



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY APPEAL NO. 10 OF 2018

MBV.....APPELLANT

-VERSUS-

FM BV.....RESPONDENT

(Being an Appeal from the Judgment of the Kadhi's Court at Mombasa by Hon. Khamis Ramadhani A (Senior Resident Kadhi) delivered on 25th January 2018 in Mombasa Kadhi's Case No. 271 of 2015)

Coram: Hon. Justice R. Nyakundi, Chief Kadhi

Sherman Nyongesa & Mutubia Advocates for the Appellant

P.A Osino Advocates for the Respondent

JUDGEMENT

1. By a Plaintiff dated 21st September 2015 filed in Mombasa Kadhi's case No. 271 of 2015, the Appellant herein sought judgement against the defendant for a dissolution of their marriage by divorce. The matter was heard and determined and judgement delivered on 29th December, 2015. Subsequently, that judgement was set aside by the consent of both parties and the matter proceeded for a fresh interpartes hearing with the Plaintiff/Appellant relying on the same Plaintiff as initially filed. At the close of the Defendant's case, both parties filed their submissions.
2. In his analysis and determinations in the ruling delivered on 25th January 2018, the Learned Kadhi outlined two issues to be resolved. First, was whether the divorce pronounced by the plaintiff was binding and whether the divorce certificate ought to issue. This issue was resolved with the confirmation that the Plaintiff had indeed dissolved his marriage in observance of the law. The learned Kadhi hence directed that the divorce certificate issue accordingly.
3. The second issue was whether or not the Defendant was entitled to Past maintenance and Mata'a compensation. On past maintenance, the Court found that both parties had been cruel to each other and the Defendant was not deserving of any past maintenance. However, the court also found the Plaintiff in default of his sons' upkeep and ordered that he be responsible for their upkeep until they are able to provide for themselves.
4. Finally, on Mata compensation, the learned Kadhi found in favour of the Defendant awarding her Ksh. 2,500,000/-. In his decision he stated:

“Now let me turn to the issue of Mata'a Compensation, indeed the Defendant has contributed immensely to the Plaintiff's life in different ways. I find that F is entitled to Mata'a for the period she has been a good wife to M and a responsible mother to Y and R. I hereby award Ms. F a sum of 2.5 Million Kenya Shillings for her resilience and hard work in the family.”

5. It is the above finding on Mata'a Compensation of the **Hon. Khamis Ramadhani** that the Appellant is aggrieved by leading him to file the instant appeal by Memorandum of Appeal dated 26th and filed on 28th February 2018 citing the following as his grounds:
 - a. That the learned trial Kadhi erred in law and fact by holding that the Respondent was entitled to Mata compensation upon divorce.

b. That the learned trial Kadhi erred in law and fact by holding that the Respondent was entitled to Mata by the mere fact that she was a mother to the couple's children.

c. That the learned trial Kadhi erred in law and fact by misdirecting himself on the principles and application of the concept of Mata under the Holy Quran and the Islamic Teachings thereby arriving at a wrong decision.

d. That the learned trial Kadhi erred in law and fact by failing to properly consider and evaluate the evidence presented by the Appellant which showed that the Respondent was the cause of the divorce and as such was not entitled to any Mata.

e. That the learned trial Kadhi erred in law and fact in awarding excessive Mata compensation to the Respondent.

6. On the basis of those grounds the Appellant prays for the appeal to be allowed, the judgement of the learned trial Kadhi be varied and the order for compensation of Ksh. 2,500,000/= to the Respondent to be set aside as well as for costs.

Analysis and Determinations

7. At the hearing of the appeal, the learned advocates for both parties made oral submissions which this court duly adverted to and will keep in mind when rendering its findings. It is clear that the only issue for determination is whether the learned Kadhi erred in awarding Mata'a compensation.

8. This being the first appeal, this court is bound to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion but also taking into account the fact that it did not have the advantage of hearing and observing the demeanour of the witnesses. In **Peters v. Sunday Post Limited (1958) EA at Pg. 424**, it was held inter alia as follows:

"It is a strong thing that for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion."

9. The concept of *mata'a* derives from **The Qur'an in Chapter Two, Verse 241 (Surah Al-Baqarah: 2:241)**. The Yusuf Ali's translation of this verse reads:

"For divorced women maintenance (should be provided) on a reasonable (scale). This is a duty on the righteous."

