



**Salat v Mohamed (Civil Appeal E010 of 2023)  
[2024] KEHC 13578 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13578 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CIVIL APPEAL E010 OF 2023  
JO NYARANGI, J  
NOVEMBER 6, 2024**

**BETWEEN**

**ADAN IBRAHIM SALAT ..... APPELLANT**

**AND**

**SUADA ABDULLAHI MOHAMED ..... RESPONDENT**

*(Being an appeal against the judgment of Hon. Mubiyidin Mohamed Sambul (S.R.K.) delivered on 13.07.2023 in KCDC/77/2022 at Mandera))*

**JUDGMENT**

1. By a plaint dated 10.11.2022, the respondent(plaintiff) moved Mandera Kadhi's Court Seeking orders that; her marriage with the appellant(defendant) be dissolved; payment of pending dowry of 1000 dollars; maintenance of Kshs 20,000 per month; custody of the children; education for the minors; divorce certificate and any other relief the court may deem fit. She averred that they contracted their marriage under Islamic law sometime 2012 and were blessed with six children.
2. The respondent blamed the appellant for the failure of their marriage while claiming that the respondent did not respect her and was in the habit of assaulting her in front of their children. It was averred that the respondent did not provide for his family and despite the elders' attempt in intervening, the same did not yield any fruits.
3. In response, the defendant entered appearance on 22.11.2022 and further filed a response dated 09.12.2022 to wit that despite not earning anything in terms of salary as a result of suspension, he regularly sent cash and shopping to the respondent. It was his defence that he was financially constrained as he was defending trumped up murder charge at the high court in Nairobi. He blamed the respondent for deserting her home unprovoked leading to the children dropping out of school and madrassa. He thus urged the court to dismiss the suit as the same lacked merit.



4. The Kadhi thus directed that the matter be referred to mediation wherein elders from the respective parties' sides were involved in solving the matter without any success.
5. Upon the matter being brought before the court, the Kadhi directed that parties do file their respective submissions which he considered in coming up with the impugned judgment.
6. The trial court via a judgment delivered on 13.07.2023 reached a determination which I hereby reproduce verbatim as follows:
  - i. Dissolution of marriage is hereby granted to the plaintiff with effect from 13.07.2023 and divorce certificate is hereby issued.
  - ii. Custody of the children are hereby granted to the plaintiff and visitation of the children are hereby allowed for the respondent.
  - iii. The plaintiff to pay 1000dollars or its equivalent within two months with effect from 13.07.2023 and three months Iddah of twenty-five thousand shillings per month.
  - iv. The respondent to pay monthly maintenance of twenty-five thousand shillings per month.
  - v. The respondent to include the children in medical cover or pay medical expenses for the children as per need arise.
7. Aggrieved by the said judgment, the appellant proffered a memorandum of appeal dated 18.08.2023 citing 7 grounds of appeal as hereunder;
  - i. The Honourable learned Kadhi erred in law and fact by delivering a judgment whereas no formal trial had taken place and the appellant had not been accorded a fair chance to be heard in defence.
  - ii. The Honourable learned Kadhi erred in law and fact by conducting proceedings in a matter averse to the rules of natural justice.
  - iii. The Honourable learned Kadhi erred in law and fact by adjudicating on matters that had not been canvassed at a formal trial.
  - iv. The Honourable learned Kadhi erred in law and fact by failing and or refusing to refer the subject matter to court annexed mediation as had been requested by the appellant.
  - v. The Honourable learned Kadhi erred in law and fact by making orders that are manifestly oppressive on the appellant without due consideration of the latter's current socio-economic status, a fact that had been brought to the Honourable court's attention through the appellant's pleadings.
  - vi. The Honourable learned Kadhi erred in law by making an order for payment of dowry without hearing the relevant evidence and further without any legal basis.
  - vii. The Honourable learned Kadhi's judgment is against the weight of the evidence howsoever availed to the court by the parties.
8. He sought for orders that:
  - i. The appeal be allowed.
  - ii. That the subordinate court's judgment delivered on 13.07.2023 be set aside.
  - iii. That the subject case be tried de novo by a different court.



