



REPUBLIC OF KENYA

High Court at Garissa

Civil Appeal 13 of 2012

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IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO. 13 OF 2012

Being an Appeal from the whole of the Judgement of the Kadhi's Court at Garissa (Hon. Osman A. Shurie) delivered on 17th April 2009 in Civil Case No. 56 of 2009.

ABDIRAHMAN MOHAMED ABDI.....1ST APPELLANT

NASRA ALI BASHIR.....2ND APPELLANT

VERSUS

ADAN YUSSUF.....RESPONDENT

JUDGEMENT

1. Abdirahman Mohamed Abdi (1st Appellant) and Nasra Ali Bashir (2nd Appellant) have preferred this appeal seeking orders to set aside the judgement of the Honourable Kadhi Osman A. Shurie, any other order/relief this court may deem fit to grant and costs of the appeal. In their memorandum of appeal the appellants have raised two grounds of appeal, namely:

a) The learned Kadhi erred in law and in fact in making a finding that the child in question belonged to the Respondent in the absence of any substantial evidence in support of finding.

b) The learned Kadhi acted *ultra vires* as he had no jurisdiction to hear and determine an issue relating to the paternity of the child in question.

2. Parties through their respective counsels filed written submissions and left the matter to the court to give its judgement. Being a matter based on Islamic Law and given that the matter did not proceed by way of oral submissions in open court this court was not able to sit with Kadhi(s) to take down the submissions and consider the matter. This court however sought and received the opinions of Hon. Mr. Sheikh Twalib Bwana Mohamed, Kadhi, Nakuru Law Courts and Hon. Mr. M. S. Hassan, Kadhi Hola Law Courts. This was done by forwarding the record of appeal and counsel's submissions to the two Kadhis who have read, considered the same and prepared their respective opinions on the matter as regards the applicable Muslim Law. They have forwarded the opinions to this court. This court in arriving at this judgement has taken into account the two opinions in as far as the applicable Muslim Law is concerned. It was not possible to get the Kadhi Nairobi sit after he excused himself hence the Kadhi Nakuru.

3. The Respondent sued the Appellants in the Kadhi's Court, Garissa, asking the court to find that the 2nd Appellant was still married to him (Respondent) and that **Y.A.Y**, the child in question, is his child and therefore he should be granted custody of the minor child. The case as presented in the lower court has simple facts. The Respondent, then the Plaintiff, told the trial court that he married the 2nd Appellant (he does not say when the marriage took place) and after three (3) months he divorced her with one *talaq*. He says that he later revoked the marriage. By revocation of marriage I understand it to mean that the Respondent revoked the divorce. My understanding of Muslim Law as guided by Mr. Hassan and Mr. Mohamed (Kadhis) is that in Muslim marriages a husband can divorce his wife with one *talaq* after which she stays for a probationary period of three menstrual cycles (periods) to allow parties an opportunity to reconcile. The husband can then revoke the divorce if they have reconciled. If this is what happened here, it would mean that the Respondent divorced the 2nd Appellant then revoked that divorce after the allowed period hence his claim that she was still his wife when she allegedly eloped with the 1st Appellant. This issue does not come out clearly in the lower court proceedings.
4. The Respondent claims that the 2nd Appellant was pregnant with his child when she eloped with the 1st Appellant. This claim is denied by the Appellants who state that the 1st Appellant was not pregnant. In her evidence in the lower court, 2nd Appellant testified that her father presided over a marriage between her and the Respondent but she did not love him. She said the marriage was consummated but after two (2) months (it is not clear whether they stayed married for one and half, two or three months since evidence is not clear) she decided to go away from the Respondent and marry the 1st Appellant. She said that after her divorce from the Respondent she observed Edda for three (3) months and during that period she used to receive her monthly periods. She eloped with the 1st Appellant after the divorce and without pregnancy. She said she married the 1st Appellant under Islamic Law in Kismayu, Somalia. She became pregnant and gave birth to a baby boy. She termed the claim by the Respondent untrue.
5. The 1st Appellant told the lower court that he did not elope with the 2nd Appellant but married her on 10th April 2004 under the guardianship of her father and got the baby boy with her. He also told the lower court that in January 2009 the Respondent claimed that the 2nd Appellant was his wife and the child was his son. That the issue of paternity of the child was not resolved by the local sheikhs in Somalia who advised the parties to have DNA done in Kenya to establish paternity.
6. The record of the lower court does not show whether the defendants (Appellants) entered appearance or filed their defence. The lower court nonetheless managed to proceed to hear the matter. The record is not clear how the matter proceeded and it seems that civil procedure was flouted. All the same the parties attended court and their evidence was recorded. It is worth noting that the evidence was recorded haphazardly and in total disregard of the civil procedure.
7. My understanding is that this appeal raises two issues for determination, whether there was sufficient evidence for the trial court to base its findings and decision on and whether the Kadhi was seized of the jurisdiction to try and determine custody of a child matter. These are the major issues this court has identified and which the two Kadhis assisting this court have also pin-pointed for determination.
8. Article 170 (5) of the Constitution 2010 limits the jurisdiction of the Kadhis' court to the determination of questions of 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 that court. In the matter before this court, all the parties profess Muslim religion and submitted themselves before the Kadhis' court for determination of their issues. The matter came to this court only by way of appeal because the appellants are dissatisfied with the decision of the Kadhi. The issues they raised before the Kadhi were to do with the marriage, divorce and paternity of the child. I have no doubt in my mind that the parties were correctly before the Kadhis' court for determination of those issues. The only issue I want to raise here is whether the Kadhi had jurisdiction to decide on the issues of paternity and custody of the minor child.
9. Section 5 of the Kadhis' Courts Act reiterates the provisions of the Constitution in respect of the

jurisdiction. However this section does not limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it. The Children's Act did not repeal the Kadhis' Court's Act. However, the Children's Act establishes Children's Courts to conduct proceedings on matters of custody of children among other matters listed under section 73 (a) of that Act.

10. I have considered the submissions by the Appellant that the matters relating to the custody of children must be heard in the Children's Court. I have taken the view that the Children's Act does not oust the jurisdiction of the Kadhi's court and therefore the Kadhi's court remains the right court with jurisdiction on matters of personal status, marriage, divorce or inheritance where parties profess Muslim religion. The issue before the trial Kadhi and on appeal before this court is not custody of the child *per se*. The issue involves marriage, divorce and paternity of the child. Paternity came up as an issue before the trial court because the Respondent sued the Appellants claiming that he was still married to the 2nd Appellant when she allegedly eloped with the 1st Appellant and that she was pregnant with his child when she got married to the 1st Appellant. After taking evidence of the parties the trial court ruled in favour of the Respondent. The issue of paternity is so intertwined with the other issues for determination that they cannot be separated. My view therefore is that paternity and custody of the child in this case are incidental to the issues of marriage and divorce between the Appellants and thus it falls under the jurisdiction of the Kadhi's court (see **Miscellaneous Civil Application No. 903 of 2005 Republic v. Kadhi Sheikh Twalib and another, Ex parte Maimuna Salim and Najma Ali Ahemd v Swaleh Rubea [2010] eKLR.**

11. On the issue of insufficient evidence, I wish to point out that the Evidence Act does not apply to judicial proceedings before to Kadhi's courts. Section 2 (1) of the Evidence Act provides thus: **This Act shall apply to all judicial proceedings in or before any court other than a Kadhi's court, but not to proceedings before an arbitrator.** Section 6 of the Kadhi's Courts Act specifies that the law and rules of evidence applicable in a Kadhi's court shall be those applicable under Muslim law. In deciding the issues presented before it, the trial court was required to turn to Muslim law for guidance on the issue of admitting evidence and subjecting the evidence to the standard of proof under that law.

12. In considering this issue, I have placed great emphasis on the assessment of the two Kadhis I referred the matter to. After assessing the evidence adduced in the trial court they are in agreement that under Muslim law as provided under the Qur'an the onus of proving an allegation lies on the person who has made the allegation. This is stated in the following terms in the **Qur'an: Produce your proof if you are truthful (Baqara 2:111)**. I have read the lower court proceedings and find it lacking. It is not established when the Respondent divorced 2nd Appellant, whether he revoked the divorce and when this was done and whether the 2nd Appellant was pregnant when she married the 1st Appellant. The 1st Appellant says he married 2nd Appellant on 10th April 2004 and in January of 2009 the Respondent claimed the child and 2nd Appellant.

13. The 2nd Appellant told the lower court that she was not pregnant when she married the 1st Appellant. She said that after the divorce from the Respondent she observed Edda as required. Edda is prescribed under the Qur'an as the period of waiting during which time a woman may not remarry after being divorced and a divorced woman must observe this period before remarrying. There was therefore need in view of these allegations to call for evidence on the dates of the divorce, remarriage and birth of the child to ensure justice was done to all the parties.

14. The opinion of the Mohamed (Kadhi Nakuru) and Hassan (Kadhi Hola) on the issue of DNA testing under Muslim Law is that it is relied on but as the last resort. After reading their opinions on the issue of DNA, it is my belief that DNA testing is not outlawed under Muslim Law but must only be applied as the last resort. I have read some opinions tending to say DNA is not acceptable in certain Muslim communities and I am sure opinion is divided on the issue.

15. Both Kadhis agree that the trial court did not apply the full spectrum of the Muslim Law of evidence. I am meant to understand that under Muslim Law of evidence when a man suspects his wife of adultery he is required to bring four male eye witnesses failing which both he and his wife take

LI'AAN translated as oath of curse (Nisa 4:15) and those who have no witnesses except themselves should testify four times by Allah (Noor 24: 6-9). To my mind this is a very high standard of proof. To get four eyewitnesses is not easy! The failure to apply the full spectrum of Muslim Law in this case by the trial court may have led to miscarriage of justice.

16. Having fully understood the issues before me and the opinion of the two Kadhis who assisted me in assessing the evidence under Muslim Law, and having considered the grounds of appeal, the submissions of both parties and the issues for determination, it is my finding that I agree with the Appellants that the trial court erred in law and fact in making a finding that the 2nd Appellant is the wife of the Respondent and that the child in question belonged to the Respondent in the absence of substantial evidence in support. I however find that the Kadhi had jurisdiction to try this matter being a matter that relates to marriage, divorce and incidentally the paternity of the child in question. The latter question (paternity) which I have explained is incidental to the issue whether the 2nd Appellant was still the Respondent's wife and whether she was pregnant by the Respondent when she married the 1st Appellant cannot be separated from the main issues of this case hence my finding that the issue relates a question of personal status to the parties.

17. Given the opinion of the two Kadhis who assessed the Muslim Law to me that the trial Kadhi did not exhaust the Muslim evidence law, it is my considered view that for justice to be done in this matter, it would be proper to send it back to the Kadhi's court Garissa for retrial by the sitting Kadhi. This is the opinion expressed by the two Kadhis and I totally agree with them. In conclusion therefore, I allow the appeal, set aside the judgement of the Kadhi and order each party to bear their own costs. The matter should proceed with haste to be placed before the Kadhi, Garissa for mention with a view to giving a hearing date and any further orders. I order accordingly.

Stella N. Mutuku, Judge

Dated signed and delivered this 21st day of January 2013