



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 66 OF 2016

(DIVORCE CAUSE 315 OF 2014)

JKM.....APPELLANT

VERSUS

SNK.....RESPONDENT

(Being an Appeal from the Ruling and Orders of the Hon. L. M. Wachira Senior Principal Magistrate

delivered on 27th May 2016 in Mililani Commercial Courts Chief Magistrate's Court

Divorce Cause No. 315 of 2014)

JUDGMENT

The appeal filed on 27th June 2016 is in regard to the Judgment of 27th May 2016 in the divorce proceedings on the following grounds:

- 1. The Learned Trial Magistrate erred in law and in fact in entering judgment against the Appellant for KES. 30,000.00 per month as maintenance;**
- 2. The learned Trial Magistrate erred in law in ordering that the Respondent gets half of the household gifts given to the parties during their wedding day;**
- 3. The Learned Trial Magistrate erred in law and in fact in awarding maintenance yet there was no evidence tendered before the court to support the claim;**
- 4. The Learned Trial Magistrate erred in law and fact in failing to examine the financial capacity of the Appellant in awarding the maintenance;**
- 5. The Learned Trial Magistrate erred in law and fact in taking judicial notice of the Appellants profession in awarding the maintenance;**
- 6. The Learned Trial Magistrate erred in law and fact in failing to appreciate matters the court can take judicial notice of as elucidated in Section 59 of the Evidence Act;**
- 7. The Learned Trial Magistrate erred in law and fact in deciding on matrimonial property in the absence of the schedule of properties to be shared;**
- 8. The Learned Trial Magistrate erred in law and fact in failing to appreciate that there was no evidence tendered before the court to support the claim on distribution of matrimonial property;**
- 9. The Learned Trial Magistrate erred in law and fact in failing to consider the submissions of the Appellant filed in court on 29th March 2016;**

10. The Learned Trial Magistrate erred in law and fact in failing to consider the authorities submitted by the appellant.

2. The appellant sought that;

1. The judgment and orders as regards to maintenance and matrimonial property be set aside;

2. The Appeal be allowed;

3. The Honorable Magistrate's Judgement and Orders limited to maintenance and matrimonial property be dismissed with costs to the appellant;

4. This Honorable court be pleased to make such further and other orders as it may deem just in the circumstances.

When the matter came up for directions on 12th October 2017 parties consented to disposing the application by way of written submissions to be highlighted and cross examination if need be.

The record before me indicates that the appellant filed his written submissions (not dated), on 9th November 2017. A list and bundle of authorities was filed simultaneously with the written submissions. The respondent filed her written submissions, dated 7th February 2018, on 6th June 2018 together with a list and bundle of authorities.

APPELLANT'S SUBMISSIONS

On the facts, the appellant states that the parties herein got married on the 6th of April 2002 and separated in February 2012. The issues for determination as set out in his submissions were:

1. Whether the magistrate erred in awarding the maintenance of KES. 30,000.00;
2. Whether the magistrate erred in awarding the sharing of the wedding gifts.

On the first issue, the appellant submitted that the trial court ordered the appellant to pay the respondent an amount to be over and above what is ordered by the children's court, and that in delivering the judgment, no evidence was adduced as to the appellants monthly income but the trial court took judicial notice that he was a medical doctor and he also submitted that the trial court did not cross examine the appellant on his financial capacity. He relied on statutory law and authorities in his submissions in support of the above, namely **Section 77 of the Marriage Act 2014, KAS vs. MMK (2016) eKLR**. He averred that the common rules that govern post-divorce maintenance derived from Kenyan as well as comparative case law indicted that the exercise by court of its discretionary power to award maintenance must be informed by examination of all the circumstances of the case including the present and future assets, income and earning potential of all the parties taking into account their ages and professional qualifications; the financial needs and obligations of the parties; the duration of the marriage and the duration of time in which the parties lived separately; the standard of living prior to the breakdown of the marriage; the contributions of the parties to the welfare of the family; and the conduct, where relevant, of each party in relation to the eventual breakdown of the marriage.

He averred that the magistrate failed to examine the financial capacity of the Appellant herein and went ahead to take judicial notice in awarding the alimony and quoted **Section 59 of the Evidence Act**. He urged that the trial court erred in taking judicial notice on a matter that needed evidence adduced, under which Section 60 of the Evidence Act is clear on which facts the court can take judicial notice of. He submitted that a person's financial capacity is not a fact contemplated under the said section and Act, and awarding maintenance on the basis of judicial notice was a misapprehension of the law by the trial court which needs to be corrected and the Appeal be allowed on that ground.

The Appellant filed his affidavit of means that breaks down his income and expenses, and urged that any additional burden on the Appellant would not be sustainable as this would amount in turning him to a beast of burden. He submitted that considering the Affidavit of Means at the appellate stage would amount to introducing new evidence which was not considered at the trial court, which the lower court failed to do.

