



HSA v AAL (Divorce Cause 1 of 2020) [2020] KEKC 9 (KLR) (9 April 2020) (Judgment)

HSA v AAL [2020] eKLR

Neutral citation: [2020] KEKC 9 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT ISIOLO
DIVORCE CAUSE 1 OF 2020
AH ATHMAN, PK
APRIL 9, 2020**

BETWEEN

HSA PLAINTIFF

AND

AAL DEFENDANT

JUDGMENT

1. In this divorce case the plaintiff prays for dissolution of her marriage to the defendant, payment of dowry, Custody and maintenance of the minors and division of matrimonial property. She claimed the defendant chased her away from the matrimonial home, has neglected his parental responsibilities and has treated her with cruelty, insulting her with vulgar and abusive words and assaulting and despite interventions by elders he has failed to reform. She claims she financially contributed towards the development of the four-bedroom matrimonial house.
2. The defendant denies the claim. He stated he has been taking care of his children through funds of a rented premises the plaintiff collects. He claims he bought her a car and opened her a butchery and that he used to give her money to the plaintiff money for construction of the house owing to his duties out of the country. The parties had already been heard by elders several times.
3. The matter was substantially part heard before the parties appointed advocates, the respondent was represented by Kiogora & Company advocates while the petitioner was represented by Mukhama & Company advocates.
4. The respondent had filed a preliminary objection dated February 17, 2020 on the grounds that the matter is res judicata under section 7 of the Civil Procedure Act. The objection was opposed. On the say scheduled for hearing on February 24, 2020, neither the respondent nor his advocate appeared. The respondent failed to prosecute his preliminary objection. It was dismissed for want of prosecution and lack of evidence of any evidence the issues between the same parties herein had been heard and



determined by any court of competent jurisdiction to qualify as res judicata. The respondent were given another opportunity to give their further evidence. On the further hearing of defence case on March 9, 2020, Mr. Kiogora requested time indication of 11:30 a.m. The court directed to proceed at 10:15. The respondent stated he had three other witnesses some of whom were present but elected not to proceed without his advocate. On application by the petitioner's advocate the defence case was closed. While courts strive to give fair opportunity to parties to present their cases, ultimately, it is the courts' duty to manage cases. The judiciary has zero policy on unnecessary adjournments to encourage timely determination of matters in compliance with article 159 of the [Constitution of Kenya](#) (2010).

Background

5. The parties were married under Islamic law in 1999 at Isiolo. They are blessed with six children from their legal wedlock. The plaintiff runs a butchery in Isiolo town, the respondent is a KDF officer, stationed at [Particulars withheld], Isiolo.

Issues

6. The issue for determination in this matter is whether or not the plaintiff is entitled to divorce, dowry, Custody and maintenance and division of matrimonial property.

Divorce

7. The plaintiff reiterated under oath that the respondent insults and assaults her and does not provide for his family. She stated that more than twenty (20) times she was compelled to leave the matrimonial home due to respondent's mistreatment and violence, that he threatened to kill her if she did not leave the house. She allegedly saw a knife under his pillow, compelling her to eventually leave. That even after she had left, he follows her at her butchery, her workstation, to insult her. She stated the respondent does not trust her, alleging she has illicit affair with another man. She further stated that the elders reconciled them many times, making her to return to him but he never reformed.
8. The plaintiff called three witnesses. Adan Sheikh Abdullahi's [PW1], evidence is that the respondent mistreated the plaintiff many times elders reconciled them returning the plaintiff to him more than twenty times, that he insults and threatened her life. Hussein Sheikh Abdullahi's [PW2] evidence is that the respondent often mistreated the plaintiff, he talked to the respondent and asked the plaintiff to be patient, that elders reconciled the parties many times but the problems persisted. Abdulrahman Sheikh Abdullahi's [PW3] evidence is that the respondent often insulted and threatened his wife, did not adequately provided for his family, that elders reconciled them many times but the problems persisted. He stated the respondent offered to divorce her on condition he is paid KES 150,000.00 that the family considered to pay him but he threatened her life using a knife.

Hussein Ali Liban's [DW1] evidence is that the plaintiff came to Moyale for their child's treatment by a local Sheikh but returned to Nairobi instead of Isiolo upon completing the therapy. She later returned to the matrimonial home but only for a day and left. He stated he tried to resolve their dispute but the plaintiff's relatives refused to talk towards reconciliation. MAA [DW2] is a colleague and Imam with KDF. His evidence is that he talked to the plaintiff and with other elders tried to resolve the marital dispute between the parties but plaintiff's elders declined to meet them as the matter was already before court.

