



**HG v AB (Divorce Cause E032 of 2021) [2021] KEKC 20 (KLR) (21 December 2021) (Judgment)**

Neutral citation: [2021] KEKC 20 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT MERTI  
DIVORCE CAUSE E032 OF 2021  
MG SHUNU, CK  
DECEMBER 21, 2021**

**BETWEEN**

**HG ..... PLAINTIFF**

**AND**

**AB ..... RESPONDENT**

**JUDGMENT**

1. The plaintiff, HGK, is the spouse to the respondent. she filed her plaint on 24<sup>th</sup> March 2021, begging the court to: -
  - a. Terminate the matrimonial relation between her and the respondent on the ground that it lacks respect and honour.
  - b. Order the respondent to surrender custodianship of their children's share of their property to her as she fears he might end up wasting the property after the part ways.
2. The respondent who is the spouse to the petitioner's spouse had not filed his defence against the petitioner statement filed against him but only appeared for cross examination in a manner seemingly aimed at delaying delivery of justice.

**Petition**

3. In an undated plaint which was filed in court on 24<sup>th</sup> March 2021, supported by an affidavit of the plaintiff. In her petition and depositions, the petitioner averred that she had been living harmoniously with her spouse (defendant) for the past thirty (30) years until the difference arose between them on 24<sup>th</sup> August 2020. She argued that even after the rise of the difference between them she remained loyal to him except that the defendant continued to be aggressive against her thus subjected her to violence.



4. She farther averred that the defendant neglected her in sickness both in terms of moral and material support thus she received the care she needed from her brother in-law one Mr. Adan Bonaya who supported her after her plea with respondent for medication cost failed to materialise.
5. The petitioner averred that the respondent refused to uphold the elders resolution in arbitration effort thus on 13<sup>th</sup> September 2020, the defendant decided to terminate their marriage in presence of Ali Hallole (Imam), Ibrahim Abkula, Kiya Gollo amongst others.
6. In her petition the plaintiff averred that after the defendant's termination of their marriage she deserted her matrimonial home and stayed at her parents residence however the defendant later returned her back to their matrimonial home.

### **Witness Statement**

7. According to the petitioner's witness 1(Mzee Mpira Sime) who is a close neighbour to the parties confirmed the respondent's failure in terms of maintenance towards the petitioner and was unable to comment on disrespect.
8. The 2<sup>nd</sup> petitioner's witness (Mzee Bagaja Molu) who is also a clan elder to the respondent confirmed the respondent's negligence, disrespect and misuse of the family's resource solely on Miraa.
9. The respondent's witness one Hajj Hassan Molu disagreed with the petitioner's witnesses as he argued that the provision as he confirmed in one of the meetings between the petitioner and the respondent was there though it is negligible. On the issue of disrespect, the respondent's witness confirmed to the court that the petitioner's claim against the respondent of disrespect and abuse in vulgar language are true. He farther reported that the respondent's disrespect towards the petitioner exceeded the limit thus he reached a point of abusing Hajj Hassan Molu himself who was once appointed as the arbiters in case of difference between the petitioner and the respondent.

### **Court's Opinion**

10. The issue which was brought before this court for determination between the petitioner and the respondent begs for the court's revisit of its earlier judgement in the Matrimonia Case No. E002 of 2020. In the aforementioned judgement the petitioner who was then the 1<sup>st</sup> respondent was ordered to return back to her matrimonial home since the cause of their separation was her involvement in extra marital relation with the 2<sup>nd</sup> respondent in the aforementioned case. In the cross examination between the petitioner and the respondent in this case; both the petitioner and the respondent confirmed to this honourable court that they (both the current petitioner, himself and the 2<sup>nd</sup> respondent in the case No. E002 of 2020) had uphold all the contents of the said judgement.
11. Therefore, in the best interest of justice, this honourable court finds it prudent to see to the issues raised by the petitioner in the current petition thus opine as follow: -

### **The Holiness of Marriage**

12. Marriage in Islam is a sign of God's power and glory. The Qur'ān says:

“From His signs is that He has created for you spouses from yourselves so that you may get peace [and tranquillity] through them; and He placed between you love and mercy. In these are signs for the people who reflect.” (Surah ar-Room, 30:21).



