



**FAY v HHS (Divorce Cause E030 of 2021) [2021] KEKC 11 (KLR) (9 September 2021) (Judgment)**

*FAY v HHS [2021] eKLR*

Neutral citation: [2021] KEKC 11 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT ISIOLO  
DIVORCE CAUSE E030 OF 2021  
AH ATHMAN, SPK  
SEPTEMBER 9, 2021**

**BETWEEN**

**FAY ..... PETITIONER**

**AND**

**HHS ..... RESPONDENT**

**JUDGMENT**

1. The parties were married under Islamic law on June 23, 2012 at Isiolo. They are blessed with one child, a girl aged (7) years old, from their wedlock. The respondent is a [Particulars Withheld] teacher in Nairobi, the respondent is not employed. Sometimes in 2020, the respondent married a second wife and cut communication and conjugal and parental support to his first family. The respondent, her father and elders tried to intervene without success.
2. The plaintiff prays for
  - i. Dissolution of marriage
  - ii. Dowry
  - iii. Legal and actual custody of the children
  - iv. Children maintenance
2. The petitioner claimed the respondent abdicated his marital and parental responsibilities since he married a second wife sometimes in November 2020.
3. The defendant failed to enter appearance of defence. He was duly served with plaint, summons and hearing notice through his WhatsApp platform pursuant to Order 5 rule 22(c) of the [Civil Procedure \(amendment\) rules \(2020\)](#).



4. The defendant was served with the plaint summons to appear and reply. He failed to enter appearance or file defence. The plaintiff filed and was granted interlocutory judgment. The matter proceeded ex parte to formal proof hearing under rule 68(1) (b) Of the *Kadhi's Court (procedure & practice) rules 2020*.
5. The issues for determination in this matter are divorce, jurisdiction, custody and child maintenance.
6. On the issue of divorce, the petitioner's witness evidence is that the respondent had only one disagreement that after elders' intervention was resolved. However, the respondent deserted his wife and child and despite severally trying to intervene, the respondent has failed to honour his obligations and rebuffed attempts at conciliation. He further testified that the respondent has neglected his responsibilities towards his family and the child has been chased from Madrasa and school.
7. The pleading have not been challenged or controverted. The petitioner has also sufficiently proven her case on the balance of probabilities, the required standard in civil litigation. I find and hold the respondent's deserted his wife and child and abdicated his marital and parental responsibilities contrary to Islamic marriage laws. The key objectives of marriage of love, affection, tranquility and mercy contemplated under Q.30.21 cannot be envisaged where the husband deserts his wife and family for long periods without conjugal rights and maintenance. Husbands are obligated to provide sustenance, accommodation to their wives, lack of which offends their fundamental rights. Muhammad Ibn Ismail Al Sana'ny, in Subul al Salam vol 3 at pp 220 Hadith reported by Imams Ahmad, Abu Daud, Nasaiy. It states:

'MQ reported that his father asked the Prophet: 'what are the rights of our wives on their husbands?' The Prophet (peace and blessings be upon him) said: 'Feed her when you eat and clothe her when you clothe yourself, do not beat her face and do not migrate (stay away from her) except (if it be necessary) in the (same) house'.

8. Lack of conjugal rights, love, affection and maintenance puts the rights, interests and welfare of the wife and child to eminent danger and palpable harm. Rule 5 (2) (d) the Kadhi's Court (practice & procedure) rules\_ 2020 'injury is removed' is one of the overriding objectives of the rules . This juristic maxim is a provision of section 20 of the Majalla, the Ottoman Courts manual founded on the hadith narrated by (May Allah be pleased with him) and reported by Imams Malik, Al Muwatta' vol 2 pp 352), Ahmad, Al Musnad pp 239 hadith No 6865), Baihaki, Sunanul Kubra vol 6 pp 257 hadith no 1909, that the Prophet (may Allah's peace and blessings be upon him) said:

' Initiating or reciprocating harm is prohibited (in Islam).

9. The marriage has irretrievably broken down. Consequently, the prayer for divorce is hereby granted. The party's marriage be and is hereby dissolved with effect from September 9, 2021 corresponding with 2<sup>nd</sup> Safar, 1443 AH Divorce certificate to issue.
10. On the issue of jurisdiction, a constructive, sensible and purposive interpretation of the provisions of the Article 170 (5) of the *Constitution* of Kenya, and Section 5 of the *Kadhis Court Act*, Cap 11 would affirm the Kadhi's court has been conferred with jurisdiction to determine questions of disputes



of children custody and maintenance between parties who profess Muslim faith. For example, the preamble of Cap 11 declares it as:

'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'

11. Child custody and maintenance issues being incidental to the issue of marriage and divorce directly fall within the jurisdiction of the court. A legal historical study of the Kadhi's Court Act, the constitution and the children's Act clearly show the Kadhi's court in Kenya had jurisdiction to deal with the issues of custody and children before the enactment of the Children's Act and the promulgation of the new constitution (2010). The children's Act specifically listed the Acts that it repealed. The Kadhi's Act is not one of the repealed Acts.

12. I am cognisant the matter is not settled; the High court having made conflicting decisions on the issue. I am persuaded by a recent decision of Ali-Aroni J, in [HCCA 85 of 2017 ZUDG v SJKUR \(2020\) eKLR](#). It adopted a purposive interpretation of the constitution, is fairly balanced, well considered and resonates well with Article 159 (2) of the Constitution of Kenya (2020). The court stated:

'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.'

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. The child in this matter are of tender age and have been living with their mother since birth. I find no reason to deviate from the general rule. Legal and actual Custody of the minors is granted to the plaintiff, the defendant to get reasonable access.

16. Islamic law rests the responsibility of children maintenance fully on their fathers based on children's needs and the father's financial ability. The quantum on maintenance order is determined not solely on the needs of the children but also on the father's financial ability 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

17. In the instant case, the respondent is a Madrasa teacher in Nairobi. He is hereby ordered to pay Kes 7,500.00 per month as children maintenance plus school and Madrasa fees.



18. The certificate No xxxx S/No xxxx issued on June 23, 2012 at the Kadhi's court at Isiolo indicates the dowry was one camel had not been paid. A marriage certificate is proof of contents therein. I find and hold the dowry was not paid. Dowry is an inherent right of a wife under the provisions of Q.4.19-21 and 24. The respondent to settle the same in kind or its monetary equivalent within six months from date hereof.
19. The respondent being a Madrasa teacher is well aware of his marital and parental responsibilities. He has no excuse to act the way he has. For this reason and his failure to appear, I award costs to the petitioner.

Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT ISIOLO ON 9<sup>TH</sup> SEPTEMBER, 2021**

**HON. ABDULHALIM H. ATHMAN**

**SENIOR PRINCIPAL KADHI**

In the presence of

Mr. Guyo Adan, court assistant

Plaintiff

Defendant

