



REPUBLIC OF KENYA

BUSIA LAW COURTS

IN THE KADHI'S COURT AT BUSIA

DIVORCE CAUSE NO. KCDC/1/2020

BETWEEN

UAM.....PETITIONER

VERSUS

MOARESPONDENT

JUDGMENT

This suit was filed on 4th of September 2020 by one UAM referred hereinafter as the petitioner against one MOA referred hereinafter as the respondent.

The petitioner's prayers against the respondent being:

1. Dissolution of marriage,
2. Custody of the issues of marriage,
3. Sharing of the properties acquired during the marriage,
4. Cost of the suit and
5. Any other relief this court deems fit.

The petitioner, a primary school teacher got married to the respondent who is a police officer. The marriage ceremony was conducted in Nairobi on the 2nd December 2008 and in accordance with Islamic customs. No marriage certificate was issued. Both the petitioner and the respondent cohabited as husband and wife in several places among them Busia town until early 2019 when they started having differences. By early 2020 these differences worsened and they ended up not living together.

The marriage between the petitioner and the respondent has been blessed with two issues namely;

1. YO a son (D.O.B.) 9th August 2010 and
2. AM a son (D.O.B.) 9th June 2013.

In her petition, the petitioner accused the respondent of cruelty, denying her conjugal rights, neglecting her together with the issues of their marriage and abusing her using indecent language. She accused the respondent of oppressing her and stated that there is neither love nor trust between the petitioner and the respondent. She stated that during their marriage, she invested a lot together with the respondent in purchasing and developing lands in Mumias and Busia respectively. Only a copy of title deed parcel no. (Particulars withheld) =0.034=ha was filed.

The respondent filed his defence on 7th January 2021. He stated in his defence statement that it was the petitioner who had violated his rights and the rights of the issues of the marriage and prayed thus, that the petition be struck out.

Before the hearing, this court had directed the parties to try settle the matter out of court and the parties reluctantly accepted showing signs of

dissatisfaction to the directions. Nothing at all was reached as the parties didn't meet. The petitioner said that her father who was supposed to participate in settling the dispute refused to meet the other party. The respondent also said that the father to the petitioner was not receiving his phone calls.

The matter came up for hearing on 18th January 2021. The petitioner testified against the respondent of accusing her of committing adultery with any man who interacts with her. The petitioner stated that the respondent has been accusing her of punishing and discriminating the elder son (Y). She stated that the respondent threatened to kill her thus forcing her to flee from their house in Busia and leaving behind the minors with a house help. She stated that the respondent once assaulted her.

The petitioner did not produce any witness nor any exhibit to support her claims against the respondent.

In response to the petitioner, the respondent testified that it was the petitioner who had wronged her by denying him his rights and also denying the two issues of the marriage their rights. He prayed that the suit be struck out because it has no reasons to back it up and instead, he accused the petitioner of having extra-marital affairs with several people. The respondent produced several phone S.M.S printout messages between the petitioner and a Mr. BO who he claimed was a petitioner's boyfriend before marrying the respondent. (Annexure 2)

The respondent also accused the petitioner of inviting a Mr. SW, a tenant in their house in Busia into their house at night and spending hours with him watching football matches. He stated that the petitioner has been denying him have intercourse with her. He says that he was once told by the petitioner to take two hundred shillings and go and look for a prostitute.

The respondent also testified that the petitioner is used to punishing the minors. He produced a rope woven like cane which he stated that the petitioner bought from Mombasa for the purpose of punishing the minors.

The respondent prayed that the petitioner be denied custody of the issues of the marriage.

The respondent also stated that he has invested a lot on the academic development of the petitioner as from college to university and thus prayed that orders be given in his favor that he be refunded all that he did spend. He stated that he spent Kenyan shillings six hundred thousand (600,000) in her degree course alone at the University of Nairobi (U.O.N). The respondent did not produce any exhibit to support this claim.

The respondent stated that he contributed to the purchasing of a one-acre parcel of land in Namamali, within Matungu Sub-County. He stated that the title deed has the names of the petitioner alone and she has denied him see it. He prays that the court gives orders that the property be shared equally between the petitioner and the respondent. The respondent did not produce anything to support his statement.

The primary question this court would like to look at first is whether there are sufficient grounds to dissolve the marriage between the petitioner and the respondent. If there are reasons, then the court may look to the question of custody of the minors and other rights and obligations related to the ending of a marriage.

First, the petitioner has accused the respondent of violating some of her rights by abusing her, denying her conjugal rights, assaulting her and even threatened to kill her. The respondent challenged the petitioner to produce witnesses, medical or even a police report to support her claims but she had none.

Though the petitioner could not produce evidence, the respondent throughout the hearing did not object to fact that he has been abusing the petitioner.

