SMK v NWM (Civil Appeal 129 of 2020)
[2021] KECA 146 (KLR) (19 November 2021) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 129 OF 2020

K M'INOTI, F SICHALE & J MOHAMMED, JJA

NOVEMBER 19, 2021

BETWEEN

SMK ..... APPELLANT

AND

NWM ..... RESPONDENT

((Being an Appeal against the judgment of the High Court of Kenya at Nairobi (Asenath Ongeri, J.) dated 24h January, 2020 in Matrimonial Cause No. 69 of 2018)

JUDGMENT

1 The appeal before us involves the perennial war between husband and wife over matrimonial property. The appellant, SMK and the respondent, NWM were married on 27th December 1977 under Kikuyu customary law, and they acquired significant assets over the next four or so decades before things went awry.

2. At the start of the marriage, the parties did not have any property of consequence to their names. The appellant was a first year law student at the University of Nairobi. He was then 23 years old. The respondent was then 19½ years and was at the time 3 months pregnant, the consequence of which she had to defer her entry into college until 1979 when she joined Murang'a School of Nursing.

3. On completion of his Bachelor of Laws degree, the appellant was posted to various stations as a judicial officer. The appellant, at an early age in his career invested in a matatu business while his wife finished her education and was employed as a nurse.

4. In 1983, the appellant bought a family car, KSL xxx Datsun pickup, which he sold and subsequently purchased other vehicles; a Peugeot KVF xxx, KXD xxx and KAC xxx A which were used as matatus plying the Embu Nairobi route. The business prospered and its proceeds led to the purchase of land Gaturi/Weru/1101. In 1993 the appellant bought their first home in Kileleshwa LR No/209[ ]. He later sold off the matatu business and invested the proceeds and some of his savings in stocks and shares

to the tune of Kshs 750,000. He also bought 3.8 acres of land, Ngong/Ngong/xxx/xx - Upper Matasia which he paid for in installments between 2009 -2011. In 2011 he purchased a second home being [Particulars Withheld] House No. 3, Karen (LR NO. xxxxx/xx a) for Kshs. 36,000,000 which they subsequently moved into.

5. The investment portfolio continued to flourish. On 12th April 2012, the appellant bought Kinanie Athi River for Kshs. 14,500,000. He then sold their original home in Kileleshwa for Kshs. 86 Million in 2012. Part of the proceeds from this sale were then used to purchase a block of flats at Kahawa Wendani for Kshs. 46 Million and another house, being [Particulars Withheld] House No. 10 Karen for 65 Million. The latter was sold on 12th May 2017 for 83 Million.

6. On the other hand, the respondent, who in addition to being in gainful employment as a nurse, also invested in a knitting business from the year 1990 to 1999 and a tyre sale business from 1998 to the year 2000. She had other businesses such as selling honey and growing potatoes in the Rift Valley. Whereas the investment portfolio was flourishing, their marriage, like other marriages was beset with ups and downs. This culminated in the dissolution of the marriage on 19th October 2018 by the High Court in Divorce Cause No. x of 2010 , resulting in the filing of a suit by the respondent (the then applicant) by way of an Originating Summons dated 16th November 2018 seeking division of the accumulated assets which she alleged were matrimonial property held in trust by the appellant (the then respondent) which, according to her, were acquired and developed in the course of their marriage by joint effort. She sought the following orders.

    i. "THAT the Honorable Court be pleased to declare that the immovable and moveable properties listed herein below were acquired by the parties jointly and that the same is held by the Respondent beneficially and in trust for the Applicant;

    "SCHELDULE OF THE PROPERTIES "SUIT PROPERTIES"

    a. Miotoni [Particulars Withheld] House No. x, Karen (the Matrimonial Home) situated on [particulars withheld].

    b. Miotoni [Particulars Withheld] House [...]Karen situated on [...]

    c. Block of flats in Kahawa situated on [...]

    d. [...](Leasehold) 0.2229 hectares

    e. I.R. [...]situated in Athi River 9.930 hectares

    f. Office Suite No. 2 on [...].situated on [...]

    g. NGONG/NGONG/[...]

    h. KBR [...]

    i. KBR [...]

    j. Nissan Sunny KAL [...]

    k. Prado KBK [...]

    l. Toyota Fielder KCC [...]

    m. Any other property acquired by the parties during the course of the marriage.

