



**REPUBLIC OF KENYA**

**IN THE KADHI'S COURT OF KENYA AT BUNGOMA**

**DIVORCE CAUSE (KCDC) 17 OF 2018**

**AM.....PLAINTIFF**

**VS**

**ZNM.....DEFENDANT**

**JUDGMENT**

**Introduction**

1. The plaintiff (hereinafter H) filed a suit against the defendant (hereinafter Z) on 23<sup>rd</sup> October 2018 for divorce, custody, return of households taken away on desertion from matrimonial house, refund of ksh 269,000/- value of hardware materials received and sold by defendant and costs among other reliefs. H and Z solemnized an Islamic marriage on 14<sup>th</sup> April, 2014 and established their matrimonial home at Buyofu. The marriage was blessed with one issue – S H aged about two (2) years. They both stayed peaceful prior to problems that form basis of this suit.

**Plaintiff's case:**

2. H in his plaint said that, he owned a hardware business managed by Z at Buyofu market and accused her of; misappropriation of ksh. 269,000/- being value of hardware material she received on 16<sup>th</sup> March 2018 from green hardware- Bungoma, desertion from matrimonial house/home with the issue of marriage on 18<sup>th</sup> June 2018 after failing to explain and/or account for sales of the material. He averred that was forced to pay Green hardware from his other sources and later discovered through her mpesa statements that Z transferred/sent a total of Ks. 91,420/= to one George Manup of Nasyanda, known but not related to them. He accused Z of engaging in extra-marital relationship with George and believed their marriage cannot stand. H said that efforts by both parents/elders to solve their marriage problems bore no fruits.

3. On 4<sup>th</sup> December 2018, H told Court that Z received goods worth Ksh 269,000/= from Green Hardware on 16<sup>th</sup> March, 2018, sold and failed to submit proceeds of the same (HAA-06). He disclosed that about Ksh. 391,760/= was deposited to her phone within the material days at an Mpesa agent about 15 metres (50 ft) away from their hardware shop. H further accused Z of extra-marital affairs and/or strong business relationship with one George Wanup behind his back. He said, Z transferred about Ksh. 91,420/= business money to George by Mpesa and had several night communications through their phones – 0717680389 and 0715714478 (HAA-04/05). He disclosed that, apart from what Mpesa transactions revealed; George also admitted receiving cash from Z in a reconciliation meeting before area Assistant Chief.

4. It was the narration of H that out of Ksh. 391,760/= deposited to her Mpesa account during material days; he received Ksh. 12,430/=, Ksh. 91,420/= sent to George and Ksh. 287,710/= misappropriated by her. He requested the Court to dismiss the argument that there existed a merry-go-round where Z and George were members until minutes of such meetings were produced and/or explanation on why those meetings were never held in their matrimonial house/home given.

5. He testified that Z deserted the matrimonial house with the issue of marriage on 18<sup>th</sup> June, 2018 together with households and demanded that the same be returned. The households included utensils, beddings, chairs and hens recorded too by area Assistant Chief and OB4/19/6/18 (HAA-02-03). He requested for custody of the child herein because he had other children under his custody and care in a conducive Islamic environment and therefore able and capable as compared to Z.

6. In cross examination H told Court that; he only received hardware materials from Green Hardware, received no cash after delivery of goods, produced her Mpesa statements from 2017 to disclose her transaction trend appropriately, closed down hardware shop on 7<sup>th</sup> April 2018 to fix the mess and transactions made to George during that time made him believe it was business money. H further disclosed that; Z was born a Muslim, before this marriage she had two children from two different Christian boyfriends and therefore immoral, together with his other wife would cooperate in custody of issue herein, he would not provide maintenance if denied custody and divorce was the only relief.

**Response:**

7. Z in her response stated; she got married to H under Islamic law on 14<sup>th</sup> April 2014, blessed with one issue aged two years, was a teacher by profession and never managed her husband's business until between November 2017 and April 2018 but he later closed down claiming the business was unstable. She disclosed that H owned two hardwares at Nasyanda and Buyofu, she received hardware materials worth Ksh. 269,000/= at Nasyanda, divided the materials between the two hardwares and after three (3) days handed over together with part of the sales to H.

8. She averred that H reprimanded her to produce her two banks and Mpesa statements to ascertain loss of his business money. She said was a member of three (3) merry-go-round groups and that the money alleged to have been transferred to George Wanup who was a member of one of the groups belonged to the group and not to his business. She further accused him of a two-year forceful suspension from matrimonial home on 18<sup>th</sup> June 2018, handed over to her parents/family before and in office of the area Assistant Chief. On her departure, she took away only what belonged to her in presence of H and her parents' efforts to reconcile them proved difficult.

9. On 4<sup>th</sup> December, 2018, Z told Court that before the marriage herein, was blessed with two issues and a teacher at [particulars withheld] Boys' Secondary School. Shee said they had a hardware business at Nasyanda and Buyofu since 2014, she worked at [particulars withheld] on weekends and holidays and later both engaged her father to assist run [particulars withheld] Hardware between January 2014 and October 2017 before she took over in November 2017 and relocated to Buyofu where they lived. She admitted that on 16<sup>th</sup> March 2018, received hardware material worth Ksh. 269,000/= at [particulars withheld] in absence of H who was away for 1½ weeks. She sold the stock for three consecutive days and handed over to H together with sales at Buyofu. She said that after two weeks, H complained of loss of stock, closed down on 3<sup>rd</sup> April 2018 and demanded her banks and Mpesa statements to ascertain the loss.

10. It was her narration that apart from being a teacher, she was a member of three merry-go-round groups where George Wanup and his wife were also members. She said that with consent of George's wife; George hosted meetings on her behalf and all her contributions and deposits were made through him and/or another member's Mpesa agent which was 15 metres (50 ft) from the hardware business. She also received income from Tala and Mshwari loans. She further told Court that the first matrimonial house was hers and later moved along with her households to his house. She carried away these households upon her departure after H insisted on a two-year suspension from the matrimonial house in a reconciliation meeting convened by her parents and area Assistant Chief. She requested the Court that in case of divorce be offered custody since the child herein was a minor, was capable of care and maintenance and denied having extra-marital affairs.

11. In cross examination Z said; had no communication with fathers of her other two children, never attended any group meetings but hosted and/or sent her contributions through George Wanup with consent of his wife who was also a member, Ksh. 15,000/= deposited to her phone on 16<sup>th</sup> March, 2018 was for the group, her salary at [particulars withheld] Secondary ended by March 2018 and kept these transactions in secret because H believed a woman was not entitled to property ownership. She further said that after three (3) days of work at Nasyanda, handed over Ksh. 22,000/= to H and left for Buyofu. She also said was capable and needed no child maintenance from H.

12. It was the submission of the Plaintiff that, he married the defendant while in hardware business and welcomed her as a wife but used the opportunity to misappropriate and/or transfer funds to George Wanup thus eroding the trust in marriage. He said they bought households as a family but she carried them away, had other children in his custody and therefore able and capable of the custody of issue herein. He disclosed that the marriage herein was beyond repair owing to several reconciliation meetings that bore no fruits.

13. The defendant submitted that; she worked as a reliever and cannot be held responsible for loss of goods if any, was a member of merry-go-round groups where George was a Project Manager since 2014 thus her transactions with him were justified and had no extra-marital affairs with him. Apart from the groups and her teaching work at [particulars withheld] Boys' Secondary, she got funds from Tala and Mshwari loans. She disclosed that, she got married to H while staying and teaching at [particulars withheld] Secondary and that the households alleged to have been taken away were acquired by her before marriage. She said that they both opened a hardware at Nasyanda at Ksh. 600,000/=, bought a plot at Nasyanda, built a permanent house, planted trees on a half-acre of land and therefore requested that the same be considered for division upon divorce.

14. The Court on its motion referred parties to parents/elders for purposes of reconciliation and/or mending their fragile relationship. According to the report, the meeting held provided no remedy to the sore marital relationship, thus prompting the Court to proceed to disposal of the matter herein.

15. Having given due attention to documents filed and taking into account evidences adduced by both parties, I believe the Court was duty bound to determine:

- a) Whether the plaintiff adduced reasonable grounds to guarantee divorce.*
- b) Custody and maintenance*
- c) Return of households taken away by defendant*
- d) Refund of Ksh. 269,000/= hardware money misappropriated by the defendant*
- e) Other reliefs and entitlement of the parties upon divorce.*

**Determination:**

16. The issues in hand demand reading Article 170(5) Constitution of Kenya 2010 together with Section (5) and (6) of the Kadhi's Court Act Cap 11, Section (71) and (85) of the Marriage Act 4 of 2014, Section (3) Matrimonial Property Act 49 of 2013 and other enabling provisions of the applicable law.

i. Article 170(5); ***“The jurisdiction of a Kadhi's Court shall be limited to the determination of questions of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim Religion and submit to the jurisdiction of the Kadhi's Courts.”***

ii. Kadhi's Court Act Cap 11 Section (5) and (6);

