



REPUBLIC OF KENYA



KENYA LAW
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DNM v JMK (Civil Appeal E392 of 2022)
[2024] KEHC 9984 (KLR) (Civ) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9984 (KLR)

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

CIVIL

CIVIL APPEAL E392 OF 2022

S MBUNGI, J

JULY 30, 2024

BETWEEN

DNM APPELLANT

AND

JMK RESPONDENT

(This appeal arises from a ruling and decision of Hon. A.N Makau (MS) – Principal Magistrate dated the 12th day of May, 2022 in the Chief Magistrates court at Nairobi, Milimani Commercial courts Miscellaneous Application No. E063 of 2022 in the matter of protection against Domestic Violence Act 2015)

JUDGMENT

Introduction

1. The Appellant is married to Respondent, they were blessed with one child, they separated in 2019 when their being together was no longer tenable. The respondent filed miscellaneous application No EO63 of 2022 under the protection against the domestic Violence Act 2015 seeking the following orders: -
 - i. That pending the hearing and determination of this application, an interim order of protection be and is hereby issued against the Respondent and/or his agents, employees, assigns and servants to the following effect;
 - a. Restraining the respondent from physically, mentally, psychologically, verbally and / or sexually abusing or threatening to abuse the applicant, her children, her relatives, friends, staff and/or any other person associated with the applicant.



- b. Restraining the respondent from damaging or threatening to damage any property of the applicant.
 - c. Restraining the respondent from intimidating, harassing, stalking and/or engaging in any behavior which amounts to emotional, verbal, or psychological abuse of the applicant, her children, relatives and/or their staff
 - d. Restraining the respondent from engaging or threatening to engage in economic abuse of the applicant and/or her children.
 - e. Restraining the respondent from watching, loitering near, or preventing or hindering access of the applicant into her current residence within Nairobi workplace or other place that the applicant visits often.
 - f. Restraining the respondent from making any other contact with the applicant herein (whether by telephone correspondence, or otherwise), unless otherwise through her advocate.
2. This appeal arises from the ruling and decision of Hon A.N Makau (Ms.)- Principal Magistrate dated the 12th day of May, 2022 where the trial court allowed the application.
 3. The Appellant filed a Memorandum of Appeal dated 10th June, 2022 before the Honourable court seeking inter alia, that the whole ruling and decree of the learned trial Magistrate delivered on 12th May, 2022 against the Appellant be set aside and be substituted with a decree dismissing the Respondent’s miscellaneous application dated 21st January, 2022.
 4. The Appellant being dissatisfied with the ruling of Hon. A N Makau (Ms.) – Principal Magistrate delivered on the 12th day of May, 2022 appealed against the ruling on the following grounds; -
 - a. That the learned trial Magistrate misdirected herself and erred both in law and in fact by holding and exercising discretion in favour of the respondent by upholding the Respondent’s miscellaneous application dated 21st January, 2022 whereas the Appellant and Respondent have been living separately since the year 2019, a fact that has not been rebutted.
 - b. That the learned trial Magistrate misdirected herself and erred in law in failing to take into account the inconsistency in the respondent’s supporting affidavit to the notice of motion sworn on 21st January, 2022 and upholding new issues raised in the respondent’s supplementary affidavit sworn on 21st February, 2022 and in the latter the appellant had not right of reply.
 - c. That the purported ruling of the learned trial magistrate offends the mandatory provisions of Order 21 Rule 4,5, of the [Civil Procedure Rules 2010](#) and should be set aside *ex-debito justitiae*
 - d. That the learned trial Magistrate misdirected herself and erred in law by upholding photographic evidence adduced as evidence and annexed to the respondent’s supplementary affidavit sworn on 21st February, 2022 and given the facts of the case, the same are not admissible for the absence of the certificate of electronic evidence that should by law accompany such documentary evidence.
 - e. That the learned trial Magistrate misdirected herself and erred in law in failing to take into account the inconsistencies in the respondent’s pleadings, annexures and failing to find that the onus of proof rested with the respondent and the evidentiary onus never shifted to the Appellant at any given time after both parties canvassed their cases.



