



**HRS v AFNA (Divorce Cause E424 of 2024) [2025] KEKC 16 (KLR) (17 April 2025) (Judgment)**

Neutral citation: [2025] KEKC 16 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT MOMBASA**

**DIVORCE CAUSE E424 OF 2024**

**AH ATHMAN, CK**

**APRIL 17, 2025**

**BETWEEN**

**HRS ..... PETITIONER**

**AND**

**AFNA ..... RESPONDENT**

**JUDGMENT**

1. Is a condition by a wife that her husband should not marry another wife valid under Islamic law of marriage? Does the husband marrying another wife upon such agreement vitiate the Islamic marriage contract? Should a marriage contracted under Islamic law be annulled if the wife is unable to live with his polygamous husband?
2. The parties married under Islamic law on 26<sup>th</sup> December, 2010. Their matrimonial home is in Lamu where the respondent works for gain with the County Government of Lamu as an administrator. The respondent has relatives in Mombasa. The respondent married the petitioner, then another wife, divorced her and then married another wife who also happened to be petitioner’s close friend. He kept it secret. The petitioner, on finding out left, the matrimonial home and moved to the respondent family’s home in Kisauni, Mombasa. The petitioner had previously filed a divorce matter in 2019 (KCDC E008/2019) but withdrew it allegedly on condition that the respondent will not marry another wife. The respondent currently has two wives. The parties have been living separately for one and a half (1 ½) year. They are blessed with three children, two sons and one daughter, aged 9, 11 and 13 years old. Commendably, the respondent continues to support his family.
3. The petitioner deposed that the respondent is disrespectful to her, is not faithful, has extra-marital affairs. She deposed that he has caused her emotional and psychological pain and there is communication breakdown between them. She deposed further that she has lost her trust and love and affection to him and the marriage has irretrievably broken down. She also claimed for edda and children maintenance.



4. The respondent through his defense denies all the claims. He averred that the petitioner moved out of the matrimonial home after she found out that he had married another wife. He contends the petition is predicated on jealous for his marrying another wife and mala fides and that she is estopped under Islamic law from conditioning the respondent from entering a lawful marriage. He averred further that the marriage has not irretrievably broken down, that the parties are faced with normal marital challenges that do not warrant dissolution of marriage.
5. The parties were referred to Sheikh Badru Khamis Imam of Masjid Kilifi for reconciliation under Q.4.35 and 128 and Article 159 (2) (c) of *the Constitution* of Kenya (2010). Reconciliation talks failed. Qur'an.4.35 provides:

‘and if you fear breach between them twain (the man and the wife) appoint an arbiter from his folk and her folk, if they desire amendment Allah will make them of one mind. Lo! Allah is ever Knower, Aware.’ Nisa: 4: 35
6. Article 159 (2) (c) of *the Constitution* of Kenya (2010) provides:

‘Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional resolution mechanisms shall be promoted subject to clause (3).’
7. The petitioner reiterated her pleadings at trial. She stated that there was an oral agreement between them that he would not marry another wife. It was the reason she withdrew the first divorce case. She contends she no longer has feelings for the respondent as a husband and no longer loves him. She admitted the respondent is entitled to marry another wife but that despite her trying to persevere in the polygamous union, it has affected and caused her depression especially as the second wife was a very close friend of hers who she regarded as a sister. She contends she can no longer stay in the marriage and has only been persevering for the sake of the children.
8. At trial the respondent reiterated his pleadings and denied the claims of infidelity, disrespect, mistreatment and lack of maintenance. He stated he loves his wife, the first wife and is not ready to divorce her. He stated that despite her denying his conjugal rights he has continued to respect and support her while she has been living at his mother’s house in Mombasa. Notably he did not deny that he had agreed he would marry another wife.
9. The petitioner did not provide any evidence to support her claims of infidelity, mistreatment or lack of provision. She did the law of probabilities, successfully prove there was an agreement the respondent would marry another wife. The issue was specifically pleaded by the petitioner; it was not specifically denied by the respondent either in his defense or evidence in chief. The petitioner confirmed the same under cross-examination, but the respondent did not rebut the same in his evidence in chief.
10. The only question for determination in this matter is whether the marriage should be dissolved due to the respondent marrying another wife especially after his agreement on the same with the petitioner.
11. Islamic marriage is potentially but limited polygamous marriage. At any one time, a Muslim husband is allowed to have under him more than one but not more than four wives. Allah the almighty in Qur'an.4.3 states:

‘And if you fear that you shall not be able to deal justly with the orphan-girl then marry (other) women of your choice, two, or three or four; but if you fear that you shall not be able to deal justly (with them) then only one or (the slaves) that your right hands possess. That is nearer to prevent you from doing injustice.’



10. Marrying more than one but only up to four wives by Muslim husbands in a marriage contracted under Islamic law is predicated on his ability to treat them with equity, fairness. Allah the almighty in Q.4.129 states:

‘You will never be able to do perfect justice between wives even if it is your ardent desire, so do not incline too much to one of them (by giving her more of your time and provision) so as to leave the other hanging (i.e. neither divorced nor married). And if you do justice, and do all that is right and fear Allah by keeping away from all that is wrong, Allah is Ever oft-forgiving, Most merciful.’

