



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**FAMILY DIVISION**

**CIVIL APPEAL 28 OF 2018**

**NK.....APPELLANT**

**VERSUS**

**AL.....RESPONDENT**

***(An Appeal from the decision Judgment of Hon. Sheikh Khamis Ramadhan, Senior Resident Kadhi***

***delivered on 14.618 in Mombasa Kadhi Civil Case No. 206 of 2016)***

**JUDGMENT**

1. The Appeal herein filed by NK, the Appellant, arises from the Judgment of Hon. Sheikh Khamis Ramadhan, Senior Resident Kadhi delivered on 14.618 in Mombasa Kadhi Court Civil Case No. 206 of 2016. In her amended plaint filed on 27.4.17 in the Kadhi's Court, the Appellant, NK sought dissolution of her marriage to the Respondent, AL, on the ground of cruelty and further sought eddah maintenance, mutá compensation and costs. The Respondent denied the allegations of cruelty and made his own accusation of cruelty against the Appellant. He prayed that the marriage be dissolved, and further sought custody of their 3 minor children, refund of dowry of \$500, refund of the cost of their wedding in the sum of \$10,000 and return of gold/jewelries and those of the children.

2. In the Judgment, the Hon. Kadhi made the following orders:

i) *The parties' marriage is hereby declared dissolved on Khul'a'u term with effect from 14.6.18.*

ii) *The Appellant to observe one month Edda away from the Respondent's house.*

iii) *The Appellant is not entitled to any Edda maintenance and monetary(Mata'a) compensation.*

iv) *The Appellant to give back to the Respondent his dowry of US\$500/- and 75% of the expenses incurred by the Respondent in their wedding.*

v) *The Appellant to give back gifts given to her by the Respondent.*

vi) *The Appellant to return to the Respondent the gold ornaments in her possession, belonging to their daughter and the Respondent's sister;*

vii) *Costs to be borne by the Appellant.*

3. Being aggrieved by the decision of the Hon. Kadhi, the Appellant preferred this Appeal raising in all, 22 grounds of appeal which in summary are that Hon. Kadhi erred in law and fact by:

i) Failing to consider the evidence on record and holding that the Respondent had not been cruel to the Appellant.

ii) Failing to adhere to the Constitution international treaties, agreements and laws of Kenya in his entire judgment.

iii) Directing the Appellant to observe eddah for 1 month and not 3 months and further finding that she is not entitled to maintenance during this period.

iv) Directing the Appellant to observe eddah away from the Respondent's house yet the issue of matrimonial property was subjudice and the High Court had barred the Respondent from evicting the Appellant and the Children's Court had ordered that they each occupy different rooms in the matrimonial home.

v) Misinterpreting the khul'a' principle and failed to grant to the Appellant eddah maintenance and mut'a compensation, while directing her to refund to the Respondent dowry and 75% of wedding expenses and return gifts given to her.

vi) Allowing a purported claim by the Respondent yet there was no counterclaim.

vii) Condemning the Appellant to pay costs of the suit.

viii) Proceeding on the wrong principles of law and failing to consider the Appellant's submissions and authorities, thereby arriving at a wrong and biased decision.

4. The Appellant prayed that the Judgment of the Hon. Kadhi except the decree of divorce be set aside and that further that:

i) The Appeal be allowed and that the prayers in her plaint be allowed and that the Court assesses eddah and mut'a compensation payable to her together with costs of the original suit and this Appeal.

ii) In the alternative, that the Appeal be allowed and the matter be referred to a different Kadhi for assessment of the mut'a and eddah payable to the Appellant, together with costs of the original suit and this Appeal.

5. Parties filed their written submissions which their respective counsel highlighted in Court. The Hon. Chief Kadhi sat as assessor 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. From the submissions, I find that the following are the issues for determination:

i) Whether the Appellant proved her grounds for divorce

ii) Whether the Hon. Kadhi misdirected himself on the khul'a principle

iii) Whether the Appellant was entitled to mut'a compensation

iv) Whether the Hon. Kadhi erred on the issue of eddah

v) Whether the Hon. Kadhi erred in allowing a purported claim by the Respondent without a counterclaim.

vi) Whether the Hon. Kadhi was biased against the Appellant

#### Whether the Appellant proved her grounds for divorce

7. It was submitted for the Appellant that she had proved the grounds of cruelty on the part of the Respondent. According to the Appellant, she did testify that the Respondent had never shown her love and affection, abandoned his treatment on premature ejaculation thereby denying her conjugal rights, failed to provide for her and the children, assaulted her and abandoned reconciliation efforts. The parties do not communicate and do not share a bedroom. It was submitted that when the Respondent conceded to the divorce, the Hon. Kadhi ought to have granted it. The case of AA v AS [2004] eKLR was cited to support this submission. To the Appellant therefore, the Hon. Kadhi ought to have granted the divorce on the Appellant's grounds and his failure to do so contravened Article 27 of the Constitution.

