



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KIAMBU

(CORAM: CHERERE-J)

BETWEEN

CIVIL APPEAL NO. 76 OF 2018

SKK.....APPELLANT

AND

MNK.....RESPONDENT

(Being an Appeal from the Ruling and Order in Thika Divorce Cause No. 16 of 2004 by *Hon. G. Omodho (SRM)* on 13th June, 2018)

JUDGMENT

Background

1. By a Petition dated 21st October, 2004, the Respondent petitioned for an order of separation and maintenance as against the Appellant.
2. By a judgment dated 29th December, 2010, the court granted an order for separation and ordered the Appellant to pay the Respondent a monthly maintenance sum of Kshs. 8,000/-.
3. A subsequent order dated 12th June, 2013 enhanced the sum from Kshs. 8,000/- to Kshs. 15,000/-.
4. By an application dated 09th June, 2017, the Respondent prayed for enhancement of the sum of Kshs. 15,000/- to Kshs. 30,000/-. The application was vehemently opposed by the Appellant. The court heard both parties and in a ruling dated 13th June, 2014 enhanced the monthly maintenance sum to Kshs. 30,000/-.

The Appeal

5. The Appellant being dissatisfied with the lower court's ruling and order preferred this appeal and on 11th July, 2018 filed the Memorandum of Appeal dated 09th July, 2018 which he raises six (6) grounds which I have summarized into 5 grounds that: -

1. **The Learned Magistrate erred in law and in fact by not appreciating that the Appellant has been paying the Respondent a monthly maintenance of Kshs. 15,000/-**
2. **The Learned Magistrate erred in law and in enhancing the monthly maintenance sum to Kshs. 30,000/- while it was clearly noted that the Appellant has another family where he is educating three children and servicing bank loans**
3. **The Learned Magistrate erred in law and in fact in not appreciating that the Respondent has a monthly income of Kshs. 60,000/-.**
4. **The Learned Magistrate erred in law and in fact in not appreciating that the Respondent has no other responsibility other than herself**
5. **The award of the trial court is manifestly excessive**

SUBMISSIONS BY THE PARTIES

6. When the appeal came up for hearing on 09.09.19, Ms. Maina for the Appellant submitted that the Appellant was wholly relying on written submissions filed on the same date. The Respondent opposed the appeal by way of oral submissions.

Appellant's submissions

7. Appellant submitted that other than the monthly maintenance sum to Kshs. 10,000/-, the Respondent resides in a rent free house receives a monthly sum of Kshs. 10,000/- from her daughter and earns Kshs. 35,000/- monthly from rental houses thereby adding the aggregate sum received to Kshs. 60, 000/-Appellant reiterated that he has another family where he is educating three children and servicing bank loans while the Respondent has no other responsibility other than herself.

8. Appellant placed reliance on the following authorities

a. K. M v ATTORNEY GENERAL [2012] eKLR where Musyoka J. in considering whether **section 25** of the *Matrimonial Causes Act* which only provides for payment of alimony by wives and husbands violates **Article 27** which prohibits discrimination and **Article 45** 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 held as follows:

“section 25 of the Matrimonial Cause Act which applies to the wife is now to be read as “spouse” to bring it in conformity with Articles 27and 45 of the Constitution and section 25 of the Act shall be read with all the necessary alteration to make it gender neutral”.

b. Appellant also relied on *S.M. R v P. H. S [2013] eKLR* where Musyoka J. reiterated the holding in *K. M v ATTORNEY GENERAL* (supra) that:

‘Parties to a marriage are entitled to equal rights at the time of the marriage during marriage and at the dissolution of marriage.’

The court went further to say that:

‘In light of Article 45(3), the criterion in determining the rights of spouses in a marriage must treat the husband and 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 vice versa and the age-old tradition in which men were deemed to be the sole breadwinners and to carry the burdening 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.

c. The Appellant similarly relied on *R P M v P K M [2015] eKLR*, where Kimaru J, held as follows:

“An important starting point in assessing the amount payable by one spouse to the other as maintenance is their current and future financial capacity. This has been upheld by Justice Musyoka in *SMR v PHS [2013] eKLR* who observed that: “*The financial capacity of the parties has to be examined before the court makes a ruling as to whether a spouse should pay maintenance and if so how much.*”

Respondent's submissions

9. Respondent holds the view that the sum of Kshs. 30,000/- is not even adequate for the reason that the Appellant is in control of all the matrimonial properties which include rental houses.