After the completion of the hearing, the petitioner while filing her written final submission, brought with her, phone S.M.S printout messages of the respondent abusing her using indecent language. These evidences should have been filed before the hearing or on the duration of the hearing to allow the respondent too to respond to that, and as a result, the court could not rely on that evidence.

Though the respondent has stated several times that he loves the petitioner and has prayed that the marriage should not be dissolved, I've found out from the statements and interactions of both the parties before and throughout the hearing, that there is a dislike and hatred between them and thus find out that the respondent wants to retain the relationship not for love and compassion, but just to enslave the petitioner for reasons known to himself alone. The Qur'an states: **"And do not retain them(wives) to hurt them or by way of transgression, whosoever does that has indeed wronged himself."** Qur'an 2: 231. Though the verse was revealed in regard to divorced women during their waiting periods, its objective (prohibiting harm) which is one of the five major principles of Islamic Jurisprudence is also applicable to a situation like this and to all other similar situations in our lives.

The petitioner did not deny that there were communications between her and BO mentioned above, but she objected to having love affairs with him in the duration of her marriage to the respondent.

She interpreted a love message sent to her, (Welcome dear, I will never forget in my live. You are part of the people who made me. Your love was one that I will never forget. Thank you too for accepting. You too b blessed) from the ex-boyfriend who from the testimony of the petitioner might be a medical practitioner. She stated that this person had assisted her while she was sick and, in that message, she was only appreciating him for the assistance and nothing else.

The petitioner is a Muslim and married and in learning process, she did pass through and Islamic learning Institution which I believe she did at least acquire basic Islamic knowledge. From that I am not convinced by her interpretation of the message and thus, I have no doubt that there were love affairs between the petitioner and her ex-boyfriend and as a result, there is no trust in the relationship between the petitioner and the respondent.

The second issue I'd like to look at is the welfare of the issues of the marriage between the petitioner and the respondent.

Islamic Law has put a lot of attention to matters related to the welfare of the minor. It has specified some of the rights of the minor even before conception. For example, by preferring that certain requirements be met by both spouses before entering into a marriage contract. All that is to emphasis on protecting the minor from all forms of harm that may inflict him/her. Article (94) of The Islamic Charter on Family states: **It is the child's right upon his parents that each should make the optimal selection in choosing his(her) partner and that they should adhere to the standards for a successful marriage that are outlined in Article (51) of this charter.**

Article 53 (2) of the Kenyan Constitution states that: **A child's best interests are of paramount importance in every matter concerning the child.**

The petitioner in her petition had prayed that she be granted custody of the minors. And while testifying during the hearing, she stated that if the respondent can't live with the two children, then the court grant her custody, and if he accepts to live with them, then the court to grant her access to them. I understand from the above statement that the petitioner has no problem with custody being granted to the respondent provided that respondent fulfil a certain requirement.

The respondent never prayed for the custody but prayed that the petitioner be denied custody and the petitioner only to be granted access to the minors and on condition that every time the petitioner is having access to them, he must be physically present.

The Muslim scholars in regard to custody of children have stated: **And the custody of the minor is a right of the two parents if the marriage is existing between them, if they separate, the custody is a right to the mother of the minor according to the consensus.** Al-mawsu'atu Alfiqhiyyah (17: 301-302).

The above position is based on a narration by Abdullahi ibn Amr that: **A woman said: Oh the messenger of Allah, this my son, my womb was his vessel, (during pregnancy) and my breasts his drink, (after delivery) and my care his abode. His father divorced me and wanted to take him away from me. The Prophet (P.B.U.H) said to her: you have more right to him (the minor) as long as you don't remarry to another man.** Sunan Abi Dawood no: 2276.

The petitioner is the rightful person to have custody of the children in the first instance which the respondent has opposed on grounds that the petitioner is used to discriminating and punishing the minors. He produced before court a cane the petitioner bought from Mombasa.

The respondent also produced two new watches as exhibits he had bought in Mombasa and gave them to the petitioner to take them to the minors in Busia but the petitioner never delivered them to intended persons until the respondent found them hidden in their house in Busia.

The petitioner confessed in her final submission that she does punish the two issues of their marriage on grounds of correcting their behavior and not hurting them. She never elaborated how she does that.

The petitioner while working in Nairobi and the respondent in Gilgil agreed to surrender their first-born son and only child then, who was below the age two to stay with his maternal grandmother in Matungu while the respondent had hired a house help for the petitioner.

This, I find it to be a negligence from both the petitioner and the respondent as there were no reasons as to why one or both of them could not stay with the minor who was at tender age then.

The petitioner also stated that when she fled from their house in Busia, she left behind the minors with their house help. She never gave reason why she left them. Mothers don't leave behind their children especially when fearing danger.

After the petitioner and the respondent separated, the two issues of the marriage were taken to their paternal grandmother which is also the matrimonial home of both the petitioner and the respondent and place where the two minors are still residing and schooling. The petitioner had gone afterward to pick her belongings from the matrimonial home. She took her belongings had never minded going together with the children.

There is no dispute between the petitioner and the respondent on the welfare of the two minors as from the time when they were taken to their grandparent.

I have noticed that apart from the conventional education of the minors being taken care of by the respondent, there is silence on their right to spiritual and faith related education. The Prophet Mohammad (P.B.U.H) has stated: **Seeking religious knowledge is an obligation upon each and every Muslim.** Sunan Ibn Maajah: 224. For Children, it is the duty of parents to make sure that their children get that knowledge. This right has also been provided for by the children's act 2001. Section 8(1) of the act states that: **Every child shall have a right to religious education subject to appropriate parental guidance.**

The third question is the maintenance of the minors. The respondent states that as both parties in this matter are employed and earning, they should share the responsibilities of the welfare of the minors equally. He cited Article 53(e) of the constitution which states that: **Every child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.**

Both the pay slips of the petitioner and the respondent were filed and they don't exactly earn same. The respondent's net pay is a little higher than the petitioner's apart from the fact that both parties have other sources of earnings.

The Muslim scholars have agreed that maintenance of children during marriage and after separation of husband and wife is a duty upon the

father according to his ability. **“Let a man of wealth spend from his wealth, and he whose provision is restricted - let him spend from what All?h has given him. All?h does not charge a soul except [according to] what He has given it. All?h will bring about, after hardship, ease”.** Qur’an 65:7 This includes food, shelter, clothing, education, and all other necessary needs of the children.

Article 68 of the Islamic Charter on Family states: **Islamic Shari’ah obliges the husband alone, to pay the financial support and dowry of his wife and furnish her house. The wife is not required to bear any of these expenses unless she willingly agrees to do so out of the kindness of her heart, however, in such a case, she maintains her right to anything she contributes.** It is clear from above that it is the duty of the father to provide for his family and children though it is not prohibited but allowed and desirable for the mother to do the same especially when circumstances allow that and she happens to do that for the sake of Almighty God. The Prophet (P.B.U.H) said about a mother who had provided for her two daughters: **Verily Allah has assured Paradise for her, because of (this act) of her, or He has rescued her from Hell-Fire.** Sahih Muslim: 2630.

Throughout this case, the petitioner as a mother, has shown little interest on the custody of the minors and this, maybe because she knows that she will be preoccupied with other affairs or maybe she has no capability of the custody. Assuming that the marriage between the petitioner and the respondent is dissolved and custody of the minors is granted to a person other than the petitioner herself, what would the little attention she is having the minors become? There are possibilities that she might neglect some important affairs related to the minors. I find out that both the petitioner and the respondent have to contribute justly and fairly to the welfare of their children each according to his/her capacity so as to put them in touch with the minors.

The last question to observe is the sharing of properties acquired during the marriage between the petitioner and the respondent. There is no dispute that the petitioner and the respondent own a property in Busia whereby the petitioner’s contribution was Kenyan Shillings four hundred and fifty thousand (450,000).

There is also no dispute that the respondent contributed to the academic development of the petitioner as from college to University. He states that he contributed Kenyan Shillings six hundred thousand (600,00) for university alone. He never mentioned how much he did in college. The petitioner has denied that the respondent contributed exactly that amount of money. She never stated how much money he contributed. No document was produced to support either the petitioner nor the respondent.

The petitioner stated also that during the marriage, she contributed to buying and developing a land in Mumias. Nothing was produced to support the claim.

The respondent claimed to have contributed to buying a land in Namamali which he claims that the petitioner secretly registered the land in her name alone. He never mentioned how much he contributed and never produced any evidence to support his claim. The Prophet (P.B.U.H) said: **“Were people to be given everything that they claimed, they would (unjustly) claim the wealth and lives of (other) people. But the onus probandi is upon the claimant, and the taking of an oath is upon the one denying”.** Sunan-Albayhaqy 10:252

From all that has been asserted, I do make the following orders:

1. **That** the marriage solemnized between the petitioner and the respondent is hereby dissolved.
2. **That** joint legal custody of the two issues of the marriage is hereby granted to both the petitioner and the respondent.
3. **That** physical custody of the two issues of the marriage is hereby granted to their paternal grandmother VMA.
4. **That** the petitioner is hereby granted liberty to the access of the two children at reasonable times.
5. **That** the respondent to refund Kenya shillings four hundred and fifty thousand (450,000) to the petitioner.
6. **That** the petitioner to refund Kenya shillings six hundred thousand (600,000) to the respondent.
7. **That** the petitioner to be contributing fifty percent (50%) towards the education of the two children.
8. **That** each party shall bear its own costs.

It is hereby ordered.

Dated, Delivered and Signed at Busia this 23rd day of February, 2021

IDRIS N. NYABOGA

SENIOR RESIDENT KADHI

In the presence of;

C/A: Mweresa

The petitioner

The respondent