



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**

**CIVIL APPEAL NO. 6 OF 2017**

**F B I.....APPELLANT**

**VERSUS**

**B G.....RESPONDENT**

**(From the decision and orders of the kadhi's court at Hola- Juma**

**Ali Abdalla Kadhi)**

**JUDGEMENT**

1. This appeal arose from the decision in family proceedings in the Kadhi's court at Hola, in which the appellant was the defendant while the respondent was the plaintiff.

2. After hearing evidence on both sides, the Hon. Kadhi on 3<sup>rd</sup> May, 2017 delivered judgement concluding the case as follows:-

**“Going by the aforementioned reasons, this court finds that the marriage of the parties is still repairable and that is by advising the plaintiff to be a good husband to the defendant. The defendant should therefore return to her matrimonial home.**

**Furthermore, the plaintiff is the one who had the fear of being harmed by the defendant but the defendant never expressed any fear if she returns to her matrimonial home.**

**However, the plaintiff is fined by this court for alleging that the defendant had an affair outside her marriage and he failed to provide proof in court. The plaintiff is ordered to pay the defendant Kshs.5000/= for that offence and that should be on or before 30th June, 2017.”**

3. Aggrieved by the decision of the Hon. Kadhi, the appellant preferred this appeal. She filed her appeal in May, 2017, and before the appeal was heard, she filed amended grounds of appeal which she has relied upon, as follows:-

**1. The learned trial magistrate (kadhi) erred by finding that the marriage between her and the respondent was still repairable thus ordering the appellant to return to her matrimonial home notwithstanding the facts that the respondent was a person who ordered elders to take her to her parent's home and she did not leave on her own.**

**2. The learned magistrate (kadhi) erred by finding that the marriage was still repairable and determining that she should return to her matrimonial home notwithstanding the fact that the respondent ordered elders to take her to her father's home simply because he was no**

longer interested with her in that he was fed up with her which she stated in her sworn evidence supported by witnesses.

3. The learned kadhi erred by finding that the marriage was still repairable and that she should return to their matrimonial home after noting that all that was raised against her by the respondent was that she had an affair with another man, collected properties and his cash and left for her father's home on her own and threatened to kill him all of which were false allegations, which conduct was incompatible with someone who was in love with another.

4. The learned Kadhi erred by failing to note that the respondent's conduct in raising several false allegations against her before the court was a clear indication that he no longer loved her as there could be no marriage without love.

5. The learned magistrate (Kadhi) erred by failing to note that the respondent's conduct of raising several false allegations relating to heinous acts against her was a clear indication that he did not require her back in his matrimonial home as a loved wife but rather that he intended to subject her to more problems.

6. The learned trial Kadhi erred by holding that the parties were still husband and wife and that they just parted ways and had not divorced notwithstanding the fact that the respondent should not have sent her to her parents as a punishment as prescribed in authentic Hadith and Quran Chapter 2 verse 226 as he failed to prove through evidence that she had an affair with a person outside marriage.

7. The learned kadhi erred in determining that the appellant should return to her matrimonial home when the respondent expressed fear of being harmed by her.

8. The learned magistrate (Kadhi) erred in holding that the appellant never expressed any fear if she returned to her matrimonial home as she had done so in her sworn defence statement as the respondent had failed to provide maintenance and necessities for the family and had also been intimidating and assaulting her for some time making their life together as husband and wife unbearable.

9. The learned kadhi erred by failing to consider her sworn defence statement especially her objection to return to the matrimonial home.

10. That this court should administer justice according to the relevant law and grant her prayers for total divorce and other demands made against the respondent.

11. That the respondent had not paid her the fine Kshs.5000/= for the offence of giving false information to court against her which was to be paid in accordance to the court order by 30th June, 2017

12. That this court should order total divorce (Talaka) children to be in the appellant's custody, and the respondent to take care and maintain the children, and personal belonging of the appellant retained by the respondent be released to the appellant.

4. This appeal was heard with the assistance of Hon. Kadhi Hassan O. Daffa of Garissa as an assessor, and at the hearing of the appeal, both the appellant and the respondent made oral submissions in court.

