



SMAK v RAK (Divorce Cause 44 of 2018) [2023] KEKC 10 (KLR) (11 May 2023) (Judgment)

Neutral citation: [2023] KEKC 10 (KLR)

REPUBLIC OF KENYA
IN THE KADHI'S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)
DIVORCE CAUSE 44 OF 2018
AH ATHMAN, SPK
MAY 11, 2023

BETWEEN

SMAK PETITIONER

AND

RAK RESPONDENT

JUDGMENT

1. This matter had been listed as a ruling, but it should be a judgment as all matters pleaded save the issue of custody and maintenance where we had also given interim orders but same are stayed by the High Court, pending determination of an appeal against this court's ruling.
2. The parties were married in under Islamic law in Hurlingham mosque, Nairobi on August 13, 2016. The petitioner had filed for dissolution of marriage through Khul' in 2018. They then were blessed with one child. The parties gave the marriage a second chance and resumed marital life and were blessed with a second child. However marital discord ensued and they fell out again. The petition was still pending and had not been closed. The petitioner filed an amended petition seeking:
 - a. Khul' divorce
 - b. Physical custody, care and control of the minor children URK and ZRK
 - c. Idda maintenance
 - d. Reasonable mata'a maintenance
 - e. Costs
3. The court pronounced itself through ruling given on October 27, 2022 on the petitioner's application on the issue of interim child maintenance. The respondent exercised his right of appeal, the High court stayed proceedings relating to the issue of children. The same was duly stayed pending the determination of the high court on the matter.



4. The issues remaining for determination in this matter are:
 - a. Divorce
 - b. Idda maintenance
 - c. Mata'a

Divorce

5. Marriage, is predicated on noble objectives to raise a family and live a happy life in mutual respect. It cannot be forced on either spouse. The choice to live with another human being is critical at all stages of the marriage. In recognition of this fact, Islamic law vested the husband with original powers to divorce his wife. The wife also enjoys the right to terminate her marriage under the provisions of Qur'an 2.229, legal prophetic precedent in Hadith Qays Ibn Shimas (Bukhari: 4990, Al Shaukany, Nail Al Awatar, 6/246) and Article 89 of the Islamic Charter on family, subject to refund (if paid) of the dowry.

'...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

6. Article 89 of the *Islamic Charter* on family provide:

'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.

7. Bukhari (4990), Al Shaukany, Nail Al Awtar,(6/246) reported on the authority of Ibn Abbas (RA) 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 to his farm? (dowry) she said 'yes'; the prophet then told Thabit, 'accept back the farm and divorce her.' it is reported by Bukhari and Al Nasa'iy. 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.'
8. Khul'a divorce 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'. This means, Khul'u executed without legal basis is illegal, because it harms the lady, and harm is prohibited by the prophet when said: 'initiating or reciprocating in harm is prohibited'



9. Ibn Juzy (d742H), Al Qawanin al Fiqhiyat, pp 352 states:

“For Khul’a 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”

10. In the instant case, parties were agreed on the issue of divorce at trial. They had previously signed a consent to divorce mutually but same had neither been adopted by court by parties. They resumed enjoyment of their martial rights. On February 21, 2023 counsel of parties confirmed that divorce was already given. After deliberation with parties’ families, the respondent pronounced talak through email on May 6, 2022 The parties’ marriage is confirmed annulled 2nd (revocable within 90 days) divorce with effect from May 6, 2022. Divorce certificate to issue.

Edda maintenance

11. This was not argued at trial. It considered abandoned.

Mata’

12. Mata’ refers to gift given to a divorced wife upon divorce by her husband. It is aimed at consoling divorced wives from the pain of divorce. It has the positive benefit of reducing pronouncement of unilateral divorces. Al Qurtuby, in his ‘Commentary of the Holy Qur’an’ at vol 2 pp 895 while commenting on Q2.241, opined:

‘Scholars differed on the provision verse ‘And for divorced women maintenance (should be provided) on reasonable scale. This is a duty on al Muttaqeen the pious’. Abu Thaur, Al Zuhry, Saeed ibn Jubair are of the view that the verse “affirmed conciliatory gift mat’a for any divorced wife, whether or not the marriage was consummated. It is one of the views of Shafi’ites. Malikites are of the view only when a marriage is consummated is the divorced wife entitled to conciliatory gift.’

13. Sheikh Muhammad Ali Al Sayyis, in his book ‘Commentary on verses of Rulings, at Vol 1, pp168 stated:

“Some husbands divorce their wives and do not care the harm that divorce inflicts on them. The wives’ application for compensation in Shariah Courts in Egypt are not granted compelling them to seek such orders from the magistrates’ courts where they are granted. It is much better for the Shariah courts to adopt Saeed ibn Jubair’s opinion in the issue, which will not only compensate wives for arbitrary divorce but also reduce divorce rates. Many a husband would rethink of divorcing his wife if he is aware he will be obliged to pay mut’a upon divorce.”



14. Imam Ibn Jarir Al Tabary while commenting on Q33.28 stated the verse implied it is obligatory for Muslim husbands to provide mata' upon divorcing their wives. He commented thus:

'I shall gift you what Allah the almighty has commanded men to gift their wives at divorce when He stated 'but give them [a gift of] compensation – the wealthy according to his capability and the poor according to his capability – a provision according to what is acceptable, a duty upon the doers of good' and ' O prophet say to your wives, 'If you should desire the worldly life and its adornment, then come, I will provide for you a gracious release''.

15. Muhammad ibn Ahmad ibn Juzy (d741) in 'al Qawanin al fiqhiya' at page 352 stated:

'Mata' is the benevolence to wives according to the financial ability of divorcing husband, it is encouraged, Al Shafiy made it obligatory ... Scholars are agreed that it is a right entitlement to all wives whose marriage was consummated whether the dowry was ascertained before or after the consummation of the marriage. It is not entitled to wives who elected to be divorced; such as wives of husbands suffering insanity, leprosy, impotence, emancipated female slave married to male slave, judicial dissolution (faskh), a wife who requested Khul' divorce, and dissolution through execution of curses in denial of marital infidelity. Scholars differed whether or not wives whose husbands gave them power to divorce themselves are entitled to mata.'

16. Strictly under Islamic a wife would not be entitled to mata' if she had pleaded for Khul' divorce, unless in the courts considered opinion, she merely made prayer out of frustration and fear of dismissal of her case on account of insufficient evidence to prove grounds for dissolution. The court in divorce petitions has discretion to dissolve the marriage through faskh and not Khul' even it had been so prayed, if in its mind, the marriage was irretrievably broken down or there was sufficient evidence to dissolve the marriage through faskh. In this case, although the petitioner pleaded for Khul' the parties already effected divorce. In the circumstances, we hold that the petitioner is entitled to mata'.

17. As argued by Imam Ibn Jarir Al Tabary on his commentary of Q33.28 there is no standard quantum of the mata' gift. It should be reasonable, according to the customs and ability of husband and I may add the duration of the marriage. Considering the duration the parties actually lived together in the matrimonial home and the fact that the petitioner had prayed for Khul' divorce and would normally not be entitled to mata', I award her what the respondent offered, Kes 50,000.00 as mata'.

18. Orders accordingly. No order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON 11TH MAY, 2023

HON. ABDULHALIM H. ATHMAN

SENIOR PRINCIPAL KADHI

In the presence of

Mr. Abdishakur, Court assistant

Ms. Athman for Petitioner

Mr. Nyamu for Respondent

