



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
H.C.CIVIL APPEAL NO. 136 OF 2001**

A.A..... APPELLANT

Versus

A.S RESPONDENT

Coram: Before Hon. Justice Mwera

Assisted by Mr. Hammad K. Kassim, Chief Kadhi

Appellant in person

No appearance for the Respondent

Court clerk – Sango

J U D G E M E N T

The proceedings before the learned Kadhi were conducted by the litigants in person. Also on appeal.

The pleadings started with the respondent, A.S.K, filing a simple plaint. She described herself as the wife of the present appellant (defendant) since 17th February 1993. That they had 3 children - a daughter (8 years) and two sons (4 and 3 years respectively). It was pleaded that the appellant had a girl friend and therefore had been mistreating the respondent. That consequently the respondent left the matrimonial home. Thus she sought a dissolution of the marriage with the appellant paying maintenance. And that both were Muslims.

The appellant filed a defence drafted in Swahili although he spoke both Swahili and English during the hearing of this appeal. There had not been an English translation of that defence, but it was noted that when the couple was heard by the Kadhi he kept the record of proceedings in English.

The defence, was to the effect that the appellant's marriage to the respondent was being interfered with by her sisters and father all to utter confusion and discomfort of the appellant. That he has done his utmost best to provide for all the needs of his wife but she keeps up demands that the appellant cannot match. That the couple had been married for 8 years. That besides the respondents' relatives abusing and insulting the appellant, seemingly with the former's (A) approval, there was also a claim that he, (A) did not properly wed A.

That A should not seek divorce and maintenance because she deserted the matrimonial home. That she should be the one to pay compensation (or maintenance) in the circumstances. That the appellant was not

ready for their marriage to be dissolved but if it must be then she should “buy” the divorce / dissolution.

On 18th July 2001 hearing opened before the learned Kadhi with A (the respondent) in the witness box. She went over what is contained in the plaint. She stressed that A (the appellant) had an affair with another woman with whom he was once found red-handed. That he used to go out to her and return late at night. So she decided to move from the matrimonial home back to her parents. That neither Abbas nor his parents followed her there to find out the basis of the dispute with a view to resolve it. Thus she wanted the marriage dissolved and A to return all her belongings.

In cross examination Amina answered that when A left home for the whole day she and his father operated the business at home.

On his part A denied the allegation that he had an affair with some woman. That Amina had been staying with her parents for about 4 months to the date of the trial. A added that he had married one Asma S.S.M. But that his going out and returning late was to eke out a living and not to have an affair. He alleged that A’s sister was inciting her to obtain a divorce - a thing A was not prepared for.

The learned Kadhi’s ruling (it should actually be a judgement) covered the evidence of both litigants. He concluded that the matrimonial relationship between A and A had worsened because of Abbas’s bad habit of leaving home and returning late at night, whereas Amina and her father-in-law had been tending to the family business. That Abbas had not shown interest by following A to see her parents from time to time she went away to live with them. That also he had married another woman without consulting the wife and that accordingly the marriage had irretrievably broken down. That even with A not willing to face the separation, there was no law to force Amina to stay with him if she did not want to.

So the marriage was dissolved with effect from 27th September 2001 on grounds of mistreatment and misunderstanding. From this decision Abbas laid five (5) grounds of appeal. That the Kadhi should not have granted maintenance in these circumstances when the appellant did not send the respondent away from the matrimonial home; that marrying the second wife should not have been a reason to grant the divorce because as a Muslim A would marry / maintain up to 4 wives; that it was also an error to grant the divorce on the basis that A was staying away from home the whole day when in fact he was engaged in earning a living. And that soon after leaving the matrimonial home Amina filed this suit and thus A thought that if he followed her to her parents, it could have been contempt of court; that the marriage could not be dissolved unless Abbas gave “talaka” according to Islamic Law or he had deserted the matrimonial home for 2 years without A knowing where he was.

The hearing date of this appeal was taken by consent but the respondent did not appear and the appellant was heard ex parte. He went over the course as it progressed through the lower court, getting even in areas that did not look relevant; he argued each ground as it appeared in the memorandum. He concluded by saying that he had paid Kshs. 70,000/- in maintenance to Amina’s father then a further Kshs. 2,500/- to do her shopping.

But that after all that A did not return and both her and her father now demand that he should marry her afresh if he wants her back. A said that he did not want to go all over this fresh celebration again but that this court should allow his appeal and order his wife (A) to go back to him plus their 3 children. That she was even sending emissaries to this effect.

This court’s view, which is informed by the learned opinion of Mr. Hamad Kassim Chief Kadhi of Kenya, begins with the Kadhi Courts Act (Cap 11) which gives Kadhis jurisdiction over Muslim matrimonial matters:

“5. A Kadhis court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.” (underlining added)

In short, a Kadhi can hear and determine issues relating to marriage and divorce under Islamic law if both litigants are Muslims. Both the appellant and the respondent are Muslims. The cause between them was one about divorce and thus the Kadhi had jurisdiction to determine i.e. hear it on merits and hand down a decision. He did that. Abbas was not satisfied and he appealed. In all his grounds he contends that the Kadhi ought not have dissolved the marriage in question.

As it may be seen from Section 5 (above) no guidelines or grounds to grant a divorce between a Muslim couple are set out. So the court now turns to the Islamic scholars and the contents of the Quran – that Holy Book of Islam. Needless to say there are many and distinguished authorities in this field. There are equally many schools of thought on as many principles and teachings of the Quran. For this reason one cannot say that there is unanimity in some of the ideas and conclusions. But the general aspects are clear. For our case let us look at Prof. Abdur Rahman I Doi. Born in an Islamic environment in India he attained BA (Hons) and MA from the University of Bombay. He got a PhD at University of Cambridge where he did extensive study and research in Islamic and Arabic Scholarship before he moved to teach Islamic studies at the University of Nigeria, Nsukka. He also taught in the same discipline in the universities of Ife and Ahmadu Bello Zaria in the same Nigeria. No doubt a renowned writer. In his book Shariah: The Islamic Law (1997 Reprint) he says this about divorce (Talaq), among the several topics covered.

In Chapter 11 under the heading Talaq: Divorce in Shariah (pp. 168)

“In Islam marriage is a contract and the contract should be made to work but not when it becomes humanly impossible to do so. It is only in such unavoidable circumstances that divorce is permitted under Shariah.”

And that:

“..... when a marriage becomes impossible to work, it is better to separate amicably rather than drag on indefinitely making the family home a hell.”

It is however made a condition precedent in the Muslim community and for the good of society’s stability and continuity that before getting to the final step of divorce, all efforts be put in reconciling the parties. The foregoing generally refers to divorce sought by the husband. A lot more is covered there.

As for the divorce sought by a wife as in our present case Prof Doi has Chapter 12: Divorce at the instance of the wife (Khul). That a wife can ask for a divorce from the husband due to his cruelty or desertion. He sets out the following grounds for Khul to succeed and emphasizes that that type of divorce should never be on flimsy grounds: The grounds are:-

- 1) *Habitual ill-treatment of the wife.*
- 2) *Non-fulfilling of the terms of the contract*
- 3) *Insanity*
- 4) *Incurable in-competency*
- 5) *Quitting the conjugal domicile without making provision for the wife*
- 6) *Any other similar causes which in the opinion of the Qadi (Kadhi) justifies divorce.*

From the plaint set out, the respondent could be taken to have sought divorce from Abbas (the appellant) on the basis of cruelty and desertion. These two grounds are gleaned from the claims that the respondent suspected A of being unfaithful, leaving home and staying away until late at night and that after she left the matrimonial home, the appellant did not follow her to her home to pay her maintenance. Evidence by the respondent was denied by the appellant. It is the principle in matters of civil nature that

relief will issue on proof of a claim on a balance of probabilities. There was no proof of infidelity on the part of the appellant or that he had deserted. If he had, then the respondent did not remain in the matrimonial home for that to be a cause for divorce and she did not advance a proper cause to move out either.

It appears that the learned Kadhi blamed the appellant for causing his wife to leave the matrimonial home but again save for the allegation by the respondent which the appellant countered by saying that he was leaving home during day to earn a living for the family, there was no evidence that the appellant (A) was staying away from home the whole day. So on the whole the claim should have failed. No wrongdoing was proved against the appellant. In such situation it could have been prudent for the learned Kadhi to order attempts at reconciliation through the relatives of the couple. The record does not show that this was even tried. But having come to the conclusion the the respondent should not be forced to remain in the marriage he should have given her the divorce she sought (Khul) which:

“..... can be reached through consent or through the order of the Qadi on payment by the wife to the husband a certain amount that does not exceed what was given to her as dower.”
(Prof. Doi pp. 192).

After such a divorce, the same learned author adds:

“It is lawful for them to remarry with mutual consent.”

That is predicated on the claim put forth by the appellant when he was urging the court to allow the appeal and direct the respondent to go back to him that infact she was sending emissaries to the appellant with wishes to return except that he should wed her afresh. He seemed not to be in favour of this course. As the learned Kadhi stated but gave unsuitable terms of the divorce, this court similarly holds the view that A (the respondent) be not forced to remain in her marriage to A. It will be contrary to the Constitution and the law of this country as well as the dictates of the Quran.

In sum the appeal is dismissed and the divorce remains, but on varied terms.

At this point with the two having been living apart for some 3 years since the dissolution on 27th September 2001, this court will not consider to order an attempt at reconciliation through relatives. So the better alternative is for this court, to order that the appellant does not pay maintenance but his wife do return to him what she took from him as dower in exchange for divorce (Khul). The appellant had alluded to this in his defence anyway.

Accordingly, the appeal is dismissed but the terms of the divorce varied as above.

Judgement delivered on 5th November, 2004.

J.W. MWERA

JUDGE