10. According to **Muhammad Khalid Masud in The award of mata'a in the early Muslim courts, in "Dispensing Justice in Islam" Masud, Peters, Powers eds., Brill:2012 (pp. 349-381) at 355**, *Mata'a* or *mata' tu talaq* is an Arabic term used for post-divorce maintenance and translated variously as "gratification", "obligatory gift", "alimony" and "suitable gift" post-divorce maintenance. It has also been argued that the quantum of *mata'a* may be developed by legislators to correlate with the duration of marriage, the facts of the case, circumstances of divorce, and financial stability of the husband.

11. The issue of *Mata'a* has been a subject of controversy within Islamic scholarship and came to the fore in the Supreme Court of India decision in **Mohd. Ahmed Khan v. Shah Bano Begum (1985 SCR (3) 844)**. In this matter, the Court ruled that settled the position of law that in case a Muslim woman is divorced, incapable of maintaining herself and has not remarried, then she shall be entitled to maintenance under Section 125 of the Indian Criminal Procedure Code. This judgement led to the passing of the **1986 Muslim Women (Protection of Rights on Divorce) Act** which provided under **Sections 3(1)(a) and 4(1) and (2)** that a former husband must provide "a reasonable and fair provision" and maintenance within the period of iddat and, that in case the divorced wife is unable to maintain herself after the period of iddat, she can claim maintenance from her relatives and if they cannot pay, then she can claim from the Wakf Board.

12. Subsequently, the Indian Supreme Court in **Danial Latifi v. Union Of India ((2001) 7 SCC 740 : 2001 CriLJ 4660)** found that the 1986 Muslim Women (Protection of Rights on Divorce) Act requires a Muslim husband to provide maintenance of a reasonable and fair amount needed to maintain his ex-wife for the rest of her life. It was held in part:

"...Obviously, the right to have a fair and reasonable provision in her favour is a right enforceable only against the woman's former husband, and in addition to what he is obliged to pay as maintenance; thirdly, the words of the Holy Quran, as translated by Yusuf Ali of *mata* as maintenance though may be incorrect and that other translations employed the word provision, this Court in Shah Banos case dismissed this aspect by holding that it is a distinction without a difference. Indeed, whether *mata* was rendered maintenance or provision, there could be no pretence that the husband in Shah Banos case had provided anything at all by way of *mata* to his divorced wife."

13. The Court in that instance further holds:

"The effect of various interpretations placed on Suras 241 and 242 of Chapter 2 of Holy Quran has been referred to in Shah Banos case. Shah Banos case clearly enunciated what the present law would be. It made a distinction between the provisions to be made and the maintenance to be paid. It was noticed that *the maintenance is payable only upto the stage of iddat and this provision is applicable in case of a normal circumstances, while in case of a divorced Muslim woman who is unable to maintain herself, she is entitled to get Mata.*"

14. The Supreme Court on India reiterated its position in **Danael** that divorced women are entitled for maintenance beyond the Iddat period in **Iqbal Bano V/s. State of Uttar Pradesh 30 AIR 2007 SC 2215** as well as in **Shabana Bano v. Imran Khan AIR 2010 SC 305**.

15. The conclusion to be drawn from the authorities I have highlighted is that, in essence, upon divorce, a muslim woman I entitled to mata'a compensation. Having found as much, I therefore cannot fault the learned Kadhi for awarding the same. However, it is also clear that the award of such compensation must be made along terms that are *fair and reasonable*. To establish what is fair and reasonable, it is this court's view that the duration of marriage, the facts of the case, circumstances of divorce, and financial stability of the husband ought to be taken into account.

16. Based on the testimony at trial and the evidence on the record, I am convinced that the sum of Ksh. 2,500,000/- as awarded by the Learned Kadhi was manifestly high. In the circumstances, I am obliged to interfere with his discretion.

17. In the upshot, the appeal succeeds to the extent that award of Ksh. 2,500,000 for Mata'a Compensation made in favour of the Respondent by the Kadhi's court by its ruling dated 25th January, 2018 is set aside and hereby substituted with an award of Ksh. 1.5 Million in favour of the respondent.

18. It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 6TH DAY OF MARCH 2020

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R NYAKUNDI

JUDGE

In the presence of:

1. Ms. Naliaka for the appellant