



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO. 23 OF 2018

MMO.....APPELLANT

VERSUS

FAH.....RESPONDENT

JUDGMENT

1. The Respondent filed divorce claim on 29/2/2016 in Wajir Kadhi Court vide Civil Case NO. 47 of 2016.
2. Seek sought reliefs that; marriage be dissolved and dowry be paid. Custody of child and maintenance plus costs.
3. The Respondent's core grounds were:-
 - **Appellant disobedience, cruelty, insulting and assaulting respondent.**
 - **Disrespect to Respondent's parents and insulting them.**
 - **Failure to maintain Respondent.**
4. The Respondent filed defence on 8/3/2016 and pleaded that he admitted para 3 and 4 but denied para 5 and 7 of the plaintiff. He also denied paragraph 8 of the plaintiff.
5. The matter was heard and the Kadhi Court ruled:-
 - (1) The marriage was dissolved.
 - (2) Custody of child to be with Respondent.
 - (3) Child maintenance of Ksh. 500/= per month was awarded.
6. Being aggrieved by the above decision the appellant lodged appeal vide memo dated 22/8/2018 and set out 9 grounds of appeal namely:-
 - (1) **That the learned Kadhi erred in law and fact by disregarding and or ignoring the testimony of the defendant and defendant's witness and not giving the defendant's evidence any weight.**
 - (2) **That the learned Kadhi erred in law and fact by using his own opinion to make decision on various Islamic issues instead of the Sharia Law.**
 - (3) **That the learned Kadhi erred in law and fact by disregarding the vital legal factual issues while making his judgement.**
 - (4) **That the learned Kadhi erred in law and fact in failing to consider the applicable law to the dispute before the court.**
 - (5) **That the learned Kadhi erred in law and fact in failing to determine pleaded issues.**
 - (6) **That the learned Kadhi erred in law and fact by basing his argument on unproved allegations.**
 - (7) **That the learned Kadhi erred in law and fact by admitting hearsay evidence.**

(8) That the learned Kadhi erred in law and fact in going outside his mandate in law by ordering dissolution of marriage.

(9) That the learned Kadhi judgment is manifestly a miscarriage of justice.

7. The matter was directed to be heard via visa voce address by parties. Only appellant addressed court during hearing.

8. The Respondent had complained that he was not maintaining her. The court ordered divorce and he didn't want divorce. He wants his wife and his children. He has 2 wives and he wants the Respondent to return as a third wife. She must be his wife.

9. Even if she does not want he wants her back. He loves her very much. He has never wronged her. What the Respondent pleaded in the plaint against the appellant was false. Respondent used to open account to help her.

10. There are people who incited her. He wants his wife back and the child. He has been paying 500/= per month at Wajir Court. He has no complain on payment of Ksh.500/= per month for his child. He needs his wife and the child. He does not want divorce nor does he want custody of his child be deprived of him.

11. The duty of the court is to analyse evidence and reach its own conclusion.

RESPONDENT'S EVIDENCE:

12. The Respondent testified that appellant married her and paid agreed to dowry of the said marriage a four year old she camel which was not yet paid .They were blessed with a three year old child girl who is under her custody.

13. The Respondent further she stated that first of all she was forced to marry the appellant by her father who is now deceased then the marriage was conducted at Kutulo Location in Wajir County.

14. That, the appellant started beating her as soon as they started living together as a couple. She also said that the appellant was always fighting with her parent and entire relatives, therefore her parents called the appellant's relatives and asked them to take the appellant with the respondent to another place.

15. The respondent further narrated that, the appellant's relatives came and moved them to another village namely Kachacha II which is far from the respondent parents' residence in the same county but the appellant after two days started beating her and when his relative tried to stop beating her he asked them whether they are better than her.

16. The respondent further testified that she deserted from the matrimonial home due to appellant harassment but her parents returned back to the appellant. The fourth time the appellant beat her while eight months pregnant.

17. This time she deserted to Wajir town not to her family's village but to her cousin who even was taking care of her sick father. Then her father telephoned appellant's relatives and asked them to come for her in order to take her back to her matrimonial home because she was almost to deliver.

18. The response was that, they had nowhere to take her because the appellant cannot keep the lady/respondent well, therefore they wanted him to take her to his own home at Kutulo but she was then taken to her father's home at Kutulo where she delivered the baby.

19. The respondent further stated that, her father passed away and the appellant never followed her nor provided her during the maternity period, or ever after maternity period. After one year and nine months the appellant came to her relative asking that the respondent be given him back.

20. The respondent narrated that the elders held a meeting about the matter and accepted that, the respondent be given back to the appellant but they asked the appellant first to apologise to his mother in-law but he refused to apologize his mother in-law .

21. The elders asked again the appellant to provide his mother in-law with Ksh. 10,000/= due to take back the respondent to her matrimonial home but the appellant refused to pay a coin of shillings then the elders told the appellant to go wherever he could get a free wife as long as he denied to adhere to their orders.

22. The respondent further narrated that the appellant complained to the whole clan elder of Omar Abikar, then a bigger meeting was discussed at Wajir town, and the meeting agreed upon that the respondent be taken back to the appellant but the appellant's close relatives refused to take their appellant's responsibility.

