IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Law V-P, Mustafa & Musoke JJ A)

CIVIL APPEAL NO. 7 OF 1977

BETWEEN

R.J.T.....APPELLANT

AND

H.M.T.....RESPONDENT

(Appeal against the order of Madan J in the High Court dated 28th October 1976 in Divorce Cause No 44 of 1971)

JUDGMENT

In January 1972 the marriage between the appellant and the respondent was dissolved. (We will refer to them as Mr T and Mrs T, respectively.) On 28th September 1972, a consent order for the maintenance of Mrs T, and the maintenance, custody and education of the two children of the marriage, was made an order of the court under rules 39, 40 and 50 of the Matrimonial Causes Rules. In terms of this order, the following matters were agreed. (1) The parties were to have joint custody of the children, of whom Mrs T was to have care and control. (2) Mr T was to pay Mrs T Shs 1500 a month for her maintenance, subject to revision in the event of either party "earning more or less than at present". (3) Mr T was to bear the cost of the children's education and further training, and of their medical and dental treatment. And (4) Mr T was to pay Mrs T Shs 1100 a month for the maintenance of the children.

Since the making of the consent order, Mr T has remarried. His second wife has two children of her own, and there is one child of the second marriage. Mrs T has not remarried. Mr T earns a gross basic salary of Shs 5416 a month, which is no more than he was earning at the date of the consent order. In addition, he enjoys some benefits such as free housing (in respect of which he is assessed to income tax), the use of a company car, and he receives from his employers Shs 160,000 a year as education allowance towards the expense of educating the two children of the marriage. Their school fees as boarders now amount to Shs 25,200 a year, so that Mr T's net liability in this respect comes to Shs 9200 a year, or about Shs 760 a month. Mr T is accordingly paying, under the consent order Shs 1500 for Mrs T's maintenance, Shs 1100 for the children's maintenance, and Shs 760 for their education; making a total of Shs 3360 a month. This leaves him with (roughly) Shs 1670 a month to maintaining himself, his wife and the child of his second marriage. His wife's two children by her first marriage are maintained by her first husband.

On 18th March 1976, Mrs T applied to the High Court for the agreed maintenance for herself and the two children of the marriage to be increased by 60 per cent, and for other matters with which we are not concerned in this appeal. The basis of the application for increased maintenance was, according to Mr Parbary, who appeared for Mrs T in the High Court and on this appeal, that the cost of living had risen by

60 per cent since the date of the consent order. Mr T, represented by Mr Le Pelley in the High Court and here, asked that the agreed maintenance should be reduced; chiefly on the ground that, as the children were now boarders instead of day pupils, Mrs T was relieved of the cost of their maintenance for about eight months in every year.

In the event Madan J increased both maintenance orders by what he described as a "composite" sum of Shs 450 a month. With respect, this was wrong. He should have specified by what amount the wife's maintenance was increased, and by what amount the children's. These are separate and distinct matters. Mrs T's maintenance remains effective until and if she remarries, which may be never. The children's maintenance ceases when they are capable of maintaining themselves. The amount of increase allocated to each type of maintenance should have been specified. The judge's decision to increase maintenance was based entirely on the effect of inflation which, he said, demanded sacrifices on both sides.

Mr T has appealed. His counsel, Mr Le Pelley, submitted that not only should the judge's order be set aside, but the maintenance agreed in the consent order for Mrs T and the two children should be reduced on the grounds (a) that Mr T is paying far more for the children's education than at the date of the consent order, and (b) that now that the children are boarders, Mr T is in effect maintaining them for eight months in each year, and Mrs T for only four months. Mr Le Pelley submitted that the judge made no reference to these grounds, the latter alone in his submission justifying a substantial reduction in the children's maintenance of Shs 1100 a month received by Mrs T.

Mr Parbary for Mrs T supported Madan J's decision, although the increase awarded amounted only to some 20 per cent as against the 60 per cent claimed by her. He stressed that Mrs T, not being a Kenya citizen, could not seek employment. Her only income was that represented by the maintenance orders, and it had been sadly eroded by inflation He also submitted that the judge's decision represented an exercise of discretion which should not be interfered with on appeal, no error of principle being involved.