5. The appellant submitted that the respondent returned her to her parent's home and witnesses had testified in the trial court to that effect. She stated further that though she had the two children of marriage with her, the respondent never visited her again, and had not assisted her in any way for 3 years though he had been employed as a CDF watchman.

6. She submitted also that though he had alleged that she had been moving with another man which was

not true, and the Kadhi found that he did not prove that allegation, and ordered him to pay her Kshs.5000/= , he has not paid the amount to her to date.

7. The Kadhi however, wrongly ordered her to return to the respondent and live with him as a wife which she was now contesting on appeal, and stated that her dowry of 2 female cows which had not been paid by the respondent. She therefore asked this court to order a divorce as she did not want to live with him.

8. The appellant closed her submissions by stating that she wanted to be granted maintenance of the children and payment of dowry of 2 female cows.

9. On inquiry from the Kadhi assessor, the appellant stated that though the respondent handed her over to elders to take her to her parent's home, he refused to forgive his "talak" letter, and though she asked the Kadhi for "talak" the Kadhi declined and ordered that she file a separate case.

10. The respondent in his submissions in response stated that the dispute between him and the appellant had already been determined by the Kadhi under Islamic law, and that when he was sick, his wife (the appellant) took his money, built a house, and lived therein with another man.

11. He also submitted that, when he was bed ridden, the appellant threatened to stab him which was the reason why he called elders and requested them to take her to her parent's home.

12. He submitted also that after recovery from the illness, he sent elders to the father of the appellant and asked for his wife but the father of the appellant refused to return her and that was when he took the matter to the Kadhi where he was ordered to pay Kshs.5000/= but before he paid the above amount the appellant filed this appeal in Garissa High Court.

13. The respondent complained that the appellant did not allow him to see his children though he had been paying school fees for them, and maintained that he wanted his wife back.

14. With regard to dowry, the respondent contended that it was 4 goats which had already been paid witnessed by Sheikh Abdi.

15. After the close of the submissions of the parties, the Kadhi assessor, Hon. Hassan O. Daffa provided me a written opinion, wherein he stated that according to him there were 2 issues, first whether the words "go to your father's house" uttered by the respondent amounted to a divorce, and secondly, what were the implications of a husband accusing his wife of adultery under sharia law were.

16. The Kadhi assessor stated that the term "go to your father's house" did not amount to a divorce under Islamic law, and that the trial Kadhis court was right on this finding.

17. The Kadhi assessor went further to state that according to him there were two types of talak. The first was "Sareeh" meaning clear or direct language expression of "talak". The second was "kinayah" which expressed an intention of the speaker to divorce. He stated what the respondent said did not amount to any of the two "talak" as he alleged that he acted out of fear that the appellant would slash him and thus ordered her to go to her father's house.

18. With regard to adultery, the Kadhi assessor stated that the trial kadhi was wrong in dismissing the allegations of the respondent outright, and stated that though the respondent failed to produce 4 witnesses to fully support his claim of adultery of his wife, he should have been asked to take an oath to prove the allegation.

19. According to the Kadhi assessor, since a husband would find it difficult to find a wife red handed in an illegal relationship and produce other witnesses to prove the case, the respondent had the right as the husband to be asked by the Kadhi to make a strong oath and testify on the allegation personally to enable the husband escape the punishment for false allegation of adultery, according to the Quran.

20. Otherwise the Kadhi assessor come to the conclusion that the marriage between the parties herein had broken down irretrievably as love, affection and residence which were ultimate objectives and goals of a marriage had disintegrated totally. In addition, the Kadhi assessor felt that the Bill of Rights under the Kenyan Constitution Article 36 granted the appellant freedom of association which include freedom to join or leave any association with anyone or any entity inclusive of marriage, as long as the Islamic law of living together in peace and departing in peace was observed. The Kadhi assessor felt that the court should dissolve the marriage union between the appellant and the respondent.

21. With regard to payment of dowry, the Kadhi assessor found that the respondent was confusing payment of two goats to the appellant's parents as bride price to be same as payment of dowry. He stated that according to Islamic law the dowry was different from bride price in that while bride price was a gift given to the parents of the woman, dowry was a gift to be given to the woman personally at marriage, and came to the conclusion that the appellant was entitled to her dowry of 2 cows (promised by the respondent at marriage) which translated to a monetary value totaling Kshs.33,000/=, with each cow valued at of Kshs.16,500/=.

