



**FAA v IAM (Matrimonial Case E005 of 2021) [2021] KEKC 15 (KLR) (12 April 2021) (Judgment)**

*FAA v IAM [2021] eKLR*

Neutral citation: [2021] KEKC 15 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT ISIOLO  
MATRIMONIAL CASE E005 OF 2021**

**AH ATHMAN, SPK**

**APRIL 12, 2021**

**BETWEEN**

**FAA ..... PETITIONER**

**AND**

**IAM ..... RESPONDENT**

**JUDGMENT**

1. The parties in this matter were married under Islamic law in 2014 and divorced after six years of marriage in November, 2020. They are blessed with three children aged 7,4 and 2 years. Upon divorce, elders of both parties, on the request of the respondent, sat to deliberate on the issue of custody and unanimously decided to give the respondent the elder two children to the father, the respondent and the younger one to the mother the petitioner. The petitioner, dissatisfied with the elders' decision filed this suit.
2. The petitioner prays for legal and actual custody of all the children and children maintenance. She claimed that the respondent took the children from her home and that it came to her knowledge that the children are living in deplorable conditions and leave the children with strangers without proper care.
3. The respondent opposed the prayers for custody because the respondent is a drug addict and violent. He averred that it was the petitioner's uncle who asked him to take the minors from the petitioner because she was a drug addict. He further averred that the children are living with their grandmother and sister who are taking good care of them and that at no time had he failed to take care of them.
4. Having considered the depositions of the parties on record and their submissions, the issues for determination in this matter are:
  - i. Jurisdiction of the Court on Children custody



- ii. Whether or not the petitioner is fit to have children custody and maintenance
5. On the first issue of jurisdiction, 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"
  6. Child custody and maintenance issues being incidental to the issue of marriage and divorce falls within the jurisdiction of the court.
  7. The matter is not settled as the High court has held contrasting decisions on it. 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."
  8. . On the second issue of whether or not the petitioner is fit to have custody of the children, the petitioner called one witness, and filed medical report to support her case. PW1's evidence is that the petitioner has never used drugs, that she is good mother and loves and is able to take care of her children. It is further her evidence that the petitioner is not a violent person and had been treated for abdominal gas problems in El Wak and Nairobi. She is the petitioner's aunt who brought her up. The petitioner filed medical reported dated March 8, 2021 signed by Dr. Mohamud Guyo, Medical officer for Health, for the medical superintendent, Isiolo County Hospital. Upon physical examination and blood tests for any drug abuse, they found no traces of drugs, and that she was in normal behavior and mood. The report concluded:
 

'FAA is or normal mental status, she can follow her duties without any difficulty and can take care for her kids without fail and any negligence'.
  9. The petitioner admitted she used to take tramadol injection but for treatment of relief from pain due to ulcer or gas problems.
  10. The respondent's witnesses were among the elders who deliberated on the party's problems. Their evidence is that the respondent had divorced the petitioner and wanted all the children and elders of both sides agreed in unanimity the respondent take the two elder children and the petitioner take the younger child, which decision both parties agreed to.
  11. Mr. Thomas Mugo, the assistant director, Isiolo County Coordinator for children wrote and filed report dated March 26, 2021. He observed the children are of tender age and the mother lives in



a permanent house in a fairly good condition in [Particulars Withheld] area in Isiolo town. He recommended custody be given to the mother, the petitioner herein.

12. 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.
13. 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”
14. 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.
15. From the evidence adduced in court, the elders, apart from their unanimous agreement, did not give the reasoning on their decision to grant custody of the two minor children to the respondent. Evidence show they had not interrogated the critical question in granting custody, whether or not the petitioner was fit to have custody of the children and the best interests of the children.
16. The petitioner was apparently addicted to tramadol. At the time. Tramadol HCL, according to webmd.com

‘is used to help relieve moderate to moderately severe pain. Tramadol is similar to opioid analgesic. It works on the brain to change how your body feels and responds to pain. Though it helps many people, this medication may sometimes cause addiction... suddenly stopping this medication may cause withdrawal symptoms. Tramadol has a risk of abuse and addiction which can lead to overdose and death.
17. The petitioner may have got addicted to tramadol HCL while treating pain due to ulcers. Lack of appreciation of the effect of sudden stopping of the medication, without medical supervision and care most probably resulted to the divorce. Evidence and medical tests confirm however, that the petitioner is currently free from any drug or substance abuse and is of normal behavior and stable mind. She is thus, I find and hold, fit to take actual care and custody of the children.
18. . In the circumstances, totality of evidence and considering the children are of tender age, the actual custody of the children is vested and granted to his mother, the petitioner herein. The defendant to get unlimited access. The parties have joint legal custody of the children. The children officer – Isiolo to make regular periodic supervisory visits on the children's wellbeing, progress and development. The respondent is directed to hand over the two minor children to the petitioner within six [6] weeks of delivery of judgment.

### **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 businessman. He is hereby directed to pay at least Kes 15,000.00 per month and also provide for the children’s education.

Each party to pay its own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ISIOLO ON 12<sup>TH</sup> APRIL, 2021**

**HON. ABDULHALIM H. ATHMAN**

**SENIOR PRINCIPAL KADHI**

**In the presence of:**

**Mr. Adano Roba, Court Assistant**

**Petitioner**

**Respondent**

