BI v SKM (Family Appeal E020 of 2025)
[2025] KEHC 12369 (KLR) (Family) (31 July 2025) (Judgment)

Neutral citation: [2025] KEHC 12369 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

FAMILY APPEAL E020 OF 2025

CJ KENDAGOR, J

JULY 31, 2025

BETWEEN

BI ..... APPELLANT

AND

SKM ..... RESPONDENT

(Being an appeal from the Ruling and Order of Hon. B.M Ochoi, Chief Magistrate, delivered on 23rd January, 2025 in Nairobi Children Court Case Number MCCHCC/E1759/2024)

JUDGMENT

1. The parties herein were in a relationship during which they were blessed with one issue A.I.I., who was born on 11th July, 2019. However, their relationship broke down and they separated. The Respondent took the actual custody of the minor and later enrolled her to [Particulars Withheld] School in May, 2021. A dispute arose between them concerning the maintenance of the minor. The Respondent sued the Appellant at the lower Court seeking several declaratory orders against the Appellant. She also wanted the Children's Court to direct the Appellant to pay half of the costs utilized towards the child's welfare.

2. Before the suit could be determined, the Appellant brought an application before the lower Court, dated 7th January, 2025, seeking some injunctive reliefs. He sought a temporary restraining order prohibiting the minor from attending [Particulars Withheld] School. He also sought on order directing that the minor should only attend a school agreed upon by the parties. The Court heard the application and delivered a Ruling 23rd January, 2025, in which it dismissed the application. The Court directed that the minor will continue schooling at the current school ([Particulars Withheld] School) pending the full hearing of the case.

3. The Appellant was dissatisfied with the Ruling and appealed to this Court vide a Memorandum of Appeal dated 29th January, 2025. He listed the following Grounds of Appeal;

    1. The Honourable Learned Trial Magistrate erred in fact and in Law in failing to consider any of the compelling evidence adduced by the Appellant at the trial Court to the effect that the Appellant's job position, the income changed and he could not therefore pay the school fees which was doubled at [Particulars Withheld] School.

    2. The Honourable Learned Trial Magistrate erred in law in holding that the Child shall remain schooling in [Particulars Withheld] School which the Appellant can no longer afford to pay its fees from his earnings, yet there are schools offering the same academic standards where the child can learn but whose fees are affordable.

    3. The Honourable Learned Trial Magistrate erred in law by disregarding and failing to take into account the established legal principle that, where a party cannot afford the fees for a minor, they are permitted to change schools and for the minor to live within the means of the parents. This error occurred despite the credible and reliable evidence presented by the Appellant.

    4. The Honourable Learned Trial Magistrate so misdirected himself on matters of both law and fact as to occasion a miscarriage of justice against the Appellant.

4. He asked this Court to allow the appeal and permit him to transfer the child to a more affordable school at the beginning of the second term and for all future school terms. He also asked this Court to order that, if the Respondent insists on retaining the child at [Particulars Withheld] School, each party should pay half of the school fees for the child at [Particulars Withheld] School.

5. The Appeal was canvassed by way of written submissions.

Appellant's Written Submissions

6. The Appellant submitted that the lower Court should not have dismissed his application. Stated that [Particulars Withheld] School charges the minor an extra 50,000/= per month for a shadow teacher and occupational therapy. He argued that there are other schools that offer exactly the same academic standards but do not charge the extra Kshs.50,000/= charged by [Particulars Withheld] School. He argued that he is not able to afford to pay the extra Kshs.50,000/= per month out of his salary and business. He argued that he should be permitted to transfer the minor to another school with comparable academic standards.

7. The Appellant also submitted that he has other financial obligations. He stated that he has two other minors who are both enrolled in school. He also stated that he has an outstanding loan with Standard Chartered Bank where he makes a monthly repayment of Kshs.150,000/=. He also stated that he has an additional loan of Kshs.2,500,000/=with I&M Bank which he is currently servicing. He submitted that the rights of a child to education should be exercised with prudence and good reasoning. He argued that the Court should ensure that the right is not used as tool to punish a party in a case.

Respondent's Written Submissions

8. The Respondent submitted that the lower Court was right in dismissing the Appellant's application. He submitted that the Appellant failed to demonstrate actual financial strain on his part, arguing that his evidence for the most parts points to him being a man of substantial means. He argued that the Appellant's decision to withdraw financial support was not due to financial constraints but rather deliberate attempt not to co-operate in co-parenting the minor. He also argued that the Appellant

is insistent on transferring the minor from [Particulars Withheld] School but has not provided an alternative school that of the same academic quality and suitability of the curriculum as the minor's current school.

Issues for Determination

9. Having considered the grounds of appeal and the written submissions by the respective parties, I find that the singular issue that arises for disposal is whether the Appellant's Application before the lower Court dated 7th January, 2025, was merited.