On the second issue for determination, whether the magistrate erred in awarding the sharing of the wedding gifts, the appellant did not dispute that he and the respondent herein were married to each other as stated above. He submitted that there was no schedule that was attached to guide the parties on the distribution of the wedding household gifts. That for the court to order distribution of the gifts in the absence of a schedule not only complicates the matter since the orders are incapable of being enforced.

RESPONDENT'S SUBMISSIONS

The respondent filed her submissions on 6th June 2018. She filed her Replying Affidavit to the Memorandum of Appeal dated 7th November 2017 and an Affidavit of Means. Her issues for determination as per the submissions were: that the respondent is entitled to alimony; that the respondent is entitled to alimony as granted; that the issue of alimony arose in the cross-appeal/pleading and the respondent's chief exam; that the appellant failed to cross examine the respondent on appellant's income; that the appellant had the burden of proving his own income; that it is undisputed that the appellant is a medical doctor; that the learned magistrate is justified in relying on market earning rates for doctors of KES. 100,000.00 which turned out to be lower than that of the actual earnings of the appellant; whether the respondent is entitled to matrimonial property; whether the respondent is entitled to half of the matrimonial property; whether the respondent is entitled to half of the wedding gifts; that the respondent is incapacitated by chronic illness; that the respondent's chronic illness handicaps the respondent's economic productivity; that the respondent should continue living at the standards she was prior to collapse of their marriage.

The respondent submitted that the trial court's decision was well founded, just and that the appellant did not demonstrate any prejudice to have it overturned. She averred that the issue of alimony was raised in the pleadings and that during the respondent's exam in chief she prayed in the cross petition to have the same awarded to her. That the appellant in exam in chief testified that he would usually provide maintenance for the respondent and their child during the marriage and that he had even opened a joint account for himself and the respondent and only just that he continued providing maintenance.

It was undisputed that the respondent fell into chronic depression following the loss of their first child, which illness was further aggravated by the neglect, cruelty and adultery of the appellant. It was also undisputed that the appellant not only showed neglect/cruelty to the respondent's well being but also resorted to adultery and starting a second family. It was also undisputed that the respondent to date still ails and need medical care which is costly and as a consequence of the illness, she has lost the capacity to make economic contribution/earn a living. She averred that her mother had been supporting her financially but retired in 2016 and as such her mother is financially constrained and have both relocated upcountry together with the child of the marriage.

In the cross petition she pleaded that the appellant earned a net of KES. 100,000.00 while they were cohabiting and that it was reasonable to presume that his income has since increased. During the trial, the appellant never disputed the purported income alluding to the fact that his income was higher, a fact he confirmed with his Affidavit of means. She averred that the appellant had the onus of clarifying his own income but failed to do so and that the learned trial magistrate was exercising her constitutional discretion as envisioned in Article 159 of the Constitution, and that she was just in relying on going market rates of salaries of doctors. She relied on Section 77 of the Marriage Act 2014 in support of her prayers to have alimony awarded to her which the learned magistrate did.

It was undisputed that the appellant took with him all the household items and wedding gifts of which the respondent is entitled to at least half of and despite the respondent having custody of the minor. She relied on **Articles 45 and 159 of the Constitution** which respectively provide for division of matrimonial property and the discretion of the court to make such orders.

ISSUES FOR DETERMINATION.

The appellate court exercises jurisdiction under Section 78 of Civil Procedure Act the following issues are for determination:

1. Whether the Trial court had jurisdiction in granting orders with regard to division of matrimonial property
2. Whether the Trial court lawfully and legally granted alimony of Ksh 30,000/- a month.

Section 6 of the Matrimonial Property Act No. 49 of 2013, describes matrimonial property as:

For the purposes of this Act; Matrimonial Property means:-

- a. The matrimonial home or homes;
- b. Household goods and effects of the matrimonial home or homes;
- c. Any other immovable or movable property jointly owned and acquired during the subsistence of the marriage.

The Respondent asked the court for the gifts that they were given at their wedding ceremony which she claims is matrimonial property. This may be housed under Household goods in the above definition. However, both the Applicant and the Respondent did not disclose list or define what the wedding gifts were so as to determine conclusively they were/are matrimonial property. The court could not from pleadings and proceedings determine the gifts and whether such property fell within the scope of the meaning of the matrimonial property. Secondly, further to describe what the gifts of the wedding were, the Respondent failed to produce a schedule of the alleged wedding gifts that she had prayed to court to have shared equally between her and the applicant. Thirdly, the parties solemnized marriage in 2002 and filed divorce proceedings in 2014; 12 years later, the Applicant and Respondent ought to have confirmed whether the said wedding gifts were/are in existence and in good condition to date as time has surely passed and definitely the gifts were put to use stored or sold. If there was money it was spent for and by the couple so that it would not be reasonable to expect the same to be available for division. Therefore although the Law Article 45 of Constitution of Kenya 2010 grant equal rights to parties in marriage during and after, in the instant case in the absence of material disclosure of the wedding gifts the same could not be granted. Fourthly, if the wedding gifts constitute matrimonial property then that would be within the purview of the High Court to grant division of matrimonial property after dissolution of marriage.

