



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO 154 OF 2008

R P M.....PETITIONER

VERSUS

P K M.....RESPONDENT

JUDGMENT

The Petitioner, R P M, is married to the Respondent, P K M. They were married on 1st March 1993. Their marriage has been blessed with two issues, both of whom are now above the age of majority. T.C.M., their first-born-daughter, was born on 13th November 1993 while K.A.M., their second-born-son, was born on 31st March 1995. The Petitioner is presently unemployed while the Respondent is a retired soldier and businessman. They lived together in their matrimonial home in Nairobi for most of their married life, but in their marriage, unhappy differences arose between the parties resulting in their separation. They have been living apart for more than five (5) years. The difference between them subsequently led to the Petitioner lodging this petition for divorce before this court. Numerous applications were subsequently filed before this court as well as in other courts of concurrent jurisdiction. These applications will not be discussed here in detail, but reference will be made to them to the extent that they are relevant to the determination of substantive aspects of the dispute before this court.

The matter before this Court originated from the petition filed by the Petitioner in 2008 seeking, among others, orders from this Court: that the marriage be dissolved on grounds of adultery and cruelty; that the Petitioner have custody and care of the children (who were minors at the time) with rights of access to the Respondent; that the Respondent pays school fees for their children in schools of their choice up to and including university education; that the Respondent pays the Petitioner's maintenance at a monthly sum of US\$6,000 or its equivalent in Kenyan Shillings, or alternatively that the Respondent pays into a trust account a sum of US\$1,000,000 for the upkeep and maintenance of the Petitioner and the children of the marriage.

The Respondent duly entered appearance and subsequently filed an answer to the petition and cross-petition in which he denied all the allegations of adultery and cruelty. He also counterclaimed that the Petitioner had deserted the matrimonial home and taken up residence with another man.

This Court per the ruling of Nambuye J (as she then was) on 24th May 2010 granted care and custody of the children of the marriage (who were still minors then) to the Petitioner, but it also made provision for reasonable access by the Respondent to the children. The Court further ordered that the time spent by the parties with the children during the children's school holidays be shared equally on condition that the party with the children caters for their expenses. The Respondent was also ordered by the same ruling to pay Kshs. 250,000 per month to the Petitioner as maintenance for the Petitioner and the children. This sum would be reduced to KShs.150,000 when the children were not with the Petitioner.

The parties were heard before this Court and presented their evidence in person and through their respective counsels on various dates in 2014. Both the Petitioner and the Respondent testified and each reiterated the contents of their respective pleadings. They were also cross-examined on various questions arising from their dispute. At the close of the hearing, the court directed the parties to file their written submissions for the court's consideration and final determination. The written submissions of the Petitioner were filed on 23rd December 2014 in which the following points were set forth. First, the Petitioner stated that the marriage between herself and the Respondent has irretrievably broken down, and consequently she urged the court to dissolve the marriage. Second, the Petitioner submitted that the Respondent should pay for her maintenance after the dissolution of the marriage. In this regard, the Petitioner proposed that the following criteria should guide the court in determining whether or not to award maintenance:

- a. The income and earning capacity as well as financial and other resources;
- b. The financial needs and obligations of each party;
- c. The standard of living enjoyed by the parties before the breakdown of the marriage;
- d. The age of each party to the marriage and the duration of the marriage;
- e. The inability of the spouse to maintain herself.

Based on the above criteria, the Petitioner urged the court to order that the said maintenance be paid by the Respondent by way of a lump sum payment of not less than Kshs.100 Million, even if such payment comprises a house and the rest in an amount such as the court may determine. The Petitioner further urged the court to take into account the fact that the Respondent had offered to provide her a house in Lavington, which cost Kshs.24 Million at the time of the offer but which currently costs approximately Kshs.100 Million. Third, the Petitioner submitted that the Respondent should bear the costs of this suit as he is responsible for the breakdown of the marriage and also because of his disobedience of court orders resulted in multiple applications thereby increasing the costs.

In his written submissions filed on 17th December 2014, the Respondent similarly stated that the marriage had irretrievably broken down, the love between the parties was lost, and that this was the real ground for divorce. He also objected to the payment by himself of maintenance to the Petitioner on the bases that: he is unable to pay that amount since his flagship businesses, *[particulars withheld]* and *[particulars withheld]*, have since gone under and only property he owns is 2 acres in Mombasa; the Petitioner is a top-notch artist capable of working and earning a living on her own and also that she has a Visa card with Kenya Commercial Bank through which she spends an average of Kshs.1 Million per month; and the court should hold that Petitioner should support him in meeting the children's academic and social expenses.

The Respondent's pleadings concerning his inability to satisfy what he considers as the **"unreasonable demands"** for maintenance by the Petitioner are reiterated in the Respondent's supplementary submissions filed on 16th January 2015. While he admits that the standard of living enjoyed by the parties during the marriage was high, he states that his finances have since dwindled so much so that it would be unfair for the court to award maintenance of the basis of a lifestyle that is no longer sustainable. He stated that he now depends on family support and well-wishers to meet his obligation to pay maintenance to the Petitioner. He further explained that he only earns a modest sum from his share-trading business, and his income is inconsistent since it depends on the vagaries of the financial market. Regarding his assets, the Respondent stated that he only owns the parcel of land in Mombasa, and not in any other place as claimed by the Petitioner.

The Respondent has also contested the legal basis of the proposed maintenance to be paid by himself to the Petitioner, arguing that an order for maintenance should only be awarded after the court has taken into account:

- a. Age of the parties;
- b. Income, property and financial resources which are limited;
- c. Ability of the Respondent to work, considering that he is a retired army officer;
- d. Suitable standard of living in Nairobi, Kenya;

- e. Whether the marriage has affected the party's ability to earn income.

In light of the above factors, the Respondent submitted that no evidence had been adduced by the Petitioner to sustain the claim of her inability to support herself, nor had she proved that she was unable to meet her expenses from her personal income and/or assets. In his supplementary submissions of 16th January 2015, the Respondent further states that the Petitioner, being in his age bracket, can still work and engage in business in order to generate income so as to be self-sufficient. He also reiterated that he is unable to pay the maintenance because he does not have sufficient property or income, and that the Petitioner has supplied no evidence to support her claims that he is a person of high financial ability. The Respondent further argued that an order for him to pay maintenance to the tune of Kshs.100 Million as proposed by the Petitioner would be unjustifiably punitive and oppressive to him, and would also allow the commercialization of divorce matters by parties seeking to exploit others.

The Respondent's submissions also raise some important constitutional questions that arise from the dissolution of marriage and its consequences as regards the respective rights of the parties thereto. Some of these questions were put by the Respondent before the Constitutional and Human Rights Division of this court vide **Constitutional Petition No. 65 of 2012** and were dealt with in the subsequent judgment of Lenaola J. Accordingly, they will be discussed here and elsewhere in the present judgment to the extent that they bear on substantive issues for determination before this Court. Three thematic questions have been raised by the Respondent.

- a. First, why should the Respondent be compelled to pay maintenance to the Petitioner and shoulder the children's needs on his own while **Article 45(3)** of the **Constitution** recognizes equality of the parties to a marriage at the time of, during and at the dissolution of marriage?
- b. Second, why should the Respondent be compelled to financially assist the Petitioner to visit their children studying abroad while **Article 53(1)(e)** of the **Constitution** requires both parents to provide for their children, the fact that they are married or not notwithstanding?
- c. Third, why should the Respondent be compelled to pay maintenance to the Petitioner on the basis of his age while **Article 27(4)** of the **Constitution** prohibits direct or indirect discrimination on the ground of age?

The submissions of the Respondent disclose that he considers it unconstitutional and unlawful to compel him to pay maintenance to the Petitioner as well as cater for the expenses related to the issues of the marriage on his own. He considers this a violation of **Articles 45(3) & 53(1)(3)** of the **Constitution** and **Section 3(2)** of the **Marriage Act 2014**. He further considers that an order compelling him so would be discriminatory because it would have as its basis the Respondent's age, one of the grounds listed in **Article 27(4)** of the **Constitution** which prohibits both direct and indirect discrimination.

After considering the arguments raised by the parties, this court finds that the issues for determination are discernible from the various contested submissions and testimonies of the parties. The following five (5) issues have been identified:

- a. Whether there are valid legal grounds to dissolve the marriage between the Petitioner and the Respondent;
- b. Should the answer to the 1st issue be in the affirmative, whether there is an obligation by the party against whom the court rules to pay maintenance to the party in whose favor the Court finds;
- c. Should the answer to the 2nd issue be in the affirmative, the court will have to determine the scope (material and temporal) of the settlement and the mode in which it should be awarded to the successful party. In this regard, the following issues are instructive:
 - i. The determination of the quantum of maintenance;
 - ii. The duration of time to be factored into the determination of quantum;
 - iii. The suitable mode of payment of the award, whether periodic payment or lump sum settlement; and
- d. Whether an order that one party pays maintenance to the other party as well as the expenses of

- issues of the marriage would offend the principle of equality and freedom from discrimination, and that of equal responsibility of and contribution by parties to a marriage;
- e. Which party should bear the costs of this suit?

