



**VNO v MKH (Divorce Cause E145 of 2021)
[2022] KEKC 151 (KLR) (25 August 2022) (Judgment)**

Neutral citation: [2022] KEKC 151 (KLR)

**REPUBLIC OF KENYA
IN THE KADHI'S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)
DIVORCE CAUSE E145 OF 2021
AH ATHMAN, SPK
AUGUST 25, 2022**

BETWEEN

VNO PETITIONER

AND

MKH RESPONDENT

JUDGMENT

1. The parties were married under Islamic law on December 2, 2018 at Kwale in the Republic of Kenya. They are blessed with three children aged 2,6 and 8 years old from their marriage. The petitioner is a lecturer at [particulars withheld] while the respondent is an electrical engineer at [particulars withheld]. The parties were living in the petitioner's house at [particulars withheld], Nairobi.
2. The petitioner through her petition dated September 16, 2021 prays for orders:
 - i. Dissolution of marriage through faskh
 - ii. Issuance of divorce certificate
 - iii. Maintenance of the petitioner during edda
 - iv. Children maintenance KES 120,000.00 per month plus school and medical fees.)
 - v. Physical custody, care and control of the minors
 - vi. Payment of outstanding dowry, KES 45,000.00
3. The petitioner deposed that the respondent is not faithful, infected her with STDs, has been absconding his marital duties, deserted matrimonial home, and caused her mental and psychological torture.



4. The respondent through answer to petition denied the petitioner's claims. He stated though he works for [particulars withheld], he faces retrenchment and is the sole breadwinner to his extended family. He stated that the amounts requested as children maintenance are highly exaggerated and meant to render the respondent bankrupt. He prayed for the court to grant the divorce, joint custody of the minors and shared cost of maintenance. He proposed to provide KES 30,000.00 per month as his contribution of the children's upkeep.
5. The prayer for divorce is not opposed. Indeed, at pre-trial on May 17, 2022 the respondent pronounced divorcing the petitioner in court. He also admitted he is owed KES 45,000.00 dowry balance. He also does not oppose the petitioner getting physical custody of the minors.
6. The petitioner argued two of the children go to corner brook school and Madrasa. The last born is yet to start school. She submitted KES 45,000.00 is due as dowry.
7. The respondent prayed for legal custody of the minors and access to the children every weekend, to take them on Friday and return them on Sunday evening. He argued he can pay KES 30,000.00 towards the children's maintenance because he also pays KES 80,000.00 per term for the two children as school fees and after his father's death, he has the responsibility of educating siblings, two of whom are in High and some primary school.
8. The remaining issues for determination in this matter are:
 - i. Edda maintenance
 - ii. Rate of children maintenance
 - iii. Modalities of children access by the respondent
9. The issue of edda maintenance was not argued at trial although it was brought in the written final submissions by petitioner through her advocate. Issues not argued at trial are considered abandoned. Arguments are not made in the final submissions. The purpose of final submissions is to highlight the facts, evidence tendered and the law. In any case, the general rule in grant of edda maintenance is that it is not given to the wife in a divorce of her own pleading. Its purpose is to provide continued sustenance of a divorced wife in the matrimonial home in the hope couples may renew their marriage in a revocable divorce. The prayer for edda maintenance is not granted.
10. The divorce was requested by the petitioner. The respondent did not oppose and pronounced it as a result of the petition and failure of reconciliation attempts. It was thus not necessary for grounds or reasons for divorce to be canvassed. It wastes judicial time, often creates animosity between parties and is in bad taste. It offends the principle of amicable divorce encouraged by Islamic law under Q.2.228 which directs thus:

‘The divorce may be pronounced twice, then keep them in good fellowship or let them go with kindness’
11. This court, by dint of rule 5 (1), one of the overriding objectives of the Kadhi's court rules of procedure and practice, is called upon to ensure as much as practically possible, disputes are settled amicably. The court thus frowns upon unnecessary exposure of dirty linen in its proceedings. Un-represented litigants may be forgiven when they venture into such strategy in their arguments, but experienced advocates of the High court have no excuse whatsoever when they consistently adopt such approaches in prosecution of divorce cases in Kadhi's court. The petitioner's counsel in this matter is faulted for indulging his client at the expense advancement of established policy in divorce proceedings in Kadhi's courts.



