



**RAW v MCB & another (Matrimonial Cause E003 of 2022)
[2022] KEKC 1 (KLR) (1 April 2022) (Judgment)**

Neutral citation: [2022] KEKC 1 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MERTI
MATRIMONIAL CAUSE E003 OF 2022**

G ADAN, PK

APRIL 1, 2022

BETWEEN

RAW APPLICANT

AND

MCB 1ST DEFENDANT

RUA 2ND DEFENDANT

JUDGMENT

1. This is a matrimonial cause, filed by the plaintiff on 11th Jan 2022, to seek for orders to return the 1st defendant to her matrimonial home, to punish the 2nd defendant for breaking his family, and destroying the life of his children, to bar the mother in-law for misleading her daughter the 1st defendant into astray, to give him all rights deemed to fit.
2. The plaintiff based his relief on the grounds, that the 1st defendant previously deserted her home on nine times, without any genuine reasons. Most of the time, the plaintiff being away from home grazing his livestock. She developed having extra marital affairs with the 2nd defendant who was seen at the plaintiff's home, at 12:45 am at night hours. The plaintiff confronted the 1st defendant over the issue and also warned the 2nd defendant to stay away from his family. But the plaintiff said, that the 2nd defendant did not keep off, he continued his illicit affairs behind him. He claims, the 1st defendant got pregnant suspecting to be from the 2nd defendant. She aborted herself and then deserted her home. The matter reached the elders, where the 1st defendant refused to return home claiming other baseless reasons. He snatched a cell phone while she was communicating with the 2nd defendant after even been restricted to keep her off, the phone found with love messages from the 2nd defendant.
3. The 1st defendant admits, to have deserted her home, several times, but due to beatings over suspicion and rumors, and also due to lack of maintenance. She denies having extra marital affairs with the 2nd defendant. She wishes the plaintiff to be put to strict proof. She claims, that the suspected defendant



- was friend to the plaintiff, even before they got married. Thus, the 2nd defendant used to come home anytime without suspicion. That day, on which the 2nd defendant came home and found there, she had sent him to fetch water for her from Bulesa Goda, hence was found there at the plaintiff's home, and not at the time been said as 12:45 am at late night, it was at 8 pm evening. She claims, that the plaintiff then tied her up and beaten her over the suspected affairs, so as to force her to admit. But she denied, and clearly told him, that she doesn't have such affairs with the said defendant.
4. She again denying to continue with the said affairs behind his back, and never had pregnancy out side their marriage, nor aborted herself 5 months old pregnant. But she claims, to have fall sick, where with the plaintiff's permission got medication from the traditional herbalist. She also denies, the claims against her mother about supporting her to desert, and neglecting her sick child. She lets him to proof the same before the court.
 5. She counter claims against the plaintiff for been subjected her to emotional and social suffering due to his barbaric behavior, and further submits to the jurisdiction of this court to attend to this matter, thus praying for dissolution of the marriage on grounds of beating her severally over suspicious and improvidence towards his family. She subsequently, seek for custody of the children and maintenance.
 6. The 2nd defendant denies the allegations, except that he admits to be cited there at the plaintiff's home at 8 pm not as claimed at late hours of the night. He said, to have seen there, not because of having any such unlawful affairs with the plaintiff's wife. He was coming there normally, anytime without any suspicion, even on before. But on that specific day, he came to assist her to fetch water, after he found her children crying for water. He further denies, that there is no time, he was warned or restrained by the elders to stay off the plaintiff's home. He therefore, wants the court to clear his name, and the plaintiff to go for DNA test to prove the ownership of the suspected pregnancy.
 7. According to the pleadings from both sides, it is in clear admission that the suspected defendant, was found there at the plaintiff's home at night, and the 1st defendant was on several occasions deserted her home. It is also in agreement, that the plaintiff spends most of the time away from home, grazing his animals.
 8. The questions of determination in this matter are, that on whether the 2nd defendant came there for having unlawful affairs with the plaintiff's wife or whether he was there to assist the plaintiff family and has no such affairs? Whether the 1st defendant (the plaintiff's wife) has on several occasions deserted her home for other reasons and not for the one in question? Whether the plaintiff subjected his wife to emotional and social suffering for no reasons?
 9. On hearing the matter, from both sides, who presented evidences orally. The plaintiff gave the evidences that he suspected the 1st defendant for having unlawful affairs with his family, from the time the 2nd defendant was found in his home at night 12:45 am. He was found by his brother JA both of them sitting on his bed. The 2nd defendant and the 1st defendant, in their admission, they testified that he was found there in the plaintiff's home, sitting in front of the house on a plastic chair, at 8pm and not 12:45 am as claimed. He was coming to fetch water for his children who were crying for water at that time. Also, the 2nd defendant, testified to come there usually without any suspicion and sometimes spend the nights there, because for been friends with the plaintiff, even before their marriage. On the other side, the 1st defendant admits to have got miscarriage of the pregnancy of 3 months old and not that one claimed by the plaintiff. She also admits the phone presented before the court as the one snatched from her by the plaintiff while she was communicating with the 2nd defendant using the same phone. She testified that the phone belongs to her mother, but she was using it and doesn't know the message sent to the said phone. She said, to have no proof to present before this court concerning her beatings and lack of maintenance.