On the question whether indeed the alleged matrimonial property was to be divided equally, that is 50:50 between the two parties; in the case of **FN vs. VWN in Nairobi Civil Appeal 179 Of 2009** ; The Court of Appeal observed;

“The reality remains that when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra. It is not a matter of mathematics merely as in the splitting of an orange in two for, as biblical Solomon of old found, justice does not get to be served by simply cutting up a contested object of love, ambition or desire into two equal parts.”

Cited in the same case;

Court of Appeal of Singapore in **LOCK YENG FUN v CHUA HOCK CHYE [2007] SGCA 33; provides;**

“ ... division of the property must be decided after weighing the peculiar circumstances of each case.

‘It is axiomatic that the division of matrimonial property under Section 112 of the Act is not – and, by its very nature cannot be – a precise *mathematical exercise*’.”

On the issue of whether the Respondent is entitled to alimony and if the Trial court was just in granting such orders. The Respondent by affidavit of means filed on 6th June 2018, disclosed that she suffers from clinical depression and is unable to sufficiently, or if at all to support herself economically. She attached Avenue Hospital Discharge Summary, Hospital Bill of Ksh 800,000/- due and owing. Her source of support; her mother has relocated upcountry. She prayed for alimony from her former husband. Her claims of alimony for herself and her child. The question that then arises is whether the respondent is entitled to the alimony/ maintenance as granted or is she capable of supporting herself, notwithstanding her alleged clinical depression.

The court in **Divorce Case 10 of 2016** upheld the findings in *W.M.M. vs B.M.L. (supra)* which was adopted by Judge I. Lenaola in *M S V v S J V & another* [2015] eKLR where it was stated that:

“In considering a claim for maintenance, regard must be had to the provisions of Article 45(3) of the Constitution of Kenya which recognizes 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 ...”

It was further held 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.”

The Respondent filed documents alleged to be affidavit of means and stated she is not in gainful employment or business activity due to medical reasons. She filed documents to this effect. The Appellant filed affidavit of means on 9th November 2017 and indicated the payments due from him in school fees and expenses and upkeep of their minor child and his commitment to his livelihood and other family. So that the inclusion of alimony of Ksh 30,000/- is not available. Secondly, the Appellant argues that the Trial Court did not cross examine the parties on their affidavit of means and circumstances.

Section 77 Marriage Act grants the Court jurisdiction to grant alimony and/or maintenance of the spouse and provides as follows;

.....

The Appellant attached only his payslip and outlined expenses that would exceed the income. However, affidavit of means entails, sources of income, assets, income generating projects/activities, expenses responsibilities and benefits. So that the affidavit if means filed by parties are in conclusive on determination of how much alimony ought to be charged if at all in the circumstances.

The Respondent too alluded to no source of income, benefit or business activity, it is not an affidavit of means. Therefore until the affidavit of means disclosing each party’s actual financial situation, the orders on maintenance /alimony by the Trial Court are upheld. This is more so due to the Respondent medical state that hinders her from obtaining gainful employment or engaging in business activity. These documents and evidence of Respondent’s ill health were not controverted by any evidence from the Appellant.

With regard to the child, the Respondent filed a matter at the Children’s court under the Children’s Act accordingly.

DISPOSITION

From the totality of evidence on record; the Court finds as follows;

1. The appeal is partly upheld with regard orders as to the division of matrimonial property during the hearing and determination of the divorce petition;

2. Division of Matrimonial Property is by the High Court upon dissolution of marriage between parties; upon filing requisite pleadings listing the properties in question and contribution thereof by each party to the marriage.

3. The Appeal is partly dismissed on the issue of granting alimony to the Respondent as provided under **Section 77 of the Marriage Act**. The amount can only be reassessed if and when both parties file affidavit of means that reflect true/current financial position to be considered by the Trial Court.

4. The Appellant shall continue to pay monthly alimony. Maintenance to and for the Respondent at Ksh 30,000/- especially due to non -employment because of her medical state for upkeep and maintenance until proper affidavit of means are filed and heard *interpartes*.

5. Each party shall bear own costs.

6. Any aggrieved party shall file appeal in Court of Appeal.

DELIVERED DATED SIGNED IN OPEN COURT ON 20TH DECEMBER 2018

M.W.MUIGAI

JUDGE –FAMILY DIVISION –HIGH COURT

IN THE PRESENCE OF;

HENIA ANZALLA FOR APPELLANT

KARANU KANUI ADVOCATES FOR RESPONDENT