



**IAD v IAS (Divorce Cause E032 of 2021) [2021] KEKC 1 (KLR) (16 November 2021) (Judgment)**

*IAD v IAS [2021] eKLR*

Neutral citation: [2021] KEKC 1 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT ISIOLO  
DIVORCE CAUSE E032 OF 2021  
AH ATHMAN, SPK  
NOVEMBER 16, 2021**

**BETWEEN**

**IAD ..... PETITIONER**

**AND**

**IAS ..... RESPONDENT**

**JUDGMENT**

1. The parties herein in their late twenties, were married under Islamic law at Isiolo on February 25, 2020. The petitioner is unemployed. The respondent is a [Particulars withheld] officer stationed at Nanyuki.
2. The petitioner prayed for orders for dissolution of marriage, issuance of divorce certificate, payment of dowry and maintenance.
3. The petitioner deposed that she was seven months pregnant from their marriage, that since January 2021, the respondent deserted her and stopped making provisions for her upkeep and the pregnancy. She stated this compelled her to do odd jobs to fend for herself although she was in her last trimester. She claimed the respondent married another wife and abandoned her.
4. The respondent denied he was not providing for the petitioner. He admitted he did not pay the dowry and that he is married another wife. He denies the petitioner is pregnant from their wedlock. He claimed the petitioner had threatened to blackmail and kill him. He supports the dissolution of the marriage and stated he is willing to pay the dowry.
5. Upon reading the pleadings and parties' depositions and upon hearing the parties, issues for determination in this matter are:
  - i. Divorce
  - ii. Dowry



- iii. Paternity of the child
  - iv. Maintenance
6. The petitioner was willing to accept reunion provided the respondent would take up his marital obligations. She recognised respondent's right to marry another wife under Islamic law. The respondent opposed reuniting with the petitioner and argued she is no longer his wife having written an affidavit of divorce dated May 21, 2021 where he deposed having divorced the respondent on April 10, 2021. court's attempt at reconciliation having failed and divorce having duly pronounced by the respondent, we confirm the annulment of the marriage of the parties herein, first revocable (within 90 days) divorce with effect from April 10, 2021. Divorce certificate to issue.
  7. On the second issue of dowry, the respondent admitted he owes the petitioner dowry of KES 20,000.00 which he is willing to pay. He is ordered to settle the same within sixty (60) days from date hereof.
  8. The key issue in this matter is the paternity of the child. The petitioner contends the child is a fruit of the parties' legal wedlock. The respondent denies paternity. He claimed the petitioner had not been pregnant and only told him about this fact the following day after he had divorced her.
  9. The petitioner had been visibly pregnant when she appeared in court on September 9, 2021. She brought the child in the hearing session on 13<sup>th</sup> October, 2021. The court observed she had been breastfeeding the infant. She produced acknowledgement of birth notification serial No. [Particulars Withheld] issued at Isiolo County referral Hospital (ICRH). It clearly indicates the male child, B, was born alive by the petitioner on September 10, 2021 at the Hospital. She apparently gave birth the day after the first hearing date. The respondent on his part produced no evidence to support his claim the child is not his.
  10. Denial of paternity is a serious offence both under common and Islamic law. It is tantamount to a claim of infidelity. It has profound effect not only on the dignity of the wife and mother to the child but infringes on the fundamental rights of the child to name, identity, family, lineage and to be treated with dignity. Article 8 of the *United Nations convention on rights of the child* CRC and article 97 of the Islamic charter on Family and article 53 of the *Constitution of Kenya* (2010) all provide for every child's right to identity including name and family relations. This is consonant with provisions of a united nations and Al Azhar University, publication which listed one of the basic children's rights stating 'every child under Islamic law has a right to family, lineage, inheritance and ownership'.
  11. Section 6 of the *children's Act*, cap 141 Laws of Kenya underscored the importance of both parents in the development of the child by stating 'every child has a right to be cared by his parents.
  12. Legal marriage is the basis of paternity in Islam. A child born in firash, the matrimonial bed, is deemed to be a legal child unless specifically denied through the li'an process. It is for this reason that wives, even when divorced are obligated to declare the pregnancy. Q.2.227 provide:

