



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 5359 of 1990

FARHANA D/O ZAFARULLAH KAHN AND ANOTHER..... PLAINTIFF

VERSUS

MOHAMMED SHAFIQ QURESHI..... DEFENDANT

JUDGEMENT

The first plaintiff is a daughter of the second plaintiff. The first plaintiff was married to the defendant on 16.8.87 under Mohamedan Law after which they established a matrimonial home in Kisumu, Haq Mehr of shs.10,000 was agreed and was payable to the first plaintiff. It is the first plaintiff's case that on the night of 3.10.88, defendant beat her and abused her throughout the night and that on the following morning she was chased away from the matrimonial home and sent to her father in Nairobi. She states that defendant bought her bus ticket and put her on a bus to

Nairobi and that she carried a few things in a paper bag leaving all furniture, clothes and jewellery behind. She received a Divorce Certificate on 19.7.89. The plaintiff claims from the defendant Shs.7, 200 being the Maintenance for one year from 4.10.88 until 18.10.89. She also claims the return of her goods specified in paragraph 9 of the plaint or their value of shs.195,750/-.

The second plaintiff states that in consideration of the defendant agreeing to marry his daughter, he in accordance with the customs incurred expenses to finance the engagement and marriage ceremonies and in paying gifts to various people. The expenses are itemized in paragraph 10 A-D of the plaint. Para A are the expenses incurred on the engagement day in the sum of sh 30,000/-. Para B are the expenses of shs 81,500 incurred on the wedding day. Para C are gifts to different relatives valued at shs 66,400/- Para D are the gifts to the defendant worth shs 17,000. The first defendant's total claim is shs 390,650.

Defendant pleads that he is not liable to pay the maintenance as the first plaintiff deserted the matrimonial home. Alternatively, he avers that the claim is exorbitant.

Regarding the first plaintiff's goods, the first defendant pleads that the first plaintiff left some goods in three cartons which he has not opened. About the jewellery, he pleads that the first plaintiff never handed them over to him or to his parents. In his evidence he denied that the jewellery was left in the house and stated that although he had a safe, it only contained a passport and other personal items listed in paragraph 9 of the plaint. He admits that the following things are in the house:

one double quilt

2 pillows

4 pair of sandals

4 handbags

2 small suits cases-not letter

1 prayer mat

1 double bed with mattress

1 dress table

1 stool

1 cupboard

3. used clothes in the cupboards He testified that he is ready and willing to return those items.

Defendant pleads a set off of shs.270,000 against the second plaintiff's claim being the amount he expended on gifts. He has a counter claim of Shs. 50,980 against the second plaintiff being the money he lent to the second plaintiff.

There is no dispute that maintenance is payable for divorced women under Muslim law. Paragraph 241 of the Holy Koran decrees so. That claim is resisted on the ground that she left the matrimonial home voluntarily and failed to return to the matrimonial home. Defendant testified that she left Kisumu under the pretext that he was traveling to Nairobi to consult her doctor and to attend a relative's wedding.

It is admitted by the defendant that the marriage was a happy one for one or two months and thereafter problems arose in the marriage. It appears from the defendant's evidence that the first plaintiff was not satisfied with the communal living the couple living with the defendant's parents in one house. One month after the marriage, she refused to be sitting with defendant's family during meals. Her position according to the evidence is that she wanted to do her things with her husband only. By 4.10.88 when he left the first plaintiff's relationship with her husband had deteriorated. First plaintiff states that he was beaten and abused on the night of 3.10.88 at the instigation of defendant's mother for refusing to attend a dinner at somebody's house where she was not invited and thrown out of the house on the following morning. This is denied by the defendant. She states that after she left defendant did not contact her for reconciliation and her telephone calls to Kisumu were not answered. Defendant admits that his parents did not make any attempts to contact his wife's parents for reconciliation. It is the defendant who applied for divorce. It is incredible that if she had left peacefully she would have refused to go back. If she was wanted, the marriage having been arranged, it is unlikely that defendant's parents could have failed to contact her parents. Further, it is unlikely that defendant would have applied for divorce considering that problems started in the marriage hardly two months after the marriage. I find the evidence of the first plaintiff credible that she was in fact thrown out of the matrimonial home. Even if she left peacefully with an intention of terminating the marriage, there were good reasons to do so in that the marriage had not succeeded. I am satisfied that she is entitled to maintenance. The first defendant runs a partnership business with his father in Kisumu. They have Firestone Dealership with Firestone for the whole of Nyanza Province. Defendant estimated the annual turnover as between Shs 18-20 million. The Shs.6000 per month claimed as maintenance is quite reasonable. I would therefore allow her claim for maintenance of Shs. 72,000 for 12 months.

As for the claim for the return of her goods, the letter of demand for the return of the goods is dated 1.9.89. A list of goods was demanded by defendant's lawyer and supplied by plaintiff's lawyers dated 18.10.89. The defendant's lawyers by a letter dated 5.29.8.90 denied that first plaintiff left the items claimed. Defendant's lawyers however admitted that furniture consisting of one double bed, dressing table

with stool and a cupboard were left by the plaintiff. They did not call on the first plaintiff to collect the goods. Instead they made a counterclaim of Shs 270,000 and intimated that if the claim of Shs.270, 000 was not settled, they would sell the furniture and claim the balance as a civil debt. It is now clear that the counter-claim of Shs 270,000 is made against the second defendant and not against the first defendant.