As regards this last submission, we do not think that an application for an order of maintenance, or for variation of such an order, can be equated with an award of general damages, which represents an exercise of discretion. General damages are assessed without regard to the defendant's means; the sole criterion being what is a fair and just compensation for the injury suffered by the plaintiff. In proceedings for maintenance, the husband's means are highly relevant. The wife may need (say) £5000 a year to maintain herself adequately; but if the husband's means are such that he could not pay that sum, it would not be awarded. An appellate court will not interfere with an award of general damages, unless it is so manifestly excessive or inadequate as to represent an erroneous estimate. The position in the case of maintenance orders is quite different, and an appellate court will substitute the figure which it considers right, even if only a very small variation is involved. We agree with, and adopt in this respect, the *dictum* of Donovan LJ in *Irvine v Irvine* (1963) 107 SJ 213 cited with approval by Sellers LJ in *Williams v Williams* [1965] p 125, 139:

It is to be remembered, however, in this class of case, that this Court may arrive at a figure which is not greatly in excess of the figure which the court below has ordered and yet which might make a material difference to a woman who has to support herself and three infant children. In the field of general damages there is generally room for more than one opinion as to the proper sum to be awarded; and this Court does not interfere unless it can say that the damages awarded have been on a scale which is manifestly wrong. When one comes to the question of living expenses, however, one is moving in a field where it is possible for much greater accuracy in the estimate. Accordingly, I think that the rule whereby the Court does not interfere unless the figure given below is greatly out of scale ought to be applied in this type of case with some caution ...

We also heard argument as to whether Madan J, in deciding Mrs T's application for a variation of the maintenance agreed in the original consent order, was right in taking that order as the starting-point, instead of approaching the whole matter *de novo*, and basing his decision on what is generally known as the "one-third rule". We think that the correct approach in such cases is as stated by Willmer LJ in *Foster v Foster* [1964] 1 WLR 1155, 1157:

... the jurisdiction is a jurisdiction to vary, and basically what the Court has to do is to consider whether an order to vary should be made, and, if so, by how much the order should be varied. *Prima facie*, it is not a jurisdiction to refix *de novo* the amount of maintenance. Secondly, the Court is specifically directed to take into consideration any increase or decrease in the means of either of the parties.

Applying these principles to the matter now before us, so far as Mrs T's personal maintenance is concerned, there has been no increase or decrease in the means of the parties since the date of the consent order fixing her maintenance at Shs 1500 a month. In real terms, the purchasing power of that maintenance has decreased owing to inflation, but the same consideration applied to Mr T's income. In money terms, the parties are in much the same position as they were at the date of the consent order. As regards the children's maintenance, it is true that, now that the children are boarders, Mrs T has been relieved of part of the burden of maintaining them. The cost of their education, paid by Mr T, has gone up considerably, but that increase has been largely mitigated by the education allowances received by Mr T from his employers.

In these circumstances, has any case been made out by either party for a variation in the consent order? We have come to the conclusion that no case has been made out for any increase in the sums actually being paid by Mr T for the maintenance of Mrs T and the children. Her maintenance has been adversely affected by inflation, a factor for which Mr T is not responsible. This has been counter-balanced by the fact that she does not have to maintain the children while they are at boarding school. Taking into account the fact that Mr T is paying the school fees, about two-thirds of his income is now being spent on Mrs T and the children of the marriage. We do not think he can be reasonably expected to pay more, without undue hardship to himself. Nor do we think that we should order a reduction in the amount of the children's maintenance. Although Mrs T has been relieved of the burden of providing food for them while at boarding school, the cost of maintaining them for the rest of the year is no doubt rising all the time as they get older and their needs increase. In all the circumstances we are of the view that no case was made out for any variation in the terms of the original consent order, and we think that Mrs T's application for a variation of that order should have been dismissed. We order accordingly; but leave undisturbed the order for costs made in favour of Mrs T in the High Court. We set aside the order for a "composite" increase of Shs 450 made in the High Court, and substitute an order dismissing the application. The appeal is allowed. Mr Le Pelley very properly did not ask for the costs of the appeal, so that the appeal is allowed, with no order as to costs.

Appeal allowed. No order for costs.

Dated and Delivered at Nairobi this 17th day of June 1977.

E.J.E.LAW

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VICE PREZIDENT

A.MUSTAFA

.....

JUDGE OF APPEAL

J.S.MUSOKE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR