



**DIJ v IKI (Divorce Cause E201 of 2021) [2023] KEKC 5 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEKC 5 (KLR)

**REPUBLIC OF KENYA**  
**IN THE KADHI'S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)**  
**DIVORCE CAUSE E201 OF 2021**  
**AH ATHMAN, SPK**  
**FEBRUARY 16, 2023**

**BETWEEN**

**DIJ ..... PETITIONER**

**AND**

**IKI ..... RESPONDENT**

**JUDGMENT**

1. The parties were married under Islamic law on December 19, 2020. They are blessed with one child (NIK, DOB 13.10.2021) from their legal wedlock. The parties separated when the petitioner was eight months pregnant. She went back to live with her parents. The petitioner did not disclose whether or not she is employed. The respondent is an advocate of the High Court of Kenya working with the UNHCR funded department of Refugee services. Elders unsuccessfully tried to resolve their dispute.
2. Through amended divorce petition dated June 8, 2022 the petitioner prays for dissolution of marriage by way of Khul'u. She stated that she is 'ready to give a consideration to the respondent for my release from the marriage according the rules of divorce by Khul'u.'
3. On his part, the respondent through his response to the petition and cross-petition dated August 12, 2022 opposed to the prayer for Khul' divorce 'in anticipation of the rights and obligations of the respondent over the said child of the marriage.' He cross-petitioned for joint legal custody of the minor, unlimited / unrestricted visitation rights of the minor.
4. The petitioner raised a preliminary objection on the issue of the child to be heard and determined by this court. Upon the parties canvassing on the issue, the court pronounced itself having requisite jurisdiction to handle the issue. The petitioner, through oral submission, then opposed the respondent to be granted joint legal custody of the minor. She prayed for full custody of the child and the respondent to be granted reasonable supervised access of the child.
5. The issues for determination in this matter are:



- a. Divorce
  - b. Legal and actual Custody of the minor
  - c. Rate of child maintenance.
6. On the issue of divorce, the respondent's position is anything but clear. One time he says he was not opposed to issuing the divorce provided the issue of the child is sorted, another time he says the marriage may be annulled through Khul'. Essentially, he does not oppose the annulment of the marriage but is not certain on the type of divorce. We will thus adopt his position as in his pleadings.
  7. Khul' literally means 'taking off something.' Imam Al – Nawawy, in Mughni al Muhtaj, 3/262 defines it as 'release from the marriage contract on a consideration through talak or Khul' statement.' Abu Al Qasim Muhammad ibn Ahmad ibn Juzzy in 'Qawanyin al Fiqhiyyat' at 375 defines it as 'the consideration paid to the husband by his wife or her agent for her divorce or waiver of one of his rights upon her.' It thus means the release of the wife from the marriage contract through payment of a consideration to the husband.' It is an instrument of Islamic law of divorce available for wives to exit the marriage on their own initiation in cases of their inability to fulfil their matrimonial obligations to their husband. It is founded on provisions of the holy Qur'an and traditions of the Prophet Muhammad (may Allah's blessings and peace be upon him). Qur'an 2.229 provides:
 

“...Then if you fear that they would not be able to keep the limits ordained by Allah then there is no sin on either of them if she gives back (the mahr or part o it) for her al- khul'u (divorce). These are the limits ordained by Allah so do not transgress them and whomsoever transgresses the limits ordained by Allah then such are the zalimun (wrongdoers)”. Al Baqarah: 229
  8. The Prophet Muhammad [may peace and blessings be upon] him ruled in favour of the wife for divorce through Khul'u provided she returns the dowry, in the celebrated case of wife of Thabit Ibn Qays Ibn Shimas.
  9. Ibn Abbas (R.A.) narrated that the wife of Thabit Ibn Qays Ibn Shimas told the prophet (PBUH): 'O prophet, I have no problem with my husband's conduct and piety but I hate to 'apostasy in Islam' (not able to observe the limits of Allah in marriage), the prophet asked her, 'will you return his farm? (dowry) she said 'yes'; the prophet then told Thabit, 'accept back the farm and divorce her.' In Dar al Qutny's version, the lady said: 'I am ready to return the farm and more', the prophet said: 'return the farm only' Bukhari: 4990, Al Shaukany, Nail Al Awatar, 6/246.
  10. Article 89 of the *Islamic Charter on Family* [ICF] provides for the right of a wife to exit from marriages if she hates her husband and cannot bear to remain in the marriage, provided she refunds dowry given.
 