8. For the Respondent, it was submitted that Islam allows divorce by talaq, at the instance of the husband, by Khul'a, at the instance of the wife and by mubarat by mutual consent. The fact that the Appellant only included the ground of cruelty in the amended plaint means that there was no cruelty. In spite of the OB number, the Appellant failed to prove the alleged assault and cruelty generally. Citing the case of Meme v Meme (1976-80) KLR 17 the Respondent argued that all the particulars of the alleged cruelty were trivialities. The Respondent contended that the Appellant never nurtured or took care of their children but being mentally unstable, mistreated and tortured them. It was also submitted that the Appellant was never prevented from withdrawing money from the bank account but the evidence on record was that she did in fact withdraw money from the bank. Further, the Appellant admitted to having abandoned her matrimonial bed and her home severally, returning to her home in Uganda. She then wrote letters apologizing for causing the Respondent and the children pain. The Respondent submitted that he had every right to file for divorce for desertion, but never exercised that option. The Respondent contended that the Appellant was hasty in filing the divorce and ought to have known the consequences.

9. In the proceedings in the Court below, each party accused the other of being responsible for the breakdown of the marriage. In her testimony, the Appellant accused the Respondent of hostility, harassment and intimidation; being abusive and violent towards her and their children; alienating her from her relatives and friends; failing to provide for her upkeep including basic necessities; reducing her to begging for money from her son, to whom the Respondent gave money; disconnecting the sockets for the oven thus frustrating her efforts to make some money through baking; misuse of family funds; preventing her from leaving the matrimonial home with her property and detaining her property. She stated that all this happened as a result of his suffering from erectile dysfunction. On his part, the Respondent accused the Appellant of severally abandoning the house; violence, trying to commit suicide; abandoning the matrimonial bed; infidelity, leaving the house without his permission and coming late at night; being picked up by several men from home during his travels, which amounts to adultery.

10. In his judgment, the Hon. Kadhi stated in part, as follows:

***The objectives of marriage can't be realized in this marriage where false allegations are the order of the day. Couples are directed to live together in kindness and love, Islam allows for divorce if the objectives of marriage can no longer be attained or there is harm to either spouse due to conduct of one of the spouses that negates rights, duties and objectives of the marriage.***

11. The parties' evidence was characterized by allegations and counter allegations. It would appear to me that the parties have by their conduct been hurting each other thus making it impossible for them to live together in harmony. Indeed, the Hon. Kadhi stated in his judgment that the ***"this marriage has experienced so much downturns which have not been healthy to have warranted a happy marriage"***. In spite of having stated thus, the Hon. Kadhi posed ***"It is this Court's wisdom that if indeed the defendant is cruel to the plaintiff, then why is she still under the same roof with the defendant?!"*** It would appear to me that it is because of the alleged cruelty, that the Appellant moved to Court seeking dissolution of the marriage. The question posed by the Hon. Kadhi thus seems unwarranted.

12. The Hon. Kadhi went on to state:

***In any marriage, there are times where the couple undergo traumatizing experiences caused by either of them occasioned by the different challenges they experience in their daily lives, but that do (sic) not warrant either party to claim that the other party was cruel toward them.***

13. Trauma is defined by the Concise Oxford English Dictionary, Twelfth Edition as ***a deeply distressing experience***. Thus, where one spouse causes the other trauma, it is difficult to conclude that such spouse has been subjected to anything but cruelty. Put differently, when the Appellant was traumatized to the extent of attempting suicide, it cannot be said that she was not subjected to cruelty by the Respondent. Further, the Respondent testified that the Appellant moved out of the matrimonial bed and was sleeping in their daughter's room. This fact was admitted by the Appellant who alleged, without proof, that the Respondent suffered from erectile dysfunction and failed to get treated. To my mind, this caused trauma to the Respondent and amounted to cruelty. The issues affecting the marriage of the parties were serious issues and not mere trivialities of occasional outbursts of temper, use of strong language and offended silences, which, as was found in the Meme v Meme case (supra), did not amount to cruelty.

