



ROE v AASV (Family Appeal 36 of 2022) [2024] KEHC 15586 (KLR) (2 May 2024) (Judgment)

Neutral citation: [2024] KEHC 15586 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL 36 OF 2022**

**G MUTAI, J
MAY 2, 2024**

BETWEEN

ROE APPELLANT

AND

AASV RESPONDENT

JUDGMENT

1. The Appellant married the Respondent on 22nd November 2011 at the Registrar of Marriages’ office in Mombasa. After celebrating the marriage, she relocated to Kenya to live with her husband. The marriage was blessed with one issue, with the family of three residing in Nyali.
2. The Appellant then filed for divorce on 14th August 2020 vide a petition dated 30th July 2020 seeking dissolution of the marriage, payment of alimony and costs.
3. The matter was heard in the Chief Magistrate’s Court. I shall give a summary of the evidence below.
4. The first witness in support of the Petition (the Appellant in the instant appeal) was the Petitioner herself. Ms R testified that she married the Respondent on 22nd September 2011 and that their union was blessed with one child. She stated that their marriage had irretrievably broken down and that she was seeking dissolution of the same and also for payment of alimony. It was her evidence that she depended on the Respondent for maintenance and that she lived in a separate bedroom from him within the same apartment. She accused him of being a cruel and abusive man who habitually shouted at and demeaned her.
5. It was her evidence that she enjoys being out of the house and goes to clubs with her friends, who include male friends and sometimes stays out all night. He testified that the Respondent also loved to party and that they would leave their daughter alone in the house. She admitted that she went to parties with Mr M but denied that he was her boyfriend. She averred that she had never been to his apartment or any other private accommodation with him as they party on the beach.



6. She stated that she was seeking alimony for the child and that the Respondent was the one catering to the child's needs. She said she was not working as she did not have a work permit and that she was in Kenya on the basis of a Kenyan pass based on her marriage to the Respondent.
7. Ms R did not call any other witness and closed her case.
8. In his testimony before the trial court, the Respondent stated that he was indeed married to the Petitioner and that their union was blessed with one child, a daughter. He admitted that he and the Appellant had differences, like in any other marriage, but he averred that he was ready to save the marriage until their daughter got a little older.
9. It was his evidence that he went partying with his friends. He, however, denied being violent or abusive. He testified that in 2020, he found the petitioner in a compromising position with one M. Mr V testified that despite their challenges, he was seeking an opportunity for them to iron out their issues and save their marriage.
10. He confirmed that the Petitioner is a Russian national, that his daughter has dual Kenyan and Russian citizenship and that both the mother and daughter fully rely on him for all their needs.
11. Upon hearing the parties, the trial court dissolved the marriage in its judgement of 3 November 2022 and dismissed the prayer for alimony.
12. Dissatisfied, the Appellant moved this court via Memorandum of Appeal dated 18th November 2022, vide which she sought to have the judgement and order of the trial court in Divorce Cause No. 61 of 2020 regarding alimony varied and/or set aside, alimony awarded to the Appellant, and the parties' evidence reassessed.
13. In a Memorandum of Appeal the Appeal raised two grounds of appeal to wit:-
 1. That the Learned Magistrate erred in law and in fact in his judgement by disregarding the material evidence on the issue of alimony and by considering only matters that were not proved by the Respondent whereby he wrongly disallowed the prayer of alimony as pleaded and sought by the Appellant;
 2. That the Learned Magistrate's judgement does not stand on sound law and is against the settled principles of the law on the gravity of the issue of alimony.
14. The appeal was canvassed through written submissions.
15. The written submissions of the Appellant are dated 30th January 2024 and were filed by her advocates, Adagi & Co.
16. Ms Adagi, learned counsel for the Appellant submitted that the trial court's dismissal of the prayer for alimony was contrary to the Appellant's pleadings and did not take into account the evidence adduced before the trial court. She submitted that if the Appellant were to go back to her country, she would require funding to cater for her living expenditure and the cost of restarting her life afresh in Russia, considering that she has been away for a long time and also to sustain the lavish lifestyle her daughter is accustomed to.
17. Counsel submitted that the Appellant is destitute and still living in the house with the respondent, albeit in different rooms, and the award of alimony would enable her to move on with her life. Counsel urged the court to allow the appeal as prayed.



18. The Respondent, on the other hand, through his advocates, Sherman Nyongesa & Mutubia Advocates, filed his written submissions dated 26th February 2024.
19. Counsel submitted that the prayer for the payment of a lump sum of Kes.1,500,000/-and a monthly sum of Kes.165,000/-as alimony by the Appellant in her submissions before the trial court was unreasonable.
20. Counsel relied on Article 45 of the constitution of Kenya and Section 77 of the Marriage Act and submitted that alimony is neither a right nor an entitlement but a discretionary order granted by the court depending on the circumstances of each case. It was submitted that no evidence was tendered to prove that the Appellant still resides with the Respondent. The Court was thus urged to dismiss such allegations. It was further urged that the appeal lacks merit and should be dismissed.
21. I have perused the proceedings of the Court below and considered the written submissions of the parties and must now determine if the trial court was wrong to deny the Appellant orders for the payment of alimony.
22. This being a first appeal, this court is under a duty to re-evaluate and reassess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
23. In the case of Mbogo and another vs Shah [1968] EA 93 the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
24. The duty of the first appellate Court was settled by Clement De Lestang, VP, Duffus and Law JJA, in the case of Selle & another vs Associated Motor Boat Company and Others [1968]EA 123, where they stated as follows:-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
25. An appellate court thus has to bear in in mind that it had neither saw nor heard the witnesses. It is the trial court that observed the demeanor and truthfulness of those witnesses.
26. I must, at the outset, set out some Constitutional and statutory provisions which will guide this Court.
27. Article 45(5) of the constitution of Kenya, 2010 provides as follows:-

“Parties to a marriage are entitled to equal rights at the time of the marriage, during marriage and at the dissolution of the marriage.”
28. Section 77 of the Marriage Act 2014 provides;
 - a. The court may order a person to pay maintenance to a spouse or a former spouse—



- i. if the person has refused or neglected to provide for the spouse or former spouse as required by this Act;
 - ii. if the person has deserted the other spouse or former spouse, for as long as the desertion continues;
 - iii. during the course of any matrimonial proceedings;
 - iv. when granting or after granting a decree of separation or divorce; or if, after making a decree of presumption of death, the spouse or former is found to be alive.
 - b. The court may order the payment of maintenance to a spouse or former spouse where a decree of separation, divorce or presumption of death is issued by a foreign court and the court may declare that the decree of separation, divorce or presumption of death is effective for the purposes of this section.
29. Section 85 of the said Act provides that
- “Custody and maintenance of children shall be dealt with in accordance with the [Children Act](#) and any other written law relating to children.”
30. My understanding of the provisions of the [Marriage Act](#) that I have quoted is that an order for payment of alimony is discretionary. It, therefore, follows that a trial court, when considering whether or not to award a party alimony, must exercise this particular discretion judiciously and not whimsically and or capriciously and ought to do so upon sound consideration.
31. Since payment of alimony may be seen in some way as being opposed to the presumption of equality made in Article 45(5) of the [constitution](#) of Kenya, 2010, the party seeking payment of alimony must give proper basis for the payment.
32. The court in the case of MN v JMK [2019] eKLR stated,
- It is clear that in this appeal, the appellant only challenges the award of alimony to the Respondent. In W.M.M. vs B.M.L. [2012] eKLR, G B M Kariuki, J (as he then was) held that:
- “In considering a claim for maintenance, regard must be heard to the provisions of Article 45(3) of the [constitution](#) of Kenya which recognize 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.” The rights enshrined in this Article connote equality of parties in a marriage and are intended to ensure that neither spouse is superior to the other in relation to enjoyment of personal rights and freedoms. The equality in this Article does not create nor is it intended to create equal spousal ownership of property acquired during marriage regardless of which spouse has acquired and paid for it or regardless of how it has been acquired and paid for. Rather, and contrary to the assumption that it makes property acquired during marriage the property of both spouses in equal shares, 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, including the right to equal opportunities in political, economic, cultural and social spheres.” In the light of Article 45(3), the criterion in determining the rights and obligations of spouses in a marriage must treat the husband and the wife as equals and neither has a greater or lesser obligation than the other in relation to maintenance. In short, in cases where, as here, spouses have no children, a wife does not enjoy advantage over a husband or the vice versa and 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. Under the *constitution*, the Respondent has a duty to support and maintain herself no less than the Petitioner has to support himself and there is no greater obligation on the part of the Petitioner to support himself than there is on the part of the Respondent to support herself. 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 seems clear that an adjustment to sections 25 and 26 of the Matrimonial Causes Act (and to a host of other provisions) to align the same with the *constitution* is called for...The quantum of maintenance must make sense. It must be such as the party paying can afford i.e. within the ability of the spouse paying it. It must not enrich the spouse to whom it is paid nor oppress the spouse paying it. Where the spouse seeking maintenance is capable of engaging in gainful employment but refuses to work, such conduct may be oppressive to the other spouse and the court is entitled to have regard to it when considering the quantum of maintenance. Equality of spouses under Article 45(3) of the *constitution* connotes equal treatment under the law.”

