

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL No. 177 OF 2002

JUMA MOHAMED.....APPELLANT

=V E R S U S=

SAID SALIM1ST RESPONDENT

BISIHABA SAID.....2ND RESPONDENT

J U D G M E N T

This appeal arises out of trial before Kadhi's Court. Under the provisions of Civil Procedure Act Section 65(c) the law requires the Chief Kadhi to sit as an Assessor and to assist the High Court.

I have had the benefit of the Chief Kadhi's opinion on the matter and I agree wholly in his views.

In this appeal, the Appellant JUMA MOHAMED through his advocate MR. KATETE bases all his arguments on the inavailability of documentary evidence to prove that a marriage did exist between him and the Respondent BISIHABA SAID. The Respondent did not have such evidence. She brought witnesses who claimed to have attended the ceremony. The main issue therefore of the appeal is how do we prove an Islamic marriage.

Documentary evidence is very important in proving a marriage. However, it is not the only way to prove a marriage. Even the documents themselves are not given before a marriage is proved by the availability of a bride, groom, bride's guardian and the witnesses. The Respondents availed the witnesses. It was the duty of the Appellant to rebut their evidence. He did not even attempt to show that these witnesses were not credible. The Hon. Kadhi's finding therefore was that the marriage did take place. This finding in my opinion was justified.

Also the proof of the marriage gave the claims of the birth expenses and the child's expenses justification. The Appellant has not denied that he caused the Respondent to conceive. The value of the expenses is genuine. Finally the Hon. Kadhi's decision to dissolve the marriage was challenged in this appeal as such a prayer was not claimed by the Respondent. However in the plaint, the Respondents did claim for "ANY RELIEF THE COURT MAY DEEM FIT".

The Respondents gave the court authority to grant them whatever it found suitable in the circumstances. The circumstances before the court were that the Appellant does not want anything to do with the Respondent BISIHABA SAID who he says was not a wife to him. He does not deny that he took the Respondent BISIHABA to her father's house and never went back for her. He has not shown that he has any feelings of love or adoration for BISIHABA. Therefore the Hon. Kadhi was right to decide that the marriage was irretrievably broken down and dissolving it was the only solution.

In the circumstances the appeal is dismissed with costs.

Dated at Mombasa this 30th day of July, 2004.

JOYCE KHAMINWA

JUDGE