



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 22 OF 2014

HBND.....APPELLANT

VERSUS

RA..... RESPONDENT

(Being an appeal from the Judgment and decision of the Learned Hon. Kadhi in Malindi Kadhi's Case No. 35 of 2012 delivered on the 16th May, 2013)

Coram: Hon. Justice R. Nyakundi

Mouko Advocate for the Appellant

Richard O. Advocate for the Respondent

J U D G M E N T

Background

HBND and **RA** named as at the time of the complaint filed in Court on 29.6.2012 they had cohabited together as husband and wife for fourteen (14) years.

During the subsistence of the marriage, they were blessed with two issues of the marriage, identified as **M** and **M** aged 12 and 8 years respectively. In the interim period as the marriage subsisted, the wife **R** deserted the matrimonial home to go and live with her parents. This triggered a complaint to be filed in Court on 29.6.2012 by the husband, appellant herein, **H** seeking the following orders:

- (1). An order to compel the wife to return to her matrimonial home or to be considered as Khulu.*
- (2). An order compelling the wife – respondent to return all matrimonial property worthy Kshs.150,000/=.*
- (3). Legal custody of the minor.*
- (4). Costs of the suit.*

In the ensuing proceedings, the Kadhis Court considered the issues and the evidence of the subject matter and did proceed to rule as follows:

- (1). Dissolution of the marriage.*
- (2). That the respondent was entitled to her dowry of Kshs.20,000/=.*
- (3). That the children and issues of the marriage being minors be left in the custody of the respondent, save that the appellant was to retain visitation rights.*
- (4). That the appellant was condemned to pay Kshs.6,000/= maintenance costs monthly and on or before the 5th day of each succeeding month.*
- (5). No orders for costs was ordered.*

Aggrieved with the above orders, the appellant preferred an appeal based on the eight grounds:

- (1). That the Learned Hon. Kadhi was biased in the said circumstances.***
- (2). That the Learned Hon. Kadhi erred in Law and fact in only relying on the evidence of the respondent/defendant and treating the appellant/plaintiff with prefatorily.***
- (3). That the Learned Hon. Kadhi erred in Law and fact in failing to appreciate that the respondent/defendant was guilty of adultery before leaving the appellant matrimonial home.***
- (4). That the Learned Hon. Kadhi erred in Law and fact in failing to consider the fact that the respondent/defendant's family could not be allowed to stay with his in-laws as it contravenes the provisions of their tribe or clan.***
- (5). That the Learned Hon. Kadhi erred in Law and fact in failing to listen to the appellant's evidence that he had not failed to give maintenance to the respondent and the family when he gave out his two motor cycles as a source of income.***
- (6). That the Learned Hon. Kadhi erred in Law and fact in failing to appreciate that soon after the respondent and the applicant's family shifted from the appellant's house; the respondent also decided to follow her family after being threatened.***
- (7). That the Learned Hon. Kadhi erred in Law and fact in ignoring the whole evidence of the appellant and favoured the respondent in giving his Judgment.***
- (8). That the Learned Hon. Kadhi's approach to this case, his analysis of the case and the whole evidence before him was wrong and the whole Judgment therefore defective.***

In this memorandum of appeal and submissions by Counsel for the appellant, his major concern was on the dissolution of marriage. Essentially, these are the major complaints espoused in ground No. 1, 2, 3, and 4. The only difference being the words used in third grounds to make them look distinct. In the complaint *Khul* was an alternative remedy to the substantive one on compelling the wife to return back to the matrimonial home. ***“Literally khul means extracting oneself. According to Alauddin Masud al-kasani, Khul is lexically alnaz which is to pull out/extract from something. Thus Khala means that the appellant was to remove the respondent from his marriage. In the technical sense, it is used for marital extraction and is the act of accepting compensation from the wife in exchange for her release from the marital tie.”***

Marriage in cases of *Khul* requires the Kadhis Court to order dissolution of marriage, if reconciliation attempts has failed. **(See Mst Khurshid, Bibi v Muhammad Amin PLD {1967} SC 97; Ibn Man Zur, the root of Khuls Khal, Beirut Dar, Sadir 1955 – 56 8: 76 – 79)**

Linking this scenario to the evidence admitted by the trial Court it was no longer visible for the marriage between the appellant and respondent to subsist. The observation was made by the Kadhis Court when adjudicating over the issue raised in the complaint. It was inferred as a fact that the interactive relations between the appellant and respondent as husband and wife was no longer tenable. This was more particularly on explicit account of the respondent deserting the matrimonial home for some period of time without connivance or consent of the appellant.