ii. THAT this Honourable Court be pleased to order that the Applicant is entitled to equal share of the properties listed in prayer 1 above or in the alternative an order that the properties be sold and the Applicant entitled to an equal share of the proceeds of sale.

iii. THAT Miotoni [Particulars Withheld] house No. x situated on LR. No. [...]be given to the applicant.

iv. Alimony.

v. THAT this Honourable Court be pleased to make such further orders as it may deem fit and just in the circumstances of this case.**

vi. THAT the cost of this Summons be provided for."**

7. In her supporting affidavit sworn on 16th November 2018 and further affidavit sworn on 31st January 2019 , the respondent deponed that she made monetary and non-monetary contributions towards the acquisition of the matrimonial property. She contended that she supported the family financially through her income as a nurse, her knitting business and motor vehicles tyre business; she took care of the home, the appellant, and their four children; she took loans to improve the matrimonial home; she farmed, furnished the home and paid school fees for their children. She deposed that her earnings supplemented the appellant's income and she trusted him to invest as the head of the family and he purchased the scheduled properties which were registered in his name in trust for her benefit and for their children. She alleged that the appellant had already sold one of the properties and that he had solely benefited from the finances from the rented matrimonial properties.

8. In a replying affidavit sworn on 13th December 2018 and further affidavit sworn on 31st January 2019, the appellant denied that the respondent was entitled to any share of the scheduled properties. He gave a comprehensive history of their married life, work and business engagements, his sources of income and how he single handedly acquired each property and catered for all the family expenses including household bills, house furniture, groceries, school fees and housing. In his view the appellant was a "joyrider" who neglected her home, her family and kept her income to herself and refused to pay for any household expenses. He contended that the only property that fell within the meaning of matrimonial property was [Particulars Withheld] No. 3 which was their matrimonial home even though the respondent did not contribute a dime towards its acquisition. He maintained that though the other properties were acquired during the subsistence of their marriage, they were neither jointly owned nor jointly acquired.

9. In a judgment dated 24th January, 2020, the learned Judge (Ongeri, J.) considered the issues raised by both parties and came to the conclusion that the respondent was entitled to 50% share of all matrimonial properties. She stated:

> " The Respondent took advantage of the Applicant's ignorance of the law and attempted to rubbish her non-monetary contribution to the acquisition of the Matrimonial Properties herein. I find that the Applicant contributed towards the acquisition of the Matrimonial properties and that her contribution was substantial and unascertainable but was equal to that of the Respondent since both were in gainful employment and the Applicant had side hassles."
>
> Save for Motor Vehicle registration No. KCC xxx B, which the court found belonged to their third born daughter (MM) and the land situated in Athi River being 9.930 hectares which the court held was purchased after the marriage had broken down, the learned judge

allowed the respondent's originating summons and distributed the matrimonial property as follows:

> "a. THAT Miotoni [Particulars Withheld] House No. x Karen be and is hereby allocated to the Applicant. The same to be transferred to her and the Respondent to move out within 60 days of this date.
>
> b.THAT Miotoni [Particulars Withheld] House No. xx Karen is allocated to the Respondent. Since he has sold the same he will retain the proceeds.
>
> c. THAT the rental proceeds from Kahawa Wendani Flats to be shared at 50:50% between the Applicant and the Respondent with effect from the date the said flat were purchased.
>
> d. THAT Ngong/Ngong/xxxxx Upper Matasia to be shared by the parties on a 50:50 basis. The same to be held by the Respondent in trust for the Applicant because they buried their son there.
>
> e. THAT the Shares at the Nairobi Stock Exchange to be shared on a 50:50% basis between the Applicant and the Respondent.
>
> f. THAT Motor Vehicle KBK xxx Q Toyota Prado to remain with the Respondent.
>
> g. THAT Motor Vehicle Reg. No. KAL xxx B to be transferred to the Applicant.
>
> h. (iii) If the parties do not agree with the distribution mode by the court within 60 days of this date, the said properties shall be sold and the net proceeds shared equally as between the Applicant and the Respondent within six (6) months thereof.
>
> i. (iv) THAT in that case, the proceeds of sale from Miotoni [Particulars Withheld] which the Respondent sold amounting to 112,000,000 to be shared equally on a 50:50 % between the Applicant and the Respondent."

