



REPUBLIC OF KENYA



**KENYA LAW**  
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**SAS v WKY (Civil Appeal E003 of 2021)  
[2023] KEHC 26775 (KLR) (22 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26775 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CIVIL APPEAL E003 OF 2021  
SM GITHINJI, J  
DECEMBER 22, 2023**

**BETWEEN**

**SAS ..... APPELLANT**

**AND**

**WKY ..... RESPONDENT**

*(Being an Appeal from Judgment of Kadhi's Court at Lamu by Hon. Swaleh M. Ali (S.R- Kadhi) delivered on the 20th August, 2020 in Lamu Kadhi's Court Divorce Cause No.15 of 2018)*

**JUDGMENT**

1. This appeal arises from the Judgment of Hon. Kadhi Swaleh M. Ali –S. R Kadhi delivered on 20<sup>th</sup> August 2020 in Divorce Case No. 15 of 2018 where the Hon. Kadhi held that;
  1. The marriage was dissolved with effect from 11<sup>th</sup> August 2020.
  2. The plaintiff was entitled to three months Edda maintenance of Kshs. 15,000
  3. Payment of Kshs. 500,000 being the balance of dowry payment.
2. Aggrieved by the judgment, the Appellant lodged this appeal on grounds that;
  1. The learned Hon. Kadhi erred in law and fact in failing to appreciate that the plaintiff never proved her case on a balance of probability.
  2. The learned Hon. Kadhi erred in law and facts in failing to appreciate that the plaintiff's claim was not substantiated.
  3. The learned Hon. Kadhi erred in law and in facts in failing to appreciate that the Appellant had contributed towards maintenance of the plaintiff as provided under Islamic.



4. That the Hon. Kadhi erred in law and in facts in failing to appreciate that the plaintiff never adduced evidence in particular that the balance of the dowry was never paid.
5. The learned Hon. Kadhi erred in law and facts in failing to substantiate the amount ought to be paid to the plaintiff.
6. The learned Hon. Kadhi erred in law and facts in not appreciating that the plaintiff called her relatives as witnesses in this matter which is against the law.
7. The learned Hon. Kadhi erred in law and facts in not appreciating that the plaintiff had another man who lived in America and she is not entitled to the amount awarded.

### **Evidence at Trial**

3. Pw1 WKY the Petitioner testified that she was married to the Respondent on 2/2/2018. She told the court that the problem was that the Respondent was not maintaining her as a wife and the last time they were together as husband and wife was on 2/2/2020.
4. Pw2 AMS told the court that the Respondent returned the Petitioner's belongings and when he asked him whether the Petitioner was his wife he did not respond.
5. Pw3 AK the Petitioner's brother told the court that the problem between the Petitioner and the Respondent is that the Respondent is abusive to the Petitioner.
6. Pw4 ASD the Petitioner's sister told the court that the Petitioner and the Respondent were married but the Respondent was not responsible towards the Petitioner. That at some point, the parties were living at her house in Lamu until she questioned the Petitioner and that is when the Respondent took her to his house at Lamu Police station. She added that the Respondent was abusive to the Petitioner and her family.
7. Rw1 SAS the Respondent told the court that he was married to the Petitioner and after a while he realized that the Petitioner had another man. He testified that the Petitioner refused to go to his house until he bought her a house and furniture and thus decided to send her Kshs. 20,000 every month for six months. He further testified that he asked the Petitioner to go with him to Lamu and when she refused he decided to take his first wife.

### **Analysis and Determination**

8. The Appeal was canvassed by way of written submissions which I have taken into consideration.
9. This is a first appeal. As a first appellate court, this court is under an obligation to re-evaluate, re-examine and re-consider the evidence tendered before the trial court and arrive at an independent conclusion, finding and or determination while bearing in mind that the trial court had the opportunity of listening and seeing the witnesses hence the advantage of assessing their demeanor. See *Sella v associated Motor Boat Company* (1968) EA 123 page 260.
10. Having considered the Memorandum of Appeal, the grounds upon which it is set and submissions by the parties, I find the issue for determination is Whether the Respondent is entitled to Kshs. 500,000 being the balance of dowry payment.
1. In Islamic law and practice a man is obliged to pay dowry. Dowry is the right of the women upon the man.



Allah says,

“And give to the women (whom you marry) their mahr obligatory bridal money given by the husband to his wife at the time of marriage) with a good heart but if they of their own good pleasure remit any part of it to you take it and enjoy it without fear of any harm (as Allah has made it lawful)” sura 4 an nisai 4

11. The Appellant in his submissions states that the Mahar agreed upon between the Respondent and himself was furniture. Further, that the Respondent is the one who had demanded for divorce which is known as Khul’ under Islamic law and where divorce is initiated by the woman under Islamic law, the wife waives her legal financial rights and returns the dowry the husband gave to her.
12. On her part, the Respondent submitted that under Islamic law, dowry is the prerogative of the wife and the husband is duty bound to pay the same as consideration of the marital contract regardless of whether it is paid upfront at the time of the marriage ceremony or it is deferred to a later period as may be agreed upon by the parties.
13. The Respondent initiated the suit in the lower court vide the plaint dated 22<sup>nd</sup> June 2020 seeking dissolution of the marriage on grounds *inter alia* that the Appellant was not maintaining her. On 11/08/2020, the Appellant filed a letter indicating that he had given the Respondent the first Talaq. It is on the weight of this letter that the Hon. Kadhi dissolved the marriage.
14. The issue by the Appellant on Khul was raised in the submissions on appeal and not in the trial court. I will therefore not deliberate on fresh issues introduced on appeal. Rather, I will address the issue whether the dowry balance is payable.
15. From the marriage certificate signed by the parties herein on 9<sup>th</sup> February 2019, the amount of dowry to be paid was Kshs. 600,000. The Appellant paid Kshs. 100,000 by the time the marriage took place as indicated on the marriage certificate. The Respondent maintains that the balance was not paid. On his part the Appellant stated that the dowry agreed upon was furniture. He has not provided any evidence showing that furniture was the agreed dowry. It is trite that he who alleges must prove. In the absence of such prove, I am of the view that nothing would carry greater weight of prove than the marriage certificate. Therefore, it is my finding that the dowry was Kshs. 600,000. Additionally, it is clear that Kshs. 100,000 was paid at the time the parties entered into the marriage. The question then is whether there is a balance of Kshs. 500,000?
16. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”
17. This is called the legal burden of proof. There is however, evidential burden of proof which is captured in Sections 109 and 112 of the same *Act* as follows:
  - “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
  112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”



18. The two provisions were addressed in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that places upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the *Act*.”

19. Having established that the dowry settled upon was Kshs. 600,000, there has been no evidence from the Appellant that the same was ever paid. The evidentiary burden of proof is incumbent upon him to show that the same was paid. Additionally, it was his responsibility to demonstrate that the dowry settled upon was furniture which he did not prove. That said, I find that the appeal fails and the same is hereby dismissed with costs.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 22<sup>ND</sup> DAY OF DECEMBER, 2023.**

**S.M. GITHINJI**

**JUDGE**

In the absence of both parties; -

1. They be notified.

**S.M. GITHINJI**

**JUDGE**

**22/12/2023**

