



**SSA v HMS (Civil Appeal E001 of 2020)
[2023] KEHC 24272 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24272 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E001 OF 2020**

**DK KEMEL, J
OCTOBER 27, 2023**

BETWEEN

SSA APPELLANT

AND

HMS RESPONDENT

*(Being an appeal from the judgment of Hon. Shaban Issa (SRK) delivered on
7th April 2020 in Bungoma Kadhis Court No. 12 of 2019 between SSA v HMS)*

JUDGMENT

1. The appellant in the Kadhi's court sought dissolution of his marriage from the respondent on grounds that the respondent had left the matrimonial home for more than eight months without his permission. He contended that according to the Islamic laws, when a wife moves out for more than 3-4 months after a quarrel, she is considered divorced from her husband (*Khula*).
2. In her defence, the respondent averred that she left her home due to mistreatment by her stepdaughters. She reported their behaviour to the appellant, but who chose not to intervene, leaving the respondent with no alternative but to go back home. She denied dissolving their union.
3. The Kadhi, after considering the evidence before him, found that the principle of *Khula* was inapplicable to the case as the respondent left home having been frustrated and in anger and upon her return requested the appellant to forgive her. The court found that it was the husband who had divorced his wife and that the respondent was entitled to alimony ('*muta'h*'). The trial court proceeded to grant the following orders:

1. The marriage between the parties is dissolved.



2. The petitioner shall pay Kshs. 100,000/- to the respondent as consolatory gift, he may pay cash and/or in instalments within a period of three months with effect from the day of judgment.
 3. The petitioner shall pay Kshs 14,000/- for *mabar* within 30 days.
 4. The custody of the children is granted to the mother. And the father shall have visitation rights without causing any harm to the respondent.
 5. The petitioner shall provide maintenance for children, pay school fees and other educational expenses as they arise and pay medical bills.
 6. The respondent shall provide shelter.
4. The appellant, being dissatisfied with the finding of the Kadhi's court, filed his Memorandum of Appeal dated 22nd October 2020. The appeal is premised on the following grounds:
1. The Appellant is not able to pay the Respondent the sum of Kshs. 100,000/- as ordered by the court.
 2. The Honourable Kadhi did not appreciate the fact that the Appellant is unemployed and only relies on herbs to earn a living and he is unable to raise and pay the Respondent huge amount of 100,000/- as a divorce present.
 3. The Honourable Kadhi in his ruling, ruled that the defendant wrote an apology letter asking to be forgiven after 9 months of being away without the knowledge of the husband which did not materialize and yet failed to appreciate that the defendant by moving out with her belonging for a period of 9 months was a clear indication of walking out of marriage which is equivalent to divorcing the husband (*Khula*).
 4. The Honourable Kadhi did not appreciate that the defendant did not have any valid reason for her to move out of marriage only to come back after 9 months with excuses that she moved out on account of frustration by her step daughter who is a minor, who can not frustrate a mature person.
 5. The Honourable Kadhi in his ruling ruled that the defendant is entitled for provisions but did not appreciate that the provision is only for a period of three months of *eda* during the time divorce is declared and that does not amount to paying defendant 100,000/- as divorce present.
 6. The Honourable Kadhi did not appreciate the fact that the defendant is entitled to *Mahar* (dowery) according to Islamic teaching as it is indicated in the marriage certificate before the honourable court and that the balance of *mabar* was cleared during ruling on 1st October 2020.
 7. The Honourable Kadhi did not appreciate that the present is a gift which one presents willingly to somebody who pleases him or her considering the ableness of a person.
5. The evidence of the parties before the Kadhi's court was as follows:
6. SSA testified that in February 2018 his wife left home with all household items without giving him any reason yet they had not quarrelled. He testified that he did not inquire into her reasons for leaving



but recalled that she had complained about one of his daughters and requested him to discipline her. The appellant thought the issue was minor and asked her to wait for him to resolve it. The respondent left and stayed away for 9 months and he thought she divorced herself from him as per *Khula*. She later returned but without his invitation. She claimed to have come to console her daughter who was sitting for KCPE of 2018. The respondent wrote an apology letter to the appellant on 31/10/2018. The appellant replied seeking to know her reasons for leaving. The respondent gave her reasons for leaving in her letter dated 3rd November 2018 and that the appellant asked for time to consider her apology.