Section (5): ***“The Kadhi's Court has been given jurisdiction to determine questions of Muslim Law relating to personal status, marriage, divorce and inheritance in proceedings in which all parties profess the Muslim Religion.”***

Section (6): ***‘The law and the rules of evidence to be applied in a kadhi’s court SHALL be those applicable under Muslim Law.’***

iii. Marriage Act 4 of 2014, Section (71) and (85):

Section (71); ***“The dissolution of marriage celebrated under Part vii (Marriage under Islamic Law) shall be governed by Islamic Law.”***

Section (85); ***“Custody and maintenance of children shall be dealt with in accordance with the Children Act and ANY OTHER WRITTEN LAW relating to children.”***

iv. Matrimonial Property Act 49 of 2013, Section (3);

Section (3), ***“A person who professes the Islamic faith may be governed by Islamic Law in all matters relating to matrimonial property.”***

***a) Whether the Plaintiff adduced reasonable grounds to guarantee divorce. ....***

17. H said that on 16<sup>th</sup> March, 2018, Z received hardware goods worth Ksh. 269,000/=, sold them and misappropriated the proceeds. He discovered through her Mpesa statements that she deposited about Ksh 391,760/= to her phone at an Mpesa agent 15 metres (50ft) from their hardware shop. He said, out of this amount, he received Ksh. 12,430/=, transferred to George Wanup Ksh. 91,420/= and misappropriated Ksh. 287,710/=. He further disclosed that, apart from Mpesa transactions (HAA-04), Zubeda had several night communications with George Wanup through their phones 0717XXXXX9, 0715XXXXX8 ( HAA-05). George through his phone admitted receiving cash from Z in a reconciliation meeting convened by the area Assistant Chief. He accused her of extra-marital affairs and/or strong business relationship with George in secrecy and submitted that divorce was the only relief. He however asked the Court to dismiss her argument that both Z and George were members of merry-go-round group hence the relationship until minutes of such meetings and/or explanation why the same meetings were never held in their matrimonial house disclosed/produced.

18. In her response to (17) above, Z received hardware goods worth Ksh. 269,000/=, sold them for three (3) days, and along with sales, handed over to H. She said that together with George were members of a merry-go-round group and the money alleged to have been transferred to George belonged to the group. She disclosed that, with consent of George's wife who was also a member of the group, George hosted meetings on her behalf and all her contributions and deposits were made through him and/or through another member's Mpesa agent 15 metres (50ft) from their hardware shop. She said the meetings had no minutes recorded and matter kept on secrecy away from H for his arrogance and belief that a woman had no right of ownership.

19. It should be noted that parties to a marriage stay together by mutual understanding and consent and any slight disagreement or secret undertaking of a party could lead to serious consequences or mistrust if not sorted out. The Court could not understand why Z dealt with George instead of George's wife and if this was for the benefit of the family, H could not have been left in darkness. Considering failed reconciliation meetings, the absence of merry-go-round evidence and Z's secret dealings with George, this Court believes and which I so hold that the marriage herein had lost meaning to be termed harmonious and Z was to blame for its collapse.

***(b) Custody and maintenance***

20. H said that though Z was born a Muslim, before the marriage herein had two children from two Christian boyfriends and therefore immoral. He told Court that with the assistance of his other wife, would cooperate in custody and averred that would not provide maintenance if denied custody because of his ability and capability compared to Z. According to Z, she married and divorced fathers of her two other children in accordance with Islamic law and had high moral standards. She however disclosed that considering the age of the minor, and her work as a teacher in Nairobi, she had the ability and capability of custody and required no maintenance from H. It is important to note that H did not avail his other wife for the Court to access and determine her ability to assume custody if given chance.

21. In Islamic Law and with due regard to the ability and capability of the parties, the mother has more right to custody of her children regardless of sex until the age of understanding recognized at seven or so provided she has not re-married. This was because of the report narrated by Ahmed (6707) and Abu Daud (2276) from Abdullah Ibn Amr (RA) according to which a woman said;

***“O messenger of Allah, my womb was a vessel for this son of mine and my breasts gave him drink and my lap was a refuge for him, but now his father has divorced me and wants to take him away from me”.***

The messenger of Allah (PBUH) said to her;

***“You have more right to him so long as you do not remarry.”***

The reason for this is that, in early years, the mother is more suitable for raising the young child (regardless of sex) with love, mercy, attention and motherly care than father.

