REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVL APPEAL NO. 163 OF 2015

MN.....APPELLANT

VERSUS

JMK.....RESPONDENT

(Being an appeal from the judgment of the Honourable Principal Magistrate, C A Ocharo, delivered on the 13th October, 2015 in Civil Suit No. IV5 of 2013 at Machakos)

BETWEEN

JMK.....APPELLANT

AND

MN.....RESPONDENT

JUDGEMENT

1. This arises from a Divorce Cause which was instituted by the Respondent herein against the Appellant. It was pleaded that arising from the union between the appellant and the respondent were two issues, who by the time of the suit were both of majority age as they were born in 1983 and 1985 respectively.

2. It was pleaded that the Respondent herein was a civil servant while the Appellant was employed by the Parliamentary Service Commission. The said divorce proceedings were grounded on various allegations of cruelty and adultery and that the said marriage had irretrievably broken down. In the said proceedings, the Respondent sought for the dissolution of the said marriage and for payment by the Appellant herein of alimony in the sum of Kshs 2,000,000.00 or such other sum as the court determined. Of course there was the prayer that the Appellant should shoulder the costs of those proceedings.

3. In answer to the petition, the Appellant denied the Respondent's allegations save for the fact that the said marriage had irretrievably broken down but blamed the Respondent for the same based on the Respondent's desertion and adultery. As a result, while the Appellant cross-petitioned for the dissolution of the same marriage sought that the Respondent's claims be disallowed.

4. However, at the hearing, only the Respondent testified since the Appellant did not attend despite having been indulged having failed on a prior occasion to attend. In her judgement, the learned trial magistrate, after hearing the evidence of the Respondent found that there was no evidence by the Respondent to prove cruelty on the part of the Respondent. The learned trial magistrate however found that since both parties were in the agreement that the marriage could not be salvaged, lack of such evidence was not fatal. She therefore found based on the evidence before her that the marriage had in fact irretrievably broken down as the parties had separated for more than fourteen (14) years. She therefore proceeded to dissolve the marriage.

5. As regards the claim for alimony, it was her view that it is upon the party seeking alimony to prove to the court that she is entitled to the sums claimed. According to the trial court, nowhere in the pleadings or evidence was it brought to the court's attention the financial abilities of the parties save in answer to the petition by the Appellant and in the Respondent's testimony. According to the Court, since the Respondent stated that the Appellant abdicated his responsibilities both as husband and father to the children, it showed that the Respondent was capable of maintaining the home as well as the children and therefore had not demonstrated the difficulties, if at all, since their separation as to persuade the court that she deserved to be maintained.

6. The court found that it could not award the alimony prayed for without a shred of evidence in support of such a claim. The learned trial magistrate however proceeded to award the Respondent Kshs 250,000.00 based on the fact that the Appellant did not challenge the fact that he took another wife while the Respondent went to seek treatment.

7. Aggrieved by the said decision, the Respondent appeals to this court citing the following grounds:

> **1.The learned magistrate erred in law to find fit for the respondent to be awarded alimony as she failed to prove her case to the honourable court.**
>
> **2. The learned magistrate erred in law and facts to award Kshs 250,000/= to the respondent as alimony without any evidence.**

8. It was submitted on behalf of the appellant that according to the ***Black's Law Dictionary*** *alimony* is defined as the allowance made to a wife out of her husband's estate for her support, either during a matrimonial suit, or at its termination, when she proves herself entitled to a separate maintenance, and the fact of a marriage is established. Alimony is an allowance out of the husband's estate, made for the support of the wife when living separate from him. It is either temporary or permanent.

