CKN v DMO (Civil Appeal 21B of 2022)
[2023] KEHC 26379 (KLR) (8 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26379 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL 21B OF 2022

DKN MAGARE, J

DECEMBER 8, 2023

BETWEEN

CKN ..... APPELLANT

AND

DMO ..... RESPONDENT

The concept of alimony is an anathema to the equality of men and women

The main issue for determination was whether the concept of alimony was part of Kenyan law considering the right to equality provided under article 45 of the Constitution providing that parties to a marriage were entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. The High Court held that alimony was no longer a reality in Kenya with the introduction of the equality clause provided under article 45 of the Constitution that provided that parties to a marriage were entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

Reported by John Ribia

Jurisdiction *– jurisdiction of a divorce court vis-à-vis the jurisdiction of the Children Court – jurisdiction to determine the rights of a child of a divorcing couple - whether a divorce court had the matter to deal with matters pertaining to the children of the divorcing couple – Children Act (Cap. 141), section 59.*

Family Law *– marriages – divorce – alimony – legality of alimony - whether the concept of alimony was part of Kenyan law considering the right to equality that provided that parties to a marriage were entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage – Constituent of Kenya, article 45.*

Family Law *– marriages – customary marriages - divorce – return of dowry after divorce - whether in a divorce petition the court could order the wife to return dowry to the husband where the same was paid by the husband to the wife's parents.*

Civil Practice and Procedure *– submissions – status of submissions - failure to file submissions despite numerous reminders of the court – effect - whether a court could issue a judgment on a matter in which a party had failed*

to file submissions despite numerous reminders by the court - whether the lack of filed submissions by one party in a matter before court could change the trajectory of the matter.

Brief facts

The appeal arose from a divorce petition. The appeal was based on the ground that the trial court erred in not awarding custody of the child to the appellant (the mother of the child), and in ordering the appellant to return dowry to the respondent. The appellant contended that dowry was paid by the respondent to her parents and as such, such a claim should be made by the respondent against her parents. The appellant also sought for payment of alimony and maintenance by the respondent.

Issues

i. Whether a divorce court had the jurisdiction to deal with matters pertaining to the children of the divorcing couple.

ii. Whether the concept of alimony was part of Kenyan law considering the right to equality provided for under article 45 of the Constitution that provided that parties to a marriage were entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

iii. Whether in a divorce petition the court could order the wife to return dowry to the husband where the same was paid by the husband to the wife's parents.

iv. Whether a court could issue a judgment on a matter in which a party had failed to file submissions despite numerous reminders by the court.

v. Whether the lack of filed submissions by one party in a matter before court could change the trajectory of the matter.

Held

1. The appellant had neglected, failed or otherwise refused to file submissions in spite of being reminded 5 times to do so. Submissions were not evidence. Consequently, the lack of the same did not change the trajectory of the matter. It only excluded matters parties could have conceded in the submissions.
2. Being a first appeal, the court was under a duty to re-evaluate and assess the evidence and make its own conclusions. A trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
3. The child had a right which was inalienable to both the father and mother. If there were any issues, then the same should be dealt by other means. The court dealing with divorce dealt with mundane issues but children were not parties. The proper court to deal with the nitty-gritties of the children was the Children Court pursuant to section 90 of the Children Act.
4. The order of access was proper in law. There was no departure from the Children's Act. The prayer for full custody of the minor was dismissed. No basis was made to show that the court wrongly exercised discretion.
5. The court could not substitute the discretion of the trial court with that of the appellate court unless there was a basis. The parties making of babies was a joint effort and that applied to love and affection. There was no parent with a superior right over another. A husband could be a mongrel to the wife or ex-wife but remained a father to the child. The fact that he was a bad husband or someone was a bad wife, did not make them bad parents.
6. Parties were bound by their pleadings. There was no contest for return of dowry. Therefore, without pleadings the court's hands were tied.
7. The appellant had not laid a basis for not retuning dowry. Other than tradition, the return of dowry was crucial where there are two underlying marriage traditions, Kisii customary law and a Christian marriage. The court rightfully ordered return of the two instruments for each of the marriages. The marriage certificate of the Christian marriage was returned to signal the cancellation of the Christian marriage.

