



**MK v AAS (Matrimonial Cause E006 of 2023)
[2023] KEKC 26 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEKC 26 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT GARBATULLA
MATRIMONIAL CAUSE E006 OF 2023**

**G ADAN, PK
MARCH 16, 2023**

BETWEEN

MK PLAINTIFF

AND

AAS DEFENDANT

JUDGMENT

1. The plaintiff herein above filed this matrimonial cause on 23rd May 2022, seeking for;
 - (i) the respondent / defendant to go back to her matrimonial home,
 - (ii) respect him as head of family,
 - (iii) the court to summon and warn the intruder against interfering with his family,
 - (iv) and any other relief as end of justice.
2. The plaintiff raises lack of respect against him by the respondent, that she leaves home in the morning and come back at night without his consent, she changed her mobile password unlike before, denied him conjugal rights and become violent. He suspects her of having outside affairs. He alleged the dispute continued after even the elders arbitrated between them, as he says she cut conversation with him, she moved to the children's room and finally rent a house somewhere away from him. He states, his effort to settle the dispute bore no fruits hence he is forced to seek for resolution from the Kadhi's court.
3. On 2nd June 2022, the defendant / respondent filed memorandum of appearance and a response, in which she admits the marriage with the plaintiff, but denies all other allegations, including on dowry payment, number of children blessed, being having good relationship, lack of respect for the plaintiff, denial of conjugal rights, being violent, going out and coming back at night hours without consent, hiding phone password and having outside affairs.



4. On the other side, she counter claims against the plaintiff for not having good relationship, none provision of maintenance, false accusation over having extra affairs outside, desertion, abuse, threats, wishing to divorce, chasing out of home, and refusing to settle the dispute. She therefore, prays for dissolution of marriage, maintenance including food, school fees, clothing, medical expenses, and other general needs.
5. On 1st September 2022, the matter proceeded to case conference, after it has failed to reach settlement through the ADR mechanism. Upon which the issue of dowry settled on one she-cow as agreed which was shown to her but not yet handed over to the defendant, as it remained with the plaintiff being custodian. It has not been yet known by either party, on how many cows to have been multiplied. However, the plaintiff admitted to have slaughtered one bull one of the proceed of that she-cow, with the permission of the defendant with a promise to replaced it back, which yet to this time not acknowledged as replaced.
6. On issue of children blessed out of this marriage, it is admitted by both that they had been blessed together two children who are now under the plaintiff care and protection, and the defendant admits to have no problem with the children being with their father as their custody.
7. Wherefore, the other issues of determination mainly as on;
 1. Whether defendant has extra affairs beside the legal wedlock?
 2. Whether there was lack of provision from the plaintiff?
 3. Amount of dowry required from the plaintiff?
 4. What orders can be issued by the court?
8. The matter took long before taking off for hearing, which actually commence on 22nd February 2023. The plaintiff did not call upon any witness or evidence to proof his accusation on defendant extra marital affairs outside legal wedlock. He testified that he could not bring witness, reason being they had incident in which he fought the defendant wife and her friend holding each other, which the incident lead to police case, despite later was resolved by the elders and the case withdrawn at the police with both sides' agreement to proceed with the case at the Kadhi's court. He felt no need to bring the witnesses on his ground that the issue had already been admitted at the police, but so far no evidence he provided to support the alleged admission.
9. On the other side, the defendant wife denied having such relationship outside the legal marriage. She testified that the plaintiff making false accusation against her, which the elders have sat resolve this issue, every time no proof was ever presented to them, and they decided as unfound claim. She testified that he had already distance her over the bed from the time they had dispute, they were separated without divorce, he has not yet paid her dowry. She states to ran away to her sister's home due to fear for her safety.
10. Finally, the plaintiff husband sorted to payment for compensation, if the defendant wife has lost love for him and no hope in him. He demands for payment of compensation at Khs 300,000 in return of divorce and the cost of the suit. But the defendant wife admits to forfeit her dowry which not yet paid. She further states to not afford the extra amount over what mentioned as dowry. Despite the plaintiff husband respond that the dowry mention would not be enough for him. she replied that she cannot afford that amount unless she seeks for fundraising to meet his demand.



