



IN THE KADHI'S COURT AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 89 OF 2015

N A.....PLAINTIFF

VERSUS

A Y A..... DEFENDANT

J U D G M E N T

The brief fact of this case are that the plaintiff contracted a marriage with the Defendant on 15th June 2012 in accordance with the provisions of the Mohammedan Marriage and Divorce Registration Act Cap.155 (repealed).

Subsequently, they were issued with the certificate of marriage Serial No. B [Particulars Withheld], by the presiding registrar of marriage . They cohabited as husband and wife in Arusha , Tanzania. They said union was blessed with two issue namely;

- 1. Y.A.Y.A - born on 12th March 2013.
- 2. A.A.Y.A - born on 12th June 2015.

On 22nd August 2015, the Plaintiff filed her Plaint dated 22nd August 2015 against the Defendant for a decree for a dissolution of the marriage, an order for the maintenance in her favour by the minors, custody of the minor and any further relief that this Honourable Court will deem fit. This Plaint was founded on the ground of negligence and cruelty.

The plaint as well as the a notice of appearance were both served on the Defendant vide the affidavit of service filed on 22nd February 2016.

No entry of appearance and filling of Answer to plaint was effected within the requisite period. When the file was called for hearing on 22th February 2016 only the plaintiff attended the court and matter proceeded by way of undefended cause.

The plaintiff from her uncontroverted testimony, the testimony which was corroborated by PW2 and PW3, testified that the Defendant 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 Defendant does not maintain her and the issue and that all efforts to reconcile/redeem their marriage have been grossly and contemptuously disregarded by the Defendant.

The plaintiff further testified that they have separated for a considerable period .

In the premises, the plaintiff contended her marriage to the Defendant has irreparably and irretrievably broken down and should be dissolved and she be granted the divorce certificate.

I have given due consideration to the application and the ground it's based on.. The court attention was drawn to Holy Qu'ran chapter 2 v. 231 wherein is stated that.

"...either take them back on reasonable basis or set them free on reasonable basis but don't take them back to hurt them...."

The court attention was also drawn, to Ash-shawkanii's. "*Fat-hul Qadiir*" Vol. 3 pg 21 where it states that.

Divorce has been allowed in Islamic Law as a remedy in incompatible union"

The foregoing evidence is not denied or rebutted by the Defendant. The plaintiff's case has been subsequently proved before me to the required standard.

Looking at the evidence in totality, it's the view of this court that the upholding of the marriage state is only one of the several objects of public policy...where a marriage has been wrecked beyond hope of salvage, the argument of public policy loses much of its force. To keep the parties tied to one another in the bonds of a marriage which has become a sham is obviously conducive to immorality and potentially more prejudicial to the public interest than a dissolution of the marriage bond.

The two parties are no longer living together neither are they planning on reconciling and the existence of irreconcilable deference render the conjugal union impossible. In short, the marriage is in existence in name and nothing more. It is a shell and hence it serves no useful purpose for it to stand.

On the issue of maintenance upon the termination of marriage by divorce the wife is entitled to maintenance whether the divorce is revocable or irrevocable and whether she is pregnant or not as held in ***Rashid Ahmad v. Anisa Khatun. AIR 1932 PC 25.***

In ***Arif Muhamood Mian v Mst. Tanvir Tatum and other 2***, the divorce wife had claimed maintenance which was awarded by the Arbitration Council vide ex parte against the husband at the rate of rupees 10,000 per mensem. in the view of the court, *maintenance can be claimed till the time talaq becomes effective as well as during the eddat period.*

The court also observed that maintenance should not be a bare minimum sustenance allowance but a convenient to the need of the wife.

I am satisfied that the plaintiff has proved her claim against the Defendant to the required standards on all the prayers.

In the premises, there being no response to the plaint and on the evidence adduced by the plaintiff and corroborated by PW2 and PW3, I find for the plaintiff. Accordingly, judgment is entered as prayed against the Defendant for the following orders:-

- i) A decree is granted for the dissolution of the marriage between the plaintiff and the Defendant.
- ii) The certificate of divorce be issued forthwith.
- iii) The Defendant shall provide eddat maintenance to the plaintiff for a period of three months on a reasonable scale.
- iv) The Defendant shall provide reasonable maintenance towards the issues of marriage.
- v) The custody, care and control of the minors of the marriage named herein above is granted to the plaintiff.

vi) The Defendant shall provide consolatory gift to the plaintiff. The modality of such support shall be ordered upon the assessment of the Defendant financial strength or upon a strong evidential proof from the plaintiff.

vii) No order as to cost. Its so ordered.

DELIVERED and SIGNED at Nairobi this 29th day of February 2016.

Hon A .I. Hussein

Kadhi II