## Violence in Marriage

13. Under no circumstances is violence against women encouraged or allowed in Islam. There are many examples in Quran and ahadith that describes the behaviours of Muslims as husband and wife. The relationship should be one of mutual love, respect and kindness. Allah (swt) says in Quran, "O believers treat women with kindness even if you dislike them; it is quite possible that you dislike something which Allah might yet make a source of abundant good" (Surah An Nisa 4:19).
14. According to Islam, marriage is a civil contract; yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity that a high degree of sanctity is attached to it. But, in spite of the holiness of the character of the matrimonial tie, Islam recognises the eternity of divorce in cases when marital relations are poisoned to a degree which makes a peaceful home life impossible. But Islam does not believe in unlimited opportunities for divorce on frivolous and flimsy grounds, because any undue increase in that facilities for divorce would destroy the stability of family life. Therefore, while allowing divorce even on genuine grounds, Islam has taken great care to introduce checks designed to limit the use of available facilities. The French legists Planiol and Ripert have explicitly emphasised Islam's point of view in regard to divorce in these words: "Divorce is a mischief. However, it is a measure that cannot be avoided for the welfare of the community, because it is the only remedy for another harm which may be more dangerous The prohibition of divorce, whatever harm it may imply, is like the prohibition of surgery, because the surgeon is compelled to amputate some of the limbs of the patient's body. However, there is no danger whatsoever, in legislating for divorce (in accordance with the practice established by Islam) since it is not divorce that spoils married life and dissolves its sacred tie, but the misunderstanding that arises between the married couple and hinders the strengthening of this (union by marriage) and demolished it. Divorce alone puts an end to the hatred that may occur between the husband and his wife before it is aggravated and becomes an intolerable mischief to society" (quoted by Hasan Ibrahim Hasan, Islam, Religious, Political. Social and Economic Study, p. 274).
15. In an Islamic family law the husband has some roles or duties that must be carried out as conferred on him by the law. Men are tagged as the "Qawwamun" that is, the protectors and the maintainers of women, in the Qur'an. This is due to the maintenance responsibility imposed on men by Allah. This can be seen in Q4:34: "Men are in charge of women by (right of) what Allah has given one over the other and what they spend (for maintenance) from their wealth". Therefore, men have a greater and more difficult responsibility in supporting their families. It is the man, who can, through his wisdom, maintain his family and prepare the grounds for their happiness and it is he who can turn the house into a paradise and his wife to act as an angel as stated in the Holy Quran "the father of the child shall bear the cost of the mother's food and clothing on a reasonable basis." And the Prophet of Allah (S) stated: 'Man is the guardian of his family and every guardian has responsibilities towards those under his guardianship'. A man, who is supporting his family, should know that a woman is also a human being like a man. She also has desires and the rights of freedom and life. Marrying a woman is not hiring a servant, but it is a selection of a partner and a friend who would be able to live with for the rest of ones life. Man has to care for her and her desires. Man is not the owner of his wife and in fact a woman has certain rights upon her husband.

## Maintenance (An- Nafaqah).

16. It is the duty of the man to provide for the maintenance of his wife as spelt out in the aforementioned verse of the Qur'an. This includes provision for her feeding, clothing, shelter, services, health care and all the expenses that corroborate the well-being of the home.