11. After hearing concluded yet another issue arose, that which were not expressively prayed for. However, to deal with it in finality, the court has to give answers for that question to the parties. This on whether the plaintiff will be compensated amount of kshs 300,000, or not compensated?
12. Upon considering the evidences from both sides, it's found that the plaintiff husband's claims not proved for lack of evidences to support the claims. On the other side, the defendant wife's counter claims over the lack of maintenance also did not been proved.
13. However, the plaintiff husband's accusation towards his wife over extra marital affairs without proof is a serious offence in accordance to Islamic shariah. This accusation amount to false accusation of adultery. The plaintiff should have produced four upright eye witnesses who saw the alleged act of adultery while exact penetration took place, which such evidence to be produced will not be easily possible to be adduced. He has not so far produced a single evidence that may connect her to the act, which indicates existence of such related illegal relationship. As a result of failing to prove the act of adultery, the plaintiff deserve punishment for a slander or alternatively will engage in li'aan to avert the punishment of a slander.
14. Li'aan according to Islamic Shariah, is a to "curse" or 'condemn" one's self, or a mutual repudiation in a sense that when either a husband or a wife accuses the other of committing adultery without provision of four credible witnesses, except himself or herself. And whoever is accused of, deny the allegation.
15. Wherefore, to avert the punishment of a slander, the accusing spouse swears four times by Allah (SW), that in deed, he or she is truthful in what he or she alleges. And on the fifth oath, seeks the curse of Allah be upon himself or herself, if she speaks a lie. The same the other accused spouse swears four times by Allah (SW), that indeed the other spouse telling a lie, and on fifth time invoke the wrath of Allah (SW) be upon herself or himself if the other spouse speaks truth.
16. This is found in surah al-Nuur 24: 6-9, "And for those who accuse their wives, but have no witnesses except themselves, let the testimony of one of them be four testimonies (ie testifies four times) by Allah that he is one of those who speaks the truth. And the fifth testimony should be the invoking the curse of Allah on him, if he be of those who tell a lie against her. But it shall avert the punishment of hadd from her, if she bears witness four times by Allah, that her husband is telling a lie, and the fifth testimony should be that the wrath of Allah be upon, if her husband speaks the truth" [al-Nur 24: 6-9].
17. Ibn Katheer (may Allah have mercy on him), said in his Tafseer: "this verse offers away out to husband, if a husband accuses his wife of Zina (adultery), but it is too difficult for him to establish proof; he may engage in li'aan against her as enjoined by Allah, may He be glorified and exalted. This means bringing her before the judge and making his accusation against her, (the same way case presented by the plaintiff husband herein) and the judge should make him swear four times by Allah, instead of bringing four witnesses, that he is telling the truth i.e. about what he is accusing her of Zina or having extra marital relationship. And the fifth time he should invoke the curse of Allah upon himself if he is lying. If he says this, she becomes irrevocably divorced by virtue of this Li'aan, according to al-Shaafie and many scholars, and she becomes permanently forbidden to him, and he should give her the Mahr (dowry), and the had punishment for Zina should be carried out on her, unless she also engages in Li'aan" End quote.
18. Al-Qurtubi, may Allah have mercy on him, said in his Tafseer, "Allah mentioned women in the verse because they are of greater concern and accusing them of immorality is more abhorrent and more hurtful, but slandering men is also included in the meaning of the verse, and the Ummah is unanimously agreed on that." End quote.



19. If the plaintiff husband knows that his defendant wife has committed Zina but he has no proof of adducing four witnesses, then he should advise her and remind her to fear Allah. If she persists in her sin he may divorce her or ask her to separate by divorcing her on revocable divorce and pays her dowry or by means of Khul'ah, because there is nothing good for him staying with her, which may be harmful if she wants to release herself from hardship by forfeiting her dowry. Instead of making false accusation without proof which may leads him to Li'aan, that make them irrevocably divorced and permanently forbidden to each other.
20. But if the plaintiff husband who accused his defendant wife of having extra marital relationship with another man whose name not mentioned, which accusation of committing adultery without presenting the required evidence by the law. And he wants to go through Li'aan he has to be aware of impact of Li'aan, which is invoking wrath of Allah, that not favourable to either of them, and they will not resume their marriage again permanently if they may wish to do so later. But I should not recommend the option of Liaan but the parties should go for Khul'ah or divorce upon payment of dowry if they see not possible to stay in their marriage.
21. On issue of compensation of the plaintiff husband demanding, amount of Kshs 300,000 in return of defendant divorce, I have to consider, who is at fault, the capacity of whoever may pay compensation, and whether the defendant had bored any child for the plaintiff, to determine whether the defendant wife has to refund him. Since the plaintiff has failed to proof his allegation and then not been admitted by the accused defendant, this confirms that the defendant is innocent and she has not been proved to be guilty. Also, it is on record that the parties have been in marriage for many years and had been blessed with children (two) and the defendant's ability to pay what is demanded herein not established by the plaintiff since she denied been affording the said amount.
22. However, if the defendant may still want to offer him, despite she is entitled to divorce without compensation and if she is willing to give compensation to the plaintiff, it is upon her to do so.
23. Finally, it is hereby ordered:
 1. That the plaintiff has failed to proof his case, he is recommended to divorce the defendant and pay the dowry of one bull and a calf. OR
 2. That the defendant become divorced upon forfeiting the said dowry, then she observes one-month eddat period for her to be married to another man of her choice.
 3. That the demand for compensation not granted because the plaintiff has not proved the defendant to be guilty, and has not established her capacity to pay his demand which she is unable and they have been in marriage for many years and blessed with children.
 4. That the plaintiff has custody of two children blessed out of this marriage as per admission of the defendant but she will have unlimited access to her children together with custody of the children during the holiday.

JUDGEMENT SIGNED AND DELIVERED AT GARBATULLA VIRTUALLY ON 16TH DAY OF MARCH 2023.

BY GALGALO ADAN – PRINCIPAL KADHI

GARBATULLA.

In the presence of:

1. MK – the Plaintiff



2. AAS – the defendant

3. Abdullah G. Dida – Senior Court Assistant

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