“If a woman hates her husband and cannot stand him, even though he hasn't hurt her in any way, that could be considered grounds for divorce and if she can no longer bear to remain with him, then she has a right to request divorce in exchange for giving up any right that would be due to her as a result of the divorce and returning any dowry or gift that he gave her.’
  11. It is not necessary as suggested by Sheikh Muhammad Al Ghazaly, to make enquiries on the reasons for Khul' once it is established the wife is desirous to exercise her right to execute the same. This is in appreciation that matters of the heart cannot be policed, however distasteful divorce is. It is also a recognition of the dignity of the woman in marriage. However, husbands should not compel their wives to seek Khul' merely for their lack of evidence to prove grounds of divorce in order to continue



harming them or get away with payment of dowry or refund thereof. Wives should on their part execute this instrument strictly if necessary for the purposes set out by law because the prophet said in an authentic hadith 'damnation is upon a lady seeking divorce without legal basis'. The requirements for Khul' are set out by 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 the consideration she offers because Allah said in Q.2.231 '...but 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'. This means, Khul'u executed without legal basis is illegal, because it harms the lady, and harm is prohibited by the prophet when he said: 'initiating or reciprocating in harm is prohibited.'

12. Ibn Juzy (d.742H), Al Qawanin al Fiqhiyat, at pp 352 further elaborated on these conditions. He states:

"For Khul' divorce to be effective it must satisfy three conditions. First, the consideration must be lawful to transact in under Islamic law. This removes acceptability of alcohol, pig and the likes as a consideration for Khul'u. Others have accepted an unknown and detrimental object as a consideration for Khul'u. Second, it must not be a means to an illegality such as taking, deferment or settlement of loan. Thirdly, it must be as a result of the woman's choice in her desire to divorce the husband without any coercion or as a result of mistreatment by the husband, if either is lacking, the annulment of the marriage becomes effective through divorce and not Khul'u"

13. In the instant case, the prayer for Khul' divorce is not opposed. It is hereby granted. The consideration for Khul' is the dowry. In this case it is not disputed it was a gold set and had not been paid. The petitioner forfeited the same. The same is considered duly settled.

14. The second issue in this matter is that of custody of the minor. The respondent does not oppose actual care. Control and custody of the minor to be granted to the petitioner. He opposes limited supervised access and wants joint legal custody. The petitioner has not demonstrated why legal custody should not be given jointly to the parents of the child. As a parent who has financial parental obligations on the welfare of the child, unless otherwise proven unfit, he is entitled to legal custody. As the mother has priority on physical custody, the father has priority on legal custody. We find no reasons to deny the father legal custody. Accordingly, both parents share equal legal custody of the minor herein. Physical custody is granted to the petitioner, the mother of the child, the respondent to get reasonable access.

15. Parties differed on the modalities of the child access. The petitioner suggested the respondent get supervised access in the presence of her mother in specific periods on account that the respondent has no relationship with the child and the child wails when he is around strangers. With respect these are not sufficient legal reasons to limit a father's access to his child. The need to bond with both his or her parents, is a fundamental right to any child. It has a great impact in his or her physical and psychological development. In dispute of children issues, the preference is given not in favour of either parent but to what is in the best interests of the child. The respondent requested for unsupervised access of the child on weekends and one day in a weekday. It is a reasonable proposal. The respondent is thus granted unsupervised access of the child on weekends from 3:00 pm to 5:30 pm and on Wednesdays from 4:00 pm to 6:00 p.m.



16. The last issue in this matter is that of rate of child maintenance. The petitioner requested for Kshs 30,000.00 per month while the respondent offered Kshs 7,000.00 per month as child maintenance. The quantum on children maintenance is predicated on the balance between the twin factors of needs of children and the financial ability of the husband as espoused under Q.65.7 read together with Q.2.233 which provide:

“Let the rich man spend according to his means; and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him”. 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

17. 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 the wife’s peers in her community without extravagance or stinginess, according to his means in times of abundance, moderation or want.’

18. Ibn Ashur (d.1393H) in Al Tahrir wa al Tanwir, in commentary of the same verse, stated:

‘It is a prohibition for spouses, taking advantage of husbands’ affection and compassion towards their children, to demand from the other above his ability.’

19. In the instant case, the respondent is an advocate of the High court of Kenya in gainful employment with the UNHCR funded department of Refugee affairs. I have seen his affidavit of means. Contrary to his submissions, he had not attached his pays lip thereto. Even according to the said affidavit, he has a net salary of Kshs 76,000.00 per month. He seems to give more emphasis on his comfort rather the actual needs of the child. He is able to pay at least a third of his income. We accordingly order that he pays Kshs 25,000.00 per month as child maintenance.

Each party to bear its own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON 16<sup>TH</sup> FEBRUARY, 2023.**

**HON. ABDULHALIM H. ATHMAN**

**SENIOR PRINCIPAL KADHI**

**In the presence of**

**Mr. Suleiman A. Mohamed, Court assistant**

**Ms. Rahma for the petitioner**

**Mr. Mohamed Jelle for the respondent**

