



**AA v F(A)M (Divorce Cause E049 of 2022)  
[2022] KEKC 168 (KLR) (15 December 2022) (Judgment)**

Neutral citation: [2022] KEKC 168 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHI'S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)  
DIVORCE CAUSE E049 OF 2022  
AH ATHMAN, SPK  
DECEMBER 15, 2022**

**BETWEEN**

**AA ..... PETITIONER**

**AND**

**F(A)M ..... RESPONDENT**

**JUDGMENT**

1. The petitioner prays for dissolution of marriage, children custody and maintenance including schooling and order for division of matrimonial property / consolatory gift.
2. The respondent on his part claimed it is the petitioner who deserted the marriage. He contends the marriage has irretrievably broken down and cannot be salvaged. He also prayed it be dissolved. He made the divorce proclamation in court on June 2, 2022.
3. The respondent further admitted to not have paid the dowry. He was ready and willing to pay the same. The dowry was gold tasbih. It had not been valued. Parties differed on its valuation. The petitioner had presented a valuation of USD 26,400.00 for 22 carats while the respondent filed valuation of USD 2,357.00 for 14 carats. The parties eventually agree to KES 500,000.00 as value of the value of the gold tasbih to be settled in instalments of KES 25,000.00 per month.
4. The parties were married under Islamic law on December 10, 2010 at Makina Mosque, Kibra – Nairobi. The respondent had reverted to Islam five days earlier on December 5, 2010. They are blessed with three children aged 11, 9 and 8 years respectively from their legal wedlock; two girls and one son. The petitioner is a Canadian national. In 2014 when the petitioner was pregnant with the last-born son, the parties agreed she travels to Canada to deliver the child there. The children have dual citizenship. The last born was born in Canada and has no Kenyan birth certificate. While in Canada, the respondent was living with the children at the petitioner's mother where he also worked with in her company until early 2016 when he moved out with the children to live alone in his apartment. The



petitioner came back in 2018 and by mutual consent the respondent handed over the children to the petitioner and have had a visitation and access arrangement. The petitioner does not object to the last born being issued with Kenyan birth certificate bearing the father's name.

5. The remaining issues for determination in this matter are custody and maintenance of the children.
6. The petitioner prays for custody of all the children to live with her in Canada, in which case she will not need family support from the respondent. She argues the respondent can visit the children in Canada once every year. She contends it is in the children's best interest to live with her due to their gender and age and Canadian government support in their welfare. Alternatively, the respondent should cater for the children's full maintenance including shelter, food, education and health in Kenya.
7. On his part the respondent contends the petitioner is not qualified to be granted custody by virtue of her nationality. He is apprehensive the petitioner will not bring back the children to Kenya which will negatively affect both himself and the children. He submitted that the petitioner has been an absentee mother and he is the one who has been caring for the children.
8. The case of *Mebrunisa v Pravez* [1982-88] 1 KAR 18 among other case law, 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'.
9. 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 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).
10. 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".
11. 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 choose between his parents. Whoever he/ she chooses, gets custody of the child'
12. 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 v Lynette Amondi Otieno* 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 v 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.”

13. In the instant case, the children are minors, two are daughters nearing puberty age and the last is a son born in Canada. It was not disputed that the mother of the children travelled to Canada on agreement of both parents. They also obtained Canadian nationality on both their consent and agreement. On her return she is the one, by mutual consent, who has been having custody of the children. She does not fit the description of an absentee mother. No sufficient evidence was produced to demonstrate the mother’s disqualification from getting custody of the minors. It was sufficiently demonstrated in court that the respondent had the children miss an academic year due to challenges with payment of their school fees. He has challenges in provision of Islamic religious tuition to the children. The children’s education and welfare will be fully catered for by the Canadian government. I find and hold, that it is in the best interest of the children to be in the custody of their mother. Accordingly, the petitioner is granted actual custody, care and control of the three children. She is allowed to take the children to Canada, their other Country. The respondent to have reasonable access by visiting them whenever he would like or have them travel to visit him in Kenya at his own travel costs.
14. The responsibility of children maintenance lies on the husband. It is well founded on the provisions of Q.4.4 and numerous Islamic traditions. Further, there is juristic consensus among Muslim jurists on its prerogative. Its quantum, however, is not standard but dependent on the balance of the twin factors of needs of the wife and children and financial ability of the husband as espoused under Q.65.35 read together with Q.2.233.
15. However, having granted custody to the petitioner and pursuant to her own pleadings that she would not need any support from the respondent for the children’s shelter, food, education and welfare, the respondent is relieved from maintenance order. This is not stay he may not support his children as he wishes.
16. Accordingly, I make the following the orders:
  - i. The party’s marriage be and is hereby annulled with effect from June 2, 2022 corresponding with 2<sup>nd</sup> Dhul Qa’da, 1443 A.H. Divorce certificate to issue.
  - ii. Respondent to settled dowry KES 500,000.00 in instalments of at least KES 25,000.00 per month.
  - iii. The child Mohammed Mutuiri Assali be issued with a Kenyan birth certificate indicating the father’s name, Mohammed Adam Mbatau. Registrar, birth certificates to effect changes in the child’s birth certificate.
  - iv. The petitioner is granted actual custody of the children. She is allowed to travel with them to Canada, their other Country.
  - v. The respondent to have reasonable access of the children by visiting them whenever he would like but at least once every year or have them travel to visit him in Kenya at his own travel costs.
  - vi. The respondent is relieved from maintenance order. This is not stay he may not support his children as he wishes.



vii. Each party to bear its own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON 15<sup>TH</sup> DECEMBER, 2022**

**HON. ABDULHALIM H. ATHMAN**

**SENIOR PRINCIPAL KADHI**

**In the presence of**

**Mr. Suleiman A. Mohamed, Court assistant**

**Petitioner**

**Respondent**