ANALYSIS AND DETERMINATION

10. I have carefully perused the record before me, and considered the grounds of appeal and submissions on behalf of both parties.

11. I am mindful of my duty as an appellate court which is grounded in Section 78 of the Civil Procedure Act to evaluate and consider the evidence and the law, and exercise as nearly as may be the powers and duties of the court of original jurisdiction and come to my own conclusion. (See *Selle v Associated Motor Boat Co [1968] EA 123*).

12. In addition, as the appellate court, this court can only interfere with the lower court's order if the same is founded on wrong principles of fact and/or law as guided by the court of Appeal decision in *Nkuba – Vs – Nyamiro [1983] KLR 403* that

“A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

13. The evidence on record disclosed that the Appellant has another family where he is educating three children and servicing bank loans. The evidence also disclosed that Respondent's children are all adults and that she has no other responsibility other than herself. It was also disclosed that the Appellant owns several immovable properties and that the Respondent collects rent from some rental houses so much so that the Respondent had in an application dated 14th April, 2011 filed on 15th March, 2011 sought to restrain the Appellant from interfering with her collection of rent from plot No. **RUIRU/MUGUTHA BLOCK [particulars withheld]**.

14. In support of the application dated 18th May, 2017 that gave rise to the impugned ruling and order dated **13th June, 2018**, the Respondent filed a supporting affidavit sworn on 18th May, 2017 in which she deposed as follows:

Paragraph 5: That I am still the wife of the Respondent and my financial needs can only be met by the Respondent who has abundant and sufficient income

Paragraph 6: That the Respondent is a man of means and hence the prayer for enhancement if so granted shall not occasion him any prejudice, loss and/or damage

15. In the ruling dated **13th June, 2018**, the learned trial magistrate stated that the Respondent had orally pleaded with the court that her health had deteriorated hence the use of her maintenance sum towards medical bills. The court thus confirmed that the Respondent did not tender any evidence in support of her medical bills. The court stated that it had appreciated the responsibilities on the shoulders of the Appellant who had another family and children to pay school fees for and went ahead to enhance the monthly maintenance sum to Kshs. 30,000/-.

16. It is trite that any court making an order as to whether a spouse should pay maintenance and if so, how much, must of necessity consider the financial capacity of the parties before making the ruling. (See **R P M v P K M (Supra)**). Clearly, there was no evidence concerning the financial capacity of the parties before the court enhanced the monthly maintenance sum from Kshs. 15,000/- to Kshs. 30,000/-. The Respondent's averments that the Appellant has abundant and sufficient income was without proof and was of no probative value and my finding is that the trial court erred in making an order that was based on no evidence.

17. Further to the foregoing, the trial court failed to appreciate the provisions of Article 45(3) of the Constitution that parties to a marriage are entitled to equal rights at the time of the marriage during marriage and at the dissolution of marriage and thus failed to treat the parties herein as equals with neither having a greater or lesser obligation than the other in relation to maintenance.

18. As much as the Respondent is still the Petitioner's wife, the age-old tradition in which men were deemed to be the sole breadwinners and to carry the burden of maintaining their spouses does not hold true anymore. The Respondent's view that all her financial needs can only be met by the Respondent is hence not valid for the reason that the Respondent has a duty to support and maintain herself and there is no greater obligation on the part of the Appellant to support the Respondent than there is on the part of the Respondent to support herself.

DISPOSITION

19. In the end and for the reasons given on the assessment above, the appeal is allowed. The ruling and order dated **13th June, 2018** is set aside in its entirety thereby reverting the parties to the order dated 12th June, 2013 that enhanced the monthly maintenance sum to Kshs. 15,000/-.

20. This being a matrimonial matter, each party shall bear its own costs.

DELIVERED AND SIGNED AT KIAMBU THIS 12th DAY OF September, 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant s - Nancy & Morris

For the Appellant -Ms. Maina hb for Ndungu

Respondent -Present in person