



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL CASE NO. 15 OF 2011

ZNN.....APPELLANT

VERSUS

MWN.....RESPONDENT

(An Appeal from Judgment of the Resident Magistrate Embu dated 12th January, 2011 in Embu Divorce Cause No. 1 of 2010)

J U D G M E N T

1. Introduction

The appellant ZN has appealed against the judgment of the Embu Resident Magistrate in Divorce Cause No. 1 of 2010 delivered on 12th January 2011, in which he was ordered to pay maintenance to the respondent of a monthly sum of Kshs.10,000/=.

The order was made at the conclusion of a successful divorce case between the parties where orders for custody of one issue of marriage and maintenance of the petitioner and the said issues of marriage were made.

2. The grounds of Appeal

The appellant argues that the case was decided against the weight of the evidence and that issues of determination were not set out in the judgment. That the petitioner is a person of adequate financial means and no order of maintenance was necessary. Further that the sum of Shs.10,000/= the court awarded the respondent was not justified considering that there was no affidavit of means tendered by the respondent.

3. The submissions

By consent of the parties, this appeal was disposed of by way of written submissions.

(i) The Appellant's Arguments

Mr. Mugambi Njeru represented the appellant herein. It was argued that the respondent is a person of great means since she is a teacher by profession whereas the appellant does not have a suitable job. He argues that his evidence was disregarded by the trial magistrate and that the judgment resulted in favour of the respondent. It was further argued that contrary to the provisions of Order 21 Rule 4 of the Civil Procedure Act, the magistrate did not set out the issues for determination, the points of decision or give reasons for the decision. The judgment was

therefore erroneous and should be set aside. It was further contended that it was clear in the respondent's evidence that she was in gainful employment as a teacher placing her income higher than that of the respondent. It was therefore improper to make the order of Shs.10,000/= per month for maintenance of the respondent and especially when there was no affidavit of means. The court had no basis to make the order of maintenance.

(ii) **The respondents Arguments**

The respondent who was represented by Mr. Joe Kathungu argued that there were no good grounds to justify setting aside or varying the judgment of the learned Resident Magistrate. It was evident that the appellant did not oppose any of the prayers of the respondent for divorce, custody and maintenance of herself and the issues of the marriage. The amount of Shs.10,000/= for maintenance per month was reasonable to cater for the respondent and her two issues of marriage.

4. **The Duty of the Court**

The duty of the first appellate court was explained in the case of **KENYA PORTS AUTHORITY VS KUSTON (K) LIMITED [2009] 2EA 212** where the court held:-

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

5. **The Issues**

In the grounds of appeal, the appellant only challenges the trial magistrate's orders in respect of maintenance. The dissolution of the marriage and custody orders are not the subject of this appeal. The only issues for determination therefore are threefold:-

- (a) *Whether the trial magistrate was right in law and in fact in awarding Kshs.10,000/= per month to the respondent and her two issues of marriage.*
- (b) *Whether she erred in failing to frame the issues for determination; and*
- (c) *Who bears the costs of this appeal.*

6. **The Law Applicable**

Article 45(3) of the Constitution provides that parties to a marriage are entitled to equal rights at the time of marriage and at the dissolution of marriage. Section 78 of the Marriage Act 2014 provides that an order for maintenance shall lapse where the person being maintained is subsequently able to support himself or herself.

Article 53(1)(e) of the Constitution provides:-

“Every child has a right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not”.

Article 27(4) of the Constitution provides:-

“The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin,

colour, age, disability, religion, conscience, belief, culture, dress, language or birth”.

Section 91 of the Children's Act provides:-

Any parent, guardian or custodian, of the child, may apply to the court to determine any matter relating to the maintenance of the child and to make an order that a specified person make such periodical or lump sum payment for the maintenance of a child, in this Act referred to as a “maintenance order,” as the court may see fit:

Provided that—

(a) on the making, varying, or discharging of a residence, guardianship or custody order, the court may make a maintenance order for a child even though no application has been made by any person;

(b) a person who has attained the age of eighteen years may, with the leave of the court, apply to the court for a maintenance order to be made in his favour in the following circumstances—

(i) The person is or will be involved in education and training which will extend beyond the person's eighteenth birthday; or

(ii) the person is disabled and requires specialized care which will extend beyond the person's eighteenth birthday; or

(iii) the person is suffering from an illness or ailment and will require medical care which will extend beyond the person's eighteenth birthday; or

(iv) other special circumstances exist which would warrant the making of the order.

The above provision is consistent with Section 28(1) of the same Act which provides for extension of maintenance orders beyond the age of the child's eighteenth birthday. In such instances, the court must be satisfied that special circumstances exist with regard to the welfare of the applicant as to justify making such an extension.

The Marriage Act 2014 attempts to give a guideline on the circumstances under which the court may grant maintenance to a spouse.

Section 77 of the Act provides:-

“The Court may order a person to pay maintenance to a spouse on 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”.

6. The Evidence

The respondent's evidence was that she married the respondent on 8/12/1990 at Nguvio Catholic Church. The first issue of marriage EM was born in 1991 while the second one CK in 1994. Their problems started soon after marriage in late 1991. They separated in the year 2009.