22. Custody is keeping and raising the child. Hence a person's right to custody is lost if he/she is immoral and corrupt, or careless and heedless, or travels a great deal which will harm children's interest or be detrimental to the child's upbringing. In proving these, H did not make it to the required standards. Irrespective of who has the right of custody, the other party has visitation rights according to mutual understanding and consent.

23. Generally, maintenance of the children is a duty of the father, according to scholarly consensus unless otherwise. In the event custody is with her, then the children's maintenance **MUST** be paid by their father on reasonable basis and depending on his circumstances or means.

**QURAN 2:233; "... but the father of the child shall bear the cost of food and clothing on a reasonable basis..."**

**QURAN 65"7; "...let the rich man spend according to his means, and the man whose resources are restricted let him spend according to which Allah has given him. Allah puts no burden on any person beyond what he has given him. Allah will grant after hardship ease ..."**

24. It should however be noted that maintenance of children include providing accommodation, food, drink, clothing, education and health services and anything that they needed on reasonable basis. The parties herein submitted they possessed the ability and capability, with Z disclosing that, she needed no support of maintenance from H if offered custody as H denied maintenance if denied custody. It is the duty of this Court to determine and balance parental responsibility for the best interest of the minor and in accordance with Section 90(a) of the Children Act 8 of 2001.

**(c) Return of households taken away by defendant**

25. It was the narration of Z that, their first matrimonial house was hers at [particulars withheld] Secondary School where she used to work as a teacher. They then moved along with her households to his house and the households carried away on her departure belonged to her. Apart from what was provided in the Assistant Chief's letter (HAA-02) and OB4/19/6/018 (HAA-03), H failed to prove ownership of households taken away by Z.

**(d) Refund of Ksh. 269,000/= hardware money misappropriated by defendant.**

26. H said that on 16<sup>th</sup> March 2018, Z received hardware goods worth Ksh. 269,000/= (HAA-06) sold and misappropriated the proceeds. He testified that out of Ksh. 391,760/= deposited at her Mpesa account at an agent 15 metres (50ft) from their shop during material days; he received Ksh. 12,430/=, sent 91,420/= to George and misappropriated 287,710/=.

27. Z admitted receiving hardware goods worth Ksh. 269,000, partly sold and handed over to H after three (3) days. She said that, together with George, George's wife and Mpesa agent 15 metres away from their business were members of same merry-go-round group. She said most of the deposits for the group were made at that Mpesa agent and with consent of George's wife, George hosted meetings on her behalf and all contributions were made through him. H was kept in darkness.

28. A close study of the Mpesa transfers from Z to George revealed that, she transferred between Ksh. 2000/= and Ksh. 4000/= at an average of about three to four times a month from 1<sup>st</sup> April 2017 to 6<sup>th</sup> March 2018 slightly before she received the hardware goods on 16<sup>th</sup> March 2018. After reception of goods until 1<sup>st</sup> June 2018, she only transferred once Ksh 4,550/= on 27<sup>th</sup> March 2018. Though there existed deposits also but very minimal. At the time of her Mpesa transactions, Z was a Secondary School teacher and these premiums could not have been difficult for her to afford. This Court believes and which I so hold that, the trend of Mpesa transactions between Z and George showed the existence of a strong relationship and did not necessarily link her directly to the alleged misappropriation of hardware money.

**(e) Other reliefs and entitlement of parties upon divorce.**

29. Z in her submission said; together they bought a plot, and opened a hardware at ksh 600,000/-at Nasyanda, planted trees at a half an acre of land for the benefit of the family and therefore wanted the same be considered for division upon divorce. Though this appeared in her submissions, it was a second thought and the matrimonial property issue was not mentioned nor discussed during the hearing hereon. I direct that it may be canvassed in a different forum.

30. All other issues raised by both parties had no evidence adduced and therefore dismissed.

**31. Orders**

1. Marriage between H and Z dissolved. Divorce certificate to issue.
2. Custody of S H to Z until eighteen (18) years of age.
3. Education and major health expenses responsibility of H.
4. Maintenance and minor health expenses responsibility of Z.
5. Z to cause issue access H during all school holidays.

6. Parties to observe peace.

7. No orders as to costs.

**Judgment Delivered, Signed and Dated at Bungoma This 7<sup>th</sup> day of February, 2019.**

**HON. D. S. RATORI**

**PRINCIPAL KADHI**

**In the presence of:**

**1. Okwaro \_\_\_\_\_ CA**

**2. AHA \_\_\_\_\_ Plaintiff.**

**3. ZNM \_\_\_\_\_ Defendant**

**HON. D. S. RATORI**

**PRINCIPAL KADHI**