



SHM v HMD (Civil Case E002 of 2025) [2025] KEHC 12370 (KLR) (28 August 2025) (Judgment)

Neutral citation: [2025] KEHC 12370 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CIVIL CASE E002 OF 2025**

**FR OLEL, J
AUGUST 28, 2025**

BETWEEN

SHM APPELLANT

AND

HMD RESPONDENT

JUDGMENT

A. Introduction

1. This Appeal arises from the Ruling/Order issued by Hon. Kombe Larry M. (Resident magistrate) delivered in Moyale Children’s case No E019 OF 2024, dated 5th February, 2024 where he dismissed the Appellant’s Application (undated) seeking to review child maintenance and custodial orders, which he had previously issued vide the court’s Judgment dated 27th November, 2024.
2. The background hereto was that the Respondent filed a Plaint before the primary court seeking custodial orders of their child and also urged the court to direct the Appellant to provide monthly upkeep of Kshs. 20,000/=, plus clothing, shelter, and medication for the minor. In response, the Appellant averred that he had consistently paid for his child’s upkeep as directed by the Kadhi’s Court, and further had also offered to take up the child’s education expenses, once he became of age.
3. The learned Magistrate did consider the evidence adduced and, in his Judgment, dated 27th November, 2024, directed that:-
 - a. The physical custody of the minor was to remain with the Respondent, while the Appellant was granted visitation rights.
 - b. The Respondent would continue to provide shelter and clothing for the Minor, while the Appellant would pay Kshs. 10,000/= for food, and at the appropriate time would take up payment of school fees and related school requirements once the child became of age.



- c. The Respondent would also cater for the child's medical expenses and also beddings in the form of a bed and mattress as earlier agreed before the Kadhi's court.
 - d. Each party would bear their own costs.
4. The Appellant, being dissatisfied with the said Judgment, opted to seek for a review of the said Judgment on grounds that there was new material evidence which had come to his possession after Judgment, which the court needed to consider. Secondly, he faulted the trial court for not considering his oral evidence tendered during the trial and also for not advising him to file his affidavit of means during trial to further explain his financial position. He was therefore disadvantaged when a determination was made without considering the said important document and urged the court to find in his favour based on provisions of Article 159(2) of *the Constitution* of Kenya 2010 and his constitutionally guaranteed right to be heard.
5. The Respondent opposed this Application and stated that the Appellant was accorded ample opportunity to present his case before the trial court and could not be heard to complain of not being heard and/or that his oral evidence was not considered. Secondly, the Appellant had also not demonstrated that the "...new evidence he had discovered" was at the time of trial, not within his knowledge, and therefore could not be produced despite due diligence on his part. His application was therefore not merited, and she urged the court to dismiss the same.
6. The trial court, upon considering the merits of the review Application, found that it did not have merit and proceeded to dismiss the same.
7. The Appellant, being dissatisfied with the said Ruling/Order, filed his Memorandum of Appeal, where he raised seven (7) grounds of Appeal, namely:-
 - a. That the learned Magistrate erred in law and fact by dismissing the application for review without considering the best interests of the minor as required under the *Children Act*.
 - b. That the learned Magistrate erred in law and fact in dismissing the Applicant's application for review despite the existence of new and important evidence that was not within the knowledge of the Appellant at the time of the Judgement
 - c. That the learned Magistrate failed to properly consider the financial capabilities of the Appellant, thereby imposing maintenance obligations.
 - d. That the learned Magistrate erred in holding that the Appellants' affidavit of means did not constitute new evidence, despite its importance in determining the financial capacity of the Appellant.
 - e. That the learned Magistrate misdirected himself by failing to appreciate that the Respondent's lifestyle and frequent travels pose a risk to the welfare of the minor, thereby justifying a review of the custodial orders.
 - f. That the learned Magistrate erred in dismissing the case on a technicality rather than on its substantive merits, particularly concerning the financial capability of the Appellant SD in relation to the maintenance order.
 - g. That the Appellant was not given an opportunity to be heard on the matter, thereby violating his right to fair hearing.



8. The Appellants thus prayed that the ruling of the trial court dated 5th February, 2025, be set aside and that the maintenance orders issued be reviewed in light of the new evidence presented and was wrongly rejected by the trial court.

