



REPUBLIC OF KENYA



**KENYA LAW**  
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**DMM v MW (Family Appeal E103 of 2024)**  
**[2025] KEHC 12588 (KLR) (Family) (16 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12588 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY**

**FAMILY APPEAL E103 OF 2024**

**H NAMISI, J**

**SEPTEMBER 16, 2025**

**BETWEEN**

**DMM ..... APPELLANT**

**AND**

**MW ..... RESPONDENT**

*(Being an Appeal against a part of the Judgement, decree and orders of Hon. E. M. Nyakundi (SRM) delivered on 25 July 2024 in Milimani Divorce Cause No. E1148 of 2023)*

**JUDGMENT**

1. This appeal arises from a Divorce Cause in the trial court, in which the Petitioner, the Appellant herein, sought the following orders:
  - i. The marriage between the Petitioner with the said Respondent celebrated and solemnized on 19 August 2000 be dissolved;
  - ii. Each party to bear their own costs;
  - iii. Any other relief that the court shall deem fit to issue.
2. The Appellant based his Petition on the grounds that the marriage had irretrievably broken down and irreconcilable differences.
3. In her Answer to Petition, the Respondent denied the grounds alleged by the Appellant. She averred that although their marriage had been rocked with problems, the Appellant had not moved out of their matrimonial home, as alleged by the Appellant. As a matter of fact, their differences between the parties were common disputes between married couples and the marriage had not irretrievably broken down. The Respondent urged the trial Court to dismiss the Petition.



4. The matter proceeded with viva voce hearing whereat the parties adopted their respective Witness Statements. At the end of the trial, the trial court directed parties to file their respective Affidavits of Means. When the matter came up for mention to confirm compliance, Counsel for the Appellant informed the Court that issue of maintenance had not been raised in the pleadings. Counsel for the Respondent did not attend court on the material day.
5. In its judgement, the trial Court noted that although the aspect of alimony was not raised by any of the parties, the Respondent appeared destitute and homeless due to the Appellant. Based on the oxygen principal and the Affidavits of Means, as well as section 77 of the *Marriage Act*, the trial court noted that the Appellant had neglected the Respondent. For that reason, the trial court entered judgement as prayed by the Appellant but also ordered that the maintenance be paid by the Appellant to the Respondent in the sum of Kshs 50,000/= every 5<sup>th</sup> day of the month. It is this particular order that precipitated the current appeal.
6. Aggrieved by the judgement, the Appellant lodged this appeal on the following grounds:
  - i. That the learned trial Magistrate erred in both law and fact by making a finding that the Respondent is entitled to monthly maintenance of Kshs 50,000/= to be paid by the Appellant before the 5th day of every month;
  - ii. That the learned trial Magistrate erred in both law and fact by awarding alimony to the Respondent whereas the same was not pleaded by any of the parties;
  - iii. That the learned trial Magistrate erred in both law and fact by making a finding that the Respondent was destitute and hence entitled to alimony whereas during the hearing the Respondent testified that she was a businesswoman running her own business;
  - iv. That the learned trial Magistrate erred in both law and fact by awarding alimony to the Respondent whereas there was no evidence adduced to justify the same.
7. Based on the foregoing, the Appellant prays that the appeal be allowed by setting aside the orders issued by the trial Court directing that maintenance be paid to the Respondent.
8. The appeal was canvassed by way of written submissions.

### **Analysis and Determination**

9. I have considered the grounds of appeal and the rival submissions. This being a first appeal, the role of this Court as the appellate Court of first instance is well settled. This Court is duty bound to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. This Court, nevertheless, appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings as was held in *Mwanasokoni v Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga v Kiruga & Another* (1988) KLR 348.
10. Further in *Mbogo & Another v Shah* [1968] EA 93, the Court stated:

“...That this Court will not interfere with the exercise of...discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”



11. In *WMM v BML*, HCDC No. 179 of 2009, it was stated maintenance as follows;

“In the light of Article 45(3), the criterion in determining the rights and obligations of spouses in a marriage must treat the husband and the wife as equals and neither has a greater or lesser obligation than the other in relation to maintenance. In short, in cases where, as here, spouses have no children, a wife does not enjoy advantage over a husband or the vice versa and the age-old tradition in which men were deemed to be the sole bread winners and to carry the burden of maintaining their spouses does not hold true anymore. Under the *Constitution*, the Respondent has a duty to support and maintain herself no less than the Petitioner has to support himself and there is no greater obligation on the part of the Petitioner to support himself than there is on the part of the Respondent to support herself. No spouse who is capable of earning should be allowed to shirk his or her responsibility to support himself or herself or turn the other spouse into a beast of burden...”

12. The appeal herein is based on the maintenance of the Respondent by the Appellant. The first and substantial ground of the appeal raises a point of law that goes to the heart of our adversarial system of justice: the sanctity of pleadings. The Appellant’s position is that the trial court acted outside its jurisdiction by granting a relief that was never pleaded.

