



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 43 OF 2019

SIAD ADAN BONAYA.....APPELLANT

VERSUS

HK.....1ST RESPONDENT

RM.....2ND RESPONDENT

(Being an appeal from the ruling of the Kadhi's Court at Isiolo by Hon. Abdulhalim H. Athman Civil Case No. 15 of 2017 dated 11th April, 2018)

JUDGMENT

Introduction

1. The Court heard the appeal herein with the aid of two assessors pursuant to section 65 (1) (c) of the Civil Procedure Act, which provides for appeals to the High Court from original decree of a Kadhi's Court as follows:

*“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.**”*

2. For the hearing of this appeal, I sat with Principal Kadhi A. J. Ishaq Hussein of Nairobi Kadhi's Court and Senior Resident Kadhi Muriithi Muriuki of Meru Kadhi's Court, both of whom gave a unanimous opinion, which, although not binding on the court (see criminal law and procedure analogy in *Kihara v. R* (1986) KLR 473, 479) I agreed with and considered for guidance in concluding the judgment and orders made herein.

The Principles for consideration of a first appeal

3. Of course, in accordance with *Peters v. Sunday Post Limited* (1958) EA 424 is entitled to review or reconsideration or rehearing by an appellate court of the evidence before the trial court as follows:

*“**Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial court 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 has plainly gone wrong, the appellate court will not hesitate so to decided.** Watt v. Thomas, (1947) 1 ALL ER 582; [1947] A.C. 484, applied.”*

4. See also *Selle & Anor. v. Automobile Associated Motor Boat Company Ltd.* (1968) EA 123, where it was held in the context of that case that “an appeal from the High Court is by way of a re-trial and the court of appeal is not bound to follow the trial judge's findings of fact if it appears either that he failed to take into account a particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.”

5. In addition, a first appeal is an appeal on both law and fact. See section 65 (b) of the Civil Procedure Act [as read with Article 169 (1) (b) of the Constitution which defines **subordinate courts** to include the of the evidence court] provides as follows:

*“from any original decree or part of a decree of **a subordinate court**, other than a magistrate's court of the third class, **on a question of law or fact.**”*

The Appeal and Cross-appeal

6. This appeal arises from the ruling of the learned Principle Kadhi Hon. Abdulhalim H. Athman in Civil Case No. 15 of 2017. In the said case the Respondents (husband and wife) had sued the appellant arising from a claim of interference of the marriage of the respondents and where they sought for:

“a) Defendant to be restrained from interference from their marriage.

b) Compensation for damages

c) Any other relief.”

7. The Respondents claim was based on fact that the appellant assaulted the 1st Respondent at the mosque and interfered with their marriage despite interventions of elders and his promise not to interfere he continued to interfere in the same by sending the 2nd Respondent sms calling her ‘Tiya’, which was intended to provoke feelings of the 1st Respondent and divorce the 2nd Respondent.

9. In his defence the Appellant denied the Respondent’s claim but acknowledged that he was one of the suitors to the 2nd Respondent. In his judgment the learned Kadhi allowed the claim for restrain against the Appellant from interference from their marriage and compensation for damages of Kshs. 20,000/= which precipitated the appeal before this court on grounds that:

1. **“That the Hon. Kadhi erred in law and fact in awarding KSHS 20,000.00/= to the Respondents as special damages.**
2. **That the Hon. Kadhi erred in law and fact by failing to recognize that this was a suit brought in bad faith.**
3. **The Hon. Kadhi erred in law and fact in ruling for the respondents contrary to the weight of the evidence adduced before him.**
4. **The Hon. Kadhi failed to consider material evidence on the conduct and psychological health of the Respondent.”**

9. The respondents too were dissatisfied with the decision hence he filed a **cross-appeal** and put forward the following grounds of appeal:

1. **The Honourable Principle erred in law and fact in making an award of Kshs. 20,000 in damages which award is too low considering the gravity of the actions of the Respondent in the cross-appeal which actions were clearly outlawed under Islamic law and practices and actions which threaten the institution of marriage between the Appellants in the cross-appeal.**
2. **The Honourable Principle Kadhi erred in law and fact by awarding damages of Kshs. 20,000 which award is too low consideration (sic) aggravating circumstances whereby the Respondent repeatedly interfered with the Appellants marriage and in spite of warning by the elders.**
3. **The Honourable Principle Kadhi totally misdirected himself into applying unknown and/or wrong principles of law in arriving at his said decision which influenced him into arriving at an erroneous and unreasonable low award.**

ISSUES FOR DETERMINATION

10. Upon considering the appeal, the cross appeal, the record and submissions, we find that the issues that falls for our opinion, in compliance with section 65(1) (c) of the Civil Procedure Act, are as follows:

- i. “Whether the word “Tiya” did lead to marriage interference.
- ii. Whether the damages were justifiably awarded.
- iii. Whether the award should be disturbed”

DETERMINATION

11. From, the submissions filed by the counsel for the parties there seem to be no contention that the Appellant sent a message to the 2nd Respondent with the word “Tiya” which translates to “mine” in Borana language, the issue is on whether the word “Tiya” amounted to interference of the marriage between the Respondents.

12. Our attention is drawn to Sahih Muslim, Book 8, *Kitab al- Nikah (The Book of Marriage) hadith (Prophetic sayings) No. Number 3289: Abu Huraira (Allah be pleased with him) reported Allah's Apostle (may peace be upon him) as having forbidden a dweller of the town selling the merchandise of a villager or outbidding in a sale (in order that another might fall into a snare), or a person making the proposal of marriage when his brother has already made such a proposal, or entering into a transaction when his brother has already entered; and a woman asking the divorce of her sister in order to deprive her of what belongs to her. 'Amr made this addition: "The person should not purchase in opposition to his brother."*

13. Further, Book 8, Number 3294:

'Uqba b. 'Amir said on the pulpit that Allah's Messenger (May peace be upon him) said: A believer is the brother of a believer, so it is not lawful for a believer to outbid his brother....

14. From the above authority, it clear that Islamic law frowns upon any kind of interference by a third party at the initial stages of marriage (post betrothal) and during the marriage (post nikah). That prohibition receives strong support as evidence in *Mu'alim Al sunnan* (Commentary on Prophetic Sayings compiled by Abu Daud), Vol.3 p. 194 where the author stated that the above state prohibition on non-interference is based upon non acceptable rule of social behavior, since prevention of harm is a fundamental principle (asl) generally agreed upon and widely applied in Islamic jurisprudence, as it has roots firmly in Qur'anic injunctions and in the sayings of the Prophet fortified by legal maxim '*La Darar wa-la Dirar*' meaning *no harm shall be inflicted or reciprocated* as a wrong which must be remedied. Thus, a claim of interference must be based on post betrothal conduct and post nikah conduct is admissible only to the extent that the conduct, complained of, is intentional.

15. The general rule is that matters of heart are not conducive to regulations, thus the availability of torts against a third party for interference is only amplified if the proof of such claim shows that; (1) There was a lawful marriage with love and affection; (2) that there was intentional interference and, (3) that the malicious act of 3rd party has a potential to result into a breakdown of marriage.

16. With the above in mind, a mere word 'Tiya' considering the Appellant and the 2nd Respondent past relationship does not become tortious but the conduct complained of must met the above test.

17. Applying the test on the conduct complained of, as adduced before the trial court, it's not in dispute, as evidenced in trial court, there was a lawful marriage between the Respondents characterized with love and affection. That considering the fundamental occurrence of the incident at Tullu Roba Mosque and, subsequent sittings of elders trying to resolve the impasse compels the rejection of the appellant's version of truth before the trial court. Further, it was crucial to the appellant's case at the lower court to find that his conduct was not intentional which was not the case. No serious rebuttal was adduced against the nexus between the occurrence of Tullu Roba Mosque and message sent on the 2nd night after the wedding of the Respondent's containing the word 'tiya'. The appellant failed to demonstrate good faith, deliberately his conduct of 19th March 2017 had potential of breaking down the Respondents' marriage. In the premises, it's our considered opinion that the answer to the first issue is affirmative.

18. On the issue of damage, our attention is drawn to Chapter 30 v 21 which states that, '*And among His Signs is this, that He created for you mates from among yourselves, that ye may dwell in tranquillity with them, and He has put love and mercy between your (hearts): verily in that are Signs for those who reflect.*'

Conclusion

19. The annals of human civilization characterize the transcendent importance of marriage. The marriage has a promise of nobility and dignity to all person, without regard to spouses' station in life. Marriage is sacred to those who live by their religion and offers unique fulfilment to those who find meaning in the secular realm. Therefore, all effort should be made in the interest of upholding marital bond. If interference arose by the conduct of 3rd party intentionally, the wrong must be remedied appropriately.

20. Further, our attention is drawn to *the legal maxim 'ad darar yuzal'* meaning ***Injury Should be Removed***, as contained '*al Ashbah*' p. 83 which give a brief commentary on legal maxims, considering the first issue answered in affirmative, it's crystal clear that the Respondents suffered emotional harm notwithstanding the physical harm visited upon the 1st Respondent at Tullu Roba Mosque. Islamic law denounces any unnecessary infliction of harm or injury and calls upon the unjustifiable harm must be remedied within the confines of law. In the premises, the damages were justifiably awarded.

21. On the quantum of the damage, in ***Loice Wanjiku Kagunda vs. Julius Gachau Mwangi*** CA 142/2003 the Court of Appeal held that: -

'We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see Mariga v. Musila [1984] KLR 257).'

22. When it can be shown that the same is inordinately low, this Court indeed has jurisdiction to disturb the finding of the lower Court on quantum. In the lead case of ***Butt v. Khan*** (1981) KLR 349, per Law JA at p. 356

"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he mis-apprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low."

23. This Court takes note of the need to protect the institution of marriage, which institution is recognized under Article 45 (2) of the Constitution of Kenya. What is frowned upon here is the act of interference with the marriage. In this case, it has been established on the evidence that there was at the time of the interference a valid marriage between the 1st and 2nd Respondents and that there was intentional interference by the Appellant which continued on despite the previous intervention by elders. Going by the serious nature of this offence, this Court finds it necessary to enhance the award of Ksh.20,000/= which this Court deems to be inordinately low. The Respondents in their submissions asked for an award of Ksh.2,000,000/=. This Court however finds that no amount of money can adequately compensate for any injury caused by unlawful interference of a marriage. The damages awarded in the matter are not punitive but merely compensatory. This Court finds that an award of Ksh.100,000/= will be sufficient. By reasons therefore, this Court enhances the award of damages from Ksh.20,000/= to Ksh.100,000/= and the cross appeal succeeds in this respect.

ORDERS

24. Accordingly, for the reasons set out above, the court makes the following orders:

1. The Appellant's appeal is dismissed.
2. The Respondents' cross-appeal succeeds and the award of Ksh.20,000/= as damages is set aside and substituted with an award of Ksh.100,000/=.
3. The Appellant shall pay the cost of the appeal and cross-appeal to the Respondents.

Order accordingly

DATED AND DELIVERED ON THIS 19TH DAY OF MARCH, 2021.

EDWARD M. MURIITHI

JUDGE

KADHI ASSESSORS:

(pursuant to section 65 (c) the Civil Procedure Act cap. 10)

.....

HON. A. J. ISHAQ HUSSEIN

PRINCIPAL KADHI

UPPER HILL KADHIS COURT

NAIROBI

.....

HON. MURITHI N. MURIUKI

SENIOR RESIDENT KADHI

MERU LAW COURTS.