



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

**FAMILY DIVISION**

**CIVIL APPEAL NUMBER 96 OF 2012**

**R W K.....APPELLANT**

**VERSUS**

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

**JUDGMENT**

1. This is an appeal against the ruling delivered on 23<sup>rd</sup> November 2012 by Kadhi R.A Omar. In the ruling, the Kadhi found that the appellant and the respondent had been divorced under Shariah Law; the respondent was the father of the child (KN) who should pay Kshs.30,000/= monthly towards its upkeep; the upbringing of the child was to be shared by the parties; the respondent was to buy the child's clothing and other necessities every six months; the respondent was to cater for the child's medical needs; and that the respondent had given the appellant a loan of Kshs.340,000/= whose repayment the parties were to negotiate and settle amicably.
2. In the amended appeal, the appellant was aggrieved by the orders on the grounds that:-
  - a. the Kadhi erred in law and fact by deciding the case without actually hearing the parties on oral evidence, and or taking down evidence, and in the process affected her right to due process;
  - b. the Kadhi found that the parties were divorced under Sharia Law without relying on any evidence;
  - c. the Kadhi erred in law and in fact in determining the issue of parental responsibility without reference to Sharia Law;
  - d. the Kadhi failed to apportion the specific responsibility of the parties; and
  - e. the Kadhi made a finding that the appellant owed the respondent Kshs.340,000/=, a matter that had not been pleaded and therefore not in issue.
3. The appeal was opposed by the respondent who was represented by MS ASLI who defended the findings of the Kadhi.
4. Ground One of the appeal has caused us a lot of anxiety. The appellant alleges that the Kadhi kept no record of the proceedings and did not receive any oral evidence, and therefore that his findings had no basis. She claimed that, in the process, her right to a fair hearing under Kadhi's Court Act, the Civil Procedure Act and the Constitution of Kenya 2010 was breached. In answer to the claim, the respondent stated that the Kadhi was not bound by the strict rules of procedure which apply to the magistrates courts and to the superior courts and therefore could not be faulted for failing to record the proceedings.
5. In reaching the decision subject of the appeal, the Kadhi stated that he had done so

**“upon hearing the parties herein, and upon perusal and study of the arguments and counter arguments by the parties herein...”**

Yet, the record of what the parties told the Kadhi or the arguments that were presented to him was not kept. Before the Kadhi were a plaint, an amended plaint and a defence. In the plaint the respondent asked for Kshs.200,000/= from the respondent for spousal support and maintenance; costs of healthcare for the unborn child; Kshs.5 million being ‘*Muakhr*’, that is, final settlement, and counseling. The amended plaint sought the Kshs.200,000/= maintenance of the appellant and the child, past maintenance, compensation for lost property and costs of healthcare for her and the child. There was a defence denying the claim. The substance of the claim was that the appellant and the respondent had married on 8<sup>th</sup> August 2010 in accordance with Sharia Law. The respondent issued “Talaq” on 20<sup>th</sup> September 2011 and another on 10<sup>th</sup> October 2011, but that they resumed sexual relationship which had resulted in her pregnancy and the birth of the child. This meant that the second “Talaq” had been revoked. In the meantime, the respondent had become indifferent to her and had failed to provide any support or maintenance. In the defence, the respondent admitted the fact of marriage but stated that he had issued “Talaq” which had brought the relationship to the end. He denied that he had resumed any sexual or other relationship with the appellant. A certificate of divorce had been issued when the period by “*Eddat*” had lapsed. He denied that he was responsible for the pregnancy. He denied that he had fathered the child in question.

