**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Apaloo, Masime JJA & Kwach Ag JA)**

**CIVIL APPEAL NO. 74 OF 1984**

**BETWEEN**

**KARANU.....APPELLANT**

**AND**

**KARANU.....RESPONDENT**

**JUDGMENT**

*(Appeal from a Ruling of the High Court at Nairobi, Porter J)*

November 17, 1988, **Apaloo JA** delivered the following Judgment.

The appellant – husband appeals against an order of the High Court (Porter J) which on the 20th December 1983, awarded the sum of 2,000/= per month as alimony pending suit to the respondent and the like sum for each of the three children of the marriage. The learned Judge on the 15th May 1984, refused an application of the appellant to reduce these sums. Hence this appeal which contests both the original awards and the Judge's decision not to vary these amounts.

The parties seem to have contracted a monogamous marriage at some time which the available evidence did not disclose. The first child of the parties, a daughter, was born in September 1974. If this child was born in coveture, then the parties must have married sometime before that date.

Husband and wife lived and cohabited together at Nakuru and after the first child Anne, two sons, Joseph and Francis were born in July 1976 and November1977 respectively. The respondent was, until December 1978, the special Branch Officer in charge of the Rift Valley. He retired in that month on pension. But before that date, he seems to have had some business interests and if the affidavit evidence of the wife can be relied on, was in receipt of considerable income. It was said he lived in great affluence. The respondent was, by training a nurse. She seems to have continued in her profession after the marriage, but she resigned in November 1978 at her husband's insistence. She herself swore that she was "forced to do so' by her husband. Thereafter, she and her children were wholly dependent on the husband for their maintainance and support.

It is unclear what the relationship was between the appellant and his wife prior to September 1983. It is not unreasonable to assume that it was punctuated by the normal domestic differences between husband and wife. But on the 27th September, 1983, the wife was obliged to leave the matrimonial home. She said she was "savagely beaten" on that day by the husband and was ordered out of the matrimonial home by him. She has since then lived separate and apart from her husband. She left the three children of the

marriage in the matrimonial home. But as a result of her application, the High Court, on the 20th December 1983, granted her custody of the three children.

One particular matter which hurt the wife and which presumably led to the break-up of the marriage, was the wife's apparently justified complaint that the husband had a mistress and was openly committing adultery with her. The wife petitioned for dissolution of the marriage on this ground. During the hearing of this appeal, we were informed by counsel that on the 16th August, 1985, the High Court granted a decree nisi in her favour. So far, no decree absolute has been sought or obtained. So the alimony and maintenance orders subsist.

The appellant husband complained that the total sum of Kshs 8,000, awarded to the wife and the children was too much and should be reduced. In particular, it was urged that in fixing this figure, the learned judge cannot have been mindful of the proviso to section 25(1) of the Matrimonial Causes Act which ordained that alimony pending suit should not "exceed one fifth of the husband's average net income for the three years next preceding the date of the order". It was also said that although the quantum involves an exercise of discretion by the Judge and that that discretion would not normally be interfered with on appeal, yet as the Judge ignored the 1/5 rule laid down by the statute, his discretion is not inviolate and can be disturbed on appeal.

That argument sounds well enough. But is there any evidential basis for saying that the sum of Kshs 2,000 awarded by the court exceeded the 1/5 Rule? Rule 44(1) of the Matrimonial Causes Rules, obliged the husband within 14 days of an application for alimony pending suit, to set out full particulars of his property and income. To quote the rule:

> "Where a husband is served with a petition in which alimony pending suit is claimed, he shall within fourteen days after entering appearance file an affidavit setting out full particulars of his property and income."

Clearly, this rule envisages an honest and true disclosure by the husband of his earnings so the court can be guided by it in fixing the quantum of the award. The appellant filed no such affidavit. What he filed, was what he called a replying affidavit in which he opposed the wife's averments as to the extend of his property and income. No one who read that affidavit of the 4th November 1983 with attention, can help feeling that the husband was only concerned in concealing from the court his real worth in terms of assets and income.

Having failed to discharge the obligation cast on him by Rule 44, it sounds ill from the mouth of the husband to contend that the learned Judge's award exceeded 1/5 of his income for the three years preceding the date of the award. It seems to me entirely opposed to principle that the appellant should be permitted to found an argument for relief based on his own breach fo statutory duty. On the facts of this case, in my opinion, the appellant's complaint that the learned Judge infringed the 1/5 rule ought not to be listened to.

If that be right, the Court can only fix the quantum on such evidence as is available and ensuring that the sum fixed is, in all the circumstances, fair and reasonable and that the figure does not depress the husband subsistence level. The husband's want of candour, as far as his true income and assets went, was made good by the wife. She filed an affidavit in which she gave detailed particulars of the husband's properties and made a fair estimate of his income.

