



REPUBLIC OF KENYA



NAH v AD (Divorce Cause 3 of 2022) [2022] KEKC 158 (KLR) (13 October 2022) (Judgment)

Neutral citation: [2022] KEKC 158 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT BUSIA
DIVORCE CAUSE 3 OF 2022
IN NYABOGA, SRK
OCTOBER 13, 2022**

BETWEEN

NAH PETITIONER

AND

AD RESPONDENT

JUDGMENT

1. The petitioner, NAH, a female adult residing of Malaba within Busia county in the Republic of Kenya, running a her own business in Tororo in the Republic of Uganda, first married in around the year 2000 to one MA(deceased) in Wajir. This marriage ended as a result of her husband's death at around the year 2005 leaving her behind with two minors (D and A).
2. In 2008, the petitioner while staying in Wajir with her parents together with her two children, married the respondent, one AD a citizen of Somalia and after the marriage ceremony the petitioner and respondent together with the two children from her first marriage left for Dhusmareb in the Republic of Somalia where they all lived together with her mother-in-law.
3. In Somalia, the petitioner and the respondent were blessed with three issues, AA, AB and MA. This second marriage did not go well with the petitioner as a result of the cruelty she was getting from the respondent. Her mother-in-law who used to provide for the petitioner and the children played an important role in trying to salvage the marriage but she passed away in 2017 thus forcing the Petitioner to flee back to her ancestral home in Wajir together with her five children.
4. Since the petitioner returned to kenya from somalia, the respondent until the hearing of this case has never cared about his family nor contacted her or anyone among her relatives.
5. As a single parent, the petitioner had to take care of herself and the five children and as a result she relocated to Busia in Kenya where she is residing with her children and working for gain in the neighbouring country Uganda.



6. The petitioner prays that the marriage between herself and the respondent be dissolved on the basis that there is nothing left between them in regard to matrimonial relationship.
7. The petitioner states that she is a woman like any other woman and thus she goes through what women go through and her faith does not allow her to engage in love relationship outside marriage. She states that if it was not for what she is experiencing as a woman like any other woman, she could live her life and move on without a man but it is difficult for her and she is afraid of committing forbidden deeds.
8. Since there has been no communication for a very long period of time, the petitioner in her sworn affidavit filed on September 9, 2022 states that it has been difficult for her to serve the respondent at his last known address or contact which has proved to be futile.

Determination;

9. The petitioner herein initiated a case against the respondent who has not appeared before this court nor aware of this suit for reasons which the petitioner has stated. Apart from herself testifying, the petitioner had no other witness to testify in her case.
10. Among the major legal maxims of the Islamic Jurisprudence is Harm/Injury/Evil must be eliminated. The petitioner has approached this court praying that the cause of her harm which is her marriage to the respondent be removed so that she can be able to marry a person of her choice. She states that several men have approached her proposing to marry her but she can't because of the existing marriage. She states that if the marriage is dissolved she will obviously get married.
11. The question which arises here is whether a court of law can decide a matter by the testimony from only one party and without hearing the other party. Muslim Jurisprudential Schools of Thought are divided into two main opinions on the question, the opinion of the majority ie the Maliki, the Shaafi and the Hanbali scholars are of the opinion that a judge can decide a case by relying on the testimony of one party if it is impossible for the other party to appear before the judge. Apart from position, this group has other views on the question but the relied upon opinion amongst them is this one. This opinion is based on several authorities and among that the following authorities: That Hindu the wife of Abu Sufyaan said to the Prophet (PBUH): "Verily Abu Sufyaan is a stingy person and does not provide what is sufficient for me and my child except what I take from his wealth without his Knowledge." The prophet (PBUH) said to her: "Take justly what is sufficient for you and your son." Ibn Maaajah:2293
12. The prophet (PBUH) in the above hadith did not summon Abu Sufyaan who was in Makkah where the incident occurred to appear before him to either dispute or confess to what Hindu her wife had raised before the Prophet (PBUH) and from that, it is understood that it is allowed for a judge to decide a case after hearing only from one party without the other party being present. The consensus of the companions of the Prophet that Umar and Uthmaan had decided on matters of women whose husbands had disappeared and made decision that these women to wait for a period of four years, four months and ten days and after that they can marry men of their choice. Ibn Hazm Muhallaa 8:438 They also state that the prohibition of a judge to hear and decide a case by the testimony of one party alone leads to injustice by denying the party present his/her right/s which judges are supposed to protect. Mughniy Almuhtaaj 6:308
13. The second opinion is of the Hanafi Scholars who hold several views but the relied upon is the prohibition of the judge from hearing a case where there is only one party present before the court. This opinion is based on several authorities and among that the following: That Ali Ibn abi Twaalib said: "The Prophet (PBUH) appointed me to be a judge in Yemen." I said to him: "You appoint me to be a judge while I'm young and have no judicial knowledge." The Prophet (PBUH) said: "Allah will



