



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 28 OF 2018**

*(Being an appeal from the judgment of the Kadhi's Court at Nairobi*

*by Hon. A. I. Hussein Civil Case No. 339 of 2013 dated 16<sup>th</sup> February, 2018)*

**HM.....APPELLANT**

**VERSUS**

**SK.....RESPONDENT**

**JUDGMENT**

1. This appeal arises from the judgment of Kadhi A. I Hussein in Civil Case No. 339 of 2013. In the said case the Respondent (wife) had sued the Appellant (husband) arising from a divorce issued by the husband and where she sought for:

- a) A send off
- b) Full custody of issues of the marriage
- c) Maintenance &
- d) Any other relief the court deemed fit

2. Custody and maintenance of the issues was dealt with in a Children's Cause and the issue for determination before the Kadhi was on send-off sought by the Respondent.

3. The Respondent sought to be paid Kshs.2 million. Her claim was based on the fact that she was not working and had to meet rent, electricity, water and travel expenses. It was also her case that the Appellant owned 2 acres of land in Syokimau, a plot in Kitengela, a vehicle, the matrimonial home in Nyayo Embakasi, and had a salary of about Kshs.250,000/= a month. She also urged that the send-off would assist the children.

4. In his defence the Appellant stated that he supported the Respondent despite the divorce by giving her Kshs.20,000/= a month as maintenance for the children and he pays school fees. Further he has a wife and other obligations. He also claimed to have taken a loan to set up a business for the Respondent. He admitted owning ? of an acre in Kitengela and 2 acres in Syokimau which he obtained before marriage. He produced his pay slip indicating a gross salary of about Kshs.262,303.34. Notable is that in evidence he produced an agreement between him and a third party where he obtained a soft loan against the car referred to by the Respondent.

5. In his judgment the learned Kadhi allowed the claim for send-off as demanded by the Respondent at kshs.2,000,000/= which precipitated the appeal before this court on grounds that:

- **The Hon. Kadhi erred in law and fact in disregarding several Islamic jurists and in making a finding that the Respondent is entitled to a mandatory send off from the Appellant.**
- **The Hon. Kadhi erred in law and fact in failing to consider the circumstances of the divorce.**
- **The Hon. Kadhi erred in law and fact in awarding Kshs.2,000,000 to the Respondent as a send-off without**

considering the pecuniary difficulties and obligations of the Appellant.

- **The Hon. Kadhi failed to consider material evidence on the conduct and psychological health of the Respondent.**

6. The parties by consent agreed to waive the attendance of two Kadhis at the hearing of the appeal and therefore the Court did not sit with the Kadhis.

7. The appeal was heard by way of written submissions summarised as follows:

**THE APPELLANT'S SUBMISSIONS:**

The Hon. Kadhi failed to consider the Appellant's financial status, the fact that the prayer for school fees and maintenance of the children had been dealt with elsewhere and the fact that the Appellant has no other source of income other than his salary.

Further the Appellant had provided the Respondent with Kshs.500,000/= to start her off in business, the Respondent is educated and can fend for herself.

He sought for setting aside of the sum of Kshs.2,000,000 for the send-off and for the same to be set at Kshs.100,000.

**THE RESPONDENT'S SUBMISSIONS:**

The Respondent urged the court not to interfere with the Kadhi's decision in that in arriving at a sum to be paid off the court ought to consider a reasonable amount taking into consideration the financial ability of the party paying. She further urged that the court should consider that the Appellant owns a car, 2 plots and a house and the fact that she was thrown out of the matrimonial home, and later divorced; which situation caused her to suffer mental anguish and frustration. Further she is unemployed and unable to support herself and the issues of marriage staying with her. She denied the Appellants allegation that he provided her with Kshs 500,00/- to set her up in business. She sought to have the appeal dismissed.

8. This being a first appeal, the court considered the evidence before the trial court, evaluated and analysed the same in order to arrive at an independent opinion bearing in mind that the trial court had first-hand interaction with the parties.

9. The court is also mindful of the holding in **Mbogo vs Shah (1968) E.A.** at 93, that the court ought not to interfere with the discretion of an inferior court unless the discretion was clearly exercised wrongly.

10. From the submissions filed by counsel for the parties there seem to be no contention that a send-off is payable in the circumstances of the case, the issue is on quantum. Both also agree that the financial capability of the husband is a consideration in assessing the send-off; Mut'a to be paid to the wife.

11. Al Quran Sura al Baqarah 2. 241 provides:

**“And for divorced woman, maintenance should be provided on reasonable scale. This is the duty of the pious.”**

Al Quran Sura al Baqarah 2.236:

**“There is no blame upon you if you divorce women you have not touched nor specified them an obligation but give them compensation, the rich according to his means and the poor according to his means, a gift of reasonable amount is a duty on the doer of good.”**

In MI alias GKI vs AA (2018) eKLR the court stated:

**“Under Islamic Sharia Mut'a compensation is a gift or compensation. Mut'a is designed to console a divorced woman and to minimise pain that is a direct consequence of a divorce.”**

12. From the above authorities, the court in awarding mut'a is called upon to balance between the husband's monetary capacity and compensation towards the wife due to the loss, pain and suffering the divorce may have caused her.

13. The Appellant is in gainful employment earning a reasonable salary; on the other hand, the respondent is not. It is clear that during coverture the husband acquired a vehicle, and a property at Nyayo Embakasi which was the parties' matrimonial home. During the 6-year marriage the Respondent at best got the two children; no other asset to herself, she continues to bring up the children. She is picking up the pieces as she embarks on her internship and will hopefully gain employment at some point.

In my view she deserves a reasonable compensation having been a house wife and stay at home mother, serving the husband and their children. It is expected that she will walk out of the marriage and also have a decent life.

14. The proposed sum of Kshs.100,000/= by the Appellant cannot by any means be a reasonable compensation or send off in the

circumstances.

15. The Court also appreciates that the parties are young, the Appellant has no other source of income other than his pay, and he is not expected to sell the few assets he acquired before and after marriage to pay off the wife. On the other hand the wife is entitled to be compensated, she is not seeking any other relief not even what was acquired during marriage and therefore in my considered opinion, bearing in mind that the Appellant will continue to pay school fees and maintain of the children either solely or with the Respondent's assistance once she has income, the sum of Kshs.2,000,000/- awarded by the Kadhi is inordinately high.

16. Balancing the interests of the parties, I will set aside the order of the Kadhi and in its place order the amount of Kshs.1,000,000/= be paid as mut'a to the Respondent within a period of 12 months from today's date.

17. Each party to meet their own cost.

**SIGNED DATED and DELIVERED in open court this 23<sup>RD</sup> day of JANUARY, 2020.**

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**ALI-ARONI**

**JUDGE**