33. Githinji, JAMES K v G L M [2018] KECA 543 (KLR) stated as follows regarding applicable principles to be applied when considering whether or not award alimony:-

“It seems that no such Rules have been made especially relating to maintenance orders and how the discretion of the court to make maintenance orders should be exercised.

In the absence of any statutory guidelines of specific factors to be taken into account in exercising discretion to grant maintenance to a spouse, the courts will no doubt consider all the circumstances of the case and exercise the discretion judicially. The specific factors stipulated in section 25(2) of the repealed Matrimonial Causes Act, that is, the fortune of the spouses, the ability of the spouse and the conduct of the parties will continue to be relevant. Other relevant factors include the income of the respective spouses, financial needs, obligations and responsibilities present and in future and the duration of the marriage.”

34. In the above-referenced decision it was held that for maintenance orders to be made it would be necessary for the parties to provide evidence of their means so that the Court could exercise its discretion on sound premise. Okwengu, JA stated in the said decision that:-

“(27) I reiterate that maintenance is neither a right nor an entitlement. It is a discretionary order the availability of which is dependent on the circumstances



of the case. As already stated, it was imperative for the trial judge to have appropriate information upon which he could judicially exercise his discretion. In this regard, the appellant, having failed to file any affidavit of means she has only herself to blame. Although she has maintained that the deceased is married to another woman, one “N”, there is no evidence in support of this. She did allege in her evidence before the trial court that the respondent had committed adultery with “N”, but this was based on pure suspicion and rumour and was rightly rejected by the trial court.”

35. From the record of the Court below, it is evident that the Appellant is not destitute and lived a fairly good life, full of parties and merriment. She admitted to owning property in her mother Country.
36. Although the trial court did not address her conduct, it is apparent from the evidence that she and her former husband were neglectful of their daughter. Had this been taken into account, negative inference militating against an award of maintenance would have been made against her.
37. It was up to the appellant to justify why alimony should be paid to her. From my analysis of the facts, she failed to discharge her burden of proof. The court notes that she did not file an affidavit of means and that she set out a schedule of expenses only in the submissions. In my view, this was a mere band-aid. It is settled law that submissions are not pleadings.
38. I must point out that alimony is not paid for the upkeep of children. Section 85 of the *Marriage Act* is very clear on this.
39. From the foregoing, it is evident that the appeal ought to be dismissed. There is no justification for payment of maintenance. I see no reason to fault the trial magistrate for his decision.
40. The upshot of the foregoing is that the appeal is dismissed.
41. As this is a family matter, each party shall bear its own costs.
42. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 2ND DAY OF MAY 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Ms Juma, holding brief for Mr Mutubwa, for the Respondent;

Ms Kimori holding brief for Ms Adagi for the Appellant; and

Arthur – Court Assistant.

