



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 122 of 2002

JOSPHAT KABINGA WAGOCHO.....APPELLANT

Versus

JACINTA WANGITHI KABINGA.....RESPONDENT

(Being appeal from the Judgment of the learned Magistrate L. Nyambura Resident Magistrate Murang'a in Divorce Cause No. 1 of 2002)

JUDGMENT

The Respondent in the lower court petitioned for dissolution of her marriage and for maintenance for herself and the children of the marriage. She also sought that the Appellant would be ordered not to interfere with her. Finally she prayed for a share of the matrimonial property. After hearing the evidence the lower court dissolved the marriage between the parties. Custody of the children of the marriage was given to the respondent. The Appellant was ordered to pay monthly maintenance to the respondent of Ksh. 30,000. The Appellant was further ordered to pay the school fees of the children. He was ordered also not to interfere with the respondent. There was no finding in respect of the share of matrimonial properties. The Appellant being dissatisfied with that judgment preferred the following grounds of appeal:

- (a) THAT the Learned Magistrate erred in law and fact in awarding the respondent maintenance of Kshs.30,000/= which amount is exorbitant, excess and not proved by the respondent.***
- (b) The learned magistrate erred in law and fact in ordering the appellant to pay school fees for the issues of marriage solely to the exclusion of the respondent whereas evidence on record shows that both the appellant and the respondent are in the same job group.***
- (c) The Learned Magistrate erred in law and fact in failing to order the respondent to meet part of the children's maintenance and school fees considering the fact that she is also in salaried employment like the appellant.***
- (d) The Learned Magistrate erred in law and fact in finding for the respondent which was against the weight of the evidence on record and whereas the respondent had not proved her case to the standard required in a divorce cause.***

The court will begin by considering ground (d). The Respondent in evidence before the lower court gave detailed account of the cruelty she suffered in the hands of the Appellant. Those cruel acts involved failure of the Appellant to meet the children's financial needs such as school fees, failure to pay the

Respondent's hospital bills, causing the Respondent to meet the payments of utility bills which caused her to use all her salary and physical assaults amongst others. The Respondent in evidence said that the Appellant earned Ksh.36,000/= per month and from his various businesses he earned a profit of 1 million per year. She gave the breakdown of her financial requirements in respect of her claim for maintenance. The Appellant on his part denied being cruel to the Respondent but rather blamed the Respondent for being cruel to him. He said that she failed to feed him and to do his washing. That she frequently picked quarrels with him. The Appellant said that he paid school fees and hospital bills and produced documents to support his claim. He also produced a pay slip showing that he earned 6,933/=. It however ought to be noted that that pay slip related to the month of Dec. 2001. This case was being heard in April 2002. He also produced bank statements which he alleged indicated that his businesses were not earning the amount claimed by the Respondent. That bank statement showed that as at March 2002 the amount in credit to the Appellants account was Ksh.13318.35. Can the court find that the finding of the learned magistrate went against the weight of the evidence? It should be noted that the trial court had an opportunity to see and to hear the parties first hand. The court was able to test the evidence of the parties. The magistrate in her judgment stated as follows:

“I observed petitioner giving her evidence and from her demeanor I concluded that she was telling the truth. She admitted that her marriage had been turbulent for a long time and she did not file divorce proceedings then as she was trying to save it.....I also observed the demeanor of the respondent and I concluded that he was just making mere denials and he had a don't care attitude. Respondent was non-committal in his response and he replied during cross-examination that he would not mind taking back the petitioner and that he had no problem with the children. As I observed him answering questions during cross examination, I concluded that he was just answering the questions for the sake of it.”

The trial court had an opportunity to see and hear the parties and to see their demeanour in giving that evidence. There is no reason shown why the court should upset the finding of the trial court in respect of whom it chose to believe. That ground is therefore rejected. It was argued by the Appellant in his submissions that the Respondent in taking too long to file the court action can be said to have condoned the cruelty. The respondent said that the cruelty was ongoing until she separated from the Appellant. It should be noted that each incident of cruelty justifies bringing an action. For the Appellant to say that the particulars of cruelty were far fetched cannot be correct. Cruelty is very subjective. The lower court's finding was that the marriage was very turbulent. It is noted that what may be cruel to one person may not necessarily be cruel to another. The court is entitled to take the point of view of a party in examining whether an act is cruel. The evidence of the Respondent did indeed display cruelty on the part of the Appellant. Waiting for 11 years did not defeat the respondent's claim. On the lower courts finding that there was cruelty it was entitled to dissolve the marriage. The lower court did not make a finding on the claim for adultery. In respect of ground (a) the Appellant gave evidence and stated that he had an income other than his salary. He produced statements which clearly indicated that from the time the Respondent filed her case the deposits that were being made into that account reduced. It may have been a deliberate act on the part of the Appellant knowing that he was facing a claim in court. There was certainly very large deposits before the case was filed. I find that the award of maintenance of 30,000/= for maintaining 4 children not to be excessive. This is because the Appellant had another source of income. It is useful at this point to rely the holding of the case of **KARANU -V- KARANU** as follows:

“The Matrimonial Causes Rules rule 44(1) obliged the husband, within 14 days of an application for alimony pending suit, to set out the full particulars of his property and income. This rule envisaged a honest and true disclosure by the husband of his earnings so that the court could be guided by it in fixing the quantum award.

The appellant filed no such affidavit and having so failed to discharged the obligation cast on him by rule 44, he could not be heard to say that the High Court's award of alimony exceeded one fifth of his income for the three years preceding the date of the award.

In those circumstances, the court could only fix the quantum on such evidence as was available ensuring that the sum fixed was, in all the circumstances, fair and reasonable and that the figure did not suppress

the husband below the subsistence level.”

Ground (b) and (c) shall be considered together. As stated in response to ground (a) the Appellant was earning an income and a profit from his business. He was, before the case was filed, making large deposits into his account. It was claimed by the Appellant that the Respondent was earning an amount beyond her salary. That it was therefore not correct in ordering the Appellant to pay the school fees to the Respondents exclusion. In the Appellant's written submission he submitted that the children are now beyond 18 years. He therefore argued that they were not entitled to maintenance because of their age. Secondly he argued that such maintenance taking into consideration the Children's Act should be shared with the respondent. That submission was introducing a new ground of appeal without the leave of the court. With that in mind and because the Respondent did not have an opportunity to Respondent to that point the same is rejected. In the end the Appellant's appeal is hereby dismissed with costs being awarded to the Respondent.

MARY KASANGO

JUDGE

Dated and delivered at Nyeri this 2nd day of November 2007.

By: M. S. A. MAKHANDIA

JUDGE