13. The general principle is beyond peradventure. Parties are bound by their pleadings. The purpose of this rule is to provide the opposing party with fair notice of the case they are to meet, to define with clarity the issues in controversy, and to prevent the trial from becoming an amorphous and unpredictable exercise.

14. Whereas Article 159(2) (d) of the *Constitution* and the oxygen principle in the *Civil Procedure Act* are relevant in the conduct of civil proceedings, they are not helpful in the instant case because the Respondent did not specifically plead alimony in form of counterclaim and/or cross petition. This position was reinforced in *W.W.W v P.M.M* (2015) eKLR, where Justice Musyoka held;

“The pleading filed by the Respondent is an answer to petition. An answer to petition is just that, a pleading responding to the allegations made in a divorce petition. A respondent, who wishes to counter the petition by the petitioner, by asking the court to dissolve the marriage on his terms, should file his own petition for the dissolution of marriage founded on grounds to be set out in the counter petition. Although the respondent has prayed for the dissolution of the marriage in his answer to the petition, it is my view that the said is without foundation so long as there is no counter-claim or counter-petition. The upshot of the above is that the orders sought in the answer to the petition are not available for reasons given above”

15. The Court’s power to grant alimony is provided in Section 77(1) of the *Marriage Act* which states:

The court may order a person to pay maintenance to a spouse or a former spouse—

- (a) if the person has refused or neglected to provide for the spouse or former spouse as required by this Act;
- (b) if the person has deserted the other spouse or former spouse, for as long as the desertion continues;
- (c) during the course of any matrimonial proceedings;
- (d) when granting or after granting a decree of separation or divorce; or



- (e) if, after making a decree of presumption of death, the spouse or former is found to be alive.
16. The provision gives the Court the power to order payment of maintenance to a spouse or former spouse in situations of desertion, neglect to provide for the spouse or during matrimonial proceedings, with the court considering factors like the standard of living during the marriage and each party's income when determining the amount and duration of maintenance; essentially allowing either spouse to seek financial support from the other upon divorce depending on the circumstances of the marriage. Though discretionary, this power must be exercised judiciously, based on legal evidence and guided by established legal principles.
17. In *RPM v PKM* [2015] eKLR and in *SMR v PHS* [2013] eKLR it was observed that:  
“The financial capacity of the parties has to be examined before the court makes a ruling as to whether a spouse should pay maintenance and if so how much.”
18. Maintenance is not a right to be claimed as a matter of course. It is a remedy intended to provide a safety net for a spouse who is financially disadvantaged by the marital breakdown and is unable, for valid reasons, to support themselves. The burden of proof lies squarely on the applicant to demonstrate the need for maintenance. This requires such an applicant to place before the court sufficient material to prove their financial position including their income, assets, expenses and liabilities. This is done through an Affidavit of Means. This information would enable the trial court to make an informed decision on whether, from evidence on record and applicable law, the Respondent is entitled to alimony/maintenance or not and if so, how much?
19. Having keenly perused the Record of Appeal, I note that there are no Affidavits of Means filed, despite the trial court's directions to file the same. Since the Respondent did not raise any objection on the completeness of the Record, it is assumed that no such Affidavits were filed before the trial court. The question that arises then is if the trial court's decision to award alimony to the Respondent is supported by evidence.
20. It is my considered view that the finding of the trial court that the Respondent was destitute is a palpable misapprehension of the evidence. This finding is in direct and irreconcilable contradiction with the Respondent's own sworn testimony. In her testimony, the Respondent indicated that she is a business woman. On cross examination, she added that she is a tailor by profession. The term 'destitute' connotes a state of utter penury, a complete lack of means for subsistence. A person who runs a business and possesses a professional skill, however modest their income may be, cannot be described as destitute.
21. Further, beyond her oral plea that she had no help, the Respondent placed no evidence before the trial court to substantiate her need to maintenance. The record is entirely bereft of the financial particulars of her business and expenses necessary to justify an award of Kshs 50,000/= per month. The Respondent failed to discharge her burden of proving her need for alimony.
22. In view of the foregoing, the appeal is merited and must be allowed. The order of Hon E.M Nyakundi (SRM) issued on 25 July 2024 in Milimani Divorce Cause No. E1148 of 2023 directing the Appellant to pay the Respondent a monthly maintenance of Kshs 50,000/= is hereby set aside in its entirety.
23. This being a family matter, each party shall bear its own costs.

**DATED AND DELIVERED AT NAIROBI THIS 16 DAY OF SEPTEMBER 2025**



**HELENE R. NAMISI**

**JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

For Appellant: N/A

For Respondent: Mr. Gakaria

Court Assistant: Lucy Mwangi

