



REPUBLIC OF KENYA



FM v DT (Divorce Cause E004 of 2025) [2025] KEKC 21 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEKC 21 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT ISIOLO
DIVORCE CAUSE E004 OF 2025
DA IBRAHIM, SRK
MAY 8, 2025**

BETWEEN

FM PETITIONER

AND

DT RESPONDENT

RULING

1. This ruling is delivered on the Respondent’s Preliminary Objection dated 5 March 2025 challenging this Court’s jurisdiction to determine the questions of custody (ḥaḍānah) and maintenance (nafāqah) of the minor children arising in these divorce proceedings.
2. The Petitioner, FM, and the Respondent, DT, are Muslims who were married under Islamic law. The Petitioner seeks dissolution of the marriage together with ancillary orders on custody and maintenance of the parties’ minor children.
3. The Respondent contends that the jurisdiction to decide custody and maintenance lies exclusively with the Children’s Court constituted under the *Children Act*, and that the Kadhi’s Court is therefore incompetent to entertain those prayers.
4. The Petitioner opposes the objection, arguing that, where both parties are Muslim and have voluntarily submitted to the Kadhi’s Court, this Court is constitutionally and statutorily empowered to deal with all ancillary matters, including the welfare of the children.
5. Consequently, the sole issue for determination is whether this Court has jurisdiction—under Article 170(5) of the *Constitution* and section 5 of the *Kadhis’ Courts Act* (Cap 11)—to hear and determine the custody and maintenance questions incidental to these divorce proceedings.
6. Article 170(5) of the *Constitution* confines the jurisdiction of Kadhis’ Courts to “questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhis’ courts.”



7. Section 5 of the *Kadhis' Courts Act* (Cap 11) mirrors this constitutional mandate. There is no dispute that both parties herein profess Islam and have submitted to this Court's authority.
8. The pivotal question is whether custody and maintenance constitute "questions of Muslim law relating to personal status, marriage [or] divorce" within Article 170(5). This Court answers in the affirmative.
9. Child custody and maintenance arise directly from the marital bond and its dissolution; they are thus integral components of personal status in Islamic law and cannot be severed from the marriage dispute.
10. In *HSA v AAL* (Kadhis' Court, Isiolo, 2020) the Court emphasised that custody and maintenance are "connected and incidental to marriage and divorce" and therefore fall squarely within the Kadhi's jurisdiction.
11. The High Court has consistently affirmed this position. In *Amin Mohamed Hassan v Zabra Mohamed Abdulkadir* [2009] eKLR, Serگون J. held that "issues touching on maintenance and custody fall into the category of personal status under Muslim law," noting that the *Children Act* did not oust the Kadhi's jurisdiction.
12. Similarly, in *Najma Ali Ahmed v Swaleh Rubea* [2010] eKLR, Omondi J. observed that "child maintenance is incidental to the marriage and thus falls under the jurisdiction of the Kadhi's Court which addresses matters of personal law of members of the Muslim faith."
13. In *Abdirahman Mohamed Abdi & Another v Adan Yusuf* [2013] eKLR, Mutuku J. ruled that paternity and custody questions were "so intertwined" with the divorce issues that they properly belonged in the Kadhi's Court.
14. Although a few earlier High Court decisions expressed a contrary view, the preponderant and more recent authority confirms the Kadhi's jurisdiction.
15. The High Court in *ZUDG v SJKUR* [2020] eKLR (Ali-Aroni J.) surveyed the diverging opinions and concluded that the *Children Act* "did not oust the jurisdiction of the Kadhi or other subordinate courts in dealing with issues of children," provided the Court applies the best-interests principle.
16. In *Fazleabbas Mohammed Chandoo v A.I. Hussein – Kadhi & 4 Others* (Pet. No. 374 of 2015), Onguto J. affirmed that the Kadhi also has jurisdiction over matters incidental to those expressly enumerated.
17. This principle—incidental—prevents fragmentation of Muslim family disputes across multiple fora and upholds the constitutional choice of Muslims to litigate personal law matters before the Kadhi.
18. Accordingly, custody and maintenance disputes, being ancillary to divorce, lie within this Court's mandate so long as the best interests of the child (*Children Act*, s. 4(2)) remain paramount.
19. The *Children Act* (No. 29 of 2022) establishes Children's Courts with specialised jurisdiction. However, it nowhere expressly repeals or restricts the Kadhi's competence on ancillary matters arising in a Muslim divorce.
20. Magistrates—who are coordinate with Kadhis in the judicial hierarchy—regularly determine children matters; denying Kadhis that jurisdiction would be an unjustifiable anomaly.
21. Where a Kadhi exercises jurisdiction over custody or maintenance, he remains bound to apply the best-interests standard and other safeguards in the *Children Act*, ensuring full protection of minors.
22. All four Sunni schools unequivocally regard custody (ḥaḍānah) and maintenance (nafaqah) as integral parts of family law.