7. HMS testified that she married the appellant when she was 18 years old and were blessed with two children. On 23rd February 2018 she moved out of the matrimonial home due to feelings of frustrations. She was experiencing difficulties in her marriage and moved out in order to defuse the situation, hoping to resolve their issues with the appellant. The appellant ignored her and was claiming that she was divorced by virtue of *Khula*. She explained that the appellant would defend his daughters even when they misbehaved. She attempted to instil discipline in one of his daughters, but that the appellant requested that she refrain from doing so in the child's presence. She was angered and left the home with a few *sufurias* and utensils but that her husband never came for her. She did not have the intention to divorce the appellant and later asked the appellant for his forgiveness. She testified that the appellant gave her a room but disconnected her electricity and was not allowed to cook. She urged the court to consider her contributions to the home and his herbal business.
8. The respondent's mother, RM also testified in favour of the respondent. She testified that the respondent had been having endless conflicts with her husband. She recalled that in 2018, the respondent came home complaining that the appellant was favouring his daughters. She stayed with her daughter for eight months and that the appellant did not attempt to make any communication. She testified that prior to the marriage the appellant and respondent had nothing they have since acquired land together. On cross-examination, she stated that she did not have the evidence that the appellant had purchased land. She also confirmed that the appellant did not pursue his wife when she left for her parent's home.
9. The appeal was canvassed by way of written submissions. Both parties have filed their rival submissions. The appellant argues that the [Holy Quran](#) Sura al Bagarah verse 229 is to the effect that when a husband has divorced a wife then the wife has to wait for *eddah*, a period of three months without moving out. During this period, the discretion amount is fixed by the court as a provision for three months and that the amount is payable by the husband. The appellant maintained that the respondent moved out of the matrimonial home for nine months and thus the union was dissolved (*Khula*).
10. The respondent on her part submits that she did not initiate the divorce '*Khula*'. It was argued that the evidence in court was that the appellant frustrated the respondent, then filed the divorce proceedings. According to the respondent the divorce between the appellant was *talaq* and not *Khula*.
11. One of the issues from the submissions of the parties is whether the appellant had proved '*Khula*'. The terminology *Khula* was aptly discussed in the case of [AWB v SFD](#) [2020] eKLR where the court held as follows:

“Let's look at the Islamic terminology known as *Khulu* or *Khula* – It is a procedure through which a woman can divorce her husband in Islam, by returning the dowry or something else she received from her husband. The most famous case is that of Thabit Bin Qals whose two wives sought divorce from him. One of them Jamillah Bint Abi Salud disliked his features. She said to the prophet, "Nothing can bring him together with me, he is the blackest, the most short-statured, and the ugliest. I don't blame him for his morals, or religion but I am



afraid Islam will lose its hold upon me if I am compelled to live with him, after hearing her complaints the prophet said to her; will you give him back the orchard he gave you. She replied yes and more if he wants. The prophet asked her not to give more and ordered Thabit to accept the Orchard and divorce her. (cited by Siddiqi M.M 1993).”

12. The four conditions of *Khula* was discussed by the court in *MMO v FAH* [2019] eKLR as follows:

“ 49. There are four main conditions of *Khula*: -

- (i) There must be an offer from the wife. The wife may make a proposal either by the use of word “Khul’u” or its derivative e.g. the wife states ‘give me a Khul’u in exchange of my dowry.’
- (ii) The offer must be accepted by the husband. The husband replies “I do”. Thereafter a valid dissolution of marriage under Khul’u comes into effect.
- (iii) The monetary compensation must be paid in return by someone who is legally qualified to donate.
- (iv) The husband must be legally qualified to divorce. (Dr. Salih Al-Fawzan, A summary of Islamic Jurisprudence, V2, page 424).”

13. The court in *MI v AA* [2018] eKLR observed that a wife must harbour a dislike towards her husband for dissolution by *Khula* to be applied. The court stated:

“ 17. From the holding case of *Khurshid Bibi v Muhammad Amin*, (*supra*) khul is the right of a woman to obtain dissolution of marriage as long as there is personal aversion or dislike, and if the Court finds that the husband and wife cannot live together in amity and fulfil the limits set by God. A woman can claim khul on agreeing to restore to the husband the dower or some other consideration. Further, the consent of the husband is not required for the wife to obtain dissolution of marriage under khul.”

14. In this case, the evidence does not point to dissolution *Khula* as submitted by the appellant. The respondent testified that she only left her matrimonial home because her husband had refused to discipline her daughter and was frustrated as a result. The respondent did not offer to return her dowry to have their marriage dissolved. There was also no evidence that the respondent harboured personal aversions or disliked the appellant. I therefore cannot fault the decision of the Kadhi that the respondent left her matrimonial home out of frustration returned and offered her apologies for leaving. The appellant failed to demonstrate dissolution of marriage by *Khula* and is not entitled to *mabar* (dower).

15. The subordinate court in its judgment also found that it is the husband (the appellant) who is seeking to divorce the respondent. The appellant in his pleadings sought the following orders:

- a. That due to her actions the divorce is deemed being valid.
- b. That a certificate of divorce be handed to me declaring that the two of us are no longer husband and wife.
- c. That the plaintiff and the defendant to have equal share of custody of the two minors.



- d. That the defendant to relocate.
- e. Costs of the suit.
16. It is clear that from his prayers the appellant sought to have the marriage dissolved and having found that there was no evidence of *Khula*, the appellant must pay mut'a (compensation). Article 86 of the [Islamic Charter on Family](#) provides for what is referred to as a conciliatory gift for divorce as follows:
- Islamic Shariah encourages the man to give his wife a material gift, known as al-mut'ah, when he divorces her. The value of the gift should be in proportion to the husband's financial abilities and the duration of the marriage. The purpose of the gift is to console her and to lessen the harm that she endures as a result of the divorce.
17. The respondent testified that she has been married to the appellant for 18 years and have two children with the appellant. She also testified that she has helped the appellant in raising his other children (her step daughters) and have also worked together in the appellant's herbal business. The appellant has argued in his submissions that he is not salaried and that the trial magistrate did not consider his earnings. In my view, the Kshs. 100,000/- compensation was not excessive as the appellant has a herbal business which he does not deny and that there was evidence by the respondent that she contributed to the growth of the business.
18. It is noted that the trial magistrate did not make any pronouncement on the issue of eddah that was raised by the Appellant. The [Quran](#) provides in Surah al Baqarah 2.228 guidance on the waiting period, eddah:
- Divorced women remain in waiting [i.e., do not remarry] for three periods, and it is not lawful for them to conceal what Allah has created in their wombs if they believe in Allah and the Last Day.
19. The appellant appears to cling to the period of eddah which should be observed by the Respondent before she can access the compensation. There is no evidence that the respondent has ever re-married after the divorce as she has been staying with her parents. The respondent in her evidence did not indicate that she had any intention of remarrying since it was the appellant's own wish. Hence, I find the appellant's claim for eddah is a ruse and a gimmick to tie and frustrate the respondent for no apparent reason. She already sent a earnest apology to the appellant for running away to her parents' home and gave her reasons therefor. It was the appellant's machinations and intention to divorce the respondent who was opposed to it. The finding by the trial court was thus sound and I see no need to interfere with it.
20. The upshot of the foregoing observations is that the appellant's appeal lacks merit. The same is hereby dismissed. As the parties are a couple I order that each party bears their own costs of the appeal and in the lower court.

DATED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF OCTOBER 2023

D.KEMEI

JUDGE.

In the presence of :

SSA Appellant

No appearance HMS Respondent



