



REPUBLIC OF KENYA



KENYA LAW
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MMB v AAM (Appeal E123 of 2024) [2025] KEHC 9587 (KLR) (Family) (4 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9587 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
APPEAL E123 OF 2024
H NAMISI, J
JULY 4, 2025

BETWEEN

MMB APPELLANT

AND

AAM RESPONDENT

(Being an Appeal from the Judgement of Hon. M.G. Randu, Senior Resident Kadhi delivered on 19 September 2024 in Kadhi Divorce Case No. E105 of 2021)

JUDGMENT

1. This appeal arises from a matter in Kadhi’s Court, filed by the Respondent against the Appellant seeking the following reliefs:
 - i. Official dissolution of the marriage;
 - ii. Issuance of a divorce certificate forthwith;
 - iii. Dissolution of the marriage through Khul’u if (i) above fails on account of the Respondent’s cruelty and neglect;
 - iv. Payment of the outstanding agreed Mahr to the tune of USD1000;
 - v. Maintenance of the Petitioner (Respondent) during eddah at the rate to be determined by the court;
 - vi. Maintenance of the minors herein, as per paragraph 29;
 - vii. Physical/actual custody, care and control of the minors herein be granted to the Petitioner



- viii. A very reasonable amount of Mataa' /Compensation for the pain suffered by the Petitioner as a result of the cruelty by the Respondent;
 - ix. Costs of the suit;
 - x. Any other relief the court may deem fit and just to grant
2. The parties herein celebrated their marriage in 2006 in accordance with Islamic law. Their union was blessed with eight children. They cohabited in various places including Eastleigh and Donholm in Nairobi, and Wajir.
 3. The Respondent sought a dissolution of their marriage on account of cruelty and unfair treatment. It was the Respondent's case that the Appellant had refused, failed and/or neglected to provide the basic necessities for the Respondent and their children despite being a man of means. The Respondent pleaded that the Appellant had absconded his marital duties and denied the Respondent her conjugal rights, failed to shower the Respondent with love and affection and threatened to desert the Respondent and their children.
 4. The Appellant entered appearance and filed his Response to the Petition, denying the Respondent's allegations therein. The Appellant pointed the finger at the Respondent, accusing her of being violent to the extent of stabbing the Appellant with a knife. In spite of all this, the Appellant was of the view that the marriage could be salvaged and prayed that the matter be referred to mediation.
 5. In its judgement, the trial court identified the following issues for determination:
 - i. Whether divorce should be granted;
 - ii. Whether the Petitioner was entitled to Eddah maintenance;
 - iii. Who is entitled to custody of the minors;
 - iv. Whether the Respondent (Appellant herein) should pay for maintenance of the minors;
 - v. Mat'a (Consolatory gift)
 6. The trial court entered judgement in favour of the Petitioner as follows:
 - i. That the marriage celebrated between the parties herein be and is hereby dissolved;
 - ii. That arising from (i) above, Certificate of Divorce be issued forthwith;
 - iii. That actual custody of the minors be granted to the petitioner, the Respondent to get regular reasonable access;
 - iv. That the Respondent shall provide adequate maintenance towards the minors at the rate of Kshs 80,000 by the 5th day of every month for general care, maintenance and upkeep of the children and the Respondent to also pay for their education, medication and clothing separately;
 - v. That the Respondent to pay eddah maintenance of three months at the rate of Kshs 20,000/ = per month;
 - vi. That the Respondent to pay the outstanding agreed mahar of USD 1000;
 - vii. That the Respondent shall provide Kshs 100,000 towards mat'a (consolatory gift) to the Petitioner



