

KUDZAI DARANGWA
versus
EVIDENCE KAMBARAMI

HIGH COURT OF ZIMBABWE
CHITAUNYE and TSANGA JJ
HARARE, 20 May 2014 and 24 July 2014

Appellant in person
Respondent in person

CHITAKUNYE J: On 20 May 2014 we heard the above appeal and awarded a maintenance sum of \$45-00. We indicated that full reasons for our determination will follow. These are the reasons for the decision.

This is an appeal from the judgement of a maintenance court sitting at Mutoko varying a maintenance order from \$30-00 per month to \$66-00 per month for the maintenance of a minor child.

The facts are that: - On 25 November 2011 the appellant was ordered to pay maintenance for a child he sired with respondent in the sum of \$30-00 per month till the child attained the age of 18 years or becomes self-supporting whichever occurred first. This order was granted with the consent of both parties.

On 3 September 2013, the respondent applied for the variation of the maintenance order in terms of s 8 of the Maintenance Act, [*Cap 5:09*] from the sum of \$30-00 to \$150-00 per month. The reason for seeking an upward variation was that the respondent wanted to employ a maid, buy groceries and for medication. In her evidence she expounded on that by saying that she needed \$50-00 for food, \$80-00 for the maid as the child will have to remain home with the maid as she had enrolled at Foundation College and \$30-00 for the minor child's medication.

The appellant opposed the application for variation. He contended that the sum being claimed was beyond his means as he earned a net income of \$178-00 per month plus \$30-00 for transport. He alluded to the fact that when the initial order was granted he was attending school and so it was his brother who made payments on his behalf. As he went to school on

cadetship he needed to pay some of the fees that were not paid in addition to repaying his brother.

He outlined his basic expenses as follows: -

Rentals - \$40-00;

Groceries \$40-00;

Maintenance to respondent \$35-00 which is the sum he was offering.

The rest of the income was for transport and payment of debts that he accrued as he was attending school. He had also married and was expecting a child soon.

In his ruling the trial magistrate indicated that respondent had not proved that she was enrolled at Foundation College and so the reason for seeking to employ a maid was not true. In the same way he concluded that appellant had not proved that he had recently married. Based on these findings the magistrate concluded that appellant's net earnings must thus be shared between appellant and his child. He thus varied the sum to \$ 66-00 per month.

The appellant appealed against that determination. His grounds of appeal were that: -

- a) The court *a quo* erred in handing down a judgment that was devoid of the principles of fairness and justice;
- b) The learned magistrate failed to appreciate that whilst the appellant had an obligation to contribute towards the upkeep of his child, he also had other parental obligations in respect of his current wife and child;
- c) The court *a quo* erred by failing to reasonably divide the sum of \$ 178-00 between the appellant and the respondent. As a result the court *a quo* awarded the respondent an amount of \$ 66-00 which is unreasonably high given that the appellant was left with just the sum of \$ 112-00 to cater for his child, wife, rent and food as well as himself.
- d) The court *a quo* grossly committed an irregularity by using a wrong yardstick to test whether or not the appellant was married.

Though the grounds are captured in a layman's language, it is clear appellant has issue with the principles the trial magistrate applied in coming to a determination that a sum of \$66-00 was fair and just.

The question to pose at the outset is whether the magistrate applied the appropriate principles in arriving at the decision as he did. Section 8 of the Maintenance Act provides for an application for variation and the manner in which such an application must be made. Section 8(2) (a) and (b) of the Act provides that:-

“An application referred to in subsection (1) shall be on affidavit; and state the grounds upon which the variation or discharge is sought.”

In *casu*, the application is in affidavit and states the grounds for the application as:-

“I am varying my maintenance from \$30-00 to \$150-00 as I need a maid for the child, groceries and medication”

Those are the only grounds stated in the affidavit. The justification to employ a maid is not stated and even the aspect of groceries is not explained as respondent was already in receipt of maintenance for that purpose.

Section 8(7) (b) of the Act states that:-

“If the maintenance court holding an inquiry in terms of subsection (6) is satisfied that the means or circumstances of any of the parties have altered since the making of the direction or order or any variation thereof, it may vary the direction or order subject to subsections (3), (4), (5), (6) and (7) of section six which shall apply, *mutatis mutandis*, in relation to any variation.”

It is thus necessary that when seized with an application for variation court must hold an inquiry and assess the grounds being advanced. Court must be satisfied that there has been a change in circumstances warranting interference with the existing order. The onus in this regard is on the party seeking to have the order varied.

As aptly stated by KORSAH JA in *Smit v Smit* 1994(2) ZLR 149 (S) at p 153 D-F

“It seems to me that the Act tasks the court with the duty of ascertaining whether there has been a change of circumstances in the light of which the financial arrangements were made and, if so, depending on the nature and degree of such change, to determine what, in its discretion, would be the appropriate adjustment to make, having regard to all the circumstances. A court shirks this duty if it refuses to exercise its discretion because an Applicant for variation has made what it considers to be an unreasonable offer by way of variation. The plain duty of the court is to make an order, after due inquiry, by way of variation appears just in all the circumstances. ...”

In *casu* the court discounted the issue of the need for a maid when it found that respondent had not proved that she had enrolled at Foundation College. The other grounds

were not well articulated at all. It was not easy to conclude that respondent had discharged the onus from the record of proceedings.

The record of proceedings shows that the only meaningful change in circumstances came from the appellant who indicated that at the time the initial order was made he was not employed but was attending school and on cadetship. The order that was made was being paid by his brother on his behalf. He is now gainfully employed and earning \$178-00 per month. Due to that change he offered \$35-00 per month for the child.

The trial magistrate dismissed the offer and opined that the \$178-00 plus \$30-00 appellant was earning should be shared with his one child with the child getting \$66-00. There is however, no indication as to how the figure of \$ 66-00 was arrived at.

In Hora v Tafamba 1992 (2) ZLR 348(S) McNALLY JA had occasion to comment on the role expected of a magistrate in a maintenance case and this is what he said at p 350 F-G:-

“Generally, the duty of a magistrate in a maintenance application, more particularly where the parties are unrepresented, is that of an investigative magistrate. He is not merely an umpire in a dispute between two sides. He is the upper guardian of the most important party, the child. He must therefore seek out the relevant facts. He must ask whatever questions are necessary to enable him to give an adequate judgment. He must aim to give the child reasonable financial support without placing an unfair burden on either parent.”

The honourable judge reiterated the 5 step method of calculating maintenance he had suggested in an earlier case of *Gwachiwa v Gwachiwa* S-134-86 as a starting point. The steps are as follows: -

- i) To ascertain and add together the total net income of the father's household and the mother's household. The total gives the total money available per month.
- ii) To calculate what claims there are on that income by allocating two shares to each adult in the two households and one share to each child in the two households.
- iii) To divide the total amount of money available each month by the total number of shares. One share will be a child's share and two shares will represent an adult share.
- iv) To calculate how much (if any) should be paid by the father to the mother as maintenance in order to ensure that the child who is the subject of the dispute receives a child's share.

v) Adjust the figure arrived at in step (iv) up or down to allow for the innumerable variable factors and special features which may arise in the case under consideration.

It is important to appreciate that this is only a point of take off. It is nevertheless a useful method of assessing what would be an appropriate award. This entails the need for the trial magistrate to be investigative so that he has adequate facts upon which to rely on.

In *casu* there was not much inquiry made of the parties. The respondent's ability or inability to contribute towards the needs of the child was not explored at all. The marital status of appellant was dismissed without justification yet appellant had insisted he now had another wife who was then expecting. Had an investigative inquiry been done probably the truth would have come out. The manner in which the magistrate arrived at the figure of \$66-00 is purely out of a gut feeling.

I thus implore magistrates to have a methodical approach in their assessment of what would be a reasonable award.

Upon hearing submissions by the parties we were of the view that despite the deficiencies alluded to above we could still decide on the appeal without having to refer the proceedings to the magistrate for further inquiries. In this regard we asked the parties at length on pertinent points. We are of the view that it is probable appellant has taken on another wife and has a new family. His income is therefore to be shared as between himself, wife and two children including the child in question. Applying the method stated above we have about 6 shares for the total income of \$208-00 per month. Each share would thus be about \$31-00. We looked at various variables such as basic needs for appellant which may not be compromised such as the need for transport, accommodation, basic food and repayment of the cadetship debt *vis -a -vis* the child's basic needs. It was our considered view that an award of \$45-00 per month would be reasonable taking into account the meagre resources available.

Accordingly the appeal is hereby allowed.

The order in the sum of \$66-00 by the court *a quo* is hereby set aside and is substituted by the following:-

1. The appellant is hereby ordered to pay maintenance in the sum of \$45-00 per month for the upkeep of the minor child till the child attains the age of 18 years or becomes self supporting whichever is earlier.
2. The payments shall be made into respondent's account as per the initial order.

TSANGA J: I concur: