



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CIVIL APPEAL NO. 1 OF 2018**

**A S H.....APPELLANT**

**VERSUS**

**B A F.....RESPONDENT**

**JUDGEMENT**

1. This is an appeal from the decision of the Wajir Kadhi's Court in Civil Case No. 143 of 2017. In a judgement delivered on 1<sup>st</sup> December 2017, the Honourable Kadhi concluded as follows-

**“That the marriage of the parties or couple is being dissolved by this Honourable Kadhi's Court of Wajir Law Courts with immediate effect due to the plaintiff's dislike this marriage and disobedient to her husband through exchange of dowry for divorce known Islamically (Khul) according to Chapter 2 verse 229 in the Holy Quran.**

**That the custody of the child is being granted for the plaintiff (mother) herein according to Chapter 31 verses 14 of and Chapter 46 verses 15 in the Holy Quran.**

**That the defendant is directed to pay Kshs.3000/= per month for the child maintenance with effect from November 2017 according to Chapter 65 verses 7 in the Holy Quran.**

**That a divorce certificate can be issued for the parties after 30 days from this date. When the plaintiff eddah period will end. That, the costs of the suit is being dismissed by this Honourable Court.”**

2. Following the above decision of the trial court, the appellant has come to this court on appeal on the following grounds-

**(1) That the learned magistrate erred in law and in fact and in the spirit of fairness denied the appellant the opportunity to bring his elders to support his claims.**

**(2) That the learned magistrate showed open bias and discrimination against the appellant, due to appellant's previous record.**

**(3) That the learned magistrate did not conduct the court in a manner that is likely to suggest that it is a court of justice.**

**(4) That learned magistrate failed to appreciate the facts presented to him by the appellant and totally disregarded his grievances.**

**(5) That the learned magistrate failed to consider the appellant's means before delivery of judgement.**

**(6) That learned magistrate erred in coming to conclusion he did and in giving judgement contrary to the weight of evidence tendered in court.**

3. At the hearing of the appeal, this court sat with Kadhi M.S. Hassan as an Assessor.

4. The appellant in his submissions stated that the respondent who was his wife sought divorce from the Kadhi's Court and he defended himself by saying there was no problem in the family. However, because a previous wife had left him and another had died, the Kadhi made the decision against him. He said that he was seeking for justice from this court.

5. The respondent said that she went to the Kadhi's Court for divorce after talks had failed between him and the appellant. She stated that the

appellant used to abuse her a lot and she had at a certain time relocated to her father's family but she was taken back because she was a cousin of the appellant. She said that she proposed to the appellant to get another wife. She also stated that for 8 years they did not have children and were not settled. According to her, that was the reason why the Kadhi made a decision to dissolve the matter.

6. In response, the appellant stated that he did not abuse her. With regard to children, the appellant said that they had one child but that the problem was with the respondent who was not getting her regular monthly circle.

7. The Kadhi who sat as an Assessor at the hearing of the appeal did not give me his opinion. I have however perused the record and the judgment.

8. It appears to me that the main complaint of the respondent before the Kadhi was that she was not having more children with the appellant. Because of her above complaint, the appellant responded rudely and the respondent felt that the marriage should be dissolved.

9. The question is whether the lack of children in a marriage is a ground for divorce? From the judgment of the Honourable Kadhi there is no reference to a paragraph in the Quran that if a husband and wife do not get children, then that is a ground for divorce or dissolution of a marriage. The rudeness of the appellant in my view as expressed by the respondent in her evidence in the lower court was mild and did not establish that the appellant was cruel to the respondent. Parties in marriages sometimes engage in harsh talks, but in my view, that cannot be a sufficient ground for divorce unless it is so persistent that it amounts to cruelty.

10. From the evidence on record, I do not find that the marriage of the appellant and respondent herein had broken down irretrievably. On that account, I allow the appeal and set aside the decision of the Kadhi's Court at Wajir. I will clarify here that as parties live together, there could arise reasons to seek for relief from court on the marriage at any stage. However, from the evidence on record, I find that the decision of the Kadhi's Court to dissolve this marriage was not justified.

11. The appeal is allowed and the entire decision of the Kadhi is set aside.

12. Parties will bear their respective costs of the appeal. Right of appeal explained.

**Dated and delivered at Garissa this 21<sup>st</sup> Day of November 2018.**

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**George Dulu**

**JUDGE**