6. Following an application, the parties on 4<sup>th</sup> June 2012 agreed that the respondent would pay to the appellant through the court Kshs.20,000/= for maintenance and Kshs.30,000/= for house rent monthly. On 7<sup>th</sup> May 2012 the Kadhi had ordered the respondent to maintain the appellant and cater for the unborn child till delivery and thereafter the parties were to undergo “*Lian*” procedure, or carry out DNA to establish the paternity of the expected minor. There is no record to show that the two orders were given following any hearing of the parties. On 17<sup>th</sup> August 2012 the respondent swore an affidavit in reference to the orders and stated that on 13<sup>th</sup> August 2012 the appellant had given birth to a baby girl. He stated that he was willing to maintain the child at the rate of Kshs.10,000/= per month; that when the child reached school-going age he was going to pay 50% of fees in a reasonable Islamic School; and that he was going to cater for the child’s reasonable medical cover.

7. Under **Section 7** of the **Kadhi’s Court Act**:-

**“Every Kadhi’s Court shall keep such records of proceedings and submit such returns of proceedings to the High Court as the Chief justice may from time to time direct.”**

Under **Section 8(2)**:-

**“Until rules of Court are made under subsection (1), and so far as such rules do not extend, procedure and practice in a Kadhi’s court shall be in accordance with those prescribed for subordinate courts by and under the Civil Procedure Act.”**

The decisions of the Kadhi’s Court are appealable to the High Court. In deciding the merits of the appeal, the High Court will only rely on the record of the proceedings and decision as kept by the Kadhi. Under **section 6** of the **Act** the Kadhi is required to hear all witnesses called and to determine each issue based on the assessment of the credibility of all the witnesses. It is noted that under **section 6(iii)**:-

**“no finding, decree or order of the court shall be reversed or altered on appeal or revision on account of the application of the law or rules of evidence applicable in the High Court, unless such application has in fact occasioned a failure of justice...”**

8. I agree that it would be onerous to subject the Kadhi's Court to the strict rules that apply in the ordinary courts. However, to keep a record of what the parties said, while either sworn or not, is the bare minimum expected of the Kadhi's Court. It is upon reading the record that the High Court can agree or not agree with the decision arrived at by the Kadhi. A party appearing before the Kadhi expects to be heard, and what he says to be recorded. He expects to be allowed to call evidence. He expects to be cross examined on what he says. The same for his witnesses. He expects to cross-examine the other side also. All these have to be recorded. There is a failure of justice, we find, when such a record is not kept. This is because, without the record, we are not able to determine on what basis the Kadhi made the findings now subject of the appeal.
9. The submission by MS ASLI was that the appeal was incompetent because the record did not contain an order or decree from the ruling against which the appellant sought to challenge it. Reliance was placed on **section 79G** of the **Civil Procedure Act** and **Order 42 rule 1(2)** and **rule 13(4) of the Civil Procedure Rules**, and the decisions in **KYUMA V KYEMA [1988]KLR 185**, **MARY KAUNGA WANYAGA V MILLICENT WANJIRU NDUNGU [2014] eKLR** and **KULWANT SINGH ROOPRA V JAMES NZILI MASWILI[2014]eKLR**. However, it should be recalled that counsel had earlier on submitted that the strict rules of procedure that are applicable in the magistrates courts and in the superior courts should not apply to the Kadhi's Court. We also bear in mind the provisions of **section 6** of the **Kadhi's Court Act**. We find that there is a legitimate complaint that is contained in the appellant's appeal which we are entitled to consider. This is what substantial justice is all about.
10. After finding that the non-keeping of the record of proceedings by the Kadhi's Court occasioned a failure of justice, we consider that no useful purpose will be served by going into the merits of the issues raised in the appeal. Instead we allow the appeal and order that the dispute between the appellant and respondent be heard by a different Kadhi. In the meantime, and in the wider interests of justice, the respondent shall provide Kshs.50,000/= monthly towards the maintenance of the appellant and the child and also provide them with a reasonable medical cover. Each party shall bear own costs of the appeal.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of October 2014**

**A.O. MUCHELULE**

**SHEIKH AL-MUHDHAR A.S. HUSSEIN**

**JUDGE**

**CHIEF KADHI**