



REPUBLIC OF KENYA



KENYA LAW
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**RNM alias M v MSR (Divorce Cause KCDC/E008 of 2024)
[2025] KEKC 3 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEKC 3 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT NAKURU
DIVORCE CAUSE KCDC/E008 OF 2024
IN NYABOGA, SRK
JANUARY 30, 2025**

BETWEEN

RNM ALIAS M PETITIONER

AND

MSR RESPONDENT

JUDGMENT

1. The petitioner seeks against the respondent from this honorable Court for inter alia orders:
 - a. That the marriage solemnized on 27th August 2018 between the petitioner and the respondent be dissolved.
 - b. That the respondent to continue providing for the minor and taking care of the minor's educational needs.
2. The grounds for the petitioner's petition are that:
 - a. The respondent has lost respect for the petitioner as a marital partner.
 - b. The respondent as exhibited and shown lack of care and/or concern for the marriage and abandoned his duties as a spouse to the petitioner.
 - c. That by reason of the respondent's conduct, the petitioner suffered emotional liability, mental distress, being ridiculed and suffered shame in the eyes of the family and friends and that the marriage between the petitioner and the respondent has therefore broken down irretrievably.
 - d. The respondent is no longer concerned with the petitioner's needs as he got married to another person.
 - e. The respondent has failed to provide the fundamental marital right/conjugal right to the petitioner.



3. The respondent, a resident of Rochester-New York in the United States of America filed his response in which he first raised a preliminary objection on grounds that there is an active matter, Nakuru Kadhi Divorce No. E007 OF 2023 filed by the petitioner touching on the same issues thus rendering this suit res judicata.
4. The respondent sought that the matter be struck out and that he be awarded the costs.
5. The respondent further contended that all allegations brought forward by the petitioner stating that the petition is full of falsehood with determination of seeking sympathy from the kadhi.
6. He went on to state in his response that the petitioner is arrogant, rude and completely uncontrollable and that he has faced a lot of humiliation in the hands of the petitioner.
7. The respondent also alleged in his response that he is in utmost shock that the petitioner has denounced Islam by adopting her former Christian names thus in worry whether his child will be raised in proper Muslim culture and he fears that his child might not be raised properly and demands that he be given access of the child without any restrictions.
8. He further states that the petitioner always uses vulgar language towards the respondent whenever the respondent calls in order to speak to his daughter, H.R.
9. The respondent states that he is a person of good moral and true follower of S.A.W peace be upon him and therefore practices what the Quran teaches.
10. The respondent states further that the petitioner has accused him of several marriages filing divorce cases making him legally allowed to seek another marriage.
11. He went on stating that he wants to state categorically that there is no crime or sin he has done against Allah and neither has he broken any sharia according to Islam since he is allowed to marry up to four wives.
12. The respondent states that he insists that once the divorce/talak is allowed, both the mother and father shall have shared custody and the child be allowed to visit him in the USA and he shall provide for all travelling logistics in order for him to bond with his daughter.
13. The respondent went on stating in his response that he has been providing for the child without fail and demands that the petitioner should respect that and award him access and shared custody any time he wants to meet the child.
14. The respondent sought from the Honorable Court that:
 - a. The respondent should be involved in any decision made by the petitioner upon the child.
 - b. If and when the petitioner travels far or out of the Kenya, the custody of the minor shall be with the respondent.
 - c. After the child joins school, the respondent shall spend school holidays with him to enable her bond with other siblings in USA.
 - d. Inshallah when the daughter joins college, she should study in America.
 - e. The last but not least, inshallah when the respondent returns to Allah, all his responsibility shall be carried out by brothers to the respondent in case she is not married.