guide your heart and make stable your speech, when you sit before disputing parties, don't judge until you hear from the second party like you heard from the first one for that is worth in making the matter clear to you." Ali said: "I remained to be a judge and never doubted after that." (Abu Dawuud 2:270)

14. The Prophet (PBUH) prohibited Ali from deciding a case unless he has listened to both parties and this implies that deciding a case before hearing from the other party is prohibited and also referring to the incident of Hindu mentioned above, they state that this was a fatwa (legal advisory opinion) she had asked the Prophet (PBUH) regarding her deed and not a decision/judgment of the court. (Fat'hu Albaary 9:510) This group also state that deciding a case with the testimony of only one party is inconsistent with justice system since the other party not present may be in possession of evidence to challenge the party present, like criticizing and challenging the testimony of witnesses and the evidence of the party who is present. Almuḡhniy 10:95.
15. By reconciling the authentic authorities relied upon by both opposing opinions, the correct position is that under normal circumstances, for example if both parties are present within the jurisdiction of the judge, then the judge should not suffice himself with the testimony of only one party but both parties, but in unique circumstances that may be allowed.
16. The matter before this court seems to be a rare case since the Respondent is in another country (Somalia) while the case is heard in the far western part of the Republic of Kenya next to Uganda and thus will be difficult for the Respondent to appear physically.
17. During the classical periods, appearing before a judge meant to appear physically or through an agent or representative, (Almuḡhniy 10:95) but in contemporary Jurisprudence it may include also appearing virtually from anywhere on earth through modern electronic devices.
18. The petitioner in this case made a mere conclusion that since the respondent is in another country and she has no access to his contacts, she will proceed with the case without the presence of the respondent.
19. Attached to her petition were certificates of birth of the three issues of the marriage which were issued in Mandera county in the Republic of Kenya. The place of birth of all the three as indicated in the certificates is Bokolow within Mandera county. This raises a question as to whether the petitioner was married in Dhusmareb or in Mandera but she states that she has never been to Mandera.
20. The *Civil Procedure (Amendment) Rules, 2020*, [order 5, rule 22C] no 1 states: summons may be sent by mobile-enabled messaging applications to the defendant's last known and used telephone number.
21. It is upon the petitioner to try use her efforts and find the contact of the respondent and either serve him directly or through her in-laws or friends or neighbours since I believe she had some of these people if not all while at her matrimonial home in Dushmaneb or at least have witness/es to support her case.
22. And lastly, I'd like to state that since matters of this nature are properly handled before courts of law, mere facts by a litigant do not prove a case before a court of law.
23. All that stated this petition is hereby dismissed with not cost.

GIVEN UNDER MY HAND AND SEAL OF THIS COURT ON 2022-10-13

IDRIS N. NYABOGA

SENIOR RESIDENT KADHI

In the presence of:

The Petitioner,

C/A Hassan

