



**HAI v ASA (Divorce Cause E058 of 2022)  
[2022] KEKC 154 (KLR) (Family) (5 October 2022) (Judgment)**

Neutral citation: [2022] KEKC 154 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT NAIROBI (MILIMANI COMMERCIAL COURT)  
FAMILY  
DIVORCE CAUSE E058 OF 2022  
AH ATHMAN, PK  
OCTOBER 5, 2022**

**BETWEEN**

**HAI ..... PETITIONER**

**AND**

**ASA ..... RESPONDENT**

**JUDGMENT**

1. The petitioner, young lady, now aged 26 years old had left her parents' home in Lokichoggio, Turkana county to Nairobi to learn some trade. The respondent saw her and the two fell in love. They got married with their parent's blessings under Islamic law in July 11, 2021 at Eastleigh, Nairobi. They are blessed with one child. The petitioner contends the respondent is short tempered, abusive and violent. She states she is unable to withstand the psychologic abuse wants divorce so that she can return to her parents in Lokichoggio. She prays for dissolution of the marriage, unpaid dowry, eddat, children custody and maintenance.
2. The respondent opposed the petition denying the petitioner's claims. He stated, should the court be inclined to grant the dissolution of the marriage, it should be through the Khul'a and 'give up her Mahr'.
6. The issue for determination in this matter is dissolution of marriage, custody and children maintenance.
7. Marriages celebrated under Islamic law are dissolved under Islamic law under section 71 the Marriage Act No 4 of 2014 which provides:  
'The dissolution of marriage celebrated under part vii shall be governed by Muslim law.'
8. Section 72 of the Act provides:



‘where a Kadhi, Sheikh, Imam or person authorised by the Registrar grants a decree on the dissolution of a marriage celebrated under Part VII, the Kadhi, Sheikh, Imam, Mukhi or authorised person shall deliver a copy of the decree to the Registrar.’

9. Divorce though legal is eschewed and ought to be used as a last resort where the marriage negates its envisioned objectives. Article 85 of the *Islamic charter* on family states:  
‘... if the woman is oppressed and the life between them is impossible, then the husband should divorce her out of consideration for her rights. If he does not, then it is the judge’s responsibility to alleviate her of the said oppression because he has the authority to prevent oppression pursuant to the Shari’ah law.’
10. Section 359 of the Kadhi’s court bench book elucidated the rationale of divorce in Islamic law:  
‘Despite the revered status of marriage, Islam recognises the necessity for divorce in cases when marital relations become bitter to a degree which makes peaceful home life impossible. Divorce in Islamic law is considered in accordance with the legal maxim of the lesser of the two evils (*aqalla al dararain*) in that divorce an end to the hatred that may occur between the husband and his wife before it is aggravated to larger extents of harming oneself and creating mischief to society.’
11. The grounds for dissolution of marriage under Islamic law include absence of husband for long periods, imprisonment of husband, lack of or inability to provide maintenance, impotency of husband, husband serious contagious diseases for long period and cruelty of husband. In the instant case, the petitioner cited the respondent’s cruelty and mistreatment as ground for divorce. The burden of proof rests with the petitioner to prove her claim. She called two witnesses whose evidence had little probative value. It was secondary evidence and hearsay. It was evident though, that the respondent did not respect the petitioner’s parents and the petitioner is clearly apprehensive to continue to live with the respondent. She has moved out of the matrimonial home to live with a relative rather than live with her husband and is not ready to return to him.
12. The prayer for dissolution on the ground of cruelty fails. However, it is within her right which the respondent has also requested, to have the marriage dissolved through Khul’a or redemption instrument.
13. Marriage, is predicated on noble objectives to raise a family and live a happy life in mutual respect. It cannot be forced on either spouse. The choice to live with another human being is critical at all stages of the marriage. While the husband is vested with the original right to divorce under Islamic law in Qur’an 2.229, legal prophetic precedent in Hadith Qays Ibn Shimas and article 89 of the Islamic Charter on family, the wife also enjoys the same right albeit subject to return the dowry paid.  
‘...Then if you fear that they would not be able to keep the limits ordained by Allah then there is no sin on either of them if she gives back (the mahr or part o it) for her al- khul’u (divorce). These are the limits ordained by Allah so do not transgress them and whomsoever transgresses the limits ordained by Allah then such are the zalimun (wrongdoers)’ Al Baqarah: 229
14. Article 89 of the Islamic Charter on family provide:  
‘If a woman hates her husband and cannot stand him, even though he hasn’t hurt her in any way, that could be considered grounds for divorce and if she can no longer bear to remain with him, then she has a right to request divorce in exchange for giving up any right that would be due to her as a result of the divorce and returning any dowry or gift that he gave her.
15. Bukhari (4990), Al Shaukany, Nail Al Awtar,(6/246) reported on the authority of Ibn Abbas (RA) that the wife of Thabit Ibn Qays Ibn Shimas told the prophet (PBUH): ‘O prophet, I have no problem with my husband’s conduct and piety but I hate to ‘apostasy in Islam’ (not able to observe the limits



of Allah in marriage), the prophet asked her, 'will you return to his farm? (dowry) she said 'yes'; the prophet then told Thabit, 'accept back the farm and divorce her.' it is reported by Bukhari and Al Nasa'iy. In Dar al Qutny's version, the lady said: 'I am ready to return the farm and more', the prophet said: 'return the farm only.'

