



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 85 OF 2017

ZUDG.....APPELLANT

VERSUS

SJKUR.....RESPONDENT

JUDGMENT

1. This is an appeal arising from the judgment of Hon. Senior Resident Kadhi A. I. Hussein, which was delivered on the 6th of November, 2017 in Kadhi's Court Civil Suit No. 46 of 2017. The Appellant was dissatisfied with the judgment and in particular orders 3, 4, 5, 6 and 7 of the judgment and appealed to this court on the grounds set in the next paragraph.

2. There are 11 grounds of appeal on the memorandum of appeal and which the court has ably summarized as follows:

- a. The Kadhi erred in law and fact in that he had no jurisdiction to deal with matters relating to children and proceeding to consider the child of the marriage to be a minor and granted Kshs.100,000/= a month towards his maintenance.**
- b. The Kadhi having found the child was a minor, erred by finding that the Respondent was entitled to a refund of his maintenance and requiring that the Appellant to refund the sum of Kshs.513,000/=.**
- c. The learned Kadhi erred in law and fact in finding that the Respondent was entitled to mut'ah.**
- d. The Kadhi failed to appreciate the evidence on record.**
- e. The Kadhi misinterpreted law and facts.**

3. The appeal was opposed by the Plaintiff/Respondent. Both parties filed their submissions which may be summarized as follows:

4. In his submissions the Appellant's counsel raised 2 issues for consideration namely; whether the Respondent is entitled to maintenance (mut'ah) and whether the Kadhi had jurisdiction to deal with issues relating to maintenance of the child.

5. The Appellant's Counsel's view in both written and oral submission was that the divorce between the parties was by mutual agreement following the suit filed by the wife (Respondent) seeking for dissolution of marriage. He submitted further that the appellant has no objection to pay maintenance during the iddat period, however the appellant is under no religious obligation to compensate the Respondent after that period since the divorce was initiated by the wife (Respondent) and not the Appellant (husband) and since the marriage was consummated. Further, the payment of mut'ah as ordered by the Hon. Kadhi will be oppressive to the Appellant.

6. On the issue of the Kadhi's jurisdiction on matters of children, the Appellant's counsel raised two issues, firstly, the fact that the child was not a minor at the time of hearing and secondly the said court had no jurisdiction. The court was informed that the said child now an adult and outside the jurisdiction of the court attending a university in Australia, and therefore the award of Kshs.100,000/= was contrary to law.

As for the Kadhi's court's jurisdiction Counsel submitted that the jurisdiction is only limited to matters pertaining to personal status, marriage, divorce and inheritance where parties profess Islam.

7. On whether the Respondent is entitled to refund of Kshs.513,000/= counsel submitted that the said amount was never pleaded. Counsel

relied on several authorities and versus from the Holy Qur'an.

8. The Respondent was acting in person in this proceeding. She filed lengthy documents with reference to several authorities. In her oral submissions the Respondent stated that she did not seek for divorce as was propagated by counsel for the Appellant, neither was any iddat maintenance paid. Further when she filed suit the child subject matter was below 18 years and was under her custody for 1½ years. She further added that her mahar remained unpaid. The respondent informed the court that she had been a house wife for 29 years while married to the Appellant and seeks what is permissible under the Sharia as compensation. She urged that she was married young, spent her youth while in the marriage and was forced to leave her matrimonial home at 50 years of age. That muta'h if paid to her will help her sustain herself and start life a fresh. The Appellant is a businessman and capable of settling the claim.

9. The court sat as required by the **Section 65(c)** of the **Civil Procedure Act** with two Kadhis, namely Hon. Mohamed A. Kutwaa, Principal Kadhi and Hon. Karanja Dhulkifil Waweru, Resident Kadhi. The court is grateful for their report which was in sync with the thoughts of the court and has greatly informed this judgment.

10. Does the Kadhi Court have jurisdiction in matters of children in view of the establishment of Children's Court? There are varied opinions by courts of concurrent jurisdiction on this matter and it is probably time that the Court of Appeal adjudicates on the same and settles the issue. This court for now, aligns itself, so did the Kadhis who sat in this matter with the thought that the Children's Act did not oust the jurisdiction of the Kadhi or other subordinate courts in dealing with issues of children. Indeed, lately all magistrates are gazetted to handle children matters and in this court's considered view, by implication Kadhis too being in the category of magistrates should and ought to hear such matters and more so where the same are connected and incidental to the cause before the kadhi, so long as the said court applies the principles laid down by The Children's Act and in particular applies the best interest of the child's principle as enunciated by the said Act

11. Cases where courts have been of similar thinking include **Amin Mohamed Hassan v Zahra Mohamed Abdulkadir (2009) eKLR** Serгон J stated:

“Even if the Children's Act No. 8 of 2001 is in existence I don't think the appellant would have succeeded for two reasons. First, the Children's Act No. 8 of 2001 didn't expressly oust the jurisdiction of the Kadhi's court nor did it repeal any of the provisions of the Kadhi's Act.”