22. I have considered the appeal, the submissions of both the appellant and the respondent, the opinion of the Kadhi assessor and have also perused the entire record and judgment of the trial Kadhis court.

23. This is a first appeal. As a first appellate court, I am required to consider the evidence on record afresh and come to my own conclusion and inferences. See the case of SELLE –VS- ASSOCIATED BOAT COMPANY LIMITED [1968] EA 122.

24. This appeal has arisen from proceedings in the Kadhi's court, and the parties are Muslims. Under Article 170 (5) of the Constitution of Kenya 2010, the jurisdiction of the Kadhi's court is defined as follows;

**170 (5) The jurisdiction of a Kadhi's court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts".**

Marriage and divorce are some of the aspects of personal law that Kadhi's courts have jurisdiction to deal with. No issue of jurisdiction has arisen with regard to the matrimonial proceeding herein.

25. In considering the appeal, I have to be mindful of the fact that the standard of proof that is required before the Kadhi is on the balance of probabilities as this was a principally civil case, and as such the respondent who brought proceedings in the Kadhi's court was required to prove his case on the balance of probabilities. See the case of KIRUGI AND ANOTHER –VS- KABIYA AND 3 OTHERS [1987] KLR 347.

26. The respondent went to the Kadhi's court through an informal hand written complaint in which he stated that the appellant took away his Kshs.108,000/= built a room with that money where she lived with another man and asked that because he still loved his wife (the appellant) the Kadhi's court should order her to go back to his home.

27. The appellant on her part, in her informal handwritten statement of defence, stated that they had been married with the respondent for 10 years and had two boys and that her brother gave her money to start a small business when the respondent was unemployed. Even when the respondent got employed with the CDF (Constituency Development Fund) as a watchman he did not assist her or the children.

28. In addition to that she stated that the respondent handed her over to elders to take her to her parent's home and in the process she did not carry anything with her except the clothes she wore because she feared that the respondent would stab her to death.

29. She also complained in her informal written defence that the appellant went to her mother and talked

rude words, and that since the respondent did not even bother about his children, she be given justice.

30. At the trial before the Kadhi's court, the respondent who was plaintiff testified and called two (2) witnesses who confirmed that the respondent called them and told them to take the appellant to her parent's home. The appellant also testified and called two (2) witnesses, an elder who assisted in taking her to her parent's home and her father.

31. This is a matrimonial matter. There is no dispute that the respondent handed over the appellant to elders to take her to her parent's home. There is no dispute that the two had been married since 2004 and had two boys. There is no dispute that the children have been living and are still living with the mother who is the appellant.

32. The respondent maintains that handing over the appellant to elders to take her to her parent's home was because of anger as the appellant had taken his money, built a house and lived with a man. The appellant on the other hand, denied this and said that she opened a business from money given to her by her brother and that the respondent asked him to close the business which she did not, which was the reason why he handed her over to elders to take her back to her parents.

33. Am advised by the Kadhi assessor that according to Islamic law, the action of the respondent of handing over the appellant to elders and telling them to take her to her parents did not amount to "talak" or divorce. Both parties were Muslims and still are and were bound by Islamic law. I find that the action of the respondent handing over the appellant to elders to take her to her parent's home did not amount to divorce under Islamic law, or any other law or custom applicable in Kenya.

34. The allegation of adultery of the appellant made by the respondent was not proved by the respondent, as he did not provide the evidence under required Islamic law to satisfy the legal requirements that was required to call eye witnesses or take special oath and state his allegation in court. Though he said he had witnesses he ended up calling none and did not take the special oath to confirm his allegations before the Kadhi. In my view, though there might have been suspicion by the respondent of adultery committed by the appellant, the same was not proved by the respondent. I find that adultery of the appellant with one Wayomo was not proved by the respondent.