- viii. There shall be no orders as to costs.
7. Being aggrieved by the judgement, the Appellant lodged this appeal on the following grounds:
- i. That the learned Kadhi erred in Law and fact by ordering that the Appellant to provide for the minors a monthly upkeep of Kshs. 80,000 by the 5th day of every month for general care, maintenance and upkeep and to also provide education, medication and clothing separately without regard to the Appellants' financial situation. The Appellant herein prays that he should be allowed provide Kshs 20,000/= upkeep, education, shelter and medical as need arises;
 - ii. That the learned Kadhi erred in law and fact by ordering the Appellant to a) pay Eddah maintenance of three months at a rate of Kshs. 20,000 per month b) pay the outstanding agreed mahar of 1000USD c) pay Mat'a/send off of KES 100,000 The learned Hon. M. G. Randu failed to consider the Islamic provision that where a woman asks for divorce she should not be granted Eddah maintenance of three months at a rate of Kshs. 20,000 per month, mahar of 1000USD and Mat'a/send off (consolatory gift) of KES 100,000 as opposed to when divorce is initiated by a man.
8. Based on the foregoing grounds, the Appellant prays for the following orders:
- a. That the appeal herein be allowed;
 - b. That the judgement dated 19 September 2024 in Nairobi Divorce Cause No. E105 of 2021 be partly set aside;
 - c. That the children matter be transferred from the Kadhi's Court to the Children Court as the Kadhis Court lacks jurisdiction;
 - d. That in case the Respondent is remarried, custody of the children shifts to the Appellant and access to the Respondent
 - e. That the Appellant be awarded costs of the appeal.
9. The appeal was canvassed by way of written submissions and oral highlights.

Analysis and Determination

10. I have keenly reviewed the Record of Appeal and read the submissions by the parties. The Appellant has identified 8 issues for determination by this Court. In my considered view, there are only four issues for determination:
- i. The jurisdiction of the Kadhis Court to hear and determine issues relating to child custody and maintenance;
 - ii. Whether the Respondent was entitled to Khul'u or judicial divorce;
 - iii. Whether the Respondent was entitled to eddah maintenance;
 - iv. Whether the Respondent is entitled to mat'a.
11. On the issue of the jurisdiction of the Kadhis Courts to hear matters relating to custody and maintenance of children, it was the Appellant's submission that the jurisdiction of the Kadhis Court emanates from Article 170 (5) of *the Constitution* which provides;

“The jurisdiction of a Kadhi's Court shall be limited 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 the Kadhi's courts."

12. The issue of the jurisdiction of the Kadhis Court to hear and determine matters of children custody and maintenance is one that has been the subject of many decisions of the High Court. In the case of Guyo -vs- Galgalo (Civil Appeal no E122 of 2023) [2025] KEHC 2664 (KLR) Justice Kendagor rendered herself as follows on this question;

"The High Court in MAA v SIE (Civil Appeal E009 of 2024) [2024] KEHC 4894 (KLR), faced a similar question where the Appellant questioned the jurisdiction of the Kadhi's Court to deal with Children maintenance matters. The Court held: "Custody and maintenance of children are incidental to marriage and divorce and therefore they fall squarely within the jurisdiction of the Kadhi's Court.

This issue was exhaustively handled by the High Court in ZUDG v SJKUR (2020) eKLR, where the Court held that the Kadhi Court has jurisdiction over children matters: "This court for now, aligns itself, so did the Kadhi's who sat in this matter with the thought that the Children's Act did not oust the jurisdiction of the Kadhi or other subordinate courts in dealing with issues of children. Indeed, lately all magistrates are gazetted to handle children matters and in this court's considered view, by implication Kadhi's too being in the category of magistrates should and ought to hear such matters and more so where the same are connected and incidental to the cause before the Kadhi, so long as the said court applies the principles laid down by The Children's Act and in particular applies the best interest of the child's principle as enunciated by the said Act.

Based on the above authorities, I do hold that the Kadhi Court had jurisdiction to hear and determine children issues on child custody and maintenance."

13. Similarly, in AYM v HIK (Miscellaneous Case 171 of 2019) [2023] KEHC 27191 (KLR) Justice Nyaundi, S.C had this to say when expounding the above:

"One can surmise from then foregoing decision that an approach that grants exclusive jurisdiction to the children court to handle children matters would be contrary to the Robust provisions of the Constitution of Kenya 2010, which has as one pillars the guarantee to access to justice. Then above decision of the court of appeal is binding on me. Consequently, I'm of the view that then Kadhi's court had jurisdiction to issue orders relating to custody and maintenance of the children in this matter."

14. The learned Judge went further and ruled as follows:

"In summary this court finds:

1. The Kadhi court has jurisdiction to determine a matter that relates custody of children.
2. Orders of then court touching on custody and maintenance of the children are upheld."



15. The Court of Appeal in *TSJ vs SHSR* (2019) eKLR, Civil Appeal No 119 of 2017, (Nairobi) D.K Musinga, S.G Kairu, A.K Murgor JJA, held that;

“Section 73 of the *Children Act* cited by the Judge provides that “there shall be courts to be known as Children’s Courts constituted” for the purpose, inter alia, of conducting civil proceedings on matters set out thereunder; hearing any charge against a child (subject to exceptions); hearing a charge against any person accused of an offence under the *Children Act*; and exercising any other jurisdiction conferred by that Act or other written law. There is however no stipulation in that provision that such jurisdiction is exclusive. Under part VII of the *Children Act*, “a court” may on application make orders regarding custody, care and control, maintenance of children but again without stipulation that such jurisdiction is exclusive. We reiterate that as the Judge correctly noted there is nothing in the Act that would prevent a body such as the Arbitration Board from arbitrating over disputes relating to such matters where both parties submit to the authority of such a body.”

16. Section 2 of the *Children Act* defines court to mean the Children’s Court designated under section 90 of this Act. Section 90 provides for the designation of children’s court by the Chief Justice. What is notable in the drafting is the use of the word “may” and not “shall”.

17. Further, section 91(2) provides as follows:

Subject to any rules or directions made or issued by the Chief Justice, where under any other written law any matter involving a child is required to be heard by a Court other than a Children’s Court, that other Court shall, for the purposes of that matter, be deemed to be a Children’s Court, and shall be bound by the provisions of this Act.

18. This provision acknowledges the fact that there may be instances when a court, other than those designated by the Chief Justice under section 90, may be called upon to determine issues relating to children. In such circumstances, such a Court would be bound by the provisions of the *Children Act*. Without any provision in any written law ousting the jurisdiction of the Kadhis Court to hear such cases, it is clear that the Kadhis can be said to be one of those courts contemplated in Section 91, thus clothing it with the relevant jurisdiction.

19. Regarding the maintenance of the children, the Appellant submitted that under Section 76 (3) (f) of the *Children Act*, the court is mandated to consider the financial ability of each parent to maintain the child. It is noteworthy that the Appellant did not file any Affidavit of Means in the trial court to assist the Court in ascertaining his financial ability.

20. It is, therefore, my finding that the Kadhis Court had jurisdiction to hear and determine issues relating to children. Further, I find that the trial court did not err in its findings relating to their custody, access and maintenance.

21. The second issue for determination is whether the Respondent was entitled to khul’u. The literal interpretation of Khul’u is divorce at the instance and initiative of the wife, with consent from the husband upon the wife paying an agreed amount as part of the compensation for her release from the bonds of marriage. A wife would be entitled to khul’u if she satisfies the court that denying the same would otherwise force her into a hateful union. Khul’u can be revocable or irrevocable, depending on the circumstances of each case.



22. The Quran 2:229 says thus:

“...And it is not lawful for you (men) to take back (from your wives) any of the (dower) which you gave them, except when both parties fear they would be unable to keep the limits of Allah. Then if you fear that they would not be able to keep the limits ordained by Allah, then there is no sin on either of them if she gives back (the dower or part of it) for her release”

23. The Appellant submitted that the trial court erred in law by not following the Islamic principles that govern divorce in that the Quran allows divorce only if there is no other way to fix the problems in the marriage. The Appellant contended that where one spouse wants a divorce and the other does not, then the Quran dictates that they should try reconciliation first. The adamant party should be reminded of his/her duty towards the family and raising children harmoniously, and Allah’s displeasure at Muslims seeking frivolous divorces.

24. The Appellant submitted that the trial court did not give room for the Appellant to be heard, neither did the Kadhi give room for decree nisi, or time before pronouncing divorce.

25. The Respondent relied on the case of RFO & Anor -vs MJ [2023] KEHC 20573 in which Justice Maureen Odero held thus:

“As a general rule the High Court will not interfere with findings made by the trial court unless it finds that the trial court erred in law and/or misapprehended the facts in interpreting evidence. IN Kiruga -vs- Kiruga & Another [1988] eKLR. “....A marriage is defined in law as the voluntary union between a man and a woman. The operative word is “voluntary”. A marriage can only subsist when the parties to the marriage enter into and remain in the marital union by choice. One cannot be compelled by a third party to remain in a marriage.”

26. In the case of MMO vs. FAH, Garissa High Court Civil Appeal No. 23 of 2018 [2019] eKLR the Court held:

“Where the marriage negates its objectives, but the husband refuses to divorce his wife amicably, and the wife satisfies the grounds under which a Muslim wife can obtain a decree for the dissolution of her marriage, the right thing for the Kadhi to do is to pronounce divorce by way of judicial decree and not Khula as the learned Kadhi purported to end the marriage.”

27. In the above case, the Court discussed the four conditions of Khul’u, which are:

- i. There must be an offer from the wife. The wife may make a proposal either by the use of word “Khul’u” or its derivative e.g. the wife states ‘give me a Khul’u in exchange of my dowry.’
- ii. The offer must be accepted by the husband. The husband replies “I do”. Thereafter a valid dissolution of marriage under Khul’u comes into effect.
- iii. The monetary compensation must be paid in return by someone who is legally qualified to donate.
- iv. The husband must be legally qualified to divorce. (Dr. Salih Al-Fawzan, A summary of Islamic Jurisprudence, V2, page 424).”



28. Reading through the testimonies of the parties in the trial court, it is my considered opinion that the Respondent was able to prove the grounds of divorce. I find that the trial court did not err in not considering the matter of Khul'u as the basis for the divorce.
29. The third issue for determination is that of eddah maintenance. The Appellant submitted that the trial Court erred in law by not following the Islamic principles that govern divorce in that in Khul'a divorce, a wife refunds her dowry or pays some other sum to her husband in order to obtain a divorce.
30. The Quran 2:228 states thus:
- “Divorced women remain in waiting for three periods, and it is not lawful for them to conceal what Allah has created in their wombs if they believe in Allah and the Last Day.”
31. The Quran (65:6) dictates further
- “Let them live where you live #during their waiting period#, according to your means. And do not harass them to make their stay unbearable. If they are pregnant, then maintain them until they deliver. And if they nurse your child, compensate them, and consult together courteously. But if you fail to reach an agreement, then another woman will nurse #the child# for the father.”
32. Having earlier found that the divorce was a judicial divorce and not Khul'a, it follows that the Respondent is entitled to eddah maintenance.
33. Regarding the issue of mat'a, Justice DK Kemei in the case of SSA vs. HMS, Bungoma High Court Civil Appeal E001 of 2020 [2023] KEHC 24272 (KLR) held thus:
- “It is clear that from his prayers the appellant sought to have the marriage dissolved and having found that there was no evidence of Khula, the appellant must pay mut'a (compensation). Article 86 of the Islamic Charter on Family provides for what is referred to as a conciliatory gift for divorce as follows: Islamic Shariah encourages the man to give his wife a material gift, known as al-mut`ah, when he divorces her. The value of the gift should be in proportion to the husband's financial abilities and the duration of the marriage. The purpose of the gift is to console her and to lessen the harm that she endures as a result of the divorce.”
34. I am of similar mind as the learned Judge in the above matter. therefore, i find no error of law in the finding of the trial court.
35. In view of the foregoing, this appeal does not succeed. This being a family matter, I make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 4 DAY OF JULY 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For Appellant: Ms. Wachika Wachira

For Respondent: Mr. Yusuf

Libertine Achieng..... Court Assistant

