



**SR v IS (Divorce Cause E006 of 2023) [2023] KEKC 22 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEKC 22 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT KERICHO  
DIVORCE CAUSE E006 OF 2023  
IN NYABOGA, SRK  
NOVEMBER 22, 2023**

**BETWEEN**

**SR ..... PETITIONER**

**AND**

**IS ..... RESPONDENT**

**JUDGMENT**

1. The petitioner, one SR, a resident of Kericho County in the Republic of Kenya approached this court on 22/09/2023 and prayed against the respondent, one IS for orders that:
  - a. The marriage celebrated between the petitioner and the respondent be dissolved;
  - b. The respondent pay the petitioner KES. 10,500 compensation for breaking her phone.
  - c. The respondent bear the costs of this suit.
  - d. Any other relief the Honorable Court may deem fit and just in the circumstances.
2. The petitioner in her petition states the she got married to the respondent on 06/03/2023 at the Department of Defence (D.O.D.) in Nairobi County. The marriage ceremony was conducted in according to Islamic Traditions.
3. The petitioner states that the respondent is [Particulars Withheld] with the Kenya Defence Force (K.D.F.) attached at the D.O.D headquarters in Nairobi and resides in Kibra.
4. The petitioner further states that after the marriage ceremony, she cohabited with the respondent as wife and husband in Kibra.
5. She also states that around July 2022, the respondent assaulted her and as a result she had a miscarriage since she was pregnant then. During this incident, the respondent also broke her phone which he promised to pay but failed to do so.



6. The petitioner states that the respondent has not been providing for her since July 2022 thus failing to perform his duties as a husband.
7. She further states that the respondent has not provided her with a home while he has provided his other wife with the same and thus showing discrimination.
8. The respondent was duly served vide affidavit of service filed on 9/10/2023
9. The matter came up for mention and directions on 25/10/2023 but only the petitioner appeared and thus the same was fixed for hearing on 26/10/2023.
10. The matter came up for hearing 26/10/2023 and only the petitioner appeared and thus the matter proceeded ex-parte.
11. The petitioner in her submission stated that she got married to the respondent in according to Islamic laws on 6/5/2022 in Nairobi County.
12. After the marriage ceremony, the petitioner states that she cohabited with the respondent as husband and wife in Kibra Nairobi until July when she traveled to Sondu to visit her mother.
13. While in Sondu, the petitioner states that she was contacted by the management of [Particulars Withheld] to attend an interview of a position she had applied in the institution.
14. The petitioner states that she qualified and was employed as an account clerk and thus could not go back to Nairobi where the respondent was residing.
15. She further states that the respondent was disappointed by the fact she was not going to be close to him because of the employment.
16. The petitioner also states that during her stay in Nairobi with the respondent, that one late night the respondent was watching television in the sitting room while she was waiting for him in the bedroom and disappointed, she went and switched off the television set and there and then ensued a fight between them.
17. She states that during the fight, the respondent hit her on the head with his fist which later led to her miscarriage as she was pregnant then. She states that the respondent also broke her phone which he promised to pay but failed to do so.
18. The petitioner asked the court to dissolve the marriage between her and the respondent.
19. Upon that point, the court advised the petitioner if she could try settle this matter without dissolving the marriage since their relationship is only one year old and the issues she has mentioned apart from the respondent hitting her on the head are not that severe.
20. The petitioner then stated hesitantly that there was something else she wanted to state before the court.
21. The petitioner states that before celebrating her marriage to the respondent, she heard several people saying that the respondent used to have an illegitimate love relationship with her mother some years back.
22. The petitioner states that she asked the respondent about that and he confessed and apologized and she forgave him.
23. The petitioner further states that her mother objected to her marriage to the respondent but she insisted on marrying him.



24. The petitioner states that she came to learn that her faith does not allow her to marry the respondent because of the relationship the respondent had with her mother.

## DETERMINATION

25. From the facts stated by the petitioner, I find that the main reason for the petitioner to file this case is the last issue she has raised about the former relationship between the respondent and her mother, an issue which she never stated in her written petition.
26. The respondent was not before the court to respond to the petitioner nor did he file a response to the petition even though he was duly served. The court too tried through its registry to reach him but he was not responding and as a result, the testimony of the petitioner is taken as true and correct.
27. The petitioner and the respondent both profess the Islamic faith.
28. According to the consensus of the Muslim Ummah, it is prohibited for a man to marry a daughter of a woman he legitimately married and had intercourse with. The Qur'an in detailing the types of women prohibited for men to marry, it states: ....and your foster-daughters under your guardianship if you have consummated marriage with their mothers. But if you have not, then you can marry them (daughters). 4:23
29. But for illegitimate consummation between a man and a woman, the scholars have differed whereby the majority of them are of the opinion that it does not prohibit the man from marrying the daughter of that woman nor his son from marrying that woman.
30. Ibn abdi-lbarr states: "Al-Imaam Maalik has said of a man who had illegitimate sexual intercourse with a woman then he is punished for that deed, the man is allowed to marry the daughter of that woman and his son can marry that woman. The reason is because the man committed an act which is prohibited and the woman whom Allah prohibited him from marrying her daughter is the one that he has legitimately married and had intercourse with her...." Al- istidhkaar, 5:462.
31. The above is also the position of al-Imaam Asshaafi'iy and Dawuud Aththahiry.
32. Ibn abdi-lbarr further states that Ibn Alqaasim, a follower of the maaliki school of thought has narrated from Al-Imaam Maalik a position different from what is stated above which is found in Maalik's al-muwatwa'a that the Imaam has states that whoever has ever had intercourse with the mother of his wife has to be separated from his wife as he is the same as the one who legitimately married his mother-in-law and had intercourse with her. This is the position of Al-Imaam Abu Haniifah, his followers and others. This second position has been refuted by all other Maaliki scholars. Al- Istidhkaar, 5:463.
33. According to the customs and practices very many communities if not all, it is prohibited that one should not only marry, but should never engage in love relationship with a woman he has ever had intercourse with her mother or daughter and it is regarded as an abomination.
34. But from the Islamic legal perspective, there is no authority neither from the main sources, the Qur'aan nor the Sunnah prohibiting a man from marrying a woman whom he has had intercourse with her mother or daughter and in-fact Ibn Al-uthaimiin, a contemporary Saudi jurist has gone against his school of thought, Al-Hanaabilah and has stated: "According to our school of thought, illegitimate intercourse is similar to the legitimate and if one has illegitimate intercourse with a woman, he is prohibited from marrying her female ascendants and descendants and the woman too is prohibited from marrying the man's male ascendants and descendants forever." He further states: "and this is among strange thoughts that illegitimate intercourse is likened to a legitimate one and is also among the weakest of opinions." Sharhu Almumti'u, 12:120



35. The petitioner might have heard of the prohibiting position which among other issues led to her approaching this court so as to nullify her marriage to the respondent.
36. Apart from the position that there is no prohibition, these same jurists advice that one should avoid that kind of marriage.
37. The respondent being aware of this petition did not make any response nor did he appear to defend himself and thus, there is no objection to granting the petitioner her prayers.
38. That said, I do make the following orders:
  - a. That the petitioner is hereby divorced from the respondent.
  - b. That the respondent is hereby ordered to pay the petitioner KES. 10,500 compensation for breaking her phone.
  - c. That there is no order as to costs.

**DATED AND SIGNED AT KERICHO THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2023**

**IDRIS N. NYABOGA**

Senior Resident Kadhi

In the presence of

The petitioner

Court Assistance

