



REPUBLIC OF KENYA



FOO v MAM (Divorce Cause E055 of 2025) [2025] KEKC 29 (KLR) (6 October 2025) (Judgment)

Neutral citation: [2025] KEKC 29 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT GARISSA
DIVORCE CAUSE E055 OF 2025
AD WAKO, SPK
OCTOBER 6, 2025**

BETWEEN

FOO PETITIONER

AND

MAM RESPONDENT

JUDGMENT

Introduction & Reliefs Sought

1. Petition filed 8/5/2025 seeking:
 - (i) dissolution of the Islamic marriage contracted in 1999;
 - (ii) payment of deferred mahr of four cows;
 - (iii) consequential reliefs.

Parties are Muslims, within Article 170(5) of the *Constitution*; the Court has subject-matter jurisdiction under the *Constitution*, the *Kadhbi's Courts Act* s.5 and the *Marriage Act* 2014 Part VII.

2. On 26/5/2025 matter was referred to ADR before four elders; on 23/6/2025 the ADR panel reported no settlement due to complexity. Hearing followed: PW1 (petitioner), PW2 (maternal uncle), PW3 (elder); RW1 (respondent) testified; respondent elected to call no other witnesses.
3. Summary of competing positions already captured in the record, Petitioner alleges sustained verbal abuse (including being called a prostitute before minors), physical violence and knife threats, non-maintenance for her personal needs leading to debts, and unpaid mahr. Respondent denies abuse, asserts he paid mahr during a 2007 divorce before the Kadhi and that parties reconciled; claims wife's misconduct and desertion.
4. Issues for Determination



- i. Whether the marriage should be dissolved under Sharī'a (tafrīq/faskh) and Kenyan law.
- ii. Whether the agreed mahr of four cows remains outstanding; quantum and mode of satisfaction.
- vii. Appropriate final orders.
- vi. Children-related prayers (if any) and Kadhi's Court jurisdictional boundaries.
- v. Reconciliation prospects after ADR.
- iv. Effect of prior ṭalāq in 2007 and subsequent reconciliation (rujū').
- iii. Whether cruelty (ḍarar) and failure of spousal maintenance (nafaqa) are proved on a balance of probabilities.

Analysis Issue-by-Issue

Cruelty (Darar) & Safety, Qur'an 4:19 prohibits harshness; the Prophetic norm is kindness. The legal maxim "lā ḍarar wa lā ḍirār" renders sustained harm actionable. In family law, ḍarar encompasses physical assault, humiliating verbal abuse, and credible threats (e.g., knife threats), especially where children witness it—undermining dignity and domestic tranquility (sukūn).

5. Madhhab positions; -Mālikī: Most expansive; tafrīq bi-l-ḍarar (judicial dissolution) where harm is proved by testimony, consistent complaints, or persistent discord. Habitual insult/beatings meet the threshold.
6. Shāfi'i: Recognizes tafrīq for harm via a judge when continued cohabitation is intolerable; husband's abuse/neglect justifies judicial intervention; khul' remains available but is not the sole path.
7. Hanbalī: Allows faskh for harm and non-maintenance; judge can separate where rights are violated and reconciliation fails. Ḥanafī: -Traditionally conservative on judicial dissolution for harm, preferring sulḥ or khul'; however, modern Ḥanafī-influenced courts accept tafrīq for cruelty and non-maintenance, especially under statutory reforms and siyāsa shar'īyya considerations to remove harm.

Application to facts.

8. . PW1 gave direct evidence of repeated insults ("prostitute") before the children, physical beatings, and a knife threat; PW2 & PW3 (elders) collaborated a long pattern of complaints, multiple mediations, and returns to the matrimonial home without durable change. Respondent offered blanket denials and no witness despite indicating family members existed. The lack of cross-examination of PW1–PW3 strengthens their uncontroverted accounts.
9. This court underscore the balance of probabilities and the need for credible evidence when alleging cruelty, this court is slow to disturb uncontroverted evidence rooted in testimony and community mediation records. therefore, on the totality, persistent ḍarar (harm)is proved. Under all four schools certainly under Mālikī, Shāfi'i, and Hanbalī, and under contemporary Ḥanafī application.

Failure of Spousal Maintenance (Nafaqa) Qur'an 2:233 and 65:7 impose maintenance according to means. Nafaqa for the wife (housing, food, clothing, personal needs reasonably commensurate



with status) is the husband's duty during subsistence of marriage, regardless of whether he also maintains the children.

10. Madhhab positions; - Consensus: If a husband with means persistently fails to maintain, a court may compel maintenance; persistent default can justify dissolution.
11. Mālikī/Hanbalī: Tafriq for non-maintenance even without explicit cruelty; arrears remain a debt and Shāfi'ī/Ḥanafī: Court compels payment or sets a time; continuing default permits dissolution.

Application.

12. . Petitioner testified the respondent “only provided for the children,” not her personal needs, forcing her to incur debts. Respondent did not rebut with bills, records, or witnesses despite asserting that he meets “family” bills. On a balance of probabilities, non-maintenance of the wife is established for material periods. The Respondent's failure in nafaqa, alongside proven cruelty, sustains dissolution.

