



REPUBLIC OF KENYA
IN THE KADHI'S COURT AT NAIROBI
MILIMANI COMMERCIAL COURTS
MISC. CAUSE NO. 73 OF 2015

D N G.....APPLICANT

-VS

A O PRESPONDENT

J U D G M E N T

1. By this application, D N G (herein after 'the petitioner') seeks order against one A O P (hereinafter 'the respondent') to pay maintenance allowance.
2. It would be useful to first note the facts from the petitioner's uncontroverted statements . The spouses belong to Muslim community. Their marriage was performed in year 1996 in accordance with tenets of Islamic religion. The petitioner is not employed. She resides in a one roomed house at Pangani Estate. She was a divorcee when she performed marriage with the respondent. She went to reside with him after the marriage in Nairobi while she was looking after his four children. Due to some financial constrains the couples were forced to move to Mombasa where they were residing with the petitioner's sister at Mtwapa. Later the respondent secured a job and moved in Nairobi .
3. The petitioner (wife) filed application under relevant provisions of Islamic law for maintenance allowance and medical expenses. She asserted that since the celebration of the said marriage she had been providing for the family solely and after the collapse of her business they were force to seek refuge in the house of her sister in Mombasa. The respondent after securing a job with Nakumatt he promised to move the petitioner to Nairobi of which he failed and consequently cut off communication with the petitioner, there after he contracted a new marriage.
4. The petitioner later relocated to Nairobi where she's currently residing in one bedroom house with the support of her children after the respondent failed to fulfill his promise of providing her with rental proceeds after the relocation. The husband (respondent) has got sufficient means to provide maintenance. Consequently, she demanded maintenance allowance at rate of Kshs.13,400/- and Kshs.15,000/- towards her medical expenses from him.
5. The petition as well as notice of appearance were both served on the Respondent vide the Affidavit of service file on 3rd November 2015. No entry of appearance and filing of Answer to petition was effected within the requisite period. When the file was called for hearing on 20th January 2016 only the petitioner attended the court and matter proceeded by way of undefended cause.

6. On trial, under the oath, the petitioner from her uncontroverted testimony testified that the respondent has been treating her in the manner which is not expected to be meted out from a spouse to another spouse in marriage.

She further testified that the respondent has failed to provide for her despite the fact that he is a man of means with other co-wife and that all efforts to reconcile/redeem their marriage have been grossly and contemptuously disregarded by the respondent

In the premises, the petitioner contended his marriage to the respondent needs immediate court intervention.

7. I have given due consideration to the application and the ground it's based on *the question that falls for my consideration is whether or not the petitioner is entitled to maintenance ?*

8. The sharia has given a right to the husband to retain a hold on his wife in return whereof it is obligatory on him to provide maintenance to her. This right and corresponding obligation arise out of the following verses of the Holy Qur'an;

i. "Let the man of means spend according to his means; and the man whose resource are restricted, let him spend according to what Allah has given him. (Chap. 65 V. 7)

ii. "Let the woman live(in iddat) in the same style as ye live, according to your means." (Chap. 65 V. 6)

iii. "But he shall bear the cost of their food and clothing on equitable terms." (Chap. 2 V. 233)

9. The maintenance allowance is incumbent on the husband due to his wife's surrender of her person to him. There basically three grounds which make it obligatory on one to provide maintenance for the dependents:

i. Marriage,

ii. Consanguinity,

iii. Ownership.

The husband's liability to maintain his wife is created by marriage. The other ground is of consanguinity which makes it obligatory upon the parents to maintain their children or place upon the children liability to maintain their aged and destitute parents. The third reason of the incidence of maintenance is ownership (which is no longer in practice) e.g. the obligatory maintenance of a slave.

10. In today's world, it is extremely difficult to conceive that a woman in a marriage for more than 20 years would be in a position to manage her life without any assistance from her husband . It can never be forgotten that the inherent and fundamental principle behind Sharia is for amelioration of the financial state of affairs as well as mental agony and anguish that woman suffers when she is compelled to look upon herself. Be it clarified that sustenance does not mean and can never allow to mean a mere survival. A woman, who is constrained to look upon herself with no or minimal income , should not be allowed to feel that she has fallen from grace and move hither and thither arranging for sustenance.

11. As per law, she is entitled to lead a life in the similar manner as she would have lived in the house of her husband. And that is where the status and strata of the husband comes into play and that is where the legal obligation of the husband becomes a prominent one. As long as the wife is held entitled to grant of maintenance within the parameters of Sharia, it has to be adequate so that she can live with dignity as she would have lived in her

matrimonial home. She cannot be compelled to become a destitute or a beggar. There can be no shadow

of doubt that an order under Chap. 65 V. 7 can be passed if a person despite having sufficient means neglects or refuses to maintain the wife without justifiable cause in the eyes of the law. Sometimes, a plea is advanced by the husband that he does not have the means to pay, for he does not have a job or his business is not doing well, or he's married to another wife.

These are only bald excuses and, in fact, they have no acceptability in law. If the husband is healthy, able bodied and is in a position to support himself and of his other wives he is under the legal obligation to support his wife, for wife's right to receive maintenance under Chap. 65 V 7, unless disqualified, is an absolute right.

12. Grant of maintenance to wife should be perceived as a measure of social justice Chap. 65 V. 7, 6 and Chap. 2 V 233 of the Holy Qur'an is a measure of social justice and is specially enacted to protect women and children and falls within constitutional sweep of Article 19(2) reinforced by Article 21(3) of the Constitution . It is meant to achieve a social purpose. The object is

to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife.

It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves.

This being the position in law, it is the obligation of the husband to maintain his wife. He cannot be permitted to plead that he is unable to maintain the wife due to financial constraints as long as he is capable of earning .

In the premises, there being no submissions nor response from the respondent and on the evidence adduced by the petitioner, the evidence which was not challenged. I find for the petitioner. Accordingly, I make the following orders:-

i. THAT the petitioner is entitled to maintenance allowance.

ii. Arising from (i) above the respondent should provide Kshs.13,400/- and Kshs.15,000/- monthly towards the maintenance and medical allowances respectively.

iii. No order as to cost.

It's so ordered.

Dated , Delivered and Signed at Nairobi this 26th day of January, 2016.

Hon. A. I. Hussein

Kadhi

In presence of;

Applicant