16. Khul'a divorce is allowed on the assumption that it is the wish of the wife to exit the marriage without any mistake or instigation on the part of the husband. It must never be used to deny a married wife her fundamental right to dowry. Al Zuhaily, in 'Islamic jurisprudence and its evidences' at 9/7027 states:

'One of the conditions for Khul'u is that the request must be made by the wife of her own free choice and wish to leave the husband without any coercion or mistreatment by the husband. If any of these conditions fails, talaq, and not Khul'u becomes effective... if a husband, intentionally mistreats his wife to compel her to seek for Khul'u, it is not lawful, according to the Hanafi, Hanbali and Shafi'i schools of jurisprudence, for him to take of the consideration she offers because Allah said in Q.23 'and do not take them back to hurt them...' and said in Q.4.19 and you should not treat them with harshness that you may take away part of the mahr you have given them'. This means, Khul'u executed without legal basis is illegal, because it harms the lady, and harm is prohibited by the prophet when said: 'initiating or reciprocating in harm is prohibited'

17. . Ibn Juzy (d 742H), Al Qawanin al Fiqhiyat, pp 352 states:

"For Khul'a divorce to be effective it must satisfy three conditions. First, the consideration must be lawful to transact in under Islamic law. This removes acceptability of alcohol, pig and the likes as a consideration for Khul'u. Others have accepted an unknown and detrimental object as a consideration for Khul'u. Second, it must not be a means to an illegality such as taking, deferment or settlement of loan. Thirdly, it must be as a result of the woman's choice in her desire to divorce the husband without any coercion or as a result of mistreatment by the husband, if either is lacking, the annulment of the marriage becomes effective through divorce and not Khul'u"

18. In the instant case, the petitioner failed to prove grounds for dissolution of marriage. In the circumstances the marriage is dissolved through Khul'a in consideration of the dowry KES 500,000.00 not paid with effect from October 5, 2022 same as 9<sup>th</sup> Rabiul I, 1444 H. He is deemed to have settled the dowry the same shall not be demanded from him.

19. The preamble to the [Kadhi's Court Act \(1967\)](#), Cap 11 Laws of Kenya, states:

"An Act of parliament to prescribe certain matters relating to Kadhis' courts under the Constitution, to make further provision concerning Kadhis' courts, and for purposes connected therewith and incidental thereto"

20. Clearly child custody and maintenance issues are a result of marriage and divorce. They are connected and incidental to marriage and divorce.

21. The [Constitution of Kenya \(2010\)](#), article 170 (5) provides:

The jurisdiction of a Kadhis' court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the muslim religion and submit to the jurisdiction of the Kadhi's courts.

22. Section 5 of the [Kadhis court Act](#), cap 11 replicates the same:

'A Kadhi Court shall have and exercise the following jurisdiction, namely the determination of question of Muslim law relating to personal status, marriage, divorce and inheritance in



proceedings in which all the parties profess the Muslim faith, but nothing in this section shall limit the jurisdiction of the High Court or any subordinate court in any proceedings coming before it.'

23. The High court has dealt with the issue of whether or not Kadhis court can hear and determine issues of custody and maintenance of children. Judges have differed on this issue between those holding the Kadhis court has jurisdiction to deal with issues of children custody and maintenance and those who hold it does not.
24. On the one hand Hon. Judges Musyoka, Muchelule and Odero and now many others following on their interpretation, held that the Kadhi's court lack jurisdiction to hear and determine issues of custody and maintenance of children because it is not expressly provided for in the law and due to the enactment of the *Children's Act*, cap 141. The matter is not settled. The court of appeal has now settled the matter in the case of *TSJ v SHSR* (2019) eKLR, Civil Appeal No 119 of 2017, (Nairobi) the court of appeal, DK Musinga, SG Kairu, A K Murgor JJA, held that there is no stipulation in section 73 of the *Act* that jurisdiction of the children's court is exclusive. The court stated:  
  
'the judge followed that pronouncement with a contradictory but accurate statement that nothing precludes a body such as the arbitration Board over disputes relating to custody and maintenance of children where both parties submit to authority of such a body. There is however nothing in that provision that such jurisdiction is exclusive, Under part vii of the *Children's Act*, 'a court' may on application make orders regarding custody, care and control and maintenance of children but again without stipulation that such jurisdiction is exclusive. We reiterate that as the judge correctly noted there is nothing in the Act that would prevent a body such as the arbitration board from arbitrating over disputes relating to such matter where both parties submit to the authority of such body.'
25. Accordingly, custody of the minor child is granted to the petitioner, the respondent to get reasonable access. There is no evidence the petitioner is currently pregnant. If she is and delivers within the normal period, the child shall belong to the parties herein and order herein will also apply to him or her.
26. It is now settled as a general principle that unless there exist peculiar and special circumstances, mother has priority to custody of minor children. In *Mehrunisa v Pravez* (1982-88) 1 KAR 18 the court clearly pronounced itself on the same. In the instant case, the children are minors less than (3) years and have been and continue to live with their mother. I find no reason to deviate from the general principle. Custody of the minor be and is hereby granted to the plaintiff. Defendant to get reasonable access.
27. Under Islamic law the father is obligated to provide for his children. The quantum of maintenance depends on the needs of the child and the financial ability of the father. This is pursuant to the provisions of Qur'an: 2:233 read together with Q 65.7. The defendant is ordered to pay KES 10,000.00 per month as child maintenance. He shall further contribute towards the child's education when she reaches school going age.
28. No orders as to costs.  
  
Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON 5<sup>TH</sup> OCTOBER, 2022**

**HON. ABDULHALIM H. ATHMAN**

**PRINCIPAL KADHI**

In the presence of

Mr. Suleiman A. Mohamed, Court assistant



Petitioner.

Respondent