11. On the Islamic legal issue whether condition to marry one wife is valid, Muslims jurists are divided into three opinions:

- i. That it is a valid condition which if not satisfied by the husband renders the marriage annulled and invalid. This is the opinion of Hanafi and Maliki schools of jurisprudence.
- ii. That it is a valid condition and the husband is obligated to satisfy it; if he does not, the wife is free to choose either to continue with or get out of the marriage contract. This is the opinion of Hanafi school and is supported by Sheikh ul Islam Ibn Taimiyyah.
- iii. That the condition is not a valid condition, the husband is not obligated to satisfy it and the wife is not entitled to dissolution on this basis. This is the opinion of the Shafi’ school of jurisprudence.

12. This difference in opinion is due to the understanding and interpretation of the Q.4.3 read together with hadith reported by Al-Tirmidhi and Ibn Hibban narrated by ‘Amr ibn ‘Auf Al Muzany (R.A.): ‘Allah’s messenger said: reconciliation is permissible between Muslims, except one which makes unlawful something lawful or makes lawful something unlawful; and Muslims must abide by their conditions (which they have made) except for a condition which makes unlawful something which is lawful, or makes lawful something which is lawful.’

13. Imam Ahmad also relies on hadith reported by Bukhari and Muslim through ‘Uqbat ibn ‘Amir (R.A.) that prophet Muhammad (May Allah’s peace and blessings be upon him) said; ‘the best condition to be satisfied is that which made marriage legal.’

14. He further relies on a legal precedent on the issue reported by Sa’id ibn Mansur in his sunan and Abd al Razaq in Al Musnaf. A man came to ‘Umar ibn Khattab (R.A.), the second caliph with his wife and complained ‘I married my wife on condition that she stays in her matrimonial home, but I need to move to another town’, ‘Umar (R.A.) told him, she is entitled to the satisfaction of the condition’ the man said ‘then men are trouble, any woman seeking divorce will surely get divorced’ ‘Umar (R.A.) said ‘Muslims are bound by their conditions within their rights.’

15. Imam Shafi on the other hand argued that marrying more than and up to four wives is legal under Q.4.3.; the condition is not to the benefit of the marriage contract and offends clear provision of the law making a lawful unlawful and is therefore invalid.

Ibn Qudamat al Maqdisy in Al Mughni states:

‘Scholars differ in this matter into three opinions, one of them is that it is a valid condition that the husband must satisfy, the condition should be one which is to her benefit such as not moving her from her matrimonial home, or town or travel with her or to marry another wife...’



16. Ibn Uthaimin in Sharh al Mumti' at 5/243 supports that this condition is valid. He states:

'It is valid for a wife to make a condition to her husband that he will not marry another wife because it is to her benefit, other scholars have opined it is not valid as Allah has allowed husbands in Q.4.3 to marry more than one wife. This can be explained that the condition is to the benefit of the wife who did not force the husband to agree to it. In agreeing to the condition, the husband relinquished his right to marry more than wife. Thus, Imam Ahmad's view on this issue is stronger.'

17. The preponderant and stronger opinion in my view is that the condition is valid but the marriage does not automatically become invalid. The wife has the liberty and is entitled to choose whether to continue with marriage if the husband fails to satisfy the condition not marry another wife. The issue was live during the time of the prophet's companions, none questioned it and therefore became ijma' juristic consensus. This view is further strengthened by the hadith that the best condition to be satisfied is that relating to marriage. It also aligns with harsh reality and dangers of forcing two individuals to live together.

18. The parties have not disclosed their madh'hab school of jurisprudence either in their pleadings or at trial. We would be bound to decide based on their madh'hab if they had so deposed. In the circumstances we are bound to decide the matter on the interests of justice and the preponderant juristic view on the matter. We find and hold that the respondent agreed not to marry another wife and that in the circumstances of this case, she is entitled to dissolution of marriage due to respondent's lack of satisfaction of the condition. We accordingly, grant her prayer for dissolution of their marriage. The parties' marriage be and is hereby dissolved with effect from 17<sup>th</sup> April, 2025 corresponding with 18<sup>th</sup> Shawwal, 144 A.H. Divorce certificate to issue.

19. The marriage having been dissolved, the petitioner is entitled to and is hereby granted actual physical custody and maintenance of the children. The respondent's means and ability of income is yet to be established. At this juncture he will provide reasonable maintenance according to his means. On application and evidence, the issue will be considered by court. The respondent is entitled to unlimited access of the children.

20. The claim of edda is rejected, the claim for divorce initiated by the petitioner.

Each party to bear its own costs.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON 17<sup>TH</sup> APRIL, 2025.**

**HON. ABDULHALIM H. ATHMAN**

**CHIEF KADHI**

In the presence of

Mr. Salim Kerrow, court assistant

Petitioner

Respondent