B. Parties Submissions

9. The Appellant submitted that the maintenance order issued directing him to pay a monthly sum of Kshs. 10,000/= was improper, having been made without proper consideration, especially of the subsequently filed affidavit of means. The net effect of the order issued was that he had been rendered financially destitute and was unable to meet his basic expenses. Secondly, the trial court had further erred in ordering him to pay maintenance of Kshs. 10,000/=, while disregarding the financial contribution of the Respondent, who was self-employed and also had an equal obligation to take care of the child as espoused under Article 53(1),(e) of *the Constitution* of Kenya, 2010. He therefore prayed that the Appeal filed be allowed and the maintenance sum be reduced to Kshs. 3,000/= monthly.
10. The Respondent, on her part, submitted that there was no error apparent on the face of the record, the basis upon which the review order would be considered. The trial Magistrate had fully appreciated and considered all the pleadings filed/ evidence tendered before issuing his Judgment. She further observed that what the Appellant was raising as new issues were not captured in his pleadings earlier filed, and therefore, was tantamount to him filing new evidence after Judgment had been rendered. Reliance was placed on the case of Hosea Nyandika Mosagwe & 2 Others –vs- County Government of Nyamira [2022] eKLR to

Emphasize this point.

11. She also denied the Appellants' contention that she was not contributing to the child's welfare, as she was her primary caregiver providing shelter, parental care, and protection, which were also basic needs and equally important to the child's well-being. She urged the court to give prominence to the best interest of the child while making its decision, and to use that "prerogative" as a pivot to tilt the balance of convenience in favour of maintaining the Judgment earlier passed by the trial court. Reliance was placed on the case of MAA –vs- ABS [2018] eKLR, where the said proposition was discussed.
12. She thus urged this court to find that this Appeal had no merit and proceed to dismiss the same.

C. Analysis and Determination

13. This Court has examined the record of appeal, the grounds of appeal, and given due consideration to the submissions by the parties' respective Counsel. This being a first appeal, this Court has the duty to analyze and re-examine the evidence adduced in the lower court and reach its own conclusions, but always bearing in mind that it neither saw nor heard the witnesses testify and make allowance for the said fact. In Abok James Odera T/A A. J. Odera & Associates –vs- John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the Court stated as follows:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

14. A first appellate court is also the final court of fact, and litigants are entitled to full, fair, independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the



entire scope of Section 78 of the *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion. See Kurian Chacko –vs- Varkey Joseph, AIR 1969 Kerala 316.

15. The two issues that arise for determination in this Appeal is whether:-
- a. The trial court was right in dismissing the Appellants' Review Application (Undated) and maintaining that he continues to pay child support for the minor at Kshs. 10,000/= per month.
 - b. The Appellant's right to fair hearing was infringed.

a. Whether the trial court was right in dismissing the Appellants' review Application (Undated)

16. Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules provide as follows: -

Section 80. Review

“Any person who considers himself aggrieved—

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of Judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

[Order 45, rule 1.] Application for review of decree or order.

“1. Any person considering himself aggrieved—

(1)

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of Judgment to the court which passed the decree or made the order without unreasonable delay.

- (2) A party who is not appealing from a decree or order may apply for a review of Judgment notwithstanding the pendency of an appeal by some other party



except where the ground of such appeal is common to the applicant and the appellant, or when, being Respondent, he can present to the appellate court the case on which he applies for the review”

17. From the above provisions, it is clear that while Section 80 of the *Civil Procedure Act* grants the court the power to make orders for review, while Order 45 sets out the jurisdiction and scope of review by hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record on any other sufficient reason.
18. The Court of Appeal had the following to say in an application for review in the case of National Bank of Kenya Ltd –vs- Ndungu Njau.

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”
19. In *Northern India Caterers (India) –vs- Lt. Governor of Delhi* 1980 AIR 674, the Court had to decide whether it could review its own decision based on the ground that the decision was based on an erroneous appreciation of facts. In dismissing the review application, the Court remarked:-

“It is well settled that a party is not entitled to seek a review of a Judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a Judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so.”
20. In addition to the statutory grounds, the court may also review its decision, in instances where the applicant was wrongly deprived of an opportunity to be heard or where the impugned decision or order was procured illegally or by fraud or perjury: see *Serengeti Road Services -vs- CRBD Bank Limited* [2011] 2 EA 395. Also, to be included as part of sufficient reason is where the impugned order, if reviewed, would lead the court in promoting public interest and enhancing public confidence in the rule of law and the system of justice. See *Benjoh Amalgamated Limited & Another –vs- Kenya Commercial Bank Limited* (supra).
21. The applicant grounded his application on the fact that he had come across new evidence, which was not within his knowledge as at the time of hearing of the suit, which evidence included his affidavit of means, his pay slip, handwritten loan agreement with one Ahmed Tase and Mpesa proof of payment made to the Respondent on various days as directed by the Kadhi’s Court.
22. It should be noted that mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review must also show that such matter or evidence was not within his/her knowledge and, even after the exercise of due diligence, the said evidence could not be produced before the court/tribunal earlier.