10. It is this judgment that has provoked the appeal before us vide a memorandum of appeal dated 16th March 2020, where the appellant has listed a whopping 57 grounds of appeal. We find most of these grounds to be repetitive, argumentative and contrary to the requirements of Rule 86(1) of the Court of Appeal Rules which stipulates as follows:

> "A Memorandum of Appeal shall set forth concisely and under distinct heads, without argument or narrative the grounds of objection to the decision appealed against, specifically the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make."

11. We deprecate such practice and reiterate once more that counsel should always seek to comply with Rule 86(1) aforesaid. Be that as it may, the appellant's complaints in a nutshell, are that the learned judge erred in law and fact by holding that all the properties owned by the appellant were matrimonial property save for the Athi River land and that the respondent was entitled to a 50% share of the said properties; finding that the respondent made direct and indirect contribution to the acquisition of the scheduled properties yet the respondent did not adduce any proof of the same; failing to appreciate that in law property does not become matrimonial property by virtue of being acquired during the subsistence of the marriage; finding that the Kileleshwa property was one of the matrimonial homes; finding that the respondent contributed to acquisition of shares in the stock exchange and was entitled

to half yet she provided no evidence of her contribution nor was the same pleaded and finally, failing to give due weight and consideration to the appellant's evidence and explanation as to how he exclusively acquired each of the properties in question.

12. At the plenary hearing, the appellant who appeared in person, relied on his written submissions and made oral highlights. He faulted the learned judge for awarding the respondent a 50% share of the Karen matrimonial home on the basis that she indirectly contributed towards the purchase of his first car- KSL xxx which the learned judge erroneously traced back as the source of the money that eventually led to the purchase of the said home in 2011. On the contrary, he contended, the evidence showed that at the time the said car was purchased, the respondent was a student in Murang'a Nursing School, living away from home while the appellant took care of the home and the children.

13. With regards to the Kahawa Wendani Flats and [Particulars Withheld] House No. 10 Karen, the appellant contended that the judge erroneously awarded a 50% share of these properties to the respondent on the basis that they were both acquired from the proceeds of the sale of the Kileleshwa home on which the respondent allegedly took a loan of 1 Million in 2010 and spent the same renovating the house. He emphasized that by the time he sold the property in 2012 the parties had moved to their matrimonial home in [Particulars Withheld] House No 3, consequently the property was not a matrimonial home and if any repairs were done by the respondent, then she was only entitled to the cost of repairs in line with Section 9 of the *Matrimonial Property Act*.

14. In his view, the repairs alone did not entitle the respondent to a beneficial interest of the property. Furthermore, he contended that the respondent did not contribute to its acquisition.

15. As for the direct financial contribution by the respondent, the appellant pointed out that the respondent made generalized claims about her contribution to the matrimonial property and even admitted that she did not keep ledgers/records. According to him, there was no cogent evidence in proof of her alleged direct contribution or that she gave the appellant any money to invest on behalf of the family.

16. It was also submitted that there was no evidence to support the finding that the respondent contributed directly or indirectly to the acquisition of the shares currently held by the appellant in the stock exchange. The appellant contended that he sold all his shares worth Kshs. 26,463,004.05 in the year 2011 to finance the purchase of the Karen matrimonial home and that their marriage irretrievably broke down in May 2012 when he called elders to witness their separation. Consequently, there was no basis in law or fact for the Court's finding that the respondent is entitled to 50% of his current holdings in the Nairobi Stock exchange nor had the same been pleaded.

17. Lastly, the appellant submitted that the marriage between the parties was as good as dead as far back as the year 2000 and there could be no companionship in a lifeless marriage. In totality, he opposed the mode of distribution of the scheduled property and asserted that the respondent was not entitled to anything as she was "a joyrider" in the marriage. We were consequently urged to allow the appeal.

18. On behalf of the respondent Mr. Chigiti, Senior Counsel also relied on his written submissions and made oral highlights in opposition to the appeal.

19. He maintained that there was evidence that the respondent made direct and indirect contribution towards the listed properties as she was not a house wife per se but was gainfully employed as a nurse and was earning an income just like the appellant. In addition, she had other sources of income which she poured into the family kitty including income from a knitting and tailoring business, car tyre sales, potato farming, chicken rearing and honey selling business. She took loans from "*chamas*" and welfare groups to grow her businesses and to cater for the family needs.

