



AMA v DYA (Divorce Cause E064 of 2025) [2025] KEKC 17 (KLR) (24 April 2025) (Judgment)

Neutral citation: [2025] KEKC 17 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOMBASA
DIVORCE CAUSE E064 OF 2025
AH ATHMAN, CK
APRIL 24, 2025**

BETWEEN

AMA PETITIONER

AND

DYA RESPONDENT

JUDGMENT

1. A Graduate student in King Imam Muhammad ibn Saud University in Riyadh from the Comoro Islands met a Kenya man working in Saudi. The Kenya had daughters in Malindi Kenya, one of whom, then a young girl was the petitioner. He convinced his daughter to marry the respondent. She gave her consent but the father passed away before the marriage was contracted. The young lady was hesitant to formalize the marriage contract, but her mother pleaded with her to respect her father’s wish. She agreed. In February, 1992, the respondent travelled to Kenya, got married and took his wife to Riyadh – Kingdom of Saudi Arabia, where they lived during his graduate studies. Upon graduation they moved to Kenya where the respondent worked for some Islamic non-governmental organization then moved back to his country the Comoro island. They lived in Mvuoni, Bambao in a very strong and close cultural set-up. The cultural differences and shock coupled with lack of regular visit to her relatives affected her and consequently their marriage. They discussed amicable divorce, the respondent opposed it, then agreed failed to effect it. In April, 2024 she returned to Kenya. She vowed not to return to Comoro Islands. They have been married for thirty-three (33) years and have five children only two of whom are minors.
2. The plaintiff prays for dissolution of marriage even if she has to pay back the dowry. She also prayed for custody of the children.
3. The petitioner deposed she sacrificed a lot for the marriage, persevering living in Comoro islands in new surroundings, peoples and language and culture. She deposed that she felt very home sick and cannot return to the Comoro islands. She deposed further that she communicated her decision and offered to refund the dowry in consideration of divorce but the respondent has been adamant.



4. The parties were married on 21st February, 1992 at Malindi within Kilifi County in the Republic of Kenya. They are blessed with five children aged between (31) and (9) years. One is working in Comoro islands, one is in university also in the Comoro and one is married and resident in France. One, a son, is aged (19) years old completed High School in Comoro islands but is in Kenya studying languages. The last born, a girl aged (9) is in primary school in Comoro islands living with her father and elder sister.
5. The defendant was served with the petition, 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 issues for determination in this matter are whether or not the petitioner is entitled to divorce through Khul' redemption and custody of the minor.
7. While the husband is vested with the original right to divorce under Islamic law in Qur'an 2.229, legal prophetic precedent in Hadith Qays Ibn Shimas and Article 89 of the Islamic Charter on family, the wife also enjoys the same right albeit subject to return the dowry paid.

'...Then if you fear that they would not be able to keep the limits ordained by Allah then there is no sin on either of them if she gives back (the mahr or part o it) for her al- khul'u (divorce). These are the limits ordained by Allah so do not transgress them and whomsoever transgresses the limits ordained by Allah then such are the zalimun (wrongdoers)' Al Baqarah: 229

8. Article 89 of the Islamic Charter on family provide:

'If a woman hates her husband and cannot stand him, even though he hasn't hurt her in any way, that could be considered grounds for divorce and if she can no longer bear to remain with him, then she has a right to request divorce in exchange for giving up any right that would be due to her as a result of the divorce and returning any dowry or gift that he gave her.

9. Bukhari (4990), Al Shaukany, Nail Al Awtar,(6/246) reported on the authority of Ibn Abbas (R.A.) that the wife of Thabit Ibn Qays Ibn Shimas told the prophet (PBUH): 'O prophet, I have no problem with my husband's conduct and piety but I hate to 'apostasy in Islam' (not able to observe the limits of Allah in marriage), the prophet asked her, 'will you return to his farm? (dowry) she said 'yes'; the prophet then told Thabit, 'accept back the farm and divorce her.' it is reported by Bukhari and Al Nasa'iy. In Dar al Qutny's version, the lady said: 'I am ready to return the farm and more', the prophet said: 'return the farm only.'
10. Khul' divorce is allowed on the assumption that it is the wish of the wife to exit the marriage without any mistake or instigation on the part of the husband. It must never be used to deny a married wife her fundamental right to dowry. Al Zuhaily, in 'Islamic jurisprudence and its evidences' at 9/7027 states:

'...Allah said in Q.2.23 'and do not take them back to hurt them...' and said in Q.4.19 and you should not treat them with harshness that you may take away part of the mahr you have given them'. This means, Khul' executed without legal basis is illegal, because it harms the lady, and harm is prohibited by the prophet when said: 'initiating or reciprocating in harm is prohibited'



11. . Ibn Juzy (d.742H), Al Qawanin al Fiqhiyat, pp 352 states:

"... it must be as a result of the woman's choice in her desire to divorce the husband without any coercion or as a result of mistreatment by the husband, if either is lacking, the annulment of the marriage becomes effective through divorce and not Khul'.

12. In the instant case, the petitioner persevered home-sickness, cultural differences and lack of regular visit to her country and relatives in the (33) years of marriage for the sake of children. She contends she also no longer loves him and since she returned in Kenya in April, 2024. The petitioner still loves the respondent. He has not failed in his marital duties. They have brought and educated their children well. He still provides for the school going children. The petitioner is a (55) year old lady. She is very clear she no longer loves the respondent and cannot return to Comoro islands. The court is obliged both by scripture and *the constitution* to treat her intelligence and choice seriously.

13. Marriage is a voluntary union. We appreciate that it is difficult and may even be counterproductive to compel two individuals to live together. In its recognition of this fact, Islamic law provided a wife married under Islamic law the right to terminate the marriage through the Khul'u instrument under Qur'an 2.229, prophet Muhammad's [may peace and blessings be upon him] ruling in the celebrated case of wife of Thabit Ibn Qays ibn Shimas (Bukhari: 4990, Al Shaukany, Nail Al Awatar, 6/246) and article 89 of the Islamic Charter on Family. It is a legal recourse available for the petitioner. There is no evidence the petitioner's choice for Khul' is made out of malice or ill will. She is entitled to exercise her choice. Accordingly, the petitioner's prayer for Khul' redemption is granted. The parties' marriage be is hereby annulled through khul' with effect from 24th April, 2025 corresponding with 25th Shawwal, 1446 A.H. Divorce certificate to issue. It is noted that the dowry of KES 50,000.00 had been paid fully. The petitioner to settle and file proof of the same with court.

14. On the issue of custody, the (19) year old is adult but needs support to complete her education. He has locus standi to choose with whom to live with. I observe the parents are currently co-operating regarding the child's education. They are directed to continue co-operating. The minor has been living with in the Comoro islands where she is yet to complete her primary education. It is in her best interest that she completes her primary education in Comoro islands. Upon completion of her education, she would have reached age of discernment and able to choose with whom to live with. The petitioner, in arrangement and consultation with the respondent, to have regular access of the minor.

15. Each party to bear its own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA ON 24TH APRIL, 2025

HON. ABDULHALIM H. ATHMAN

CHIEF KADHI

In the presence of

Mr. Salim Kerrow, Court assistant

Petitioner