8. The traditional marriage was cancelled by return of dowry. Whether the same was returned by her or her father, was irrelevant. She had 2 years to file an indemnity suit against her father for return of dowry. It was unnecessary to join the appellant's parents in order to get refund of dowry.
9. Alimony was no longer a reality in Kenya with the introduction of the equality clause provided under article 45 of the Constitution that provided that parties to a marriage were entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.
10. The reality of the concept of alimony was that it was based on the concept that the men and women were not equal. A man and woman joined in holy matrimony and became one. That led to the men paying alimony as they slowly let go of their ex-wives. Alimony ceased on re-marriage, not for any reason but that the woman had a new man to maintain her. That was why Kenya had the Married Women Property Act, 1882 (repealed). It was not surprising that there was no Married Men Properties Act.
11. The concept of alimony was anathema to equality of men and women. It portrayed women wrongfully as weak. Parties must walk out with only scars of the marriage. The appellant was not entitled alimony. Not because she did not prove, but because the concept of alimony was no longer part of the law. With constitutional changes, the existence of alimony was repugnant to good order and equality of people in marriage before, during and after the marriage. None of the parties had a burden of maintaining the other.

Appeal dismissed with no order as to costs.

Citations

Cases

Kenya

1. *Chatte, Raghbir Singh v National Bank of Kenya Limited* Civil Appeal 50 of 1996; [1996] KECA 99 (KLR) - (Explained)
2. *Fidelity & Commercial Bank Ltd v Kenya Grange Vehicle Industries Ltd* Civil Appeal 61 of 2013 - (Explained)
3. *Migore, Daniel Otieno v South Nyanza Sugar Co Ltd* Civil Appeal 52 of 2017; [2018] KEHC 5465 (KLR) - (Explained)
4. *MN v JMK* Civil Appeal 163 of 2015; [2019] KEHC 8815 (KLR) - (Explained)
5. *Odinga & another v Independent Electoral and Boundaries Commission & 2 others* Election Petition 1 of 2017; [2017] KESC 31 (KLR) - (Explained)
6. *RKM v GMN* Divorce Cause 10 of 2014; [2015] KEHC 3860 (KLR) - (Explained)
7. *Walutsachi, Sylvanus Manuel v St Mary's Hospital Mumias* Civil Appeal 42 of 2019; [2021] KEHC 8335 (KLR) - (Explained)

Regional Court

1. *Mbogo and another v Shah* [1968] EA 93 - (Explained)
2. *Peters v Sunday Post Limited* [1958] EA 424 - (Explained)
3. *Selle and another v Associated Motor Board Company and others* [1968] EA 123 - (Explained)

Statutes

Kenya

1. Children Act (cap 141) section 90 - (Interpreted)
2. Constitution of Kenya articles 21(3); 45; 53 - (Interpreted)
3. Matrimonial Causes Act (Repealed) (cap 152) sections 25, 26 - (Interpreted)

Advocates

Ms. Nyandoro for the respondent

JUDGMENT

1. This is an appeal from the judgment and decree of Hon CA Ogweno (RM) delivered on March 1, 2022 in Kisii Chief Magistrate's Divorce Cause No 58 of 2021.

2. This matter came before me for hearing of the appeal during the service week. I note from record that the appellant has neglected, failed or otherwise refused to file submissions in spite of being reminded 5 times to do so.

3. On Wednesday, 6/12/2023, I directed that the matter shall proceed for hearing at 1100 hours. However, though the appellant's advocates were called but did not log in only the respondent's advocate attended court. I opted to use the record and to render my Judgment. I am comforted by the decision of the Court of Appeal in the case of , where the Court of Appeal stated as doth: -

> " On the charge that this court considered and determined the matter on submissions of counsel who was not properly on record, no reasons have been put forth as to why Mr Wanyonyi, learned counsel for the respondent, was not properly on record and the assertion suffers an insurmountable difficulty. At any rate, it is clear, on rereading our impugned decision, that the outcome would have remained unchanged even without the benefit of considering those submissions."

