



REPUBLIC OF KENYA



**AMS v NFD (Civil Appeal E002 of 2024) [2025] KEHC 6336 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 6336 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CIVIL APPEAL E002 OF 2024  
JN ONYIEGO, J  
MARCH 21, 2025**

**BETWEEN**

**AMS ..... APPELLANT**

**AND**

**NFD ..... RESPONDENT**

*(Being an appeal from the judgement of Hon. Kadhi Mohamed Sambul delivered on 13.02.2024 in KCDC /E024/2023 Senior Resident Kadhi's Court at Mandera)*

**JUDGMENT**

1. The respondent via a plaint dated 10.05.2023, moved the Mandera Kadhi's Court seeking orders that:
  - i. The court dissolves her marriage to the defendant
  - ii. The court directs the defendant/appellant to clear an outstanding sum of Kes. 50,000.00/- being payment of dowry.
  - iii. Provision of bills for the children.
  - iv. Medical bills for the children.
2. According to the plaint, the appellant and the respondent were previously married for a period of six years and their marriage blessed with four children although one passed on. The respondent accused the appellant of neglect and failing to provide for her and their children. She averred that despite the elders' intervention in trying to solve their marital problems, the same was in vain. She thus urged the court to grant her prayers as sought in the plaint.
3. The appellant entered appearance and then filed an undated defence on 24.05.2023 urging that he still cared for his wife and children. He averred that despite the fact that he was employed, he earned a meagre salary. That despite being encumbered with heavy responsibilities, he still provided for his



- family to the best of his ability. He averred that he was a student pursuing further education at the university besides maintaining his mother.
4. He therefore urged the court to grant the following:
    - i. Not to dissolve the marriage.
    - ii. That the respondent should fetch her dowry only if the marriage fails.
    - iii. Any other order the court deems fit to grant.
  5. The court granted an opportunity for the matter to proceed for court annexed mediation wherein the parties failed to reach a consensus thereby enabling the matter to be rescheduled for hearing.
  6. The court further directed that parties file their respective affidavit of means. The appellant in his affidavit of means sworn on 19.09.2023 did not deny that the children herein belongs to him and the respondent as his wife. That he is employed by Manderu County Government in the department of education as an ECD teacher (3) earning a monthly salary of Kes. 31,867.60.
  7. He annexed his pay slip to support his averments. It was his deposition that on a monthly basis, he spends Kes. 23,000/- a month in form of utility bills and food. That he also maintained a child from a previous relationship hence remitting Kes. 3,000 per month besides maintaining his mother on a monthly basis of Kes. 5,000/-.
  8. He further averred that he was a student pursuing a degree in Early Childhood Education at the university thus paying an amount of Kes. 33,000/- as college fees. He deposed that after meeting all his obligations, he is left with a balance of Kes 15,000/-. The respondent on the other hand did not file an affidavit of means but instead filed what she referred to as a response to affidavit of means. She confirmed that indeed the appellant earned Kes. 31,867.60/- of which amount he gives his mother Kes. 5,000/- and his other child from a previous relationship Kes. 3,000/-. Further, she deposed that the appellant was a university student in as much as she could not confirm the amount payable by the appellant to the university as college fees.
  9. She further confirmed that the appellant had provided an NHIF Medical card in as much as she wasn't sure if the same was still active. However, the respondent did not indicate her share of responsibilities towards the upkeep of the children nor the amount she possibly could raise towards ensuring the wellbeing of the children in issue. In the same breadth, it was not clear whether the children herein had been registered in a formal school save for the request that the appellant provides fees for duksi school.
  10. This being the first appellate court, it is duty bound to re-evaluate and re-assess the evidence tendered before the trial court a fresh and make its independent finding or determination while bearing in mind that it did not have the benefit of listening to nor hearing the witnesses testify so as to be able to assess their demeanour. See *Mursal & another v Manese* (suing as the legal administrator of Dalphine Kanini Manesa)(Civil Appeal E20 of 2021)[2022]KEHC(KLR)(6 April 2022 (Judgment)).
  11. During the hearing, it was averred by the respondent(respondent) that the respondent(appellant) had neglected her together with the children. That the respondent had failed to provide medical care to the minors despite him being in formal employment. She alleged that the neglect has been so severe to the extent that she lost a baby as the appellant failed to provide money to keep the child in the hospital. It was alleged that the appellant paid Kes. 5,000/- in January, 2023 and had failed to further pay for more. It was her prayer that the court grants the orders sought in her plaint.
  12. PW2, Farah Dahir, the respondent's father testified that the dispute between the parties started after the plaintiff delivered her second born. That he used to urge the respondent to persevere despite the



- challenges in her marriage with the appellant. He stated that together with the brother of PW1, they were responsible for the appellant's children upkeep as the appellant had failed to provide for his family. He alleged that the respondent did not have the pleasure of visiting her mother as every time she did, the appellant would allege that she was out on her own pleasures.
13. It was his case that after the respondent left her matrimonial home, he called the appellant's family asking whether they were aware that PW1 had left her matrimonial home but he did not get any answer. That after three months, the appellant's family reached out urging PW1 to return to her matrimonial home. That when he asked why the appellant had failed to provide for his family, he was told that a solution would be found in court.
  14. DW1, Abdullahi Mukhtar Sheikh(appellant) in his testimony denied the allegations by the plaintiff that he had failed to cater for his family. That the plaintiff used to decline receiving money via Mpesa claiming that where she lived, there were no Mpesa shops that could handle a sum of Kes. 20,000/- and as such, he used to give her cash. He stated that he doubles up as a student as well as ECD teacher who earns Kes. 31,867.60 as per the annexed pay slip. It was his evidence that he still loved the respondent and therefore, was not willing to divorce her. He urged the court not to heed to the prayers sought in the respondent's plaint.
  15. DW2, Mumina Alasow Abdi, mother to the appellant in support of the appellant urged that indeed the appellant supports and provides for his family. That the same was witnessed when the appellant took the respondent to Nairobi to undergo a medical procedure. She contended that PW2 was responsible for the troubles bedeviling the parties as he was against the idea of the respondent going back to her matrimonial home.
  16. The trial court upon considering the facts and the law as presented before it delivered its judgment on 13.02.2024 thus making the following pronouncement:
    - i. Dissolution of marriage is hereby granted to the plaintiff with effect from 12.02.2024 and issue of divorce certificate is hereby allowed.
    - ii. Custody of children is hereby granted to the plaintiff and visitation of the children is hereby allowed to the defendant.
    - iii. The defendant to pay monthly maintenance of Kes. 15,000.00/- and payment of maintenance arrears of Kes. 180,000.00/-. The defendant to submit payment arrangement of the arrears within two weeks.
    - iv. The defendant to pay dowry of Kes. 50,000.00/- to the plaintiff.
    - v. The plaintiff to enroll the children in school and Quranic school and the defendant to cater for education expenses.
  17. The appellant being dissatisfied with the judgment and decree of the trial court filed a memorandum of appeal dated 19.02.2024 on the grounds summarized as below:
    - i. That the learned trial magistrate erred in law by failing to consider the detailed evidence tendered by the appellant, the Islamic principles in marriage and authorities cited thus reaching an unsupported determination.
    - ii. The learned trial magistrate erred in fact and law by reaching a determination that the appellant pays a monthly maintenance of Kes. 15,000.00/- to the respondent.
  18. The appellant prayed that the appeal be allowed. He also sought the following:



- a. That the judgment delivered on 12.02.2024 be set aside and be substituted with a judgment of this court.
  - b. The cost of appeal be borne by the respondent.
  - c. Any other relief this court may deem fit to issue.
19. The court directed that the appeal be canvassed by way of written submissions.
20. The appellant via his oral submissions urged that the respondent is a house wife while he is a teacher. That the respondent deserted their matrimonial home without his knowledge despite him providing their needs. It was his contention that they have three children whom he has been taking care of and further, he was not ready to divorce the respondent as he still cared for her.
21. The respondent in opposition of the appeal filed submissions dated 07.07.2024 noting that the appellant has not only been cruel to the respondent but also has failed to maintain his family and therefore, the trial Kadhi did not fall into error in dissolving the marriage. That Islam religion allows divorce by Khul'a at the instance of a wife having in mind that the conduct of the appellant negated the rights, duties and objectives of the marriage. This court was therefore urged to uphold the findings of the trial court.
22. The Court heard the appeal with the aid of two Kadhis as assessors pursuant to section 65 (1) (c) of the *Civil Procedure Act*, which provides for appeals to the High Court from original decree of a Kadhi's Court as follows:
- “ c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.”
23. The court sat with Principal Kadhi A.J. Ishaq and Hon. Abdulrahman Muriithi. In their joint opinion dated 10.02.2025, they urged that it was the primary responsibility of a muslim man to maintain his family. To that end, reliance was drawn from the case of *Ali v Ali* [2016] eKLR where it was held that the primary obligation of a Muslim husband is to maintain his wife and children. That the holy Quran in chapter 2 verse 233 establishes that a father according to his means is responsible for the maintenance of his sons until they attain maturity and his daughters until they are married.
24. That this responsibility is unconditional and absolute. That no father should be treated unfairly or harmed on account of his child. Considering the facts herein, the Kadhis unanimously suggested that an amount of Kes. 10,000.00/- would be appropriate as monthly maintenance. It was urged that the evidence in the record supports a period of seven months rather than twelve months of unpaid maintenance. According to the Kadhis, the arrears ought to be revised to Kes. 70,000.00/- (being 10,000.00/- x 7 months).
25. On custody, it was stated that the minors are of tender years hence physical custody ought to be granted to the respondent in recognition of the best interest of a child pursuant to article 53(2) of *the constitution*. It was stated that the role of both parents should be complementary and the question of who has superior right to custody should be secondary to ensuring the children have meaningful relationships with both parents.
26. On dowry, reliance was placed on the case of *N.A.H. v S.B.K.* [2016] eKLR where Hon. Kadhi A.I. Hussein stated that unpaid mahr is considered as unsecured debt payable to the wife by the husband or from his estate. In the end, it was their opinion that parties agree on visitation rights to be scheduled within 30 days' failure to which the matter be referred back to the Kadhi for determination; the



- appellant to commence paying the revised maintenance immediately or arrange payment of arrears within a period of 90 days.
27. In as much as this court is not bound by the Kadhis opinions, it is important to note that the court has considered the same for guidance in making a final determination.
  28. Having reviewed the evidence adduced before the trial court, parties' respective pleadings, submissions, authorities cited and the applicable law, I discern the following as the issues for determination:
    - i. Whether the decision by the trial court was in the best interest of the children.
    - ii. Whether the trial court properly arrived at the decision to dissolve the subject marriage.
  29. On the ground that the trial court's determination was not supported by the facts herein, it is trite that he who alleges must prove. [ See section 107(1) of the *Evidence Act*].
  30. It is trite that grounds of divorce under Islamic law must always be proved to the required standards. It is worth noting that the appellant has all through maintained that he can no longer maintain his wife according to her demands. The respondent on the other hand urged that her marriage to the appellant be annulled. Additionally, it was submitted that Islam religion does allow divorce by Khul'a at the instance of a wife bearing in mind that the conduct of the appellant negated the rights, duties and objectives of the marriage.
  31. Under the Islamic law, it is the responsibility of the husband to provide and maintain his wife according to his capability as the same is an Allah given duty. [ See Nisa: 4:34]. It therefore follows that a wife is entitled to apply for dissolution of such marriage if it can be ascertained that indeed the husband has failed to support her. In Baqarah: 2: 228 Muawiyya al Qushairiy reported that his father asked the Prophet: "What are the rights of our wives on their husbands?" The Prophet (PBUH) said: "Feed her when you eat and clothe her when you clothe yourself, do not beat her face and do not migrate (stay away from her) except (if it be necessary) in the (same) house."
  32. The standard of proof in establishing divorce is a preponderance of probability. This view is supported by the Court of Appeal judgment in the case of Alexander Kamweru v Anne Wanjiru Kamweru (2000] eKLR, where it was observed that: Certainly cruelty or desertion may be proved by a preponderance of probability, that is to say that the Court ought to be satisfied as to feel sure that the cruelty or desertion, or even adultery (all being matrimonial offences) has been (as the case may be) established. In the same breadth, article 89 of the Islamic Charter on Family provides:

If a woman hates her husband and cannot stand him, even though he hasn't hurt her in any way that would be considered grounds for divorce, and if she can no longer bear to remain with him, then she has the right to request divorce in exchange for giving up any financial rights that would be due to her as a result of the divorce, and returning any dowry or gifts that he gave her.
  33. In this case, the respondent urged that she no longer wants to return to her matrimonial home and further, the appellant can no longer provide for his family hence, she urged that this court grants her divorce. Thus in my considered view, the trial court did not in any way err when it ordered that the marriage between the parties herein be dissolved and the appellant pays the respondent her mahar. I say so for the reason that it was quite evident that the appellant is not in a capacity to provide for his family.
  34. Secondly, it is against good practice to compel two adults to live together against their will or one of them. Marriage is a social contract founded on mutual consent of two adults based on love and none should be compelled to stay with the other against his or her wish.



35. Having noted that the trial court did not err in granting the respondent divorce, it follows that the minors herein must be taken care of and be provided for. Thus the law relating to maintenance of a child is contained in the Constitution of Kenya, 2010 and the Children Act. Article 53 of the Constitution provides:
- (1) Every child has the right–
    - (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not;
36. Maintenance is an aspect of parental care and is the responsibility of both parents of a child. Section 94(1) of the Children Act stipulates the considerations by which the Court should be guided when making an order for financial provision for the maintenance of a child. These considerations include inter alia:
- (a) The income or earning capacity, property and other financial resources which the parties or any other person in whose favour the court proposes to make an order, have or are likely to have in the foreseeable future;
  - (b) the financial needs, obligations, or responsibilities which each party has or is likely to have in the foreseeable future;
  - (c) the financial needs of the child and the child’s current circumstances;
  - (d) the income or earning capacity, if any, property and other financial resources of the child;
  - (e) any physical or mental disabilities, illness or medical condition of the child;
  - (f) the manner in which the child is being or was expected to be educated or trained;
  - (g) the circumstances of any of the child’s siblings;
  - (h) the customs, practices and religion of the parties and the child;
  - (i) ...
37. The paternity of the children herein is not in dispute nor is the parental responsibility of both parents to maintain the children. What is in dispute is the quantum of that maintenance. The appellant submitted that he has been taking care of his family and therefore, the court should not allow divorce or order of maintenance as sought by the respondent. He decried the amount of Kes. 15,000 as huge and beyond his capability.
38. It is not lost to this Court that it has power to make adjustments to an order for the maintenance of a child as it may deem fit in the circumstances of each case. Section 99 of the Act provides as follows:
- “The court shall have power to impose such conditions as it thinks fit to an order made under this section and shall have power to vary, modify or discharge any order made under section 98 with respect to the making of any financial provision, by altering the times of payments or by increasing or diminishing the amount payable or may temporarily suspend the order as to the whole or any part of the money paid and subsequently revive it wholly or in part as the court thinks fit.”
39. The Court in exercise of its power may impose conditions, vary, modify or even discharge a maintenance order for the making of a financial provision. The Court may also increase or decrease or change the times of payments of the amount payable under a maintenance order. For a party to be



deserving of an order of variation of a maintenance order, it must be demonstrated that such variation is in the best interests of the child.

40. The foregoing notwithstanding, while considering the appellant's application for maintenance of the children, the trial Court was obligated to take into account the income or earning capacity, property and financial resources of the parties both then and in the foreseeable future. The trial Court was also to consider the parties' financial needs, obligations, or responsibilities. As regards the children, the Court was required to bear in mind their financial needs and circumstances as well as any physical or mental disabilities, illness or medical condition.
41. The appellant in his affidavit of means annexed his pay slip showing that he worked as an ECD teacher and earned an amount of Kes. 31,867.60 per month. On the other hand, the respondent did not attach any but urged the court to grant her prayers.
42. Having regard to the circumstances of this case, it is clear that the appellant already has a medical cover for the minors herein, only that the same needs to be updated. Further, noting the minors' religious background, it is important that they not only attend formal education but also *duksi*. To that end, it is the responsibility of the appellant to make such provisions for the wellbeing of the minors in question. Considering the meagre salary, the appellant is earning against the heavy responsibility he is undertaking, A sum of Kes. 10,000/- is appropriate as monthly remittance in form of maintenance.
43. As a form of parental responsibility and contribution, the respondent shall provide shelter and clothing for the children as she can't behave like a passerby in the lives of the minors herein. This position was well stated by Kimaru J. (as he was then) in the case of C.I.N v J.N.N [2014] eKLR, where he stated:

"It will not do for the Respondent to say that she has an uncertain source of income and therefore the responsibility of maintaining the children should only be borne by the Appellant. The Respondent must establish, to the satisfaction of the court, that she has also made effort to provide for the upkeep of the children."
44. In a nut shell, it is my finding that the appeal herein partially succeeds and partially fails. Accordingly, the following orders shall apply;
  - i. That the Kadhi's order on divorce is hereby upheld.
  - ii. That the appellant to pay the respondent Kes. 50,000/- as mahr.
  - iii. That both parties are hereby granted joint legal custody of the children while the respondent is hereby granted physical custody of the children.
  - iv. That the appellant shall have unlimited visitation rights over the children upon parties mutually agreeing on the timing in default, the trial court shall intervene
  - v. The appellant shall pay for the minors' school/*duksi* fees and school related expenses.
  - vi. The respondent shall provide for shelter and clothing to the minors.
  - vii. That the appellant shall pay to the respondent an amount of Kes. 10,000/- as maintenance to the respondent on the 5<sup>th</sup> day of every new month.
  - viii. That the maintenance arrears to the tune of kshs 70,000/= be paid in equal monthly instalments for a period of six months
  - ix. Each party to bear its costs.



**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21<sup>ST</sup> DAY OF MARCH 2025**

**J.N.ONYIEGO**

**JUDGE**

