



JMN PLAINTIFF/APPELLANT

VERSUS

JKN..... DEFENDANT/ RESPONDENT

(Being an appeal from the Judgment of Honourable M/s A. Ireri RM dated 13th April 2007 in Machakos Chief Magistrate Civil Case No. [PARTICULARS WITHHELD])

JUDGMENT

1. This Appeal arises from the decision of A. Ireri (Ms) in her judgment dated 13/4/2007 within Machakos **CM's Court Maintenance Cause No. [PARTICULARS WITHHELD]**
2. From the complaint filed on 7/11/2006, JKN stated that the Respondent, JMN was her husband but that since 2006, he had become cruel to her and their 3 children and had also willfully neglected to provide reasonable maintenance for her and the children. She sought the following orders in the Maintenance Cause;
 - i. **“THAT the complainant be no longer bound to cohabit with her husband, the Defendant.**
 - ii. **THAT the legal custody of children of the marriage between the complainant and the defendant namely;**
 - a. V N - aged 17 years.
 - b. DM - aged 13 years.
 - c. M K - aged 10 years.**While under the age of 16 years to be committed to the complainant.**
 - iii. **THAT the defendant shall pay to the complainant such monthly sum as the court shall consider reasonable together with such further sum for the maintenance of each such child till they shall respectively attain the age of 16 years or as court shall order.**
 - iv. **THAT the costs of the court and of the complainant shall be paid by the defendant.”**
3. In her Supporting Affidavit, she claimed that the Respondent was a man of ungovernable temper and was quarrelsome. That he frequently took away money from her. That as a result of his frustrations she became depressed and had to be treated for that problem. That she required at the time money to maintain herself and the children.
4. In a response contained in his Replying Affidavit sworn on 15/12/2006, the Respondent denied the allegations of cruelty and neglect of his family and instead stated that the Applicant was the one who caused him emotional stress by openly displaying affection to another man; physically assaulting him; destroying his clothing and apparels and disrespecting him generally. That the application for maintenance was nothing more than an attempt at fleecing him and impoverishing him.
5. The learned magistrate heard the parties and delivered a judgment on 13/4/2007 in which she found that the expectations of Section 3 (1)

(c) of the Subordinate Court (Separation and Maintenance Act) Cap 153 had been met and she granted all the orders sought by the Applicant. The Respondent, (now the Appellant) was dissatisfied and preferred this Appeal on the following grounds;

- a. **“The learned trial magistrate grossly erred both in law and facts when she dismissed the defendant’s defence and allowed the claimant’s claim in full.**
- b. **The learned trial magistrate grossly erred both in law and facts when she found and held that the marriage between the claimant and the defendant was irretrievably broken down.**
- c. **The learned trial magistrate grossly erred both in law and facts when she entered a judgment which was in contravention of the Children’s Act as regards the responsibility of maintaining and educating children by their parents.**
- d. **The learned trial magistrate grossly erred both in law and facts when she gave a decision which was against the weight of the evidence and thereby reached a judgment which was unfair and oppressive to the appellant.**
- e. **The learned trial magistrate grossly erred both in law and facts when she gave the custody of all the three issues of the marriage to the respondent unfairly and without considering their best interest and also their age.”**

6. I have read the pleadings in this matter, the record of proceedings and the judgment and I have taken into account the submissions made by the advocates for the parties. My analysis and evaluation of the matter is as follows:-

It is clear that the proceedings before the learned magistrate were not proceedings for divorce and therefore whether the marriage had irretrievably broken was a matter for other proceedings. I say so because Section 3 (1) of the Subordinate Courts (Separation and Maintenance) Act provides as follows:-

“3. (1) Any woman may apply to the court for an order or orders under this Act on any of the following grounds, namely-

