

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII

Divorce Cause 5 of 2007

AKMM.....PETITIONER

VERSUS

EMM.....RESPONDENT

RULING

The marriage between the petitioner and the Respondent was dissolved and custody of DOM, a child now aged about 14 years given to the Petitioner. The petitioner prayed for maintenance orders for herself and for the aforesaid child. The Respondent did not defend this divorce cause.

According to an affidavit of means filed by the Petitioner, the Respondent is a Secondary School Teacher, employed by the Teachers Service Commission and is currently teaching at M[Particulars Withheld] Secondary School. His gross salary as shown in a copy of a pay slip for the month of October, 2008, which was annexed to the said affidavit, is Kshs. 42,998.50 However, after all the statutory and loan deductions, his net salary was kshs.9,110/=.

The petitioner is a primary school Teacher and her current monthly gross salary is kshs.28,271/=. After sundry deductions, the net amount as shown in the pay slip for the month of June 2008 was kshs.4,317.30/=.

The petitioner stated that the annual school fees for DOM is Kshs. 53,430/=. She is currently paying the same. She is also renting a house at Kshs.7000/= per month and spends kshs.10,500/= per month on food and transport. The petitioner urged the court to order the Respondent to pay to her kshs.21,494/= being half of his monthly gross salary, for her maintenance as well as that of DOM.

Apart from the aforesaid expenses currently being met by the petitioner, she is also taking care of two other children she got with the Respondent but who are over 18 years old. There is IGM currently pursuing a Degree Course at Kenyatta University and STM who sat for the Kenya certificate of Secondary Education Examinations in the year 2008. The annual College fees for the first born is Kshs. 171,200/=.

I cannot understand how the petitioner is able to foot all these expenses with a net monthly salary of Kshs.4,317.30! The petitioner did not state whether herself and the Respondent have any other source of income. If the Respondent's net pay is about kshs.9,110/= per month, how can he be ordered to pay Kshs. 21,494/= as maintenance charges every month? It is impossible, unless he has other sources of income, which evidence has not been given to court.

Unlike the case in assessment of general damages which is done without regard to the defendant's means, the sole criteria being what is fair and just, in proceedings for maintenance, the husband's means are highly relevant, see **TOLLEY –VS- TOLLEY** [1977] KLR 116. A court has to look at the realities of the parties' financial position before it makes a maintenance order.

In considering a man's financial position, a court may consider not only what amount of money a man earns or has, but also what he is capable of getting if he liked. His earning capacity will also be taken into consideration. See **PRINCIPLES OF FAMILY LAW**, S.M. Cretney, 3rd Edition Pg 288. In **McEWAN –VS- McEWAN** [1972] 1 WLR 1217, the husband, a retired detective constable aged 59, was unemployed. Although his only cash income was a police pension £6 weekly, the court held that an order that he should pay his wife the whole of that sum was not unreasonable. It was proper to take into account his potential earning capacity as he could have obtained suitable work had he tried.

However, the court can only act on proper evidence, either direct or justifiable by inference, in assessing what a man is capable of raising. Although it appears to me that both the petitioner and the respondent may be having other sources of income, there is no evidence to that effect. In the circumstances, I can only make a maintenance order of Kshs. 2,000/= per month which shall be deducted from the Respondent's monthly salary and paid to the petitioner. The petitioner can make an application for increment of the said maintenance sum as and when the respondent's financial position improves.

DATED, SIGNED AND DELIVERED AT KISII THIS 27TH DAY OF JULY, 2009.

D. MUSINGA

JUDGE.