



**REPUBLIC OF KENYA**

**IN THE KADHI'S COURT**

**AT HOMABAY**

**MATRIMONIAL CAUSE NO 1 OF 2019**

**MAR.....PETITIONER**

**VERSES**

**ERO.....RESPONDENT**

**JUDGMENT**

This Matrimonial case was filed in this court on the 30<sup>th</sup> of August 2019 by one MAR referred hereinafter as the Petitioner against ERO hereinafter referred as the Respondent. Both the Petitioner and the Respondent are residents of Kendubay within Homabay County in the Republic of Kenya. The petitioner's prayers against the respondent being;

1. Monthly maintenance cash of kshs 5000.
2. Be allowed to live with her child in Matrimonial home.
3. Dowry balance kshs 5000.
4. Cost of this suit.

The background of the case is that the parties had been having love relations for a period of time until they entered into marriage under Islamic Law before this court on the 7<sup>th</sup> of May 2019 and marriage certificate serial number **B [particulars withheld]** issued and they cohabited as husband and wife in Kendubay. The Petitioner had conceived with another person before marrying the Respondent and they had been staying together with the issue(minor) in a house which converted into their matrimonial home after celebrating their marriage. The Petitioner is also pregnant from the Respondent as indicated from a report from Kendu Bay Sub-County Hospital.

The Respondent filed his defense on 24<sup>th</sup> of September 2019. In his defence he prayed that he provide a monthly maintenance kshs 3500 for the issue to be born, and dissolution of the marriage. The Respondent also had paid the Petitioner kshs 5000 dowry balance through Mpesa but surprisingly the Petitioner resent back the cash to the Respondent.

The matter came for hearing on the 12<sup>th</sup> of November 2019 and the petitioner testified that before and shortly after solemnizing their marriage, the Respondent used to cater for the needs of her son from another father including education.

Later on the Respondent asked her to take the minor (a son) to stay with her parents and as a result caused the Petitioner to become disappointed as she believes that she is the best person to look after the minor and not minor's grandparents.

The Petitioner testified that the Respondent had begun a habit of spending nights away from home and not providing for the Respondent and the minor with essential needs and also not wanting to be asked about those habits. The Petitioner thought that those habits were a result of her continuing staying with the minor which was against the Respondent's wishes. She decided to take the minor to the grandparents to stay with them so that the dispute can be settled.

The Petitioner stated that later on the Respondent regretted and asked the her to bring back the minor and she accepted on condition that the Respondent go to the Petitioner's parents and apologies which the Respondent failed to do.

The Petitioner states that after the disputes between them worsened, she organized for solutions from elders from both sides and the disputes were settled and both parties were sent back to their matrimonial home, but the same day the Respondent arrived in the house shortly before

midnight and as she was hungry she had called her mother to send her food as the Respondent was not providing.

The Petitioner states that that same night after the Respondent entered the house, he started packing his belongings to leave her alone in the house and she too decided to park and leave and suddenly a fight ensued as the Petitioner was trying to bar the Respondent from getting out of the house and she got hurt on her face.

On his defence the Respondent states that he had been providing for the family and that he didn't compel the Petitioner take the minor from the house but he politely asked her to allow the minor be staying with the petitioner's parents who are not far away because they always disputed concerning the minor and thus the environment was not conducive for his upbringing.

This Court finds that there is no dispute about the legality of the marriage between the parties and also that amount of dowry balance which was kshs 5000.

The Court finds that the main issues to deal with in this case are whether;

1. The Respondent is to be giving the Petitioner monthly maintenance cash of kshs 5000 or 3500.
2. Whether there are sufficient grounds for dissolving the marriage.

To begin with the second issue, it is the Respondent who is asking the Court to dissolve the marriage and not the Petitioner. The Qur'an has given the husband the discretion to divorce his wife in the first place and to take her back to marriage after the first and the second divorce and before the waiting period has elapsed. The Qur'an states: "**O Prophet! If any of you divorce women, di-vorce them during their period of purity, and calculate their term.....**" (65:1) It also states:

**"Meanwhile, their husbands have the better right to take them back, if they de-sire reconciliation."** (2:228) It has also been narrated that Ibn 'Abbas said: "A man came to the Prophet (P.B.U.H) and said: 'O Messenger of Allah, my master married me to his slave woman, and now he wants to separate me from her.' The Messenger of Allah (P.B.U.H) ascended the pulpit and said: '**O people, what is the matter with one of you who marries his slave to his slave woman, then wants to separate them? Divorcing belongs only to the one who takes hold of the calf** (i.e., her husband).' Ibn Maajah, 2081;

Unlike the wife, who if she cannot bear the difficulties or harm from her husband, she has a right to ask the husband to divorce her in the first place, and if he refuses then she seeks redress from a court of law.