14. After evaluating the evidence on record, my conclusion is that the conduct of both parties led to the irretrievable breakdown of the marriage. As such, the Hon. Kadhi erred in trivializing the trauma inflicted upon the Appellant during the subsistence of the marriage, leading him to an erroneous finding that the grounds of cruelty were not proved. Both parties were guilty of cruelty.

#### Whether the Hon. Kadhi misdirected himself on the khul'a principle

15. On the principle of khul'a, it was submitted for the Appellant that since the Respondent was responsible for the breakdown of the marriage, he was not entitled to a return of the gifts he had given to the Appellant nor a refund of dowry or wedding expenses. In this regard, the Appellant relied on the case of MI v AA [2018] eKLR. It was also argued that the amounts were not proved. Her evidence that the Respondent and his brother had broken into the safe and had taken all the gold ornaments was totally ignored by the Hon. Kadhi.

16. The Respondent submitted that the Appellant filed for divorce due to intense dislike of the Respondent. Guidance, counselling and medical attention had been exhausted. The parties could not live in conformity with their conjugal obligations as the Appellant had moved out of the matrimonial bed. In such circumstances, the right of khul'a was available to the Appellant, but upon the Kadhi concluding that the parties could no longer live together. Citing the Quran verse 2:229 and Article 89 of the Islamic Charter on Family, the Respondent submitted that when a wife files for divorce, some return must pass to the husband. The Respondent further argued that the Appellant failed to prove her case. Accordingly, the Kadhi had no option but to have the marriage dissolved under khul'a.

17. The basis and origin of the legality of khul'a is verse 2:229 of the Quran which provides:

***Divorce is twice. Then [after that], either keep [her] in an acceptable manner or release [her] with good treatment. And it is not lawful for you to take anything of what you have given them unless both fear that they will not be able to keep [within] the limits of Allah. But if you fear that they will not keep [within] the limits of Allah, then there is no blame upon either of them concerning that by which she ransoms herself.***

18. It would seem from the foregoing that when a woman seeks divorce from her husband, he can keep her in an acceptable manner or release her with good treatment. In such circumstances, it would be unlawful for the husband to accept a return of anything given to the wife. But if the parties cannot keep within the limits of Allah, then it is lawful for the woman to give something to her husband to ransom herself from the marriage.

19. Article 89 of the Islamic Charter on Family provides:

***If a woman hates her husband and cannot stand him, even though he hasn't hurt her in any way that would be considered grounds for divorce, and if she can no longer bear to remain with him, then she has the right to request divorce in exchange for giving up any financial rights that would be due to her as a result of the divorce, and returning any dowry or gifts that he gave her.***

20. Under the foregoing provision, a woman may request for divorce if she hates her husband or if she simply cannot stand him, provided that she forfeits any financial rights due to her and further returns any dowry or gifts given to her by her husband. In the present case, it is clear from the evidence that the reason the Appellant sought divorce was not merely because she hated the Respondent or could not stand him but because there was cruelty in the marriage.

21. There is a dearth of authorities on the Islamic principle of khul'a in our jurisdiction. Looking further afield in the Pakistani case of Khurshid Bibi v Muhammad Amin P L D 1967 Supreme Court 97, S.A. Mahmood, J., found that:

***“Verse 2:229 of the Holy Qur'an implies that the wife has to pay compensation to the husband in order to obtain dissolution of marriage by khula. This conclusion clearly emerges from its words “what she gives up to be free,” or “by what she ransomes herself” ... It is a further check on the wife's exercise of the right of khula that, as a general rule, she cannot retain the benefits, i.e., the consideration of the marriage, the same as the husband cannot take back whatever he has given to the wife in consideration of the marriage, if he divorces her, which is a corresponding restraint on his right. Therefore, it is necessary for the Court to ascertain in a case of khula what benefits have been conferred on the wife by the husband as a consideration of the marriage, and it is in the discretion of the Court to fix the amount of compensation...”***

22. In the instant case, the Hon Kadhi dissolved the marriage on khulá principle given that it was the Appellant who moved the Court for dissolution of the same. On this I agree with the Hon. Kadhi. What I have difficulty with, is the order that the Appellant refunds the dowry, 75% of the wedding expenses and return gifts and ornaments. In the Khurshid Bibi case (supra), the Court stated, and for good reason, that ***it is necessary for the Court to ascertain in a case of khula what benefits have been conferred on the wife by the husband.*** The difficulty I have with the order, is that the Hon. Kadhi did not ascertain the amount of dowry paid, the wedding expenses or even the gifts and ornaments the return of which he ordered. It would therefore appear that he made the order simply because the Respondent asked for the same. No evidence was led, to ascertain this claim. In this regard therefore, I find that the Hon. Kadhi misdirected himself.