9. According to the Appellant, the respondent does not have grounds to be awarded alimony as the issues of the dissolved marriage are adults fending for themselves. The respondent did not support the issues of marriage nor show care towards them but instead deserted their matrimonial home in 2000 while the appellant was left with full financial responsibility including their full education. In support of his submissions, the Appellant relied on the case of **WN vs. PB [2013] eKLR** where it was held that:

> **"The purpose of an award of alimony pending suit is to provide temporary support to a spouse so that she is not destitute for duration of the suit."**

10. According to the Appellant, the purpose of alimony was to provide for those situations where a divorced or separated wife becoming a charge on the common purse i.e. the state. The purpose of alimony is not to provide a luxurious living to such spouse, nor is such an order made to allow a spouse to maintain the lavish lifestyle she may have enjoyed during the marriage. Alimony *pendent lite* is to provide basic sustenance to a wife pending the determination of the matrimonial cause. It was submitted that the respondent has a well-paying job hence she is not in destitute. Reliance was placed on Article 45(3) of the constitution of Kenya which provides that '*parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage***.'**

11. It was therefore submitted that respondent came to court seeking to be divorced and subsequently set free from her engagement with the appellant. Since the children are now adults with a stable income and in view of the parties' view on each other, it would be unfair to grant the prayers for alimony as the appellant is a retired officer with no source of income while the respondent is working and has a stable source of income.

12. In response to the Appeal, the Respondent submitted that as put forth by the learned magistrate, *alimony payment provides a means for a spouse who was financially dependent on the other spouse to support themselves either before or after the dissolution of the marriage*. The Respondent relied on section 25(2) of the repealed ***Matrimonial Causes Act*** **Cap 152** which conferred a discretion on the court with regards to maintenance, that discretion should be exercised with due regard to the circumstances of each case with a view to arriving at a just decision, that in the exercise of this discretion, their respective financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living prior to the divorce, their conduct in so far as it may be relevant to the breakdown of the marriage and any other factor which should, in the opinion of the court, ought to be taken into account. The court should remember that both parties have equal rights under Article 45(3) of the constitution.

13. It was submitted that the repealed the ***Matrimonial Causes Act*** is applicable to the case by virtue of section 23(3) (b) of the ***Interpretation and General Provisions Act***.

14. After setting out the facts of the case it was submitted that the parties herein were married for 33 years at the time the judgement was entered in 2015 and in exercising its discretion, the trial court considered the duration of the marriage in awarding of alimony or maintenance. While the appellant has based his appeal on the fact that the respondent is working and earning a living and she can therefore provide for herself, the respondent clearly demonstrated that she was supported by the appellant, a fact that boosted the quality of the life of her family. The standard of living prior to the divorce was of good quality. She has satisfied the requirements of section 25(2) of the repealed ***Matrimonial Causes Act*** Cap 152 as to the standard of living prior to the divorce.

15. It was submitted that the fact that the respondent is working and earning does not disqualify her from getting alimony. If the court in exercising of its discretion feels her demands are reasonable and if her income is not sufficient to support the lifestyle she enjoyed while married can grant alimony. It was submitted that under Rule 44(2) of the ***Matrimonial Causes Rules*** the appellant was required to file an affidavit setting out his property and income once he was served with the petition consisting a prayer for alimony. That was not done and that is why the learned magistrate noted that both parties had not filed any evidence to support or deny the award of alimony as pleaded by the respondent in her petition for divorce. The trial magistrate went ahead and demonstrated the reason why she did not award the pleaded amount of Kshs. 2,000,000 to the respondent and instead awarded her a one off sum of Kshs. 250,000 as alimony. The respondent did not seek maintenance for the children as she is alive to the fact that the children are above the age of minority.

16. According to the Respondent, the appellant's decision to take in another wife after his disagreement with the respondent warranted that award in that he left no room for reconciliation and no home for the respondent. With respect to exercise of discretion, the Respondent relied on **Mbogo and Another vs. Shah [1968] EA a3** where the court stated:-

> **"……..that this court will not interfere with the exercise of……discretion by an inferior court unless it is satisfied that its decision is clearly wrong, the court 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."

17. According to the Respondent, given those parameters, the appellant has not made a case for this court to interfere with the lower court's decision hence this appeal should be dismissed with costs to the respondent.

Determination

18. I have considered evidence that was adduced by the Respondent, the findings of the learned trial magistrate thereon and the submissions on record.

19. 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."**

20. The said decision was cited with approval by **Lenaola, J** (as he then was) in ***M S V vs. S J V & Another*** **[2015] eKLR** *in which he stated that* even after divorce, each spouse has certain duties to the other.