23. The Court of Appeal's determination in RK –vs- Angelo Mpanjuiza [2009] eKLR quoted the commentary by Mulla of the Indian Civil Procedure Code, 15th Edition at Page 2726, which discussed reviews grounded on the discovery of new and important evidence: It states that:-

“Applications on this ground must be treated with great caution and, as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the Applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”

24. Reliance is also placed on the case of D.J. Lowe & Company Ltd –vs- Banque Indosuez Civil Appl. Nai. 217/98 (ur), which was also quoted with approval by the Court of Appeal in the case of RK Case above (supra) :-

“Where such a review application is based on fact of the discovery of fresh evidence, the court must exercise greatest of care, as it is easy for a party who has lost to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such an event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.”

25. Finally, the discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason under Order 45 in 2010 Civil Procedure Rules, relates to issues of fact which may emerge from evidence. The discovery does not relate to or refer to issues of law, which the Court is deemed to be alive to. See Barclays Bank of Kenya Ltd –vs- Abdi Abshir Warsame and Darare Transporters Limited [2006] eKLR; and Ndirangu –vs- Commercial Bank of Africa [2002] 2 KLR. 603.)

26. The trial Magistrate did consider the said review application and determined that the suit was heard through viva voce evidence and both parties were granted equal opportunity to present their case. Under the said circumstances, allowing the said review application would be tantamount to reopening the case afresh since the Respondent would also have to counter the issues raised. The Appellant had also failed to annex the formally extracted decree, which was fatal to his claim

27. I have reviewed the said proceedings and find that the trial Magistrate was right in his appreciation of the law and facts as presented therein. The Applicant ought to have filed his affidavit of means together with his witness statement before the suit was heard. He cannot be heard to complain that he was not aware of the need to do so, because, as the adage goes, “ his ignorance of procedure/the law is no defence to this fatal lapse”. Secondly, and more importantly, the applicant has not proved to the court's satisfaction that the supporting documents annexed to prove his financial ability were not within his possession/knowledge, and had he acted diligently, he would have been able to place the same before the court for determination at the initial stage during trial.

28. As stated in the RK Case above (supra), “ the court must exercise greatest of care, as it is easy for a party who has lost to see the weak part of his case and the temptation to lay and procure evidence which will



strengthen that weak part”. In this instance, that is exactly what the applicant is attempting to do by regurgitating his case afresh to cover the weak points earlier noted in the Judgment passed. Accordingly, this ground of Appeal fails.

b. Whether the Appellant’s right to fair hearing was infringed.

- 29. The Appellant also averred that he was not given a fair opportunity to be heard in the matter. First and foremost, it must be clear that he did not appeal against the Judgment earlier passed on 27th November, 2024, but opted to seek for review of the same. At this stage, what the court can only consider is the review proceedings and not those undertaken during the hearing of the main suit.
- 30. Fair hearing, in principle, incorporates the rules of natural justice, and includes the concept of Audi alteram partem (hear the other side or no one is to be condemned unheard) and Nemo iudex in causa sua (no man shall judge his own case), otherwise referred to as the rule against bias. In Supreme Court of India, in the case of Indru Ramchand Bharvani & Others –vs- Union of India & Others, 1988 SCR Supl. (1) 544, 555 found that a fair hearing has two justiciable elements: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable and that each case had to be decided on its own merits.
- 31. Contrary to what is alleged, the Appellant was allowed to present his case, and even filed a further Affidavit, once served with the Respondents’ replying affidavit. He also filed submission in support of his Application, all of which were considered by the trial Magistrate before delivery of the ruling, which is challenged. The record demonstrates that he was given ample opportunity to present his case and has no basis to claim that his right to fair trial had been infringed upon.

Disposition.

- 32. The upshot is that this Appeal lacks merit and the same is dismissed with no orders as to costs, since the parties herein are Co-parents to the minor herein.
- 31. It is so ordered.

READ, SIGNED, AND DELIVERED VIRTUALLY AT MARSABIT ON THIS 28TH DAY OF AUGUST, 2025.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED VIA THE VIRTUAL PLATFORM, TEAMS THIS 28TH DAY OF AUGUST, 2025.

In the presence of: -

Present.....Appellant

Present.....Respondent

Julie.....Court Assistant

