



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**FAMILY DIVISION**

**CIVIL APPEAL 21 OF 2014**

**M I ALIAS G K I .....APPELLANT**

**VERSUS**

**A A.....RESPONDENT**

**JUDGEMENT**

*(An Appeal from the Judgment of Hon. Sheikh Abdulhalim H. Athman, Principal Kadhi delivered on 12.6.14 in Mombasa Kadhi Civil Suit No. 23 of 2013)*

1. M I alias G K I the Appellant filed Kadhi's Cause No. 23 of 2103 against A A the Respondent dissolution of the marriage, a share in matrimonial properties, mut'a compensation for 20 wasted years of marriage and costs. The Plaintiff shows that the parties were married under Islamic law on 4.12.93 and were blessed with 3 children who in 2013 were aged 17, 13 and 9 years. The Appellant accused the Respondent of causing strife between them, threatening her and using abusive language towards her. She accused him of being immoral and engaging in extra marital affairs. He also denied her conjugal rights. During the hearing, the Appellant withdrew the claim for matrimonial property.

2. In his judgment delivered on 12.6.14, the Hon. Principal Kadhi made the following orders:

- i. Parties were given time to reconcile and reunite and a date be given to confirm the same failing which the Court would dissolve the marriage.
- ii. The claim for a share in matrimonial properties was dismissed.
- iii. Mut'a compensation is not applicable
- iv. Each party to bear own costs.

3. The Appellant was aggrieved by the Hon. Chief Kadhi's decision and has preferred the Appeal herein. The Grounds of appeal are reproduced below:

- 1. THAT the Honourable Kadhi erred in fact and in law in failing to grant the divorce forthwith.**
- 2. THAT the Honourable Kadhi erred in fact and in law in failing to find that the Applicant had proved grounds for divorce.**
- 3. THAT the Honourable Kadhi erred in fact and in law in dealing with a claim for matrimonial property which claim had been withdrawn before the hearing commenced.**
- 4. THAT the Honourable Kadhi erred in fact and in law in failing to consider the Appellant's evidence and written submissions.**
- 5. THAT the Honourable Kadhi erred in fact and in law in failing to award mut compensation.**
- 6. THAT the Honourable Kadhi erred in fact and in law in ordering reconciliation yet the evidence on record clearly showed that the marriage was at its end and ought to be dissolved forthwith.**
- 7. THAT the Honourable Kadhi erred in fact and in law in failing to award costs to the Applicant.**

**8. THAT the Honourable Kadhi erred in fact and in law in failing to find that the Respondent had committed matrimonial offences contrary to the Islamic faith.**

**9. THAT the Honourable Magistrate erred in fact and in law in finding that the Applicant did not prove her case since she failed to call any witness.**

**10. THAT the Honourable Magistrate erred in fact and in law in failing to consider and apply the law appropriately.**

**11. THAT the Honourable Magistrate erred in fact and in law in showing open bias and discrimination to the Appellant**

4. Directions were given that the Appeal would be disposed of by way of written submissions and parties duly filed their respective submissions. The submissions were highlighted before me with the Hon. Chief Kadhi sitting as assessor as required by Section 65(1)(c) of the Civil Procedure Act which provides:

**“(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.”**

5. Having considered the Appeal and the submissions by the parties, I do find that the issues for determination are:

- i. Whether the Hon. Kadhi erred in not granting the divorce.
- ii. Whether mut’a compensation should be awarded to the Appellant.
- iii. Whether the Hon. Kadhi erred in considering the issue of matrimonial property.

Whether the Hon. Kadhi erred in not granting the divorce

6. The Appellant finds fault with the refusal by the Hon. Kadhi to grant divorce sought by the Appellant and his further order that parties reconcile and re-unite. According to the Appellant, both parties wanted the divorce and once the Respondent conceded to the divorce, the Hon. Kadhi was obligated to grant the same. The Court therefore erred in making a decision that in effect compelled the parties to live together yet there was no longer any trust between them. For the Respondent, it was submitted that the Appellant failed to prove the grounds for divorce set out in the Complaint leading the Hon. Kadhi to give the parties more time to reconcile and unite. The Appellant was to report back to the Hon. Kadhi to report on reconciliation efforts to enable him make a decision. The Appellant failed to comply with the order of the Hon. Kadhi and instead rushed to this Court with this Appeal which in the Respondent’s view is premature and ill conceived.

7. I have looked at the evidence of both parties. The Appellant accused the Respondent of *inter alia* infidelity, neglect and denying her conjugal rights.