21. In this case the only reason why the learned trial magistrate expressed herself as hereunder:

> **"Alimony is not granted as a matter of course. It is not fair for the petitioner to simply throw a figure as substantial as Kshs 2 million to the court and pray to be awarded without a shred of evidence in support of such a claim. Both children of the union are now beyond the age of minority. Without such evidence I find it impossible to grant the sums prayed for and shall therefore grant a sum of Kshs 250,000/= since the Respondent did not challenge the fact that he took in another wife while the petitioner went away to seek treatment after the alleged assault by the respondent thereby dashing all hopes of a possible reconciliation."**

22. In her judgement, the learned trial magistrate was not satisfied that the Respondent had proved the allegation of cruelty. In fact the only basis upon which the marriage was dissolved was that the same had irretrievably broken down. Consequently, it was an error on the part of the learned trial magistrate to rely on what in effect amounted to cruelty on the part of the Appellant to grant the order for alimony having found that cruelty was not proved. In any case having found, correctly in my view, that it is imperative upon the party seeking alimony to prove to the court that she is entitled to the sums claimed and that nowhere in the pleadings or evidence was it brought to the court's attention the financial abilities of the parties, there was no basis for awarding the Respondent Kshs 250,000.00 or any other sum for that matter. In **PIL Kenya Ltd vs. Oppong [2009] KLR 442**, the Court of Appeal held by a majority that:

> **"With respect, a court of law cannot just pluck both liability and damages from the air as the Superior Court did in this matter."**

23. That was the position adopted by **Makhandia, J** (as he then was) in **Mununga Tea Factory Ltd vs. Ephantus Munyi Gichimu Nyeri HCCA No. 82 of 2004**, in which he held that:

"Even if the respondent had been entitled to damages, the amount awarded was arbitrary. It seems like the learned Magistrate merely plucked a figure from the air and planted it on the appellant. There was no factual basis or evidence adduced by the respondents upon which appropriate damages awardable in the circumstances would have been considered."

24. This Court appreciates the legal position enunciated in **Mbogo and Another vs. Shah [1968] EA 93** that:-

"This court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, the court 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."

25. However, the Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

26. In **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231**, the same court held that:

"A Court will not interfere with the exercise of discretion unless it is satisfied that it is clearly wrong, because it has misdirected himself, or acted on matters which it should have not acted or failed to take into consideration matters which it should have considered and in so doing arrived at a wrong conclusion…Discretion must be exercised judicially and not arbitrarily or capriciously; nor should it be exercised on the basis of sentiment or sympathy."

27. In other words an appellate court is justified in interfering with the exercise of discretion where it is satisfied that it is clearly wrong, because it has misdirected himself, or acted on matters which it should have not acted or failed to take into consideration matters which it should have considered and in so doing arrived at a wrong conclusion or where the discretion is exercised arbitrarily or capriciously or should it be exercised on the basis of sentiment or sympathy rather than judicially. Where the figure awarded is not based on the evidence, the exercise of discretion may well be arbitrary.

28. In this case I agree with the decision of **Chitembwe, J** in **K A S vs. M M K [2016] eKLR** where he noted that:

"The petitioner came to court seeking to be divorced and subsequently set free from her engagement with the respondent. That is the main reason why she came to court. Since there are no children out of the marriage and in view of the parties' view on each other, it would be unfair to grant the prayers for maintenance. The parties have been living separately since the petition was filed. No order of interim maintenance was made. It is fair if each party is set free and allowed to cater for herself/himself. Consequently, the prayer for maintenance is not granted."

29. In the premises, I find that the award of alimony was not justified based on the evidence on record and cannot be sustained.

30. Consequently, this appeal succeeds and the judgement of the trial court awarding alimony to the Respondent is hereby set aside. Taking into account the relationship between the parties, while I have no reason to interfere with the decision on costs of the trial court, there will be no order as to costs the costs of the appeal.

31. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 4th day of April, 2019

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Nthiwa for Mr Mwoki for the Appellant

CA Geoffrey