17. This is made obligatory on the husband by the Qur'an, the Prophetic traditions and the consensus of the 'Ulama'. In Qur'an 2:233: "...And upon the father is their (i.e. the mothers') provision and their clothing according to what is acceptable. No person is charged with more than his capacity". In another verse Q65: 6 Allah says: "Lodge them (in a section) of where you dwell out of your means and do not harm them in order to oppress them. And if they should be pregnant, then spend on them until they give birth..." Among the traditions of the prophet in support of this maintenance are: "Related by Muawiyah al-Qushayri, may Allah be pleased with him, He said: I said oh the Messenger of Allah what is the right of our wives on us? The prophet said: You should feed her when you eat, you should clothe her when you clothe yourself, don't ever beat the face (of the wife), don't insult (her) and don't neglect her except in the house". (Ahmad, 1981) Except the woman proves recalcitrant (Nushuz) to her husband for no cause should he leave her not catered for according to his capability. Failure to give all this provision intentionally amounts to sin before the wife and then before Allah. A husband is commanded by the law of Allah to treat his wife with equity, to respect her feelings, and show her kindness and consideration, especially if he has any other wife. Nevertheless, the man may not be able to be fair and just in terms of love. This is because the control of the heart is in the hand of the Creator, Allah. He can twist it whichever direction He likes. The Prophet was reported that he used to distribute things among his wives in a just and fair manner. However, he used to pray to Allah to pardon him on what he did not have its control (i.e., his heart). The prayer of the Prophet on this goes thus "Oh Allah this is my distribution on what I have power, I beseech you not to hold: me responsible for what I have no power and you have power (on it). It was explained that what the Prophet referred to in this prayer as what he had no power over is the love for his wives. This is because human beings' hearts are controlled by their Creator to any direction He wishes at any point in time".

### **Divorce in Islam**

18. Divorce has been generally frowned upon in Islam; hence it is imperative that we exhaust every possible avenue to avert the same; the steps thus recommended in averting divorce involve the following:
- a. Seek counsel from those who possess wisdom, experience, and knowledge and seek to solve the outstanding issues between yourselves after gaining insight and advice from them.
  - b. In the event that the effort in (a) above fails, both spouses must resort to Islamic arbitration; in this arbitration one should have parties representing both sides. They (spouses) should submit to abide by the decisions agreed upon. The reason for this is that often humans become so preoccupied with their temporary personal likes and dislikes that they fail to see their own destructive behaviours and weaknesses. Thus they are encouraged to seek advice and wisdom from those with experience and knowledge, who may help them to empower themselves to take charge of rectifying their behaviour(s) and attitudes.

### **Issues of Determination**

19. The pertinent issues of determination in this case are: -
1. If the issues raised by the petitioner in her plaint meets the threshold for dissolution of marriage between her and the respondent.
  2. If the respondent's estate can be placed under the custodianship of the petitioner after their separation as the children's share of his estate.
  3. Custodianship and maintenance of the children



