



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NYERI**

**Civil Appeal 43 of 2002**

**BENARD KINANI MUTHIKE.....APPELLANT**

*Versus*

**DORCAS GATHONI KINANI.....RESPONDENT**

*(Being appeal from the Judgment of the lower court dated 22<sup>nd</sup> day of February, 2002 in Kerugoya Cause No. 13 of 2001 before S. A. Okato, Resident Magistrate)*

**JUDGMENT**

The Appellant filed a petition seeking dissolution of his marriage to the Respondent in the lower court. The Respondent's petition for divorce was based on grounds of cruelty and adultery. When the case came up for hearing the Petitioner gave evidence and also called two witnesses. Whilst the 2<sup>nd</sup> witness was giving evidence he stated that the parties had been married in church. That statement was contrary to Appellants evidence. In his earlier evidence he had stated that he had been married to the respondent under Kikuyu customary law. The court immediately recorded the following:

*“Ct: The petitioner concealed material particulars from this court. He is not reliable. He told the court that he married under Kikuyu customary law. I therefore dismiss his petition dated 23.11.02 with no order as to costs.”*

The Appellant's case was dismissed even without the hearing of the respondent's evidence. That dismissal was improper and cannot be said to be a judgment as contemplated in *Order XX* of the Civil Procedure Rules. A judgment is required to contain concise statements of the case and should identify all the points of determination before reaching a conclusion. That judgment should also give reasons for its decision. See *Order XX Rule 4*. The learned magistrates decision as quoted herein before failed to comply with those requirements. As stated before the decision was reached without hearing the Respondent's evidence. The Appellant was indeed aggrieved by that decision and has accordingly filed the present appeal.

In his Memorandum of Appeal the appeal has raised three grounds as follows:

**1. “The learned Resident Magistrate having confirmed from the petitioner and respondent under what system of marriage they had married, erred in law and fact by dismissing the petitioner's petition on the ground that the petitioner concealed material facts to the suit. A miscarriage of justice was occasioned.**

**2. The learned Resident Magistrate erred in law and fact by failing to take cognizance of the pleading**

*before him specifically the petition which petition had raised the petitioner's claim. A miscarriage of justice was occasioned.*

*3. The learned Magistrate erred in law and fact by holding that the petitioner concealed material facts while there was enough evidence on record to go by in support of the petitioner's case."*

The only order that is appropriate in this case is that a new trial be undertaken by the lower court.

*The judgment of this court is that the judgment and decree of the lower court dated 22<sup>nd</sup> Feb 2002 be and is hereby set aside. The divorce case no. 13 of 2001 shall hereby be referred back to Kerugoya Magistrate's court where a new trial shall be undertaken before any magistrate other than S. A. Okato. The Appellant is awarded costs of this appeal.*

**MARY KASANGO**

JUDGE

*Dated and delivered at Nyeri this 2<sup>nd</sup> day of November 2007.*

**By: M. S. A. MAKHANDIA**

JUDGE