The Respondent in his testimony stated:

**“For the last two (2) years, the marriage has not been a happy marriage...The marriage has no chance, she is the cause. She had never asked for talakah until now. She is the one who wants the marriage annulled. I cannot stop her, she may be granted.”**

8. In his judgment, the Hon. Kadhi stated in part:

**There is no evidence to support the plaintiff’s claim for the prayer of divorce. The prayer should fail. However, both parties admitted during proceedings they are no longer interested in the marriage. A marriage must serve its objectives and not remain so just on paper. Since February 2013 the parties have literally separated and have not enjoyed conjugal rights...The status quo is contrary to law. I recognize that human beings cannot be forced to live together. I give parties more time to reconcile and unite.**

9. The foregoing finding of the Hon. Kadhi is rather baffling. In one breath he says that there was no evidence to support the divorce claim and in the other that both parties admitted that they were no longer interested in the marriage; that marriage should not be on paper only but should serve its objectives. He further recognized that human beings cannot be forced to live together but curiously gave the parties time to reconcile and unite. In *N v. N [2008] 1 KLR [G & F] 16*, Madan, J (as he then was) observed:

**“if two spouses have reached the point of not being able to live together reasonably happily for causes some of which may appear trifling to an outsider but are of vital effect upon their lives and which are felt by them to be intolerable, or unreasonable to continue to bear them, they are entitled to be released from their matrimonial union, the guilty spouse bearing the consequences.”**

10. The Appellant in her testimony stated:

**The defendant doesn't care about my health. I have anxiety and depression. We have been married for 21 years. I trusted him. These days there are dangerous diseases, infections. I no longer trust to live with him. It is dangerous. I have been hospitalized severally for depression.**

11. Clearly the parties have reached a point of not being able to coexist and cohabit in reasonable peace and harmony. The Appellant is apprehensive about her life and health and the Court ought to have provided a remedy and should not have compelled her to continue in a relationship that she says is causing her anxiety and depression. Adopting the principle in N. v. N (supra) principle I find and hold that the Hon. Kadhi erred in declining to grant the divorce and compelling clearly unwilling parties to reconcile and unite.

Whether mut'a compensation should be awarded to the Appellant

12. For the Appellant, it was submitted that having been married for 20 years and given that the Respondent was responsible for the divorce, the Appellant was entitled to mut'a compensation. The Appellant relied on Quran Baqarah 2.241 and Article 86 of the Islamic Charter on Family. To the Appellant, the Hon. Kadhi failed to exercise his discretion in favour of the Applicant. She urged this Court to exercise its discretion and award mut'a compensation to the Appellant. The Respondent's position however is that the Hon. Kadhi correctly held that mut'a compensation is only awarded where the husband arbitrarily divorced the wife without good cause. In this case, it was not the Respondent who sought the divorce. In his judgment, the Hon. Kadhi found that mut'a compensation was not awarded if the wife is the one seeking divorce while the husband wishes the marriage to continue. He therefore declined to award mut'a compensation.

13. Under Islamic Sharia, mut'a compensation is a gift or compensation. Mut'a is designed to console a divorced woman and to minimise the pain that is a direct consequence of divorce. 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.**

14. Mut'a is payable by a man to his wife upon divorcing her. There however appears to be no provision in the Quran for payment of mut'a upon termination of the marriage at the instance of the wife which is known as "Khul". The basis and the origin of the legality of Khul'a is verse 2:229 of the Quran which provides:

**A divorce is only permissible twice; after that, the parties should either hold together on equitable terms or separate with kindness. It is not lawful for you (men) to take back any of your gifts (from your wives) except when both parties fear that they would be unable to keep the limits ordained by Allah. If ye (judges) do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them if she gives something for her freedom. These are the limits ordained by Allah, so do not transgress them.**

15. From the foregoing it would seem that a woman who seeks to divorce her husband is allowed to do so provided she gives something to her husband as compensation to ransom herself from the marriage. In an article in the Lums Law Journal Vol. 2 titled The Law of Khul' in Islamic Law and the Legal System of Pakistan, Dr. Muhammad Munir had this to say about Khul:

**Literally, the term khul' means 'extracting oneself'.<sup>[5]</sup> According to 'Alauddin Mas'ud al-Kasani, '[t]he khul' is lexically, 'al-naz' and 'al-naz' is to pull out/extract something from something.'<sup>[6]</sup> Thus, 'khala'ha means that he has removed her from his marriage.'<sup>[7]</sup>In the technical sense, it is used for marital 'extraction',<sup>[8]</sup> and is the act of accepting compensation from the wife in exchange for her release from the marital tie. Ibn Hajr defines it as '[s]eparation of the husband from his wife for money consideration to be given to the husband.'<sup>[9]</sup> According to Ibn Rushd, 'the terms khul', fitya, sulh and mubara'a refer to the same meaning, which is a transaction in which wife pays compensation for obtaining her divorce.'<sup>[10]</sup>**

16. In the land mark 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" (p. 148).**

On his part, S.A. Rahman, J. observed:

**She expressed a willingness to give up the dower, but the husband said he would not agree, even in that situation, to grant her khula. According to the Hedaya, it is "abominable" for the husband to obtain more than the dower, but it is legally permissible in the case of khula if he insists on getting restitution for the gifts he provided during the marriage to the wife." (p. 121).**

17. From the holding case of Khurshid Bibi v Muhammad Amin, (supra) khul is the right of a woman to obtain dissolution of marriage as long as there is personal aversion or dislike, and if the Court finds that the husband and wife cannot live together in amity and fulfill the limits set by God. A woman can claim khul on agreeing to restore to the husband the dower or some other consideration. Further, the consent of the husband is not required for the wife to obtain dissolution of marriage under khul.

