



**SMH v YMD (Divorce Cause E082 of 2022) [2022] KEKC 10 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEKC 10 (KLR)

**REPUBLIC OF KENYA**  
**IN THE KADHI'S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)**  
**DIVORCE CAUSE E082 OF 2022**  
**AH ATHMAN, SPK**  
**JUNE 23, 2022**

**BETWEEN**

**SMH ..... PETITIONER**

**AND**

**YMD ..... RESPONDENT**

**JUDGMENT**

1. The petitioner prays for dissolution of marriage, issuance of divorce certificate, dowry, children custody and maintenance.
2. The petitioner claimed the respondent is emotionally and physically abusive and violent causing her bodily harm. She stated that relative's efforts at reconciliation bore no fruits and the marriage is irretrievably broken down due to irreconcilable differences.
3. The respondent denied the claims. He is represented by Prof. Hassan Nandwa. Parties negotiated and reached partial settlement as follows:
  - i. The marriage between the parties be dissolved with effect from today and consequently the petitioner to observe edda ritual and divorce certificate be issued
  - ii. Joint legal custody of the minors of the marriage to both parents
  - iii. Petitioner to hand over original birth certificates and Marriage certificate to the respondent for purpose of record keeping.
4. The parties were married on 4<sup>th</sup> August, 2007 at Mombasa. Both parties are employed. The petitioner lives in Ruaraka while the respondent lives in Parklands Nairobi. They are blessed with two children from their marriage, FYD and AYD aged 11 and 12. They are both girls.
5. The only issue remaining for determination in this matter is physical custody of the minor children and their maintenance.



6. The petitioner contends the children, being adolescent girls, need her and the respondent is able to provide for them. The respondent argued it is in the interests of the children to live with him because it is the home the children have known and have been living in and it is close to [particulars withheld] School and the madrasa they go to for religious tuition. It is also near their paternal grandparents who often assist to pick them up.
7. Prof Nandwa for the respondent submitted that the children are comfortable to live with their father and it is convenient for them being near their school and madrasa. He argued the petitioner is young and the possibility of her remarrying are strong which will expose the children to strangers and may lead to severe consequences.
8. The petitioner submitted that the respondent is able to provide for his children while they are living with him and she is not intending to be remarried again.
9. 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. The court held:
 

"The general principle of law is that custody of such children shall be awarded the mother unless special or peculiar circumstances exist to disqualify her from being awarded custody'.
10. The same is in tandem with 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).
11. While a mother gets priority on right to custody of minor children, that right is subject to the best interests of the children. A mother may be disqualified from getting custody of minors if she is negligent, endangers the security of the minors or her custody is not conducive to the physical, moral and intellectual welfare of the child. The key factor in custody under Islamic law is the best interest of the children based on the juristic maxims "Repelling an evil is preferred to securing a benefit", "Latitude should be afforded in the cause of difficulty" and "Difficulty begets facility".
12. Islamic law also recognizes that a person vested with custody may be disqualified and lose the right to custody owing to factors impacting on the interests of the children. Ibn Al Qayyim Al Juzzy (693-741 A.H.) in his 'Al Qawanin al Fiqhiyyat' (Juristic statutes) at pp 366-367 stated:
 

"a person granted custody may be lose it on four grounds: travel to a distant place, contagious or serious sickness (such as insanity, leprosy...), immorality, lack of piety marriage to another husband, except if she later divorced (in a dissenting opinion). Period of custody of minors extend to puberty in males and up to marriage in females and consummation of marriage. Imam Shafie' said: 'when a child reaches seven years old, he/ she is left to chose between his parents. Whoever he/ she chooses, gets custody of the child'
13. The same principle applies in common law based on consideration of the best interests of the minors at all times while making decisions on issues relating to children. Unless specifically proven to be



unqualified, the mother gets priority of custody of minors. In *Sospeter Ojaamong vs. Lynette Amondi Otiemo* Civil Appeal 176 of 2006, the Court of Appeal held;

“The general principle of law is that custody of such children should be awarded to the mother unless special and peculiar circumstances exist to disqualify her from being awarded custody. The case of Martha Olela & another vs. Jackson Obiera Civil Application No. Nairobi 16 of 1979 was cited as one authority for such principle. The mother’s disgraceful conduct, say her immoral behavior, drunken habit, bad company are some of the factors which would disqualify her from being awarded custody of a child of tender age.”

14. In the instant case, no evidence was adduced to support any ground to disqualify the mother as competent to get custody of the children. Possibility of remarriage is not a sufficient ground to deny a mother custody of minor children. The only but major challenge is the best interest of the children with respect to their fundamental rights to secular and religious education. Clearly the children would be more comfortable and live near their school and madrasa. The mother lives further away in Ruaraka and school starts at 6:30 a.m. It was not established whether there is a madrasa in Ruaraka. Granting custody to the petitioner would disrupt and interfere with their access to education. It is the only reason we hesitate to grant her custody of the child. However, we grant her unlimited access of the minors including all weekends and entire holidays, provided it does not interfere with their education, secular or religious.
15. I make the following orders:
  - i. The marriage between the parties be dissolved with effect from 2<sup>nd</sup> June, 2022 and consequently the petitioner to observe edda ritual and divorce certificate be issued
  - ii. Joint legal custody of the minors of the marriage to both parents.
  - iii. Physical custody of the minors is granted to the respondent; the petitioner to get unlimited access of the minors including all weekends and entire holidays, provided it does not interfere with their education, secular or religious.
  - iv. Petitioner to hand over original birth certificates and Marriage certificate to the respondent for purpose of record keeping.
16. Each party to bear its own costs.  
Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI ON 23<sup>RD</sup> JUNE, 2022**

**HON. ABDULHALIM H. ATHMAN**

**SENIOR PRINCIPAL KADHI**

In the presence of

Ms. Judith, Court

Petitioner

Prof Hassan Nandwa for respondent