20. It was further submitted that the respondent renovated their first home in Kileleshwa to the extent that she took a loan of Kshs. 1 Million and that the home was eventually sold for 85 Million. The proceeds from the sale thereof resulted in the purchase of the Kahawa Wendani flats, 9.93 Acres of land in Athi River, the matrimonial home-[Particulars Withheld] House No 3 in Karen, [Particulars Withheld] House No. 10 Karen and several cars. It was the respondent's counsel's view that the respondent has a beneficial interest in all the properties as provided under Section 9 of the *Matrimonial Property Act* and is entitled to 50% share of the same.

21. Counsel further reiterated that the respondent's contribution in terms of child care and companionship could not be disregarded. Her studies took a back seat as she carried and nursed their two children while the appellant undertook his law studies that eventually secured him employment. She also took care of their children and the home thus ensuring that the appellant had peace of mind as he travelled abroad and around the country for work and focused on developing his career and the family businesses. Citing Articles 27 & 45 of the Constitution in light of matrimonial equality, counsel maintained that pregnancy and bearing children has value as an indirect contribution under Section 2 of the *Matrimonial Property Act*.

22. Turning to the issue of whether the respondent was entitled to 50% of the appellant's current shares in the stock market and whether they sought such orders from the court, it was submitted that the respondent had asked for orders in relation to any other property acquired during the subsistence of the marriage and that all the money used to purchase the shares came from the couple's salaries, sale of matrimonial property, income from family businesses and family savings. Having contributed directly and indirectly to the acquisition of the shares, counsel contended that the respondent had a beneficial interest to the shares which had grown over time.

23. In conclusion, Mr. Chigiti, urged us to dismiss the appeal and consider the tenets of equity in marriage.

24. This being a first appeal, we are mandated to reconsider the entire evidence before the trial court and give it fresh analysis but bearing in mind that, unlike the trial court, we never saw or heard the witnesses testify. See *Kenya Ports Authority vs. Kuston (Kenya) Limited* (2009) 2 EA 212 where this Court held:

> " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

25. Article 45(1)(3) of the 2010 Constitution provides for equality of spouses in a marriage. It provides:

> " (3) Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage."

26. This however does not mean that on dissolution of a marriage, the parties

automatically share the matrimonial property on 50:50 per cent basis. Section 7 of the *Matrimonial Property Act*, 2013 provides guidance on the sharing of matrimonial property. It reads:

> " Subject to section 6(3), ownership of matrimonial property vests in the spouses according to contribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved".

27. In our view, the core issues raised in this appeal is to determine the

contribution of either spouse in the acquisition of the assets and whether the listed properties in the respondent's originating summons formed part of the matrimonial property and whether the learned Judge erred in awarding the respondent 50% of the properties.

28. Section 6 of the *Matrimonial Property Act* defines matrimonial property as:

> "(1) For the purposes of this Act, matrimonial property means –
>
> a. The matrimonial home or homes;
>
> b. Household goods and effects in the matrimonial home or homes; or
>
> c. Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage."

29. The appellant told the trial court that although the properties were

acquired during the subsistence of the marriage, they were solely acquired by him and the respondent's contribution was zero. The appellant maintained that as the property was not jointly acquired, it cannot be jointly owned. The learned trial judge however took a different view. She held that all the properties (save for the 9.930 hectares in Athi River and Motor vehicle registration No. KCC xxx B) were acquired during coverture and hence were matrimonial property. The learned judge stated:

> "I find that there is evidence which is undisputed that all the properties listed on the originating summons were acquired during coverture.
>
> The parties are in agreement that the first property was M/v Reg. No. KSL xxx Datsun 1200 which the Respondent bought in December, 1983. The respondent said he bought that vehicle solely with his own funds without any monetary contribution from the Applicant.
>
> However, there is evidence that the Respondent bought that vehicle for use by his family. At that time, the Applicant had staggered her career for purposes of child care and therefore she also contributed in kind to the family progress."

She further stated:

> "I find that there is evidence that the first property KSL xxx which the applicant purchased for the use of his family was sold in 1985 and the Respondent purchased KVF xxx and he also bought KXD xxx and he converted the two vehicles into Matatus plying between Embu and Nairobi. I find that there is evidence that KSL xxx gave birth to KVF xxx and KVF xxx gave birth to KXD xxx. At this time, the Applicant and the Respondent were in gainful employment earning Ksh. 1,500 and 2,500 respectively. There is evidence that the Applicant provided the Respondent with companionship and took care of their children and this gave the Respondent a peaceful atmosphere to invest."