20. In addressing the 1<sup>st</sup> issue of determination; as earlier in the introductory part of this court's opinion, the current petitioner who was the 1<sup>st</sup> respondent in the matrimonial case No. E002 of 2020 was ordered to return back unconditionally to her matrimonial home thus despite her discomfort with the order(s) she upheld the order and returned back to her matrimonial home. The issues of the respondent's failure in provision of medical expense to the petitioner and cruelties as raised in the the Matrimonial Case No. E032 of 2021 was prior to the court's judgement on Matrimonial Case No. E002 of 2020 which was delivered on 21<sup>st</sup> December 2021 at Dadach Basa Mobile Court; the petitioner should have raised the same prior to the judgement but her failure to adduce the same in court prior to that judgement is a clear evidence of a narration to justify her engagement with the then 2<sup>nd</sup> respondent hence the issue as raised in this case cannot meet the threshold for termination of marriage between her and the respondent. However, it is this honourable court's observation that the matrimonial bond between the petitioner and the respondent was damaged beyond repair hence forcing the matrimonial bond between the petitioner and the respondent who are not willing to reside together is a futile effort which shall never see the light day hence this honourable court sees it valuable to dissolve the marriage between the petitioner and the respondent through Judicial decree as the marriage between the two lacks peace, love, care and tranquillity as it should thus declaring it null and void is the best solution to remove any harm. Secondly the petitioner had proved that she cannot live with the respondent through her actions and words thus based on article 36 of *the constitution* of Kenya; this honorable court cannot force the petition to remain in the association between her and the respondent.
21. On the 2<sup>nd</sup> issue, this court has found it not appropriate to place the custodianship of the respondent's estate under the petitioners since he is a live, there was no reason for consideration of shares in his property by the petitioner on behalf of their children. However, the court can enforce an order against the respondent to maintain his children on reason terms and means within his capabilities until proven otherwise.
22. On the issue of maintenance and custodianship of children after the parties' separation, In Arabic language guardianship is termed as 'Wilayat' and custody as 'Hidhanat'. Custody means physical or material possession of the children, whereas its Arabic equivalent Hidhanat literally means 'training' or 'upbringing of the child'. The term guardianship means the constructive possession of the child which deals with care of his or her person as well as property and its Arabic equivalent 'Wilayat' literally means to 'protect' or to defend. Legally the term guardianship is defined in the Guardians and Wards Act1 of Pakistan as 'A person having the care of person of minor or of his property or of both his person and property'. The terms custody and guardianship seem to have similar connotations, but it is often argued that guardianship is a superior right. According to the principles of established Muslim jurisprudence, father is the natural guardian (Wali) of the person and property of the minor child. Whereas custody (hidhanat) is a right of the child and not of either of the parents, or any other person claiming through them. The basic consideration always is to provide to the child the most natural, most considerate and most compassionate atmosphere to grow up as a better member of the society. Islam keeps the institution of family in high esteem and tries to preserve it. Rights and duties of the spouses have been prescribed in a manner to keep an ideal balance. While it is the man's job to earn livelihood and provide sustenance to the family, the wife's duty is to give birth to the children, to bring them up and to groom them. She is not required to work for her family or earn a living. Law of hidhanat in Sharia has been framed keeping in view the roles of both parents. That is why mothers are given preference while deciding custody of the children born out of the wedlock during child's initial years. There is a consensus of all sunni schools of thought on this. Schools of fiqh differ in custody laws for boys and girls after 7 years of age. It has been observed in the recorded cases of classical Islamic era that the judges took into consideration the wishes and welfare of the minors while deciding their custody. It



must be remembered here that wish of the ward is subject to the following two considerations:Welfare of the childReasons of disqualifications of the mother and father to seek further custody.

23. According to Ibn Qayyam, ‘There are two types of guardianships. In one, father prevails over the mother and that is in matters of money and marriage. In the other one the mother prevails over the father and that is in matters of nourishing and upbringing’. Under Islamic law even if the mother has the physical custody of her children, father continues to be the guardian of the child as he is supposed to support the child financially. However, it should be noted that under the prevailing social setup where the father is not the sole financial contributor and the mother shares financial responsibility and in most cases is the main contributor to the financial needs of the family then the privilege of ‘guardianship of person and property’ should vest in her as well.

### Orders

24. Upon hearing the plaintiff and the defendants; with the powers conferred on this court by article 170 of *the constitution* of Kenya, cap. 5 of the Kadhis Court, this court gives the following orders:

1. That the matrimonial bond between the parties in this case is hereby dissolved through faskh to remove harms which might result from it.
2. That the petitioner’s prayer for placement of custodianship of her children’s share of their father’s (defendant) estate is hereby dismissed as it is not prudent for the same to be done while the respondent is alive and is in his right mind.
3. That the respondent is hereby ordered to provide maintenance to his four (4) minor children at a rate of Kshs. 3,000 per month exclusive of medical and tuition fees.
4. That the respondent is hereby ordered to refrain from evicting the petitioner from her house.
5. That the petitioner is hereby ordered to refrain from engaging or marrying Mr. Ali Mohamed.
6. That the custody vested with mother while the father has an access and visitation
7. That the plaintiff shall observe 3 month as an eddah period.
8. That witness be protected

It so ordered.

**DATED AND DELIVERED AT D/BASA MOBILE COURT ON THIS 21<sup>TH</sup> DAY OF DECEMBER 2021**

**HON. MUSTAFA G. SHUNU**

In presence of: -

Salad Adan - Court Clerk.

Abdirahman Bonaya – Plaintiff.

Halima Galgalo – 1<sup>st</sup> Respondent.

