



REPUBLIC OF KENYA



AMN v AAM (Civil Appeal E003 of 2020) [2022] KEHC 10179 (KLR) (23 June 2022) (Judgment)

Neutral citation: [2022] KEHC 10179 (KLR)

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

CIVIL APPEAL E003 OF 2020

A ALI-ARONI, J

JUNE 23, 2022

BETWEEN

AMN APPELLANT

AND

AAM RESPONDENT

(Being an appeal from the judgement of Honourable Dadacha. A. Ibrahim – Resident Kadhi Bute, dated 29th October 2020 in Divorce Cause Number 10 of 2020)

JUDGMENT

1. AAM the Respondent herein filed a Petition for divorce in the trial court dated 14th September 2020 and sought the following prayers against the Appellant AMN;
 - a. That the marriage between the Petitioner and the Respondent be dissolved and the court do issue a divorce certificate.
 - b. That the agreed dowry of four years old she camel be paid by the Respondent.
 - c. That the petitioner be granted legal, physical and actual custody of the minor namely ZA.
 - d. The Respondent to provide maintenance for the minor.
 - e. The costs of the Petition be awarded to the petitioner.
 - f. The court be pleased to make any other Order or relief as it may deem just and expedient.
2. The Appellant filed his Response & a Cross Petition dated 30TH September 2020 denying the averments made in the Petition and urged the court to dismiss the Petition. In his Cross Petition he urged the court to Order;
 - a. The Petitioner to return to her matrimonial home &



- b. The Petitioner be relocated to place the Respondent desires.
3. Upon hearing the Respondent and her witnesses on one part and the Appellant herein as a sole witness the trial court found that the marriage between the two had broken down irretrievably and granted the prayer for dissolution of marriage. It also held that the Respondent was entitled to her dowry of a four-year-old camel and directed the Appellant to settle the same within thirty days of the order. On custody and maintenance, the court directed the appellant to provide sustenance at Kshs. 6,000.00 a month. He was further ordered to provide for the children educational fees when they start going to school, cater for medical fees and clothing for the kid twice a year.
4. Aggrieved by the trial court's determination the Appellant moved this Court by way of a memorandum of Appeal dated 19th November 2020 raising the following grounds;
- i. That the trial court erred in law by giving the divorce certificate absolutely without giving the appellant a chance to defend himself.
 - ii. That the learned Kadhi failed to observe that the matter before him was divorce in nature and he should have taken into consideration of other beneficiaries who stands to suffer.
 - iii. That the learned Kadhi failed to observe that there was an agreement between the parties on the mode of paying the dowry.
 - iv. That the learned Kadhi erred in law and fact by failing to appreciate that the appellant is a young man and with a young family and he should have mediated instead of giving a harsh judgment.
 - v. That the trial court erred in law and in fact by failing to strictly give judgment as per Islamic Sharia Law.
5. The appeal was set down for hearing. The court heard the same with the assistance of two Kadhis as assessors in compliance with Section 65(1)(c) of the [Civil Procedure Act](#) which provides as follows:
- “(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—
(c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.”
6. The appellant submitted that he is appealing against the divorce and is ready to take care of his wife. That the trial Kadhi rushed to make his decision and did not consider that they had one issue in the marriage and his wife was also pregnant. He stated that he is ready to pay the dowry.
- Further he informed the court that the Respondent had since eloped with someone else. And that on his part he is also married to another wife.
7. The Respondent failed to Appear in Court despite service of notice upon her severally. The Appeal was therefore undefended.

Analysis and Determination

8. As the 1st Appellate court, this court is required to consider the evidence afresh, analyze and evaluate the same in order to arrive at its own independent decision, bearing in mind that the trial court saw and heard the evidence first hand and an allowance ought to be given in this regard.



