Mohamed v Hassan (Civil Appeal E008 of 2023)
[2024] KEHC 13562 (KLR) (4 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13562 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CIVIL APPEAL E008 OF 2023

JN ONYIEGO, J

NOVEMBER 4, 2024

BETWEEN

RASHID MOHAMED .... APPELLANT

AND

KALTUMA ALI HASSAN .... RESPONDENT

(Being an appeal from the judgment of Hon. D.S. Dabasoo (P.K.) delivered on 31.05.2023 in Garissa Kadhi Court)

JUDGMENT

1. The petitioner now the respondent herein approached Garissa Kadhi's court via an amended petition dated 02.06.2022 seeking for orders that:
   i. A declaration do issue that the marriage between the respondent and the appellant be dissolved by way of talaq.
   ii. The respondent to pay the petitioner unpaid mahar amounting to Kes. 100,000/-.
   iii. The respondent to pay the petitioner unpaid debt of Kes. 250,000/-
   iv. The appellant to bear the cost of the suit.
   v. Any other relief the Honourable court deems fit.
2. The respondent in her petition had averred that she got married to the appellant in the year 2001 or thereabouts and their union was blessed with four children. That the said marriage was conducted in Garissa but cohabited in Wajir between the year 2016 to 2021, when they moved back to Garissa. She stated that at the time of the marriage, the appellant had pledged to pay mahar of Kes. 100,00/- which amount has remained unpaid till the filing of the instant suit.

3. She averred that on or around the year 2016, the appellant ceased providing for her and her children. She urged that the appellant owed her an amount of Kes. 250,000/- which remained unpaid despite the fact that the appellant is a man of means who works and resides both in Garissa and Qatar. She deposed that their marriage had irretrievably broken down. She urged the court to dissolve the same and further grant prayers as listed in her pleadings.

4. The defendant, the appellant herein entered appearance on 21.02.2022 and further filed an amended reply dated 23.02.2022 denying the allegations by the respondent. He disputed the amount of mahar as urged by the respondent arguing that they agreed the same was to encompass 4 small cows of 2 years which were valued at Kes. 10,000/- each making a total of kshs 40,000.

5. The appellant further denied owing the respondent money and put the appellant to strict proof. He argued that besides the respondent, he also had other wives and children who wholly depended on him and the same notwithstanding, his income was meagre.

6. In his cross petition, he averred that it is the respondent who had been cruel to him thus causing him emotional and psychological neglect. That he had been providing to the respondent together with her children. It was his case that in the month of February, 2021, the respondent willfully abandoned her matrimonial home without any proper cause thus neglecting the feelings and desires of the appellant hence exposing him to great distress.

7. He averred that the respondent was secretive in conducting her affairs; occasionally intimated to the appellant that he was not the father to their children; the respondent was a woman of ungovernable temperament; very abusive and frequently deserted their matrimonial home.

8. In the end, he sought for prayers that:

   i. A declaration that the petitioner was married to the respondent in accordance to the Islamic laws.

   ii. A declaration that the respondent owes the petitioner mahar of four small cows of 2 years' old which is valued at Kes. 10,000/- each as per the agreement of the parties.

   iii. The petition and subsequent orders as prayed in a, b, c, d, e, f and g be dismissed.

   iv. A declaration that the marriage has not irretrievably broken down.

   v. A declaration that the appellant is/was not cruel to the respondent.

   vi. A permanent injunction restraining the respondent from spreading defamatory information against the appellant.

   vii. A permanent injunction restraining the respondent from denying the appellant access to the minors and the matrimonial home.

   viii. Costs be granted to the appellant.

9. The respondent in her reply to cross petition by the appellant herein filed a reply dated 02.06.2022 wherein she denied the averments by the appellant and further urged the court to allow the amended petition as prayed.

10. Upon hearing the matter, the trial court on 31.05.2023 delivered its judgment dissolving the marriage between the parties herein; the appellant was directed to pay mahar at court's rate of Kes. 18,000/- i.e. 72,000 and each party to bear its own costs.

11. The appellant being dissatisfied with the determination of the trial court's decision preferred an appeal before this court via a memorandum of appeal dated 26.06.2023 on the following summarised grounds:

    i. The Honourable Kadhi erred in law and fact by failing to appreciate the grounds for divorce provided and directed in the holy Quran.

    ii. The Honourable Kadhi failed to appreciate that the best interest of minors is best secured with involvement of both parents.

    iii. The Honourable Kadhi erred in law and fact by denying the appellant an opportunity to appear during the proceedings and to allow the petitioner to be recalled to testify despite the appellant making applications on the same.

    iv. The Honourable Kadhi erred in law and in fact when he openly showed biasness against the appellant.

    v. The Honourable Kadhi's determination was marred with contradictions hence rendering the judgment unenforceable.

