of the Act, is a fundamental component of a child's maintenance. For a day scholar, a safe, stable and conducive home is not merely the parent's residence but the child's primary environment for life, study and development. Given the standard of living the child was accustomed to, a fact established by the Respondent's choice of previous schools, it is inequitable to place the entire burden of providing suitable shelter on the parent with a demonstrably lower and unstable income. The request for a contribution towards rent was not a claim for personal maintenance for the Appellant, but a legitimate child-related expense aimed at ensuring the minor's standard of living is not drastically compromised.
18. Similarly, the claim for a contribution towards a house help's salary must be viewed in context. This is not a luxury but a necessary expense to facilitate the Appellant's ability to work and earn an income to meet her share of the parental responsibility, while ensuring that the child is cared for and supervised after school hours. To deny this support is to indirectly penalise the resident parent and curtail her ability to generate income, which is ultimately not in the child's best interests.
19. For these reasons, the Court finds that the trial court erred in apportionment of financial responsibilities.

Claim for Reimbursement

20. Regarding the Appellants claim for reimbursement, the Appellant seeks two sums: Kshs 190,050/- for school fees and uniform for the child's first term at Regis School, and Kshs 75,000/- for costs associated with the Appellant's relocation from Ruai to Ruiru. In law, such claims fall under the head of special damages.
21. The legal principle governing special damages is trite: they must be specifically pleaded and strictly proven. As held by the Court in *Equity Bank Ltd v Gerald Wang'ombe Thuni* [2015] KEHC 2474 (KLR), a claim for special damages must be supported by compelling and accurate evidence to prove the exact loss sustained. The burden of proof lies squarely on the claimant.
22. This Court has meticulously re-examined the Record of Appeal to ascertain the evidence tendered in support of these claims. The Appellant, in her own submissions, states that she raised the Kshs 190,050/= by taking loans from her mother and a friend, and furnished the trial court with a screenshot



of an m-pesa message for Kshs 50,419 from the friend and a sales memo for uniform worth Kshs 12,050/=. While this evidence proves an expenditure of Kshs 62,469/=:, it falls short of the strict proof required for the entire sum of Kshs 190,050/=. There are no receipts for the school fees paid or evidence of the loan from her mother.

23. Similarly, for Kshs 75,000/- relocation cost, while the relocation itself is not disputed, the record does not contain specific receipts for transport, deposits for the new residence, or other documentary proof to substantiate this exact figure.
24. While the Court is sympathetic to the Appellant's position, particularly as she incurred these costs to secure the child's education and welfare, the law of evidence on special damages is unforgiving. A claim for special damages is a claim for a liquidated sum, and its proof must be as precise as the claim itself. The trial court was bound by this high standard of proof. In the absence of strict proof for the full amounts claimed, the trial court's decision to dismiss these claims, while appearing harsh, was not an error in law. The claims failed not on their moral merit, but on the standard of proof. This ground of appeal, therefore, fails.

Restraining Order

25. In its judgment, the trial court ordered that the Appellant is restrained from transferring the child from Regis School without the leave of the court or the consent of the Respondent. A perusal of the Respondent's Plaintiff reveals that the restraining order he had prayed for was specific to the child's transfer from [Name Withheld] Girls School. The order granted by the court was, therefore, not pleaded and was made suo motu.
26. The Children's Court is vested with wide powers and an overriding duty under section 8 of the Act to act in the best interests of the child. This may, in exceptional circumstances, require the court to make orders that were not specifically prayed for by the parties. However, this power must be exercised judiciously and in a manner that respects the principles of natural justice, which require that a party be heard in a matter before an adverse order is made.
27. More importantly, the practical effect of the order must be scrutinized. By requiring the Respondent's consent for any future transfer, the order effectively grants the Respondent the opportunity to participate in decisions relating to the child's education. The Respondent accused the Appellant of arbitrarily moving the child from one school to another. While this Court cannot claim to know the intention of the trial court, it is likely that this order was intended to ensure stability for the child, while requiring meaningful consultation between the parents. Therefore, this Court finds that the trial court did not err in making this order.

Essential Documents

28. The Appellant seeks an order compelling the Respondent to release the child's original Certificate of Birth and expired passport to facilitate its renewal. The record shows that the parties have joint legal custody of the child. Joint legal custody implies shared rights and responsibilities in making major decisions concerning the child's welfare, including matters of education, health, and travel. It is an arrangement that demands cooperation. Withholding essential documents such as Birth Certificates and passport is an act that frustrates the exercise of parental responsibility by the other parent. These documents are necessary for a myriad of administrative and legal purposes. The renewal of the passport for the child requires the consent and participation of both parents. The Respondent cannot, therefore, withhold the expired passport and simultaneously fail to cooperate in the renewal process. Such conduct is contrary to the spirit of joint legal custody and is detrimental to the child's interests.



29. The parent with primary physical custody must have ready access to these documents for the day-to-day needs of the child. It is, therefore, unreasonable for the non-resident parent to retain them. The trial court erred in failing to make a definitive and practical order in this regard.
30. In view of the foregoing, the appeal succeeds in part. I make the following orders:
- i. The appeal on the apportionment of parental financial responsibility is allowed. The orders of the trial court directing the Appellant to solely provide for shelter, food, utilities, clothing and a house help are hereby set aside;
 - ii. In substitution thereof, the parental responsibilities shall be shared as follows:
 - a. The Respondent shall continue to pay the child's school fees and all school related expenses, and shall provide a comprehensive inpatient and outpatient medical cover for the child;
 - b. In addition, the Respondent shall pay to the Appellant a monthly sum of Kshs 30,000/= on or before the 5th day of every month, being his contribution towards the child's maintenance;
 - c. The Appellant shall be responsible for the child's food, clothing, shelter, utilities and other daily needs;
 - iii. The Respondent is hereby ordered and directed to release the child's original Certificate of Birth and expired passport to the Appellant within 7 days from the date hereof. The Respondent shall fully co-operate with the Appellant in the process of renewing the child's passport;
 - iv. Save for the foregoing orders, all other orders made by the trial court remain unchanged.
 - v. Each party shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 7 DAY OF NOVEMBER 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For Appellant: N/A

For Respondent: Mrs. Ndungu

Court Assistant: Lucy Mwangi