9. The respondent's evidence relates to only the last quarrel between the parties. Court gave opportunity for reconciliation at the start and during the proceedings of this case. The plaintiff and her relatives refused to participate in further talks, probably due to having reconciled them many (more than 30) times without positive change from the respondent. The plaintiff has proven her case on the balance



- of probability, the required standard in civil matters. I find as fact and hereby hold, the respondents, mistreatment, insulting, assaulting the plaintiff many times and threatening her life.
10. The respondent's conduct offends the objectives of marriage under Islamic law of love, affection and mercy.

‘And of His signs is that He has created for you from yourselves mates that you may find tranquility in them; and He placed between you affection and mercy. Indeed in that are signs for a people who give thought’. Rum 30 : 21
 11. Further husbands are directed to treat their wives with dignity and honour and not mistreat them by either orally, physically or psychologically. Islamic law of marriage prohibits marital violence.

“o you who believe! You are forbidden to inherit women against their will; and you should not treat them with harshness, that you may take away part of the mahr you have given them, unless they commit open illegal sexual intercourse; and live with them honourably. If you dislike them, it may be that you dislike a thing and Allah brings through it a great deal of good.” Qur’an: Nisa: 4:19
 12. Article 87 of the Islamic Charter on Family ICF provide:

"If the wife has been harmed by her husband to an extent that would be impossible for most people similar to them to continue marital relationship under such circumstances, then she shall have right to ask for divorce. If her husband refuses to divorce her, she can raise her case to the judge. If the harm is proven, then the judge shall rule in her favor thereby divorcing her from her husband..."
 13. The article classes types harms that qualify to dissolve marriages into material and emotional. The material harms are such as beating her, injuring her, throwing hot water on her and the emotional harm such as insulting her, accusing her of adultery and speaking to her in profane manner. Some husbands have misapprehended the provisions of Qur'an: 4:34 on discipline of wives as condoning marital violence and legality of assault of wives. Nothing could be further from the truth.

‘As for those whom ye fear rebellion, admonish them, and banish them to beds apart, and scourge them. Then if they obey you, seek not away against them. Lo! Allah is ever High, Exalted, Great’. Qur’an: Nisa: 34
 14. Scriptures are not translated verbatim but as interpreted by the Prophet (May Allah's peace and blessings be upon him) and his companions. Ibn Abbas (May Allah be pleased with him) when asked of the meaning of the verse stated “beat them lightly, a beating that leaves no mark on them” Al Qurtuby vol.3 pp 121
 15. Islamic law explicitly prohibits infliction of harm, physically or otherwise, on oneself or another person. Harm, pursuant to the famous Islamic legal maxim, must be removed.

Narrated Abu Said Al Khudry [R.A] that the Prophet [peace and blessings be upon him] said: ' infliction of harm on oneself or others is not allowed in Islam' reported by Ibn Maja [2341], Al Dar Al Qutny [4/228] and Malik in his Muwatta' through Amr Ibn Yahya [2/746].
 16. In the instant case, the defendant has been patient for a long time. She is, I find and hold, entitled to divorce. Accordingly I grant her prayer for dissolution of marriage, first minor irrevocable. The parties' marriage be and is hereby declared dissolved with effect from 9th April, 2020 same as 15th Sha'ban 1441 A.H. Divorce certificate to issue.



Dowry

17. The defendant admits he has not paid dowry. He however stated it was one and not three cows as claimed by the plaintiff. None of the parties filed marriage certificate, it would have been conclusive in settlement of the issue. The plaintiff's claim on this issue was supported by evidence of PW1, I accordingly, I find as fact the dowry of three cows was not paid.
18. Dowry is an basic and fundamental right to the wife under Qur'an 4: 4 and 25. It is not extinguished unless wholly or partly forfeited by the wife in her own free will and consent.

“And give to the women (whom you marry) their mahr (obligatory bridal-money) with a good heart; but if they of their own good pleasure, remit any part of it to you, take it, and enjoy it without fear of any harm (as Allah has made it lawful) Nisa: 4:4
19. The defendant shall settle the same in kind or its monetary equivalent at current market price.

Jurisdiction of Kadhi's Courts on Children Custody and Maintenance

20. The Constitution of Kenya (2010), Article 170 (5) and Section 5 of the Kadhis court Act, Cap 11 conferred on Kadhi's Courts jurisdiction to determine questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's Courts.
21. The preamble to the Kadhi's Court Act (1967), Cap 11 Laws of Kenya, states:

"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"
22. Clearly child custody and maintenance issues are a result of marriage and divorce. They are connected and incidental to marriage and divorce. Under Islamic law, part from children custody and maintenance being connected and incidental to issues of marriage and divorce, it is explicitly a personal status matter which is specifically provided for as part of jurisdiction of Kadhi's Courts in the Constitution and the Act.
23. However, the the High court has have differed on this issue between those holding the Kadhis court has jurisdiction to deal with issues of children custody and maintenance and those who hold it does not.
24. On the one hand Hon. Judges Musyoka [Nairobi High Court Civil appeal No. 53 of 2013 [2014] eKLR], Muchelule [Kisumu High Court Misc application No. 125 of 2013 [2013] eKLR] and Odero [Mombasa High Court, Misc. Civil application No. 45 of 2013 [2014] eKLR and Civil appeal No. 15 of 2013 [2014] eKLR], and now many others following on their interpretation, held that the Kadhi's court lack jurisdiction to hear and determine issues of custody and maintenance of children. There reason is that it is not expressly provided for in the law and due to the enactment of the Children's Act, Cap 141.
25. On the other hand Hon. Judges Sergon [HCCA 120 of 20004, Amin Mohamed Hassan Vs Zahra Mohamed Abdulkadir [2009] eKLR and Mohamed Omar Vs J.B. Mdivo, Mombasa High Court, Misc. civil application No. 949 of 2005 [2007] eKLR] Hellen Omondi [Najma Ali Ahmed Vs Swaleh Rubea, Malindi High Court Civil appeal No. 22 of 2007 [2010] eKLR] and Stella Mutuku [Abdirahman Mohamed Abdi & another Vs Adan Yusuf, Garissa High Court, Civil appeal No. 13 of 2012 [2013] eKLR] held that the Kadhi's court have jurisdiction to hear and determine issues of



custody and maintenance. Their reasons are that it is incidental to the issue of divorce, it is a component of personal status and the enactment of the Children's Act did not oust the jurisdiction of the Kadhis Court and / or repeal any of the provisions of the Act.

26. The matter is therefore not settled. I am however persuaded by the decisions upholding Kadhi's Court jurisdiction to determine issues of children custody and maintenance due to the strength of their reasons and purposive approach to interpretation of the Constitution and statute. This is best illustrated by the decision of the High Court at Mombasa (Sergon, J)in HCCA 120 of 2000⁴, Amin Mohamed Hassan Vs Zahra Mohamed Abdulkadir [2009] eKLR held:

"even if the Children's' Act No 8 of 2001 was in existence, I don't think the appellant would have succeeded for two reasons. First, the Children's Act No. 8 of 2001 didn't expressly oust the jurisdiction of the Kadhi's court nor did it repeal any of the provisions of the Kadhi's Act.

Custody

27. It is now settled as a general principle that unless there exist peculiar and special circumstances, mother has priority to custody of minor children. In *Mehrunisa v. Pravez* (1982-88) 1 KAR 18 the court clearly pronounced itself on the same. In the instant case, the children are minors aged between (8) years and (6) months and have been and continue to live with their mother. I find no reason to deviate from the general principle. Custody of the minors be and is hereby granted to the plaintiff. Defendant to get reasonable access.
28. Under Islamic law costs of children maintenance is a 100% responsibility of the father. The quantum of maintenance depends on the needs of the child and the financial ability of the father. This is pursuant to the provisions of Qur'an: 2:233 read together with Q:65:7. The defendant is a KDF officer stationed at [particulars withheld] Isiolo. He indicated he has, apart from his salary, a rental house that makes a monthly return of Kshs 38,000.00. The plaintiff at para 6 (e) of her petition indicates the rental house has an income of KES 20,000.00 per month. The parties have six school going children, attending [Particulars Withheld] Academy. The annual fees per child is about 42,000.00. The total for five children is KES 210,000.00 which translates to 17,500.00 per month. The KES 20,000.00 from the rental house is not adequate One child completed Form Four and needs to go to college. The defendant to provide maintenance as follows:
- i. Sustenance KES 20,000.00 per month
 - ii. Accommodation KES 12,000.00 per month
 - iii. School fees KES 18,000.00 per month
29. The rental income shall be used as part of maintenance herein above.