- iv. Costs hereof be provided for.
9. The court directed that the appeal be canvassed by way of written submissions which the appellant through the firm of Solomon Mugo & Co. Advocates in their submissions dated 19.06.2024 submitted that; save for a few haphazard interrogatories made by the Honourable Kadhi on the parties, no formal trial where parties were sworn for purposes of giving viva voce evidence took place.
  10. Learned counsel further submitted that, there was no consensus by the respective litigants that the trial should proceed without giving formal evidence. As such, the manner in which the Kadhi conducted the hearing of the matter was not only unprocedural but also against the norms of natural justice. Reliance was drawn from Petition No. E002 of 2021 *Catherine Chepkemoi Mukenyang v Evanson Pkemei Lomaduny & Another* [2022] eKLR where the court emphasized the right to be heard in a fair manner. It was contended that no formal evidence was tendered by either party in the trial. In counsel's view the threshold for standard of proof was not met hence the determination by the court remained ungrounded.
  11. The trial court was also faulted for having failed to refer the matter to court annexed mediation after the respective parties' elders failed to meet and resolve the issues between the parties herein. That the same went contra the provisions of the holy Quran, the *Kadhi's Act* and the *Kadhi's Courts (Procedure and Practices) Rules*. In the end, the court was called upon to allow the appeal as prayed.
  12. The respondent did not participate in these proceedings despite being served.
  13. This being the first appellate court, it is thus bound to reconsider, re-evaluate and re-assess the evidence tendered before the trial court together with the assessors' opinions and arrive at an independent determination and or conclusion without losing sight of the fact that the trial court had the advantage of seeing and listening to the witnesses to be able to assess their demeanour. See *Selle and another v Associated Motor Boat Co. Ltd and others* (1968) EA 123 and *Peters v Sunday post limited* (1958) EA 424.
  14. The Court heard the appeal herein with the aid of two 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."
  15. For the hearing of this appeal, I sat with Principal Kadhi Rashid Kokonya Otundo of Ijara Kadhi's Court and Senior Resident Kadhi Fahad Ismail Mahmud of Garissa Kadhi's Court, both of whom in their opinion reached the same determination thus being in agreement with the findings of Hon. Muhiyidin Mohamed Sambul hence recommending that the appeal had no merit.
  16. In as much as this court is not bound by their finding, it is important to note that the court has considered the same for guidance in concluding the judgment and orders made herein.
  17. I have considered the record of appeal, grounds of appeal and the submissions by the appellant. The only critical ground of appeal which if favourably decided will with finality dispose this appeal, is the question whether the procedure in conducting civil proceedings was followed and; whether the right for the appellant to be heard was accorded to the appellant.
  18. As already stated in this judgment, the appeal is on the manner in which the Kadhi conducted the hearing and the resultant orders of the same. But before the court delves into the legality of the orders of



the impugned hearing process, I find it necessary to first deal with the fundamental issue of procedure that was adopted by the trial court, in “hearing” the matter.

19. This court has perused the record and the same shows that, the suit the subject matter of this appeal, was filed on 10.11.2022. Upon service of the summons and the plaint, the defendant entered appearance on 22.11.2022 and further filed a response dated 09.12.2022.
20. The matter then came up for hearing on a number of occasions and on the 18.01.2022, the court directed that the matter be referred to ADR thus directing some elders to help the parties solve their differences without success.
21. On 06.03.2023, the court issued summons to the very elders who were to help the parties reach an amicable solution. Some of the said elders were cross examined by the appellant’s counsel. The court then proceeded to direct that Elders Abdirahman Mihamed Jabane and Abass Ahmed Jabane lead the parties in a talk with a view to reaching an agreement. After some deliberations by the said elders, it was reported to the court that the appellant had frustrated attempts on reaching a proper solution.
22. The court thus directed that children officer, Mandera East makes a welfare report on children and the parties herein; counsel for the appellant to submit written submissions and witness statements within a period of one month; the respondent also to file written submission and witness statement. Consequently, the Hon. Kadhi set 24.05.2023 as the date for all the parties to confirm compliance with the aforementioned directions.
23. The appellant subsequently filed an application dated 19.05.2023, which the court certified urgent and further directed that the same be served upon the respondent. It was further directed that an inter parte hearing would be conducted on 09.06.2023 but in the end, the said application was canvassed by way of written submissions where only the respondent complied with the court’s directions. Meanwhile, the appellant insisted by urging the court that the matter be referred to court annexed mediation notwithstanding the fact that the appellant was never keen in ensuring the same happen.
24. Mr. Solomon, counsel for the appellant later informed the court that he had filed a supplementary affidavit on mediation thus prompting the court to direct that the same be retrieved. Upon the court resuming in the afternoon, the respondent informed the court that she was no longer interested in the process of mediation since the appellant had failed to support his family amidst other accusations.
25. As already noted elsewhere in this judgment, the court on 13.07.2023 proceeded to deliver its judgment.
26. With the said background in mind, it cannot be emphasized that the procedure of hearing of suits and examination of witnesses is provided for under 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 which provide as follows: -
  1. The plaintiff shall have the right to begin unless the court otherwise orders.
  2. Unless the court otherwise orders—
    1. On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.
    2. The other party shall then state his case and produce his evidence, and may then address the court generally on the case. The party beginning may then reply.



3. After the party beginning has produced his evidence then, if the other party has not produced and announces that he does not propose to produce evidence, the party beginning shall have the right to address the court generally on the case; the other party shall then have the right to address the court in reply, but if in the course of his address he cites a case or cases the party beginning shall have the right to address the court at the conclusion of the address of the other party for the purpose of observing on the case or cases cited.
27. The *Civil Procedure Act* makes provision for the 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. Under section 8 (2) of the *Kadhi's Act*, the *Civil Procedure Act* and rules is applicable to the kadhi's court.
28. In view of the above provisions, can the procedure that was adopted by the trial court in the case herein be said to have complied with the procedure as laid down in the *Civil Procedure Act*?
29. In my considered view, before the trial court were the main suit and an application which were due for determination. It remained a mystery as to what became of the application and the main suit as the same were mixed somewhere along the trial process with an outcome in the form of a judgment delivered on 13.07.2023.
30. Pre –trial was not even mentioned in the process to certify the matter herein ready for hearing. In the same breadth, the appellant was also not accorded an opportunity to be heard despite him making the talks unfruitful. [ See article 50 of the *Constitution* and the Court of Appeal decision in the case of *CMC Holdings Ltd v James Mumo Nzioki* Civil Appeal No. 329 of 2001 [2004] eKLR. In the same breadth, nothing was mentioned in regards to the documents filed by the parties and /or how the same were to be dealt with in the admission as evidence in the case.
31. The Court of Appeal in the case of *Kenneth Nyaga Mwige v Austin Kiguta and 2 others* [2015] eKLR had this to say on production of documents.

The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the documents are filed, the documents though on the court file does not become part of the judicial record.

Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document.

Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the reference and veracity of the contents. This is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the documents when called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone, but would take into consideration all facts and evidence on record.



32. The Court of Appeal further stated: -

Once a document has been marked for identification it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once the foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit; it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an authenticated account.

33. In the case of *Des Raj Sharma v Reginan* [1953] EACA 210, the court held that there is a distinction between exhibits and articles marked for identification and that the term exhibit should be confined to articles which have been formally proved and admitted in evidence.

34. Order 18 of the [Civil Procedure Rules](#) is clear on how a hearing should proceed and how evidence should be recorded and produced. In this case, parties and the court substantially deviated from the laid down procedure. This court is alive to the provisions of Order 11 and in particular Rule (7) which gives the court the discretion to order admission of statements without calling the makers as witnesses where, appropriate.

35. But the same notwithstanding, the discretion given to the court in Order 11 Rule (7) is not absolute but only limited and that explains the use of the words “where appropriate”. That discretion cannot be taken to override the provisions of Order 18 on the recording and production of evidence.

36. It is my considered view that, such substantial deviation from a well laid down procedure is not acceptable. [ See the case of [James Njoro Kibutiri v Eliud Njau Kibutiri](#) 1 KAR 60 [1983] KLR 62; [1975-1985] EA 220; *Lehmann's (East Africa) Limited v R Lehmann & Co. Limited* [1973] EA 167]. In fact, the notes recorded by the hon.Kadhi are so confusing considering that our legal system is adversarial. It is totally difficult to comprehend or even follow what the honourable kadhi was doing.

37. The proceedings are so conflouted, mixed and lacks flow of events in a sequential order. Witnesses were not formally called, sworn or affirmed and then cross examined. Why the court avoided taking witnesses evidence and subject them to cross examination is not clear. Ideally, there was no trial conducted in accordance with the laid down rules of procedure. I personally was unable to follow the proceedings. In the absence of a proper trial being conducted, the appellant and even the respondent were not accorded a fair trial or hearing which is an absolute right as envisaged under Articles 25 and 50 of the [Constitution](#). The Hon. Kadhi need to undergo some training if not mentorship to help him on how to record court proceedings

38. In view of the foregoing, and considering that the correct procedure of recording and production of evidence was not proper, it is my view that the Kadhi fell into error and the whole trial was rendered a nullity. Of importance to note, is the fact that this matter inter alia involves the best interest of the minors and as such, their wellbeing must be upheld at all times. [ See article 50 of the [Constitution](#)].

39. Having held as above, I need not belabor in determining the rest of the issues on merit as it will be prejudicial to the likely outcome after a retrial before another Kadhi other than Muhiyidin Sambul. Accordingly, the appeal herein succeeds and the judgment of Hon. Kadhi Muhiyidin Sambul delivered on 13-07-2023 and its consequential orders is set aside.

40. As a consequence of the above, the court makes orders as follows:

- i. The appeal herein succeeds and the impugned judgment set aside.



- ii. The matter is hereby remitted to the trial court for hearing and determination before a kadhi other than Muhiyidin Sambul.
- iii. The appellant is hereby ordered in the intervening period pending the hearing and determination of the suit to continue providing medical care, school fees and school related expenses to the minors.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 6<sup>TH</sup> DAY OF NOVEMBER 2024.**

**J. N. ONYIEGO**

**JUDGE**