10. The role of this Court as the first appellate Court is well-settled. In Okeno vs. Republic (1972) EA 32, the East Africa Court of Appeal gave an authoritative observation on the duty of the first Appellate court. It stated as follows;

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

11. Based on this authority, this Court shall undertake a wholesome review of the evidence with a view to reaching its own conclusion. This Court is being invited to determine whether the Appellant adduced enough evidence to justify the proposed transfer of the minor from [Particulars Withheld] School to another school.

12. Courts have issued guidelines on what to consider before issuing child maintenance orders, particularly where one of the parties claim that he or she is facing financial difficulties. The Court in TMM v JMM [2019] eKLR considered this issue and observed as follows;

> 28. I am satisfied that the Applicant is deserving of the exercise of the discretion of this Court in his favour. It is clear from the evidence adduced in this Court that the Children's court failed to critically analyze the earnings of each of the parents in this case. In HWN vs. GKC Children Appeal No. 3 of 2018, [2018] eKLR Ndung'u J observed that orders of maintenance, like all other orders of court, should not be given in vain. Such orders must pass the test of practical enforcement. It behoves the court to call for and analyze with circumspection the earnings of the parents on the one hand and the needs of the children on the other. This is especially important in a case such as this one where there is an indication that the Applicant has another family.

13. Similarly, the Court in EAW v WAN [2021] eKLR interrogated this question and pronounced itself as follows;

> 4. The Children Court has the jurisdiction to periodically review and adjust the maintenance and education orders which it has issued where the circumstances of the child and the parents change (J.K.W. –v- A.W.M. [2018] eKLR). In order to review upwards or downwards, as the circumstances may demand, the court has to fully hear the parties and examine whatever evidence of means that will be availed. It is only then that the court can reach a decision as to the

appropriate maintenance and education amount. Such decision is reviewable, or appealable, as the case may be.

14. The above authorities underscore that a Court can review education orders where it has been proved that the circumstances of the child and the parent have changed. They also emphasize that orders of maintenance should not be given in vain and must pass the test of practical enforcement. This two impose an obligation on the Court to call for and analyze with circumspection the earnings of the parents.

15. I will now review the evidence on record to determine whether the Appellant adduced enough evidence to justify his request to transfer the minor from [Particulars Withheld] School to another school.

Analysis of the Evidence

16. The Appellant argued that he could not afford to sustain the minor's education at [Particulars Withheld] School due to financial constraints. He relied on his supporting affidavit dated 7th January, 2025 and his affidavit of means dated 10th October, 2024. He stated that his net monthly pay is Kshs. 234,509/= and he attached a pay-slip for September, 2024 to prove the same. I have seen the said pay-slip. It captures the same figure. I thus find that his net pay as of 7th January, 2025 was Kshs.234,509/=. I have referred to the said date because that is the date when the Appellant brought the application before the lower Court.

17. The Appellant also stated that he had an outstanding loan with Standard Chartered Bank with a monthly repayment of Kshs.150,000/=. He produced bank statements extracts to prove the repayments. I have seen the said extracts. They indicate that he made periodic payments to the bank in the following manner; Kshs.106,632/= on 28/3/2024, Kshs.42,008/= on 18/3/2024, Kshs.88,323/= on 6/3/2024, Kshs.154,184/= on 30/4/2024, Kshs.54,237/= on 31/5/2024, Kshs.100,000/= on 29/5/2024, and Kshs.154,064/= on 3/9/2024.

18. The bank extracts captured the above payments as loan repayments. The Court notes that the Appellant did not disclose when he acquired this particular loan as well as its lifespan. This means that this Court cannot tell with absolute certainty when the Appellant's loan repayment obligations under this loan were expected to come to an end.

19. However, in my analysis, I find that it is more likely than not that the Appellant had an outstanding loan with the Bank as of 7th January, 2025. I also find that it is more likely than not that the repayment terms were Kshs.150,000/= per month. This is more so because a majority of the monthly repayments he made to the Bank were capped at Kshs.150,000/=. (March, April, May, and September 2024).

20. The Appellant also stated that he had another outstanding loan with the I&M Bank with a monthly repayment of Kshs.70,276/=. He produced a loan agreement between him and the Bank dated 7th March, 2023, capturing the loaned amount as Kshs.2,500,000/=and monthly repayment as Kshs.70,276/= . I have seen the said loan agreement. It is duly executed.

21. The Appellant's loan agreement with the Bank indicates that this particular loan was to be paid in 48 consecutive monthly instalments. The loan agreement is dated 7th March, 2023. In this Court's calculation, 48 months lapsed around April or May 2025. Similarly, this Court finds no difficulties in finding that the said loan was still outstanding as of 7th January, 2025 when the Appellant brought the application before the lower Court.

