



H S v K A (Divorce Cause 22 of 2018) [2019] KEKC 39 (KLR) (30 January 2019) (Ruling)

HS v KA [2018] eKLR

Neutral citation: [2019] KEKC 39 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT ISIOLO
DIVORCE CAUSE 22 OF 2018
AH ATHMAN, PK
JANUARY 30, 2019**

BETWEEN

HS PLAINTIFF

AND

KA DEFENDANT

RULING

1. This is a ruling on the issue of divorce between parties herein. The plaintiff prayed for dissolution of marriage on grounds of defendant's extra marital relationship and insults. After hearing of parties and evidence the court entered judgment on September 4, 2018. It found "The plaintiff's prayer for dissolution of marriage cannot be granted for lack of evidence. The court is however cognisant of the reality that two human beings cannot be forced to forced to live together. Marriage cannot be forced at the onset. Islam envisages that couples may have during their marriage differences that negate the very objective of marriage and provided for divorce and khul'u ". Appreciating parties cannot be forced to live together and objectives of marriage may not be realised if one party is reluctant, It gave parties three months to "reconcile and observe their matrimonial vows and invest in improving their marriage" but granted plaintiff liberty to apply for Khul'u if efforts still fail.
2. On post judgment proceeding over the status of the parties' marriage, the plaintiff still insisted on divorce. The defendant on his part still wanted his wife. He is a [particulars withheld] based at Mombasa. He is recently transferred and will be based in Nairobi from January 2019. He apologised to his wife and offered to give her his ATM back. He is willing to undergo AIDs test to remove any doubt about his status. He complained the plaintiff has denied him conjugal rights for more than one year. The plaintiff still insisted on divorce and to remain with the one child from their wedlock.
3. The defendant reluctantly agreed but under Khul'u. He admitted the dowry of Ksh 20,000.00 was not paid. He stated in the circumstances he earns Ksh 55,000.00 and has six other children from another marriage and would not be able to pay the plaintiff Ksh 16,000.00 per month as child maintenance.



He urged court to distribute fairly to all his children. He also prayed that the plaintiff should leave the matrimonial home in Isiolo, since it is his and he has nowhere to take his six children while the plaintiff has only one child with him. The plaintiff opposed the issue of leaving the matrimonial home stating she has a stake in it.

4. The right to divorce under Islamic law is vested in the husband unless specifically delegated to his wife by the husband. The courts are also vested with powers to dissolve marriages if a wife can prove sufficient ground under the law or through the Khul'u instrument popularly referred to as buying the divorce. It is provided under Qur'an:2:229 where the wife fears inability to fulfil her matrimonial obligations to her husband.

"...Then if you fear that they would not be able to keep the limits ordained by Allah then there is no sin on either of them if she gives back (the mahr or part o it) for her al- khul'u (divorce). These are the limits ordained by Allah so do not transgress them and whomsoever transgresses the limits ordained by Allah then such are the zalimun (wrongdoers)". Al Baqarah: 229

5. The Prophet Muhammad [may peace and blessings be upon] him ruled favour of the wife for divorce through Khul'u provided she returns the dowry, in the case of the celebrated case of wife of Thabit Ibn Qays Ibn Shimas.
6. Ibn Abbas (R.A.) narrated that the wife of Thabit Ibn Qays Ibn Shimas told the prophet (PBUH): ' O prophet, I have no problem with my husband's conduct and piety but I hate to 'apostasy in Islam' (not able to observe the limits of Allah in marriage), the prophet asked her, ' will you return to his farm? (dowry) she said 'yes'; the prophet then told Thabit, 'accept back the farm and divorce her.' In Dar al Qutny's version, the lady said : ' I am ready to return the farm and more' , the prophet said : 'return the farm only' Bukhari: 4990, Al Shaukany, Nail Al Awatar, 6/246
7. Based on this verse, hadiths of the Prophet Muhammad [may peace and blessings be upon him] Article 89 of the Islamic Charter on Family [ICF] provides for the right of a wife to exit from marriages if she hates her husband and cannot bear her in any way provided she refunds dowry given.
"If a woman hates her husband and cannot stand him, even though he hasn't hurt her in any way, that could be considered grounds for divorce and if she can no longer bear to remain with him, then she has a right to request divorce in exchange for giving up any right that would be due to her as a result of the divorce and returning any dowry or gift that he gave her". Article 89, ICF.
8. [The Islamic charter on Family is published by the International Islamic Committee for women and Child IICWC with contributions from eminent Muslim scholars: Dr Abd El Lateef Aamir, Dr Abdurrahman El Naqeeb, Dr Ahmad Assal, Dr Ahmad El Mahdi Abd el Haleem, Dr Ali Gomaa, Dr Fathi Lashin, Dr Jamal Al Din Atiyyah, Dr Makarim El Deeri, Dr Mohammad Emarah, Dr Muhammad Kamal El Din Imam, Dr Salah Abd El Mutaal, Dr Yusuf Al Qaradawi].
9. Accordingly in the circumstances, we grant the plaintiff's prayer for dissolution but through the Khul'u instrument. The parties' marriage be and is hereby annulled through Khul'u, with effect from 6th December 2018 corresponding with 28th Rabiul I, 1440 A.H. Divorce certificate to issue. The plaintiff relinquishes her dowry of Ksh 20,000.00.
10. Custody of the minor child is granted to the plaintiff, defendant to get unlimited access. The defendant earns Ksh 55,000.00 per month and has six other children. The average is Ksh 7,857.14. The defendant to pay Ksh 8,000.00 as child maintenance.
11. The issue of matrimonial home needs evidence for determination. It had not been pleaded and the main case is now finalized. I decline to make any orders in regard to this issue.



Orders accordingly.

Dated, signed and delivered at ISIOLO on 6th December 2018.

HON. ABDULHALIM H. ATHMAN

PRINCIPAL KADHI

ISIOLO LAW COURT

In the presence of

Mr. Mohamed N. Jattan, Court assistant

Plaintiff

Defendant

