



**MWM v HMO (Civil Appeal E020 of 2023)
[2024] KEHC 2759 (KLR) (13 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2759 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E020 OF 2023
GMA DULU, J
MARCH 13, 2024**

BETWEEN

MWM APPELLANT

AND

HMO RESPONDENT

(From the Judgment in Divorce Case No. E002 of 2022 delivered on 30th November 2022 by Hon. D. Wangeci (PM) at Wundanyi Law Courts)

JUDGMENT

1. In a judgment delivered on 30th November 2022 the trial Magistrate, in a divorce case, concluded that the marriage between H.M.O and M.W.M be and is dissolved, and that the petitioner shall have custody of the child of the marriage and that each party bear their respective costs.
2. Dissatisfied with the decision of the trial court, MWM (M.W.M) who was the respondent, has come to this court on appeal on the following grounds:-
 1. That the learned Magistrate erred in law and in fact in not taking into consideration that the appellant was never served with the petition and/or pleadings.
 2. The learned Magistrate erred in law and in fact in not considering that there was no return of service from a qualified person or personnel to prove service of pleadings to the appellant.
 3. The learned Magistrate erred in law and in fact by allowing the divorce cause to proceed ex-parte without the petitioner filing an application to satisfy the proceedings were in order as required by the law.
 4. The learned Magistrate erred in law and in fact by entering judgment for custody of the minor, which was not part of the prayers in the petition.



5. The learned trial Magistrate erred in law and in fact in relying on the petitioner's evidence without calling the appellant to court.
3. With the above grounds of appeal, the appellant has asked that the judgment in Wundanyi Divorce Cause No. E003 of 2022 *HMO v MWM* be set aside, and the appellant be allowed to defend herself.
4. The appeal was canvassed through written submissions filed in person by the appellant as well as the submissions filed by the respondent. I note that in the submissions, the respondent contends that the appellant has appealed only against the order of custody of the issue (E.B).
5. Having perused and considered the petition of appeal and written submissions, I am of the view that the custody of the child (issue) of the marriage is one of the grounds not the only ground of appeal as alleged by the respondent.
6. Having myself perused the petition filed by the respondent in the divorce cause, dated 6th June 2022 lodged in court by the respondent (petitioner) in person, I note that the prayers were as follows:-
 - a. The said marriage to be dissolved.
 - b. The respondent (now appellant) to be condemned to pay the costs of this cause and all costs and expenses incidental to these proceedings.
 - c. Such other costs and reliefs as this court might deem right and just to grant.
7. From the judgment of the trial court however, custody of the child of the marriage was granted by the Magistrate to the respondent without the court either laying a basis for it or giving reasons for the order. I thus find the order of custody issued by the Magistrate was an error, as it was not pleaded, nor were there reasons given for such an order. I will set aside the order of custody of the child.
8. With regard to the adequacy of service of process to the appellant, I have perused the record of the trial court. I note that on 18th July 2022 the trial Magistrate adjourned the matter to 29th August 2022 to enable the respondent file an affidavit of service.
9. I also note that on 25th July 2022 an affidavit of service was filed, and on 29th August 2022 the Magistrate acknowledged that the said affidavit was filed, before allowing the respondent to proceed to tender evidence in the matter, as an undefended divorce petition.
10. I have also perused the affidavit of service sworn by the respondent herein on 22nd July 2022, and observe that it was deponed in paragraph 2 thereof that on 17th June 2022 the deponent (respondent herein) instructed his brother AO who proceeded to the deponent's home at [particulars withheld] village in Kakamega, and served the appellant and that appellant accepted service, but refused to sign for receipt.
11. It was also deponed that the appellant later confirmed to the respondent on phone, that she had received the petition and all the related documents.
12. In my view, the alleged service herein was not proper. First of all there is no indication that the person who is alleged to have served the documents was a process server.
13. Secondly, the affidavit is actually based on hearsay information, as the person to have sworn the affidavit of service of the documents was AO and not the respondent herein.
14. It follows that the service of the petition on the appellant was not proved, and consequently, the respondent was denied her right to be heard as required under Article 25 and 50 of the [Constitution of](#)



Kenya since she was not served and could thus not be able to respond and be heard. The appeal will thus succeed on that account.

15. I thus allow the appeal, set aside the entire judgment of the trial court and all consequential orders, and order as follows:-
1. A retrial is hereby ordered in which the appellant will be allowed to defend herself according to the law.
 2. The costs of this appeal will abide the determination in the fresh trial.
 3. I order that the matter be mentioned before the Magistrate's court on 25th March 2024 for directions.

DATED, SIGNED AND DELIVERED THIS 13TH DAY OF MARCH 2024 IN OPEN COURT AT VOL.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

Appellant in person

Respondent in person (virtual)