Grounds for Dissolution of the Marriage

The Petitioner, by her petition filed on 24th December 2008, seeks to have the marriage between her and the Respondent dissolved on grounds of adultery and cruelty. On the other hand, the Respondent has denied all the allegations made against him by the Petitioner and counterclaimed that the Petitioner deserted the matrimonial home for another man's house. The Respondent consequently seeks to have the marriage dissolved on grounds of desertion and adultery. The grounds of cruelty, adultery and desertion are all questions of fact which require the court to assess them based on the evidence provided by the parties. The standard of proof in establishing the above grounds of divorce is a preponderance of probability or in other words, balance of probabilities. This point was elaborated by the Court of Appeal in the case of **Alexander Kamweru v Anne Wanjiru Kamweru [2000] eKLR**, where it was stated:

“Certainly cruelty or desertion may be proved by a preponderance of probability, that is to say that the Court ought to be satisfied as to feel sure that the cruelty or desertion, or even adultery (all being matrimonial offences) has been (as the case may be) established”.

The Petitioner's allegation of cruelty requires proof to convince the court that the factual circumstances would suggest that the Respondent's conduct caused or threatened to cause actual danger to the Petitioner's life or limb. In the case of **DM v TM [2008] 1 KLR 5** Chesoni J (as he then was) stated that:

“To establish cruelty the complainant must show to the satisfaction of the court: –

- i. misconduct of a grave and weighty nature***
- ii. real injury to the complainants health and reasonable apprehension of such injury***
- iii. that the injury was caused by misconduct on the part of the Respondent, and***
- iv. that on the whole the evidence of the conduct amounted to cruelty in the ordinary sense of that word”.***

As regards the allegation of adultery, it is important to note that both parties have accused the other of committing this matrimonial offence. The Respondent has counterclaimed that the Petitioner moved out of the matrimonial home and started living with another man with whom she committed adultery. In the case of **N v N [2008] 1 KLR 17**, Madan J, as he then was, stated that:

“To prove adultery, it is not necessary to have evidence of the same. Association coupled with opportunity, illicit affection, undue familiarity and guilt attachment are some of the instances which create an inference upon which the court can act. Circumstantial evidence can prove and establish adultery provided the circumstances are relevant, cogent and compelling”.

By the time this matter was heard by this court, it was apparent to this court, and it was also admitted by both parties, that the marriage had irretrievably broken down and that there was little hope for reconciliation. The parties have been living separately and apart for a period of time exceeding five (5) years. During the intervening period between their initial separation and the present time, the parties have been pitted against each other in a bitter legal contest characterized by numerous applications seeking to vary, set aside, avoid, and enforce the maintenance orders issued by this court.

Upon evaluation of the evidence in this regard, it was clear to this court that the conduct of the parties demonstrate that, on preponderance of probabilities, the marriage between the two parties has irretrievably broken down. From the evidence adduced before this court, it was clear from the allegations and counter allegations of cruelty and adultery that there no longer exists trust between the Petitioner and the Respondent. The emotional display in court by both parties was just but symptomatic of how their marital relationship had deteriorated to such an extent that what was initially a loving relationship has now turned into one of suspicion and lack of trust. This court is particularly mindful of the emotional

anguish that the parties exhibited in their respective applications and when they testified in court, and is thus inclined to make a finding that indeed the marriage has so broken down that it cannot be salvaged. The separation of more than five (5) years is sufficient proof that the marriage between the Petitioner and the Respondent can longer be sustained.

In the period that the Petitioner and the Respondent have been separated, it was apparent that no effort was made by either of them to promote reconciliation between them. The Petitioner and the Respondent instead expended much energy in going for each other's jugular, literally, with tongs and hammers. It was clear to the court that the position respectively taken by the Petitioner and Respondent in this suit was inimical to the existence of a conducive environment in which reconciliation would have been promoted. Matters were not helped by the fact that the personalities of the Petitioner and the Respondent were such that, in this court's considered view, they were not ready to climb down from the rigid positions that they had each taken. The parties were unwilling to have any third party intervene with a view to reconciling them. In the circumstances therefore, the court has no choice but to grant their wish.

The only course of action that is just is to dissolve the marriage. In this regard, I am persuaded by the judgment in **NMM v SJC, Divorce Cause No. 1 of 2013** where Karanja J stated that:

“... it has all along been apparent that the marriage between the two has irretrievably broken down such that any attempt to give them time to resolve their marital problems by sustaining it would cause both of them untold anxiety and/or psychological torture. It is in their own interest and the interest of justice that the marriage be dissolved and they be allowed to move on with their respective lives ...”

In light of the above decision, this court finds that it will not only be in the best interests of the parties to dissolve their marriage, but it will also serve the greater interests of justice. In the premises therefore, this court declares the marriage solemnized between the Petitioner and the Respondent on 1st March 1993 dissolved. Decree nisi dissolving the said marriage is hereby issued. The decree nisi shall be made absolute thirty (30) days from the date of this judgment.

The Objects and Obligations of Post-Divorce Maintenance

The concept of maintenance or 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 marriage. This concept has its origins in English Common Law but has been incorporated into Kenyan Law by statute and by judicial precedent which seeks to protect the formerly dependent spouse from the adverse consequences of the breakdown of marriage before they acquire self-sufficiency. This view has been articulated by Justice Odero J in the case of **WN v PB [2013] eKLR**, who observed:

“The concept of alimony originated in England. A wife was deemed to be totally reliant on her husband and would not own property or earn money to support herself. As such upon divorce alimony would provide an economic means to enable the divorced wife to support herself and prevent her from being a public charge”.

The applicable law then relating to the obligation to pay maintenance to a spouse was **Section 25(2)** of the **Matrimonial Causes Act** (now repealed) which provided that:

“The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem reasonable”.

The suit was filed in 2008 before the promulgation of the **New Constitution** and the enactment of the **Marriage Act 2014**. The **Marriage Act 2014** consolidated all the then existing marriage and divorce laws in one statute. The **Matrimonial Causes Act** therefore ceased to exist as an independent statute.

It is important to draw attention to the fact that while the above provision seems to be discriminatory to men in that it only provides for the payment by men of maintenance to women, any adverse effect to men is eliminated by **Section 7(1) of the Sixth Schedule to the Constitution** which provides:

“All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution”.

A conjunctive reading of the above provisions would require the words **“husband”** and **“wife”** to be adapted to the principle of equality in the **Constitution**, and thus replaced with the word **“spouse”** so as not to discriminate any of the sexes, either directly or indirectly. This interpretation has been acknowledged in our law. In the case of ***K.M. v Attorney General and T.M. Petition 458 of 2012***, Majanja J held:

“An application of Section 7(1) of the Sixth Schedule to the Constitution entitles the court to read into the Act words that would bring the Act in conformity with the Constitution. In the circumstances, section 25 of the Matrimonial Causes Act which applies to the wife is now to be read as “spouse” to bring it in conformity with Articles 27 and 45 of the Constitution and section 25 will be read with all the necessary alteration to make it gender neutral”.

While there is a presumptive duty on the spouse with a higher earning capacity to pay alimony to the other spouse, the position as can be gleaned from decided cases is that the spouse who is seeking to be maintained should not seek the court’s intervention to be granted maintenance without providing evidence that he or she has made an effort or is making an effort to secure a livelihood for herself or himself. For instance, In the case of ***WMM v BML [2012] eKLR***, Justice GBM Kariuki (as he then was) observed that:

“In considering a claim for maintenance, regard must be had to the provisions of Article 45(3) of the Constitution of Kenya which recognizes 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”. No spouse who is capable of earning should be allowed to shirk his or her responsibility to support himself or herself or to 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 story of Kenya’s law on post-divorce maintenance is essentially one of gradual and incremental development through organic case law without an overarching legislative framework.

Assessment of the Quantum of Post-divorce Settlement

The **Marriage Act 2014** attempts to give a guideline on the circumstances under which the court may grant maintenance to a spouse. **Section 77** of the **Act** provides as follows:

“(1) The court may order a person to pay maintenance to a spouse or a former spouse –

- a. if the person has refused or neglected to provide for the spouse or former spouse as required by this Act;***
- b. if the person has deserted the other spouse or former spouse, for as long as the desertion continues;***
- c. during the court of any matrimonial proceedings;***
- d. when granting or after granting a decree of separation or divorce; or***
- e. if, after making a decree of presumption of death, the spouse or former is found to be alive.***

(2) 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.”

The court has been granted wide discretion in determining the maintenance to be paid to a spouse during divorce proceedings and after the granting of the decree of divorce. The **Marriage Act 2014** does not however give the parameters upon which the court may assess maintenance to be paid to a spouse. This is unlike the situation in South Africa. In matters of post-divorce maintenance in South African, the law is governed by the provisions of **Section 7** of the **Divorce Act 70 of 1979**. The relevant part is **Section 7(2)** of the **Act** which provides:

“... the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the breakdown of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until death or remarriage of the party in whose favour the order is given, whichever event may first occur”.

