

MR. ADELEKE ADEJUMO v. MRS. TOYIN ADEJUMO
(2010) LPELR-3602(CA)

In The Court of Appeal of Nigeria
On Thursday, the 10th day of June, 2010

CA/A/168/08

Before Their Lordships

MARY U. PETER-ODILI Justice of The Court of Appeal of Nigeria

JIMI OLUKAYODE BADA Justice of The Court of Appeal of Nigeria

ABDU ABOKI Justice of The Court of Appeal of Nigeria

Between

Text

MR. ADELEKE ADEJUMO Appellant(s)

AND

MRS. TOYIN ADEJUMO Respondent(s)

RATIO DECIDENDI

1. COURT - DUTY OF COURT: Courts duty to order and assess maintenance of a wife and child.

"Section 70(a) gives the Court the discretionary power to order and assess maintenance of a party, it is not likened to a claim for special damages where the claimant must strictly prove his entitlement to such award before same can be awarded by the court as submitted by the appellant's Counsel." The Matrimonial Causes Act Cap 220 LFN 1990 provides for the principles to guide the Court in assessment of maintenance under Section 70 thus:- "(1) Subject to this Section, the Court may, in proceedings with respect to the maintenance of a party to a marriage, or of children of the marriage, other than proceedings for an order for maintenance pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances. (3) The court may make an order for the maintenance of a party notwithstanding that a decree is or has been made against that party in the proceedings to which the proceedings with respect to maintenance are related." Per ABOKI, J.C.A. (P. 15, paras. B-G) (...read in context)

2. INTERPRETATION OF STATUTE - MATRIMONIAL CAUSES ACT: Interpretation of Section 70(1) of the Matrimonial Causes Act

"A literal interpretation of Section 70(1) of the Matrimonial Causes Act will reveal that the sum to be awarded for maintenance of a wife and child of the marriage

shall be determined inter alia by - "(a) The means of the parties, which has been interpreted to mean capital assets of the parties including contingent and respective assets. See *Damulak v. Damulak* (2004) 8 NWLR Pt. 874 page 157, at 171-172. (b) The earning capacity of the parties (c) Conduct of the parties to the marriage (d) Other relevant consideration may include - (i) the existence or non existence of children (ii) the age of the children (iii) the station in life of the parties and their life styles (iv) Inflationary aspect of cost of living See *Hayes v. Hayes* (2000) 3 NWLR Pt. 648 page 276: *Akinbuwa v. Akinbuwa* (1998) 7 NWLR Pt. 559 at page 601: *Nanna v. Nanna* (supra)." Per ABOKI, J.C.A. (P. 16, paras. A-F) (...read in context)

3. FAMILY LAW - WIFE AND CHILD MAINTAINANCE: Whether a husband has a duty to maintain his wife and child

"A husband has a duty under the common law to maintain his wife and his children. It is the right of the wife and the child to demand that they be so maintained. Where a husband neglects to discharge his responsibility of maintaining his wife and children he can be compelled by law. The duty to provide maintenance entails the provision of food (balanced diet), clean water, clothing and shelter by the husband. A man who discharges this duty efficiently acquires for himself the title or appellation of Bread Winner. The importance of providing necessities to the family is captured by the Constitution of the Federal Republic of Nigeria 1999 under Section 17(3)(h) which enjoins the State to encourage the promotion of family life.. It also stipulates under Section 17(3)(f),(g) that the State has a duty towards ensuring that children are protected against material neglect

and to provide assistance in deserving cases. In *Nanna v. Nanna* (2006) 3 NWLR Pt. 966 page 1 at 41 Abba Aji J.C.A. said on the duty of Husband to maintain his wife and children thus:- "The law has clearly provided for the criteria to be followed. A man has a common law duty to maintain his wife and his children and such a wife and child or children have a right to be so maintained. The right of a wife and child to maintenance is not contractual in nature. The husband is obliged to maintain his wife and may by law be compelled to find them necessaries, as meat, drink, clothes et cetera, suitable to the husband's degree, estate or circumstance." Per ABOKI, J.C.A. (Pp. 14-15, paras. A-A) (...read in context)

ABDU ABOKI, J.C.A. (Delivered the Leading judgment) This Appeal is against the decision of the High Court of the Federal Capital Territory Abuja delivered by O.O. Goodluck J. dated 18th February 2008. The fact of this case in brief is that the Petitioner married the Respondent at the Immanuel Baptist Church, Akeetan, Oyo State on the 4th June, 1994. From that date, they lived together as man and wife in Flat 11, Block 2, Section 2, Badagry Street in Area 2, Abuja.

