MIA v AAA (Divorce Cause E005 of 2023) [2023] KEKC 19 (KLR) (25 October 2023) (Judgment)

Neutral citation: [2023] KEKC 19 (KLR)

REPUBLIC OF KENYA

IN THE KADHIS COURT AT KERICHO

DIVORCE CAUSE E005 OF 2023

IN NYABOGA, SRK

OCTOBER 25, 2023

BETWEEN

MIA ..... PETITIONER

AND

AAA ..... RESPONDENT

JUDGMENT

1. Dissatisfied with the conduct of the respondent, the petitioner, one MIA left her matrimonial home in Nairobi on October, 2021 and went back to reside with her parents in Narok County.

2. Apart from that, the petitioner also blocked the respondent from communicating with her through all means of mobile communication.

3. The respondent, one AAA never throughout that period the petitioner was residing with her parents did he himself travel or send anyone to the petitioner so as to try resolve the problems they were facing.

4. The petitioner approached this court on 28/08/2023 and prayed against the respondent for orders that:

    i. The Petitioner be formally divorced from the respondent

    ii. Cost of the suit and

    iii. Any other reward the honorable court may deem fit and just in the circumstances.

5. The petitioner states in her petition that they married in 2017 in Narok and in according to Islamic customs.

6. She states that after the marriage, they cohabited has husband and wife in Nairobi and were blessed with two children, H and U , both boys.

7. The petitioner further states that the respondent used to mistreat her by denying her rights and the rights of the two children by not sufficiently providing for them.

8. She states also that the respondent is stingy and gives her only Kshs 5,000 which cannot suffice the family in a whole month and thus forcing the her to seek assistance from her mother who is in Narok.

9. The petitioner also states that due to the continuous negligence of the respondent, she was forced to relocate to her mother together with the two children in Narok County.

10. The respondent filed her response on 21/09/2021 and therein stated that despite of what had transpired between him and the petitioner, he was not prepared to lose his family as it was not the petitioner herself who had decided to petition this court but a third party who was indirectly pushing for the relationship to end.

11. The respondent further states in his response that he used to send money to the petitioner in Narok for her upkeep together with the two children but the petitioner was reversing the money back to the respondent.

12. This matter came up for mention on 21/9/2021 and the court in applying the concept of Alternative Justice System (AJS) founded in 4:128 of the Quran and article 159(2) (c) of the *Constitution* among other authorities, referred the parties herein to one Sheikh Salim of Daarul-ulquran in Narok to assist in settling the dispute.

13. The parties appeared back before the court on the 4/10/2023 and they never engaged apart from the respondent traveling from Nairobi to Narok and thus the matter was fixed for hearing on the 11/10/2023.

14. During the hearing, the petitioner stated that the respondent is used to chewing miraa and spends his nights away from his matrimonial home only to come early in the morning the next day and when ask where he was, he beats the petitioner.

15. The petitioner further states that the respondent does not perform the daily obligatory prayers which is a major pillar in Islam.

16. The petitioner states that she has engaged parents from both sides so as to save their marriage but the respondent was not reforming and as a result she fled to her parents together with the two children in the year 2021 and has been there until the hearing of this petition.

17. Other than dissolving the marriage, the petitioner further prayed for orders that the respondent pay her dowry of Kshs 35,000 which is her right and he also be providing a monthly Kshs 15,000 towards the maintenance of the two children.

18. During cross examination, the petitioner confessed reversing money send to her back to the respondent and further blocking him from communicating with her.

19. In his response, the respondent states that regardless of what did transpire between him and the petitioner, he did not want his family to break but instead to be together and bring up the children together and asked that they forgive one another.

Determination

20. Marriage, apart from its main objective of preserving human species in accordance to the scriptures, it is also a means of achieving tranquility, affection and compassion for married couples. The Almighty God states: And among His signs is that He has created for you spouses from among yourselves so that

you may find comfort in them. And He has placed between you compassion and mercy. Surely in these are signs for people who reflect. Qur'aan, 30:21.

21. Whereby it happens that some or all of the objectives of marriage are not met and instead there is harm either on both the husband and wife or one of them, the law has laid down ways of either least reducing or fully getting rid of the harm and divorce being among them is the last alternative incase all the other means have failed.

22. There is no dispute that the petitioner and the respondent have been having difficulties in their relationship for several years and they have been settling that through Alternative Justice System but the problems have been resurfacing.

23. The respondent has pleaded with the petitioner not to let the relationship end but the petitioner has refused stating that she cannot be forced to live with someone she doesn't love.

24. It has been established that a woman who seeks divorce from her husband is supposed to compensate by giving back her dowry to the husband so as to divorce her. This position is founded on the narration that Habibah bint Sahl who was a wife to Thaabit ibn Qays ibn Shammaas came to the Prophet (P.B.U.H.) and said, "O Messenger of Allah, I do not find any fault with Thaabit ibn Qays in his conduct or his religious commitment, but I do not want to commit any act of disbelieve after becoming a Muslim." The Prophet (P.B.U.H.) asked her, "Will you give back his garden?" She said, "Yes." The Prophet (P.B.U.H.) said to Thaabit: "Take back your garden and divorce her." Al-Bukhaary, 5273.

25. In another hadith, the Prophet (P.B.U.H.) tried to intercede for Mughiith to his wife, Bariirah who had rejected him. Bariirah asked, "Is what you are asking me a religious obligation?" The Prophet (P.B.U.H.) replied, "No, I am only interceding for him." She said, "No, I have no desire for him." After the separation, Mughiith used to follow her on her ways in Madinah crying with his tears flowing down his beard. Al-Bukhaary, 5382

26. There is no doubt that someone cannot be coerced to be in a relationship with a person he or she does not desire. The petitioner in the case before this court is the one who has prayed for divorce. But does the respondent deserve compensation as a result of that? He has insisted and asked that the marriage not be dissolved and asked the petitioner to put aside all that had transpired so that they can gone on with their relationship.

27. It is not always that a wife who is asking for divorce has to compensate the husband by refunding dowry. This is because men might abuse that right by oppressing their wives and then demanding for the refund of dowry when the wife seeks divorce.

28. In the matter before us, both the petitioner and the respondent have been having disputes which is different from the case of Thaabit ibn Qays and his wife, Habibah bint Sahl before the Prophet (P.B.U.H.) and thus, the petitioner may have reasons to ask for divorce without the need to refund dowry and as a matter of fact, the respondent himself has not paid the petitioner her dowry.

29. Lastly, I find that the act of the petitioner blocking the respondent from communicating with her and reversing to the respondent monies sent to her meant that the respondent was supposed to appear before his in-laws or at least send someone to represent him or both himself and his representative(s) to go and deal with the issues in dispute. For a period of almost two years, the respondent never put that into consideration.

30. All that stated, I hereby make the following orders:

    i. That the petitioner is hereby divorced from the respondent.

ii. That the respondent pay the petitioner her dowry of Kshs 35,000.

iii. That the respondent to pay a monthly Kshs 10,000 towards the maintenance of the two children.

iv. That no orders as to costs.

DATED, SIGNED AND DELIVERED IN KERICHO THIS 25TH DAY OF OCTOBER, 2023.

HON. IDRIS N. NYABOGA

SENIOR RESIDENT KADHI