12. Reasons wherefore, the appellant prayed that:

    i. The appeal be allowed.

    ii. In the alterative, the matter be heard de novo.

    iii. Costs of the appeal.

13. The appeal was canvassed by way of written submissions.

14. The appellant through the firm of Stephen Wanyoike filed submissions dated 14th June 2024 submitting on three issues namely; whether there was proof that marriage had irretrievably broken down; whether the trial court improperly denied the appellant an opportunity to defend his case; whether the trial court exhibited outright bias against the appellant and whether the trial Kadhi erred when he dissolved the union between the parties yet the evidence adduced before him did not fit the allegations cited.

15. It was counsel's submission that the respondent having alleged cruelty as a ground of divorce, it was incumbent upon her to adduce evidence to support the same. That simple oral evidence was not enough to prove such an allegation. Reliance to that end was placed on sections 107(1) of the *Evidence Act* that he who alleges must prove.

16. Counsel Further referred the court to article 87 of the Islamic Charter on Family which stipulates that if harm is proven, then the judge ought to rule in favour of the woman thereby divorcing her husband. It was therefore contended that no tangible evidence was adduced before the trial court to support allegations of cruelty hence the court erred by not giving the appellant an opportunity to rebut such an allegation.

17. Regarding the issue that the ADR had failed, counsel submitted to the contrary arguing that the same was not possible considering that the appellant was living in Qatar. The trial court was faulted for separating the family by listening to the respondent only without giving an opportunity to the appellant to present his case. Reliance was placed on the case of M vs MDC No. 3 of 1993 where it was emphasized that it is not enough merely to allege a matrimonial offence without sufficient proof of the same.

18. It was contended that the trial court completely declined to adjourn the matter despite being informed that Counsel was attending COC meeting in Garissa while Mr. Ayienda was bereaved. As such, the principles of fairness as enunciated in the case of Ridge vs Baldwin (1964) AC (1963) 2 ALL ER 66 were not applied to the appellant's case as he was condemned unheard given that he was not granted an opportunity to present his case. The appellant thus urged this court to direct that there was a mistrial and allow the prayers sought.

19. The respondent on the other hand opposed the appeal vide the submissions dated 17.06.2024. Three issues were framed for determination as follows;

    i. Whether the dissolution of the marriage between the parties was justified.

    ii. Whether the appellant was unfairly denied a chance to prosecute his case.

    iii. Whether the judgment was contradictory and confusing.

20. On the first issue regarding dissolution of marriage, Counsel relied on the holding in the case of SYT vs TA [2019] eKLR where it was held that Islamic religion permits dissolution of marriage when the marriage has broken down irretrievably. That the respondent in her pleadings demonstrated how the marriage between her and the appellant had broken down.

21. Learned counsel submitted that there was proof that the appellant had pronounced three talaqs and that the appellant had neglected the respondent's matrimonial needs. Additionally, counsel observed that there was evidence through the testimony of the respondent which clearly brought out the aspect of cruelty in that she produced a police abstract No. 63 recorded on 19.01.2022 at Garissa Police station where she had reported a complaint on threats of harm from the appellant.

22. On the question whether the appellant was denied an opportunity to be heard, counsel opined that the appellant's counsel failed to appear during the hearing date and his prayer for adjournment via SMS addressed to the respondent's counsel was opposed and eventually rejected by the court. That when the case came up for hearing on 03.11.2022, neither the appellant nor his counsel was present despite being served with the hearing notice. That counsel simply sent the respondent's counsel an SMS stating that he was unavailable.

23. To support the position that the appellant was not denied the opportunity to be heard, counsel gave a chronology of events as follows; That previously, the case was fixed for further hearing on two subsequent occasions i.e 07.12.2022 and 09.02.2023 which dates the case did not proceed as the court was not sitting on both occasions. On 02.05.2023, the appellant's advocate failed to attend court but then again, the court did not sit on that day. On 21.03.2023, counsel for the appellant intimated that he wished to recall the respondent for cross examination thus he made reference to a notice of motion dated 24.01.2023 which application was not in the court record and further, had not been served upon the respondent's counsel. In the same breadth, counsel also intimated that he intended to file a P.O. to challenge the competency of the petition and the court gave directions that the same be filed and served to no avail.