- f. That the learned trial Magistrate erred in law and in fact by failing to consider the principle guiding protection against domestic violence as well as precedent; that indeed noting warranted the appellant being restrained as the evidence adduced was based on hearsay.
 - g. That the purported ruling of the learned trial Magistrate flies against the weight of the evidence adduced by the Appellant and is prejudicial to the Appellant in its entirety.
 - h. That the learned trial Magistrate misdirected herself and erred in law and in fact by failing to properly consider the appellant's submissions on record thus arrived at an erroneous finding
 - i. That the learned trial Magistrate erred in law and in fact, by failing to uphold precedent and the doctrine of state decisis.
5. The court directed both parties to file and exchange written submission. The parties filed.

Appellants Submissions

6. The Appellant isolated three issues which he addressed in his submissions as follows: -
- i. Whether the Respondent discharged the evidentiary onus for grant of temporary injunctions-
 - a. On this issue he submitted that the trial court took all the assertion and allegations of the respondent herein as gospel truth, and determined the application before it, not based on the two-fold principles of equity and fairness, but on apprehensions and falsehoods that had been carefully choreographed to ultimately defeat the ends of justice.
 - b. The Respondent did not produce any medical report to support her allegations that he assaulted her and the minor therefore there was no prove that the Appellant was a cruel and violent person. He referred the court to the case of *KAS v MMK* (2016) eKLR where the court observed thus;

“No comprehensive definition of cruelty has ever been accepted as satisfactory- much depends on the habits and circumstances of the matrimonial life of the husband and wife, their characters, the normal mode of conduct one to the other and the knowledge which each has of the true intention and feelings of the other. An essential element of every petition base don cruelty is, however, that the party seeking relief must prove actual or probable injury to life, limb or health. For this reason, it is seldom indeed that a decree is granted upon a single act of cruelty though, should that act be serious enough and result in injury, then the court will grant the decree.”

He also cited the case of *RPM v PKM* (2015), where the court reiterated the case of *AOO v PNT* (2016) eKLR where it was stated:

“Certainly cruelty (...) may be proved by a preponderance of probability, that is to say that the court ought to be satisfied as to feel sure that the cruelty or desertion, or even adultery (all being matrimonial offences) has been (as the case may be) established.”
 - c. The Respondent failed to show that she stood to suffer irreparable harm, which harm could not be compensated by way of damages. needless to say, the litigious and complaints venture embarked on by the Respondent was a vendetta against the



appellant which costed him his work as a police officer. The complaints recorded vide various OB numbers have never culminated to the preferment of charges.

- ii. Whether photographic evidence can be admissible without a certificate of electronic evidence
 - a. On this issue the Appellant submitted that from the testimony of the respondent, an independent witness was never called to corroborate her grave assertions. The testimony of an independent witness would have aided the court in ascertaining to a degree of reasonable doubt that the appellant herein was blameworthy or not, of the accusations levelled against him.
 - b. The Respondent placed reliance on photographic evidence in support of her case. The said photographs were not authenticated and or legitimized as there was no certificate of evidence filed as required by Section 106B of the Evidence Act. As such, he submitted the said photographs where a forgery and any reliance on them will be akin to placing reliance on hearsay evidence which was contrary to the provisions of the Evidence Act, Cap 80.

He cited the case of Millitonic Mwendwa Kimanzi Kitute v Independent Electoral and Boundaries Commission and 2 others (2017) eKLR where the high court whilst holding that the electronic evidence that was tendered devoid of the certificate of evidence was inadmissible, discussed the peculiarities of electronic evidence and noted that:

“secondly, it is evident that the provisions of Section 106B of the Evidence Act are intended to ensure the reliability and authenticity of an electronically produced document, and the procedure set out therein is aimed at preventing printed copies of the electronic records adduced as evidence in court being manipulated, altered or tampered with.
 - c. He submitted that Electronic evidence is susceptible to tampering, alterations, and Section 106B of the Evidence Act seeks to cure such mischief, which if unchecked will ultimately lead to travesty of justice. The print outs relied on were erroneously admitted by the trial magistrate. There is no telling whether the said documents were doctored to aid the Respondent in her quest to taming the name for the appellant after their love affair turned sour. He urged the court to make a finding that the said documents were inadmissible.
- iii. Who bears the costs of this appeal.
 - a. He did not submit on this.