4. Submissions are not evidence. Consequently, the lack of the same does not change the trajectory of the matter. It only excludes mattes parties could have conceded in the submissions.

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

6. The duty of the first appellate court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the *locus classicus* case of *Selle and another v Associated Motor Board Company and others* [1968] EA 123, where the law looks in their usual gusto, held by as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

7. The court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

8. In the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction

to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

9. In *Fidelity & Commercial Bank Ltd v Kenya Grange Vehicle Industries Ltd* [2017] eKLR , the Court of Appeal, Ouko, Kiage and Murgor JJ A held as doth;-

> " Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called four corners of an instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

10. The trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document.

11. Therefore, where the findings of the trial court are consistent with the evidence generally, this court should not interfere with the same.

12. The appeal is based on 5 grounds, that is: -

    a. The learned trial magistrate erred both in law and fact by failing to evaluate the evidence presented by the appellant.

    b. The learned trial magistrate erredboth in law and fact in arriving at a wrong decision.

    c. The learned trial magistrate erred both in law and fact by failing to make a finding that the appellant had proved her case on a balance of probability and was entitled to the orders of custody of the child.

13. The appellant's appeal is based on two grounds. Firstly, the trial magistrate ordered the appellant to return the dowry to the respondent, even though the appellant did not receive it. Secondly, the trial magistrate did not recognize that the dowry was paid to the appellant's parents. The appellant seeks the following remedies: -

    a. Grant of custody of the appellant exclusively.

    b. Payment of Kshs 150,000 as dowry be vacated.

    c. Payment of almonry and maintenance of the child at Kshs 25,000 per month.

Pleadings

14. The parties are said to have contracted a marriage on 3/12/2017. This was a Christian marriage. The appellant is said to have left the matrimonial home in 2019 to her parent's home. There s no appeal related to the divorce itself, but the auxiliary reliefs.

15. The appellantfiled across petition stating that the appellant was cruel and remarried and is staying at Mulolongo Machakos County. She prayed that she be given custody of the minor. She also prayed for the divorce.

16. From the pleadings the marriage was already dead. It was not for resuscitation. The court rightly terminated it. The pleadings are not the best as to the auxiliary relief.

17. The parties testified on 31/1/2022. The appellant last saw the minor in July 2021. The marriage was properly dissolved. There is no issue on the same.

Analysis

18. The questions for the court are two:-

    a. Whether the respondent should have been granted legal access to the minor.

    b. Whether the petitioner should have been ordered to return dowry.

19. On the children, article 53 of the *Constitution* states as doth:-

> " 53. Children
>
> (1) Every child has the right—
>
> (a) to a name and nationality from birth;
>
> (b) to free and compulsory basic education;
>
> (c) to basic nutrition, shelter and health care;
>
> (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
>
> (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; and
>
> (f) not to be detained, except as a measure of last resort, and when detained, to be held—
>
> (i) for the shortest appropriate period of time; and
>
> (ii) separate from adults and in conditions that take account of the child's sex and age.
>
> (2) A child's best interests are of paramount importance in every matter concerning the child.

20. The child has a right which is inalienable to both the father and mother. If there are any issues, then the same should be dealt by other means. The court dealing with divorce deals with mundane issues but children are not parties.The proper court to deal with the nit-gritties of the children is the children's court pursuant to section 90 of the *children's act*. The long title of the *Children's Act* provides as doth: -

> " An Act of parliament to give effect to article 53 of the *Constitution*; to make provision for children rights, parental responsibility, alternative care of children including guardianship, foster care placement and adoption; to make provision for care and protection of children and children in conflict with the law; to make provision for, and regulate the administration of children services; to establish the National Council for Children's Services and for connected purposes."