In the case of *Peters v Sunday Post Ltd* [1958] EA 424, the Court held that;

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide”

In another case *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] e KLR, the Court had this to say with regard to the duty of the first appellate court;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

9. In the Kadhi’s Court, AAM testified that she was married to the Appellant at Nyatta Location in accordance to Islamic Sharia. That the agreed dowry was a 4-year-old she camel which was not paid. She had problems with the Appellant which started when the Appellant failed to provide maintenance for her and their child and he assaulted her on several occasions. This forced his brother and the Elders to bring her some supplies after witnessing the problem she was going through.

10. Further the Appellant continuously assaulted her for receiving food from his brother. That the issue became chronic and the elders intervened five times but all was in vain owing to the Appellant’s rigidity and stubbornness.

She further testified that in a meeting held on 4th September 2020, convened by several elders including three chiefs it was resolved that since the Appellant was cruel, irresponsible and short tempered the Appellant should divorce the her due to the Appellant’s behavior and failure to care and provide for the family.

11. Three witnesses testified for the Petitioner as follows: - a.k.a testified that he is a neighbor to the parties. He attended five different meeting that sought to resolve the dispute between the two. The Appellant is a violent person and not cooperative. He was also aware that the Appellant was not providing food for his family and had become irresponsible and that elders out of their mercy contributed maintenance of the Respondent after noting her condition was worsening.

In cross-examination, he testified that it is only after the Respondent’s mother complained that the Appellant brought food through his brother Ibrahim Mohamed Noor. And fifty-six (56) days after this first provision the elders intervened and contributed food stuff for the petitioner to save the situation.

MMA also a neighbor to the parties. He personally witnessed the Appellant assaulting the Respondent two times. The second assault happened when the Appellant attempted to forcefully take the child from the Respondent.

The witness testified further that after the Appellant failed to provide for the Respondent several meetings were held to solve the maintenance issue but all was in vain. And at the last meeting attended by fifteen (15) elders among them three (3) chiefs, it was decided that the Appellant should divorce the Respondent. At the start of the meeting the Appellant indicated that he would accept the elders’ verdict but thereafter he reneged against his words.



IMN a brother to the Appellant testified that after the first assault the elders came together to try and solve the problem, they decided that the appellant was on the wrong and fined him Kenya Shillings five thousand for injury compensation.

Further when the Appellant failed to provide the Respondent with food and as he took food to the Respondent he saw the Appellant assault the her. He proceeded to their house and saw the Respondent holding her kidneys crying out of pain. He personally went to the hospital and brought a doctor to attend to the Respondent. the doctors recommended that the Respondent be taken to Moyale to ascertain whether there were any serious internal injuries.

Further he testified that the problem has been persistent for one year and at their meeting the elders' final verdict was that the Appellant should divorce the Respondent. He supported the elders' decision as his brother has completely failed to transform.

12. On his part AMN testified that on March 2020 he was robbed off Kenya shillings thirty-seven thousand (Kshs. 37,000/=) but despite that he has been trying to provide for the Respondent. He denied all the allegations of cruelty attributed to him.

13. From the grounds raised in the Appeal and the submissions of the Appellant in the absence of the Respondent, the issues for determination is whether the Hon, Kadhi misdirected himself in granting a divorce and issuing a divorce certificate to the Respondent and whether the Hon. Kadhi's judgement was in strict compliance with Islamic Sharia.

14. The jurisdiction of the Kadhi's Courts is established under Article 170 of *the Constitution* of Kenya 2010. Article 170(5) provides that:

“The jurisdiction of a Kadhi's court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.

15. The above is replicated in Section 5 of the Kadhi's Court Act, Cap11 Laws of Kenya which states that:

“A Kadhi's court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.”

16. Article 83 of *Islamic Charter on Family (charter) The Definition of Divorce and the Wisdom Behind* It is stated thus ;

“Divorce is the severing of the marital bond by the sole will of the husband. It is one of the permissible actions that is hated in Islam; in fact, of all permissible acts, divorce is the most abhorred by Allah. It was legislated to put an end to marriage that does not achieve its Shari#ah aims as a result of intense conflict between the spouses in cases when it is sure that continuing the marriage is absolutely impossible.”

17. Article 87 of the Charter: Divorce by Judicial Decree as a Result of Harm states as follows:

“If the wife has been harmed by her husband to an extent that would be impossible for most people similar to them to continue marital relationship under such circumstances, then she



shall have right to ask for divorce. If her husband refuses to divorce her, she can raise her case to the judge. If the harm is proven, then the judge shall rule in her favor thereby divorcing her from her husband..."

18. Further Article 88 the said Charter states; Judicial Decree of Divorce Due to Non-Payment of Financial Support or Long Absence provides;

"It is the wife's right to request divorce if her husband refuses to provide financial support for her or if he is absent for a long time and there is no news from him, or if he is lost or imprisoned for a long period of time and does not have any apparent wealth from which she can spend. Even if he does have wealth, she may request divorce if she is harmed by his absence from her, and this right is subject to the regulations and stipulations mentioned in the rulings of Shari#ah."

19. In this case, there is clear proof that the appellant assaulted the Respondent and failed to provide for the needs of the Respondent and their child. Articles 83 and 87 of the Islamic Charter provides this as a ground for divorce. The evidence of the Respondent and the Appellant's brother and the two neighbors' was clear proof that the Appellant assaulted the Respondent. This was corroborated by the determination of the elders annexed in support of the petition for divorce. As to provisions. It took the efforts of the Appellant's brother and the elders to take care of the Respondent and the minor. The Appellant sought to lay claim to the fact that he had been robbed hence was unable to cater for the Respondent. The Appellant's brother sought to help him cater for the needs of his family but the same was met with hostility.

There were attempts for reconciliation by the elders but the same did not succeed.

20. Based on the above analysis this Court finds that the Hon. Kadhi was right in his finding that the marriage between the two had broken down irretrievably, divorcing the parties and issuing a divorce certificate to the Respondent.
21. The Hon. Kadhi proceeded to make a determination as to the custody and maintenance of the issue of the marriage. Every child has 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)). The Court's careful consideration of the proceedings before the Kadhi show that there would be no reason to interfere with the determination reached by the Hon. Kadhi on this score, the same was well thought out and in the best interest of the child.

See also [FFA v NYA](#) [2021] eKLR

22. The next issue is the dowry payment by the Appellant. Under Islamic law dowry is an inherent and basic right of the wife. The Holy Qurán states;

"And give to the women [whom you marry] their mahr [obligatory bridal-money] with a good heart; but if they of their own good pleasure, remit any part of it to you take it, and enjoy it without fear of any harm (as Allah has made it lawful)" Nisa: 4:4

"You [believers] are of one another. So marry them with the permission of their people and give them their due compensation (i.e. mahr) according to what is acceptable. [They should be] chaste, neither [of] those who commit unlawful intercourse randomly nor those who take [secret lovers]." Nisa: 4:25



23. Prophet Mohamed S.A.W [may peace be upon him] said:

“the greatest sin before Allah is a person who married a lady and after fulfilling his desires divorced her and did not give her dowry, and a person who engaged a worker and did not give him his dues and another who kills an animal in vain.” Reported by Al Hakim and Baihaki. Certified as correct by Al Albany.

24. The amount of dowry that was to be paid by the Appellant is not in dispute. The Respondent was entitled to her dowry and the Kadhi made a just determination in this regard.

25. Interestingly the Appellant in his submissions informed the court the he has remarried and the Respondent has also gotten married. Though he is allowed to take up to four wives, it beats logic why he would follow an already married woman with a child from another man. In as much as he proclaims he loved the Respondent, he did not show it in his deed and actions necessitating the Respondent to seek a divorce from the Kadhi. The most logical thing for the Appellant to do is to carry on with his life and let the Respondent be.

26. The upshot of this court’s determination is that the Kadhi’s verdict has been affirmed. The court finds the Appeal lacking in merit.

27. The Appeal was undefended no orders as to costs.

DATED DELIVERED AND SIGNED IN GARISSA THIS 23RD DAY OF JUNE 2022

ALI-ARONI

JUDGE

