



**LWW v HMB (Family Appeal E015 of 2024)
[2025] KEHC 19198 (KLR) (18 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 19198 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
FAMILY APPEAL E015 OF 2024
MS SHARIFF, J
DECEMBER 18, 2025**

BETWEEN

LWW APPELLANT

AND

HMB RESPONDENT

*(Being an appeal from the Judgement and Decree of the Senior
Principal Magistrate’s Court in Webuye Children Case No. E005
of 2024 delivered by Hon. V. Yator (SPM) on 11th December 2024.)*

JUDGMENT

A. Background

1. This Appeal arises from a judgment of the Senior Principal Magistrate’s Court in Webuye Children Case No. E005 of 2024 delivered by Hon. V. Yator (SPM) on 11th December 2024, whereat she made the following orders:
 - a. Both parties shall have joint legal custody of the children, the Appellant shall have actual physical custody and the Respondent to enjoy unlimited access;
 - b. The Respondent shall cater for the school fees and related expenses of the four (4) older children and the Appellant shall cater for the school fees and school related expenses of the 3 younger children until they finish their primary level of education.
 - c. The Respondent shall take over in payment of school related expenses of the 3 younger children upon joining secondary schools onwards.
 - d. The Appellant shall cater for food and utility needs of the children.



- e. The Respondent shall provide 3 bags of maize every end of harvesting season as his contribution towards food for the children.
- f. The clothing and medical needs of the children shall be catered by both parties.
- g. No orders as to costs as this is a children's matter.

B. The Duty Of A First Appellate Court

- 2. 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. (See *Selle & another v Associated Motor Boat Co. Ltd. & others* {1968} EA 123). As was held by the Court of Appeal for East Africa in *Peters v Sunday Post Limited* {1958} E.A. page 424: -

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

- 3. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate Court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate Court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate Court had discharged the duty expected of it. (See *Santosh Hazari vs. Purushottam Tiwari (Deceased)* by L. Rs {2001} 3 SCC 179).

C. Appeal

- 4. In her Memorandum of Appeal dated 23rd December 2024, the Appellant has raised Seven (7) grounds of appeal which are as follows:
 - a. That the learned Magistrate erred in law and in fact by failing to appreciate the evidence of the (Applicant) Appellant.
 - b. The learned Magistrate erred in law and in fact by heavily relying on the Respondent's evidence when delivering her judgment when the Respondent was dishonest to the Court.
 - c. The learned Magistrate erred in law and fact as she delivered judgment and yet the Appellant had never been served with the documents by the Respondent therefore the Appellant could not counter the claims made by the Respondent.
 - d. The learned Magistrate erred in law and in fact when she failed to put the interests of the children before the interests of the Respondent.



- e. The learned Magistrate erred in law and in fact when she failed to interview the children or to send the children's officer to find out the best interests of the children.
 - f. That the said judgment is not based on any honest evidence.
 - g. That the judgment has occasioned a miscarriage of justice on part of the children.
5. The Appellant prayed that this appeal be allowed and this Court do set aside the judgement and orders of the subordinate Court and substitute the same with an appropriate order for maintenance for the 7 children against the Respondent for Shelter-Kshs. 12,000/=, School fees-Kshs. 160,000/=, clothing-Kshs. 15,000/=, medication-Kshs. 50,000/= and leisure Kshs. 10,000/=.
 6. Vide Court directions issued on 18th March 2025, this Court directed the parties to canvass the appeal by way of written submissions.
 7. At the point of writing this judgement and after strict perusal of the Court record and the Court Tracking System only the both parties herein had complied with the Court directions as issued on 18th March 2025.

D. Submissions

8. The Appellant submits that the appeal challenges the orders issued by the lower Court regarding custody, financial responsibilities, and other matters concerning the welfare of the children. Based on the grounds of appeal preferred, the Appellant seeks to have the lower court's judgment set aside, arguing that:
 - a. Unequal Responsibility: The division of financial responsibilities between the parents violates the principle of equal parental responsibility. The Appellant contends that all children require support from both parents, and separating responsibilities creates confusion for the children.
 - b. Communication Issues: The Respondent allegedly blocked the Appellant's number, hindering communication between the children and their father, which is not in the best interests of the children as outlined in Article 53(2) of *the Constitution* of Kenya 2010 and Section 4(3) of the *Children Act*.
 - c. Shelter and Rent: The issue of shelter, particularly rent for children in colleges, was not addressed in the lower court's judgment.
 - d. Food Contribution: The Appellant argues that the provision of 3 bags of maize per year is insufficient, as harvesting occurs only once a year. The lower court had previously ordered the Respondent to provide 7 bags annually, and the reduction is deemed unfair.
 - e. Leisure Rights: The Appellant claims the lower court failed to consider the children's rights to leisure.
 - f. Partiality: The Appellant alleges that the lower court acted partially by not ensuring equal parental responsibilities for the children.
 - g. School Fees: The Appellant asserts that the Respondent deliberately ignores his responsibility for school fees unless compelled, which is unfair given that the Appellant is with the children most of the time.
9. The Appellant placed reliance of the dints of Article 53(2) of *the Constitution* of Kenya 2010, which emphasizes that the best interests of the child are of paramount importance in every matter concerning



the child. Subsequently, she relied on Section 4(3) of the *Children Act* that reinforces the principle of prioritizing the best interests of the child.

10. In conclusion, the Appellant argues that the lower Court's judgment was unfair and failed to uphold the best interests of the children. She seeks a review of the orders to ensure equal parental responsibility and adequate support for the children's needs.
11. Opposing the appeal, the Respondent relying on Article 53(1) of *the Constitution* of Kenya, Sections 107(1), 108, and 109 of the *Evidence Act* (Cap 80), argues that he cohabited with the Appellant herein as husband and wife under African customary law since 1999 and had seven children. Subsequently, the Respondent lost his job in 2014, leading to financial struggles and eventual family separation in 2017. He claims to have been solely responsible for the financial, material, and social support of the children, including school fees, clothing, subsistence, and medical expenses.
12. According to the Respondent, the Appellant pursued her education from 2006 to 2018, during which he took full parental responsibility for the children. Further, he argues that the Appellant refused to assist in paying fees and supporting the children, even after the Respondent lost his job. The Respondent provided evidence of financial support through M-Pesa transactions totaling Kshs. 144,88/= between January and March 2024.
13. The Respondent argues that the Appellant failed to provide evidence to substantiate her claims, including allegations of hostility and abandonment. His work history has been unstable since 1999, with stable employment only secured in November 2020. He argues that his current net pay is Kshs. 15,722/= per month due to deductions for loans and other expenses.
14. The Respondent finally argues that he has committed his pay slip to school fees loans, leaving no funds for self-development or entertainment.
15. In conclusion, the Respondent requests the dismissal of the Appellant's appeal with costs, arguing that the lower Court judgment was fair and addressed the best interests of the children. He emphasized that his financial contributions and the Appellant's lack of cooperation and support.

E. Analysis And Determination

16. I have read the Court record, the memorandum of appeal and the respective submissions of the parties herein. In determining this appeal, I have taken into account Article 53 (2) of *the Constitution* and Section 4(3) of the *Children Act* that obligate this Court to give primacy to the best interest of children in all matters dealing with the child. It is also the duty of a Court in determining issues of custody of children to ensure that the provisions of Section 83(1) of the *Children Act* are taken into account. This Section provides that:

- “(1) In determining whether or not a custody order should be made in favour of the 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 any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;
 - d. the ascertainable wishes of the child;



- e. whether the child has suffered any harm or is likely to suffer any harm if the order is not made;
- f. the customs of the community to which the child belongs;
- g. the religious persuasion of the child;
- h. whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;
- i. the circumstances of any sibling of the child concerned, and of any other children of the home, if any;
- j. the best interest of the child.”

17. In considering whether to interfere with the decision of the lower Court, it is trite law that an appellate Court should be slow in interfering with the exercise of the discretion of the Court below. An appellate Court may only tinker with a decision of the lower Court, if it is satisfied that the discretion of that court was not exercised judiciously. In *Mbogo & Another v Shah* [1968] EA 93, it was held at page 96 that:

“An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice.”

18. I have taken into account the issues raised in this Appeal and as I have stated above, it is trite that the best interest of the child is of paramount importance in all matters concerning the child. I will decide this matter based on what is the best interest of the minors.

19. 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 (Article 53 (1) (e)). My careful consideration the Appellant’s arguments she is shifting all the responsibility of the seven children onto the Respondent herein and this clearly is contrary to the dints of Article 53 (1) (e). The trial Court noted in its judgement that it was guided by the propositions levelled during mediation and duly recorded, but the Appellant refused to assent to the same agreement. This clearly shows that I have no reason to interfere with the discretion of the trial Court in all the orders made as the same clearly did take into account the best interest of the minors for their full benefit from the provisions of the law. I find no evidence that the Respondent is not fit to share joint legal custody and enjoy unlimited access of the minors. But it is important to also recognize the rights of the children to parental responsibility of both parents. She should not be denied the love of their father. It is important to note to the Appellant herein that parental responsibility is a joint effort and not the sole responsibility of the father, the Respondent herein.

20. Finally, it is disheartening listening to the Appellants oral arguments that the Respondent herein took control and access of his daughter’s released HELB funds of Kshs. 28,000/= and extend to her meagre Kshs. 17,000/= for upkeep. It is imperative for the Respondent to know that he ought to not take advantage of the fact that his identification details were utilized to open the daughter’s KCB bank



account to now access the same, draw funds from the same and misappropriating her HELB funds in the name of taking care of his responsibility. HELB disburses loans to students in universities and Technical, Vocational Education and Training (TVET) institutions in Kenya as financial assistance. That loan is expected to help the parties daughter navigate her university education with ease and without external financial pressures that will limit her full accessibility to education. This Court wishes to issue a warning to the Respondent herein to draw his claws from that KCB account and the parties are advised to proceed to the nearest KCB branch and have them issue their daughter with new pin details only known to her and the Respondent is cautioned from accessing the future disbursed HELB funds channeled to that account with immediate effect until his daughter is able to change her banking details with HELB.

21. At this juncture, I concur with the trial Court's holding and uphold the same. Hence, I do not see any reason why I should interfere with the trial court's decision.

F. Conclusion

22. In view of my findings, it is clear as day that the Appellant's appeal lacks merit. The same is dismissed with no order as to costs.

Orders accordingly

DELIVERED, SIGNED AND DATED AT BUNGOMA THIS 18TH DAY OF DECEMBER 2025.

MWANAISHA.S. SHARIFF

JUDGE

In the presence of:

N/A by Appellant

Respondent

Peter Machoni - Court Assistant

