



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 107 OF 2015

R W K APPELLANT

VERSUS

A M A..... RESPONDENT

J U D G M E N T

1. The parties before the court got married under the Islamic law on 8th August 2010. The Appellant introduced some of her family members including her parents and her brother to the Respondent the day before the marriage. On the date of the marriage she converted to Islam. The marriage ceremony was presided over by a Sheikh (Muslim scholar).
2. This relationship between the two parties was therefore governed by Islamic law and when things fell apart and the center could no longer hold the parties voluntarily submitted themselves to the jurisdiction of the Kadhi's court.
3. Under **Article 170 (5)** of the **Constitution** the jurisdiction of the Kadhi's is limited to the determination of question of the Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's court.
4. Aggrieved by the initial judgment and orders of the Hon. Kadhi A. I. Hussein in Civil case No. 50 of 2012 the appellant filed this appeal dated 29th October 2015. Hon. Kadhis Abdulhalim H. Athman and Sukyan H. Omar sat as the assessors of this judgment as is required under **section 65(1) (c)** of the **Civil Procedure Act**.
5. In her appeal the Appellant prayed that the marriage between her and the Respondent be declared null and void; that both legal and actual custody of the minor be given to the Appellant; that the Respondent be compelled to register minor K N K with the Kenya Airways Medical Scheme and that the minor be recognized without any discrimination in all welfare and pension schemes that the Respondent is or will be a member in, where his other children are registered.
6. The Appellant also prayed that the Respondent be compelled to provide for the minor and the Appellant a monthly maintenance of Kshs.200,000/= or such other amount this court deems reasonable and just; that the Respondent do pay arrears of past maintenance at the same rate of Kshs.200,000/= from July 2011 to July 2012; That the Respondent do pay the Appellant Kshs.500,000/= for the loss of household.

7. The appeal was premised on the grounds that the Hon. Kadhi erred in law:

- 1. by improperly refusing to admit oral evidence of the plaintiff leading to a miscarriage of justice.**
- 2. in over emphasising that litigation must come to an end even when that rush would be at the expense of not doing substantive justice to the appellant.**
- 3. by delivering judgment and then making substantive changes or alterations to it after its pronouncement, delivery and signing.**
- 4. by not giving, or setting out reasons for decisions that he arrived at in his judgment.**
- 5. and in fact in giving orders that were vague and ambiguous.**
- 6. and in fact in purporting to act in the best interests of the minor but proceeding to withhold the right of education to the minor.**
- 7. and fact in opting to selectively apply Islamic law in determination of the issues before him.**
- 8. and in fact in denying the appellant legal and actual custody of the minor and purporting to only grant physical custody, giving the defendant an order he had not sought.**
- 9. in awarding maintenance for the minor in the sum of only KES 25,000.00 vaguely stated in his judgment.**
- 10. and in fact in not awarding any maintenance to the plaintiff /appellant.**
- 11. and in fact by not giving any decision or order on the status of the marriage although the same was specifically pleaded.**

8. This matter was first heard by Hon. Kadhi Rashid Ali Omar. The appellant successfully appealed against his decision in HCCA 96 of 2012 and a retrial by another Kadhi was ordered. Hon. A. I. Hussein subsequently heard and determined the matter provoking this appeal against his decision.

9. Upon consideration of the pleadings and the rival arguments the court has framed the following issues for determination:

1. Whether the trial in the lower court was fair;
2. Whether or not the judgment is defective;
3. Whether or not the maintenance order was fair and reasonable;
4. The status of the marriage;
5. Whether or not the appellant is entitled to maintenance.

FAIR TRIAL

10. The appellant submitted the trial Kadhi entered judgment without considering her evidence. That she was not heard. The Respondent's position was that the court directed the hearing to proceed but the appellant elected not to participate.

11. The Kadhi's order for the matter to proceed to hearing was a valid order of the court on directions. The spirit of the **Civil Procedure Act and Rules** gives the trial court power over the conduct of the case

before it. Parties do not dictate the timelines for proceedings. Judicial officers have a duty to give effect to the spirit of the Constitution for both fair and expedited trial.