10. Also, the 2nd defendant admits that on last time he communicated with the plaintiff's wife over the phone informing her about their milk which was given to him by someone to take it for them. He called her, for just to inform her of their milk, so that she picks it early before the milk may perish, in spite of the restriction against him, to keep off the plaintiff's wife. He testified to assist the plaintiff's wife just because of his friendship with the plaintiff as they were brought up in the same village. He further adds, that even the very day, the plaintiff eloped the 1st defendant, he ferried them with his motorbike. However, the 1st defendant admits in court sending love message in Borana word, "Tiyayo" meaning my lovely. But giving excuse, that he doesn't know, how it happens to be in her phone as he has intended to be sent to another girl which he cannot mention her name here, because of fearing to fall into another case, because she is one of the close family of the area. The 1st defendant did not proof to this court, how she is been subjected to emotional and social suffering for reasons by presenting evidence.
11. Based on the evidences produced herein, it's clear, that the 2nd defendant has shown to this court, that he has relationship with the plaintiff's wife, emanated from normal neighborhood relationship to unlawful one. This indicated by his admission and sending lovely message. It is evident, that the 1st and 2nd defendant have been alone at the plaintiff's home at night hour. It's not permissible in Islamic law, for a man to be alone with a woman who is not his blood relative, because the prophet (blessings and peace of Allah be upon him) said: "No man should be alone with a woman unless there is a mahram with them." narrated by al-Bukhari (1862) and Muslim (1341). And in another hadith, the prophet (blessings and peace of Allah be upon him) said: "No man is alone with a woman but the shaytaan is the third one present." Narrated by al-Tirmidhi (1171) and classed as saheeh by al-Albaani in Saheeh al-Tirmidhi.
12. The prominent Muslim scholars of the standing committee for issuing fatwas, sheikh Abd al-Azeez ibn Abd-Allah ibn Baaz; sheikh Abd al-Razaaq Afeefi; sheikh Abd-Allah ibn Ghadyaan; Sheikh Abd-Allah ibn Qa'ood, replied to the question on what it meant by Khalwah, that is forbidden under Islamic law. They answered, that, "Khalwah" means "being alone with", not only when a man is alone with a woman who is not his mahram in a place where they cannot be seen; rather it also includes situations in which he is alone with her in a place where she can converse with him and he can converse with her, even if they can be seen by other people, but their words cannot be heard, whether that is out in the open or in a car or on the roof of a house, and so on. This is because, "Khalwah" has been forbidden, for it is the harbinger of zina and the means that leads to it. So, everything that could lead to that, even arranging to do that later, comes under the ruling of physical "khalwah" or being alone in a place where they cannot be seen. End quote. It is clear that 1st and 2nd defendants were not blood relatives to be together alone, at night time which is wrong hour to be in some one's house not related and moreover to have phone conversation to a woman whom the husband has restricted to keep away from her. This act amount to interfering with one's wife and leading to destroying their marital relationship.
13. One of the rights that the husband has over his wife is that she should not permit anyone whom he dislikes to enter his house. Abu Hurayrah, may Allah be pleased with him, narrated that the messenger of Allah, peace and blessings of Allah be upon him, said: "it is not permitted for a woman to fast when her husband is present without his permission, or to admit anyone into his house without his permission. And whatever she spends in charity of his wealth without his consent," (Narrated by al-Bukhari, 4899; Muslim, 1026).
14. Therefore, the 2nd defendant also breached her husband rights by allowing the 2nd defendant to her home with excuse of assisting her as if she is married to him. She has no permission to seek for assistant



from another man who is not her husband, furthermore, this person is not the plaintiff relative or not of her own relative.

15. It is also observed, that during the hearing of this matter, the 1st and 2nd defendant noted to be in close contacts with each other as they found coming to court for hearing at the same time, talking and chatting to one another while seated out, they go together when leaving the court. Also, the 2nd defendant shown to be more concern with 1st defendant, by him willing to speak for her. He has information about the 1st defendant, especially, the problem she is facing at home, and how her brothers' in-law is not helping her. He proved to be of more concern and willing to assist the 1st defendant, even after he was instructed to keep off.
16. Finally, it is hereby ordered as follows:
 - a. That the 2nd defendant has crossed to interfere with the marriage between the plaintiff and 1st defendant, hence he is liable to pay a fine of kshs 20000.
 - b. That the he is further warned to keep off the plaintiff's family in any form and means he can.
 - c. That the 1st defendant also has been found wrong for the unlawful relationship, since she had children with the plaintiff through lawful marriage. She has to abstain, instead resume her matrimonial home for the best interest of her children and protect marriage institution.
 - d. That if the 1st defendant agree to resume her matrimonial home; the plaintiff should forgive her and not retaliate against his wife for the wrong she engaged.
 - e. That in the event that the 1st defendant would not agree to resume her home, she should be liable for punishment to pay kshs 30000, in addition to what she will return as dowry given for the marriage, or forfeiting the unpaid dowry, and paying other cost upon demand by the plaintiff if the will be any.
 - f. That the issue of children's custody, did not take central stage of their arguments, but to the finding of this court, it is hereby granted to the plaintiff if it happen that they should divorce each other, based on the best interest of the children as per this case, where the 1st defendant has not proved to be morally complying with the good character required by Islamic faith.

DATED, SIGNED & DELIVERED AT MERTI ON THIS 1ST DAY OF APRIL 2022.

GALGALO ADAN

PRINCIPAL KADHI

MERTI.

