



REPUBLIC OF KENYA



KENYA LAW
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**SMK v AW (Civil Appeal E076 of 2024)
[2025] KEHC 12326 (KLR) (Civ) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 12326 (KLR)

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

CIVIL

CIVIL APPEAL E076 OF 2024

CJ KENDAGOR, J

JULY 31, 2025

BETWEEN

SMK APPELLANT

AND

AW RESPONDENT

(Being an appeal against part of the Judgment delivered on 27th June, 2024 by Hon. E.M. Nyakundi in Milimani Chief Magistrate's Court Nairobi, Divorce Cause No. 216 of 2023)

JUDGMENT

1. The parties herein were married under a Christian Marriage in 2013 but their marriage irretrievably broke down in 2023. The Appellant filed a petition seeking dissolution of the marriage in which he accused the Respondent of cruelty and adultery. The Respondent filed an Answer to the Petition and Cross-Petition in which she denied the averments raised in the Petition. In her Cross-Petition, she accused the Appellant of adultery and cruelty and she sought to have the marriage dissolved on the basis of her Cross-Petition. She also sought to have the Appellant provide her with alimony.
2. The Court delivered a Judgment on 27th June, 2024, in which it dissolved their marriage. It also ordered the Appellant to pay the Respondent monthly maintenance of Kshs.45,000/= on or before the 5th of every month. It held that the said amount would abate upon remarriage of the Respondent.
3. The Appellant was dissatisfied with the Judgment and appealed to this Court vide a Memorandum of Appeal dated 10th July, 2024. He listed the following Grounds of Appeal;
 1. The learned trial Magistrate erred in law and fact by awarding alimony to the Respondent in the sum of Kshs.45,000/= per month, without sufficient consideration of the Appellant's financial capacity and other relevant circumstances.



2. The learned trial Magistrate failed to properly apply the principles and precedents governing the award of alimony as established in Kenyan law.
 3. The learned trial Magistrate failed to consider the Appellant's evidence and submissions regarding the financial implications and undue hardship that the award of alimony would impose.
 4. The learned trial Magistrate erred in law and fact by failing to adequately balance the needs of the Respondent and the ability of the Appellant to pay the awarded alimony.
4. He asked the Court to set aside the judgment of the Chief Magistrate's Court at Nairobi, Divorce Cause No.E216 of 2023, delivered on 27th June, 2024 in part, especially the award of alimony. He also sought that the Respondent's cross-petition for alimony be dismissed.
 5. The Appeal was canvassed by way of written submissions.

The Appellant's Written Submissions

6. The Appellant submitted that the Appeal should be allowed and the lower Court's award for alimony should be set aside. He argued that the trial Court failed to properly apply the guiding principles on this issue. He argued that the constitutional principle of equality between spouses as enshrined in Article 45 (3) implies that neither spouse should be unfairly burdened or disadvantaged in the obligation of maintenance. He submitted that the lower Court did not sufficiently consider the parties' respective financial positions, the need for equality, or whether the Respondent had met the threshold for claiming maintenance.
7. He submitted that alimony is not an entitlement but a need-based remedy that must remain subject to periodic review based on prevailing circumstances. He argued that by conditioning alimony exclusively on remarriage, the trial Court effectively imposed a lifelong financial burden on him, regardless of the evolving economic realities or the Respondent's own earning potential. He argued that the award was rendered arbitrarily and unjustly, and failed to reflect the law's intent or the *Constitution's* spirit of substantive fairness. He argued that the Respondent did not present evidence of financial incapacity to justify the award because she has an educational background and is actively engaged in business.
8. Lastly, the Appellant submitted that the Court failed to appropriately evaluate his financial reality and the special circumstances of the case. He argued that the alimony awarded represents over one-third of his net income and is thus unjust and a disproportionate financial burden on him. In addition, he argued that he already assumes full responsibility for the child's educational and general upkeep, which significantly affect his disposable income. Lastly, he argued that the Respondent is not financially incapacitated and is capable of earning a living and supporting herself, and thus does not meet the threshold for dependency-based spousal maintenance.