23. The Hanafī school grants the mother custody of a son until approximately age 7 and a daughter until about age 9.
24. The Shāfi‘ī school allows maternal custody until the child attains discernment and chooses the parent.
25. The Mālikī school extends the mother’s right over a boy until puberty and over a girl until marriage.
26. The Hanbalī school places children with the mother until age 7, after which the child may elect.
27. A Prophetic ḥadīth states: “You have more right to [custody of] your child so long as you do not remarry.” (Abū Dāwūd, 2276), underscoring the maternal priority.
28. Islamic jurists unite in holding that the father bears the duty of financial support, as founded on Qur’ān 2:233 and 65:7.
29. Thus, Islamic law treats custody and maintenance as inseparable from marriage and divorce disputes —reinforcing their placement within the Kadhi’s jurisdiction under Article 170(5).
30. In *HSA v AAL* (2020) this Court reiterated that “under Islamic law, 100 % of children’s maintenance is the father’s responsibility,” subject to his means and the child’s needs.
31. Taking the constitutional text, statutory provisions, Kenyan case law, and classical fiqh together, the Court is satisfied that matters of custody and maintenance are squarely within “questions of Muslim law relating to personal status, marriage [and] divorce.”
32. The Respondent’s reliance on the *Children Act* to exclude this Court’s competence is misplaced; the Act was never intended to override Article 170(5) or the *Kadhis’ Courts Act*.
33. Requiring Muslim litigants to pursue divorce before the Kadhi and custody before a Children’s Court would defeat the constitutional objective of allowing them a unified forum.
34. Moreover, such forum-splitting could jeopardise speedy justice and inflate litigation costs, contrary to Article 159(2)(b) of the *Constitution* (justice without undue delay).
35. This Court is well-placed to evaluate custody and maintenance through both Sharia and statutory lenses, ensuring the welfare of the children under the best-interests standard.
36. The Preliminary Objection dated 5 March 2025 lacks merit and is hereby dismissed.
37. The Kadhi’s Court at Garbatulla affirms its jurisdiction to determine the parties’ prayers on custody and maintenance of the minor children alongside the divorce cause.
38. In exercising that jurisdiction the Court shall:
 - b. Invoke the relevant provisions of Islamic jurisprudence to ensure outcomes consonant with Sharia.
 - a. Apply the guiding principles of the *Children Act* (No. 29 of 2022), especially the best interests of the child; and
39. Directions: 5th June 2025 with respect to divorce, custody, and maintenance on or before 2ND June 2025.
 - c. Each party shall bear its own cost.
 - b. The Respondent shall file and serve his defence and any affidavits
 - a. The cause shall proceed to full hearing on



40. Orders accordingly.

DATED AND DELIVERED AT GARBATULLA THIS 8TH DAY OF MAY 2025.

Before:

HON: DADACHA.A.IBRAHIM

SENIOR RESIDENT KADHI

GARBATULLAKADHIS COURT

Petitioner- Virtually Present

Respondent-virtually Present

Court Assistant -osman Hussein