To some extent, the South African law is the codification of the principles that have been accepted and applied by courts within Commonwealth countries that apply the common law tradition. Some of the above principles have been applied by Courts in Kenya. In view of the above authorities, I am persuaded that in exercising its discretion to make orders for post-divorce maintenance, it is the duty of this court to be guided by the objectives sought to be achieved by such orders. These include, but are not limited to, the following:

- a. Identify the economic advantages and losses to the spouses as have been contributed by the subsistence of the marriage or its breakdown;
- b. Apportion between the parties the attendant expenses of maintaining the issues of the marriage;
- c. Provide relief to cover the negative consequences for the spouses as may likely arise from the breakdown of the marriage;
- d. Make sufficient provision to enable the parties to become economically self-sufficient within a reasonable duration of time.

Moreover, the common law rules that govern post-divorce maintenance derived from Kenyan as well as comparative case law indicate that the exercise by this Court of its discretionary power to award maintenance must be informed by an examination of all the circumstance of the case including: the present and future assets, income, and earning potential of the parties, taking into account their ages and professional qualification; the financial needs and obligations of the parties; the duration of the marriage and the duration of time in which the parties lived separately; the standard of living prior to the breakdown of the marriage; the contributions of the parties to the welfare of the family; and the conduct, where relevant, of each party in relation to the eventual breakdown of the marriage.

Present and future assets, income earning capacity, and age

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.”*** The Respondent is opposed to being compelled by this court to pay to the Petitioner maintenance because she is said to be a topnotch artist capable of earning an income and sustaining herself. However, the Petitioner’s ability to earn income is not in itself a ground that can exclude the payment by her former husband of maintenance to her.

While the Petitioner’s capacity to earn an income is one of the factors to be taken into account in assessing ancillary relief, the important point is whether any income that she is likely to earn would be

sufficient. It was common ground that the Petitioner has not been working since 2011 when she left her job in Sudan. She was then aged 54 years. At her age, it may not be easy for the Petitioner to get back into employment, and this has a direct impact on her earning capacity which has since diminished. It is therefore just and equitable to award alimony to the Petitioner because this will compensate her for the loss of her earning capacity, supply relief for the negative post-divorce consequences, and improve her chances of attaining self-sufficiency in the longer term.

In the case of **SCC v MKC [2014] eKLR**, Justice Ngenye-Macharia held that:

“... alimony or maintenance can be paid where, even if a party is earning, is disadvantaged to fully meet family needs already placed on her/him before the final divorce is pronounced or upon dissolution of the marriage respectively”.

Financial needs and obligations

The Petitioner filed a schedule of documents on 12th February 2014 consisting of invoices, receipts, statements, and letters reminding her of pending or overdue payments. An examination of these documents shows that the Petitioner spends approximately Kshs.380,000/- per month, a figure far more than the sum of Kshs.150,000 that the Respondent currently pays her as maintenance per month. Being unemployed and having no assets, the Petitioner has no other source of income and occasionally receives some financial assistance from her mother and friends. For his part, the Respondent has not produced any evidence of his monthly income and expenditure but has maintained that his monthly income consists of only Kshs. 6,000 from his army pension and approximately Kshs.250,000 to 350,000 from his business of trading in shares. From the evidence adduced in court, it was clear to this court that the Respondent concealed from the court his income. The Respondent's lifestyle as adduced in evidence by both the Petitioner and the Respondent himself cannot be supported by the paltry income he says he earns. The court got the impression that when the Petitioner lodged the present petition, the Respondent made every effort to conceal all his properties through limited liability companies which he incorporated for the purpose or by transferring some of the properties to his nominees and or close relatives.

The Respondent's plea that he was literally a pauper dependant on the goodwill of his relatives rings hollow when the evidence adduced in this case is considered in totality. The Respondent pleaded that this court should not accord him special treatment on account of his surname. It was his case that his present circumstances should be considered just like the court would treat any other Kenyan who did not have famous relatives. The position taken by the Respondent in that regard is both fallacious and self-serving. This court has heard many cases involving maintenance of spouses. The evidence adduced in this case were unique in the sense that it was clear to the court that from the word go, the Respondent took the position that under no circumstances was he going to pay maintenance to the Petitioner. In that regard, by hook or crook, he used all legal means to frustrate the Petitioner from being paid any maintenance. He also stubbornly refused to disclose to the court his net worth and the properties he owns. Upon evaluation of the evidence adduced in this case, it was clear to the court that the Respondent was less than candid when he claims to be a pauper. The court got the distinct impression that the Respondent is a person who is used to having his way and would go to any lengths to frustrate anyone who would be an impediment to his wishes. Unlike other such cases where the issue that the court is left to grapple with after divorce is division of matrimonial property, in this case the Respondent has frustrated any inquiry being made by the court to determine the extent of the properties that he owns. Yet it was clear from the lifestyle that leads that he has substantial income which he did not wish to disclose to the court. The final order of maintenance that shall be made by this court will be made on the basis that the Respondent owns substantial property and income which he deliberately failed to disclose to the court.

