



DAA v BHA (Divorce Cause E030 of 2024) [2024] KEKC 20 (KLR) (16 October 2024) (Judgment)

Neutral citation: [2024] KEKC 20 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT WAJIR (HABASWEIN)
DIVORCE CAUSE E030 OF 2024
DA IBRAHIM, SRK
OCTOBER 16, 2024**

BETWEEN

DAA PETITIONER

AND

BHA RESPONDENT

JUDGMENT

1. This judgment pertains to a petition filed by Ms. DAD (hereinafter referred to as "the Petitioner") against Mr. BHA (hereinafter referred to as "the Respondent"). The Petitioner seeks the following reliefs:
 1. Dissolution of the marriage between herself and the Respondent.
 2. Payment of unpaid dowry (mahr) amounting to Kshs. 25,000.
 3. Custody of the children and maintenance at Kshs. 15,000 per month.
 4. Arrears of maintenance for the past eight years at Kshs. 15,000 per month, payable upon the Respondent's return or when he is locatable.
2. The Respondent has been absent and untraceable for over eight years, prompting the Petitioner to seek relief from this honorable court.
3. The Petitioner and the Respondent were married in 2005 under Islamic law in Kariobangi, Nairobi. The marriage was solemnized with an agreed dowry (mahr) of Kshs. 25,000, which remains unpaid to date. Prior to this marriage, the Respondent was married to the Petitioner's sister, who sadly passed away. Following her sister's demise, the Petitioner's father encouraged her to marry the Respondent to provide care and support for the children from his previous marriage.
4. The union between the Petitioner and the Respondent was blessed with four children:
 1. YB, born in 2005, now aged 19 years.



2. ZB, born in 2007, now aged 17 years.
3. HB, born in 2009, now aged 15 years.
4. MB, born in 2016, now aged 8 years.
5. In 2016, when the Petitioner was three months pregnant with their youngest child, M, the Respondent disappeared without a trace. He has neither communicated with the Petitioner nor provided any form of maintenance or support since his disappearance. Despite exhaustive efforts to locate him including inquiries through family, friends, and local authorities his whereabouts remain unknown.
6. On 21st August 2024, the Petitioner filed this petition seeking the dissolution of the marriage, payment of unpaid dowry, custody of the children, and maintenance.
7. Due to the Respondent's unknown whereabouts, the Petitioner was unable to serve him personally. Consequently, on 10th September 2024, she filed a Notice of Motion seeking leave to effect service upon the Respondent by substituted means, pursuant to Order 5 Rule 17 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, and Rule 63 of the Kadhi's Court Rules and Procedures, 2020.
8. On the same day, 10th September 2024, the court delivered a ruling granting the Petitioner's application for substituted service. The court permitted the Petitioner to serve the Respondent by way of advertisement and affixing the summons in a conspicuous place.
9. Pursuant to the court's ruling, the Petitioner effected substituted service by advertisement, as directed. However, the Respondent did not enter an appearance or respond to the petition.
10. On 9th October 2024, the matter was scheduled for hearing. Given the Respondent's absence and lack of response, the court allowed the matter to proceed ex parte. The Petitioner testified to the circumstances of the case, supported by a witness, Mr. AAI, her nephew.

Petitioner's Testimony

11. The Petitioner testified that she married the Respondent in 2005, with an agreed dowry of Kshs. 25,000, which remains unpaid. She stated that the Respondent was previously married to her late sister and that their marriage was encouraged by her father to support the Respondent's children from the previous marriage.
12. She recounted that the Respondent disappeared eight years ago when she was three months pregnant with their youngest child, M. Since his disappearance, the Respondent has neither communicated nor provided any financial support. The Petitioner has been solely responsible for raising their four children and the Respondent's children from his previous marriage, facing significant financial and health challenges.
13. She requested the court to dissolve the marriage, order the payment of the unpaid dowry, grant her custody of the children, and mandate maintenance payments from the Respondent.

PW1: Mr. AAI

14. Mr. I, the Petitioner's nephew, corroborated her testimony. He affirmed that the Respondent deserted his family eight years ago and has been untraceable since. He highlighted the emotional and financial hardships faced by the Petitioner in raising the children without any support from the Respondent. He urged the court to grant the reliefs sought by the Petitioner.



Issues for Determination

15. The court identifies the following issues for determination:
 1. Whether the marriage between the Petitioner and the Respondent should be dissolved.
 2. Whether the Petitioner is entitled to the unpaid dowry (mahr).
 3. Whether the Petitioner should be granted custody of the children.
 4. Whether the Respondent is obligated to provide maintenance for the children, including arrears.
 5. Any other reliefs deemed just and equitable by the court.

Legal Framework

16. The determination of this case is guided by: *The Constitution* of Kenya, 2010. The Kadhi's Courts Act, Cap 11 Laws of Kenya. The *Marriage Act*, 2014. The *Children Act*, 2001 (Revised 2018). Islamic Law (Sharia), including the Quran, Hadith, and jurisprudence from the four Sunni schools: Hanafi, Maliki, Shafi'i, and Hanbali. Relevant case law.

Analysis

17. Issue 1: Dissolution of Marriage

Jurisdiction

18. Article 170(5) of *the Constitution* of Kenya, 2010, provides:

“The jurisdiction of a Kadhi's Court shall be limited to the determination of 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 Kadhi's courts.”
19. Both parties are Muslims, and the matter relates to marriage and divorce. Therefore, this court has the jurisdiction to hear and determine this matter.