23. The respondent further said that the appellant was asked by the meeting to apologize to both sides elders but he failed to adhere to the meeting orders, thus divorce proceedings were lodge resulting to the impugned divorce decree.

24. Both sides elders who are entire Omar Abikar elders came to Wajir Kadhi's Court supporting the couple's marriage be dissolved, and the respondent called witnesses who corroborated her divorce case.

DEFENCE EVIDENCE:

25. The appellant testified in defence that, he married the respondent on 5th day of July 2013 in accordance with Islamic Sheria at Wargadud Location Kutulo Division – Tarbaj Sub-County in Wajir County.

26. He stated that the agreed dowry of the said marriage was four year old she camel which is not yet paid and they were blessed in the said marriage with a baby girl.

27. He narrated that, they did not obtain an official marriage certificate but he had a note from the Sheikh who presided over their marriage.

28. The appellant stated that, the respondent was stranger to him when he proposed to her for a marriage and it was two of her cousins who convinced him to request the respondent marriage through her father.

29. He accepted their advice. Seriously therefore he requested one of his brother's namely YMO to look for the respondent.

30. The appellant said that, his elder brother and himself went to the in-laws home and opened their proposal to the in-laws. The in-laws accepted the proposal and the appellant was welcomed.

31. The father in-law told them he would consult the mother in-law, so he told them to come for wedlock after four days from that date. They came back after four days as agreed and the wedlock took place and the respondent was engaged to him.

32. The appellant further testified that, he prepared the wedding which took place on 18th November 2013 at Kutulo Location in Wajir County. The wedding expenses was up Ksh. 1,458,000/=. Both parents of the respondent were present.

33. That after the wedding he met a lot of interruptions from some youth among the residents of the said village demanding that, he either stopped preaching to the people at the mosque or he would have to move to another place out of the village.

34. The discussed with father in-law about what was going on. They agreed upon that his relative be called and discuss more on the matter. They were called and after long discussion they agreed that the parties should be shifted to another village namely Kachacha II to avoid conflict between the appellant and the youth of Kutulo village.

35. Therefore the appellant with the respondent moved from Kutulo on 27th December 2013 to Kachacha II. The appellant said that, there was no any disagreement between him and his wife the respondent.

36. The appellant said that he lived at Kutulo since he married the respondent and he was providing his family with Kshs. 25,000/= per month when they joined to the second village.

37. He occupied his elder brother's plot. The appellant was against the Islamic teaching such as someone who is not close relative to the wife to come and sleep on his bed in his absence. He said he stopped that culture.

38. He narrated that, the people of the new village started talking badly against the new faith he started and started inciting the respondent, telling her that she was a prisoner. Therefore the respondent deserted from the matrimonial home without informing him anything on 24th August, 2014.

39. The appellant further testified that during that period while at Kachacha II village he was providing the respondent with everything including water and firewood.

40. The respondent later went to her mother and delivered a baby girl on 8th October, 2014. He visited her and proved her with Ksh.15,000/=. In the circumstances, he met with his mother in-law who appeared to have changed mood against him.

41. He went back to his home village then two of his brothers namely YMO and M asked him money to visit his father in-law who was suffering from cancer. He gave them Ksh.10,000/=. They visited him and after two days the old man passed on.

ISSUES, ANALYSIS AND DETERMINATION:

42. After going through evidence on record and appellant address the court in the instant matter, I find the issues are:-

- ***Whether the divorce granted by Hon. Kadhi to the respondent was justified under Islamic Law.***
- ***Whether the orders in the matters of custody and maintenance for the minor girl are justified herein?***
- ***What is the order as to costs?***

43. There are several ways in which a marriage contract can be dissolved in Islam. First it should be noted that divorce ends the marriage by severing bond by the sole will of the husband.

44. Divorce by judicial decree applies where the husband has harmed wife, if he refuses to divorce her she can raise her case to the court (Kadhi). If harm is proven, then the court rules in her favour thereby divorcing her husband.

45. When it comes to *Khulu* the same is defined as redemption/release against payment. Literally meaning “*talking of something*”. It applies the wife separates from her husband just like talking off her clothing in-law. It means the release of wife against payment of remuneration to the husband. It is a form of divorce initiated by the wife, which is effected by return of her husband’s wedding gift.

Legal basis for Khula:-

46. The Holy Quran lays the legal basis of *Khula*, it says:

“And it is not lawful for you (men) to take back (from your wives) any of your Mahr (bridal money given by the husband to his wife at the time of marriage) which you have given them, except when both parties fear that they would be unable to keep the limits ordained by Allah (e.g.) to deal with each other on fair basis). Then if you fear that they would not be able to keep the limits ordained by Allah so do not transgress them and whomsoever transgresses the limits ordained by Allah then such are the zalimu (wrongdoers)”. Al Baqarah: 229.

