



SM v AA (Divorce Cause E443 of 2024) [2025] KEKC 4 (KLR) (6 February 2025) (Judgment)

Neutral citation: [2025] KEKC 4 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOMBASA
DIVORCE CAUSE E443 OF 2024
AH ATHMAN, CK
FEBRUARY 6, 2025**

BETWEEN

SM PETITIONER

AND

AA RESPONDENT

JUDGMENT

1. Young men and women meet on social media and often lead to marriage. It is a contemporary trend of courtship heretofore not known in Islamic jurisprudence. Some of these marriages may be successful. Most are not and disintegrate often to disastrous. The reasons are many and varied. Key among these are the negative character and behavior of spouses only become apparent upon marriage when it is too late.
2. Another serious challenge of virtual marriages in the modern era, is when, as often happens, the marriage is not consummated. Conjugal rights, one of the fundamental, basic and critical rights of both spouses in marriage, cannot be envisaged let alone satisfied if spouses do not live together and consummate the marriage. It leads spouses to engage in strange, unorthodox sexual methods to try to satisfy their natural sexual needs. This has in many cases, have led to blackmail.
3. A Kenyan young man working in Jeddah, in the Kingdom of Saudi Arabia (KSA), met a thirty-three (33) year old divorced lady beautician and influencer with accounts in Instagram, facebook, tiktok among other social media platforms displaying her talent on beautification techniques. They in-boxed, chatted and the relationship led to marriage. He appointed proxy or attorney (wakil) to marry her on his behalf. The understanding was that he was single, his parents are deceased had no siblings and would process her visa so that she will join him in Jeddah, KSA. Shortly after the marriage and after intimate enjoying video calls and sharing of intimate photos it turned out he was not the man of impeccable character he had claimed to be. He became obsessive, jealous, demanding, neglected his marital responsibilities and spied on her. He blackmailed her, threatening to post her intimate photos and videos online. She found out he was actually married for (13) years with several children, mother



and siblings. The wife does not even know any of his relatives. She does not trust him anymore. She is psychologically disturbed, feels unsafe and is afraid of him. She came to court to seek the dissolution of the marriage.

4. The petitioner claimed the respondent lied to her about his identity, parents and marital status; that he was rude, cruel and threatened to blackmail her by posting her intimate photos on social media.
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 19th March, 2024. The marriage was done through proxy. The respondent was in the Jeddah in the Kingdom of Saudi Arabia while the petitioner and her relatives were in Mombasa in the Republic of Kenya. Being legally married opened the way to enjoy intimate conversations virtually through WhatsApp calls and photos especially of the petitioner. This replaced the normal enjoyment of conjugal rights. They are not blessed with any child from their legal wedlock. The petitioner is a (33) year old lady, the respondent is (48) years old. She was previously divorced and worked as beautician (Kuchora) and selling cosmetics. She had accounts on facebook, Instagram, titktok among other social media accounts where she advertised her work and products. The petitioner met her in one of these accounts, talked with her, proposed and eventually married her. The dowry was for him to facilitate and pay for her to perform the minor pilgrimage in Mecca and then live together in Saudi Arabia. She deposed that the respondent had informed her that he was not currently married, his parents are deceased and had no siblings hence none of his relatives attended their wedding. She deposed further that he was cruel, threatened and blackmailed her and had lied about his identity and relatives. She averred that he was not providing maintenance and had not paid the dowry as agreed. She stated that they have never physically met.
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. She submitted that their marriage done through proxy has not been consummated; that the respondent is a liar, cruel and neglected his marital responsibilities of wife maintenance; that he is a jealous, obsessive person who has threatened to blackmail her by posting her intimate photos online. She contends she is afraid of him and cannot trust him anymore. She is not sure about his identity, work or relatives and would not know where and who to turn to for help if she had gone to him.



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 *Kadbi’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. The key objectives marriage are tranquillity, affection and mercy. Q.30.21 provides:

‘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
17. These can be best realized when spouses actually live together in one house and share the matrimonial bed. It is however allowed due to necessities of work and studies, for spouses to live separately. This



is an exception rather than the rule. It is hoped that within reasonable duration, the spouses would eventually have the normal marital life together. Upon marriage, even through proxy marriage, the husband is obligated to grant his wife all her legal and marital rights including maintenance and fair treatment. The wife on her part is also obligated to grant her husband his rights of respect and obedience within the limits allowed in Islamic law. Sharing of nude and intimate photos and videos is prohibited, a wife should not obey her husband in an illegal act. Narrated Ibn Umar that the messenger of Allah (May Allah's blessings and peace be upon him) said: 'Hearing and obeying is required from every Muslim man – in what he like and what he dislikes – as long as he is ordered with disobedience, then no hearing or obeying is required of him' Tirmidhi (1707).

18. The petitioner successfully proved her case on the balance of probability. The petition was not opposed, evidence not controverted. Her witness supported her claims as pleaded. We find as fact the respondent's cruelty, blackmail, uncouth behavior and lack of maintenance. 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).

19. The petitioner suffered cruelty, mistreatment and psychological abuse. Her marital rights of maintenance, fair and respectful treatment were offended. 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