Respondents Submission

7. Counsel for the Respondent submitted that: -
 - A. The learned trial Magistrate in her impugned ruling relied on the landmark case of *Giella v Cassman Brown & Co. Ltd* to grant the interim orders sought for by the Respondent herein. The learned trial Magistrate embraced a three-step approach in arriving at her impugned decision. The learned trial Magistrate analyzed: -
 - i. If the Respondent herein had established a *prima facie* case with a probability of success. The learned trial Magistrate was convinced that the Respondent herein had disclosed a valid cause of action. The gist of the Respondent’s application before the



trial court was that he Appellant was conducting himself in a manner that posed grave danger to the wellbeing of not only the Respondent herein but also their child and the employees, relatives and friends of the Respondent. The Respondent adduced irrefutable evidence before the trial court including but not limited to OB No 41//23/08/2021 as proof the recurrent domestic abuse and grave danger she was subjected to by the Appellant thus she sufficiently discharged requirement of a prima facie case with a probability of success.

- ii. Whether the Applicant would suffer irreparable harm which would not be adequately compensated by an award of damages. The Respondent demonstrated to the trial court the impending danger on her life and that of her child, employees, friends and relatives that was occasioned by the Appellant. The Respondent informed the trial court that she had reported the Appellants recurrent abuse to the police but no action was taken in what she believes was an olive branch being extended to the Appellant who is also a police officer by his colleagues in the police service.
- iii. Expounded on the final principle set out in Giella case (*supra*), that is, on a balance of convenience. The trial court averred that where all other factors appear to be evenly balanced, it was prudent for the court to take calculated measures to preserve *status quo*. The learned trial court in reliance on the case of [*Swalleh C Kariuki & another v Violet Owiso Okuyu*](#) (2021) eKLR. The learned trial court was convinced that prudent action in the circumstances was to temporarily stop the misery on the Respondent occasioned by the Appellants unending mistreatment

B. The Respondent counsel cited Section 12 of the [*Protection Against Domestic Act*](#) provides that an interim protection order may be made on an application without notice and outside ordinary court hours or on a day which is not an ordinary court day, if the court is satisfied that delay would be caused by proceedings on notice or might entail: a risk of harm or undue hardship to the applicant or child of the applicant's family. Further, Section 13 of the [*Protection Against Domestic Act*](#) stipulates that the court may make a protection order if it is satisfied that; the respondent is using, or has used, domestic violence against the applicant, or a child of the applicant's family or both; and the making of an order is necessary for the protection of the applicant or a child of the Applicant's family or both.

- i. It is the Respondents weighed opinion that the learned trial court relied on the two statutory provisions quoted above when rendering the impugned ruling. In the matter before the trial court, the Appellant subjected the Respondent and the minor to endless violence, both physical and mental. The Respondent herein even reported the incident to various police stations with no substantive action being taken against the Appellant. The learned trial Magistrate in her impugned ruling unequivocally stated that she was alive to the fact that the Appellant is a police officer and he might have unduly influenced the investigations and/or charges against him either through connections in the police force and/or relied on professional courtesy of police officers.
- ii. The learned trial Magistrate stated that in best interest of the child, it was imperative for her to issue the interim protection orders restraining the appellant and/or his agent, employees, assigns and servants pending the hearing and determination of the Nairobi children's court case No 1035 of 2017, in the matter of Dylan Mutisyo (minor), Josephine Kithu v Daniel Nzusyo.