The Respondent's Written Submissions

9. The Respondent submitted that the Appeal lacks merit and should be dismissed. She argued that the lower Court properly applied the principles and precedents governing the award of alimony. She argued that the trial Court considered the facts and circumstances under which the parties herein contracted the marriage before coming to the conclusion to award alimony. She submitted that the Court appreciated the circumstances, status and conditions of both parties before, during, and after the divorce proceedings. She argued that the lower Court examined the various affidavits of means filed by the parties, and considered the financial position and capabilities of both parties after a full hearing.



10. The Respondent submitted that her circumstances deserved the award for alimony. She argued that she was a Housewife who was solely dependent on the Appellant and that the Appellant continued to support her even during their separation and before the institution of the divorce proceedings by the Appellant. She further argued that the alimony is conditional and will not run indefinitely as alleged by the Appellant because it would abate if she remarries. Finally, she submitted that an award of alimony is meant to ensure that the living standards of the spouse in need are maintained even after the marriage so that their human dignity remains undisturbed.

Issues for Determination

11. Having carefully considered the Grounds of Appeal and the submissions by the parties, there is only one issue for determination;
- a. Whether the lower Court's award requiring the Appellant to pay the Respondent Kshs.45,000/= for monthly maintenance was merited.
12. It is trite law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. As the Court is re-evaluating the evidence, it is required to bear in mind that it had neither seen nor heard the witnesses. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

Whether the lower Court's award requiring the Appellant to pay the Respondent Kshs.45,000/= for monthly maintenance was merited

13. The Appellant argued that the lower Court misapplied the legal principles on Alimony. He based his arguments on Section 25 of the Matrimonial Causes Act CAP 152 Laws of Kenya. The Respondent in her submissions also relied on the same Section, particularly Sub-Section 1 & 2.
14. At the onset, I have relooked at the current law on this area with a view to ascertaining whether the said Matrimonial Causes Act is still in force. I have established that the Matrimonial Causes Act, Cap.152 was repealed by the *Marriage Act*, 2014 which came into force on 20th May, 2014. Therefore, the parties' reference to the Matrimonial Causes Act, Cap. 152 in their submissions is erroneous as that Act no longer exists.
15. The Kenyan law on the maintenance of a former spouse is Section 77(1) of the *Marriage Act* provides;
- 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 Kenyan position on Alimony and Maintenance was discussed at length by G B M Kariuki, J (as he then was) in *W.M.M. v B.M.L.* [2012] eKLR, where he held that:

“In considering a claim for maintenance, regard must be had to the provisions of Article 45(3) of the *Constitution* of Kenya which recognize that “parties to a marriage are entitled to equal rights at the time of the marriage, during marriage, and at the dissolution of the marriage.....it relates to and recognizes personal rights of each spouse to enjoy equal rights to property and personal freedoms and to receive equal treatment without discrimination on the basis of gender and without being shackled by repugnant cultural practices or social prejudices. Article 45(3) is in harmony with Article 21(3) of the *Constitution* which enshrines equality of men and women and specifically states that “women and men have the right to equal treatment.... 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. 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 but where a spouse deserves to be paid maintenance in the event of divorce or separation the law must be enforced to ensure that a deserving spouse enjoys spousal support so as to maintain the standard of life he or she was used to before separation or divorce. The financial capacity of the spouses has to be examined before the court makes a finding as to whether a spouse should pay maintenance and if so how much....The quantum of maintenance must make sense. It must be such as the party paying can afford i.e. within the ability of the spouse paying it. It must not enrich the spouse to whom it is paid nor oppress the spouse paying it. Where the spouse seeking maintenance is capable of engaging in gainful employment but refuses to work, such conduct may be oppressive to the other spouse and the court is entitled to have regard to it when considering the quantum of maintenance. Equality of spouses under Article 45(3) of the *Constitution* connotes equal treatment under the law.”

17. The above authority was cited with approval by Lenaola, J (as he then was) in *MSV v SJV & another* [2015] eKLR, by Kizito, J. in *CKN v DMO* [2023] eKLR, as well as by Justice GV Odunga in *MN v JMK* [2019] eKLR. I am equally in total agreement with the sentiments of the learned Judge in the said authority and find that the same is applicable to the instant case.

18. The Courts in *M S V v S J v & another* [2015] eKLR and *GDM v CMM* [2022] eKLR agreed that;

“neither alimony nor maintenance should be paid as a matter of course. It should not be used as a field where spouses cash in on their partners. It should be established that the party claiming such alimony or maintenance is incapacitated to make his/her own earnings and therefore deserves the support of the other partner.”

