

IN THE FAMILY DIVISION OF THE HIGH COURT OF FIJI

IN THE WESTERN DIVISION

AT LAUTOKA

APPELLATE JURISDICTION

APPEAL NUMBER:	20/LTK/006
BETWEEN:	ATIL APPELLANT
AND:	PAYAL RESPONDENT
Appearances:	Mr. Josaia Niudamu and Mr N. Chand for the Appellant Ms. Esiteri Radrole for the Respondent
Date/Place of hearing:	Tuesday, 06 th October 2020 at Lautoka
Date of Judgment:	Friday, 22 nd of January, 2021.
Coram:	Hon. Mr. Justice Jude Nannayakarra.
Category:	<i>All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarity to any persons is purely coincidental.</i>
Anonymised Case Citation:	Atil v. Payal –Family High Court Appeal Case Number 20/LTK/006

JUDGMENT OF THE COURT

(A) INTRODUCTION

- (01) This is an appeal against the decision of the Resident Magistrate dated 13.12.2019. In his decision, the Magistrate ordered the appellant inter alia to pay \$30.00 per week as spousal maintenance to the respondent.

(02) Being aggrieved by the said order, the appellant appealed against the order of the Magistrate to the High Court.

(B) Grounds of Appeal

(01) The appellant in his notice of appeal filed on 13.12.2019 has set out three (03) grounds of appeal. The grounds of appeal are;

1. *That the learned Magistrate erred in fact and/or in law in wrongly and/or incorrectly applying and/or relying on Section 155 of the Family Law Act.*

2. *That the learned Magistrate erred in fact and/or in law in wrongly and/or incorrectly applying and/or relying on and/or addressing the exercising jurisdiction under Section 155 in accordance with Section 157 of the Family Law Act.*

3. *That the learned Magistrate erred in fact and/or in law in wrongly and/or incorrectly applying the statutory test in exercising jurisdiction under Section 155 in accordance with Section 157 of Family Law Act for Spousal Maintenance.*

(02) As to the grounds of appeal, which are in general terms, the following matters come in to issue; how did the Magistrate incorrectly apply Section 155 of the Family Law Act? How did the Magistrate err in fact when exercising the discretion given under Section 157 of the Family Law Act? How did the Magistrate err in law when exercising the discretion given under Section 157 of the Family Law Act? How did the Magistrate incorrectly apply the statutory test?

As stated, the three grounds of appeal are in general terms. They have not been particularized. They are unintelligible and vague and difficult to respond to. The issues that are raised in Counsel for the appellant's submissions are not stated in the grounds of appeal. On the appellant's grounds of appeal, it is difficult to discern any serious issues. It is not only placing an unnecessary burden on the court to ask it to search through the transcript of hearing to find out what they may be to complained of; but it is also unfair to the respondent who is entitled to know what the case she has to meet.

(C) Consideration and the determination

(01) The respondent lady in her evidence before the lower court stated that she met the appellant in 2016. She got married in January 2019. In June 2019, she had left the matrimonial home to stay with her parents. The marriage lasted only six months. There are no children of the marriage. She is 24 years old. She clearly stated that prior to her marriage she was unemployed. Even after the marriage and separation she is unemployed. She had attempted to find an employment. But since she is not educated and she cannot read and write she finds difficulty in finding an employment. She left the matrimonial home because the appellant, his mother and brother are fighting with her. The respondent lady submitted documentary proof of her expenses

in addition to her oral testimony before the lower court. The respondent lady sought \$90.00 per week. The Magistrate found as a fact that the appropriate amount would be \$30.00 per week.

- (02) The appellant was represented by a Counsel in the lower court. The appellant did not give evidence before the lower court but relied on his Form 6 response as a defence. In the Form 6 response, the appellant opposed the spousal maintenance application alleging that the respondent lady left the matrimonial home on her own accord without informing the appellant.
- (03) On the hearing of the appeal, Counsel for the appellant submitted that the Magistrate has wrongly decided the issue of liability to pay spousal maintenance. I do not intend to set out the submissions of Counsel for the appellant in detail or verbatim. However, as I understand his submissions, the gist of the issues is that;
 - (1) The appellant is a casual worker. As a result he does not have an adequate income to support the respondent lady.
 - (2) The duration of the marriage was six months. As a result, her financial dependence was for a shorter period. Counsel relied on High Court of Lautoka, Family Division Decision, **Sk V AL, Action Number 16/LTK/009.**

I will take these issues in turn.

Casual worker

- (04) Turning to the evidence adduced before the Magistrate, the respondent lady gave evidence under cross-examination in the lower court that the appellant man is employed as a Mechanic at Combine brothers which is owned by the appellant's brother, a company located at Ellington.
- (05) Her evidence had been let go unchallenged. There was no suggestion made to her in cross-examination that the appellant is a casual worker and he does not have an adequate income to support the respondent lady. By itself, it does prove that Counsel for the appellant in the lower court did not have reasonable grounds to suspect the evidence of the respondent lady. In other words, the absence of any grounds for suspicion has been provided by Counsel for the appellant in the lower court. It must be accorded weight.
- (06) It should be firmly stated that if a witness is not cross-examined in relation to a particular matter upon which he has given evidence, then that circumstance would often be a good reason for accepting the evidence of that witness upon that matter. See;

- ❖ **Cross on Evidence (2nd Australian Ed, 1979) at paragraph 10.50**
- ❖ **Phipson on Evidence, (12th Ed, 1976) at paragraph 1593.**

(07) Therefore, it appears to me that there be no reason to interfere on the basis of the finding that the appellant man has a gainful employment to pay spousal maintenance.

Duration of the marriage

(08) In the case of SK v AL (supra), Her Ladyship J.Wati held that “*if the duration of the marriage was long and her financial dependence longer, the ordering of maintenance would arguably be justified on the basis that she has been made to be financially dependent and accustomed to the husband supporting her that it is unreasonable to now expect her to go out and look for work*”.

(09) The problem there in that case was that the evidence of the wife and her father clearly revealed that the motive behind the maintenance application was revenge than the necessity for financial support or contribution. Moreover, in that case, there is admission by the wife and her father that she can find work and until she does she will be fully supported by the father.

(10) The problem here in the case before me is that there is clear and unchallenged evidence by the respondent lady that she cannot find an appropriate gainful employment because she cannot read and write and her level of education had become a stumbling block for her. She is currently, financially depending on her mother, aged 56 whose average weekly income is \$100.00. She says that she is a financial burden to her mother. The evidence clearly shows that the motive behind the application for spousal maintenance is that she is unable to support herself.

(11) In my view, the testimony of the respondent lady in lower court does meet the legal threshold (see paragraph 10 above) for liability for spousal maintenance. Therefore, the order of the Resident Magistrate is just and I do not see any reason to overturn the order.

The appeal lacks merits.

ORDERS

(1) The appeal is dismissed.

(2) The order of the Magistrate Court to take effect from the date of the decision in the lower court.

(3) I make no order as to costs.

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Jude Nanayakkara
[Judge]
22. 01. 2021