#### Whether the Appellant was entitled to mut'a compensation

23. In his judgment, the Hon Kadhi found that the Appellant ***“is not entitled to any monetary compensation (Mata'a) by the defendant”***. The Appellant found fault with this finding and submitted that because the Respondent was responsible for the collapse of the 16-year marriage by treating the Appellant arbitrarily, she was entitled to mut'a compensation. Citing the Quran Baqarah 2.241 and Article 86 of the Islamic Charter on Family, the Appellant argued that mut'a compensation was discretionary and the Hon. Kadhi erred in failing to exercise his discretion in her favour. The Appellant further argued that to deny her compensation was discriminatory and contrary to Article 45(3) of the Constitution and Article 6(1)(h) of the International Convention on the Elimination of All Forms of Discrimination against Women. The award of compensation to a wife when a husband files for divorce but denying her compensation when she files for divorce when the man is at fault, is discriminatory.

24. The Respondent rebutted the submissions, contending that mut'a compensation must be based on Islamic law which provides that compensation is only given when a man divorces his wife and to reduce the rate of arbitrary divorce. The divorce cause in the Court below was filed by the Appellant. As such, the Hon. Kadhi was right to deny her mut'a compensation.

25. Mut'a compensation is payable by a man to his wife upon divorcing her. The Quran makes provision for compensation to a woman upon divorce by her husband. The quantum of the compensation is dependent upon the financial ability of the husband. Surah al Baqarah 2.241 of the Quran provides:

***And for divorced women is a provision according to what is acceptable – a duty upon the righteous.***

26. Similarly, Article 86 of the Islamic Charter on Family provides for what is referred to as a conciliatory gift for divorce as follows:

***Islamic Shari'ah encourages the man to give his wife a material gift, known as al-mut'ah, when he divorces her. The value of the gift should be in proportion to the husband's financial abilities and the duration of the marriage. The purpose of the gift is to console her and to lessen the harm that she endures as a result of the divorce.***

27. From the wording of both the Quran and the Charter, it would appear that this compensation is only payable to a woman when she is divorced by the husband and not when the wife initiates the divorce. Indeed, given that in the case of khul'a, a wife pays to the husband a ransom to redeem herself from the marriage, it cannot be that the husband is then required to pay compensation to the same wife. That would be a zero sum game. In the premises, I do agree with the Hon. Kadhi that the Appellant was not entitled to mut'a compensation. This Court did find, in the case of M I v A A [2018] eKLR, that the appellant therein was not entitled to mut'a compensation having sought the divorce herself.

#### Whether the Hon. Kadhi erred on the issue of eddah

28. The Appellant is aggrieved with the Hon. Kadhi's order that she observes ***“a one month Eddah away from the defendant's house”***. The Appellant contended that the parties had a pending case in the High Court on division of matrimonial property. Consequently, the Hon. Kadhi had no jurisdiction to order the Appellant to observe eddah away from the matrimonial home, effectively evicting her. The Appellant submitted that there was evidence before the Hon. Kadhi that the matrimonial home had been fraudulently transferred to their children. He also erred in failing to award maintenance to the Appellant and further reducing the period of eddah from 3 months to 1 month without

justification. According to the Appellant, the Hon. Kadhi disregarded the principle in Article 45(3) of the Constitution which applies to Muslims as stated in the case of UMM v IMM [2014] eKLR.

29. To the Respondent, there was no way the Hon. Kadhi would have ordered the Appellant to stay together with the Respondent after the divorce. Islam prohibits divorced parties from staying together under the same roof as it amounts to sin. The Respondent submitted that the issue of Flat No. 18A on plot Nos 455 and 456 XXVI, Kizingo is pending before this Court and declined to delve into the same.

