



ZSM v SNN (Divorce Cause E212 of 2021) [2022] KEKC 2 (KLR) (Family) (7 June 2022) (Ruling)

Neutral citation: [2022] KEKC 2 (KLR)

REPUBLIC OF KENYA
IN THE KADHIS COURT AT NAIROBI (MILIMANI COMMERCIAL COURT)
FAMILY
DIVORCE CAUSE E212 OF 2021
AH ATHMAN, PK
JUNE 7, 2022

BETWEEN

ZSM PETITIONER

AND

SNN RESPONDENT

RULING

1. The plaintiff prays for dissolution of marriage and issuance of divorce certificate.
2. The petitioner claimed the respondent deserted his family and abdicated his marital responsibilities.
3. The defendant was served with the plaint 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 (54) years old lady. She is Kenyan. The respondent is a citizen and resident of the United Kingdom of Great Britain and Northern Ireland. The parties were married under Islamic law on 13th March, 2019 at Nairobi. They are not blessed with any child from their marriage. The parties are in their fifties.
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 two years and has stopped providing and communicating with her.
7. The pleadings have not been challenged or controverted. Her case was supported by the evidence of PW1 who confirmed the respondent evaded her on the issue of the party's marriage when she had travelled to U.K. The respondent had undertaken to visit his wife every three months or at the very



least once every year. He reneged on the terms of the marital contract. 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 7th June, 2022 corresponding with 7th Dhul Qa'dah, 1443 A.H. Divorce certificate to issue.
12. The petitioner prayed for edda maintenance. The general rule is that it is not granted where the divorce or dissolution, as in this case, is a consequence of her own prayer. In the circumstances, it is declined.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI ON 7TH JUNE, 2022

HON. ABDULHALIM H. ATHMAN

SENIOR PRINCIPAL KADHI

In the presence of

Ms. Judith, Court assistant

Petitioner

