



**FAO v MB (Divorce Cause E006 of 2021) [2021] KEKC 16 (KLR) (25 March 2021) (Judgment)**

*FAO v MB [2021] eKLR*

Neutral citation: [2021] KEKC 16 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT ISIOLO  
DIVORCE CAUSE E006 OF 2021  
AH ATHMAN, SPK  
MARCH 25, 2021**

**BETWEEN**

**FAO ..... PLAINTIFF**

**AND**

**MB ..... DEFENDANT**

**JUDGMENT**

1. The parties, both prison wardens, were married in Moyale under Islamic law in 2010. They moved to Isiolo and bought two parcels of land and developed their 3 bedroomed matrimonial home and are blessed with two children aged (8) and (6) years old. The defendant developed violent physical, oral and psychological behaviour, insulting, assaulting and threatening the plaintiff's life. Elders failed to resolve their dispute due to defendant's disrespect to them.
2. The plaintiff seeks dissolution of the marriage, legal and actual custody of the child and division of matrimonial property. She claimed the defendant is negligent, has not been providing for his family and that he assaulted her, treated her with insults and cruelty and threatened to kill her. She stated that she lives in fear for their lives due to his conduct.
3. The defendant through his defence denied the claims, save that he admitted not having paid the dowry. He stated he 'is a family man who loves and adores his wife and children and he is not ready for divorce.' On the day scheduled for further hearing of case in court, hearing notice duly served upon the defendant, the defendant failed to appear. The matter proceeded to hearing under order 12 (2) (a) of the *Civil procedure Rules*, which provide:

'If on the day fixed for hearing, after the suit has been called on or hearing outside the court, only the plaintiff attends, if the court is satisfied: (a) that the notice of hearing was duly served, it may proceed ex parte.'



## Issues

4. The issues for determination in this matter are:
  - i. whether or not the plaintiff is entitled to divorce.
  - ii. Jurisdiction of the Court on Children custody
  - iii. Children custody and maintenance

## Divorce

5. The plaintiff under oath, stated she was afraid for her life and that of their children due to the defendant's numerous threats to her life with a gun. She stated the defendant often insults and assaults her and often stay awake all night in fear of the defendant. She further stated they argue all night and once threatened to kill himself and the children. When she was bedridden at hospital, she stated, he never visited her and told her she ought to die. The plaintiff called two witnesses. They witnessed signs of violence – marks of a knife on a wall and broken doors- at the parties' matrimonial home and defendant's disrespect even to elders. The defendant orally abused and insulted elders using unprintable vulgar language. PW2 testified the defendant admitted to the claims of violence against the plaintiff in one of the elders' meeting and apologised in writing, which document was produced by the plaintiff.
6. The defence was not argued. The plaintiff successfully proved her case. Her claim is corroborated by that of her witness. The evidence is not controverted. In the case of *Karuru Munyororo V Joseph Ndumia Murage & another* (Nyeri) HCCA No 95 of 1988, Makhandia J, held:

"The plaintiff proved on the balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and their counsel to cross examine her on the evidence, the plaintiff's evidence remains unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to accept."
7. I find as fact the defendant's mistreatment of the plaintiff, insulting and threatening. The defendant is afraid of the husband and cannot live with her. The couple have been living separately for three years. The defendant has another wife but the plaintiff, under Islamic law, can only be married to one husband at a time. The marriage has irretrievably broken.
8. The objectives of marriage under Islamic law; love, affection and mercy provided under Q.30.21 cannot be realised in this marriage. Wives are entitled to fair and honourable treatment. Mistreatment, Physical, psychological, oral, harmful and abusive treatment is prohibited under Islamic law of marriage.

'And of His signs is that He has created for you from yourselves mates that you may find tranquility in them; and He placed between you affection and mercy. Indeed, in that are signs for a people who give thought'. Q. 30.21

"O you who believe! You are forbidden to inherit women against their will; and you should not treat them with harshness, that you may take away part of the mahr you have given them, unless they commit open illegal sexual intercourse; and live with them honourably. If you dislike them, it may be that you dislike a thing and Allah brings through it a great deal of good." Qur'an:Nisa: 4:19



9. Although Islamic law eschews divorce, it is nevertheless legal and necessary where the objectives of marriage cannot be realized, the spouses cannot undertake their marital responsibilities or the relationship is harmful and offends fundamental rights of spouses. The recourse to divorce, although primarily vested in the husband, is a right to each of the spouses.
10. The plaintiff suffered severe psychological treatment and was denied her fundamental rights of marriage under Islamic Law to the extent she is afraid for her own life. The problem has not been resolved for three years. Accordingly, the plaintiff is entitled to divorce. The parties' marriage be and is hereby dissolved with effect from March 25, 2021, corresponding with 10<sup>th</sup> Sha'ban 1442 AH Divorce Certificate to issue.