8. I have looked at the application No E 063/2022, the supporting affidavit and reply thereto, the ruling of the court appealed against, grounds of appeal and submissions filed by the parties.
9. This being a first appeal, this Court has the duty to analyse and re-examine the evidence adduced in the lower Court and reach its own conclusion but bear in mind that it neither saw nor heard the witnesses testify and make due allowance for the said fact. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the Court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
10. The issue for determination is whether the trial court misapprehended the principles governing the grant of injunctions as laid down in the case of *Giella v Cassman Brown & Co. Ltd.*

Determination

11. I have looked at the ruling, the Magistrate at length analyzed and considered the principles of granting an injunction as set out in landmark case of *Giella v Cassman Brown & Co. Ltd.*
12. In part the court stated “.. On the first principle, the court needs to satisfy that there is a serious case to be determined on merit hence the applicant’s cause of action has to show that it has substance and reality. For a prima to be established, the substantive suit should, on the face of it, without recourse to the merits, disclose a cause of action. The gravamen of the applicant’s contention was that the Respondent has consistently conducted himself in a manner endangering the safety, freedom and privacy of the applicant, the minor herein and the Applicant’s friends, family, acquaintances and employees and subsequently tendered evidence to corroborate the same. I find that the application has discharged the requirement of a prima facie case with a probability of success. The next principle to be considered is if an interlocutory injunction would not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. The applicant avers in her affidavit and submissions that her reason for seeking the application herein is premised on the grounds restraining the respondent from otherwise harming, abusing, harassing, threatening and accessing the applicant, her minor, her friends, family, employees and acquaintances. The grounds labelled (K) on the face of the Notice of Motion application states that the Applicant is apprehensive of being exposed to real and grave danger at the hands of the Respondent. The applicant further asseverates that her child, the minor Dylan Mutisya faces real danger from continued association and contact with the Respondent.

The objective of interlocutory injunction was to protect the Applicant against injury by violation of the rights for which she could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in her favour at the trial, but the applicant’s need for such protection has to be weighed against the corresponding need of Respondent to be protected against injury resulting from having been prevented from exercising his own legal rights for which he could not be adequately compensated if the application was granted.

The court has to weigh one need against another and determine where the balance of convenience lay. Where other factors appeared to be evenly balanced it was a counsel of prudence to take such measures as were calculated to preserve the status quo as held in the



case *Swalleh C Kariuki & another v Violet Owiso Okuyu* (2021) eKLR. The aforementioned injury is irreparable and cannot be compensated by damages hence I find that the application has satisfied the criteria set for granting interim orders”.

13. Further the court considered provisions of Section 12 of the *protection against Domestic Violence Act* 2015 which covers application for interim protection orders.
14. The Appellant acknowledges the fact that they have separated with the Respondent even if what the respondent deponed in her affidavit in support of the application was not proved, the court cannot force people to associate. Every person is entitled to freedom of association.
15. Article 36 (1) of the *Constitution* of Kenya 2010 provides ..Every person has the right to freedom of association which include the right to form, join or participate in the activities of an association of any kind.
16. The Appellant also acknowledges that the respondent has made numerous reports to the police station alleging that the appellant has committed several ills against her and her people, though the Appellant has not been charged before a court of law, this apprehension on the part of the Appellant is enough for her rights are threatened or are likely to be violated or threatened by the action of the appellant.
17. Article 23 of the *Constitution* of Kenya of 2010 provides granting of an injunction as one of the reliefs to a person who fails that his or her constitutional rights are threatened or are likely to be threatened.
18. All in all, I find that the Magistrate was right to grant the injunctive orders she gave in order to protect and uphold the Respondents and her daughters right to association and peaceful life.
19. On the issue of admissibility of photographic evidence without a certificate of electronic evidence, I note that there was no oral evidence adduced producing the photographs referred to by the appellant as exhibits, there were only annexures in the affidavits and there is nowhere in the ruling where the magistrate said she anchored her ruling solely on the photographs.
20. In nutshell, I find the appellants appeal has no merit. It is hereby dismissed the lower court ruling is hereby upheld.
21. Since the matter involves two people who were cohabiting together for a long time, I order that each party to bear its own costs for the appeal.
22. Right of appeal within 30 days.

DELIVERED, SIGNED AND DATED THE 30TH JULY, 2024 AT KAKAMEGA HIGH COURT

.....
HON MR. JUSTICE S. MBUNGI

JUDGE OF THE HIGH COURT.

In the presence/absence of: -

The Appellant/ Advocate- Absent

The Respondent /Advocate- Absent

The Court Clerk- Elizabeth Angong'a