21. For now, the order of access is proper in law. I do not see any departure from the *Children's Act*. I therefore dismiss the prayer for full custody of the minor. No basis was made to show that the court wrongly exercised discretion. In the case of *Mbogo & another v Shah* [1968] EA 93 where the Court stated:

> " ...that this court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

22. I cannot substitute the discretion of the court with mine unless there is basis parties must understand that there are making of babies is a joint effort and this applies to love and affection. There is no parent with a superior right over another. A husband can be a mongrel to the wife or ex-wife but remains a father to the child. The fact that he is a bad husband or someone is a bad wife, does not make them bad parents. In the case of *Sylvanus Manuel Walutsachi v St Mary's Hospital Mumias*, the Court of Appeal stated as doth: -

> " The field of love, no doubt, is littered with the wreckage of many a broken heart. The tears that have flowed, in the wake of betrayal, perfidy and other two-or multiple-timing adventures of lovers, is beyond reckoning. Thus must one who ventures into love do so alive to the perils that abound.
>
> The lesson learnt is that the wounds of love find scant balm in the courts of law. Love's ills and woes can only be found in Lovers return and reconciliation, failing which in accepting and moving on, while holding onto hope for comfort elsewhere, or leaving Love's threshing floor altogether, paying heed to Kahil Gibran's The Prophet:
>
> > "But if in your heart you would seek only love's peace and loves pleasure, then it is better for you that you cover your nakedness and pass out of love's threshing floor...."

23. On the issue of return of dowry, this matter turns on pleadings. The cross petition reference did not touch on dowry. In a proper defence, the parties must specifically deny the money. If someone else was paid other than her, then she needs to plead so. In the case of the case of *Raghbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR, where the Court of Appeal stated as doth: -

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per *Jessel MR in Thorp v Holdworth* (1876) 3 Ch D 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underling supplied).
>
> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence.
>
> This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here

again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes ..."

24. Parties are bound by their pleadings. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co Ltd* [2018] eKLR, Justice AC Mrima stated as doth: -

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC* SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
>
> > ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
> >
> > ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

25. The Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of *Raila Amolo Odinga & another v IEBC & 2 others* (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings..."

26. There was no contest on dowry. Therefore, without pleadings the court's hands were tied. Parties are bound by their pleadings.In the circumstances, I find absolutely no merit in the appeal. However, I shall not awardcosts given the relationship between parties.

27. As I part it is my that that parties should also find a way of amicably moving on when things are truly over.The amount and vigour of energy used to fight each other can build a train across Hind Mahāsāgar from the breath of the federal republic of Somalia to Palestine all the way to Himalayas. The appeal and the subsequent emotional drain over spilt water is commensurate with gains to the parties. I is my

sincere hope that the parties who still appear young can refresh and go back to the market without the baggage of the failed marriage. I noted the distain with which the Appellant was relating to the appellant was describing how the respondent is happily married and stating in Mulolongo in Machakos county.

28. In the case of *RKM v GMN* [2015] eKLR, Justice Nagilah stated as doth: -

> " On the issue of refund of the dowry, DW2 confirmed that he took the dowry. However, it is not clear whether or not there were three cows, two life, one unborn. It is also not clear, whether the cows were grade cows or native cows. The court concludes that the cows were two at the value of Kshs 40,000/= each and cash value of Kshs 50,000/=. Therefore the petitioner's father is hereby ordered to refund Kshs 130,000/= to the respondent as dowry."

29. The appellant has not laid basis for not retuning dowry. Other than tradition the return of dowry is crucial in this case where there are two underlying marriage traditions, that is Kisii Customary Law and a Christian marriage. The court rights ordered return of the two instruments for each of the marriages. The marriage certificate of the Christian marriage is returned to signal the cancellation of the Christian marriage.

30. The traditional marriage is cancelled by return of dowry. Whether the same is returned by her or her father, it is irrelevant. She had 2 years to file an indemnity suit against her father for return of dowry. It is unnecessary to join the appellant's parents to be able to get refund of dowry.

31. On the other alimony is nolonger a reality in Kenya.With the introduction of the equality clause in the *Constitution* under article 45 of the *Constitution*, provides as follows: -

> " 45. Family
>
> (1) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.
>
> (2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.
>
> (3) 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.
>
> (4) Parliament shall enact legislation that recognizes—
>
> (a) marriages concluded under any tradition, or system of religious, personal or family law; and
>
> (b) any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriages or systems of law are consistent with this Constitution."