And lastly that:

> "The Respondent did not table bank statements to show the sources of his money but he agreed that from the first car KSL xxx, he bought another vehicle KVF xxx and then he bought another car KXD 924 and then he sold the two cars which were operating as matatus and bought the GATURU/WERU land which he sold later and the money continued to

grow as he invested it in the Stock Exchange. From the Stock Exchange the Respondent bought their current Matrimonial home at [Particulars Withheld] house No. 3.

The largest income came from the sale of their first matrimonial home in Kileleshwa which the Applicant said fetched 86 Million which he invested in the WENDANI flats and the [Particulars Withheld] House NO.10.

The Respondent said he bought the Kileleshwa matrimonial property at Kshs 500,000. The Applicant said she used to maintain it and further that she took a loan of Kshs. 1,000,000 to renovate it. Although the Respondent disputed this fact, I find that there is evidence that the Applicant was always a resident of the Kileleshwa property and that she used to cultivate the garden and plant vegetables to supplement the food budget. Her long stay and maintenance of the property entitles her to an equal share."

30. From the evidence, the properties the subject of the dispute herein, are all registered in the appellant's name. In the decision of *PME vs. PNE* [2001] eKLR, this Court held:

> "... where the disputed property is not registered in the name of the spouses, the beneficial share of each spouse would ultimately depend on the proven respective proportions of financial contribution either indirect or direct towards acquisition of the property. However, in cases where each spouse has made substantial but uncertainable contribution, it may be equitable to apply the maxim equality is equity".

31. Section 2 of the *Matrimonial Property Act* recognizes that contribution can be both monetary and non-monetary. The latter includes:

> "(a) domestic work and management of the matrimonial home;
>
> (b) child care; (c)companionship;
>
> (d) management of family business or property; and
>
> (e) farm work."

32. However, the determination of direct and indirect contribution poses a great challenge to the Courts as has often been said, it is not a mathematical exercise. Perhaps, this difficulty was underscored in the decision of *PNN v ZWN* Civil Appeal No. 128 of 2014, wherein Kiage, JA stated:

> "... when the ship of marriage hits the rocks, flounders and sinks, the sad, awful business of division and distribution of matrimonial property must be proceeded with on the basis of fairness and conscience, not a romantic clutching on to the 50:50 mantra. It is not a matter of mathematics merely as in the splitting of an orange in two for, as biblical Solomon of old found, justice does not get to be served by simply cutting up a contested object of love, ambition or desire into two equal parts."

33. Further, in *FN v VWN*, Nairobi Civil Appeal No. 179 of 2009, this Court stated:

> "...a division of the property must be decided after weighing the peculiar circumstances of each case."

34. We therefore have to weigh the evidence tendered in Court and consider the extent to which either party has contributed to the acquisition of the matrimonial property, either directly or indirectly.

35. The other challenge posed is whether in assessing contributions, a global or asset by asset approach should be taken in evaluating spousal contribution in matrimonial property. The Australian Family Court in *G v G* (1984) FLC 91-528 was of the view that it cannot be required of the Family Court to assess contribution with mathematical precision with respect to each item. Nygh J held that:

> "both approaches are legitimate unless the High Court rules otherwise provided that those who take the global approach heed the warning that the origin and nature of the different assets ought to be considered and that those who favour the more precise approach do not mistake the trees for the forest, i.e. add up their individual items without standing back at the end to review the overall result in the light of the needs of the parties."

36. Similarly, in *Norbis v Norbis* (1986) 161 CLR 513, the court on appeal considered the correct approach to take when assessing parties' contribution. The court considered whether a global or asset by asset approach is more suitable and determined that neither alternative was more just or equitable than the other. The Court stated thus:

> "It has not been suggested that there is any fundamental difference between the two competing approaches which we have considered, in the sense that one will yield more just and equitable entitlements than the other. The general preference which has been expressed for the global approach is not by reason of any notion that it is the only approach authorized by the Act, but by reason of considerations of convenience. Accordingly, quite apart from the fact that its status as a prescribed approach is that of a guideline and not that of a principle of law, the application of the asset-by asset approach does not of itself amount to an error of law."

37. In our view, the circumstances of this case would favour a global approach given that the two parties began their union without any tangible asset and during the 41 years of their marriage, built a sizeable asset portfolio.