(iii)Mahr (Dowry) of Four Cows: Liability, Timing & Proofdebt owed to the wife; non-payment does not invalidate the marriage but remains recoverable. All schools agree that if consummation occurred, full mahr is due upon divorce unless lawfully remitted. (Hanafi/majority: if divorce precedes consummation, half may be due depending on stipulation; not alleged here.)

13. Qurʾān 4:4 commands mahr be given graciously. Unpaid mahr is a Madhhab points. Immediate vs deferred mahr is permissible by agreement across schools. Payment must be proved by the party asserting discharge (husband). Absent proof, the debt stands. Valuation in kind (four cows) may be satisfied either in specie or by market-value equivalent when delivery in kind is impracticable—accepted in practice across schools.

Application.

14. . Respondent alleges he paid the mahr “before the Kadhi” upon a 2007 divorce and that parties reconciled thereafter. He produced no receipt, record, or witness; he declined to call witnesses who might have collaborated the alleged payment. The burden to prove discharge lies on the debtor; on this record, payment is not proved.
15. The agreed mahr of four cows remains due. As remedy, this Court will permit satisfaction either by delivery of four healthy, mature cows or by payment of the prevailing market value of four such cows in Garissa within a fixed compliance period, with default consequences.
16. . (iv) Prior Ṭalāq (2007) and Reconciliation (Rujū ‘): Legal Effect. A single revocable ṭalāq (ṭalāq rajʿī) followed by valid ruju ‘within the ‘idda lawfully restores the marriage. Rujū ‘does not extinguish the wife’s pre-existing rights (e.g., unpaid deferred mahr). Most jurists treat mahr as still owing unless positively paid or remitted.

Application

17. Respondent's unproved assertion of mahr payment “before the Kadhi” during the 2007 episode cannot defeat a clear contractual debt without evidence. The fact of reconciliation does not discharge mahr ipso facto.

(v)Reconciliation (Ṣulḥ), Arbitration (Taḥkīm), and ADR Outcome. Qurʾān 4:35 encourages appointment of arbiters from both families; if reconciliation is feasible, they will make it



happen. All schools endorse staged peacemaking. Dissolution becomes appropriate where repeated ADR fails and harm persists.

18. ADR in this case, This Court-appointed elders (four in number) laboured to reconcile but reported failure due to complexity. Repeated, long-term community mediations (as narrated by PW2/PW3) also failed.
19. Practically when Courts commend ADR in family disputes; but where it fails and evidence establishes *ḍarar* (harm), the Court must resolve the dispute definitively. Reconciliation is no longer viable; judicial decree is justified.

SUBPARA (vi) - Children: Custody/Maintenance Jurisdiction Law. There exist divergent High Court views on whether Kadhis' Courts may issue child-related orders ancillary to divorce. Some decisions accept an "incidental to marriage" approach (e.g., THJ v SMO (2014) noting no objection to the Kadhi's custody orders on that record), while other High Court decisions have held Kadhis lack such jurisdiction and that children matters belong to the Children's Court. Parties often pursue child issues separately under the *Children Act*, with the best interest's principle paramount.

Application.

20. Given the jurisprudential split and to forestall jurisdictional error, this Court confines itself here to dissolution and spousal rights (*mahr*). Either party may move the competent Children's Court for custody/maintenance orders; if a consensual parenting plan is filed here, the Court may record it as a *sulḥ* agreement without purporting to exercise standalone children jurisdiction contrary to higher-court holdings.

Evidentiary Burdens, Credibility & Non-Cross-Examination Burden & standard: Civil balance of probabilities; he who alleges must prove; he who asserts discharge of a debt must prove payment. Where a party elects not to cross-examine, the opponent's evidence may stand unshaken unless inherently incredible.

21. Here: PW1–PW3's testimonies were consistent and mutually reinforcing; the respondent's general denials, unaided by witnesses (despite availability of relatives he mentioned), do not dislodge that evidence.

Orders

1. Dissolution (*Tafriq/Faskh*). The marriage contracted in 1999 between the Petitioner and Respondent is dissolved on the grounds of sustained *ḍarar* (cruelty/verbal abuse/threats) and failure of spousal maintenance, after unsuccessful ADR, consistent with Shari'a and Kenyan law.
2. 'Idda. The Petitioner shall observe 'idda period as per Shari'a, during which the Respondent shall provide appropriate 'idda maintenance to the Petitioner according to his means (Q 65:7), save that this does not affect the separate *mahr* debt.
3. *Mahr* (Dowry) of Four Cows. The Respondent shall pay the Petitioner her unpaid *mahr* of four (4) cows within 90 days from today, either: by delivering four healthy, mature cows in Garissa; or by paying the prevailing market value of four such cows in Garissa as at the date of payment (parties may obtain a joint valuation from the livestock market office or two reputable livestock traders; if they disagree, either party may apply for directions).
4. Children (Liberty to Apply). Without prejudice to any consensual parenting plan the parties may file, either party is at liberty to move the competent Children's Court for custody, care, and



maintenance orders guided by the best interests' principle. This approach respects the High Court's jurisdictional holdings while acknowledging divergent lines

5. Costs. Owing to the family nature of the cause and to promote post-decree cooperation, each party shall bear own costs.
6. Right of Appeal.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 6TH DAY OF OCTOBER, 2025.

HON. A. D. WAKO

SENIOR PRINCIPAL KADHI.