24. On 09.05.2023, the appellant's counsel failed to attend court and the respondent's counsel set the case for mention on 16.06.2023 and further sent out a notice. That counsel for the appellant once again failed to attend court hence the respondent's plea to the court to have the matter proceed for hearing which plea the court allowed. To support the position that the refusal by the court not to adjourn did not in any way amount to denial to the right to be heard as it was within the court's discretion, the court was referred to the case of SYT vs TA [supra], where the Court of Appeal held that the Honourable Kadhi could not be blamed for setting down a matter for hearing as the respondent had been granted

sufficient time to defend his cause. That likewise in the instant case, the trial court cannot therefore be blamed for the appellant's negligence.

25. On the question that the judgment was not well grounded hence confusing, it was urged that the same lacked basis as the Honourable Kadhi followed the provisions set out in Order 21 Rule 4 of the Civil Procedure Rules thus the same was well drafted. This court was therefore urged to dismiss the appeal noting that in any event, the respondent has since settled down in Nairobi with her new family and therefore, she has moved on.

26. When the matter came up for hearing, parties opted to adopt their submissions fully. Pursuant to section 65(1)(c) of the *civil procedure Act*, this court heard the appeal with the assistance of two kadhis as assessors namely; Kadhi Fahad Ismail Mohamud (SRK) and Kadhi R.K.(PK). After considering the appeal, the two kadhis found that the dissolution of marriage in this case was properly done hence recommended dismissal of the appeal.

27. Having considered the grounds of appeal and the submissions thereof, three issues are discernable for determination.

    i. Whether the appellant was condemned unheard.

    ii. Whether the Appellant proved her grounds for divorce.

    iii. Whether the court was biased against the appellant

28. This being a first appeal, parties are entitled to expect a rehearing, reevaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. [See Gitobu Imanyara & 2 others vs Attorney General [2016] e KLR].

29. On the ground that the appellant was condemned unheard, the procedure of hearing of suits and examination of witnesses is provided for in Order 18 of the Civil Procedure Rules (2010), Cap 21 Laws of Kenya. The said order is very comprehensive on how a trial should proceed in court including the recording and production of evidence. Of importance to this court is Order 18 Rules 1 and 2.

30. The *Civil Procedure Act* makes provision for procedure in civil cases and further applies to proceedings in the High Court and, subject to the Magistrate's Courts Act, to proceedings in subordinate courts.

31. It is trite law that the discretion to grant or refuse adjournments is within the ambit of the trial court. It must be borne in mind that an application for adjournment must be supported by reasons that sufficiently explain the absence of a litigant or his advocate in court on the day under review. It is trite law that atrial court is under no obligation to grant an adjournment if it is not convinced that the application is supported by good and credible reasons.

32. The constitutional rights of all the litigants in the case must be taken into consideration in granting or refusal of adjournment. In this case, it is not denied as the record speaks for itself, the matter herein having been amended on 02.06.2022 was brought before court on 25.08.2022. Previously, counsel for the appellant did not attend court and the subsequent court attendance, he was still missing. The record speaks that he sent counsel for the respondent a message that he was attending a training and the lawyer who used to hold his brief was away as he was also attending a burial. For the foregoing reasons, he sought that the hearing be adjourned.

33. In F U M vs Republic [2015] eKLR, the Court of Appeal (P.N. Waki, R. Nambuye and P.O Kiage JJs) while agreeing with the decision of trial court to deny the appellant an adjournment held as thus: -

> " Is there substance in the appellant's criticism against the learned judge that she improperly denied him an adjournment thereby scuttling his chance to mount a defence? We respectfully disagree. An accused person is of course entitled to apply for an adjournment, but the grant of it is not automatic. It is at the discretion of the court, to be exercised upon principle and reason.

[Also see the Court of Appeal in Criminal Appeal No. 11 of 2018 at Nyeri Harambee John Gikingo vs DPP ; Section 1A,1B and 3A in the Civil Procedure].

34. In my considered view, counsel's reasons for not attending court on the hearing date were not good enough as his absence was not supported by any evidence. Be it as it may, granting an adjournment is at the discretion of the court and as such, a judicial officer cannot be faulted for exercising his/ her discretion unless the same went contrary to the expected normal standards. As a consequence of what transpired in court on the day the matter proceeded ex parte, I am not convinced that the Kadhi exercised his discretion capriciously. In fact, counsel should always be prepared to attend court if not in person through another counsel. As such, I find no basis in these allegations that the appellant was condemned unheard.

35. On the ground that the case for divorce was not proved to the required standard, it is trite that he who alleges must prove. [See section 107(1) of the *Evidence Act*].

36. From the amended petition, the respondent listed the grounds of divorce as enumerated at paragraph 14 of the amended petition and urged that the court dissolve her marriage to the appellant.