Division of Matrimonial property

30. The plaintiff seeks refund of KES 2,000,000.00 she used in the development of the four bedroom matrimonial home . The respondent's argued he is the sole breadwinner of the family and used to give money to the petitioner for supervise the construction of the house as he was mostly out of the country on duty in peace missions.
31. The petitioner runs a butchery business. She produced bank statements to support her contributions to the development of the house and receipts from Tulla Hardware. Among the entries is a payment of KES 700,000.00 to Tulla Hardware and many over the counter [OTC] withdrawals of about KES 3,260,000.00 within short periods of time between July 2015 and December 2017. The respondent's



- admits the petitioner is the one who supervised its construction. He differs with her on her financial contribution. The plaintiff did not produce statements to support his claim that he transmitted funds to the petitioner to be used for the construction of the house.
32. Section 3 of the Matrimonial Property Act, 2013 provide:
- 'A person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property.'
33. The High Court has jurisdiction to hear and determine issues of division of matrimonial property where both parties are Muslims and subject to the jurisdiction to the court. In *R.M.M v B.A.M* [2015] eKLR, Civil Appeal No. 267 of 2011, Waki, G.B.M. Kariuki, Mwilu, M'noti & Murgor, JJ.A; the Court of Appeal held:
- 'At the root of the issue is whether it was the High Court or the Kadhi's Court which has jurisdiction to determine the matter of distribution of the matrimonial property....'..If their marriage was purely Muslim, and the property in issue was acquired during the currency of that marriage, the Kadhi's Court would be the most efficacious in handling and determining the dispute.'
34. Matrimonial property may be defined as property acquired by the husband and wife during the subsistence of the marriage in accordance with conditions stipulated by Islamic Law. Islam recognises the right to own property to both man and woman.
- "And wish not for the things in which Allah has made some of you to excel others. For men there is reward for what they have earned, [and likewise] for women there is a reward for what they have earned, and ask Allah of his Bounty. Surely Allah is All Knower of everything.' Qur'an:4:32
35. Islamic Law has provided protections to one's wealth and prohibited unlawful use of another's wealth and property.
- 'O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent. And do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful'. Q:4:29
36. Abu Huraira (May Allah be pleased with him) narrated that the prophet [PBUH] said: '..the life, wealth and dignity of a Muslim are sacred'. [Muslim 2564].
37. The concept of matrimonial property in Islam is complete separation of the wealth of the husband and wife and independent financial identities of the husband and wife. However spouses are allowed to contribute and invest and eventually distribute properties and investments. Upon divorce each spouse is entitled to the contributions and investments so made by a spouse during the subsistence of a marriage. Although relatively a new concept in Islamic law and there is no explicit authority from original sources of Islamic law on this issue, it has strong legal foundation from general verses on equity, justice, respect and protection of wealth and investments of spouses in marriage. It certainly does not contradict any of the principles and doctrines of Islamic law.
38. The following guidelines borrowed from the Malaysia Syariah Courts are helpful on the modalities of division of matrimonial property upon divorce:
- a. If the contribution is determinable, she gets the specific share of her contribution



- b. If the contribution is indeterminable, the property is shared equally. However the parties are required to take oaths affirming his or her claim. If both of them take the oath, the property is divided equally. If they both refuse to take oath, it will be divided equally. If one of them declines to take the oath and the other takes it, it will be given to one who takes the oath.
 - c. a small share does not bar entitlement to a share of the property, it only limits her quantum.
 - d. If contribution is de minimis [trifle, negligible] the wife is not entitled to any share of the property
 - e. The effort of each party such as tilling the land, participation in the running of the business, obedience and care of the home e.t.c. is considered.
 - f. The wife or husband has no share in property acquired by the other before their marriage unless there is proof of substantial contribution to its improvement. He / she would be entitled to the value of the improvement.
39. In the instant case, the four bedroom house at Isiolo was developed during the subsistence of the party's marriage with substantial financial and supervisory contribution by the petitioner. The petitioner has only prayed for refund of KES 2,000,000.00 although her contribution is more than that. Her prayer, I find and hold, has merit. It is hereby granted. Defendant to refund petitioner KES 2,000,000.00 as her share of the matrimonial property.
40. Each party to bear its own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ISIOLO ON 9TH APRIL, 2020.

HON. ABDULHALIM H. ATHMAN

PRINCIPAL KADHI

In the presence of

Mr. Guyo Adan, Court assistant

Mukhama Solomon Advocate-For Petitioner

Kiogora Mugambi Advocate-For Respondent