47. Ibn Abbas (R.A) narrated that the wife of Thabit Ibn Qays Ibn Shimas told the prophet (PBUH): ‘O prophet, I have no problem with my husband’s conduct and piety but I hate to apostasy in Islam’ (not able to observe the limits of Allah in marriage), the prophet asked her, ‘will you return to him his farm? (dowry) she said ‘yes’; the prophet then told Thabit, “*accept back the farm and divorce her.*’ It is reported by Bukhari and Al Nasa’iy. In Dar al Qutny’s version, the lady said: ‘I am ready to return the farm and more’, the prophet said: ‘*return the farm only*’.

48. Both the above verse and the tradition of the prophet talk about the wife proposing to return the dowry or part of it to the husband in return for divorce. This arrangement is what is known as *khula*.

(i) Essentials of Khula

49. There are four main conditions of *khula*:-

(i) There must be an offer from the wife. The wife may make a proposal either by the use of word “*Khul’u*” or its derivative e.g. the wife states ‘give me a *Khul’u* in exchange of my dowry.’

(ii) The offer must be accepted by the husband. The husband replies “I do”. Thereafter a valid dissolution of marriage under *Khul’u* comes into effect.

(iii) The monetary compensation must be paid in return by someone who is legally qualified to donate.

(iv) The husband must be legally qualified to divorce. (Dr. Salih Al-Fawzan, A summary of Islamic Jurisprudence, V2, page 424).

50. *Khulu* may take place by agreement between the two parties, however, if they cannot come to an agreement, or if the husband arbitrarily refuses to respond to the wife’s request, the wife can raise her case to the court to obtain an irrevocable divorce decree. (The Islamic Charter on Family page 404 Article 89).

51. In our case neither the respondent nor the appellant made a proposal for *Khula*. In the instant case the plaintiff/respondent clearly demanded the defendant/appellant to pay the agreed dowry and further requested the court to dissolve the marriage. (Page 3 of the proceedings).

52. Where the marriage negates its objectives, but the husband refuses to divorce his wife amicably, and the wife satisfies the grounds under which a Muslim wife can obtain a decree for the dissolution of her marriage, ***the right thing for the Kadhi to do is to pronounce divorce by way of judicial decree and not Khula as the learned Kadhi purported to end the marriage.***

53. The trial Kadhi relied on *Khulu* divorce to dissolve the marriage which was erroneous in view of the above explanation.

54. The respondent claim was the divorce by judicial decree on grounds of-

(i) Disobedience and cruelty including insulting and assaulting inflicted on her by the appellant.

55. This category of divorce does not take form and process of *Khulu*. Thus the Kadhi Court was wrong to use the element of *Khulu* divorce to justify divorce herein.

56. Thus this court nullifies the said divorce and substitutes the same with a judicial decree divorce.

57. This is because the respondent evidence in support of her suffering in the hands of the appellant proved the grounds for divorce and justified divorce without appellant consent.

58. I agree with trial court Kadhi holding that, **“marriage is a contract which cannot continue by forcefully and if the husband decides to revoke then he has right to do so but must pay all rights upon him for the wife and divorce her according to Chapter 4 verses 120, Chapter 2 verses 229, Chapter 65 verses 1 and many other verses in the Holy Quran and teaching of the prophet Mohamed (P.B.U.H) and if the wife decided to revoke the marriage then she has to go to a Muslim Kadhi who has got jurisdiction and he will facilitate**

her revocation with due process.

That forcing one of the parties to live in a marriage which he/she does not want to continue is unlawful and it might cause a major problem such as losing lives.”

59. I am aware that courts have found that the Kadhi Court lacks jurisdiction to determine matters custody and maintenance of children. See **AAI V HAD (2018) KLR, JAOO vs HAS (2015) eKLR, HMM vs KJD (2014) eKLR, GSA vs ASA Nairobi, High Court Civil Appeal No. 53 of 2013 (2014) eKLR , ZHZ vs SDS Mombasa High Court Civil Appeal No. 45 of 2013(2014) eKLR and the case of OMS vs Principal Magistrate Marsabit Civil Appeal No. 23 of 2015 (2016) eKLR.**

60. However on the issue of the custody and maintenance, I note that the appellant did not plead issue of want of jurisdiction by Kadhi court. However, appellant agrees to continue paying maintenance of the baby girl in respondent’s custody.

61. As for custody, even if the court was to nullify the custody awarded to the respondent, the baby girl would not be taken by the appellant.

62. This court for the best interest of the baby would still restore it to the mother as there is no evidence tendered by the appellant to warrant denial of mother the custody.

63. The Constitution of Kenya 2010 and the Children Act oblige the Court to give paramount importance to the best interest of the child. **Article 53(2) of the Constitution** provides:

“(2) A child’s best interests are of paramount importance in every matter concerning the child.”

The principle underpins and reinforces the provisions of section 4(2) of the Children Act which provides:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

64. Therefore based on the above a party on appeal seeking to vary, review or set aside the orders of a Court affecting a child must satisfy the Court that the orders sought are in the best interests of the child.

65. The appellant has failed to demonstrate that in the best interest of the baby girl the orders on custody should be varied in his favour.

66. Thus the court makes the following orders:-

(i) The appeal is dismissed.

(ii) No orders as to costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT GARISSA THIS 6TH DAY OF AUGUST, 2019.

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C. KARIUKI

JUDGE