12. Parents, under Islamic law have shared responsibilities on provision of physical, psychological care and financial provision for sustenance, education, medication and other welfare issues to their children. The mother has the primary responsibility of physical, psychological care of children while the financial responsibility of children maintenance lies entirely on the husband / father predicated on his financial ability. It is well founded on the provisions of Q.4.4 and numerous Islamic tradition and there is juristic consensus among Muslim jurists on its prerogative.
13. There is no standard quantum in children maintenance. It is dependent on the balance between the twin factors of needs of children and the financial ability of the husband as espoused under Q.65.35 read together with Q.2.233 which provide:

“Let him who hath abundance spend of his abundance and he whose provision is measured let him spend of what Allah gave him, Allah asketh naught of any soul save that which He hath given it, Allah will vouchsafe after hardship ease”. Qur’an.65.7

“...No person shall have a burden laid on him greater than he can bear. No mother shall be treated unfairly on account of her child; nor father on account of his child.” Q.2.233
14. Ibn Kathir (d.774H) in his commentary of the verse Q.2.233 stated:

‘The father of the child is obligated to provide food and clothing (of the child) according to custom of her peers in her community without extravagance or stinginess, according to his means in times of abundance, moderation or want.’
15. Ibn Ashur (d.1393H) in Al Tahrir wa al Tanwir, in commentary of the same verse, stated:

‘It is a prohibition for spouses, taking advantage of husbands’ affection and compassion towards their children, to demand from the other above his ability.’
16. The court is thus duty bound, while determining the rate of children maintenance, to balance between the needs of the children and the financial ability of the father.
17. In this case although the petitioner is a lecturer at [particulars withheld] University, Islamic law does not obligate her to provide financially for the children. Her income is entirely hers. Any financial provision towards the welfare of the children is purely philanthropic. The husband, the respondent herein has obligation to provide for the children’s welfare that needs financial input. This however depends on his financial ability as the law does not burden one above his ability. In determination of the rate of children maintenance, the court has the duty to ascertain the father’s ability. The father (in this case the respondent) is required to help court reach this determination.
18. The respondent filed an affidavit of means whereof he had attached his pay slip. He further submitted that he has other obligations of taking care of his siblings’ education after death of his father. The petitioner argued the affidavit should be expunged from the record as it was not in the respondent’ list of documents. The court notes that the document was part of the respondent’s application formally filed in the record. It is also the key evidence that can assist the court in reaching its determination on the issue of quantum. Expunging it from the record offends Islamic laws of evidence and rules of natural justice and fair trial. The laws of *Evidence Act* does not apply in proceedings before the Kadhi’s court. The applicable laws of evidence under section 6 of the *Kadhis’ Court Act*, cap 11 laws of Kenya is Islamic law of evidence. It provides:

‘The law and rules of evidence to be applied in a Kadhi’s court shall be those applicable under Muslim law.’



19. Under Islamic law of evidence, the court, may call any party to give evidence, inspect document or property at any stage of trial if it will help it to arrive at a considered decision on the dispute. Rule 138 of the [*Kadbi's Court Procedure and Practice Rules, 2020*](#) provides:

‘in the interest of justice, the court may at any stage of proceedings call any party to adduce evidence and may inspect any document, premises or property.’

