



REPUBLIC OF KENYA

HOMABAY LAW COURTS

IN THE KADHI'S COURT AT HOMABAY

DIVORCE CAUSE NO 2 OF 2019

RM.....PETITIONER

VERSES

MAO.....RESPONDENT

JUDGMENT

This Divorce case was filed in this court on the 24th of December 2019 by one RM referred hereinafter as the Petitioner against MAO referred hereinafter as the Respondent. Both the Petitioner and the Respondent are Muslims and residents of Kendubay within Homabay County in the Republic of Kenya. The petitioner's prayers against the respondent being;

1. That the Marriage between the Petitioner and the Respondent be dissolved.
2. That the Petitioner be granted custody of the issue in marriage.
3. That the Respondent give back to the Petitioner her belongings.
4. That the Respondent to bear the cost of this suit.

The background of this case is that the Petitioner got married to the Respondent in accordance with Islamic Traditions in Nairobi on the 18th of March 2018. No marriage certificate was issued. The marriage has been blessed with one issue, KM a girl aged one year and eight months.

After their marriage, the Petitioner and the Respondent resided on several places in Nairobi before shifting to Kendubay the ancestral home to the Respondent where this suit ensued from.

The matter came up for hearing on the 12th of February 2020. The Petitioner testified that her marriage to the Respondent had problems from the start. She accused the Respondent of being cruel to her as he on several occasions assaulted her including the period when she was pregnant. She also accused the Respondent of engaging in extra-marital affairs. She stated that the union between her and the Respondent has irretrievably broken down as she never at any time enjoyed the fruits of the marriage.

The Respondent consented to the claim by the Petitioner that the marriage had problems from the beginning but denied being cruel and adulterous. Instead, he accused the Petitioner of being disrespectful and unkind to him and the issue in marriage. He stated that the Petitioner is high tempered and whenever they disagree, she runs away from her matrimonial home and only comes back several days after interference from elders and friends.

The Respondent states that the Petitioner has been cruel to the issue in marriage as she occasionally does not clean her, and as a result, the minor once had burns on her private parts and when taken to hospital, the doctor stated that the burns was a result of her not being cleaned properly after calls of nature.

The Respondent testified that on severally occasions and especially when he was studying in Nakuru, the Petitioner had been going and leaving behind the issue in marriage with friends and relatives and spending many days away and not caring about her. He states that on several times he has been contacted by relatives of the Petitioner to come and pick the minor after the Petitioner had disappeared to unknown locations.

The Respondent stated that the Petitioner once left the minor in Nairobi with a relative and without his knowledge and travelled to Voi to work in a restaurant. She never visited the minor until after around three months when she left the job and went back to Nairobi.

The Respondent prays that custody of the minor should not be granted to Petitioner because she's careless and always on transit and doesn't have a fixed abode to reside, and instead, he is the best person who the best interest of the minor lies. He also states that according to the customs of the Taita community which is the Petitioner's ethnic community, a divorced woman is not allowed to go back to her parents with issues acquired during her marriage.

From all that has been stated by both parties, I find that there is no dispute that the marriage between the Petitioner and the Respondent has had conflicts from the beginning. Each party accuses the other to be the source of the problems, but no one did provide sufficient evidence to prove his/her case except that the Respondent had one witness Juma Ali Ogot an Imam in Nairobi.

The most important question to deal with is who should be given the custody of the issue as each party claims to be the best to carter for the welfare of the minor.

The custody of the minor is a right to both the father and the mother while the marriage is existing. But in case of separation, the consensus of the scholars is that the mother is the best to person to remain with the minor(s).

It has been stated: **“And the custody of the minor is a right of the two parents if the marriage is existing between them, if they separate, the custody is a right to the mother of the minor according to the consensus.”** Almawsuu'atu Alfiqhiyyah (17: 301-302).

This consensus is based on an authority from the Prophet (P.B.U.H) narrated by Abdullahi ibn Amr that: **“A woman said: oh the messenger of Allah: this my son, my womb was his vessel, (during pregnancy) and my breasts his drink, (after conceiving) and my care his abode. His father divorced me and wanted to take him away from me. The Prophet (P.B.U.H) said to her: you have more right to him (the minor) as long as you don't remarry to another man.”** Sunan Abi Dawood no: 2276.

In this narration, the Prophet states that the rightful person to have custody minor(s) after separation is the mother provided that she doesn't remarry to another man. But does remarrying by itself takeaway her right to custody? The scholars differed on the wisdom behind which remarrying takes away this right. Albuhuuty said: **“It is because she becomes preoccupied from the custody of the minor by the welfare of the new husband. So she loses that right.”** (Kasshaaf Alqanaa'a 5:499)

Albaajy and Alkandahwi said: **“The reason is that the minor is inflicted with harm by hate and dissatisfaction from the new husband and by default, the mother will neglect him/her seeking the pleasures of her husband by being preoccupied with him, and all that is harm to the minor...”** (Almuntaqaa sharhu Almuwattw'a 6:186) and (Awjaz-al-Masaalik 14: 367).

Al-uthaymiin said: **“The reason is that the new husband is not a consanguineous to the minor, and if he is foreign to the minor, maybe he's not going to be compassionate to him and might not care whether the minor's welfare is catered or not.”** (Assharhu-lmumti'u 13:541)

From the above and other interpretations of the hadith, the Prophet (P.B.U.H) did not intend marriage by itself, but as a means to prejudicing the interest of the minor which is not is not allowed. So remarrying is no not the objective, but a means to the objective which is endangering the welfare of the minor(s). When Islamic Law forbids something, it also forbids all the means to the forbidden. Just like when it allows something, it allows the means to the allowed.

The rights of minors must be protected and anything leading to the interference of these rights has to be stopped, be it marriage or anything else. So the important thing to observe in custody matters is the interest of the minor.

I find that both the Petitioner and the Respondent each claim to be the best person to be granted custody of the issue in marriage. The Respondent has tried to disprove the claim by the by Petitioner stating that the minor has suffered on her hands by being left behind with relatives while she has been disappearing to unknown locations. I find that the Petitioner really left the minor at her sister(Mariam) in Nairobi without the knowledge of the Respondent and went to Voi and never returned except after around three months. He also testified that the petitioner has no fixed abode where she can reside with the minor.

On her side the petitioner stated that the Respondent has no ability for the custody of the minor but didn't clarify that.

The Respondent has no stable income, he testified that he earns kshs 5,000 per month and if he finds another good source of income, he shall move even if its abroad and if granted custody, he will move with her and never leave her behind like as the Petitioner has been doing.

The Petitioner too has no source of income and assuming that she gets employed in a situation like her employment in Voi where she'll be forced to leave behind the minor, who is that person who the minor is going to be left with? Most probably the same person(Maryam) unless otherwise. This person Maryam runs a hair salon in Nairobi next to where she resides. The Petitioner always used to leave behind the minor with Mariam. The Respondent never raised any issue with Mariam concerning the minor.

From all that has been stated, I do make the following orders;

1. **THAT** the marriage between the Petitioner and Respondent is hereby dissolved.
2. **THAT** joint physical actual custody of the minor is hereby granted to both MMM and the Petitioner.
3. **THAT** the legal custody of the minor is hereby granted to the Respondent.

4. **THAT** the Respondent shall contribute a monthly 3000 Ksh. towards the maintenance of the minor.

5. **THAT** the Respondent to visit the minor without conditions.

6. **THAT** no order to costs.

Dated, Signed and Delivered in Homabay this 29th day of June 2020.

Hon. Idris N. Nyaboga

Resident Kadhi

In the presence of;

Court Assistant: Muchiri Joseph

The Respondent