For purpose of this appeal, I will not dwell with the evidence in support on the grounds of divorce. The respondent without giving any more details on financial needs of the issues of the marriage, her own needs or the financial capability of the appellant urged the court to grant her the orders prayed in the plaint. These included divorce, custody and maintenance of the children. During cross-examination, the respondent said that she worked as a diploma teacher for 15 years and later graduated to degree level though her salary did not increase. She also told the court that she has been financially stable.

It was the appellant's evidence that the respondent graduated in 2008 and attributed the reason for the respondent seeking divorce to her elevated educational level. On his financial status, the appellant told the court that he does not have a stable job but did not elaborate on what he does for a living or what his income was.

The appellant did not dispute the respondent's evidence that he was married to another woman at the time of the hearing of the divorce case.

The prayer for maintenance in the plaint was for “the petitioner and the issues of the marriage”. The respondent in his evidence did not explain his inability to pay maintenance for the petitioner and to the issues of the marriage. He only made vague statement that he had no “stable job” and failed to substantiate. The respondent did not present to the court any material to guide it in awarding maintenance. What was the court supposed to do in the circumstances in view of a divorce where there were two issues of marriage?

Article 53(1) of the Constitution provides that every child has a right to maintenance by the parents. Article 54(3) grants both parents equal rights at the time of the marriage and at the dissolution. This means that no parent who is earning should be allowed to escape responsibility of maintaining his/her children. The respondent was said to be a graduate teacher of course earning a salary whose particulars were not given by either of the parties. The appellant was also earning but did not have a stable job as can be drawn from his evidence. The respondent as well as the appellant bear a responsibility to maintain the issue of marriage who was 16 years at the time of the determination of the case.

The magistrate would have been in a better position to determine the maintenance payable had she ordered for and received an affidavit of means for both the appellant and the respondent. In the absence of such an affidavit, the magistrate awarded Kshs.10,000/= to both the respondent and the issues of marriage.

The appellant was dissatisfied with the orders for the maintenance and complains that he is earning his living from various small or medium businesses while the respondent has a stable job. A teaching job cannot be said to be a well paying job given the Kenyan salary packages for teachers especially in public schools. That notwithstanding, none of the parties can be allowed to escape from their parental responsibility.

The law provides for maintenance for issues of marriage up to the age of 18 years unless there is an extension granted by the court under Section 91 of the Children's Act. The only issue entitled to maintenance in this was CK who was aged 16 years at the material time. The first issue had attained 18 years and was not entitled to benefit from the order made by the court.

As for the respondent, there was evidence that she was under gainful employment and with the appellant's income not known, there was no basis of making orders in her favour for maintenance.

It's my considered view that the magistrate was wrong in awarding maintenance to the respondent

and to the first issue of marriage who was already over 18 years at the time of determination of the suit. The second child was said to have been born in 1994 and was about 16 years at the material time. The date of birth was not given by the parties.

In regard to the trial magistrate failing to set out the issues for determination, the respondent relied on Order 21 Rule 4 of the Civil Procedure Act which provides:-

“Judgment in defended suits shall contain a concise statement of the case, points of determination, the decision thereon and the reasons for such decisions.”

The magistrate analyzed the evidence adduced by the parties and then made the order for dissolution of the marriage:-

“I have carefully considered the evidence on record... and I am thoroughly convinced that the marriage has irretrievably broken down and the same is hereby dissolved”

The orders for custody and maintenance and costs followed.

The trial magistrate analyzed the evidence and applied it to the prayers in the plaint without setting the issues out in a chronological order. The respondent argues that for the foregoing reason, the judgment is erroneous and it should be set aside.

It was held in the English case of **FLANNER VS HALIFAZ AGENCIES LTD [2001 ALL ER 273]** which was cited with approval in **MUFRANK BUILDERS LTD VS KIRITI WOMEN TRANSPORT & HOUSING CO-OPERATIVE SOCIETY [2015] eKLR Nairobi HCA 650 OF 2006** in discussing the general rule of setting out “points for determination and giving reasons for decision” thus:-

1. *The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in Ex parte Dave) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind, if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.*

2. *The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself..”.*

I have perused the judgment of the trial court and find that it leaves no doubt what the prayers in the plaint were, and what the defence contained. The analysis of the evidence and the decision were briefly stated. However, the judgment was based on the evidence and spelt out the decision and orders made in a clear manner.

It is my considered opinion that failure to list down points for determination in an orderly manner is not in itself sufficient ground to set aside judgment.

The foregoing analysis leads me to the finding that the magistrate erred in awarding maintenance to the respondent and to the issue of marriage who was over 18 years. The said order of maintenance is set aside and substituted with an order of maintenance for the second issue of marriage CK fixed at Kshs.5,000/= per month until the attainment of 18 years.

The appeal is only partly successful. Each party to meet their own costs of this appeal.

DELIVERED, SIGNED AND DATED AT EMBU THIS 22ND DAY OF APRIL, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Kathungu for Respondent