18. Dr. Samia Maqbool Niazi, Assistant Professor Law, Acting Chairperson, Department of Law (Female Section) Faculty of Shariah and Law of the International Islamic University Islamabad- Pakistan, in an article in the International Journal of Liberal Arts and Social Science Vol. 4 No. 4 May, 2016 said of verse 2:229 of the Qu'ran:

**The verse thus means, if there be such a dislike between the husband and the wife that it becomes difficult to lead their life in mutual love and happiness the wife may, on payment of compensation, obtain Khul'a from the husband. That is, Khul'a is**

**permissible when there is no possibility for happy union between the couple and there is the apprehension that due to their extreme differences they shall not be able to live in accordance with the dictates of Shari'ah. However, if the fault lies with the husband, in the fulfillment of his obligations to his wife, the acceptance of compensation for Khul'a by him is forbidden in Shari'ah.**

19. In the instant case, the Appellant has after more than 20 years of marriage sought dissolution of the same and accused the Respondent of infidelity and cruelty. The Hon. Kadhi found that both were of the view that the marriage had irretrievably broken down and was a marriage on paper only. From the evidence on record, the fault lies with the Respondent. In the premises, though the Appellant has exercised her right of khul, acceptance of any compensation by the Respondent for the dissolution of the marriage is forbidden in Islam. However, I find nothing in the foregoing that suggests that because acceptance of compensation by the man when he is found to be at fault is forbidden, he should pay mut'a compensation to the wife. In the circumstances, I find that the Appellant is not entitled to mut'a compensation having sought the divorce herself.

Whether the Hon. Kadhi erred in considering the issue of matrimonial property

20. It was submitted for the Appellant that the Hon. Kadhi erred in considering the issue of matrimonial property which had been withdrawn before the hearing of the suit. For the Respondent, it was argued that the Matrimonial Property Act does not apply to Islamic marriages unless both parties submit to the same. The Hon Kadhi was therefore within the law when he held that the concept was alien to Islam and inapplicable.

21. I have looked at the record and note that the Hon. Kadhi did indeed pronounce himself on the claim of matrimonial property. He found that found the concept of matrimonial property where a property acquired by one spouse during the marriage automatically belongs to both is alien to Islamic law. He further found that the Appellant had not provided any proof of ownership or contribution of any of the properties she claimed and proceeded to dismiss the claim. The record however shows that at the commencement of the hearing, the Appellant's counsel stated that they wished to withdraw paragraph 5 and prayer (b) of the Plaintiff regarding properties. The Hon. Kadhi made an order that prayer (b) and paragraph 5 of the Plaintiff be expunged from the record.

22. It is trite law that Courts just like parties are bound by the pleadings of the parties and cannot embark on an enquiry into the case before them other than to adjudicate upon the specific matters in dispute. In stating so, I am guided by the Court of Appeal in the case of Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR, which cited with approval the Supreme Court of Malawi in Malawi Railways Limited v Nyasulu [1998] MWSC 3

**“The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation.”**

23. The issue of matrimonial property having been withdrawn was not an issue for determination before the Kadhi's Court. For the Kadhi's Court to purport to consider and make a pronouncement on the issue was to act contrary to its character and to enter upon the realm of speculation. In the premises, I find and hold that the Hon. Kadhi misdirected himself in considering the issue of matrimonial property and making a pronouncement thereon, an issue that was not before him.

24. Hon. Sheikh Al Muhdhar A. S. Hussein, Chief Kadhi was of the opinion that the Appeal should be allowed on the issue of divorce and mut'a. He stated in part:

**“The learned Kadhi erred in not granting divorce at that juncture and opted to give parties chance to reconcile, which was never prayed. I would therefore opine that this appeal be allowed partly on issue of divorce and mut'a compensation as I found she deserves the divorce especially after living separately for more than one and a half years.**

25. I concur with the Hon. Chief Kadhi on the issue of divorce. However, for the reasons stated above, I respectfully disagree with him on the issue of mut'a compensation.

26. As regards matrimonial property, the Hon Chief Kadhi opined:

**Matrimonial property in Islamic jurisprudence never exists at all and it has (sic) nowhere to be found neither in Quran nor in Hadith...On issue of matrimonial property, I concur with Kadhi's findings and the same should be upheld.**

With respect, I disagree with the Hon. Chief Kadhi. As stated above, the matter was withdrawn and an order issued by the Hon. Kadhi to that effect. The Hon. Kadhi therefore misdirected himself when he entered the realm of speculation by considering the matter and pronouncing himself on the same.

27. Having considered all the material before me I allow the Appeal on the following terms:

i. The decision of the Hon. Kadhi of 12.6.14 is hereby set aside.

ii. The matter is remitted to a Kadhi other than Hon. Sheikh Abdulhalim H. Athman for purposes of issuing a certificate of dissolution of the marriage between the parties.

iii. The prayer for mut'a compensation fails.

iv. This being a family matter, each party shall bear own costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 21<sup>st</sup> day of September 2018**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

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

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

.....**Court Assistant**