20. We thus find the affidavit of means and documents annexed thereto admissible.

According to the respondent’s January, 2022 pay slip, his gross income is 192,965.21, after statutory deductions his income is 132,546.60 but because of servicing two loans at KES 93,156.20 his net income is 37,890.00; Taking care of one’s siblings especially where their father is deceased is part of social takaful, Islamic social welfare that is highly recommended under articles 126, 127 and 129 of the [*Islamic Charter on Family*](#) (ICF). Article 127 provide:

‘In Islam, those entitled to takaful include all groups of the society who are unable to meet their basic needs and who are living within the Muslim community, permanently or temporarily. This includes orphans, the weak, the poor, the needy, victims of catastrophes and those who have incurred debts for shariah sanctioned interests who are unable to repay them, whether the person is Muslim or non-Muslim.’

21. Islam lays special emphasis to care for one’s kin especially if they are vulnerable and needy. Apart from the primary responsibility of providing for their children and wives, husbands and fathers have the secondary responsibility of providing for their parents and kin. It is second only to the command to submission to the will of Allah the almighty as provided in Q.2.215, Q.4.1, Q.4.36, Q.13.25, Q.16.9, Q.17.27, Q.30.38. Some of the provisions of the [*Holy Qur’an*](#) on the subject are hereunder:

‘Indeed, Allah orders justice and good conduct and giving to relatives and forbids immorality and bad conduct and oppression.’ Q.16.9

‘And give to the kinsman his due and to the poor and to the wayfarer. But spend not wastefully (your wealth) in the manner of a spendthrift.’ Q.17.27

‘So, give the relatives his right as well as the needy and the traveler, that is best for those who desire the countenance of Allah and it is they who will be successful.’ Q.30.38

‘...and fear Allah through whom you ask one another and the womb, indeed, Allah is ever over you an observer.’ Q.4.1.

‘They ask you (O Muhammad) what they should spend, say ‘whatever you spend of good is (to be) for parents and relatives and orphans and the needy and the traveler and whatever you do of good, indeed, Allah is knowing of it.’ Q.2.215.

‘And worship Allah and associate nothing with him and to parents do good and to relatives, orphans, the needy, the near neighbour and the neighbour farther away, the companion by your side, the traveler...’ Q.3.36

22. The same is also emphasized by the prophet Muhammad (may Allah’s peace and blessings be upon him) in numerous hadiths including Bukhari, Fathul Bari 3/1396, 10/5986,5989; Muslim 2555. In this case the respondent’s kin are not only his siblings but they are also orphans and therefore in need of his assistance.

23. The respondent should pay at least one third (30%) of his income to his children, 40% on himself and new family and the rest on his parent and siblings. He pays school fees of 80,000.00 per term for two



children, which translates to KES 240,000.00 per year and KES 20,000.00 per month. Accordingly, we order him to pay KES 35,000.00 for food. This (plus school fees per month) translates to about 41%, of his income which is more than the basic minimum of his financial obligations towards his children.

24. The petitioner did not oppose the respondent's proposal on access to children. At trial the respondent requested to have the children every weekend and half of holidays but in submissions he opted to have them in alternate weekends. It is a reasonable proposal.

25. In conclusion we order as follows:

- i. Parties' marriage is annulled first revocable (within 90 days) divorce with effect from May 17, 2022 corresponding with 15th Shawwal XXXX H, divorce certificate to issue.
- ii. The respondent to pay the petitioner her dowry balance of KES 45,000.00 in monthly instalments in a period not exceeding six (6) months from date of this judgment.
- iii. Both parents have equal legal custody of the children.
- iv. Physical custody of the minors is granted to the petitioner, the respondent to get access in alternate weekends and half of holidays.
- v. The respondent to pay children maintenance as follows:
 - a. Food KES 35,000.00 per month
 - b. School fees KES 80,000.00 per term
 - c. Medical cover / fees
 - d. Clothing at least twice a year.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON 25TH AUGUST, 2022

HON ABDULHALIM H ATHMAN

SENIOR PRINCIPAL KADHI

In the presence of

Mr Suleiman A. Mohamed, Court assistant

Mr Yusuf for Petitioner

Respondent