35. With regard to the issue of marriage, a marriage is a voluntary union between two consenting adults. Its workability is determined by both partners to the marriage. From the evidence on record before the Kadhi's court, the respondent created a situation in which he sent the appellant back to her parent's home back in 2014. He did not go back to try to reconcile with the appellant, nor did he call elders to go and reconcile with the appellant through her parents. He did not care for the appellant or the children of the marriage. Instead he went to the Kadhi's court in 2016 after two years asking that the appellant be ordered by the court to go back to him as a wife.

36. The appellant stated before the Hon. Kadhi and before this court that she did not wish to go back to the respondent for reasons of neglect of her and her children as well as threats by the respondent to her. She feared that the respondent would assault her with a machete. Though the Hon. Kadhi found that the appellant did not feel threatened, that was not so as evidenced in her written defence in which she said that he used to assault her, and her testimony in court for fear of the respondent assaulting her with a machete.

37. In my view the respondent was misadvised in going to the Kadhi or to any court of law for it to order the appellant to go back to his home as a wife. In my view, the Kadhi's court had no power to make such order. The court in my view could only make a decision on whether the marriage should continue or be dissolved. In my view therefore, the Kadhi's court erred in ordering the appellant to go back to her husband, which amounted to forcing somebody on another which was a violation of the right of freedom of association provided under Article 36 of the Constitution of Kenya 2010, as neither the Constitution nor the written law allows a court to force somebody to live with another when that person feels like not doing so. I will thus set aside the Hon. Kadhi's decision to order the appellant to go and live at the home of the respondent.

38. Indeed, as at now there exists a marriage between the parties, however, the marriage has irretrievably broken down. On this I agree with Kadhi assessor that from the evidence on record the marriage has irretrievably broken down. I thus find that the Kadhi's court should have ordered dissolution of the marriage, and on my part, I will dissolve the marriage between the two parties herein as the marriage cannot be salvaged by this court for reasons stated in paragraphs 35 and 36 above.

39. On appeal the appellant has made submissions about recovery of dowry of 2 cows and also custody and maintenance of children. In her statement of defence, she stated before the Kadhis court that there was an agreement of dowry of 2 cows which the respondent promised to pay in due course. She also stated so in her evidence at the trial.

40. I agree with the Kadhi assessor that "bride price" and "dowry" are two different things, though the two have often been confused to mean the same thing. Bride price is a gift or payment made to the parents of the bride at marriage, while dowry is a gift given to the woman in a marriage, which becomes her sole property. The promise of dowry in the marriage is a contract and in my view is enforceable. The two goats of the respondent were not given to the appellant. Now that the marriage is for dissolution and the two cows promised to the appellant have not been paid by the respondent to the appellant, I order that the respondent do give the appellant the two cows or the money equivalent of Kshs,16,500/= per cow which translates to Kshs.33,000/= as dowry within 60 days from the date of this judgment.

41. As for the fine of Kshs.5,000/= in the place of 80 lashes of the cane imposed by the Kadhi's court on the respondent for the false accusation by the respondent of adultery of the appellant, I find that the said punishment is not justified. As the Kadhi assessor has pointed out, that punishment was handed down by the Kadhi without availing the respondent an opportunity to swear to prove his allegations on adultery of the appellant in the place of providing physical witnesses as required in Islamic law. The said punishment was a mistake and is thus herewith set aside.

42. The appellant has asked on appeal for maintenance and custody of the children of the marriage. I note that the children are already with the appellant. There were no prayers in proceedings before the Kadhi's court for custody and maintenance of children. I advise the appellant to approach the Childrens Court for appropriate orders on custody and maintenance of the children.

43. To conclude, I allow the appeal and order that the marriage between the appellant and the respondent herein be and is hereby dissolved. A decree nisi for divorce is hereby granted which will become absolute on the lapse of 6 months from today.

44. I order also that the respondent will give dowry of 2 female cows to the appellant or pay the appellant the money equivalent Kshs. 33,000/= being the total for two cows each at Kshs.16,500/= within 60 days from today.

45. As no party has asked for costs, I order that each of the parties will bear their respective costs of this appeal.

**Dated and delivered at Garissa on 30<sup>th</sup> January, 2018**

**George Dulu**

**JUDGE**