



**FMM v HMA (Divorce Cause E272 of 2023) [2024] KEKC 3 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEKC 3 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT MOMBASA  
DIVORCE CAUSE E272 OF 2023**

**AH ATHMAN, CK**

**MAY 2, 2024**

**BETWEEN**

**FMM ..... PETITIONER**

**AND**

**HMA ..... RESPONDENT**

**JUDGMENT**

1. The petitioner prays for:
  - i. Dissolution of marriage.
  - ii. Children custody and maintenance at KES 20,000.00 per month
  - iii. Respondent be ordered to release petitioner’s personal effects or its value as per annexed list
  - iv. Petitioner’s past maintenance from November, 2022 to date of judgment
  - v. Children’s past maintenance from November 2022 to date of judgment
2. The petitioner deposed that the respondent is irresponsible, disrespectful, lazy refuses to work and neglects his parental and marital obligations. She further averred that the respondent does not perform religious prayers.
3. The defendant opposed the petition. He denied petitioner’s claims. He averred the he lost his business but was still able to provide for his family. He further stated that the petitioner deserted the matrimonial home and has refused to return despite all his efforts. He contends he has undying love and affection for the petitioner and that because she abdicated her duties as a wife, he is not legally obligated to provide for her maintenance. He prayed for a declaration that they are still legally married and that the petitioner should go back to the matrimonial home.
4. The parties were married under Islamic law at Mombasa on 27<sup>th</sup> April, 2019. The petitioner a Kenyan is a (26) years old lady. They moved to live in Magomeni, Daresalam in the United Republic of Tanzania



where the petitioner also has some relatives. The Respondent is Tanzanian. They are blessed with two minor children, aged 3 and 2-year-old, from their legal wedlock.

5. The issues for determination in this matter are:
  - vi. whether or not the petitioner is entitled to dissolution of marriage.
  - vii. Children custody and maintenance
  - viii. Whether or not the respondent should be ordered to release petitioner's personal effects or its value.
  - ix. Petitioner's past maintenance
  - x. Children's past maintenance

6. The petitioner reiterated her pleadings under oath. Her grounds for dissolution of the marriage are lack of maintenance, respondent's laziness and irreligious character. She stated under oath that the respondent spends most of the day sleeping, does not perform the daily prayers unless she forces him to and is rude and quarrelsome. It is her testimony that she returned to her parents with his permission due to his inability to provide for him. She further stated that her parents were the ones supporting her on sustenance; that she had agreed to return to the matrimonial home in Daresalam, Tanzania but changed his mind because she had gone to bid a relative farewell.

PW1 evidence supported the petitioner's claims of laziness, lack of maintenance and not performing prayers as a required of a Muslim.

7. 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.’

8. Divorce though discouraged is legal. It 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.’

9. Section 359 of the Kadhi'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.’

10. 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..."

11. 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.
12. 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...’
13. The petitioner has discharged her burden to prove lack of religious commitment of the respondent. It is clear from the proceedings that this is a very serious and key issue to the petitioner. It is the reason of constant quarrels admitted by the respondent that she has to force him to perform obligatory prayers. It is a valid ground for dissolution of marriage. It was not proven by the respondent that the petitioner deserted the matrimonial home. A wife lacking maintenance is entitled to return to her parents to save herself from hunger, if the husband is unable to provide for her. Lack of or inability to provide is another valid ground for dissolution of marriage.
14. It was submitted by the respondent that the petitioner should probably pay for the divorce through the Khul’ instrument. Khul’ is provided for in Q.2.229, the prophet’s ruling in the celebrated case of wife of Thabit bin Qais ibn Shimas in the Hadith reported by Imam Bukhari on the authority of Ibn Abbas (may Allah be pleased with him) and article 89 of the Islamic Charter of Family. It 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:

‘One of the conditions for Khul’u is that the request must be made by the wife of her own free choice and wish to leave the husband without any coercion or mistreatment by the husband. If any of these conditions fails, talaq, and not Khul’u becomes effective... if a husband, intentionally mistreats his wife to compel her to seek for Khul’u, it is not lawful, according to the Hanafi, Hanbali and Shafi’i schools of jurisprudence, for him to take of the consideration she offers because 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’
15. Having proven at least two grounds for dissolution of the marriage, the parties having separated for more than one year and the respondent’s continued lack of maintenance during the period of separation, the marriage should be annulled through dissolution and not Khul’. The party’s marriage be and is hereby dissolved (minor irrevocable) with effect from 2<sup>nd</sup> May, 2024 corresponding with 23<sup>rd</sup> Shawwal, 1445 A.H. Divorce certificate to issue.
16. The responsibility to provide for wives vests with the husbands. It is an inherent and fundamental right of a wife under Q.4.34 and valid hadiths. Ibn Qudamat and Ibn Mundhir report Juristic consensus among Muslim scholars that a husband is obliged to provide for his wife except if she is disobedient.



The respondent failed in his duty to provide for his wife from November 2022 to the date of this judgment save for two months. The petitioner is entitled to past maintenance.

17. It is now settled as a general principle that unless there exist peculiar and special circumstances, mother has priority to custody of minor children. In *Mehrunisa v. Pravez* (1982-88) 1 KAR 18 the court clearly pronounced itself on the same. In the instant case, the children are minors and have been and continue to live with their mother. I find no reason to deviate from the general principle. Full custody of the minor children be and is hereby granted to the petitioner, respondent to get reasonable access.
18. The mother has the primary responsibility of physical, psychological care of children while the financial responsibility of children maintenance lies entirely on the husband / father predicated on his financial ability. It is well founded on the provisions of Q.4.4 and numerous Islamic tradition and there is juristic consensus among Muslim jurists on its prerogative.
19. The quantum on children maintenance is predicated on a balance between the twin factors of needs of children and the financial ability of the husband as espoused under Q.65.35 read together with Q.2.233 which provide:

“Let him who hath abundance spend of his abundance and he whose provision is measured let him spend of what Allah gave him, Allah asketh naught of any soul save that which He hath given it, Allah will vouchsafe after hardship ease”. Qur’an.65.7

“...No person shall have a burden laid on him greater than he can bear. No mother shall be treated unfairly on account of her child; nor father on account of his child.” Q.2.233
20. Ibn Kathir (d.774H) in his commentary of the verse Q.2.233 stated:

‘The father of the child is obligated to provide food and clothing (of the child) according to custom of her peers in her community without extravagance or stinginess, according to his means in times of abundance, moderation or want.’
21. The respondent, the father of the two minor children, is a businessman. He has proposed to pay KES 5,000.00 per month for the maintenance of two minor children. It is on the lower side and not sufficient to cater for the children’s basic needs. Considering he is currently unemployed and out of business, he is hereby ordered to pay KES 12,000.00 per month as children maintenance. He shall further cater for the children’s reasonable educational needs when the children start schooling. The respondent further failed to pay the children maintenance for thirteen months. He shall settle the past wife and children maintenance at the rate of KES 15,000.00 per month equivalent to KES 195,000.00
22. The prayer for release of petitioner’s personal effects was not opposed. The list annexed to the petition included: Furniture, clothes, handbags, shoes, kitchen utensils, curtain (full set) and bedsheets. The respondent to return the same to the petitioner within three (3) months.

No orders as to costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON 2<sup>ND</sup> MAY, 2024.**

**HON. ABDULHALIM H. ATHMAN**

**CHIEF KADHI**

**In the presence of**



Ms. Salim Kerrow, Court assistant

Petitioner

Ms. Osman for the Respondent

