



**HHA v IMI (Divorce Cause E001 of 2021) [2021] KEKC 17 (KLR) (25 March 2021) (Judgment)**

*HHA v IMI [2021] eKLR*

Neutral citation: [2021] KEKC 17 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT ISIOLO  
DIVORCE CAUSE E001 OF 2021  
AH ATHMAN, SPK  
MARCH 25, 2021**

**BETWEEN**

**HHA ..... PETITIONER**

**AND**

**IMI ..... RESPONDENT**

**JUDGMENT**

1. The famous Arab Poet, Abu Tammam, said:  
If of consequences of your actions, you are afraid not  
And of any shame, you care not  
Do as you may please.
2. The parties married under Islamic law for about (30) years, living in [Particulars withheld] village in the sprawling valleys of Isiolo County are blessed with (10) children some of whom are adults and married. The plaintiff, in her early forties, left her legally married husband, an old man in his eighties, to cohabit and has conceived with a younger man and herds boy.
3. In summary, the petitioner claimed the respondent abandoned her and had never shown spousal and fatherly affection and love to her and the children. She prays the court to issue a declaration of divorce and compel respondent to pay eddat maintenance and cater for the children’s maintenance.
4. The respondent claimed it is the petitioner who ran away from him and the children, together with (30) of his goats and some KES 700,000.00, and is cohabiting contrary to law, with another man. He counterclaimed that the petitioner had been in charge of managing his resources. He prays for the petitioner to be compelled to return his money, goats and dowry.



5. At Pre-Trial, the petitioner denied she has a sexual relationship and that she had conceived with another man. The court directed her to undergo pregnancy test. She however failed to undergo the test, stating 'I admit I am pregnant. It does not belong to the respondent ...I confirm I am in a relationship with STG'.
6. The issue for determination in this matter is whether or not the petitioner is entitled to divorce and the other prayers sought.
7. Both Islamic law of evidence and the Laws of evidence Act, demand claimants to prove their claims.  
" ...say produce your proof if you should be truthful". Qur'an.Al Naml.27.64
8. Ibn Abbas [R.A] narrated that the Prophet [PBUH] said: "If people be given only on the basis of their claims they would claim the blood and property of others, but the [onus of] oath is on the defendant."  
(Bukhari 3/213 [214], Muslim 5/128, Baihaki 10/252, Nasai' 2/311, Ahmad 1/342, Abu Daud 3619, Al Tirmidhi 251)
9. The petitioner did not call any evidence to support her claim that the respondent abandoned her and the children. On the contrary, the respondent's witnesses' evidence confirms his claim that the plaintiff is the one who, despite advice and requests by elders, abandoned the respondent and children. Her admission that she is cohabiting with and is in fact pregnant from another man further removes any doubt on who deserted the other.
10. Under Islamic law of evidence, admission is the strongest form of evidence. Dr. Muhammad Mustafa Al Zuhaily, in 'Modes of Evidence in Islamic law, Dar Al Bayan, at page 241. states:  
'admission has, since time immemorial, been the master of all evidences. It settles with finality, disputes before the judge'.
11. The principle is founded on many Quranic verses among them Q.4.135 where Allah the Almighty states:  
'O you who have believed, be persistent standing firm in justice, witnesses for Allah even if it be against yourselves or parents or relatives...'
12. Dr. Muhammad M. Al Zuhaily in 'Modes of evidence in Islamic law', Dar Al Bayan, at page 243, in commentary of the verse, opined that:  
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'Admission confirms rights, which is ordained by Allah. In this verse it has been emphasised by Allah by its reference as evidence. Evidence against oneself is the highest degree of justice and mercy, a key objective of Islamic law'.
13. Marriage is a unique and solemn spiritual and legal contract. Q.4.21 refers to it as a solemn covenant. It envisages rights and obligations of spouses while married, the most fundamental and intimate of which is love and conjugal rights as espoused in Q.30.21. The corpus of Islamic law is premised on protection of life, mind, faith, wealth and dignity of people. The five are referred to as the objectives of Islamic law. Marital infidelity is the apex of betrayal of the marriage union and covenant. Divorce is legal and allowed only as a means of last resort. It is available to either spouses upon clearly defined grounds and specific legal procedure.



14. In the instant case, the petitioner came to court with unclean hands. She admitted adultery and infidelity. She is unapologetic and remorseless. She failed to demonstrate any grounds for divorce. It would appear, she no longer loves her husband and would wish to live with a younger, more energetic and handsome young man and wishes the court to assist her in her endeavour. Courts are hallowed halls of justice. They cannot be used as instruments to encourage or assist immoralities and injustices.
15. A person, under Islamic law, may be denied a valid legal right, if he or she hastens to prematurely acquire it. Section 99 of the 'Al Majalla', the Ottoman Courts manual provide:  
*'##### #### ##### ## ##### ##' 'Any person who hastens the accomplishment of a thing before its due time, is punished by being deprived thereof'.*
16. In *D. Njogu & Co v National Bank of Kenya Limited (2009) eKLR*, M.K. Koome J, cited with approval text book 'Chitty contracts', 28<sup>th</sup> edition, vol 1 General principles page 839, where the learned authors opined:  
*'The principle of public policy, said Lord Hasfield, is this, ex dolo malo non oritur actio. No court shall lend its aid to a man who founds his action upon an immoral or illegal act'.*
17. The petition for divorce fails. The petitioner's act is illegal and against public policy. Let it be known to all in Isiolo, that the petitioner is the respondent's legal wife. She be and is hereby restrained from cohabiting with any other man, other than her husband. Until she delivers the pregnancy, they are prohibited from enjoying conjugal rights.
18. The petitioner's action has the potential to create public outrage and insecurity. The OCS / investigating officer Ngare Mara to initiate further investigations and ODPP – Isiolo to consider to prefer charges against the petitioner and one STG of [Particulars withheld] village – Ngare Mara Division of Isiolo County on bigamy contrary to section 171, of the Penal Code, Cap 63 Laws of Kenya.
19. The issue of paternity of the pregnancy is too grave to be left undecided. The court has inherent powers under section 3A of the civil Procedure Act, Cap 21 Laws of Kenya, to make any orders in the interests' justice. This, in my view, is such instance. The petitioner's admission in open court, of the pregnancy from another man other than her husband, has serious consequences on the paternity of the expected child. The expected child cannot be biologically or legally related to the respondent. It is declared as the mother's child only.
20. The respondent counterclaimed for return of KES 700,000.00 and (30) goats allegedly taken by the petitioner. Although the petitioner filed no reply to the counterclaim, she denied the claims at trial and took denial oath. The petitioner failed to produce sufficient evidence to support these claims. The claims also fail.

Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT ISIOLO ON 25TH MARCH, 2021.**

**HON. ABDULHALIM H. ATHMAN**

**SENIOR PRINCIPAL KADHI**

In the presence of

Mr. Adano Roba, Court assistant

Petitioner



Respondent