What can be the reason behind the husband not divorcing his wife and instead asks a court to dissolve the marriage? It can be either he doesn't know laws pertaining to divorce or he wants the court to divorce on his behalf.

But can a Court of law dissolve a marriage on grounds that a husband does not know how to divorce his wife or be an agent of the husband in divorcing his wife or because the husband wants to excuse himself afterwards that it was the court that dissolved the marriage and not him?

But for the husband being having powers to divorce his wife, he is not not barred from asking the court to dissolve his marriage with his wife and especially where the prayer happened to be within his defence as the Respondent but he has to give reasons before the court unlike when he himself is the one divorcing.

Secondly the parties agree that the Respondent be giving the Petitioner maintenance fee but disagree on the amount. The Petitioner wants kshs 5000 while the Respondent is ready to be providing kshs 3,500 per month for the child to be born and not for the Petitioner. The Qur'an has prescribed the duty of looking after the family upon the husband who is the head of the family according to his individual capacity. It states: "**It is the duty of the father to provide for them and clothe them in a proper manner. No soul shall be burdened beyond its capacity.**" (2:233) And in a hadith mentioned by AL-Bukhary that Hindu the wife of Abu Sufyaan came to the Prophet (P.B.U.H.) and complained that her husband is an ungenerous person. She said: "**He does not give me what is sufficient for me and my son except for what I take from his money without his knowledge. Is what I'm doing a sin?**" The Prophet (P.B.U.H.) answered: "**Take justly from his money what is sufficient for you and your son.**" (Sahih Bukhary 5072)

The Court had referred the parties to ADR for reconciliation ... **for reconciliation is best.** (Qur'an 4:28) but to no avail and as a matter of fact the Petitioner and the Respondent are not living together since they last fought in their house and they don't communicate too.

It is difficult for a disputing husband and wife to settle their dispute especially when they are not together and not communicating. For that reason, this court directed the parties to go back to their matrimonial home and stay there as they are still husband and wife until the matter is determined. This was to give them an opportunity to review the issues in dispute.

When the parties appeared again before this court, the court found that they did not settle any of the issues related to this case. Thus the court has no option except to conclude the case. First I want to state that when it happens that a wife is seeking divorce from her husband, then the husband has a right if he wants, to ask for compensation in order to divorce her. The evidence for that is that the wife of Thaabit ibn Qays ibn Shammaas (may Allaah be pleased with him) came to the Prophet (peace and blessings of Allaah be upon him) and said, "**O Messenger of Allaah, I do not find any fault with Thaabit ibn Qays in his character or his religious commitment, but I do not want to commit any act of disbelieve after becoming a Muslim.**" The Prophet (P.B.U.H) said to her, "**Will you give back his garden?**" Because he had given her a garden as her dowry. She said, "**Yes.**" The Prophet (P.B.U.H) said to Thaabit: "**Take back your garden, and divorce her.**" (Narrated by al-Bukhary, 5273)

On the other hand, if the divorce is from the husband, Islam too did put the wife into consideration by giving her the right to alimony

(mataa'u). The Qur'an has stated: *“And divorced women shall be provided for, justly—a duty upon the righteous.”* (2:241) It also states to divorcing husbands: *“You commit no error by divorcing women before having touched them, or before having set the dowry for them. And compensate them—the wealthy according to his means, and the poor according to his means—with a fair compensation, a duty upon the doers of good.”* (2:236) From The mentioned authorities, it has been established in Islamic law that if a wife is divorced after or before consummating the marriage, she is entitled to alimony according to the husband's ability.

The Respondent states that currently he is not working but during their marriage and during the time of filing his defence he was working as a teacher with Gendia Secondary School.

From that I do make the following orders;

1. **THAT** the marriage between the Petitioner and Respondent is hereby dissolved.
2. **THAT** the Respondent to pay the Petitioner kshs 15,000 alimony.
3. **THAT** the Respondent to pay the Petitioner kshs 5,000 dowry balance.
4. **THAT** the Respondent to be paying a monthly kshs 5,000 maintenance fee for the minor.
5. **THAT** no order to costs.

**N/B:** Aggrieved party has a right to file an appeal within a period of 30 days.

**Dated, Signed and Delivered in Homabay this 26th day of February, 2020.**

**Hon. Idris N. Nyaboga Resident Kadhi**

In the presence of;

Court Assistant: Francis Tshombe The Petitioner

The Respondent