



**NMA v DIA (Divorce Cause E054 of 2020)
[2022] KEKC 12 (KLR) (Family) (6 June 2022) (Judgment)**

Neutral citation: [2022] KEKC 12 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT NAIROBI (MILIMANI COMMERCIAL COURT)
FAMILY
DIVORCE CAUSE E054 OF 2020**

AH ATHMAN, SPK

JUNE 6, 2022

BETWEEN

NMA PETITIONER

AND

DIA RESPONDENT

JUDGMENT

1. The plaintiff prays for dissolution of marriage, custody and children maintenance.
2. The petitioner claimed the respondent deserted his family and abdicated his marital responsibilities.
3. The defendant was served with the plaintiff summons to appear and reply. He failed to enter appearance or file defence. The matter proceeded ex parte to formal proof hearing under rule 68(1) (b) of the *Kadhi's Court (procedure & practice) rules 2020*.
4. The petitioner is a (32) years old lady. She is Kenyan. The respondent was Somali refugee in Kenya. He obtained US citizenship and travelled to U.S.A in 2016. The parties had married under Islamic law in 2014 in [Particulars Withheld] – Nairobi in a marriage conducted by the bride's father. They are blessed with three children.
5. The issues for determination in this matter are whether or not the petitioner is entitled to divorce and custody of the children.
6. The petitioner reiterated under oath, that the respondent deserted her for year six years. She stated that he sends her USD 450.00 per month but that is not adequate. The party have three children aged (7, 6, and 5) years old. She said she is a young lady in need of her husband and despite telling him to come and seeking family intervention, he has failed to honour his promise and for two years he has stopped talking to her.



7. The pleadings have not been challenged or controverted. Her case was supported by the evidence of PW1 and PW2. The petitioner has successfully discharged her evidentiary burden on the required standard. I find and hold the respondent deserted his wife and abdicated his marital responsibilities contrary to Islamic marriage laws.
8. The key objectives of marriage of love, affection, tranquility and mercy contemplated under Q.30.21 cannot be envisaged where the husband deserts his wife for long periods without conjugal rights.
9. Desertion offends the objectives of marriage and the fundamental marital rights of the wife. It is unlawful under Islamic law, to leave a wife 'hanging' and starve her of her conjugal right for more than four months under Q.2.226. Jalaluddin Al Suyyuty in 'History of Caliphs' at pg. 132-133 records Umar's (R.A.) famous ruling on his soldiers to return to their wives within four months of service in the filed upon consultation with her daughter Hafsa (R.A.) the wife of the Prophet Muhammad (May Allah's peace and blessings be upon him). Umar (R.A.) In his daily night patrols, had overheard a lady passionately complaining the absence her husband who had been out on military duty. This decision by the second caliph of Islam forms a strong precedent on the issue and manifest the protection of conjugal rights to married wives under Islamic law. It matters not that a husband provides for food and other needs, if the wife is no longer able to withstand his absence, he is obliged to satisfy her conjugal right.
10. Lack of conjugal rights, love, affection puts the rights, interests and welfare of the young wife to eminent danger and palpable harm. Rule 5 (2) (d) the [Kadhi's Court \(practice & procedure\) rules 2020](#) 'injury is removed' is one of the overriding objectives of the rules. This 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).
11. The petitioner is a middle-aged lady. Her fundamental rights in marriage have been infringed. The petition is merited. Consequently, the prayer for divorce is hereby granted. The party's marriage be and is hereby dissolved with effect from June 6, 2022 corresponding with 6th Dhul Qa'dah, 1443 A.H. Divorce certificate to issue.
12. The petitioner has been having actual and legal custody of the parties' two minor children. The case of *Mebrunisa 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.
13. The petitioner had not prayed for maintenance because the respondent has been paying USD 450.00 per month. It is the right and in the best interests of the children, which we hereby direct, that the children maintenance continues to be paid.

Orders accordingly.



DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI ON 6TH JUNE, 2022

HON. ABDULHALIM H. ATHMAN

SENIOR PRINCIPAL KADHI

In the presence of

Mr. Jama, Court assistant

Petitioner