12. In the instant case the matter was adjourned more than ten times from February 2014 to October 2015. The appellant sought and was granted leave to amend her plaint in July 2015. Both parties were present for the hearing on the 12th October 2015, and there is no evidence that the matter was listed for mention.

13. It is however evident that the trial Kadhi gave the Appellant little time for preparation. **Under Article 50(1) of the Constitution** every person has the right to have any dispute that can be resolved by a court of law, decided in a fair and public hearing before a court although the Hon. Kadhi had conduct of the matter and acted within his discretion.

14. At the appeal level the court should not tamper with issues within the discretion of the trial court. Considering the history of the case however, the trial Kadhi should have granted the Appellant a little more time to prepare for the hearing to proceed. I find that since the pleadings from both parties were comprehensive and that the Kadhi's ruling appears to have taken note thereof the judgment was therefore not prejudicial to any of the parties.

Whether or not the judgment was defective

15. The Appellant argued that the trial Kadhi altered the judgment in favour of the Respondent after it had been delivered and signed. That the judgment was vague and ambiguous and did not give reasons. That the Kadhi relied on evidence in the Respondent's further affidavit touching on other persons not party to the case. Mr. Ndege for the Respondent contended that judgment was clear and unambiguous and gave reasons for the findings.

16. A Judgment can be delivered in handwritten or typed form but for purposes of the record of appeal it must be typed. A Judicial officer is allowed to make corrections to a judgment or ruling to fully capture the expression of the intention of their decisions. Court is only *functus officio* when it has completed all its duties to a particular case, and released the judgment.

17. The doctrine of *functus officio* is that once the court has pronounced itself on the matters before it, it cannot determine the issues on their merit or alter its decision whatsoever. However the court's decision must be perfected and a final decision issued. The court is permitted to correct clerical mistakes or errors in the expression of its intention in the judgment. This is further provided for under **Section 99 of the Civil Procedure Act**, which allows the court to make amendments or rectifications to its judgment or ruling. - See the holding of Emukule, **J Dhanji Jadra Ramji v Commissioner of Prisons & another [2014] eKLR**.

18. The Supreme Court expounding on the concept of *functus officio* in Election Petitions Nos. 3, 4 & 5 RAILA ODINGA & OTHERS vs. IEBC & OTHERS [2013 eKLR cited with approval the case of **JERSEY EVENING POST LIMITED VS A1 THANI [2002] JLR 542 at 550** that:

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available. [emphasis supplied]”

The trial Kadhi was therefore at liberty to correct his judgment before he released it.

19. The handwritten judgment of the trial court had some cancellations. The canceled words are few and are legible. It is not clear whether they were made during delivery of the judgment or shortly thereafter

when the document was requested. The trial Kadhi had a duty to ensure the judgment expressed his intention as delivered. The court cannot find fault with the alterations as the decision is essentially the same.

20. There are different styles to judgment writing. One, as in this case, is to analyze all issues and give all findings in the end. The other style is to analyze and make finding on each issue framed for determination. Going through the judgment, the trial Kadhi may have not listed the issues for determination but they are clearly captured in his judgment.

21. It is preferable, although not mandatory, to list issues for determination. Judgment writing is however a matter of style and clarity. In this case the style chosen by the trial Kadhi does not impugn the decision as the reasons are given and authorities are cited. The court is also not persuaded that the Respondent's further affidavit was the only evidence relied upon by the trial Kadhi to reach the decision. The Kadhi appears to have used it as corroborative evidence for the Respondent's case. Such evidence is admissible in civil litigation.

Whether or not the maintenance order was fair

22. The Appellant had prayed for maintenance of KES 300,000.00 per month while the Respondent prayed to be allowed to pay KES 18,000.00 per month. The High Court had ordered for the Respondent to pay her KES 50,000.00 per month plus school fees and medical cover in the interim, pending the determination of the matter. The trial court awarded the Appellant maintenance of KES 25,000.00 plus 75% of school fees and medical cover.

23. The Respondent had deponed in his affidavit of means that he was earning KES 600,000.00 per month, more than half of which was expended in loan repayment and payment of insurance premiums. In the body of the judgment there is no clarity on how the Hon. Kadhi arrived at the figure of KES 25,000.00 and the percentages in school fees sharing between the parties. Since this was the key issue in this case, it would have been prudent to give elaborate reasons for the finding on this issue.

24. There are two basic principles in determining the rate of maintenance in Islamic law: financial ability of the father and the needs of the minor. Where divorced parents do not agree on the rate, of maintenance, Islamic law provides that the father should pay for a surrogate mother to breastfeed the child.

25. It is based on the following verses of the Qur'an:

'their mothers shall give suck to their children for two whole years (that is) for those (parents) who desire to complete the term of suckling, but the father of the child shall bear the cost of the mother's food and clothing on a reasonable basis. No person shall have a burden laid on him greater than he can bear. No mother shall be treated unfairly on account of her child; nor father on account of his child. And on the (father's) heir is incumbent the like of that (which was incumbent on the father). If they both decide on weaning the baby by mutual consent and after due consultation, there is no sin on them. And if you decide on a foster suckling mother for your children, there is no sin on you, provided you pay (the mother) what you agreed (to give her) on reasonable basis. And fear Allah and know that Allah is All Sear of what you do' Al Baqarah: 233. Emphasis given

"Let him who hath abundance spend of his abundance and he whose provision is measured let him spend of what Allah gave him, Allah asketh naught of any soul save that which He hath given it, Allah will vouchsafe after hardship ease". Qur'an: Talaq 65: 7

26. Islam therefore directs fair treatment of wives and children. The Appellant came into the marriage as a second wife. The first wife is entitled to the same standard that she had before the husband's marriage to the second wife. A divorced wife cannot also demand maintenance more than what she used to get while in the marriage. She would get reasonably less as the husband having divorced her, is no longer entitled to any marital rights.

27. The divorced husband's responsibility is on the welfare of the child. These facts did not come out clearly in the proceedings. However the financial ability of the Respondent has been said to have considerably weakened. It was submitted on behalf of the Respondent that he is no longer on permanent employment. That being a pilot he only gets a commission whenever he flies which is not regular.

28. KES 300,000.00 demanded by the Appellant is therefore, in the view, of the court, on the higher side given the Respondent's changed status. The court also finds that the KES 25,000.00 proposed by the Respondent is on the lower side. This is pegged on the earning capacity of the Respondent and not what the father of another minor in the Appellant's custody is paying for the maintenance of that other minor.

29. Under Islamic law the financial responsibility of maintenance lies on the father of the child according to his means and taking into consideration other facts outlined hereinabove. The mother of the child is obliged to consult the father on the school the child should go to. The father should not be prejudiced by the mother's unilateral decisions.

The legal and actual custody of the minor

30. The minor was confirmed to be a biological child of the parties by the Government Chemist. She was born on 13th August 2012. By the Appellant's own assessment, the child was conceived around November 2011 after expiry of the Edda period.

31. Under Islamic law any sexual intercourse that parties engage in after the expiry of Edda period means that there was no automatic remarriage. The implication is that the child was born out of wedlock and is therefore illegitimate. Such a child has no legal relationship to whoever the father is.

32. The Hon. Kadhi therefore, erred in granting legal and actual custody of the minor to the Respondent who is in the eyes of the Shariah, a complete stranger to the child. The entire custody should vest in the mother who is the Appellant herein. No justification for sharing of the responsibility was given unless it is on the assumption that this is a biological but not legal child.

The status of the marriage.

33. The trial Kadhi dealt with the matter of the marriage and the divorce in his judgment. Both parties believed they were married under Islamic law. The Kadhi held that the marriage existed hence the divorce. The consent of guardian [waliyy] is a condition to the validity of any marriage. In cases of women Muslim reverts, normally the waliyy is the Kadhi. In this case no Kadhi gave consent to the marriage.

34. The marriage ceremony was attended by the appellant's brother, sister in law and some friends. On the Respondent's side only two people attended being, Hassan the Muslim Scholar and one Harun. The Appellant was not introduced to any family members of the Respondent's family. The Appellant set her dowry at 500,000/= Kshs and it was fully paid.

35. The father of the Appellant also did not give express consent, although it may have been implied. In any case the relationship would, in the worst case scenario, be referred to as *shubha*, that is cast in doubt. Anwar A. Qadri in his 'Islamic Jurisprudence in the modern world', 402- 405 states:

"Paternity does not admit of positive proof, because the connection of the child with its father is secret. But it may be established by the word of the father himself, or by a subsisting legally constituted relationship between him and the mother of the child. There are three degrees in the establishment of paternity. At first it is by a valid marriage, secondly, an irregular or fasid contract of marriage coming near to the former and lastly by bondage. The effect of the first degree is to establish paternity without any claim [rejected by a process of li'an only]."

Where there exists between a man and a woman the relationship of husband and wife or such semblance as is recognised by the law, the children are either admittedly the lawful children of

the man or capable of being made so by his acknowledgment. The semblance of lawful marriage for this purpose includes fasid marriage, and even batil marriage, where it subsisted in bona fide ignorance of the bar or shubha. Legitimacy results from the absence of criminal intent on the part of parents. Indeed in sunni law, even the child of criminal intercourse or walad-ul-zina has full rights of inheritance to its mother though not to its father...''

Any child from any of the relationships above enjoys the full protection of the law.

36. Once the divorce is pronounced it becomes effective. Registration only serves to formalize a divorce pronouncement/ notification. Islamic law provides that a couple can reunite in marriage after divorce by mutual consent, within approximately three months [after expiry of exactly three menstrual cycles of the wife] of the *talak*.

37. Consortium of a couple during the Edda period is regarded as consent to remarriage if there is no coercion. This right can be exercised twice and after the third pronouncement of divorce, couples cannot remarry unless the divorced woman first marries another man, is divorced by him and completes her Edda period.

38. The Appellant argued that the parties enjoyed their conjugal rights even after the divorce, a fact denied by the Respondent. There is evidence of only one divorce pronounced on 14th July 2011. The Appellant contended that there was a second divorce which was denied by the Respondent. The Respondent's explanation was that the so called second divorce was merely a record of his pronounced divorce.

39. Under Islamic law it is the husband who is granted power to divorce the wife. In the event of a dispute and without contrary evidence the husband's testimony shall prevail. Therefore the Respondent divorced the Appellant orally on 14th July 2011 and registered that same divorce on 20th September 2012. The Edda period therefore ended about 4th September 2011.

Whether or not the appellant was entitled to maintenance.

40. A divorced woman is entitled to maintenance during the Edda period, which is approximately three months under Qur'an: 2: 228 read together with Quran: 2: 241.

'And for divorced women maintenance (should be provided) on reasonable scale. This is a duty on al Muttaqeen (the pious). Al Baqarah: 241

"and divorced women shall wait (as regards their marriage) for three menstrual periods, and it is not lawful for them to conceal what Allah has created in their wombs, if they believe in Allah and the last day. And their husbands have the better right to take them back in that period, if they wish for reconciliation. And they (women) have rights (over their husbands as regards living expenses) similar (to those of their husbands over them as regards obedience and respect) to what is reasonable, but men have a degree of responsibility over them. And Allah is All Mighty, All wise. Qur'an :2:228

From the foregoing the trial Kadhi correctly found that the appellant is not entitled to Edda maintenance.

41. After careful consideration of the pleadings and the rival submissions of the parties, the court therefore orders as follows:

- (i) The child maintenance is adjusted from Kshs.25,000/- to Kshs.40,000/= per month keeping in mind the Respondent's current earning capacity or financial ability as stated in his submissions.
- (ii) The Respondent shall continue to provide medical cover for the minor.
- (iii) The Respondent shall pay school fees for the minor in a school to be agreed by the parties.

(iv) Both legal and actual custody of the child are vested in the Appellant in accordance with Islamic Law.

There are no orders as to costs.

SIGNED DATED and **DELIVERED** in open court this **13th** day of **October, 2016**.

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L. A. ACHODE

JUDGE

In the presence of the Appellant.

In the presence ofadvocate for the Respondent.