22. Further, the Appellant stated that he has acquired an apartment where he lives with his family and that he pays Kshs.61,500/= monthly for the same. He produced Mpesa extracts to prove the

monthly payments. I have looked at the said extracts. They show that he deposited Kshs.61,500/= to bank account number XXX on 10/9/2024, 8/9/3023, 10/11/2023, 2/10/2024, 8/9/2023, 10/9/2024, 14/8/2024, 14/7/2024, 14/8/2024, 22/4/2024, 10/9/2024, and 12/12/2023. I find that this is sufficient evidence to prove that he was paying a monthly rent of Kshs.61,500/= as of 7th January, 2025.

23. The Appellant stated that he utilized the funds from the two loans to invest in his clinic, [Particulars Withheld] Limited. He averred that the clinic is a relatively new venture and was relying on loan financing and other external funding sources to support operations. He also stated that it had not broken even and that its current business model is unsustainable. He stated that the clinic had outstanding rent, salary payments, and supplier debts. He produced a letter dated 3rd October, 2024 written by Laser Property Services addressed to him, indicating that he was in rent arrears of Kshs.1,075,242.12/=.

24. I have carefully considered the Respondent's lengthy and detailed submissions on this issue. I have also considered the Respondent's averments on why she thinks the Appellant is not facing real financial difficulties. However, in my view, the evidence on record shows that it is more probable than not that the Appellant was facing financial challenges as of 7th January, 2025, when he brought the Application before the lower Court.

25. The Respondent argued that the Appellant is insistent on transferring the minor from [Particulars Withheld] School but has not provided an alternative school of the same academic quality and suitability as the minor's current school. I have re-examined the available evidence on record to ascertain whether the Appellant provided an alternative. The Appellant averred that he had identified Nairobi [Particulars Withheld] Academy as the alternative school. He produced an email written by him addressed to the Respondent dated 31st December, 2024.

26. I have seen the said email. The text of the email show that the Appellant told the Respondent about his choice for Nairobi [Particulars Withheld] Academy and explained to her that the school caters to the needs of autistic children. He even invited the Respondent to book an appointment with the school so as they could go together and evaluate its suitability. The Respondent admitted receipt of the said email in her replying affidavit.

27. I have carefully read the Respondent's replying affidavit to ascertain how she responded to this invitation. She stated that she visited the Nairobi [Particulars Withheld] Academy on 8th January, 2025 and that the school confirmed that it accepts children on the autism spectrum. She also averred that the school informed her that it did not have educators trained and licensed to support children who may require specialized attention with their educational development. Lastly, she stated that the school told her that it did not offer individualized education plans tailored specifically to children with special needs.

28. However, I note that she did not provide proof that she actually visited the Nairobi [Particulars Withheld] Academy as she claims. This Court also notes that the Respondent decided to go to the school alone (without the Appellant) despite the fact that the Appellant had suggested that they visit the school together. It would have been better if the parties visited the school together and jointly assess its suitability. It would have been preferable if the school discussed its alleged shortcomings in the presence of the two parties.

29. Based on these facts, it cannot possibly be said that the Appellant did not provide an alternative school of the same academic quality and suitability as the minor's current school. The Appellant suggested that they should visit the school together to evaluate its suitability but the Respondent turned that

invitation down and decided to go it alone. The conduct of the Respondent on this particular issue casts doubt as to whether the school actually spoke to her on this issue. I have formed the opinion that she was hell-bent to disqualify Nairobi [Particulars Withheld] Academy and frustrate any transfer.

30. In terms of affordability, the Appellant attached the fee structure for Nairobi [Particulars Withheld] Academy as well as the fee structure for [Particulars Withheld] School 2025. As of 7th January, 2025, the minor was aged 5 ½ years. According to the fee structures, the minor's tuition fee per term at [Particulars Withheld] was ranging between Kshs.100,800 -106,900. If the minor were in the proposed school, the tuition fees per term would have been Kshs.43,950/=. Clearly, the difference in terms of the fees payable is significant. The Appellant stated that the fee at the proposed school was within his current financial means and manageable.

31. In the end, I find that the Appellant's application at the lower Court was merited. The totality of the evidence placed before the lower Court at that time leads to the conclusion that the Court should have permitted the Appellant to transfer the minor to Nairobi [Particulars Withheld] Academy or to any other school agreed upon by the parties.

Disposition

32. The Appeal is allowed.

33. The Appellant is permitted to transfer the minor to Nairobi [Particulars Withheld] Academy or to any other school agreed upon by the parties.

34. No order as to costs

35. It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI through the Micrsoft Teams Online Platform on this 31ST day of JULY, 2025.

.....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Ms. Nyaga, Advocate holding brief for Kamau Muturi, Advocate for the Respondent

No attendance for Appellant