30. The Quran provides in Surah al Baqarah 2.228 as follows concerning the period of eddah observation:

***Divorced women remain in waiting [i.e., do not remarry] for three periods, and it is not lawful for them to conceal what Allah has created in their wombs if they believe in Allah and the Last Day.***

31. According to the Quran, the divorced woman is to observe eddah for a period of 3 months. It would however, appear from the Khurshid Bibi case (supra), that a distinction is made between dissolution of marriage by talaq at the instance of the husband and by khul'a at the instance of the wife. Where a man divorces his wife, the period of eddah is 3 months. Where a woman initiates the divorce, the eddah period is 1 month. S. A. Rahman, J. stated in the case:

***He relies in this connection on a Tradition of the Prophet, which specified that Sabet-bin-Qais's wife, after the grant of khula, was ordered to pass one period of menstruation as her iddat and this would not be so if khula were talaq.***

Similarly, S. A. Mahmood, J. had this to say on the period of eddah after khul'a:

***"...and the period of iddat is also different in either case. In the case of Jamila, the Holy Prophet ordered her to observe one period of menstruation as her iddat, which is different from talaq."***

32. Further, this period of eddah is to be observed in the husband's home. In this regard, I disagree with the contention by the Respondent that Islam prohibits divorced parties to live under the same roof. The Quran in Surah al Talaq 65:1 provides:

***O Prophet, when you [Muslims] divorce women, divorce them for [the commencement of] their waiting period and keep count of the waiting period, and fear Allah, your Lord. Do not turn them out of their [husbands'] houses, nor should they [themselves] leave [during that period] unless they are committing a clear immorality.***

33. My finding therefore is that the Hon. Kadhi was right in reducing the eddah period from 3 months to 1 month but erred in directing that the period be observed by the Appellant away from the Respondent's house. He also erred in his finding that the Appellant was not entitled to eddah maintenance. This was clearly against the dictates of Islamic law as contained in the Quran.

Whether the Hon. Kadhi erred in allowing a purported claim by the Respondent without a counterclaim

34. Section 8(1) of the Kadhis' Courts Act provides that the Chief Justice may make rules of court providing for the procedure and practice to be followed in Kadhis' courts. Subsection 2 provides:

***Until rules of court are made under subsection (1) of this section and so far as such rules do not extend, procedure and practice in a Kadhi's Court shall be in accordance with those prescribed for subordinate courts by and under the Civil Procedure Act (Cap. 21).***

35. To date, the Chief Justice is yet to make rules of procedure and practice to be followed in Kadhis Courts. Consequently, the rules applicable in the Kadhi's Court are the Civil Procedure Rules under the Civil Procedure Act.

36. The Respondent sought to set off against the Appellant's claims, in her amended plaint in the Court below. He ought to have done so by way of a counterclaim as required by the Civil Procedure Rules. Order 7 Rule 3 of the Civil Procedure Rules provides:

***A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.***

37. The filing of a counterclaim by a defendant makes a plaintiff aware of the case is against them and enables them to respond appropriately. A counterclaim also enables the Court to pronounce a final judgment in the same suit, both on the original and on the cross-claim. In the present case, the Respondent ought to have raised his claim against the Appellant by way of a counterclaim and have the same disposed of in the suit before the Hon. Kadhi. Rather than raising a counterclaim however, to which the Appellant would have had an opportunity to respond and in respect of which the Court would have pronounced itself, the Respondent merely included the claims as prayers in his amended statement of defence. This is contrary to the provisions of Rule 7 which provides:

***Where any defendant seeks to rely upon any grounds as supporting a right of counterclaim, he shall, in his statement of defence, state specifically that he does so by way of counterclaim.***

38. Further, Halsbury's Laws of England, Fourth Edition, Vol. 42, states as follows about a counterclaim:

***When A has a claim of any kind against B and brings an action to enforce that claim, and B has a cross-claim of any kind against A which by law he is entitled to raise and have disposed of in the action brought by A, then B is said to have a right of counterclaim.***

39. The Respondent had an opportunity to exercise his right of counterclaim against the Appellant, but for whatever reason, chose not to exercise the same. The Hon. Kadhi in his judgment held:

***Having dissolved the marriage on Khul'a principle, the plaintiff is hereby ordered to give back to the defendant his dowry of US\$.500/- accordingly. She must also give back all the gifts given to her by the defendant including Gold ornaments. She must also refund a (sic) 75% of the expenses incurred by the defendant during their wedding at Kampala. The plaintiff to return to the defendant the Gold ornaments in her possession belonging to their daughter and the defendant's sister as well.***

40. Without a counterclaim before him, the Hon. Kadhi had no basis to consider the claim by the Respondent. It follows therefore that the Hon. Kadhi misdirected himself in ordering a refund to the Respondent by the Appellant of the dowry and 75% of the wedding expenses. Similarly, the order that the Appellant return to the Respondent the gifts given to her and those in her possession belonging to their daughter and the Respondent's sister, was without basis. Even assuming these claims had been made in a counterclaim, which they were not, the Respondent did not tender any evidence to demonstrate that he had indeed paid dowry in the sum claimed of USD 500 or that he spent US\$ 10,000 for the wedding. Further, no list, description or details were produced of the gifts, jewellery or ornaments allegedly given to the Appellant and in her possession. Indeed, the order for return of jewellery and ornaments is rather vague and enforcement would obviously present challenges. In the circumstances, I find and hold that the Hon. Kadhi erred in granting these reliefs to the Respondent in the absence of a counterclaim and without any evidence to support the same.

