



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO. 25 OF 2018

JMA.....APPELLANT

VERSUS

SHA.....RESPONDENT

JUDGEMENT

1. By plaint dated and filed on 8/10/2018 the respondent sought reliefs that:

- (1) Dissolution of marriage.**
- (2) Mahr.**
- (3) Custody of the child.**
- (4) Maintenance of the child.**

2. The appellant replied via his defence and therein sought relief by what appears to be a counter-claim for:

- (1) Divorce.**
- (2) Admitted he will pay dowry once money available.**
- (3) Custody of the child.**

3. After hearing the parties, the Kadhi Court made a decision to the effect that:

- (a) Dowry to be paid was Kshs.100,000/= which was admitted by appellant.**
- (b) Monthly maintenance Kshs.5,000/= .**
- (c) Also appellant had agreed he was paying Ksh.5,000/= for maintenance.**

4. The court went further to order the appellant to be committed to civil jail until he pays Kshs.100,000/= dowry and satisfies court that he will be paying Kshs.5,000/= per month as maintenance.

5. Being aggrieved by the aforesaid decision, the appellant in the instant appeal is complaining that:

- (1) Kadhi's Court had no jurisdiction to deal with the matter.**
- (2) The court did not follow procedure in committing him to civil jail.**
- (3) The court failed to consider the evidence adduced by the appellant in court regarding payment of the dowry.**

6. When matter came for hearing the appellant told court that he divorced respondent and married another wife. He has now a wife and children in the new marriage.

7. He admitted they had a child with respondent who is living with the respondent. He says that he is willing to pay dowry but he is not able as he is a casual worker and also that he wishes to have custody of the child of marriage.

8. He seeks monthly maintenance of the child to be reduced to Kshs.3,000/= per month from Kshs.5,000/= per month and Kshs.2,000/= per month to be going to the dowry payment.

9. On respondent side, she admits that they divorced with the appellant and that she lives with the child of the marriage. She does not work. She admitted that appellant is married with children and works in Dar-salaam. She admitted that since divorce, the appellant has been paying Kshs.5,000/= for monthly maintenance but has not paid the dowry ordered by the court. She needs the dowry in lumpsum.

10. In response to the respondent's submissions above, the appellant submits that he cannot be able to pay Kshs.5,000/= per month for maintenance.

11. After going through the pleadings herein I find the only issues are:

- **Whether the appellant was liable to be committed to civil jail to pay Kshs.100,000/= for dowry?**
- **Whether appellant is able to pay amount awarded?**

12. Before going to the issue above, I note that the appellant in his grounds of appeal avers that the Kadhi Court had no jurisdiction to entertain the matter.

13. The court dismisses this ground without further ado. The reason is that the issue of jurisdiction was not raised in the pleadings and proceedings nor is it addressed in submissions herein. In any event the appellant admits and agrees to the fact that he pays Kshs.5,000/= for maintenance per month and wishes to continue paying the same.

14. Secondly, the appellant agrees he is liable to pay dowry Kshs.100,000/= but only that he is not financially able at the moment.

15. On whether the court was procedurally right to commit the appellant to civil jail, the court notes that section 38 of the Civil Procedure Rules (F) states that:

“.....where a decree is for payment of money, execution by detention in prison shall not be ordered unless, after giving the judgement debtor an opportunity of showing cause why he should not be committed to prison, the court for reasons to be recorded in writing; finds debtor has;

- **absconded or about to abscond.**
- **transferred his properties.**
- **has means but has refused to pay decretal amount.**

16. The aforesaid procedure was not followed in committing the appellant to civil jail. The appellant has complained that though willing to pay ordered dowry, he cannot afford to pay same but proposes to be paying 2,000/= per month for the same.

17. In Cap. 65.7 the Holy Quran states that:

“Let the Rich man spend according to his means and the man whose resources are restricted, let him spend according to what Allah has given him.”

18. Thus the court finds that whereas the appellant proposes to pay Kshs.2,000/= per month towards the dowry award, the respondent seeks to be paid the entire amount in lumpsum.

19. The respondent has not managed to convince court that the appellant is able to pay the same amount in lumpsum. However though a casual labourer, he proposed to pay Kshs.2,000/= per month which is unreasonable as it will take 50 months or over 4 years to clear.

20. The court finds that it is only reasonable that the payment of the dowry be done by way of monthly instalment of Kshs.5,000/= until payment of the entire amount. The maintenance of Kshs.5,000/= to continue to be paid.

21. Thus this court makes the following orders:-

(1) The trial court order/ruling is set aside and substituted by this court order that:

- (i) Dowry payable Kshs.100,000/= to be paid by way of monthly instalment of Kshs.5,000/= with effect from June 2019.**

(ii) The maintenance of monthly amount of Kshs.5,000/= to continue to be paid.

(iii) In default of payment of any instalment above, execution to issue.

(iv) No orders as to costs.

DATED, DELIVERED AND SINGED IN OPEN COURT AT GARISSA THIS 18TH DAY OF JUNE, 2019.

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CHARLES KARIUKI

JUDGE