There is no dispute that under Muslim law the marriage gifts a man gives to his prospective wife belongs to her and that gifts acquired by the wife before the marriage or after the marriage belongs to her. The defendant case is that other than for the items admitted, the others were carried away by the plaintiff. I have found the evidence of the first plaintiff that she was thrown out of the matrimonial home credible in the circumstances of the marriage. Plaintiff states that she was put in a bus to Nairobi by the defendant and that she carried a few clothes in a paper bag. Defendant states in his evidence in cross-examination that first plaintiff carried a big suit case and a small bag. First plaintiff states that all the goods she is claiming were bought for her by her father except the jewellery which was bought by defendant's mother and given to her as a gift. It is her case that defendant asked for the jewellery and kept the jewellery in his safe. Defendant admits that in Asian Community the bride's jewellery is the most valuable item which must be safe guarded. But he explains that although he has a safe in the bedroom, first plaintiff chose to be keeping her jewellery in the cupboard. Defendant does not plead in his Amended defense that first plaintiff carried away the goods she is claiming or that the goods were not in the house. I note further that defendant denied in his evidence that the jewellery is in the house. However, he does not say in his entire evidence that the first plaintiff took with her the goods claimed or that she did not have them. I note also that the defendant's letter dated 29.8.90 in reply to the demand letter defendant's advocates stated that first plaintiff carried away ornaments belonging to the defendant. However defendant did not say in his evidence that first plaintiff carried any of her ornaments.

Although defendant does not say that first plaintiff carried some of the goods she had claimed, it is unlikely that she could have carried any goods with her on 4.10.88. If she was thrown out of the house as I have found, there was no time to pack her goods. If alternatively she left for a journey to Nairobi with defendant's permission without any indication that she was not going back, she could not have carried goods which would have aroused defendant's suspicion that she was leaving for good more so when defendant had to escort her to the bus stage. The mode of transport (by bus) would not have been suitable for transportation of expensive goods or a heavy load.

In the circumstances of this case I believe the evidence that first plaintiff left all the goods she has claimed in the matrimonial home.

Defendant says that he is ready and willing to return the goods he has admitted as I observe earlier he did not offer to return them in the reply to the letter of demand. His reply to the letter of demand shows that he was keeping the first plaintiff's goods as a set-off to his claim against his claim against the second plaintiff. It is now over eight years since the goods were left with the defendant. Some of the goods like clothes etc must have been damaged by prolonged disuse. It is only just that defendant refunds their value. It is true that the value put to each item is an estimate. Defendant states that the values shown are exaggerated. He did not recommend the reasonable values of the items claimed.

The only valuable item is the jewellery which is shown to be worth 104,000. Plaintiff supplied particulars of the jewellery on 8.3.91 on request by the defendant. The value of each piece of jewellery shown in the particulars was not disputed during the hearing. The rest of items are ordinary personal household goods with modest values attached to each. I accept the values shown against each item in the plaint as reasonable and find that the value of the items claimed is Shs.195,750

As regards the second plaintiff claim and the defendant's counter-claim against the second plaintiff what is claimed by each party in fact expenses incurred to stage the marriage. Mr. Kah for the defendant submits the gift given by parents of the spouses during marriage are not recoverable as they are absolute gifts given freely. It is also his submission that lavishing gifts are not necessary for the celebration of a Muslim marriage.

On the other hand, Mr, Malik for the plaintiffs submitted that claim is tied to the marriage and since

Muslims marriage is a contract all the expenses incurred by the second plaintiff was in consideration of the defendant agreeing to marry the first plaintiff. He submits that the natural assumption in Muslim Marriages is that the marriage will last and since defendant unilaterally terminated the marriage, he is liable to reimburse the wasted expenditure.

Muslims marriage like the English marriage is a contract but it is a special contract involving, as it does, strong interpersonal relationship between the bride and the bridegroom. It is not an economic transaction. In this case, a marriage did in fact take place between second plaintiff's daughter and the defendant which lasted almost 2 years. Although ideally the marriage should last until death of either spouse, it is not always the case. That is why the Holy Quran in particular allows divorce. The marriage between first plaintiff and the defendant could potentially be dissolved and was indeed dissolved on 19.7.89. To say that the defendant breached the contract of marriage unilaterally is to deny the defendant a holy right to dissolve the marriage. To claim reimbursement of the expenses incurred in the staging of a marriage which eventually fails is to attach an economic element to the contract of marriage and in my view contrary to public policy. To allow the claim is tantamount to giving parents of spouses a right of monetary investment in the marriage of their children. If such claims are to be allowed, spouses in broken marriages may waive their right to divorce to avoid paying such compensation.

I note that neither the second plaintiff's claim nor the defendant's counter-claim is based on Quaranic verses. I find that neither of them has any foundation in Mohamedan law or in common law and are indeed against public policy. Defendant's counsel submits that if second defendant's claim is disallowed, the defendant abandons his counter claim against the second plaintiff.

The second plaintiff's claim should be dismissed. Similarly the defendant counterclaim should be dismissed. Neither should pay the other costs.

For the above reasons I allow the first plaintiff's claim and enter judgment for the first plaintiff against the defendant for a total of shs 267,750 (Shs 72,000/- + Shs 195,750) plus costs and interest. I dismiss the second plaintiff's claim with no orders as to cost. I also dismiss the defendant's counter claim with no order as to costs.

E.M GITHINJI

JUDGE

28.5.97