Even assuming that the Petitioner was earning or will subsequently earn some income, there is authority in our case law that that fact does not exclude her from the benefit of maintenance payment by the Respondent. Indeed, in the appeal judgment in the case of **K v K, Civil Appeal No. 74 of 1984** it was held that:

“Where the wife is earning income, the whole of it need not and should not ordinarily be

brought into account so as to ensure that the husband's benefit particularly where ... she would not reasonably be expected to be working if the marriage had not been disrupted".

This court is persuaded by the reasoning in the above holding of the Court of Appeal because the Petitioner in the present case was entirely dependent on the Respondent during the subsistence of the marriage. This point is admitted by the Respondent. It would therefore be reasonable to conclude that had the marriage not broken down, it would be unlikely that the Petitioner would find it necessary to work because the Respondent, per his own admission, would provide for all the needs of the family.

Duration of the marriage and time spent living apart

The duration of the marriage and the time that the parties lived separate and apart from one another is disputed. The Respondent states that the marriage subsisted for thirteen (13) years before the Petitioner deserted the matrimonial home in 2006, while the Petitioner maintains that the marriage lasted for fifteen (15) years before the parties separated in 2008.

Standard of living during the marriage

The Petitioner has maintained that the standard of living during the marriage between her and the Respondent was reasonably high. It was not that of the middle class but that of persons of a higher class. She testified that they had so many workers in their employ at their Muthaiga matrimonial home that the place looked like a small village. This was denied by the Respondent. He however conceded that he presently has **"only"** 9 employees, including cooks, house helps, gardeners, security guards, and car and swimming pool attendants. The Respondent would like the court to believe that the lifestyle he currently maintains is supported by his relatives and well-wishers. That explanation is improbable as it is fictitious. The two issues of the marriage attended various high cost schools in Kenya, including **[particulars withheld]** School. The Respondent paid the school fees of the children without any difficulty. His explanation on how he was able to pay these fees is as expected from him is that he was supported by his relatives and well-wishers. The children are currently studying in high cost Universities in the United Kingdom. One is studying at **[particulars withheld]** while the other is studying at the **[particulars withheld]**. The children live off campus in residences rented for them by the Respondent. Again, the Respondent stated that it is his relatives and well-wishers who support him to pay the tuition fees and support the living expenses of the children. The Respondent did not deny the claim by the Petitioner which was to the effect that during the subsistence of their marriage, they regularly went on holidays abroad. This left no doubt that the parties maintained a very high standard of living.

The Petitioner is currently struggling to maintain herself. She has been unable to pay her utility expenses on time causing her to receive correspondence from the service providers reminding her to comply or warning her of the adverse results of failure to comply. She has no vehicle of her own, having sold the one that she owned two (2) years ago, and currently relies on taxis or hired vehicles in order to move around. The Respondent has similarly claimed to have fallen on hard times since the closure of his flagship businesses and claims to be depending of the help of family, friends and well-wishers. But, unlike the Petitioner, the Respondent has not been forthcoming about what he owns; his testimony has been inconsistent, less than candid, and was an exercise by the Respondent of concealment of material facts and information from the court. Indeed, the Respondent denied ownership of all properties associated with him, claiming that they belonged to his father, his sister, his family, his friends, or people not known to him. While doubt was cast to many of his responses during the hearing, he did not seek to support his claims with convincing evidence. The only conclusion that this court reached from assessment of the Respondent's evidence in regard to the properties that he owns is that the Respondent is a person of substantial means and of substantial income who has over time perfected the art of concealing what he actually owns. However, his reluctance to disclose his properties will not prevent this court from rendering its decision in accordance with the evidence placed on record.

Be that as it may, it is accepted that parties who approach the court for spousal maintenance cannot expect the court to afford them the lifestyle to which they were accustomed during the marriage. It is nonetheless important to be guided by the principle that the resulting standard of living should be kept as close as

practicably possible to that enjoyed during the marriage.

Contributions of the parties to the family welfare

It is not disputed that the Respondent has been bearing the greater part if not all of the responsibility to provide for the family.

