REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Appeal 125 of 2000

M H A …….….........……...……...…..........………….. 1ST APPELLANT

A B……………………………………...………….2ND APPELLANT

V E R S U S

H A R.………………….......……………........……………RESPONDENT

JUDGMENT

1. This Appeal raises inter-alia but importantly the ultimate academic questions whether the Kadhi was right in awarding custody of one F-W, a minor, to the Respondent by the Judgment delivered on 8.9.1994 in the Kadhi's Court Case No. 18/94 at Wajir. Academic because it is agreed that in fact the child is and has been in the custody of the 2nd Appellant and the Respondent has expressed no interest in taking such custody.

2. Although the Appeal raises 7 grounds two grounds were argued and they encompass the entire basis for the Appeal viz:-

1. Did the honourable Kadhi err when he declared the Respondent as the biological father of the minor, F-W when he had no evidence before him to determine such parenthood.

2. Did the honourable Kadhi err when he granted custody of the minor to the Respondent based on his findings to the question in 1 above?

3. In submissions Mr. Mokua argued that the honourable Kadhi had no Jurisdiction either under s.66(5) of the Constitution or the Provisions of the Kadhi's Courts Act to determine the question of paternity of a child and even if he did, he could only do so on the basis of scientific evidence and not hearsay. In any event, the 2nd Appellant denied ever having sexual contact with the Respondent and yet the Kadhi found to the contrary. Further, that by his own evidence the Respondent had many children from other women and had no interest of the minor at heart and was not suited to have custody of the child.

4. In response Mr. Gitonga argued that the Kadhi properly exercised his jurisdiction under s.66(5) of the constitution as read with s.5 of the Kadhi's Court Act because the question of paternity is a matter of "**Personal Status**" which is included in the two sections. There was no need therefore to call scientific evidence to prove paternity of the minor as the evidence before the court was sufficient. That evidence was that the child was born 7 months after the marriage between its parents and that in Islamic law a child born 6 months before a wedding is treated as a bastard and this is not true of F-W whose name in any

event means "**unexpected Child**". That the Appeal therefore was unmerited and should be dismissed with costs.

5. S.66(5) of the Constitution provides as follows:-

"**The Jurisdiction of a Kadhi's court shall extend to the determination of questions of muslim law relating to Personal Status, marriage, divorce or inheritance in proceedings in which all the parties prefers the muslim religion**."

s.5 of the Kadhi's Courts Act is a replica of s.66(5) and I see no need to reproduce it.

6. In the Plaint filed before the Kadhi, the plaintiff (who is now the Respondent) sought this prayer:

"**I requested** *(sic)* **this honourable court to order the boy** *(sic)* **is my legal child to declare** (*sic*) **according to Islamic law**."

This issue is not one that is with regard to marriage (it is agreed that the parties are divorced) nor therefore of divorce nor one of inheritance. Counsel for the Respondent argues that it is a matter of "**Personal Status**". I do not know what he meant by that in the context of this case because he did not elaborate at all on the point. So far as I know, the definition of "**Personal Status"** is that given by James Hadley in Introduction to Roman Law 106(1881) where he said;

"**By the status (or standing) of a person is meant the position that he holds with reference to the rights which are recognized and maintained by the law; in other words, his capacity for the exercise and enjoyment of legal rights."**

7. "**Law of Status"** is defined in Black's Law Dictionary, Eighth Edition Ed. Bryan A. Garner as "**the category of law dealing with personal or non-proprietary rights, whether in rem or in personam**" and is distinguished from the other two departments of civil law namely the law of obligations and the law of property.

8. Taking these definitions into account, what the Kadhi went on to do was to enquire whether the 2nd Appellant became heavy with child and whether that child truly belonged to the Respondent and whether having subsequently married the 1st Appellant and given birth while his wife, the child may have belonged to the 1st Appellant and not the Respondent. To my mind these are not matters of personal status. The evidence given about whether the parties had sexual intercourse and of the child who was born 7 months after the second marriage are matters clearly outside the purview of the Kadhi's court Act. That is my finding.

9. As to the academic question I posed earlier, the child is with the mother who is the 2nd Appellant. Let him stay there because the Respondent for the last thirteen(13) years has had no interest in him.

10. As to the Appeal; it is merited. The Kadhi's Court had no mandate nor the legal Jurisdiction to handle the dispute before it. That was a matter best left to the High court exercising its powers under s. 60 of the Constitution.

11. The Appeal is allowed, the orders made by the Kadhi in Wajir Case No. 18/94 are vacated and set aside. It is however also sought that the court should make an order as to the status of the child. It will not. It has no evidence or proper basis for so doing. That is all there is to say on the matter.

12. Costs of the Appeal shall be paid by the Respondent.

13. Orders accordingly.

Dated, signed and delivered in open court at Meru this 3RD Day of May 2006

ISAAC LENAOLA

<u>JUDGE</u>