'and divorced women shall wait (as regards their marriage) for three menstrual periods, and it is not lawful for them to conceal what Allah has created in their wombs if they believe in Allah and the last Day;
  13. It is settled in Islamic law, that a child born of a legal marriage, unless specifically denied, through li'an, is legally related to the parties of the marriage. Ibn Qudamat is of the view that this is the case even if the husband were away from the wife for twenty years. This is founded on a legal ruling by the prophet Muhammad (May Allah's peace and blessings be upon him) in a paternity dispute as reported in the tradition narrated by Bukhari [2053] and Muslim [1457]. Aisha [May Allah's blessings be upon her]



said, 'SI A W and A i Z had a dispute over a child. Ss 'O Prophet of A, he is my nephew, UIA by W informed me he is his child, look at his resemblance [to U]. AI Z said, 'O Prophet, he is my brother, he was born in my father's matrimonial bed with his female slave'. The prophet looked at the child and found he had a clear resemblance with U[IAW ]. The prophet (May Allah's peace and blessings be upon him) said to A iZ'a, 'he is yours, a child belongs to the matrimonial bed, the prostitute has nothing.'

14. Despite the clear resemblance of the child to another person, the Prophet [May Allah's peace and blessings be upon him] confirmed paternity of the child to the legal father.
15. Islamic law prohibits denial of paternity without legal grounds. Q.24.6-9 establishes automatic paternity of children born in legal wedlock and sets out an elaborate and strict procedure to deny paternity referred to as li'an. It states:

“And for those who accuses their wives but have no witnesses except themselves, let the testimony of one of them be four testimonies (i.e. testifies four times) by Allah that he is one of those who speak the truth. And the fifth (testimony should be) the invoking of the curse of Allah on him if he be of those who tell a lie (against her). But it shall avert the punishment (of stoning to death) from her, if she bears witness four times by Allah, that he (her husband) is telling a lie. And the fifth (testimony) should be that the wrath of Allah be upon her if he (her husband) speaks the truth.’
16. IHA A (d.852 H) in his 'al talkhis al habir' at 4/1379 reported on the authority of Qubeisa ibn Dhuaib that O I K (may Allah's blessings be upon him) ordered a man to be punished forty (40) lashes for slander. The man had denied paternity of the pregnancy of his wife, then accepted it only to deny it after the child was born.
17. In the instant case, the parties were legally married under Islamic law. The petitioner was divorced on 10<sup>th</sup> April, 2021. The acknowledgement of birth notification issued at Isiolo County referral Hospital (ICRH) indicates the male child, was born by the petitioner on 10<sup>th</sup> September, 2021, five (5) months after the divorce. The court observed the petitioner had opportunity to observe the petitioner during the proceedings before and after the birth of the child. It noted the petitioner had been pregnant and she, upon giving birth has been breastfeeding the child, even during trial. The respondent produced no evidence and declined the option of D.N.A testing to confirm paternity. His only ground is that he was not aware of the pregnancy until after he had divorced. It is a tenuous and flimsy ground without any proof on a very serious allegation. I find and hereby declare that the child, B, is a legal and biological child of the parties herein. I award the petitioner KES 100,000.00 general damages for slander.
18. On the issue of jurisdiction of Kadhi's Courts in Kenya in the determination of questions of children custody, this court is of the considered view that the provisions of Article 170 (5) of the Constitution of Kenya, and Section 5 of the *Kadhis court Act*, Cap 11 confers it with requisite jurisdiction to determine such questions where both parties profess Muslim faith and submit to its jurisdiction. This is further emphasized by the preamble of Cap 11, appreciation of the legal history of the Court and lack of explicit provision denying it jurisdiction. It is notable that the *Children's Act*, Cap 141 Laws of Kenya conspicuously omitted the Kadhi's Court from the repealed Acts by its enactment.
19. I am cognisant the High court of Kenya has 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.”

20. In the case of *Mehrunisa v. Pravez* (1982-88) 1 KAR 18, the court of Appeal settled the that the mother, unless disqualified by special or peculiar circumstances, gets first priority of custody of minor children.
21. The same is the position under Islamic law based on a Islamic tradition reported by Abu Daud [2276] on the authority of Abdallah ibn Amr (may Allah be pleased with him) and Article 106 (1) of the [Islamic Charter on Family](#) [ICF] where the Prophet Muhammad (may peace and blessings be upon him) in a custody dispute, ruled in favour of the mother.
22. The respondent is a KDF officer. He is ordered to pay child maintenance of KES 15,000.00 per month plus medication, clothing and school fees when the child starts schooling.
23. This being a family matter, each party to bear its own costs.

Orders accordingly,

**DATED, SIGNED AND DELIVERED AT ISIOLO ON 16TH NOVEMBER, 2021.**

**HON. ABDULHALIM H. ATHMAN**

**SENIOR PRINCIPAL KADHI**

In the presence of

Mr. Ismail I. Hussein, Court assistant

Petitioner

Respondent.

