



REPUBLIC OF KENYA

**IN THE COURT OF APPEAL
AT MOMBASA**

**(CORAM: KWACH, SHAH J.J.A. & BOSIRE AG. J.A.)
CIVIL APPEAL NO.126 OF 1997**

BETWEEN

MUHIDIN SHEIKH MOHAMED.....APPELLANT

AND

KHADIJA OMAR ALAMIN..... RESPONDENT

**(Appeal from the ruling of the High Court of Kenya at
Mombasa (Justice Ang'awa) dated 27th February, 1997
in
DIVORCE CAUSE NO.1 OF 1995**

JUDGMENT OF THE COURT

This appeal although based on three grounds of appeal raises really one point for decision, that is to say whether or not the learned Judge (Ang'awa J.) erred in ordering that the appellant (the husband) pays Shs.25,000/= per month as maintenance for the respondent (former wife) and the children of the marriage. Of the sum of Shs.25,000/= the three children of the marriage were to receive Shs.20,000/= per month and the former wife Shs.5,000/=.

The husband complains that the learned Judge failed to appreciate the principles governing assessment of maintenance sums and that she erred in her understanding and application of the law and arrived, therefore, at a wholly erroneous figure.

This Court in the case of Catherine Jean Marsden v. Patrick Michael Oyango, (Civil Appeal No. 273 of 1996), (unreported), a decision handed down on 31st January, 1997 here in Mombasa, said of and concerning the decision of the same Judge (Ang'awa J.) as follows:-

"This rule (rule 48 of Matrimonial Causes Rules) requires a Judge to make full investigation into the matters in issue for such ancillary relief as is sought and the duty to make such investigation becomes more pronounced when the interests of an infant are involved."

In the same case the Court also said:

"When the application for ancillary relief came up for hearing before Ang'awa J. the respondent had not filed his affidavit of means. The appellant however, submitted that

the respondent was in receipt of gross salary exceeding Kshs. 80,000/= per month.

Despite such evidence the learned Judge proceeded to assess the maintenance for the appellant at Shs.2000/= per month thereby reducing the amount awarded to her by Mbogholi-Mshaga J. by Shs.4000/= per month when in fact there was no application at all by the respondent for review of the orders made by Mbogholi-Mshaga J. In doing so the learned Judge clearly erred and in our view surprisingly so."

Yet on 27th February, 1997 in the present case the learned Judge completely disregarded the observations of this Court in the Marsden case and without giving any reasons simply said: "as to maintenance the Respondent has stopped working. This whole divorce cause appears to have put him in agony.

I would rule that the Respondent do pay maintenance to the petitioner of KShs.5000/= per month and for the maintenance of the children KShs.20,000/= per month."

The learned Judge made no inquiry of any kind before arriving at the figure of KShs.25,000/= save to state earlier in her judgment as follows:-

"An affidavit of means has now been filed to represent (sic) the Respondent's income. He further stated that he is unable to maintain the petitioner (sic) very high and luxurious life style."

There was evidence before the learned Judge to the effect that the husband's rental income was Shs.12000/= per month, gross. There was also evidence before the learned Judge to the effect that the husband was unemployed because he was suffering from hypertension and arthritic gout. Whilst the former wife had made vague allegations to the effect that the rental income was Shs.25,000/= per month (she raised it to Shs.45,000/= per month in her evidence) there was nothing to controvert the husband's affidavit of means in which he stated that his rental income was Shs12,000/= per month and that he had applied to have the rent re-assessed by the Rent Restriction Tribunal. Mr Musinga for the former wife, very properly, conceded that the only credible evidence before the learned Judge was that the husband's rental income was Shs.12,000/= per month and that he had no other income.

In the face of all this the learned Judge ordered the husband to pay Shs.25,000/= per month. How she came to this figure is beyond our comprehension. It amounts to what can only be referred to as enigmatic.

An aspect of the record of appeal which has disturbed us is the manner in which the proceedings have been recorded. There are too many blanks in the typed copy of the proceedings. Some are filled in by hand in ink. Some are left blank. If the typist had difficulties in reading the learned Judge's notes he or she ought to have gone to Judge for elucidation. It appears that blanks in the typescript of the proceedings were filled in haphazardly. We had to, at times, strain our imagination to guess what was recorded.

We come now to the issue of maintenance itself. Mr Musinga has suggested that the matter be referred back to the superior court for re-hearing and a full inquiry be carried out into the income and income earning capacity of the husband. That can only arise if we are unable to reach our own conclusion and in this case we have enough material to go by and there is therefore no need to refer the matter back to the superior Court.

There is evidence that the husband is in receipt of monthly rental income of Shs.12,000/= gross. There is evidence that he is now jobless and was so at the date of the trial. The former wife has not stated how much she earns. She stated at one stage that she carried on an ice-cream vending business. Later she stated that she does not carry out that business any longer. We must keep in mind the fact that the former wife never disclosed her earnings at any time. We must also keep in mind the fact that we do not know what the husband's second wife earns, if she earns at all.

The couple have three children, now aged 15, 13 and 5 years. The former wife has to look after them as she indeed is doing. The husband has a child by the second wife. The former wife, it appears, has managed to send the children to good schools.

Taking all the facts into consideration we assess the maintenance for the former wife and the three children at KShs.6000/= per month. The effective date, which was not given by the superior court, is from 1st March, 1997.

The upshot of all this is that this appeal is allowed and the figure of Shs.25,000/= assessed by the learned Judge is reduced to Shs.6,000/= per month with effect from 1st March, 1997. There will be no order as to costs of this appeal.

We must express our gratitude to Mr. Suchak for taking over the conduct of the appeal at the last minute when Mr. S.P. Master, the counsel for the appellant was hospitalized and also for doing an admirable job. We must also express our gratitude to Mr. Musinga for carrying out his duties as an advocate and as an officer of the Court. He made ready concessions, in our view rightly so, when faced with an uphill task in supporting the impossible figure arrived at by the learned Judge.

our anxiety at the manner in which the learned Judge arbitrarily assessed the figures for maintenance totally abdicating the duties cast on her by rule 48 of the Matrimonial Causes Rules. As a Court of final jurisdiction we have endeavoured in numerous pronouncements in our judgments to provide guidance to this particular judge on basic concepts of law but she does not seem to have heeded our advice. Our suspicion is that she does not care to read those judgments. As a result the administration of justice in Mombasa has deteriorated alarmingly and we hope that the Hon. the Chief Justice will deem it fit to take the necessary remedial action to forestall further deterioration. We have reached this decision with regret and needless to say, with great reluctance.

Dated and delivered at Mombasa this 25th day of July, 1997.

R.O. KWACH

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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Ag. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR