



FSO v FA (Civil Appeal E111 of 2022) [2023] KEHC 20972 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20972 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA**

CIVIL APPEAL E111 OF 2022

DK KEMEL, J

JULY 28, 2023

BETWEEN

FSO APPELLANT

AND

FA RESPONDENT

(Being an appeal against the judgement of Hon Shaban Issa (Principal Kadhi) delivered on 15th October, 2022 in Bungoma Kadhi's Court Divorce Cause No. E001 of 2022 between FA Vs FSO)

JUDGMENT

1. This Appeal arises from a judgment delivered in Principal Kadhi's Court Divorce Cause No 01 of 2022. The Appellant is aggrieved by the decision of the Honourable Principal Kadhi Hon Shaban Issa M delivered on October 18, 2022, and has preferred this Appeal. The Kadhi dissolved the marriage between the Appellant and the Respondent and made further orders inter alia; the Appellant to pay the deferred "Mahar" to the Respondent within three months with effect from October 18, 2022; granted custody, care and control of their minor to the Respondent; ordered the Appellant to pay Kshs 10,000/= for maintenance and school fees; ordered the Respondent to provide shelter and other basic needs; ordered the Appellant shall have visitation rights and that he be going there frequently so that the child can get used to him.
2. In his Memorandum of Appeal dated November 15, 2021, the Appellant has raised four (4) grounds of appeal which are as follows:
 - i. That the learned Kadhi erred in fact and in law by failing to appreciate that it is the Respondent herein who initiated the divorce proceedings herein and was thus not entitled to deferred Mahar.
 - ii. That the learned Kadhi erred in fact and in law in making an order for the custody of the minor whereas the cause before him was a Petition for divorce and not suit for custody and maintenance of the minor.



- iii. That the learned Kadhi erred in fact and in law by failing to appreciate that custody of the minor ought to be vested on the parties herein jointly and that awarding the custody to the Respondent herein was an error in law.
 - iv. That the learned Kadhi erred in fact and in law in granting the Appellant visitation rights to the minor whereas the proceedings leading to the divorce is instructive of the relationship between the Appellant and the Respondent's family not being good.
3. The Appellant prayed for the appeal to be allowed; the subordinate's Court finding on deferred "Mahar" be set aside; the subordinate's Court finding on custody of the minor and visitation rights thereof be set aside, and any further relief as may appear just to the Honourable Court.
 4. In compliance with the directions of this court, this Appeal was canvassed through written submissions. Both parties complied. I have had the chance to read the said submissions and have given due consideration to the same.
 5. This being the first appeal, this Court is obligated to consider all the evidence tendered in the lower Court and arrive at an independent conclusion. This duty was set out by the Court of Appeal in the case of *Kenya Ports Authority v Kusthon (Kenya) Limited* [2009] 2EA 212 wherein it was held *inter alia*, that: -

“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”.
 6. The Respondent FA testified that the Appellant is her husband with whom they got married on October 14, 2014 under Islamic Sharia law and that they were blessed with one issue namely MF aged 5 years old. She stated that the Appellant used to reside in New Zealand, Australia and used to visit her once in a while. She stated that the Appellant later stayed away for about four years and when he visited, he was hostile and cruel to her and was not happy that in his absence she had enrolled for a second degree. She accused the appellant for only being with her for about ten months within a period of seven years of the marriage. She also maintained that she used to support herself and the child and after consultation with her family, she lodged the petition for divorce where she sought for dissolution of the marriage, custody of the minor, payment of deferred "Mahar" of Kshs 30, 000/ and any other relief. She also sought for upkeep of the minor of Kshs 20,000/ from the appellant.

On cross-examination, she stated that the money sent was not enough to cater for the house expenses and that she regretted entering into the marriage. She added that she had earlier requested the appellant to relocate to Kenya and start up a business but he ignored it.
 7. SAI testified that he is an uncle of the Respondent and confirmed that the couple had been having endless conflicts which could not be resolved. He stated that the Respondent's pursuit of further studies is not sinful as claimed by the appellant. He castigated the appellant for failing to maintain his family and appreciated the respondent for her patience to the long distance marriage. He confirmed that wives are entitled to payment of "Mahar" and "Eddat" as per Islamic Sharia law. He added that the deferred Mahar should be paid even after the divorce
 8. The Appellant FSO testified that before he married the Respondent he had informed her about his marital status and what he did for a living in New Zealand and the difficulties he was going through. He stated that he believes that there are other persons behind the Respondent's quest for Talaka (Divorce)



who comprise of her relatives who are against the marriage. He stated that the respondent had always been insisting for a divorce and that as she is the one initiating the divorce then she is not entitled to the claim for deferred Mahar. He confirmed that he is ready to pay for the school fees for his daughter in a school of his choice preferably a public school. He also confirmed that he was ready to pay a sum of Kshs 10,000/every month for the maintenance of the child. He denied the allegations by the Respondent especially the claim that he had been the one instigating her to go for divorce as she was the one talking about separation. He denied divorcing her. Regarding custody, he agreed that the Respondent could be granted the same but that the court should allow him free access to the minor. He finally added that in the event that she marries, then the custody will be transferred to him as per Sharia law.

9. I have read the evidence tendered in the Kadhi's court and have analyzed the same. In determining this appeal, I have taken into account Article 53 (2) of the Constitution and Section 4(3) of the Children Act that obligate this court to give primacy to the best interest of children in all matters dealing with the child. It is also the duty of a Court in determining issues of custody of children to ensure that the provisions of Section 83(1) of the Children Act are taken into account. This Section provides that:

- "(1) In determining whether or not a custody order should be made in favour of the applicant, the court shall have regard to—
- (a) the conduct and wishes of the parent or guardian of the child;
 - (b) the ascertainable wishes of the relatives of the child;
 - (c) the ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;
 - (d) the ascertainable wishes of the child;
 - (e) whether the child has suffered any harm or is likely to suffer any harm if the order is not made;
 - (f) the customs of the community to which the child belongs;
 - (g) the religious persuasion of the child;
 - (h) whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;
 - (i) the circumstances of any sibling of the child concerned, and of any other children of the home, if any;
 - (j) the best interest of the child"

10. I am aware that Courts have found that the Kadhi Court lacks jurisdiction to determine matters custody and maintenance of children. There are several decisions on this issue including AAI v HAD [2018] KLR and JAOO v HAS [2015] eKLR. I note, however, that on the issue of the custody and maintenance, the Appellant did not plead issue of want of jurisdiction by the Kadhi's Court nor tender evidence in respect thereof before the trial court but has raised it here in his submissions. On the other hand, the respondent, in her submissions, has argued that the learned Kadhi had jurisdiction to handle the minor's custody and maintenance even if he was biased. It is also noted that the Appellant confirmed that he has no objection to the Respondent being granted custody of the child as long as he allowed to have access to the minor.



11. In considering whether to interfere with the decision of the lower Court, it is trite law that an appellate Court should be slow in interfering with the exercise of the discretion of the Court below. An appellate Court may only tinker with a decision of the lower Court, if it is satisfied that the discretion of that court was not exercised judiciously. In *Mbogo & Another v Shah* [1968] EA 93, it was held at page 96 that:

“An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice.”
12. I have taken into account the issues raised in this Appeal and as I have stated above, it is trite that the best interest of the child is of paramount importance in all matters concerning the child. I have also noted that there is the issue of whether the Kadhi has jurisdiction to handle issues of custody of children. Since this issue has been raised in the trial court and in this appeal, I will decide this matter based on what is the best interest of the minor.
13. Every child has a right 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 (Article 53 (1) (e)). My careful consideration of the proceedings before the Kadhi show that I have no reason to interfere with the discretion of the Kadhi in all the orders he made save for some of the orders which did not take into account the best interest of the minor for her to fully benefit from the provisions of the law. I find no evidence that the Appellant is not fit to have actual custody, care and control of the minor. But it is important to also recognize the rights of the children to parental responsibility of both parents. She should not be denied the love of their father. It is noted that the Appellant in his response to the petition indicated that he had no objection to the Petitioner having custody and that the circumstances could only change if the petitioner remarries. It is thus erroneous for the Appellant herein to challenge the order on custody yet the same had been pleaded by himself as well as the Respondent herein. Hence grounds 2 and 3 of the appeal must fail
14. As regards the 1st ground of appeal, the Appellant contends that the Respondent having initiated the petition for divorce, then she is not entitled to payment of deferred ‘Mahar’. The issue of who is entitled to deferred Mahar, the mahar (dowry) is something that is paid by the man to his wife. It is paid to the wife and to her only as an honour and a respect given to her and to show that he has a serious desire to marry her and is not simply entering into the marriage contract without any sense of responsibility and obligation or effort on his part.
15. It has been referred to by many names in the texts and the books of fiqh:

Proof that the Mahar is Obligatory

Allah says in the Qur'an:

“And give the women their dowries with a good heart...” [Noble Quran 4:4]
16. This verse is addressed to either the husbands or the guardians. It is addressed to the husbands because it is their responsibility to pay the dowry. It could also be addressed to the guardians, not because they have to pay the dowry, but because in pre-Islamic jahiliya (and in much of today's "post-Islamic" jahiliya), they used to take the dowry of the women and not give it to them. This verse shows that the



dowry must be given to the women and not kept by the guardians. The following verses also shows the obligatory nature of paying the dowry to the women:

“...So for that pleasure which you have enjoyed from them, give them their prescribed compensation.” [Noble Quran 4:24]

“...All others have been made lawful for you provided you seek (them in marriage) with your property...” [Noble Quran 4:24]

17. Regarding one of the Companions who was poor and wished to marry, the Prophet (peace and blessings be upon him) said to him:

“ Search for something, even if it is just a ring made from iron.” [Bukhari & Muslim]

18. Regarding this case, I have noted the Respondent’s argument that it was clear that the Mahar was never paid and therefore Mahar has to be paid to the Respondent and it is compulsory under the Islamic law and thus the Respondent herein is entitled to her full Mahar upon the dissolution of the marriage. I am aware that as per the Islamic practice and sharia, the Mahar is paid to the wife and its compulsory and must be paid even on death. I cannot abandon the law of Allah which the parties herein profess. The Respondent herein is entitled to her full dowry and it will be against the law for me strip it off. I do note that the Kadhi’s orders handed over the same to the Respondent with was allowed under the sharia law. It is instructive that Mahar is similar to dowry paid by husbands for a woman’s hand in marriage. In the present case, the Appellant married the Respondent but apparently had not paid the said Mahar. He has lived with the Respondent and have been blessed with one child. The Appellant was aware that he ought to have paid the same but now that the marriage has come to an end, the same ought to be paid since the Respondent had been his wife all along. The respondent had served as his wife all along and both enjoyed consortium and been blessed with a child. Ordinarily, the Mahar ought to have been paid at the time of the marriage and hence the deferred Mahar is still a right to the Respondent whether or not there was divorce. The Appellant has taken issue with the fact that it was the Respondent who had initiated the divorce and so she cannot be allowed to access the Mahar. I am unable to agree with the Appellant for the reason that the Respondent still remains the mother of his child even when divorced as she still has to receive maintenance for the child and to receive the Appellant during his visitation. The issue of Mahar (dowry) is key in a woman’s personality as it allows her to have respect as a married woman and that the mahar signifies the respect her husband and the community has for her. I am therefore satisfied that the learned Kadhi came to a correct decision regarding the issue of deferred Mahar.

19. The Appellant vide ground 4 of his appeal, has castigated the trial court for making an order on visitation yet the relationship between him and the Respondent’s family is hostile. Whereas the effect of divorce usually comes with some strain in the relationship, the parties have no option but to put up with a brave face as the issue of visitation is necessary and in the best interest of the child. In any event, there is a court order to that effect and thus the parties concerned must comply or else the attendant consequences will ensue. Further, it is noted that the the Appellant vide his response to the petition dated 12/4/2022 prayer (d) thereof, he sought to be given access to his daughter. Again, in his evidence, the Appellant testified that he agrees that the Respondent be given custody of the minor but that the court ought to grant him access to the minor and that the custody will be transferred to him upon the Respondent’s remarriage. If indeed, that the Respondent’s family are hostile as alluded to by the Appellant, then the two can make arrangements where the minor could be brought in order for the Appellant to access her. Consequently, this ground must fail.



20. Finally, it is noted that the Appellant in his Memorandum of Appeal dated November 15, 2022 has not raised any objection to the orders by the trial court regarding the issue of maintenance and school fees for the minor. The record indicates that the Appellant had informed the court that he would be paying Kshs 10, 000/ per month for the minor's upkeep as well as pay her school fees preferably in a public school. The Respondent in her evidence, stated that she needed the Appellant to pay Kshs 20, 000/ for upkeep of the minor. She also stated that she was in employment and could enroll the child in her private school and that should the Appellant not afford it then he should leave it to her. It is noted that the trial court ordered the Appellant to pay Kshs 20, 000/ per month for upkeep of the minor. Indeed, the Appellant did not avail his affidavit of means or statement of finances for the court's perusal and hence the sum ordered is still reasonable in my view. The trial court also ordered the Respondent to provide shelter and other basic needs for the minor. As the Respondent has indicated that she is now in employment and could afford to enroll the child in a private school, then the Appellant's responsibility has somewhat been lessened and thus the payment of Kshs 20, 000/ shouldn't be an issue. Hence, I do not see any reason why I should interfere with the trial court's decision.
21. The upshot of the foregoing observations is that the appellant's appeal lacks merit. The same is dismissed with no order as to costs.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF JULY 2023.

D.KEMEI

JUDGE

In the presence of:

FA Appellant

Onyando Respondent

Kizito Court Assistant