Grounds for Dissolution

20. Under Islamic law, marriage is a sacred contract (nikah) that can be dissolved under specific circumstances. The grounds for dissolution include: Faskh (judicial annulment) due to harm or defects. Talaq (divorce initiated by the husband). Khul' (divorce at the wife's request with compensation). Ila (husband's oath of abstinence). Desertion and absence of the husband.
21. In this case, the Petitioner seeks dissolution through faskh on grounds of: Prolonged absence and desertion by the Respondent. Failure to provide maintenance.

Prolonged Absence and Desertion

22. The Quran emphasizes the duty of spouses to live together in kindness. Surah An-Nisa [4:19] states:

“O you who have believed, it is not lawful for you to inherit women by compulsion... And live with them in kindness.”



23. The husband's obligation to maintain his wife and children is well established. Surah Al-Baqarah [2:233]:

"...But the father of the child shall bear the cost of the mother's food and clothing on a reasonable basis."

Shafi'i School Perspective

The Shafi'i school, predominant in Kenya, allows a wife to seek dissolution if the husband is absent for a prolonged period without maintenance.

Imam Al-Nawawi, a renowned Shafi'i jurist, in *Al-Majmu'* states:

"If the husband disappears and his whereabouts are unknown, and he leaves his wife without maintenance, she has the right to seek annulment of the marriage."

Maliki School Perspective

24. The Maliki school permits dissolution if the husband is absent for more than one year without just cause or maintenance.

Ibn al-Qasim, in *Al-Mudawwana al-Kubra*, asserts:

"A wife may seek dissolution if her husband is absent and fails to provide maintenance, even if he left with her permission."

Conclusion on Dissolution

25. Given the Respondent's eight-year absence without maintenance or communication, the Petitioner has valid grounds for dissolution under Islamic law, supported by the Shafi'i and Maliki schools.

Precedent

26. In *Fatuma Mohamed v Said Abdi* [2015] eKLR, the Kadhi's Court held that prolonged absence and failure to maintain are valid grounds for dissolution.
27. Issue 2: Unpaid Dowry (Mahr)

Islamic Law on Mahr

28. Mahr is a mandatory gift from the husband to the wife, signifying respect and commitment. Surah An-Nisa [4:4] states:

"And give the women [upon marriage] their [bridal] gifts graciously."

29. Once the marriage is consummated, the wife is entitled to the full mahr, even if deferred.

Hanbali School Perspective

Ibn Qudamah, in *Al-Mughni*, states:

"If the mahr is specified and the marriage consummated, it becomes a confirmed debt upon the husband."



Conclusion on Mahr

30. The agreed mahr of Kshs. 25,000 remains unpaid. The Respondent is obligated under Islamic law to fulfill this obligation.
31. Issue 3: Custody of the Children

Best Interests of the Child

32. 8(1) of the *Children Act*, 2001 provides:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration.”

Islamic Law on Custody (Hadanah)

33. Custody is awarded based on the welfare of the child.
Shafi'i School Perspective
The mother has priority in custody unless unfit.
Ibn Hajar Al-Haytami, in *Tuhfat al-Muhtaj*, states:

“The mother has the most right to custody unless she remarries or is deemed unfit.”

Conclusion on Custody

34. The Petitioner has been the sole caregiver and is deemed fit. It is in the best interests of the children that custody remains with her.
35. Issue 4: Maintenance

Maintenance of the Children

36. The father's duty to maintain his children is affirmed in Surah Al-Baqarah [2:233]:

“Upon the father is their provision and their clothing according to what is acceptable.”

Arrears of Maintenance

37. Shafi'i and Maliki Schools Perspective
Maintenance is a debt that accumulates and is recoverable.
Imam Al-Ramli, a Shafi'i jurist, in *Nihayat al-Muhtaj*, affirms:

“Maintenance becomes a debt upon the husband when he fails to provide, and the wife may claim it for past periods.”

Quantum of Maintenance

38. Maintenance should be fair, considering the husband's means and the family's needs.



39. Section 94(1) of the *Children Act*:

“A court may, on the application of a parent or guardian, make orders for the financial provision for the maintenance of a child.”

40. Given the Respondent's occupation as a professional driver and the cost of living, Kshs. 15,000 per month is reasonable.

Orders

41. Accordingly, the court makes the following orders:

1. The marriage between the Petitioner, Ms. DAD, and the Respondent, Mr. BHA, is hereby dissolved.
2. A Decree Nisi is issued and shall become absolute after three (3) months from the date of this judgment unless sufficient cause is shown to the contrary.
3. The Respondent shall pay the Petitioner the unpaid mahr of Ksh. 25,000.
4. Custody of the minor children—ZB(17 years), HB (15 years), and MB (8 years)—is granted to the Petitioner. YB, aged 19 years, is at liberty to decide his residence.
5. The Respondent shall pay maintenance for the children at Ksh. 15,000 per month, effective from the date of this judgment.
6. The Respondent is liable for arrears of maintenance totalling Kshs. 1,440,000 (Kshs. 15,000 x 96 months). Payment to be made upon the Respondent's return or when he is locatable.
7. The Petitioner is at liberty to apply for further orders if circumstances change.

It is so ordered

DATED DELIVERED AT HABASWEIN THIS 16th DAY OF OCTOBER 2024

HON:DADACHA.A I

SENIOR RESIDENT KADHI

In the presence of :Najma Farah

Court Assistant.

Petitioner:DAD