19. In my view and based on the authorities cited above, the Respondent was under an obligation to show that she is incapacitated to make her own earnings and therefore deserves the support of the Appellant. This Court is being invited to relook at the evidence on record and determine whether the award of the lower Court meets the principles established in *W.M.M. v B.M.L.* [2012] eKLR. In other words, the Court is being invited to ascertain whether the Respondent deserves to be paid maintenance and whether the quantum of maintenance awarded by the lower Court is justified.



20. I have re-looked at the evidence on record to determine the financial capacities of the parties herein. The parties filed their affidavit of means and the Court has considered the same at length.
21. I have seen the Appellant's affidavit of means dated 4th July, 2023 in which he stated that he has solely been contributing to the minor's needs. He stated that he spends Kshs.32,000/= per month towards the minor's welfare and Kshs.20,300/= per term towards her school fees. He also stated that he spends Kshs.48,000/= per month towards his own personal expenses. I have also seen certified copies of his pay slip indicating his net pay as Kshs.125,009.92/=. This Court notes that the Appellant swore this affidavit in July, 2023, and that at that time the minor was scheduled to write her KCSE exams later that year.
22. I have also seen the Respondent's Affidavit of means dated 3rd July, 2023 in which she stated that she did not have other source of income. She claimed that she was fully depends on the Appellant and that all her attempts to secure gainful ventures have been thwarted by the Appellant.
23. I have however relooked at the evidence on record and I have ascertained that the Respondent's financial position had changed by the time the matter came up for hearing. The parties testified before the lower Court on 10th June, 2024. During the hearing, the Respondent told the Court that she had secured employment. In her words, she said; "I am currently employed and just surviving." She however did not disclose to the Court the nature of the employment and how much she earns from the said employment.
24. I also associate myself with the finding of the Court in GDM v CMM (Divorce Cause 01 of 2019) [2022] KEHC 10231 (KLR) where it held as follows;
- "It is to be remembered that considerations for granting alimony include the income or earning capacity of the parties, the financial needs, obligations, or responsibilities which each party has or is likely to have in the foreseeable future."
25. I have also re-examined the evidence on record to ascertain each party's financial needs and obligations or responsibilities which each party has or is likely to have in the foreseeable future. From the evidence on record, it is not in dispute that the Appellant has the actual custody of the only issue of the marriage and has taken full responsibility for the child's expenses. The parties testified before the lower Court, and the Respondent told the Court that the Appellant has the custody of the child and he is the child's sole provider. There was no evidence that the minor depended on the Respondent. In my view, and based on the evidence on record, I am inclined to find that whatever earnings Respondent receives from her employment is for her own exclusive use.
26. Courts have held that the financial capacity of the spouses has to be examined before the court makes a finding as to whether a spouse should pay maintenance, and if so, how much. Turning to the facts of this case, I find that the lower Court found no difficulties in determining the Appellant's financial capacity. However, the same cannot be said of the Respondent's financial capacity. In my view, the Lower Court did not have the means to determine the Respondent's financial capacity because the Respondent did not tender any evidence about the nature of her current employment and what she earns therefrom.
27. I associate myself with the finding of the Court in GDM v CMM (Divorce Cause 01 of 2019) [2022] KEHC 10231 (KLR), where the Court faced a similar question and held as follows;
- " 15) The need for information on the income of the party against whom the order of alimony was sought is intended to assist the court come up with an informed



decision as to whether, compared to her admitted earnings, petitioner is deserving of an order of alimony and the amount payable if any. Petitioner failed to provide this information and since a figure cannot be plucked from the air and imposed on the respondent, I find that petitioner has failed to demonstrate that she is deserving of an order of alimony”.

28. Given that the Respondent admitted that she was employed, it was upon her to disclose her exact earnings for the lower Court to compare her earning capacity with that of the Appellant. I believe that her decision to withhold and sit on such vital information proved fatal to her claim for maintenance. For that reason alone, the Appeal succeeds.

Disposition

29. The Appeal succeeds.
30. Each party shall bear its own costs.
29. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 31ST DAY OF JULY, 2025.

.....

C. KENDAGOR

JUDGE

Court Assistant: Beryl

Mr. Ongoch, Advocate for the Respondent

No attendance for the Appellant

