

**Midwa v Midwa (2003) AHRLR 189 (KeCA 2000)**

*Midwa v Midwa*

Court of Appeal of Kenya at Nairobi, 31 July 2000

Judges: Kwach, Tunoi and Keiwua

Previously reported: [2000] 2 EA 453 (CAK)

*A wife's claim that she was discriminated against by her husband on the grounds of her HIV status*

**Cruel, inhuman or degrading treatment** (6, 8)

**Health** (6, 8)

**Children** (best interest, 7, 9)

**Equality, non-discrimination** (discrimination on the grounds of HIV status, 10)

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**Kwach, Tunoi and Keiwua JJA**

[1.] This is an application under rule 5(2)(b) of the Court of Appeal Rules seeking an order for a stay of execution of the order of the superior court (Rawal J) dated 6 June 2000, by which order the applicant, the wife in the petition, was expelled from the matrimonial home and consigned into the servants quarter euphemistically labelled an outhouse pending the hearing and determination of the intended appeal.

[2.] Though this is a peculiar case and one of its rare kind to reach this Court, we are somehow perturbed by the manner in which the learned Judge approached it. In the process she ignored the medical condition of the wife and the tender age of the children of the marriage and consequently made certain orders which plainly cry loudly for justice.

[3.] The parties are husband and wife. They solemnised their marriage under the African Christian Marriage and Divorce Act at the All Saints' Cathedral, Nairobi, on 10 February 1990. The husband works with Total Kenya Ltd while the wife is an officer with the National Bank of Kenya. They are blessed with two sons, now aged 7 and 10. The marriage appears to have been reasonably happy until in or about December 1996 when the wife tested HIV positive. The medical status of the husband has so far not been revealed.

[4.] On 24 January 2000, the husband petitioned for divorce on the grounds of cruelty; the particulars thereof being given as that the wife having tested HIV positive was endangering the life of the husband. Other instances of cruelty cited in the petition are assaults, abuse and other matrimonial offences allegedly committed by the wife upon the person of the husband and the children. These are not relevant to the application before us and neither have they been tried in the cause which is still pending before the superior court.

[5.] Under the Matrimonial Causes Act (Chapter 152) Laws of Kenya only impotence, insanity and infectious venereal diseases are recognised as grounds of petition for divorce and for decree of nullity.

[6.] Ms Abida Ali for the wife, submits that the servants quarter is unfurnished, unpainted and incomplete. It has only a simple bed and a cooker. The wife is denied access and enjoyment of the matrimonial home and yet her salary is deducted every month in

payment of the mortgage taken for its construction. She contended that it was totally unjustified for the learned Judge to confine the wife there in her present predicament.

[7.] As for the children, Ms Ali argues that there do not exist any exceptional circumstances so as to justify giving their custody to the father. She contended that to separate them from their mother will make them suffer psychologically and emotionally thereby causing them irreparable loss and damage.

[8.] We have no hesitation in holding that the intended appeal is arguable and not frivolous. The ruling of the learned Judge, on its face, smacks of insensitivity and total inconsideration of the facts presented before her. It is not denied that the wife is 50% holder of the entire property and that her salary services the mortgage. It is traumatising and dehumanising to order her to live in the servants quarter of her own house. We agree with Ms Ali that in such conditions her health is likely to be adversely affected.

[9.] It is trite law that, prima facie, other things being equal, children of tender age should be with their mother, and where a court gives the custody of a child of tender age to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the prima facie rule. See *Re S (an infant)* [1958] 1 All ER 783 at 786 and 787 and *Karanu v Karanu* [1975] EA 18. The learned Judge, in our view, did not correctly direct herself on the principle that in cases of custody of the children the paramount consideration is their welfare. Moreover, as the record shows, there were no exceptional circumstances shown to justify depriving the mother of her natural right to have her children with her.

[10.] The husband in countering the application maintains that he cannot live together with his wife under the same roof as she poses a grave risk to his life. We sympathise. The wife is still working and servicing the mortgage. She avers that she is still strong and healthy despite the fact that she was diagnosed HIV positive about five years ago. Until the Court decrees otherwise the husband should not desert his wife. Presently it would be morally wrong.

[11.] If anything is done to upset and alter the state of health of the wife, substantial harm may be occasioned and the intended appeal will be rendered nugatory.

[12.] We allow the application and grant a stay of execution. We order that the wife be put back in the matrimonial home forthwith. The costs of this application shall be in the intended appeal