38. The "seed" property being the family car registration Number KSL xxx Datsun pickup which the appellant bought in 1983 during coverture, although the respondent at the time was at a Nursing School. This car was subsequently sold and motor-vehicles KVF xxx and KXD xxx were purchased for matatu business. These plied Embu-Nairobi route. The investment in the matatu business was also undertaken during coverture. This business flourished and the profits therein were wisely invested by the appellant to the extent that their property asset had vastly increased when the two parted. The asset base of the parties herein is traceable to their first car that birthed the matatu business which yielded good returns and enabled the family to acquire other properties. It is for this reason that we have favoured the application of a global approach vis-à-vis the approach of asset by asset as one investment gave rise to another and there was an upward spiral effect in the acquisition of the assets.

39. The learned judge found that the respondent's financial contribution,though significant, was unascertainable and largely found her contribution to be indirect. She stated as follows:

> "In a nutshell, I find that the Applicant herein was in gainful employment until she retired and although she did not produce documents to show that she directly contributed to the acquisition of the matrimonial properties listed in paragraph one of the Originating Summons...
>
> I find that the mere lack of records does not mean that the Applicant did not contribute directly and indirectly to acquisition of the Matrimonial Properties."

40. Indeed, the evidence in this appeal is largely undisputed that the appellant is the one who made the bulk of the monetary contribution towards the purchase of the matrimonial properties and had the same registered solely in his name. The appellant gave a detailed account in his affidavit of how he acquired his first car in 1981 and how he used that asset to grow his matatu business and acquire other assets including KXD xxx and Isuzu minibus KAC xxx also used as matatus, a piece of land being Gaturi/Weru/1101-partly purchased from his 'regular income earned from his two matatus', their home in Kileleshwa (purchased at Kshs 500,000.00) which he was able to pay for from a per diem allowance received from a one and a half month work travel to Tokyo, Japan and investing in stock and shares after selling off the matatu business. He deponed that in 2002 he registered his law firm which was a further source of income which he used to buy more properties including the matrimonial home, [particulars Withheld] House No x in Karen - Miotoni for 36 Million.

41. The sale of the Kileleshwa property for 86 Million resulted in the purchase of Kahawa Wendani flats. The appellant admits in his affidavit that he "paid for this property using part of the proceeds from the Kileleshwa sale." He invested the balance, and as he stated under cross examination, "part of the money bought [Particulars Withheld] House No. 10"for 65 Million and he sold it for 83 Million in 2017.

42. In our view, and like most couples, the parties herein got into marriage barely with any property to their name. Their first matrimonial home was a grass thatched house which according to the respondent (and this was not denied by the appellant) "... had nothing but a bed." At the time, the appellant was still a law student at the University of Nairobi. The respondent on the other hand had to defer her studies at Murang'a School of Nursing as she was 3 months pregnant. She sacrificed her training for the sake of their 1st born child as well as the 2nd born child. This meant that she sacrificed her earning capacity to bear and raise the couple's children.

43. There is evidence that both of them worked very hard to uplift their family. At the start, the appellant's salary was Kshs 2,500.00 whilst that of the respondent was Kshs 1,500.00. With admirable zeal, each of the spouses did side hustles, the appellant investing in matatu business whilst the respondent supplemented her nursing income by carrying out businesses such as selling of tyres, honey, farming and knitting. She provided a bundle of receipts showing the purchase of machines for her knitting business which thrived between 1990 and 1999, she had a tyre sale business which the appellant helped her in setting up, she willingly moved to Machakos, Embu and Nairobi when her husband's job dictated it, she held the fort at home when the appellant travelled around the country and abroad, provided general receipts for household shopping at various supermarkets and gave *viva voce* evidence, which the learned judge believed, she tilled and farmed the land in Kileleshwa and Ngong to supplement the food at home. The respondent took a loan of Kshs 1 million that renovated the Kileleshwa house that had been bought for Kshs 500,000.00 by the appellant. This home was subsequently sold for a neat sum of Kshs 86 million and as stated above, the proceeds thereof were further invested. The respondent attached bank statements from Barclays Bank as proof of the loan she took in 2010 to renovate the house.

44. It is also not lost to us that by the nature of his work as a judicial officer, the appellant was posted to various stations to wit, Machakos, Embu and Nairobi. His work as the Chairperson of the [Particulars Withheld] Tribunal also meant that he spent many hours from home. Indeed, the appellant testified that at one time, he was away in Tokyo, Japan for a period of one month and the per diem he earned from this trip enabled him to pay deposit for the Kileleshwa house, a government house which they had hitherto occupied by virtue of the appellant's employment as a judicial officer. Suffice to state that the appellant's nature of work often took him away from home.

45. It would therefore be remiss on our part to fail to recognize that during

the appellant's sojourns, the respondent took care of the children and the matrimonial home, besides her formal employment as well as the businesses she undertook. Indeed, she appears to have been such a hardworking woman who carried her pregnancies to full term and worked throughout her pregnancies. This is attested by the fact that she always delivered a few hours after leaving work. Moreover, there is evidence that she delivered their 1st born child in a matatu, presumably on her way to hospital.

46. In our view, and contrary to the appellant's assertion, the respondent was not a "joyrider" in the marriage. True, her contributions apart from direct contributions were also indirect. Her career took a back seat whilst the appellant pursued his LLB degree. She deferred her college studies twice, to give birth to their 1st and 2nd born children. The burden of carrying 4 children to full term in pregnancy, and the subsequent care of the infants did not count for nothing but were all indirect contributions over and above the businesses the respondent undertook, as well as her formal employment.

47. We therefore disagree with the appellant that the learned Judge erred in finding that the respondent provided indirect contribution and at the risk of being repetitive, the purchase of the appellant's first car was the seed asset that led to the purchase of subsequent properties. The sale of this car led to the purchase of matatus. The returns from the matatu business was invested wisely by the appellant. He used part of this money to buy shares. Suffice to state that all these properties were acquired during coverture. We find that the respondent who was gainfully employed contributed indirectly to the acquisition of the matrimonial property acquired from the onset of the marriage and during the life of the marriage when the various properties were acquired. She contributed to the acquisition of their first home in Kileleshwa LR No. 209/[ ], whose sale resulted in the purchase of [Particulars Withheld] House No. 10 and the Block of flats in Kahawa Wendani, the purchase of Ngong/Ngong/xxxxx Upper Matasia, the purchase of their matrimonial home [Particulars Withheld] House No. 3 and Motor Vehicles KBK xxx Q Toyota Prado and KAL xxx B.

48. We have no doubt that the respondent's contribution played a vital role in liberating the appellant to devote his time and energy to the growth of his career, financial gain, the acquisition of property and even manage a family business for the family. As for the respondent's specific financial contribution to the matrimonial property, the documentary evidence provided was unsurprisingly scanty as is oft the case in marriages where one spouse relies on the other to make investments on the family's behalf.

49. Having found that the respondent proved that she directly and indirectly contributed to the acquisition of the properties in dispute the question then arises, as to the equitable and just mode of distribution. Equality of contribution in a marriage cannot be assumed, although it may readily be inferred from the evidence of each party's contribution in some cases.

50. In our view, the evidence on record does not permit a conclusion that the contributions during the marriage were equal. The learned Judge overlooked the weight of the appellant's evidence not only as the main financial contributor but that the wealth of the parties was amassed by the appellant seizing opportunities as they arose and by careful investment. In addition to working and running a business for the benefit of his family, the appellant provided evidence that he took care of the children while his wife pursued her nursing education at the beginning of the marriage, he loaned the respondent money for her tyre business- a fact

which she admitted at trial, he provided proof through Mpesa statements that he purchased groceries from the local grocery, provided bank statements showing he paid school fees for the children, provided receipts showing he bought furniture for their home, bought various properties and operated businesses and invested for the benefit of the family. His professional work was always on an upward trajectory and no doubt his direct financial capability outweighed that of the respondent.

51 Taking into account all of the circumstances, and in light of our assessment of the parties' contribution we find that the appellant made greater contribution to the family fortunes. Consequently, we hold that a 65:35 division of the matrimonial property in favour of the appellant is just and equitable. The decision of Ongeri, J is therefore varied to the extent of setting aside the 50:50 per cent contribution and substituting it with a 65:35 per cent contribution in favour of the appellant. (Otherwise, we shall not disturb the division of the rest of the assets by the trial court (Ongeri, J).

52 Given the fact that this is a dispute involving former spouses, we direct that each party bears his/her own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021.

K. M'INOTI

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR