



**RFO & another v MJ (Civil Appeal 11 of 2022)
[2023] KEHC 20573 (KLR) (Family) (7 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20573 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL 11 OF 2022**

MA ODERO, J

JULY 7, 2023

BETWEEN

RFO 1ST APPELLANT

ABB 2ND APPELLANT

AND

MJ RESPONDENT

JUDGMENT

1. Before this Court for determination is the Amended memorandum of Appeal dated 26th July 2021 by which the Appellants RFO (1st Appellant) and ABB (2nd Appellant) seek the following orders:-
 1. Spent.
 2. That the marriage between the 1st Appellant and the Respondent be dissolved.
 3. That the Respondent should be ordered to provide for maintenance of the five (5) children of the marriage.
 4. That the Respondent be ordered to pay the 1st Appellant’s Maher (dowry).
 5. That the Respondent be ordered and restrained from assaulting the Appellants by himself or through his family and agent.
 6. That the costs of this appeal be borne by the Respondent.
 7. THAT this court be pleased to make such other orders as it may deem fit.



2. The Respondent MJ opposed the appeal through his Response dated 14th December 2021. The Appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated 11th February 2022 whilst the Respondent relied upon his written submissions dated 6th April 2022.

Background

3. The 1st Appellant RFO and the Respondent MJ got married under Islamic Sharia Law on 5th May 2009. They agreed on a dowry ('Mahr') of a four (4) year old female cow which dowry is yet to be paid. The couple were blessed with five (5) children.
4. It appears that at some point quarrels/disputes arose between the couple and the 1st Appellant (wife) moved back to her family home (plot) to reside there with the 2nd Appellant who is her brother. The matter was reported to elders who sat to reconcile the parties. The elders directed the Respondent to pay his in-laws an amount of Kshs.120,000 and further directed the 2nd Appellant to release his sister and her children to return to the matrimonial home. The Respondent claims that whilst the 1st Appellant (his wife) accepted the elders verdict her brother (2nd Appellant) refused to comply with the same.
5. The Respondent filed in the Kadhi Court at Wajir Civil Case No. 20 of 2020 claiming that the 2nd Appellant who is his brother in law (wife's brother) had rejected/declined to allow the 1st Appellant and her children to return to their husband/father despite elders having him to allow them return to the matrimonial home. The Respondent complained that the 2nd Appellant had failed to adhere to the decision of the elders that his wife and children be allowed to return to him. The suit was heard by Hon. Osman Sheikh Abdi, Senior Resident Kadhi who on 31st May 2021 delivered his judgement (verdict) in which he made the following orders:-

- “ 1) That there is nothing significant which can lead this honourable court to dissolve the marriage of this couple plaintiff and the 2nd defendant who have been blessed with five children, therefore the court is hereby ordering them to stay together as wife and husband and respect each other due to the children's best interest according to chapter 2 verses 228 in the Holy Quran. They have rights (wives) upon their husband as husbands have rights upon their wives.
- 2) That the 1st defendant should give the 2nd defendant the plaintiff who is her husband in order the plaintiff to discharge his marital responsibility and obligation without any fear or interruption from his in laws especially the 1st defendant Mr. ABB who is the key of this couple's problem according to this court's observation to raise together their lovely children without any problem from outside according to chapter 4 verses 34 and 59 in the holy Quran.
- 3) That the plaintiff should keep his family in a peaceful place and provide them their upkeep well according to this capacity and give his in laws the respect they deserve and solve any matter which may arise between him and either his wife or his in laws through the community elders.
- 4) That the costs of the suit is being dismissed so each party should bear his her expenses.”



6. Being aggrieved by the decision of the Hon. Kadhi the Appellant filed Amended Memorandum of Appeal dated 26th July 2021 which appeal is premised upon the following grounds:-

- “ 1. That the Kadhi Court Wajir took inordinately long time to make such decision which occasioned the appellant with a lot of problems.
2. That the Honourable Kadhi erred in failing to take into account evidence by the Appellants that the Respondent had assaulted the 1st Appellant.
3. That the Honourable Kadhi erred in fact in failing to consider that the marriage between the 1st Appellant and the Respondent had irretrievably broken down.
4. That the Honourable Kadhi erred in law and fact in failing to consider the 1st Appellant wishes and ordering her to go back to the Respondent as his wife.
5. That the Honourable Kadhi erred in fact in finding that the 2nd Appellant had prevented the 1st Appellant from living with the Respondent.
6. That the 1st Appellant, RFO is not willing to go back to her husband because of the above Respondent (husband) mistreated his wife RFO. even while the Kadhi Court at Wajir proceeded with the case.
7. That the Honourable Kadhi erred in Law and in fact by failing to consider the P3 form given as evidence. The Respondent at one time attacked the Appellant and poured hot tea on her thereby inflicted several injuries as evidenced by the P3 form. The Respondent continued to abuse his wife and family and therefore has no intention of reuniting with him.
8. That the Honourable Kadhi judgement is unlawful as it denies the 1st Appellant agency and choice over her life.
9. That the Honourable Kadhi judgement is manifestly a miscarriage of justice.

7. As stated earlier the appeal was opposed.

Analysis and Determination

8. I have carefully conserved the Amended Memorandum of Appeal, the Response filed thereto as well as the written submissions filed by both parties.

9. This being a first appeal it is the duty of this court to examine the evidence adduced during the trial and to draw its own conclusions on the same. In *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123 the court held as follows:

“ An appeal to this court from trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions through it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial Judge’s findings of facts if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence



or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.....”

10. 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 the evidence. In *Kiruga v Kiruga & Another* [1988] eKLR the court observed as follows:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”

11. The Appellants herein are aggrieved by the refusal of the Hon. Kadhi to grant the divorce sought by the 1st Appellant and are further aggrieved by the orders made by the Hon. Kadhi directing that the 1st Appellant and her children be compelled to return to live with the Respondent.
12. It was submitted that the Hon. Kadhi had failed to take into account the fact that attempts by elders to resolve the dispute between the parties had failed and also failed to take into account the fact that the 1st Appellant was not willing to return to her husband.
13. A marriage is defined in law as the voluntary union between a man and a woman. The operative work is “voluntary”. A marriage can only subsist when the parties to that marriage enter into and remain in the marital union by choice. One cannot be compelled by a third party to remain in a marriage.
14. Although the Respondent blamed his brother-in law (the 2nd Appellant) for failing to return his wife and children to the matrimonial home, the fact is that the 1st Appellant is not a child to be ferried back to her marital home by her brother. The 1st Appellant is an adult with a mind and opinion of her own. She has freedom of choice. If the 1st Appellant had truly wished to return to her husband then nothing would have prevented her from doing so.
15. In his judgement the Hon. Kadhi ‘ordered’ that the couple stay together as man and wife and respect each other due to the children’s best interest.....”
16. Whilst there can be no doubt at all that the best interests of a child are served by having parents who cohabit in harmony, love and mutual respect, an adult cannot be ‘ordered’ to live with his/her spouse and cannot be ‘ordered’ to remain shackled to a marriage which they wish to extricate themselves from.
17. The 1st Appellant had herself walked out of her marital home taking her five (5) children with her and had gone to reside with her brother.
18. From the evidence adduced before the Hon. Kadhi it was clear that the 1st Appellant herself was unwilling to return to her husband. The 1st Appellant in her evidence stated that she had filed a case at the Kadhi Court in Wajir seeking a divorce from her husband but the case was dismissed by the Hon. Kadhi.
19. The 1st Appellant in her evidence went on to list all the problems she faced in her marriage which included insults, abuse, neglect and curses from her husband. She claimed that the Respondent assaulted her and that he failed to provide for the maintenance of the family. The 1st Appellant made it clear that her wish was that her marriage to the Respondent be dissolved.
20. In the typed proceedings at page 21 line 17 the 1st Appellant states as follows:-

“I pray for judgement against the plaintiff for:



Dissolution of Marriage

Payment of dowry

Custody of the children

Maintenance of the children

My two children at the plaintiff to be returned back to my custody.

Costs of the suit.

That is all”

21. It is mind boggling that in the face of the evidence adduced by the 1st Appellant the Hon. Kadhi still directed that she return to her husband. The orders of the Hon. Kadhi were tantamount to forcing a person to remain in a marital union which orders violated the 1st Appellant’s right to Freedom of Association as guaranteed under Article 36 of the Constitution of Kenya 2010.
22. I find that the Hon. Kadhi erred in law in making the orders that he did. The 1st Appellant was clearly pleading for a divorce which the court declined to grant despite the evidence that the marriage had irretrievably broken down and the 1st Appellant was not willing to return to her marital home. The Hon. Kadhi erred in ordering the 1st Appellant to remain in a marriage which by her words and actions she had clearly demonstrated that she did not wish to remain in.
23. Given the facts of this case it is my view that the marriage between the couple ought to have been dissolved. I therefore grant prayer A of this Amended Memorandum of Appeal.
24. During the trial before the Hon. Kadhi and during this Appeal it was conceded by all parties that the dowry (‘Mahr’) agreed upon between the couple had not been paid. The promise of dowry in a marriage amounts to a contract between the couple. The Respondent promised to pay dowry of a four (4) year old female cow which promise has not been honoured. The 1st Appellant did enter into the marriage on the basis of that promise and went on to bear her husband five (5) children. In the circumstances I find that the 1st Appellant is entitled to receipt of the promised dowry.
25. The Appellant in her appeal has sought for orders directing the Respondent to pay maintenance for the upkeep of the children of the marriage. The question of maintenance was not canvassed during the trial in the Kadhi Court. As such it would be improper for this court sitting on appeal to consider the issue of maintenance. This is a prayer which the 1st Appellant ought to make before the Children’s Court which is the court mandated in law to hear and determine issues relating to custody and maintenance of Children. Accordingly, I decline to make any orders on maintenance.

Conclusion.

26. Finally, and in conclusion I find merit in this appeal. Accordingly the same is allowed and this court now makes the following orders:-
 - (1) Her marriage to the Respondent be dissolved is hereby allowed. Decree *nisi* to issue to be made absolute after sixty (60) days.
 - (2) The Respondent MJ is directed to pay to the 1st Appellant the promised dowry (Mahr) of a four (4) year old female cow within Sixty (60) days of the date of this judgement.
 - (3) The question of maintenance of the children of the marriage to be referred to the Children’s Court for determination.



(4) This being a family matter each side will bear their own costs.

DATED IN NAIROBI THIS 7TH DAY OF JULY, 2023.

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MAUREEN A. ODERO

JUDGE

