



**FYH v AII (Divorce Cause E188 of 2022)
[2022] KEKC 8 (KLR) (Family) (16 June 2022) (Judgment)**

Neutral citation: [2022] KEKC 8 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT NAIROBI (MILIMANI COMMERCIAL COURT)
FAMILY
DIVORCE CAUSE E188 OF 2022
AH ATHMAN, SPK
JUNE 16, 2022**

BETWEEN

FYH PETITIONER

AND

AII RESPONDENT

JUDGMENT

1. The petitioner approached this court through divorce petition. She seeks orders for dissolution of marriage, issuance of divorce certificate, custody of the children and maintenance including school fees.
2. The petitioner claimed the respondent is abusive and violent, that he insults and beats her in front of the kids and in public.
3. The respondent was served with the petition. He did not file a reply to the petition. He filed an affidavit in opposition. He requested the matter be referred to elders for reconciliation.
4. The court did refer the matter for reconciliation to elders. The elders reported that they had tried to resolve the martial dispute more than twenty times and had done everything from slaughtering a goat to recitation of the Holy Qur'an but their efforts have not been successful. They contended the petitioner ready for the marriage to continue.
5. The parties married in 1998 at Filtu town, Ethiopia. They are both Kenya nationals living in Eastleigh, Kamukunji - Nairobi. They are blessed with eight children and raising also the respondent's niece. Two children are above eighteen (19 and 21 years) but are still schooling, one in university and another did KCSE but is yet to join college.
6. The issues for determination in this matter are whether or not the petitioner is entitled to divorce, custody and children maintenance.



7. The petitioner reiterated under oath that the respondent treated her cruelly by often assaulting and insulting her compelling her to run away from him for her safety. She stated that he declined amicable divorce and contends the marriage has irretrievably broken down. She stated that the dowry was not given and she relinquishes it for her freedom.
8. Neither party called witnesses to support their claims. They relied on their testimony under oath and documents. The petitioner reiterated the violence both oral and physical, meted on her by the respondent to the extent of suffering a miscarriage and having her uterus removed. This fact is contested by the respondent who alluded that the removal of the uterus was due to a medical condition and not as a result of any of his actions. However, it was patently clear from the proceedings that the respondent did not trust the petitioner. He followed her at her workstation, accused her of infidelity on the flimsiest of reason. He admitted being jealous without sound legal basis. The petitioner reported allegedly assault to the police and filled out P3 form.
9. Q.4.19 obligates husbands to treat their wives fairly and with honour. Mistreatment of any kind is prohibited.

“O you who believe! You are forbidden to inherit women against their will; and you should not treat them with harshness, that you may take away part of the mahr you have given them, unless they commit open illegal sexual intercourse; and live with them honourably. If you dislike them, it may be that you dislike a thing and Allah brings through it a great deal of good.”
10. Article 87 of the Islamic Charter on Family [ICF] establishes mistreatment as a valid ground for divorce. It provides:

“If the wife has been harmed by her husband to an extent that would be impossible for most people similar to them to continue marital relationship under such circumstances, then she shall have right to ask for divorce. If her husband refuses to divorce her, she can raise her case to the judge. If the harm is proven, then the judge shall rule in her favor thereby divorcing her from her husband...”
11. Domestic violence and mistreatment of wives is not condoned under Islamic marital laws. Rule 5 (2) (d) the *Kadhi's Court (practice & procedure) rules 2020* 'injury is removed' one of the overriding objectives of the rules, confers the court with necessary powers to end harmful practices in marriage, a space designed for happiness, love and affection. The juristic maxim is a provision of section 20 of the Majalla, the Ottoman Courts manual founded on the hadith narrated by (May Allah be pleased with him) and reported by Imams Malik, Al Muwatta' vol 2. pp 352), Ahmad, Al Musnad pp 239 hadith No. 6865), Baihaki, Sunanul Kubra vol. 6 pp 257 hadith No. 1909, that the Prophet (may Allah's peace and blessings be upon him) said:

“initiating or reciprocating harm is prohibited (in Islam).
12. I cannot find for the petitioner the respondent's physical assault. I find however that the respondent meted oral and psychological violence on the petitioner. Despite having lived together in the marriage for twenty-three years and many interventions by elders, the petitioner still has palpable fear of living with the respondent. The marriage has irretrievably broken down and compelling the petitioner to live with respondent in marriage offends the espoused objectives of marriage contemplated in Q.30.21.



13. The petition is merited. Consequently, the prayer for divorce is hereby granted. The party's marriage be and is hereby dissolved with effect from 16th June, 2022 corresponding with 16th Dhul Qa'dah, 1443 A.H. Divorce certificate to issue.
14. The case of *Mehrunisa v. Pravez* (1982-88) 1 KAR 18 settled with finality the issue of the mother getting priority on children custody unless there exist proven special or peculiar circumstances to disqualify her. It further conforms to the principle of best interests of the child being paramount under Article 53 of *the Constitution* of Kenya (2010), Section 4 of the *Children's Act*, Cap 141 Laws of Kenya, Article 19 of the United Nations Convention on the rights of the Child (CRC), Article 106 (1) of the Islamic Charter on Family (ICF) and ruling of the Prophet Muhammad (may peace and blessings be upon him) on a complaint over custody by a divorced wife (Reported by Abu Daud [2276] through Abdallah ibn Amr (may Allah be pleased with him). Accordingly, Actual and legal custody of the minor children of the parties herein is granted to the petitioner, the respondent to get reasonable access.
15. The petitioner reviewed her prayer for children maintenance from Kshs 150,000.00 for accommodation and food, Kshs 140,000.00 for school fees and Kshs 30,000.00 for medical fees to Kshs 50,000.00 per month for food and school fees plus school fees. The respondent offered to pay Kshs 40,000.00 per month for rent and food. He argued he no longer has any business and that his adult children out of the country do not, contrary to petitioner's claim, assist him in any way. Under cross-examination the respondent admitted to have been providing Kshs 52,000.00 for accommodation and food.
16. The responsibility to of children maintenance lies on the husband. It is well founded on the provisions of Q.4.4 and numerous Islamic traditions. Further, there is juristic consensus among Muslim jurists on its prerogative. Its quantum, however, is not standard but dependent on the balance of the twin factors of needs of the wife and children and financial ability of the husband as espoused under Q.65.35 read together with Q.2.233. In the circumstances of this case, we direct and order the respondent to pay Kshs 50,000.00 per month being children maintenance inclusive of accommodation and food. He shall also pay school and madrasa fees.

Each party to bear its own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI ON 16TH JUNE, 2022

HON. ABDULHALIM H. ATHMAN

SENIOR PRINCIPAL KADHI

In the presence of

Ms. Judith, Court assistant

Petitioner