In **Najma Ali Ahmed vs Swaleh Rubea (2010) eKLR**

Omondi J held as follows:

“Part VII of the Act deals with custody and maintenance of the child and gives children's court provision to make orders for maintenance for the child. However, it must be borne in mind that the child's maintenance is incidental to the marriage and thus this fall under the jurisdiction of the Kadhi's court which addressed matters of personal law on members of the Muslim faith. Indeed, the readings of the Qur'an are so specific even as regards provision by fathers for their sons and there was no error by the Kadhi.”

In **Abdirahman Mohamed Abdi & Another vs Adan Yusuf (2013) eKLR**

Mutuku J stated as follows:

“My view therefore is that paternity and custody of the child in this case are incidental to the issues of marriage and divorce between the Appellant and thus it falls under the jurisdiction of the Kadhi.....”

12. I concur in total with the above holdings by my brother and two sisters and go further to add that the cardinal issue for consideration in this appeal is whether the decision of the Kadhi was in the best interest of the child as required by Section 4 of the Childrens' Act.

In this instance the Kadhi acted on an issue brought before him in relation to a child who required to be taken care of by his father as he lived with his mother who is a house wife.

And the Court finds that the issue of the child was incidental to the issue before the Kadhi of divorce between his parents and rightly so.

13. The Appellant had the responsibility of maintaining his son which responsibility he seems now to take up and what his estranged wife did at the Kadhi was to seek for enforcement of the same for the time he had not taken it up and she was compensated Kshs.513,000/=. The Court therefore has no reason to interference with the said decision of the Kadhi now that the court has established that the Hon. Kadhi had acted with jurisdiction and in the best interest of the child in line with the Law. Indeed, the Childrens' Act, Section 4 requires all persons in authority to act in the best interest of the child which the Kadhi did.

14. The third issues is whether the Kadhi erred in finding that the Respondent was entitled to muta'h. The position taken by counsel for the Appellant is that the Respondent had moved the court for divorce (Khula) and that eventually divorce between the parties was by consent. The correct position as put by the Respondent is that she moved the Court on the 27th of February 2017 through her counsel Ali & Company by way of a plaint and sought the following orders:

a. Physical custody care and control of the child Osman Dean (minor)

b. Maintenance

c. Maintenance in arrears from 2015 to 2017 amounting to Kshs.513,000.

d. A reasonable amount of muta'h and costs.

15. The position taken by the Appellant's counsel is therefore totally erroneous. Indeed, the Appellant in his defence before the Hon. Kadhi, dated 9th March, 2017, sought for;

a. Dissolution of marriage.

b. Custody, care and control.

c. Return of gold and other jewelry

d. Return furniture.

e. Costs.

16. Having established the correct position, that it is Appellant who sought for dissolution of the marriage between the two, and that even if there was consent eventually, the Respondent gave in to the demands of the Appellant and cannot be denied her right or penalized.

17. The next question to answer is if muta'h is payable in the circumstance herein. Muta'h means gratification or a gift *mut'at-al talaa* or *nafatqal al mut'a* is payment by a husband to his wife upon divorce. The Quran propagates maintenance of divorced women in the following terms:-

“And for divorced women is a provision according to what is acceptable - a duty upon the righteous.”

(Qur'an 2:241)

“And those who are taken in death among you and leave wives behind – for their wives is a bequest; maintenance of one year without turning (them) out. But if they leave (of their own accord), then there is no blame upon you for what they did with themselves in an acceptable way. And Allah is exalted in might and righteous”

(Quran 2:234).

18. From the above, clearly, a divorced woman is entitled to some form of compensation. In this instance divorce was sought for by the Appellant and he should therefore be prepared to compensate his wife. He is able and capable, he kept her as a housewife to take care of him and their children as he prospered in his career and business. He is not a pauper otherwise he would not be educating their child in Australia. And to compensate his ex-wife would only be in line with the teachings of Allah.

19. The court finds that Hon. Kadhi cannot therefore be faulted in his finding in this regard and concurs with the findings as follows:

a. Payment and sharing of Kshs.100,000 a month as maintenance of the child from 6th November, 2017 to the time the child left for overseas in the proportions set.

b. Payment of mut'ah based on the assessment of the Respondent's financial status.

c. Refund of Kshs.513,000/= being maintenance for the child.

20. And in order to bring this long outstanding matter to a conclusion the Appellant is directed to file an affidavit containing his financial status within 14 days for this judgement to enable this court assess the mut'ah payable to the wife.

21. The appeal is otherwise dismissed with costs to the Respondent.

DATED and DELIVERED in NAIROBI on this 27TH day of MAY, 2020.

ALI-ARONI

JUDGE