It transpired therefore and was of relevance to the trial Court that the conduct of both parties one deserting the matrimonial home and the other one deciding to remarry constituted an element of irretrievably broken down marriage. Notably, the Kadhis Court based on the understanding of equal rights test and as a form of justice did dissolve the marriage.

In real terms, the appellant on appeal and submissions has failed to demonstrate the misapprehension of evidence or application of wrong principles in granting the relief of dissolving the marriage. I reckon the legal imperative that marriage in Islamic Law is a civil contract that gave rise to certain rights and obligations between the appellant and the respondent. In the context of this, the appellant pleaded the ground of adultery as a form of impeaching the Kadhis Court Judgment. However, these may be an issue intertwined with the reality which put the appellant in a precarious situation to demand for her return or declare *Khul* or extract himself from the obligations of the marriage. This suggests that the original contract of marriage had started experiencing cracks providing a reasonable ground for the dissolution of the marriage. Central to this appeal is also the issue of maintenance assessed in Kshs.6,000/= per month in favor of the respondent/appellant children.

The Qur'anic verse 241 states that:

“for divorced women maintenance should be provided on a reasonable scale. This is a duty of the righteous. The same verse does not set the limit for maintenance to divorced women, nor does it lay on specific limit to the amount of ‘mata’a’ mentioning reasonable maintenance only thus ‘mata’a is to be given to the wife with kindness and humility.”

In the submissions and arguments adverted to by the appellant no compelling or substantial reasons have been provided for this Court to review that order on maintenance. At the level of constitutionalism, Article 27 provides the visible norms for equality and non-discrimination. In interpreting the Quran, and the structures set therein at varying degrees one of the commitment is to achieve gender equality, eliminate any form of discrimination against women when it comes to the provisions on maintenance and upkeep post-divorce period for the children. There shall be no discrimination as all citizens both women, children and men are equal before the Law.

In the context of this appeal, any arguments advanced to deny the respondent financial provision post-divorce would be tantamount to an act of discrimination. A legal protection guaranteed under Article 27 of the Constitution.

Thirdly, by way of judicial intervention, after the divorce cause, the respondent in this case, the wife is entitled to restitution of dowry assessed in this case at Kshs.20,000/=. From the Judgment of the trial Court, the type of divorce met the criterion of a non-fulfilled marriage on the part of the husband (appellant) and on the other hand the respondent (wife). The arguments on appeal that the evidence appraised and considered by the Kadhis Court was that of an out lateral approach and at the behest of the respondent holds no anchor.

Permitted to review the trial Court record and the findings made by the Kadhis Court. There was overwhelming evidence to discharge the burden of proof on a balance of probabilities. In so far as the divorce in this case was concerned, it was an initiation by the appellant (husband). Conservatively, *Khul* divorce is a right conferred by the Quran on the wife. The **Supreme Court of Pakistan in Rehman {2007} at 122 and also Khurshid Bibi v Muhammad Amin {1967} PLD SC 97** opined:

“ In Islam, marriage is a contract and not a sacrament and whatever sanctity attaches to it, remains basically a contractual relationship between the parties. Islam recognizes the weakness in human nature, has permitted the dissolution of the marriage and does not made it an unseverable tie, condemning the spouses to a life of helpless despair. The Qur’anic legislation makes it clear that it has raised the status of women the Holy Quran declares in verse 2: 228 that women have rights against men similar to those that men have against them. It conferred the right to Khula on women as against the right of Talaa in men.”

It must therefore be pointed out that the dowry of Kshs.20,000/= concerns which revolve around the issue of *Mahr*. I find no suited issue on appeal to overturn the Judgment of the trial Court as such: Be it as it may be, I am satisfied with the findings of the Lower Court and the conclusion reached on the issues canvassed before him at that forum. Though the appellant has grievous, they do not rise to a level of the jurisdiction of an appeals Court to set aside the Judgment.

As a consequence, the appeal is dismissed with costs.

DATED, SIGNED DISPATCHED AT MALINDI VIA EMAIL ON 27TH DAY OF OCTOBER, 2021

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R. NYAKUNDI

JUDGE