



3. He urged that the Court should have seen through the respondent's unilateral transfer of the minors from the schools they were attending to more expensive schools.
4. The Appeal was canvassed through written submissions. The appellant's submissions are dated 28 January 2026, and the respondent's submissions are dated 3 March 2026. I have considered the respective submissions.

### **ANALYSIS AND DETERMINATION**

5. Since this is the first appeal, this Court is required, pursuant to section 78 of the Civil Procedure Act (Chapter 21 of the Laws of Kenya), to examine the trial court's record and the evidence before it in order to arrive at its own conclusion. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd [1968] EA 123**, where the Court of Appeal outlined the duty of a first appellate court as follows:

**[An appellate court] is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are 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**

6. The parties are the biological parents of the minors who are the subject of these proceedings. In the judgment delivered on 8th September 2023, the Court allocated personal responsibility between the parents as follows-

- a. Legal Custody, Actual Custody, care and control of the minors to vest in both parties
- b. Actual care, custody, and control to vest in the respondent
- c. Access to the appellant
- d. Respondent ( shelter partly, food partly, and medical)
- e. Appellant ( school fees and school-related expenses; Kshs 20000 towards upkeep payable on or before the 5th of every successive month; clothing on a need basis).

7. When the appellant did not comply with the judgment by paying the monthly subsistence and children's fees as ordered, the respondent initiated enforcement by filing a Notice to Show Cause. The appellant responded that he lacked the means.

8. In allowing the Notice to Show Cause, the Court observed that this was the respondent's second such application. It noted that in the earlier application, the appellant had raised the same issues as in the current application. The Court found that no basis had been established for varying the terms of the judgment delivered on 8th September 2023.

9. As this matter concerns the welfare of Children, I am obliged by Article 53(2) of the Constitution of Kenya and Section 8 of the

Children Act to give paramountcy to the Child's best interests.

**The issue for determination is therefore whether it is in the Child's best interests to allow the appeal.**

10. The law governing the maintenance of a child is set out in the Constitution of Kenya 2010 and the Children Act. Article 53 of the Constitution provides:

**53.(1) Every child has the right-(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.**

11. Maintenance is part of parental care and is the responsibility of both parents. Section 114(1) of the Children Act 2022 sets out the considerations that should guide the court in making an order for a child's maintenance. These considerations include inter alia:

- (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 foreseeable future;**
- (b) The financial needs, obligations, or responsibilities, which each party has or is likely to have in the foreseeable future;**
- (c) The financial needs of the child and the child's current circumstances.**

12. From the above, it is evident that the responsibility to provide for a child rests squarely with the parents. When a parent seeks to shift this responsibility away from themselves, it is for them to provide a concrete proposal for how the child's needs will be met as the parent steps away.

13. Because the appellant makes no offer as to how the Children will be maintained, the appeal is dismissed. The Trial Court correctly apportioned parental responsibility, and the appellant has failed to provide a viable alternative to safeguard the Children's rights to education and support, seeking only to evade his allotted obligations. The file is returned to the Trial Court for execution of the original judgment.

14. On account of the relationship between the parties, there shall be no order as to costs.

**SIGNED, DATED and DELIVERED VIRTUALLY at NAIROBI  
this 8<sup>th</sup> day of May 2026.**

**P. M. NYAUNDI  
JUDGE**

**In the Presence of**  
Fardosa Court Assistant  
Ms. Mathu for Appellant

ORIGINAL