Constitutional Questions on Equality in Marriage

Certain constitutional questions have been raised by the Respondent in a bid to challenge any obligation on his part to pay to the Petitioner maintenance and to also cater for the expenses of the issues of the marriage on his own. Central to his argument is the proposition that the **Constitution** recognizes equality of parties to a marriage and therefore envisages the equal contribution by both the Respondent and the Petitioner to the education and welfare of the children. He further contends that to compel him to pay maintenance to the Petitioner and to also pay for the expenses of the children of the marriage would be discriminatory, and contrary to the **Constitution**.

The constitutional provisions that are relevant to the Respondent's argument and which he calls to his aid are **Articles 45(3), 53(1)(e) & 27(4)** of the **Constitution**, all of which are contained in the Bill of Rights. **Article 45(3)** of the **Constitution** provides:

“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”.

Article 53(1)(e) of the **Constitution** provides:

“Every child has the right –

(e) to parental care and protection which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not”;

Article 27(4) of the **Constitution** provides:

“The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth”.

The question to which this court will now focus its attention is whether an order that the Respondent pays maintenance to the Petitioner as well as the expenses of issues of the marriage would offend the principle of equality and freedom from discrimination, and that of equal responsibility of and contribution by parties to a marriage. Before answering this question, it is important to clarify a preliminary yet important issue: the jurisdiction of this court to determine legal questions that relate to the Bill of Rights. **Article 23(1)** of the **Constitution** empowers the court in this regard by providing:

“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights”.

While the finding of this court that that the Respondent is liable to pay to the Petitioner lump sum maintenance and also to pay for the expenses of the issues of the marriage may appear to run afoul of the idea of equality, this court finds, on careful analysis, that this is not necessarily the case. **Articles 45(3), 53(1) and 27 of the Constitution** depart from the common law position where husbands were viewed as the primary providers of the family and therefore bore the task of maintaining their wives or former wives pending the divorce or even after divorce had been granted. This view has been expressed by Justice Musyoka in the case of **SMR v PHS [2013] eKLR**:

“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. ... Under the Constitution, the respondent has a duty to support and maintain herself no less than the petitioner has to maintain 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”.

However, it must be borne in mind that the primary object of the above equality provisions in the **Constitution** is to ensure that every person is afforded equal protection by the law and equal benefit from it.

The Respondent’s thesis is that since he and the Petitioner were equal parties in their marriage, they should consequently bear equal responsibilities that follow from the dissolution of the marriage. His conception of equality presupposes parity of treatment by the law and by this court of the parties because they were equal in their roles as husband and wife. However, it is apparent that the parties were never equal in these roles. Since getting married, the Respondent assumed the sole responsibility of maintaining the Petitioner and the issues of the marriage. There was no time during the subsistence of the marriage that the Petitioner was required to contribute towards her own maintenance and that of her children. It was common ground that it was the Respondent, and still is the Respondent who is the earner in the family. The Petitioner has never been required to contribute towards the maintenance of the children. For the Respondent to argue that since he was the one who was now providing for the children and therefore, he is not required to provide maintenance for the Petitioner is a disingenuous.

To adopt the Respondent’s interpretation of **Article 45(3)** of the **Constitution** is tantamount to denying the fact that the Respondent was and still is the higher earning party, and is likely to remain so in the foreseeable future. The Constitutional requirement of equal treatment of the parties to a marriage takes cognizance of the respective earning capacities of the parties to the marriage during the subsistence of the marriage. That equal treatment can only be interpreted to mean the treatment that the parties accorded to each other during the subsistence of the marriage. In the present case, it was established to the required standard of proof beyond any reasonable doubt that it was the Respondent who solely provided for the maintenance of the Petitioner and the children of the marriage during the subsistence of the marriage.

The better view that is taken by this court is that **Article 45(3)** of the **Constitution** envisages that while parties to a marriage are equal bearers of rights, it is often the case that their economic and other circumstances are markedly dissimilar. Men are, in most cases, more likely to exercise greater control in the marriage as compared to women. In such cases, as is the case with the present matter, it would amount to a misapprehension of the law to insist upon an unrealistic reading of **Article 45(3) and 53(1)(e)** of the **Constitution** that demands the identical treatment of the parties to a marriage. The Respondent admitted that he provided on an almost exclusive basis for the Petitioner and their children during the subsistence of the marriage. This establishes the fact that while the parties had equal rights, they shouldered unequal responsibilities.

The Respondent has also argued that to compel him to pay maintenance to the Petitioner would amount to discrimination because of his age, which action he contends would be discriminatory and in contravention of **Article 27(4)** of the **Constitution**. His argument stems from his submission that the Petitioner is in his age bracket and can work or conduct business in order to be self-sufficient. The thrust of his contention is that since both of them are more or less the same age, one should not be dependent on the other.