- (a) that her husband has been convicted on an offence against her under any of sections 234, 236, 237, 239 and 251 of the Penal Code;**
- (b) that her husband has deserted her;**
- (c) that her husband has deserted her;**
- (d) that her husband has been guilty of president cruelty to her or her children or of willful neglect to provide reasonable maintenance for her or her children whom he is legally liable to maintain;**
- (e) that her husband has, while suffering from a venereal disease and knowing that he was so suffering, insisted upon having sexual intercourse with her;**
- (f) that her husband has compelled her to submit herself to prostitution;**
- (g) that her husband is an habitual drunkard or habitual drug-taker.”**

7. The powers of court are then defined in Section 4 of the Act which provides as follows:-

“4. The court to which any application under this Act is made may make an order or orders containing all or any of the following provisions, namely-

- a) a provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty);**
- b) a provision that the legal custody of any children of the marriage between the applicant and her husband while under the age of sixteen years be committed to the applicant;**
- c) a provision that the husband shall pay to the applicant personally or for her use to any officer of the court or third person on her behalf such monthly sum as the court, having regard to the means both of the husband and wife, considers reasonable;**
- d) a provision for payment by the applicant or the husband or both of them of the costs of the court and such reasonable costs of either of the parties as the court may think fit.”**

8. As to the issue of maintenance, Section 10 of the Act provides as follows:

“10. (1) Where on the hearing of an application for an order of maintenance the application is adjourned for any period exceeding one week, the court may order that the husband do pay to the wife, or to an officer of the court or third person on her behalf, such weekly sum as the court considers reasonable in the circumstances of the case for the maintenance of the wife and any child or

children in her custody until the final determination of the case:

Provided that the order directing such payment shall not remain in operation for more than three months from the date on which it was made.

(2) Any such order shall be enforced in like manner as if it were a final order of the court.”

9. That being the law, was the decision of the learned magistrate against the weight of the evidence, or unlawful as is claimed by the Appellant?

10. Firstly, I should dispose of the issue of the parties’ children; their custody and maintenance. Under Section 6 (2) of the Act and the proviso thereto, the order of maintenance should only subsist until the children reach of the age of 16 years. From the record, when the complaint was filed, VN was above that age and D M now 16 years and so only M K is the lawful subject of the custody order. I have seen no reason to interfere with the order of custody as regards that child and I will sustain the learned magistrate’s order in that regard.

11. As regards maintenance of the spouse and children, Section 6 (2) in its proviso protects the wife against any specific order in maintenance as the Act was primarily enacted to protect married women in circumstances set out above. However, Section 90 (a) of the Children’s Act provides as follows:-

“90. (a) where the parents of a child were married to each other at the time of the birth of the child and are both living, the duty to maintain a child shall be their joint responsibility.”

12. Section 6 (2) aforesaid is not in conflict with Section 90 (a) because the former obligates the court to consider the circumstances of each case and to make a reasonable provision for maintenance. In the instant case, the learned magistrate ordered the Appellant to pay Kshs.10,000/= as monthly maintenance to the Respondent **“for the benefit of the children.”** During the hearing it transpired that the Appellant earned Kshs.25,854/= and the Respondent Kshs.30,657/=. Surely, Kshs.10,000/= is not too unreasonable noting that at the time, the Respondent had and still has the custody of the children. In any event, in any evidence and lawfully so, under Section 24 of the Children’s Act, the two parents had equal responsibility to the children and I do not see what is unfair about the order for maintenance more so, when the order will any event lapse by law once all the children attain the age of 16 years.

13. Lastly, on cohabitation, both parties agreed that they were frequently fighting and were unable to agree on simple family issues including how to manage their finances. The Respondent produced unchallenged evidence that she was suffering from depression due to marital disharmony. Why should any court allow cohabitation in such circumstances? The order to cease cohabitation was proper and lawful.

14. On all limbs of the appeal from the facts and the law as I know it, none can succeed and the Appeal is hereby dismissed. As to costs, since both are still paying for their children’s education, each should bear his/her costs of this Appeal.

15. Orders accordingly.

Dated and delivered at Machakos this 28th day of April 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Mrs Nduva h/b for Mr O.N. Makau for Appellant**

Mr Makau for Respondent

ISAAC LENAOLA

JUDGE