From these, it is possible to form a fairly broad picture of the husband's properties. He had or probably still has, a farm containing diary, - the Mbaruk farm, a Uniform shop – Mbaruk Uniform Ltd., Residential House at Thika which was let, a block of flats in Nakuru, a quarry which were all income–yielding. The husband did not dispute his ownership of these properties but sought to show that they were all ridden with debts. It hardly sounds credible that the appellant made no income from these apparently income–yielding assets. I think he did. The wife estimates that at least, he should be in receipt of monthly income in the order of Kshs 100,000/= or probably more. That does not strike me as unreasonable. 1/5 of that sum works out at just over Kshs 20,000/=.

So the award of Kshs 2,000/= per month to the wife for maintenance does not come to anything near to the 1/5 of his monthly income. In relation to the husband's monthly receipts, Kshs 2,000/= is less than generous. It is said, as happened here, that where cohabitation has been disrupted by a matrimonial offence on the part of the husband, the wife and children's maintenance should be so assessed that their standard of living does not suffer more than is inherent in the circumstances of separation. And for an errant husband in receipt of a monthly income of Ksh 100,000/= a monthly award of Kshs 8,000/= for the maintenance of his wife and three children, is slightly parsimonious. I would have to have some cogent reason to reduce it. I need hardly say, none has been given.

Counsel for the husband stressed the fact that the wife resumed her profession as a nurse and is in receipt of salary and rent from a house she owns at Kimathi Estate in Nairobi. That, he submits, should be taken into consideration in determining a reasonable provision for her maintainance and that of the children. That contention is right but there is no reason to suppose that her income from these two sources was not taken into account in fixing the figure at Kshs 8,000/=. She produced documentary evidence to show that from her profession as a nurse, she earns a monthly net salary of Kshs 2,272/= and receives a rent of Kshs 1,500/= from her Kimathi Estate House. That works out at a paltry sum of Kshs 3,772/=. That sum bears very little relationship to the husband's enormous income. How much of this should be taken into consideration in fixing the maintenance?

In *Ward v Ward* [1947] 2 All ER 713, 715, it was held that;

> "Where the wife is earning an income, the whole of this need not, and should not ordinarily, be brought into account so as to enure to the husband's benefit ....This consideration is particularly potent where the wife only takes up employment in consequence of the disruption of the marriage by the husband or where she would not reasonably be expected to be working if the marriage had not been so disrupted."

(See also *J v J* [1955] 2 All ER 85, 617.)

It is clear from the evidence that the wife felt obliged to resume her profession as a nurse because of the break-up of the marriage.

She said she was down and out and was living on charity. She thought she could relieve her misfortune by earning a little income. Had she remained with her well-to do- husband, she would not have to work. She has three little children to raise and the family's life style was such that the husband did not permit her to continue working on marriage. She did not need to. He was in a position to provide for the needs of the family. That being the position, the husband should not be permitted to make a fetish for the pittance the wife was receiving by the way of salary. All said and done, the disruption of cohabitation was brought about by his own conscious conduct.

Accordingly, in the end, the question that must be posed is, is the sum of Kshs 8,000/= awarded as alimony pending suit and for the maintenance and support of the three children unreasonable or indiscreet or can it be said that that award was clearly wrong? In view of the husband's income and affluent circumstances, that question must be answered firmly in the negative. That being so, in my judgment, this appeal crumbles and must be dismissed with costs.

**Kwach Ag JA**. I have had the advantage of reading in draft the judgment of Apaloo JA , and I entirely agree with him that this appeal should be dismissed with costs.

As I understand it, a husband who wishes to take advantage of the 1/5th rule under section 25(1) of the Matrimonial Causes Act (cap 152), is obliged to make a full and frank disclosure of his property and income under rule 44 of the Matrimonial Causes Rules. It follows from this that a husband against whom an order for alimony pending suit has been made can only successfully challenge the figure arrived at by the Court if he can show that he made a full disclosure of his income and the application by the Court of the formula has resulted in a figure in excess of one-fifth of his income.

The evidence in this case clearly shows that the appellant was determined right from the start to conceal his income. If the order was wrong, which in my judgment, it is not, then all I can say to him is that he was the author of this own misfortune.

**Masime Ag JA.** I have read in draft the judgment of my learned brother Apaloo JA which sets out the facts of this appeal. Having read the pleadings on the basis of which the learned trial judge exercised his discretion in assessing the alimony pending suit and the award of maintenance for the children of the marriage, I agree with Apaloo JA that there is no reason to disturb the orders appealed from. I agree therefore that the appeal should be dismissed with costs.

**Dated and delivered at Nairobi this 17th day of November , 1988**

**F.K. APALOO**

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**JUDGE OF APPEAL**

**J.R.O. MASIME**

**.....**

**JUDGE OF APPELA**

**R.O. KWACH**

**Ag. JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**