



REPUBLIC OF KENYA



**SHA v AMI & another (Divorce Cause E056 of 2023)  
[2023] KEKC 30 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEKC 30 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT GARISSA  
DIVORCE CAUSE E056 OF 2023  
AD WAKO, PK  
JULY 31, 2023**

**BETWEEN**

**SHA ..... PETITIONER**

**AND**

**AMI ..... 1<sup>ST</sup> RESPONDENT**

**AMI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner in this Divorce cause is one SH (hereinafter the petitioner). She filed her petition dated 19<sup>th</sup> May, 2023 against one AM (hereinafter the respondent) where she prays for;
  - a. Dissolution of marriage
2. The 1<sup>st</sup> Respondent is male adult whose last known address was [Name Withheld], Garissa within the republic of Kenya.
3. The 2<sup>nd</sup> Respondent is a male adult of sound mind residing in [Name Withheld], Garissa within the Republic of Kenya. Brother to the 1<sup>st</sup> respondent.
4. That the petitioner and the 1<sup>st</sup> respondent contracted an Islamic marriage and have been living together as husband and wife subsequently was blessed with 3 issues.
5. That the 1<sup>st</sup> respondent was reported missing on June 18, 2017. He was taken by a group of unknown people from his place of work (spania Bus office) at around 10:00 am in the morning.
6. That subsequently, the incident was reported to the police, under OB no. 23/18/6/17.
7. That it has been more than six years since the petitioner last received any information about the 1<sup>st</sup> respondent.



8. .That both the petitioner and the respondent’s family have made extensive efforts to locate him but it has been unsuccessful.
9. . That the petitioner has reached a point of giving up on finding the 1<sup>st</sup> respondent, as there is uncertainty regarding his status, whether he is alive or dead.
10. . That given the circumstance and the prolong absence of the 1<sup>st</sup> respondent, the petitioner believes it is the best of both parties involved to seek a divorce.
11. . The 2<sup>nd</sup> respondent filed a response on 13<sup>th</sup> June 2023 to the petition and admitted to the pleading of the petitioner as entailed in her petition.
12. . The petitioner from her uncontroverted testimony testified on oath that the 1<sup>st</sup> respondent has been missing for a period of 6 years, as a woman she needs to move on with her live rather than been captive in a marriage that does not exist.
13. Having considered the evidence adduced before me, the evidence was not challenged. Therefore, the issue that fall for my consideration is; -
  - a) what is the concept of Islam on a missing person?

14 The definition of missing person(mafqud) a person missing from his place of residence for a long time with no news and it is unknown whether he or she is alive or dead (wahbah al-zuhayli. Al-fiqh al-islam wa adillatuh, pg 784)
15. There are no clear Quranic or prophet evidences that set certain durations for missing person before person presumed dead, however, the Muslim scholars agreed that it is necessary to determine the duration of missing person.
16. According to the opinion of imam shafii during his stay in Egypt is that the duration is 4 years, this is also the opinion of Umar bin al- khattab, Uthman bin Affan, Ibn Abbas, Ibnu Umar.
17. In other jurisdiction the Malaysia shariah court also maintain that waiting period for a presumption of death is 4years in matter relating to the dissolution of marriage.
18. . Meanwhile the Mālikis the Ḥanbalis and the more preferable view among the Ḥanafis opined that dissolution is permissible in case of a missing husband, but they differed on the minimum period of his disappearance to enable a wife to claim for a dissolution. The opinion is based on the following arguments:
  - i) Allah says to the effect:
 

“ A divorce is only permissible twice: after that, the parties should either hold together on equitable terms, or separate with kindness.” (Surah al-Baqarah, 2: 229)
19. . It is the custom of the pagan Arabs that a man could divorce his wife thousands of times and revoke it in order to cause harm to her, while there was no limit in this regard. When this grievance was reported to the divorce to three times. Thus, forcing a wife whose husband has disappeared and is not divorced to remain in a marriage tie is surely not an act of Ihsan, thus, she should be released with kindness.
20. . In another verse, Allah has ordained not to keep wives so as to hurt or harm her. Allah says to the effect:
 

“ But do not take them back to injure them, (or) to take undue advantage.” (Surah al-Baqarah, 2: 23



Preventing a dissolution of marriage between a missing husband and a wife shall mean to abstain the wife in a way that will harm her. The jurists who viewed that dissolution is not permissible in this matter argued that the verse of the Quran is not considered as *adillah tafşiliyyah* thus inadmissible, and moreover the verse is revealed to clarify the number of *talāq*.

21. .In answering to this, jurists of Malikis and Hanbalis held on the principle (What must be considered is the generality of text wording, not the particularity of the cause of revelation). This means when a text is expressed in a general form, it should be understood as so, although the context of the revelation is specific to a particular point in time.

22. . It is narrated that when the Prophet P.B.U.H. was informed that ‘Abd Allāh bin Amru bin al-‘As performed fasting during the day and prayer all the night, he said; “Don’t do that, fast for few days and pray and sleep at night, as your body has a right on you, and your eyes have a right on you, and your wife has a right on you...”

Hence among the rights of which Islam has bestowed on a wife over her

husband is the right to consummation (*al-wat’u*), and if the husband fails to fulfill his obligation, it shall become permissible for the wife to claim for a dissolution.

23 The Prophet P.B.U.H. forbids any element of harm as he said, ‘*La ḍarār wa la ḍirār.*’ (There should be neither harm nor reciprocating harm) The absence of the husband may bring harm to the wife and denying her from her right, may cause upon her great ordeal or may lead her to immoral acts, thus the principle of ‘*al-ḍarār yuzal*’ (harm must be eliminated) must be applied. The jurists also relied on several other principles of *fiqh* such as ‘*Dar’ al-mafāsīd awla min jalbi al-mansaaleh*’ (the repelling of evil is preferred to the acquisition of benefits) and ‘*al-ḍarār al-aqwa yuzal bi al-ḍarār al-akhaf*’ (greater harm must be prevented even at the expense of a lesser harm). Thus, even if dissolution is not preferred in Islam, yet harm inflicted on a wife due to the missing husband is far greater, and in order to remove the harm, a *fasakh* should be more allowable.

24. . Based on the principle of *qiyas* (analogy), the jurists relied that a dissolution due to missing husband is justified as done in the case of *ila’* (vow of abstinence) and ‘*unnah* (impotence). They argued that the possibility of infliction of harm and hardship in the case of *ila’* and ‘*unnah* is lesser than in the case of a missing husband. This is because occurrence of *ila’* and ‘*unnah* merely affected the spousal intimate relationship, but a wife whose husband is missing suffers a denial in a conjugal relationship, a life protection (*al-ri’āyah*) and financial maintenance. Hence the wife has a right to be released from the marriage tie.

25. To my view the reasoning given by the jurists, it seems that the Malikis, the Hanbalis and few jurists among the Hanafis have taken into consideration the avoidance of harm as a general principle in order for a wife to apply for a dissolution of marriage in the case of missing husband.

26. Therefore, the subject matter of these proceedings is accordingly hereby dissolved. Divorce Certificate shall be issued forthwith.

**DATED, DELIVERED AND SIGNED AT GARISSA THIS 31<sup>ST</sup> DAY OF JULY, 2023.**

**HON. A. D. WAKO**

**PRINCIPAL KADHI.**

