



AMS v IS (Divorce Cause E367 of 2025) [2025] KEKC 5 (KLR) (6 February 2025) (Judgment)

Neutral citation: [2025] KEKC 5 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOMBASA
DIVORCE CAUSE E367 OF 2025
AH ATHMAN, CK
FEBRUARY 6, 2025**

BETWEEN

AMS PETITIONER

AND

IS RESPONDENT

JUDGMENT

1. This is a case of one of the vulnerabilities of secret marriages. The practice is rampant in Kenya where some men marry a second wife in ‘secret’ but offer them none or little of their marital rights. A (29) year old single mother previously divorced with a child from her first marriage, desirous to enjoy legal and halal conjugal rights, goes out of her way to accept the marriage to be conducted in ‘secret’, relinquished her right to accommodation and provided for the family only for the husband to leave her to live with his mother with no maintenance when he left to work out of the country. While the husband was out of the country and the wife facing mounting psychological turmoil, he stopped communicating with her and offered no help.
2. This is not a case of misyar marriage where the husband does not stay continuously in one place with his wife but visits regularly at his discretion. It is a valid marriage that fulfilled all its legal requirements, but was contracted in the presence of the barest minimum of witnesses and not declared to the entire public. The wife did not relinquish her martial rights.
3. The petitioner prays for dissolution of marriage and edda maintenance.
4. The petitioner claimed the respondent neglected his marital responsibilities of provision for the family, that he left her to live with his mother who mistreated her and her child causing her mental distress. She deposed that the respondent travelled to Qatar and has failed to protect and assist her.
5. The defendant was served with the plaint summons to appear and reply. He failed to enter appearance or file defence. He was further served with a hearing notice with the court link to enable him appear virtually. He also failed to appear either physically or virtually for the formal proof hearing. The matter



proceeded ex parte to formal proof hearing under rule 68(1) (b) of the Kadhi's Court (procedure & practice) rules_2020.

6. The parties were married under Islamic law at Mombasa on 23rd January, 2022. The respondent has another wife, a first wife. The petitioner was a divorcee with a son aged about seven years from another marriage and living with her mother in Tudor. She is a beautician. The respondent did not want his first wife or family to know about his marrying a second wife. He respondent requested the marriage be secret. The petitioner and her family agreed but for only a couple of months. The respondent did not provide a separate house for his second wife but would only visit his wife at her mother's home during the day. The respondent was not employed when they during the early days of the marriage but when he got a job in Qatar, he introduced his wife to and had her live with his mother at Majengo. He then left for Qatar. The respondent's mother and the petitioner, his wife did not gel. The petitioner asked him to intervene, he did not and stopped talking to her. She returned to live with her mother.
7. The issues for determination in this matter are whether or not the petitioner is entitled to dissolution of marriage.
8. When duly served and elect not to participate, the wheels of justice have to continue rolling. The claimant has an equal duty to be heard. She must however discharge the burden of proof at trial even in the absence of the respondent. In the case of *Karuru Munyororo V Joseph Ndumia Murage & another (Nyeri) HCCA No 95 of 1988, Makhandia J, held:*

‘The plaintiff proved on the balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and their counsel to cross examine her on the evidence, the plaintiff's evidence remains unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to accept.’
9. The petitioner reiterated her pleadings under oath. The petitioner informed court that being a single mother she reluctantly agreed for her marriage to be ‘secret’ and provided everything for them. The respondent did not provide food or accommodation and would visit her at her mother's only during the day. She would even give him money to give her mother to make him appear good to her. He kept the marriage a secret more than the agreed period. She still accepted to live with his mother when he travelled for work in Qatar. Her mother mistreated, abused and beat her son. She stated that the complaints to the respondents of her mother's behavior bore no fruit and he stopped communicating with her. During their entire marriage, he only sent food stuffs to her once. She could not bear the mistreatments and fearing for her mental health, she left his mother's house and went back with his son to live with her mother. The lack of communication and provision has persisted during all this time.
10. Marriages celebrated under Islamic law are dissolved under Islamic law under Section 71 the [Marriage Act](#) No. 4 of 2014 which provides:

‘The dissolution of marriage celebrated under part VII shall be governed by Muslim law.’
11. Divorce though legal is eschewed and ought to be used as a last resort where the marriage negates its envisioned objectives. Article 85 of the Islamic charter on Family states:

‘... if the woman is oppressed and the life between them is impossible, then the husband should divorce her out of consideration for her rights. If he does not, then it is the judge's responsibility to alleviate her of the said oppression because he has the authority to prevent oppression pursuant to the Shari'ah law.’



12. . Section 359 of the Kadhi's court bench book elucidated the rationale of divorce in Islamic law:
- ‘Despite the revered status of marriage, Islam recognises the necessity for divorce in cases when marital relations become bitter to a degree which makes peaceful home life impossible. Divorce in Islamic law is considered in accordance with the legal maxim of the lesser of the two evils (aqalla al dararain) in that divorce an end to the hatred that may occur between the husband and his wife before it is aggravated to larger extents of harming oneself and creating mischief to society.’
13. Article 87 of the Islamic Charter on Family ICF grants wives the right to divorce where they face harm and mistreatment from their husbands. It is aimed at protecting them from harmful and repugnant practices and customs. It provides:
- "If the wife has been harmed by her husband to an extent that would be impossible for most people similar to them to continue marital relationship under such circumstances, then she shall have right to ask for divorce. If her husband refuses to divorce her, she can raise her case to the judge. If the harm is proven, then the judge shall rule in her favor thereby divorcing her from her husband..."
14. The grounds for dissolution of marriage under Islamic law may be physical and material or emotional and psychological. The material grounds include absence of husband for long periods, imprisonment of husband, lack of or inability to provide maintenance, impotency of husband, husband serious contagious diseases for long period and cruelty of husband. The emotional and psychological grounds include, insulting, accusing her of adultery, speaking her in a profane manner, lack of decent or communication.
15. Husbands in Q.4.19 are commanded by the almighty Allah to treat their wives with love, affection and kindness. Allah says:
- ‘...and live with them honourably...’
16. Every wife, unless she otherwise consents, is entitled to a separate accommodation from her husband. Living in parent's house is the exception rather than the rule. Qur'an in Talak, 65.6 provides:
- ‘Lodge them (the divorced women) where you dwell, according to your means, and do not harm them so as to straiten them (that they be obliged to leave you house). And if they are pregnant then spend on them till they lay down their burden. Then if they give suck to your children for you, give them their due payment, and let each of you accept the advice of the other in a just way. But if you make difficulties for one another, some other woman may give suck for him (the father of the child).’
17. The entitlement to accommodation is so strong that the matrimonial house is regarded as the wife's house even during edda upon divorce. Qur'an in .65.1 provides.
- "O Prophet, when you divorce women, divorce them for [commencement of] their waiting period and keep count of the waiting period and fear Allah your Lord. Do not turn them out of their [husband's] houses, nor should they [themselves] leave [during that period] unless they are committing a clear immorality, and those are the limits set by Allah and whoever transgresses the limits of Allah has certainly wronged himself. You know not perhaps Allah will bring after that a [different] matter.’



18. Although Islamic marriages are potentially limited polygamous, the husband has to be competent to contract such marriage by fulfilling the requirements of ability (both financial, physical and psychological) and equity and fairness between the wives. This aligns with the key objective of tranquillity, affection and mercy in an Islamic marriage enunciated in Qur'an, 30.21. Independent accommodation lets spouses explore full potential of their love and marital responsibilities and gives the marriage highest chances of success.

‘And of His signs is that He has created for you from yourselves mates that you may find tranquility in them; and He placed between you, affection and mercy. Indeed, in that are signs for a people who give thought’. Q.30.21

19. The petitioner successfully proved her case on the balance of probability. Her witnesses supported her claims as pleaded. The petitioner has suffered psychological, financial and marital mistreatment and harm. Rule 5 (2) (d) the Kadhi's Court (practice & procedure) rules_ 2020 'injury is removed' is one of the overriding objectives of the rules. This juristic maxim is a provision of section 20 of the Majalla, the Ottoman Courts manual founded on public policy and the hadith narrated by (May Allah be pleased with him) and reported by Imams Malik, Al Muwatta' vol 2. pp 352), Ahmad, Al Musnad pp 239 hadith No. 6865), Baihaki, Sunanul Kubra vol. 6 pp 257 hadith No. 1909, that the Prophet (may Allah's peace and blessings be upon him) said:

“initiating or reciprocating harm is prohibited (in Islam).

20. The respondent neglected his key marital responsibility of independent accommodation, maintenance and fair treatment. He took advantage of the petitioner's kindness and did not appreciate her needs and challenges. The petition is merited. Consequently, the prayer for divorce is hereby granted. The party's marriage be and is hereby dissolved (minor irrevocable) with effect from 6th February, 2024 corresponding with 7th Shaban, 1446 A.H. Divorce certificate to issue.

No orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON 6TH FEBRUARY, 2025

HON. ABDULHALIM H. ATHMAN

CHIEF KADHI

In the presence of

Mr. Salim Kerrow, Court assistant