In December, 2002, the Respondent brought in a woman to live with them in their matrimonial home in a relationship which according to the Petitioner bore the semblance, of a "marital relationship". The trio could not live together amicably, life became unbearable for the Petitioner who found her matrimonial home unconducive. The Petitioner alleged that she was occasionally physically and verbally assaulted by the Respondent besides, financial assistance from the Respondent was grounded to a halt hence she had to cater for herself and the only issue of the marriage.

On 31st January 2003 the Petitioner moved out of the matrimonial home for the sanity of her child and herself and has since been continuously living apart from her husband.

The Petitioner by her Amended Petition dated 14th March 2006 prayed the lower Court for the following reliefs against the Respondent:-

"(a) A decree of Dissolution of marriage on the grounds of cruelty, desertion for at least one year and having lived apart for a period of three years.

(b) An Order awarding the Petitioner custody of the child of the marriage.

(c) Maintenance Order for the Petitioner and the child of the marriage."

The Respondent filed an answer dated 31st May, 2006 in which he denied all the averments of the Petitioner other than the fact that they were lawfully married.

He denied ever marrying another woman nor did he bring any woman into their matrimonial home. He alleged that the Petitioner was persistently quarrelling with his two daughters of his previous marriage and that her departure from their matrimonial home according to the Respondent was Petitioner's unilateral decision.

The lower Court in its judgment delivered on 18th February, 2008 granted all the three reliefs sought by the Petitioner and made the following Order for the maintenance of the Petitioner and the child of the marriage:-

"1. The Respondent is hereby ordered to pay the sum of N40,000.00 (Forty Thousand Naira) per quarter towards the upkeep of the only child of the marriage. Respondent is further ordered to pay the sum of N25,000.00 (Twenty five Thousand Naira) per term for Oluwaseyi's school fees. He shall be financially responsible for her education up to tertiary level,

2. The Respondent should pay N20,000 (Twenty Thousand Naira) per quarter for the maintenance of the Petitioner such payment is to cease in the event that she remarries.

The annual rent of N130,000.00 (One Hundred and Twenty Thousand Naira) paid by the Petitioner must be jointly borne by the two parties.

The Respondent shall be liable to pay the sum of N65,000.00 (Sixty five Thousand Naira) per annum towards the Petitioner's house rent provided she remains unmarried to another man."

The Appellant dissatisfied with the award of maintenance cost against him appealed to this Court. On 26/1/2010 pursuant to an application dated 4/11/08 and filed 5/11/08, this Court granted the Appellant leave to determine this Appeal on the strength of the Appellant/Applicant's brief of Argument, the Respondent having failed to file her Brief of Argument.

The Notice of Appeal dated 26/11/08 and filed on 27/3/2008 contained two Grounds of Appeal from which one issue is distilled for the determination of this Appeal. The lone issue reads as follows :-

"Whether in the circumstance of this case and the evidence adduced at the trial, the learned trial Judge was right to award maintenance cost for both the child and the Respondent against him."

Learned Counsel for the Appellant Adekola Mustapha referred the Court to the Provisions of Section 70 of the Matrimonial Causes Act Cap 220 Laws of the Federation, 1990.

He submitted that the power of the Court to make an Order with respect to the maintenance of the children of the marriage shall not be exercised for the benefit

of a child who has attained the age of 21 unless the Court is of the opinion that there are special circumstances that justify the making of such an Order for the benefit of that child.

Learned Counsel to the Appellant referred the Court to the Appellant's answer to the Petition and Cross-petition at page 21 of the Record of Appeal particularly paragraph 6 where he avers as follows:-

"a. The Petitioner is currently running a business he set up for her over 10years ago at Wuse Modern Market The annual shop rent alone is over N250,000.00 while the Petitioner makes an average monthly profit of over N100,000.00.

b. The Petitioner is also a qualified Professional Teacher with a University Degree in education.

c. The Petitioner willingly and voluntarily abandoned the matrimonial home.

d. The Respondent lost his first wife about 15 years ago that was when the older daughters were aged 5 and 3 and to the glory of God, he was able to bring them up successfully and one of them now is at a tertiary institution.

e. The Respondent is a level 10 officer with the Federal Capital Territory Administration his net pay per month is N31,377.86.

That is after CTSS, National Housing Fund, Pension and Tax deductions. The Respondent pleads his pay details for the month of January, 2006 and shall rely on it at the trial.

f. The Respondent further to (d) above states that pursuant to the Federal Government Monetization Policy/Sale of Accommodation to Civil Servant the one Bedroom Flat he was staying was offered to him for purchase at the sum of nearly N2,000,000.00 and because he doesn't want to lose that opportunity he had to apply for Mortgage Loan at Intercontinental Bank which is also being deducted

from his monthly salary. The letter of offer of mortgage finance loan is pleaded and shall be relied upon at the trial.

g. In consideration of paragraphs (d) and (e) above, his monthly take home pay is now below N10,000.00."

Learned Counsel to the Appellant Adekola Mustapha contended that the Respondent joined issues with the Appellant in her reply to the Appellant's answer to the Petition at pages 25-28 of the Record wherein she admitted the following:-

"a. That she is aware that the Appellant had parents.

b. That she is aware that the Appellant had children from his previous marriage.

c. That she is aware of the Appellant shrinking financial status and even went as far as admonishing the Court in that ground not to grant him custody of the child.

d. Other averments in paragraphs 6(a) & (b) of the answer to the Petition were not controverted at all."

Adekola Mustapha maintained that the Respondent did not deny the Appellant's averments as to his salary on pages 32 and 33 of the Record of Appeal.

At pages 34-39 of the Record is the pay slip of the Appellant for six months.

Learned Counsel argued that since the Appellant's salary slip is the only proof of income established before the Court, the Court cannot enter any other source of income in favour of the Appellant to justify the award of the maintenance cost. He referred the Court to the case of Savannah Bank Ltd. v. Salami (1996) 8 NWLR Pt. 465 page 131 and submitted that it is the law that oral or extrinsic evidence cannot be admissible to contradict a written document.

Adekola Mustapha queried how the learned trial Judge came to award the maintenance cost it gave to the Respondent giving the circumstances of the case and the evidence of means of the two parties presented before the Court.

He contended that by the Appellant's estimation, he will be expected to pay a total sum of N380,000 to the Respondent and the only child of the marriage as maintenance cost.

Learned Counsel argued that even if the Appellant has no parent, children of pervious marriage or relations under his care and control that he would not be able to take care of himself if he pays an average sum of N31,666.7 to the Respondent per month as maintenance cost out of less than N33,000.00 his monthly take home pay. He opined that the law is that the Court will not make an Order in futility or one not capable of being enforced.

Learned Counsel insisted that it is not a must that maintenance cost be awarded against a party when it is apparent that such party has no means of paying.

He referred the Court to the cases of:

Anyaso v. Anyaso (1998) 9 NWLR Pt. 564 page 150 and Akinboni v. Akinboni (2002) 5 NWLR Pt. 761 page 546 where he said the Court held that it is punitive to order a party to pay a maintenance allowance that is much more than his income.

Adekola Mustapha submitted that the learned trial Judge did not properly consider and evaluate the evidence of earning capacities of the parties before making those award and neither did he consider the means of the parties. On the definition of what constitutes means of the parties and "earning capacity of the parties" in ordering maintenance in matrimonial cause, he cited the case of Damulak v. Damulak (2004) 8 NWLR Pt. 874 page 157, at 171-172.

Learned Counsel submitted that "means of the parties" refer to the respective capital assets of the parties including contingent and respective assets but "earning capacity" is based on different factors such as where the husband's earning capacity is subject to severe fluctuations or where the wife is unusually efficient and a keen business woman commanding substantial means yet may be involving to work after the decree, or where the wife is young with no children, or where the wife is young with children.

He submitted that the learned trial Judge did not advance any cogent reason or reason at all for making those awards. Adekola Mustapha insisted that Section 70(1) of the Matrimonial Causes Act has given a clear guideline to be followed in awarding maintenance cost in matrimonial proceedings; which he listed as follows:

- (a) Means of Parties
- (b) Earning capacity
- (c) Conduct of the parties to the marriage
- (d) Other relevant consideration

Learned Counsel maintained that the Court of Appeal in the case of *Damulak v. Damulak* (supra) warned that even where the conduct of the husband is immoral or perfidious which conduct is objectionable, the wife must be given maintenance but not to be envied by the reason of that conduct.

In the instant case learned Counsel argued, the Respondent claims that she earns N25,000.00 monthly unimpaired from the business she runs in the shop while the learned trial Judge admitted the evidence of the appellant that he earns N31,000.00 per month as a Civil Servant. He maintained that even according to the learned trial Judge, the Appellant admitted owning two houses, living in one

and renting the other. Learned Counsel argued that there was no evidence of receipt of such rent or amount. He queried the basis upon which the Court believed that the Appellant is deriving income from such house.

Adekola Mustapha submitted that the learned trial Judge did not properly evaluate the evidence before him. He further submitted that this is a proper case for the Court to intervene. He cited the cases of:

Chime v. Ndu (1993) 3 NWLR Pt.227 and Adegboyega v. Awe (1993) 3 NWLR Pt. 286 page 224 where he said the Court held that where findings of facts by a trial Court are not supported by evidence and are therefore perverse it will be appropriate and proper for the Appellate Court to interfere with such findings and reverse them.

Learned Counsel said the contention of the appellant is that both he and the Respondent are working and that since the Respondent is the one managing the business he set up for her where she admits making an average income of N25,000.00 per month, then he, the appellant should not be made to make any further financial contribution to the only child of the marriage and particularly the Respondent taking into consideration his earning capacity.

Adekola Mustapha urged the Court to resolve the issue in favour of the Appellant and set aside the orders of maintenance awarded against the Appellant.

Maintenance means the provision made by a man for a woman who was formerly his wife. See Hayes v. Haves (2000) 3 NWLR Pt. 648 page 276 at 293-294.

Maintenance is intended to provide for the needs of the wife and not to mark disapproval of the husband's conduct. However the misconduct of the wife may be treated as relevant to her claim for maintenance in certain circumstances.

An applicant with dirty hands may be granted maintenance if it is adjudged that the interest of the child of the marriage which is paramount compels it.

A husband has a duty under the common law to maintain his wife and his children. It is the right of the wife and the child to demand that they be so maintained.

Where a husband neglects to discharge his responsibility of maintaining his wife and children he can be compelled by law. The duty to provide maintenance entails the provision of food (balanced diet), clean water, clothing and shelter by the husband.

A man who discharges this duty efficiently acquires for himself the title or appellation of Bread Winner.

The importance of providing necessities to the family is captured by the Constitution of the Federal Republic of Nigeria 1999 under Section 17(3)(h) which enjoins the State to encourage the promotion of family life.. It also stipulates under Section 17(3)(f), {g) that the State has a duty towards ensuring that children are protected against material neglect and to provide assistance in deserving cases.

In *Nanna v. Nanna* (2006 3 NWLR Pt. 966 page 1 at 41 Abba Aji J.C.A. said on the duty of Husband to maintain his wife and children thus:-

"The law has clearly provided for the criteria to be followed. A man has a common law duty to maintain his wife and his children and such a wife and child or children have a right to be so maintained. The right of a wife and child to maintenance is not contractual in nature. The husband is obliged to maintain his wife and may by law be compelled to find them necessities, as meat, drink, clothes et cetera, suitable to the husband's degree, estate or circumstance.

In assessing maintenance, Section 70(a) gives the Court the discretionary power to order and assess maintenance of a party, it is not likened to a claim for special damages where the claimant must strictly prove his entitlement to such award before same can be awarded by the court as submitted by the appellant's Counsel."

The Matrimonial Causes Act Cap 220 LFN 1990 provides for the principles to guide the Court in assessment of maintenance under Section 70 thus:-

"(1) Subject to this Section, the Court may, in proceedings with respect to the maintenance of a party to a marriage, or of children of the marriage, other than proceedings for an order for maintenance pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.

(3) The court may make an order for the maintenance of a party notwithstanding that a decree is or has been made against that party in the proceedings to which the proceedings with respect to maintenance are related."

A literal interpretation of Section 70(1) of the Matrimonial Causes Act will reveal that the sum to be awarded for maintenance of a wife and child of the marriage shall be determined inter alia by -

"(a) The means of the parties, which has been interpreted to mean capital assets of the parties including contingent and respective assets. See *Damulak v. Damulak* (2004) 8 NWLR Pt. 874 page 157, at 171-172.

(b) The earning capacity of the parties

- (c) Conduct of the parties to the marriage
- (d) Other relevant consideration may include -
 - (i) the existence or non existence of children
 - (ii) the age of the children
 - (iii) the station in life of the parties and their life styles
 - (iv) Inflationary aspect of cost of living

See Hayes v. Hayes (2000) 3 NWLR Pt. 648 page 276:

Akinbuwa v. Akinbuwa (1998) 7 NWLR Pt. 559 at page 601:

Nanna v. Nanna (supra).

It has been argued on behalf of the Appellant that the trial Court did not properly evaluate the evidence before him.

I have carefully perused the judgment of the trial Court, the trial Court in my opinion considered all the evidence presented before it as to the means of the parties, their earning capacity, the conduct of the parties to the marriage and other relevant considerations such as their lifestyle and other dependants of the parties before coming to his assessment of the maintenance cost to be paid by the Appellant to the Respondent.

On page 87 of the Record of Appeal the trial Court said:-

"Relying on the case of Hayes v. Hayes (supra) regard must be given to the financial status of both parties and their lifestyle....."

Still on the considerations enunciated in the Hayes v. Hayes case, the respective means of livelihood has also been taken into account under this issue of maintenance.....

Finally on the 3 condition for maintenance, it is the case of the Petitioner that the Respondent brought a woman to live with her and the Respondent in their matrimonial home in December, 2001. She cited an instance when she was verbally and physically assaulted by the Respondent. On the 17th April, 2002, the Police and neighbours had to intervene. Besides, she has had to pay for herself and the child when the Respondent refused to provide feeding allowance. Her departure from their matrimonial home was on account of the unbearable and intolerable conduct of the Respondent. The Respondent denied all the Petitioner's allegations rather it was a case of Counter accusation as he testified that it was Petitioner who made life so unbearable to his two elder daughters to the extent that he had to send them away from home."

At page 88 of the Record of Appeal the trial Court made the following findings on the conduct of the parties thus:-

"Upon a thorough evaluation of the facts presented to this Court together with the factors considered in the Hayes v. Hayes case my answer to issue 3 is in the affirmative."

In arriving at its decision that it is proper to award maintenance to both the Petitioner and the child the Court said at page 88 of the record of Appeal thus:-

"Both the petitioner and the only child of the marriage are entitled to maintenance payable by the Respondent However, the Court's award will be informed by the financial capabilities of the Respondent."

It is in evidence before the Court that the Appellant has two houses, he lives in one of the houses while the second house is given out on rent. However the Appellant failed to disclose the rent generated from the said house which could have been of assistance to the Court in assessing his correct means. The actual

rent for the said second house is a fact within the personal knowledge of the Respondent which he ought to have disclosed to the Court but he did not.

In its assessment of the means of the parties the trial Court observed this non disclosure of the rent generated by the Respondent from the second house and said:-

"The shop the Respondent opened up for the Petitioner is solely run by Petitioner and proceeds are still collected by the Petitioner, there is no evidence of the rent generated by the Respondent from his second house before this Court In light of the foregoing considerations, the Respondent is hereby ordered to pay the sum of N40,000,00 (Forty Thousand Naira) per quarter toward the upkeep of the only child of the marriage. Respondent is further ordered to pay the sum of N25,000 (Twenty-five Thousand Naira) per term for Oluwaseyi's school fees. He shall be financially responsible for her education up to tertiary level."

Considering the inflationary regime in this country vis-a-vis the depreciating value of the Naira, I am of the opinion that the maintenance assessment made by the trial Court was very fair.

The Appellant has presented nothing of value in this Appeal to satisfy the condition of the law for setting aside the Orders of maintenance awarded by the trial Court.

The Matrimonial Causes Act provides under Section 73 thus:-

"The Court shall not make an order increasing or decreasing an amount ordered to be paid by an order unless it is satisfied -

(a) that, since the order was made or last varied, the circumstances of the parties or either of them, or of any child for whose benefit the order was made, have changed to such an extent as to justify its so doing; or

(b) that material facts were withheld from the Court that varied the order or material evidence previously given before such Court was false."

In the instant case this Appeal seeks to vary the order of maintenance made by the lower Court on 18th February, 2008, but the Appellant has not presented anything before this Court to indicate that since the Order was made the circumstances by the parties or either of them or of the child for whose benefit the Order was made have changed to such an extent as to justify this Court varying the Order of maintenance made by the trial Court.

The Appellant had not also contended at the hearing of this Appeal that material facts were withheld from the trial Court that made the order or that material evidence previously given before the trial Court was false.

If any of these circumstances had existed at the hearing of this Appeal, the Appellant upon an application for leave to adduce fresh evidence would have been granted an indulgence by this Court. In the instant case if there is any party that withheld vital material from the trial Court, it is the Appellant because he refused to disclose the sums generated as rent from his second house. He who comes to equity must come with clean hands.

I see no merit in this Appeal and it is hereby dismissed. Pursuant to the provisions of Section 79(a) & (b) of the Matrimonial Causes Act Cap 220 LFN 1990, I hereby confirm the decision of the trial Court delivered on 18th February, 2008.

I will however not make any order as to cost.

MARY U. PETER-ODILI, J.C.A: I have the privilege of reading the draft judgment of my brother ABDU ABOKI, JCA which decision and reasonings I agree totally with. I have nothing more to add.

JIMI OLUKAYODE BADA, J.C.A: I have had the privilege of reading in a draft from the lead Judgment just delivered by my learned brother ABDU ABOKI, JCA. His Lordship has dealt with the issues in this appeal appropriately.

The appeal lacks merit and it is also dismissed by me.

There shall be no order as to costs.

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Appearances

T. O. Badmus For Appellant

AND

Unrepresented. For Respondent