



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.45 OF 2013

SON.....APPELLANT

VERSUS

ZKM.....RESPONDENT

(An Appeal from the Judgment of Hon. R. Onganyo, Resident Magistrate delivered on 22nd March, 2013 in Divorce Cause No.12 of 2011)

JUDGMENT

INTRODUCTION

1. This appeal arise from Petition dated 25th March 2011 filed in the lower court by the respondent/petitioner seeking the following orders:-
 - i. Dissolution of marriage between appellant and respondent.**
 - ii. The appellant be ordered to return to the respondent all properties owned before and acquired after marriage.**
 - iii. Maintenance**
 - iv. Costs of the petition**
2. The petitioner cited adultery, cruelty and desertion as ground for divorce and particularized them in paragraph 8 (a) - (c) of the Petition.
3. The respondent filed answer to Petition dated 27th April 2011 filed on 29th April 2011. She denied particulars of adultery, cruelty and desertion set out in paragraph 8 of the Petition. The respondent further indicated in paragraph 10 that she would rely on doctrine of *sub-judice* and/or *Res judicata*.
4. The petitioner filed reply to answer to Petition dated on 17th May 2011.
5. The trial magistrate found that the marriage could not work and allowed divorce and issued decree *Nisi* to be confirmed after 6 months. She further ordered the appellant to pay alimony of kshs.16,000 per month with effect from March 2013 plus standing order amount from the month he stopped to February 2013. The appellant being aggrieved by the above decision filed appeal on the following grounds:-
 - i. That the learned trial magistrate erred in law and in fact in granting the respondent a sum of Kshs.5, 000/= backdated which amounts to an order for alimony *pedente lite* when there was no prayer for such by the respondent.
 - ii. That the learned trial magistrate erred in law and in fact in awarding the respondent maintenance of Kshs.16, 000/= per month until the respondent remarries in the absence of any evidence and/or basis.
 - iii. That the learned trial magistrate erred in law and in fact in failing to appreciate that the claim for maintenance is a liquidated and/or special claim that ought to not only be specifically pleaded but should also be strictly proved.
 - iv. That the learned trial magistrate erred in law and in fact in disregarding the submissions of the counsel for the appellant.
 - v. That the learned trial magistrate erred in law and in fact in shifting the burden of proof to the appellant.
 - vi. That the learned trial magistrate erred in law and in fact in failing to consider the appellant evidence and therefore reached a

wrong conclusion.

APPELLANT'S SUBMISSIONS

6. The appellant challenges the order for payment of kshs shillings backdated. The stop date is not indicated in the judgment. He also challenges payment of alimony on the ground that there is evidence to prove that.

7. Appellant submitted Petition dated 25th March 2011 sought orders for dissolution of marriage, return of property and maintenance.

8. Appellant submitted that grant of relief of maintenance involve courts discretion which must be exercised judiciously and this appellate court can only interfere with it if it is satisfied that the decision is clearly wrong because it misdirected itself or it considered matters it should not have or failed to consider matters it should have considered and arrived at a wrong decision.

9. Appellant submitted that while the court of appeal was interfering with the lower courts discretion and setting aside the decision in the case of **PKM V RPM [2017] eKLR** stated as follows:

“We venture to suggest that whenever a court is faced with an application for maintenance, whether seeking interim relief or upon dissolution of marriage, it must direct the parties to furnish the court with comprehensive information by way of affidavit relating to their respective financial circumstances.”

10. The appellant urged this court to adopt the position of the court of appeal as the court failed to obtain evidence on financial means from the parties submitted that under **Rule 44 of Matrimonial Causes Act** requires a spouse after being served with notice for an application for alimony pending suit, permanent alimony, maintenance of spouse or children or periodic payments, he shall within 14 days from the date of filing appearance file affidavit setting out full particulars of his property and income.

11. That in **PKM V RPM** the court of appeal was of the opinion that the provision should be construed as requiring both parties to file affidavit of means.

12. Appellant submitted that evidence adduced was that the parties herein had not lived together for a period of one month after the celebration of the marriage and that the respondent was a Liberian and was therefore gainfully employed at the time of celebration of marriage to the appellant. Further that the respondent quit her job and has not shown attempts to secure employment for the period of pendency of this suit.

13. Appellant submitted that the parties herein had not lived together for a period of more than 6 years that the marriage lasted and subjecting appellant to pay maintenance was purely speculative.

14. Finally, that no evidence was adduced in court on the parties' capabilities through an affidavit of means and neither did the court exercise its inquisitorial powers as provided for in **Rule 48 of Matrimonial Causes Act**.

RESPONDENT'S SUBMISSIONS

15. Respondent submitted that the burden to prove whether the appellant had means to maintain the respondent lay on him; that though both parties were required to file affidavit of means. It was incumbent upon the appellant to file when claim of maintenance was made at the trial court; that he never raised his inability and as result of his failure his financial capability has not been shown. That the responsibility and obligation to bring to court's attention financial capability was his.

ANALYSIS AND DETERMINATION

16. This being first appeal I have obligation to reevaluate evidence on record and arrive at an independent determination. This I do knowing that the trial court had opportunity to take evidence first hand and observe demeanor of witness, which I have not. For this I give due allowance.

17. What is being challenged is the monthly payment of kshs.5000, which was backdated to the period the respondent stopped paying to February 2013. From March 2013 the respondent was ordered to pay alimony of kshs.16,000 until the respondent contracts another marriage.

18. The respondent in her testimony informed court that he learned from the appellant that he was working for [particulars withheld] and he could afford kshs.30,000 monthly. She said that she stopped working on being married to the appellant. Appellant in his testimony in court confirmed that he was working in [particulars withheld] on temporary terms. He confirmed that the standing order to support the respondent was true.

19. Appellant indicated that he was earning kshs.48,000 per month. He added that he was in a lot of debt but never produced any document to prove that.

20. From evidence adduced, the appellant was employed. He never availed any documents to confirm whether he was earning kshs.48,000 as he alleged. It is evident that the appellant had committed himself to pay maintenance of kshs.5,000 during the pendency of the suit in the trial court. Respondent in her testimony said he stopped remitting the 5000. It is not indicated when the standing order was operational and when it was stopped. From evidence adduced, it appears that was an arrangement between respondent and appellant. It is not clear when it

started and when it stopped. In the petition, the respondent did not pray for arrears in respect of standing order. She also never adduced any evidence of when it started and when it stopped.

21. From the foregoing, I find that the trial magistrate acted in error in awarding maintenance in respect of standing order, as it is not prayed for and there is no evidence to base calculation.

22. In respect of alimony after suit, the appellant confirmed that he was employed. He said he was earning kshs.48,000 but never availed any document to prove the earnings. Appellant had noticed that the respondent was claiming maintenance. It was his responsibility to avail his income documents to court, which he failed. In the absence of evidence on means of the appellant, it would be difficult to say whether the sum of kshs.16,000 monthly is on the higher side. I therefore decline to interfere with the trial magistrates finding on alimony.

23. FINAL ORDER

1. Order for payment of kshs.5000 backdated to when appellant stopped paying is set aside
2. Appeal on order for payment of Alimony of kshs.16,000 is dismissed
3. Each party to bear own costs.

Judgment dated, signed and delivered at Nakuru this 25th day of July 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Jeniffer Court Assistant

N/A Counsel for Appellant

Mr. Kimatta Counsel for Respondent