37. Grounds of divorce under Islamic law happens when a husband is absent although scholars differ on the time period to wit whether the same ought to be 1,2 or 4 years thus the wife is entitled to apply for dissolution of such marriage; equally, it applies when the man is unable to maintain his wife. This is so because it is the responsibility of a husband to provide for his wife according to his capability. [See Nisa: 4:34].

38. In the same breadth, 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."

39. It therefore follows that in a case where a husband no longer or has refused to maintain his wife, as reported by Imams Ahmad, Abu Daud, Nasaiy; ref: Subulul Salam vol. 3 pp 220 Abu zanad was reported to have asked Saeed Ibn Musaib for a ruling on a person who has no ability to provide for his wife, could they be separated? Ibn Musaib said 'yes'. Abu Zanad asked whether that was sunnah. Ibn Musaib said 'yes it is sunnah to separate such couple. Al Zuhaily, Fiqh Al Islami wa Addillatuhu 9/7042- 7045.

40. In the same breadth, Al Baqarah: 231 'Narrated Ibn Abbas (R.A.) that the Prophet (Pbuh) said: "(initiating) harm or (reciprocating in) harm is prohibited (in Islam). It thus clearly shows that husbands are prohibited from harming their wives in any way.

41. The question that begs for an answer is whether the respondent proved the above noting that such cited grounds for divorce in an Islamic marriage must be proved. As already noted, the ground of cruelty is a question of fact which requires a Court to assess based on the evidence adduced by the parties.

The standard of proof in establishing the above grounds of divorce is a preponderance of probability. This view is supported by the Court of Appeal judgment in the case of Alexander Kamweru vs 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.

42. The respondent in paragraph 14 of her amended petition particularized cruelty as suffered from the appellant. It was stated that the appellant had or has been occasioning actual bodily harm upon the petitioner and projecting verbal abuse upon her by telling her that her own father wants to marry her. It is trite under the Islamic religion that a woman can seek divorce when its proved that indeed her husband is cruel to her. Cruelty encompasses physical or psychological assaults and as in this case, the respondent urged that the appellant kept telling her that she should get married to her father amongst others abuses. In the same breadth, it is not lost to the court that the appellant threatened the respondent hence the complaint made by the respondent at Garissa Police Station via OB No. 63.

43. The fact that the respondent even made a report to the police in regards to the behaviours of the appellant and the same having not been challenged on cross examination and further considering that three pronouncements of Talaq were made by the appellant which is not denied, marriage was properly dissolved.

44. It is worth noting that marriage is a social contract founded on the firm ground of love and affection. Once the lamp for love is extinguished, nobody including a court of law can force it. It can not work whether by court or military order. Parties can not be forced to stay together where there is no love. In the instant case, each party is accusing the other of cruelty, disrespect, absence from the matrimonial home and neglect to mention just but a few. In the case of KNM V MHM (2019) e KLR this court had this to say;

> " There is no doubt that, marriage whether Christian, Hindu or Muslim is a voluntary union or social contract pegged on mutual love, trust and commitment to each other's weaknesses and strength...courts have no business in forcing such relationship to subsist".

45. Similarly, the supreme court in MNK v POM*; initiative for strategic litigation in Africa(ISLA)(AmicusCuriae)(Petition No. 9 of 2021*)(2023)KESC2(KLR)(27 January 2023)(Judgment) had this to say;

> " [12]...marriage was a voluntary union. Courts should shy away from imposing marriage on unwilling persons"

46. From above holding, I do agree with the Kadhi assessors' opinion and the holding of the trial court that the grounds for divorce were not controverted hence proved successfully. To that extent, dissolution of marriage was properly pronounced and the same is upheld.

47. On the issue of bias, no solid evidence was laid before the court to arrive at such conclusion. Failure to allow an adjournment and the appellant's failure to attend court when required does not amount to bias. This is an allegation that can not superficially be accepted without proof as it touches on the nerve of litigation as a key principle of natural justice that a dispute shall only be heard before an impartial arbiter. That ground is therefore dismissed.

48. On whether the trial court failed to appreciate that the best interest of the children was best secured in an environment involving the parents and whether the judgment was contradictory, the court record is clear. It is trite that one is bound by his/her pleadings. A perusal of the amended plaint by the

respondent shows that no prayer was sought in regards to the children of the marriage. As such, the same was not available for the court to determine. Clearly, the court in my view not only understood what was expected of it but also dealt with and delivered appropriately on the prayers sought. Thus ground 2 and 5 are hereby dismissed.

49. In a nutshell, having considered all the cited grounds of appeal and the submissions thereof, and further having analyzed the applicable law and caselaw quoted herein, I do not find merit in the instant appeal. Accordingly, I do hereby dismiss the same with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 4TH DAY OF NOVEMBER 2024

J. N. ONYIEGO

JUDGE