What orders should issue in regard to maintenance?

In the present case, the court has taken into account the respective earning capabilities of the parties. It has also taken into account the age of the Petitioner and the fact that she will unlikely to secure an employment that will give her consistent earning both in short and in the long term. The court also took into account the fact that the Respondent has consistently frustrated the Petitioner from her accessing her monthly maintenance. The Petitioner’s conduct before the courts of justices has elicited various comments by Judges of this court. For instance, Lenaola J in **Philip Kipchirchir Moi v Attorney**

General & Rossana Pluda Moi, Constitutional Petition No. 65 of 2012, observed that:

“Without directly condemning him for forum-shopping, I am also aware that while this ruling was pending delivery, he waited until the Easter Vacation had started, appeared before Ombija J., and obtained orders akin to the ones that he is now seeking, albeit on a temporary basis, within Divorce Cause No. 154 of 2008. That, by whatever other name, is an abuse of the process of the Court ...”

A similar observation was made concerning the Respondent’s conduct in the Ruling of this court per Kariuki J of 26th June 2012 in respect of the non-payment by the Respondent of the accumulated arrears of maintenance to the Petitioner, where the learned Judge stated that:

“The Respondent misled the court. He led the court to believe that the debt owing was Kshs.540,000 as of 17th January 2012 and that he had paid it in full. The truth of the matter was that the sum of accumulated arrears of maintenance was in excess of Kshs.7 million. And he knew it. In the statement of affairs which the Respondent signed on 25.5.2012, and submitted to the Bankruptcy Court in Milimani Commercial and Admiralty Division in Bankruptcy Cause No. 13 of 2012, the Respondent filled in respect of unsecured creditors the name of the Petitioner and showed the amount of debt he owes the Petitioner to be Kshs.7.5 million. He also indicated that it was due by dint of court judgment. ... It is patent that the Respondent has trivialized the litigation and showed scant respect for the truth and the court process”.

It was clear to this court that if this court were to make an order that the Respondent pays monthly maintenance to the Petitioner, taking into consideration the history of this case, it is more likely than not that the Petitioner would be compelled to file an application every other month to enforce the maintenance order. The Respondent told the court that it would be his desire that he be ordered to pay one lump sum so that he is not required to pay monthly maintenance to the Petitioner. This court is of the view that the monthly maintenance to be paid to the Petitioner should be such that it would enable her to make adequate arrangement for her own support in the long term. The Respondent is under no obligation to maintain the Petitioner until her death.

Taking into consideration the entire circumstances in this case, this court is of the view that the Respondent should pay the Petitioner the sum of Kshs.250,000/- per month for a period of ten years. Since the Respondent has indicated that he would like to pay this sum as lump sum, the Respondent is hereby ordered to pay the Petitioner the sum of Kshs.30 million. In addition, the Respondent conceded that he was obligated to provide a house for the Petitioner. In fact during the proceedings, in recognition of this obligation, the Respondent offered to give to the Petitioner a plot in Mombasa which in his estimation was valued at Kshs.120 million. The Petitioner could not take up this offer because the parcel of land is mired in a legal dispute. This court therefore orders the Respondent to provide the Petitioner with a house within one of the following localities: Runda, Lavington, Kileleshwa, Kilimani or Karen or any other upmarket area of Nairobi. This will accord with the standard of living that the Petitioner was used to during the subsistence of their marriage. He shall provide this house within ninety (90) days or in default thereof he shall pay the Petitioner the sum of Kshs.60 million. In view of the protracted nature of this case, the Petitioner shall have the cost of this suit.

In the premises therefore, judgment is entered in this cause in the following terms:

- I. The marriage solemnized between the Petitioner and the Respondent on 1st March 1993 is hereby dissolved. Decree nisi dissolving the marriage is hereby issued. It shall be made absolute thirty (30) days from the date of this judgment.
- II. The Respondent shall pay maintenance to the Petitioner to the sum of Kshs.30 million within ninety (90) days of the date of this judgment.
- III. The Respondent shall provide the Petitioner with a house within one of the following localities: Runda, Lavington, Kileleshwa, Kilimani or Karen or any other upmarket area of Nairobi that will accord with the standard of living that the Petitioner was used to during the subsistence of the

marriage. The Respondent shall provide the house within ninety (90) days of the date of this judgment or if he fails to do so, he shall pay to the Petitioner the sum of Kshs.60 million.
IV.The Respondent shall pay the cost of the suit to the Petitioner.

DATED AT NAIROBI THIS 10TH DAY OF MARCH 2015

L. KIMARU

JUDGE