### **Jurisdiction of Kadhi's Court on Children Custody and Maintenance**

11. The Kadhi's court has been donated jurisdiction to hear and determine disputes on children by the [\*Constitution of Kenya \(2010\)\*](#) under Article 170 (5), and Section 5 of the [\*Kadhis court Act\*](#), Cap 11 whose preamble declares:

"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"

12. Child custody and maintenance issues being incidental to the issue of marriage and divorce falls within the jurisdiction of the court.
13. The matter is not settled. The High court is divided. I am persuaded by a recent decision conferring jurisdiction to the court on this issue. Ali-Aroni J, in HCCA 85 of 2017 [\*ZUDG v SJKUR\*](#) (2020) eKLR, stated:

"Does the Kadhi Court have jurisdiction in matters of children in view of the establishment of Children's Court? There are varied opinions by courts of concurrent jurisdiction on this matter and it is probably time that the Court of Appeal adjudicates on the same and settles the issue. This court for now, aligns itself, so did the Kadhis who sat in this matter with the thought that the Children's Act did not oust the jurisdiction of the Kadhi or other subordinate courts in dealing with issues of children. Indeed, lately all magistrates are gazetted to handle children matters and in this court's considered view, by implication Kadhis too being in the category of magistrates should and ought to hear such matters and more so where the same are connected and incidental to the cause before the Kadhi, so long as the said court applies the principles laid down by The Children's Act and in particular applies the best interest of the child's principle as enunciated by the said Act."

### **Children Custody**

14. Section 76(3) of The [\*Children's Act\*](#) directs the court to consider and protect children's physical, emotional and educational needs and comfort and would shun any disruption likely to affect their wellbeing.



15. The general principle regarding custody of minor children is that unless there exist peculiar and special circumstances, the mother has priority. In *Mebrunisa v Pravez* (1982-88) 1 KAR 18 the court of Appeal stated:

"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."

16. Under Islamic law, the same principle of priority of custody of children of tender age to mothers applies. It is based on 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) and Article 106 (1) of the *Islamic Charter on Family*.
18. In the instant case, two of the children are of tender age. The actual custody of the children is vested and granted to his mother, the plaintiff herein. The defendant to get reasonable access. The parties have joint legal custody of the children.

### **Children Maintenance**

19. Islamic law rests the responsibility of children maintenance fully on their fathers based on children's needs and the father's financial ability. There is no standard quantum on rate of children maintenance. It is discretionary and the court has to balance between the two factors under Q.65.35 read together with Q.2.233.

"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

20. The defendant is a prison warden. He is hereby directed to pay Kes 8,000.00 per month and also provide for the children's education.

### **Matrimonial Property.**

21. Section 3 of the *Matrimonial Property Act, 2013* provide:

"A person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property."

22. The Kadhi's Court has jurisdiction to hear and determine issues of division of matrimonial property where both parties are Muslims and subject to the jurisdiction to the court. In *RMM v BAM* [2015] eKLR, Civil Appeal No 267 Of 2011, Waki, Gbm Kariuki, Mwilu, M'noti & Murgor, Jja; the Court of Appeal held:

At the root of the issue is whether it was the High Court or the Kadhi's Court which has jurisdiction to determine the matter of distribution of the matrimonial property...If their marriage was purely Muslim, and the property in issue was acquired during the currency of that marriage, the Kadhi's Court would be the most efficacious in handling and determining the dispute.



23. Islamic law recognizes contribution of spouses in properties developed during the period of marriage. That contribution relates to both spouses, husband or wife and may be direct or otherwise. In OS No 3 of 2015 (Mombasa), *EMK v SSS*, [unreported], Thande J, held:

"My finding therefore is that the law applicable in this case is Islamic law. Chitembwe, J had a similar view in *AWA v HDD eKLR*, cited by the respondent where he stated, 'as held in the case of *MSR v NAB* a dispute involving matrimonial property of a Muslim can be heard by either the subordinate court including the Kadhi's court or the High Court provided that the Islamic law is used as the determinant factor. In this case both parties profess the Islamic faith...from the forgoing, it is evident that non-monetary contribution by spouses must be taken into account in the division of matrimonial property acquired or improved during coverture, notwithstanding that property is in the name of one spouse.'

The Hon Judge further held that in the distribution of matrimonial property under Islamic law, cognizance must be taken of each spouses' contribution towards the acquisition or development of the properties. She stated:

"The Qur'an recognizes that each spouse is entitled to their property. Surah An Nisa: 4:32 provides as follows 'For men is a share of what they have earned, and for women is a share of what they have earned.' It is clear from this provision of the Qur'an that earning is a key factor in determining each spouse's entitlement to matrimonial property. Said differently, division of matrimonial property, must be based on each spouse's contribution. From the evidence in the present case, it is quite evident that the applicant made no financial contribution towards the acquisition or development of the properties. However, she made non-financial contributions which is recognized in Islamic law."

24. In the instant case, the plaintiff successfully demonstrated the couple purchased two plots adjacent to each other in Maisha Bora. Although sale agreements are both in the plaintiff's name, she argued the properties were bought and funded by their joint financial efforts. There was no evidence adduced over contribution of the shop. Due to lack of evidence on the contrary the same is also held to be jointly owned. Accordingly, the matrimonial property at Maisha bora and the shop be divided equally between the parties herein.

Each party to pay its own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ISIOLO ON 25<sup>TH</sup> MARCH, 2021**

**HON. ABDULHALIM H. ATHMAN**

**SENIOR PRINCIPAL KADHI**

In the presence of:

Mr. Adano Roba, Court Assistant

Plaintiff