Brief Background:

15. The petitioner and the respondent, a Kenyan and American nationals respectively celebrated their marriage under Islamic Law in Naivasha within Nakuru County in the Republic of Kenya on 27th August 2021 vide Certificate of Marriage, Entry No.XX/XXX/NAIVASHA, Serial No.00XXXX, issued in Naivasha on 11th September 2021.
16. The petitioner and respondent thereafter cohabited as wife and husband in Naivasha and as a result were blessed with one issue, a baby girl named H.N.R., born on 17th May 2022.
17. The respondent had been spending one month annually with the petitioner and the minor in Kenya then returns to the USA which is his permanent residence and place of work.
18. The petitioner and respondent had been having disputes throughout their marriage and as a result, the petitioner had filed a Divorce Cause before this Honorable Court, which has been referred to above by the respondent, Divorce Cause No. KCDC/E007/2023 in which they reconciled and withdrew the matter from the Court before judgment was delivered in that if anything, the petitioner may reapproach the Court and for that reason, the Court did not pronounce itself in that particular matter nor is the matter active before this Court.

Instance Suit:

19. The petitioner reapproached the Honorable Court through this petition filed on 15th November 2024.
20. The matter came first for mention on 4th December 2024 in which both parties appeared remotely and agreed that the marriage be terminated and as result, the respondent with directions from the Court pronounced divorcing the petitioner before Court and thus the Court was left to decide on issues touching on the child of the marriage which the petitioner insisted that only the Court should deal and handle it as she was not prepared to discuss anything with the respondent.
21. The matter came up for hearing on 10th December 2024 and on her oral submissions, the petitioner delved on the reasons why she sought for the termination of the marriage which question this Court finds that both parties had agreed that the marriage be terminated and thereafter the respondent pronounced divorcing the petitioner before court and thus, the Court will not go in to the details surrounding divorce.
22. The petitioner sought that the respondent should continue providing for the issue of marriage just as he has been doing during the subsistence of their marriage.
23. She further stated that there has been no exact amount the respondent has been providing and thus cannot state exactly how much is to be provided for the maintenance of the minor.
24. In his response, the respondent sought that any decision concerning the minor should involve both the petitioner and the respondent and in case the petitioner will be travelling outside Kenya for a period of more than thirty days, then the minor should be under his care.
25. And in regard to the education of the minor in case it is in Kenya, the respondent sought that the minor to be spending her holidays with him in the USA.
26. The respondent further stated that in case he passes away, his sons would assume his responsibilities towards the minor herein and that he should be respected in all aspects concerning the minor as it is not about only one parent.



27. The respondent finally stated that when the minor reaches junior high school and she decides to study in America, then there should be no problem.
28. During cross examination of the respondent by the petitioner, the respondent withdrew his statement that the petitioner had renounced Islam.
29. Since the only question left for the Court to look at is related to the child of the marriage, it is appropriate for the Court to address the question of jurisdiction as it is very common that the jurisdiction of the Kadhi's Court over children matters as been challenged many a times before the Kadhi's Court itself and before Superior Courts.
30. Jurisdiction is necessary in order for a court to proceed in any matter as held in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989]* eKLR by Nyarangi JA that: "Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."
31. There are several decisions from High Court holding that the Kadhi's Court was not conferred with jurisdiction over matters touching children. The basis for this opinion is the fact that there is no provision in *the Constitution* nor an act of parliament in that regard. They further hold that the Children's Act which established the Children's Court conferred exclusive jurisdiction over children matters to the same Children's Court.
32. In *V.K v S.A [2020]* eKLR, A.O Muchelule J, then held that "Under section 73 of the *Children Act*, Children courts have been constituted under the Act to hear all matters concerning children, including custody and maintenance of children. Such courts are, by a Gazette Notice, appointed by the Chief Justice. There was no evidence that the Kadhi's court that heard and determined this dispute was a children's court, properly so designated."
33. There are also other decisions from the High Court which hold that the Kadhi's Court has jurisdiction over children matters. This opinion is founded on the fact that children's matters are connected and incidental to matters litigated before the Kadhi's Court and further, the Children's Act did not oust the Kadhi's Court from entertaining children matters.
34. An example is in *AYM v HIK (Miscellaneous Case 171 of 2019) [2023] KEHC 27191 (KLR) (Family) (8 December 2023) (Ruling)* in which P. Nyaundi, J held in paragraph 25 (1) that: "The Kadhi Court has jurisdiction to determine a matter that relates custody of Children."
35. In addressing the idea that the Children's Act conferred exclusive jurisdiction solely to the Children's Court, the Court of Appeal in *TSJ v SHSR [2019]* eKLR observed in paragraph 41 that: "There is however no stipulation in that provision that such jurisdiction is exclusive."
36. And before the promulgation of the 2010 Constitution, and before the enactment of the Children's Act which established the Children's Court, i.e., during the Guardianship of Infants Act (repealed) which provided legislations pertaining to children matters then, the Court of Appeal in *N v N [1982]* eKLR had held that: "It is an incorrect statement of the law that the High Court has exclusive jurisdiction under the Guardianship of Infants Act."
37. In the above two decisions, the Court of Appeal held that non statutory bodies like the Shia Imami Ismaili Arbitration Board/Council have jurisdiction over family disputes including custody of children.