32. The reality of the concept of alimony is that it was based on the concept that the men and women were not equal. A man and woman join in holy matrimony and become one and that is the man. This led to the men paying alimony as they slowly let go of their ex-wives. Alimony ceased on re-marriage, not

for any reason but that the woman has a new man to maintain her. That is why we had the married Woman Property Act, 1882. It is not surprising that we had no married Men Properties Act.

33. The concept of alimony is anathema to equality of men and women. It portrays women wrongfully as weak. parties must walk out with only scars of the marriage. In the case of *MN v JMK* [2019] eKLR, Justice GV Odunga stated as doth: -

> " 19. It is clear that in this appeal, the appellant only challenges the award of alimony to the respondent. In *WMM v BML* [2012] eKLR, GBM Kariuki, J (as he then was) held that:
>
> > "In considering a claim for maintenance, regard must be heard to the provisions of article 45(3) of the *Constitution* of Kenya which recognize that "parties to a marriage are entitled to equal rights at the time of the marriage, during marriage, and at the dissolution of the marriage." The rights enshrined in this Article connote equality of parties in a marriage and are intended to ensure that neither spouse is superior to the other in relation to enjoyment of personal rights and freedoms. The equality in this article does not create nor is it intended to create equal spousal ownership of property acquired during marriage regardless of which spouse has acquired and paid for it or regardless of how it has been acquired and paid for. Rather, and contrary to the assumption that it makes property acquired during marriage the property of both spouses in equal shares, it relates to and recognizes personal rights of each spouse to enjoy equal rights to property and personal freedoms and to receive equal treatment without discrimination on the basis of gender and without being shackled by repugnant cultural practices or social prejudices. article 45(3) is in harmony with article 21(3) of the *Constitution* which enshrines equality of men and women and specifically states that "women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres." In the light of article 45(3), the criterion in determining the rights and obligations of spouses in a marriage must treat the husband and the wife as equals and neither has a greater or lesser obligation than the other in relation to maintenance. In short, in cases where, as here, spouses have no children, a wife does not enjoy advantage over a husband or the *vice versa* and the age-old tradition in which men were deemed to be the sole bread winners and to carry the burden of maintaining their spouses does not hold true anymore. Under the *Constitution*, the respondent has a duty to support and maintain herself no less than the Petitioner has to support himself and there is no greater obligation on the part of the petitioner to support himself than there is on the part of the respondent to support herself. No spouse who is capable of earning should be allowed to shirk his or her responsibility to support himself or herself or turn the other spouse into a beast of burden but where a spouse deserves to be paid maintenance in the event of divorce or separation the law must be

> enforced to ensure that a deserving spouse enjoys spousal support so as to maintain the standard of life he or she was used to before separation or divorce. The financial capacity of the spouses has to be examined before the court makes a finding as to whether a spouse should pay maintenance and if so how much. It seems clear that an adjustment to sections 25 and 26 of the *Matrimonial Causes Act* (and to a host of other provisions) to align the same with the *Constitution* is called for...The quantum of maintenance must make sense. It must be such as the party paying can afford i.e. within the ability of the spouse paying it. It must not enrich the spouse to whom it is paid nor oppress the spouse paying it. Where the spouse seeking maintenance is capable of engaging in gainful employment but refuses to work, such conduct may be oppressive to the other spouse and the court is entitled to have regard to it when considering the quantum of maintenance. Equality of spouses under article 45(3) of the *Constitution* connotes equal treatment under the law."

The said decision was cited with approval by Lenaola, J (as he then was) in *MSV v SJV & another* [2015] eKLR in which he stated that even after divorce, each spouse has certain duties to the other.

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

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

34. I do agree that is not entitled alimony. Not because she did not prove, but because the concept of alimony is no longer part of our law. With constitutional changes, the existence of alimony is repugnant to good order and equality of people in marriage before, during and after the marriage. None of the parties has a burden of maintaining the other.

35. At the end of the matter I make the following orders: -

    a. I dismiss the appeal herein with no order as to cost.

    b. The file is closed.

DELIVERED, DATED AND SIGNED AT KISII ON THIS 8TH DAY OF DECEMBER 2023. JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for the Appellant

Ms. Nyandoro Advocate for the Respondent

Court Assistant - Roselyn