#### Whether the Hon. Kadhi was biased against the Appellant

41. On the issue of bias, it was submitted for the Appellant that the Hon. Kadhi was biased against the Appellant. Having found that she had failed to prove her case, he ought to have granted the divorce as prayed by the Respondent in his statement of defence and grant eddah maintenance and mut'a compensation. The Respondent disputed this assertion and contended that the Appellant had a predetermined mind that expected a determination in her favour. My own view after scouring the record is that the allegation of bias is not supported by evidence. The Appellant has not demonstrated to the satisfaction of the Court that the Hon. Kadhi was biased against her. The fact that the Hon. Kadhi decided against the Appellant is not evidence of bias against her.

42. Article 45(3) of the Constitution of Kenya, 2010 provides:

***Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.***

43. The entitlement of parties in a marriage to equal rights cannot be gainsaid. For the parties herein who profess the Muslim faith, this entitlement, in my view, means that Islamic law which is applicable to them, will be applied to them equally in this matter that relates to the dissolution of their marriage. For Muslims, the provisions of the bill of rights in the Constitution, give way to the application of Islamic law in matters relating to personal status, marriage, divorce and inheritance. This is the tenor of Article 24(4) of the Constitution, which provides:

***The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.***

44. The Hon. Sheikh Al Muhdhar A. S. Hussein, Chief Kadhi in his opinion, was of the view that the Hon. Kadhi erred in his findings. His opinion is that the Appeal be allowed and the judgment of the Hon. Kadhi set aside. On the order that the appellant observes 1 month eddah, he stated:

***This is a clear error from the trial kadhi to order the appellant to observe only a month instead of three (3) months as Quran states in chapter 2 verse (228).***

45. On return of dowry, the Hon. Chief Kadhi cited Chapter 2:229, 4:19, 20 and 21 and opined:

***This is not entertained or supported by Quran at all. The Quran is very bitter on men who ask for return of any payment made to their wives when there is dispute between them, even if is in case of divorce.***

46. While I agree with the Hon. Kadhi that the Hon. Kadhi erred in some of his findings, I for the reasons stated in the judgment differ with the Hon Kadhi to the extent stated herein.

47. I now turn to the issue of costs. The award of costs is a matter of judicial discretion and costs follow the event. Section 27 of the Civil Procedure Code provides that the costs of and incidental to all suits shall be in the discretion of the Court, which shall have full power to determine by whom and to what extent such costs shall be paid. In the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR, the Supreme Court held that the principle of law that costs follow the event is not invariable. The Court said:

***Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in***

***law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Appellant.***

48. This is a family matter. The parties herein were married on 26.1.02 and have 3 children together. Their marriage was dissolved barely 2 years ago. Their relationship has been strained for a long time including during the duration of the litigation. To condemn either party to bear all costs in the Court below and in this Court is to antagonize the parties more and to further aggravate their relationship. This is in my view unnecessary.

49. In the premises and from the totality of my evaluation of the evidence and the law relevant in this matter, my finding is that the Appeal partially succeeds. It is therefore ordered as follows:

- i) The order that the marriage is dissolved by way of khul'a is hereby upheld.
- ii) The order that the Appellant is not entitled mut'ah compensation is hereby upheld.
- iii) The order that the Appellant observes 1 month eddah away from the Respondent's house is hereby set aside. In its place, an order is hereby issued that the Appellant observes a 1 month eddah in the matrimonial home.
- iv) The order that the Appellant is not entitled to edda maintenance is hereby set aside.
- v) The order that the Appellant refunds to the Respondent the dowry of US\$500 and 75% of the wedding expenses as well as return of gifts and gold ornaments in her possession is hereby set aside.
- vi) Parties shall bear own costs of both the original suit and of this Appeal.

**DATED, SIGNED and DELIVERED in MOMBASA this 29<sup>th</sup> day of May 2020**

\_\_\_\_\_  
**M. THANDE**

**JUDGE**

**In the presence of: -**

.....**for the Appellant**

..... **for the Respondent**

.....**Court Assistant**