38. If a non-statutory entity has jurisdiction to entertain children matters, it is my persuasion that the Kadhi's Court which is an establishment of the Constitution ought to have jurisdiction to entertain the same in the first place.
39. From the above, this Court is bound by the position taken by the Court of Appeal that children's matters are not exclusive to the Children's Court.

Determination:

40. There is no dispute that the parties herein implicitly agree that actual custody and care of the minor should remain with the petitioner and furthermore, the respondent has not at all raised any concern negatively affecting the rights of the minor in being under the care of the petitioner and which the Court finds is consistent with an authentic authority from the Prophet (P.B.U.H.) in which a woman came to him and said: "O Messenger of Allah, my womb was a vessel for this son of mine, my breasts were a water-skin for him, and my lap was a shelter for him. His father divorced me and wanted to take him away from me." The Messenger of Allah, (P.B.U.H.) said to her, "You have more right to him (minor) as long as you do not remarry." Sunan Abi Daawud, 2276.
41. The above authority is in regard to a society where men are the providers of their families thus making them most of the time to be away from homes in search for provision and that most probably or most of the time makes the best interest of minors in regard to actual custody and care to be in mothers who spend most of their times in homes with children.
42. In situations where both men and women go out in search of their provisions or maybe circumstances don't allow women to remain in homes caring for their children, then the only and important issue to consider is the best interest of the minor regardless of the status of the parent.
43. The concept of best interest of the child in Islamic Law is distinguished from other laws in that in various jurisdiction in world even until today , the concept is effected from the time a child is born until attaining majority while in Islamic Law, the concept is effective even before the existence of the child in that for instance, an individual is required first to choose a suitable spouse before marriage who can properly undertake responsibilities as a good parent, making supplication before intercourse and also the prohibition from consuming intoxicants at all times including during pregnancy which may have negative implication on the physical and mental health of a child which all are for the best interest of children.
44. The fact that there is no dispute between the petitioner and the respondent in regard to actual custody as they implicitly agree that the right to care and actual custody be retained by the petitioner, this Court does not agree with them unless convinced that the rights of the minor herein are protected and not violated and this is a question the Court will address later in this judgment.
45. The parties also implicitly agree that maintenance of the minor shall be provided solely by the respondent which is also an undisputed concept in Islam that the duty to provide the needs of a family is upon the father in the first instance.
46. The Qur'aan stipulates stating: "... And it's the duty of fathers to give mothers their provision and clothing fairly." 2: 233.
47. This verse is in regard to mothers who have been divorced by their husband who are also the fathers of their children. The fact the provision and clothing of mothers is a duty upon the fathers of the children, then the provision of the children is a duty upon the fathers in the first place.



48. And in an authentic authority, it is narrated that Hindu the wife of Abu Sufyaan came to the Messenger of Allah and said: “Oh Messenger of Allah, verily Abu Sufyaan is a stingy person, he does not provide for me and my son what is sufficient except what I take from him without his knowledge. Do I sin in doing that?” The messenger of Allah (P.B.U.H.) responded: “take fairly, reasonably from him what is sufficient for you and your son.” Musnadu ddaarimy, 2281.
49. The petitioner and the respondent could not agree on how much the respondent will be providing because during the subsistence of the marriage, there was no exact amount which the respondent used to give as it ranged between US dollars 250 to 500 per month.
50. The respondent averred that he cannot state exactly how much he will be providing but he committed himself that he will be providing what he will be capable of.
51. That Qur’aan states: “Let the man of means spend according to his means and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him. After a difficulty, Allah will soon grant relief.” 65:7.
52. The idea that provision of the family is a duty upon the father does not mean that the mother/wife is prohibited from providing for her children. In fact, it is something which is recommended even when the father is capable of providing and especially during times of economic difficulties.
53. The issue which the respondent is more concerned about is his right of access to his daughter who is in the custody of her mother as he claims that the petitioner has been a barrier to him whenever he wants to speak to the daughter.
54. The petitioner did not dispute that claim but instead, she gave the reason behind that has being that the respondent uses indecent language against her when he calls her in order to speak to his daughter.
55. Has mention above that this Court did not agree with the parties herein in regard to custody of the minor being retained by the petitioner unless the Court is convinced that the minor’s rights are protected and not violated. The Court’s attention has been drawn to the conduct of the petitioner in denying the respondent access to his daughter which apart from violating the father’s right to her child, she also violated the minor’s right to get in contact with the father.
56. *The Constitution* in outlining the rights of every child state in Article 53 (1) (e) the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not;
57. The fact that the petitioner and respondent are having disputes between themselves does not justify violating the rights of the child by a party barring another from performing a responsibility towards a child. The conduct of a parent toward another is not important and does not extinguish parental rights to a child unless proven that the parent does not act in the best interest of a child.
58. Article 9 of the Convention on the Rights of a Child stipulates inter alia that:
 - “(3). States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.”
59. In MAK v RMAA & 4 others (Petition 2 (E003) of 2022), the Supreme Court of Kenya in paragraph 84 observed stating that: “It is a known fact that the society in which children grow up shapes who they are. Having both a mother and father involved in a child’s life can provide significant social, psychological, and health benefits. In addition, the stability of having a relationship with both



parents can provide security and greater opportunities for children to find their own paths to success. Accordingly, even if circumstances may warrant limited access to a parent, a court should order supervised access....”

60. I do find the conduct of the petitioner in denying the respondent opportunity to communicate with the child of marriage for reasons that the respondent abuses her through phone using indecent language is a violation of not only the right the child but the respondent’s too.
61. The respondent also sought that in case the petitioner will travel out of Kenya for a period exceeding one month, custody of the minor should be granted to the respondent but the petitioner stated that she will not be leaving the country. He further sought that in case the minor will go to school in Kenya, then she should spend her holidays with the respondent in America as he will be facilitating for everything for the minor including travelling logistics.
62. The respondent and petitioner have a responsibility to participate in everything concerning the child of marriage for the best interest of their child and no one should restrict another from performing his/her duty towards the child.
63. The child has not started school as she is still at tender age but after she is enrolled in school, the petitioner and respondent may discuss about her spending holidays in the US once annually or make an application before Court for consideration.
64. From the above, this Court makes the following orders:
 - a. That the petitioner be and is hereby divorced from the respondent.
 - b. That the petitioner and respondent be and are hereby granted joint legal custody of the minor.
 - c. That the petitioner be and is hereby granted actual/physical custody of the minor.
 - d. That the respondent be and is hereby granted unrestricted access to the minor.
 - e. That the respondent to provide a monthly US dollar not less than 300 towards maintenance of the minor.
 - f. That the respondent to cater for minor’s medical expenses when needed.
 - g. That the respondent to cater for educational needs of the minor.
 - h. That no order as to costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 30TH JANUARY 2025

IDRIS N. NYABOGA

In the presence of:

Court assistant

Petitioner

Respondent

