



REPUBLIC OF KENYA

IN THE KADHI'S COURT AT NAIROBI

UPPER HILL, ELGON ROAD

DIVORCE CAUSE NO. 188 OF 2018

SSA.....PETITIONER

VERSUS

MNA.....RESPONDENT

JUDGEMENT

1. The petitioner and the respondent got married sometime back in the year 2007. The marriage was solemnized and celebrated at Nairobi under Islamic law. On 17th August, 2018 the petitioner filed petition seeking the dissolution of marriage, custody and maintenance of the issues of the this suit namely, MM (10) and HM (8) The petition is based on grounds of cruelty, desertion and exceptional depravity.
2. The respondent filed his Answer to the petition and a cross petition on 7th September 2018 in which he denied the allegation raised in the petition hence sought the petition be dismissed with costs. In his cross petition, the respondent sought orders of physical custody, care and control of the two minors, cost of this suit among other orders which are now spent.
3. The petitioner filed her reply to the respondent's cross petition on 26th November 2018 in which she denied allegations raised by the respondent.
4. At the close of the pleadings, the case proceeded for hearing, on 3rd December 2018, with the petitioner and the respondent as the only witnesses to present and argue their respective cases.
5. I have considered the arguments and submissions for both parties, the issues for determination before this court are as follows:-
 - a) Whether the marriage between the petitioner and the respondent should be dissolved?
 - b) Whether the petitioner and/or the respondent should be granted custody, care and control of the children of marriage?
6. The petitioner in her evidence adhered to the averments in paragraphs 7,8,9,10,11 and 12 of her petition. The petitioner alleged that the parties are now incompatible mainly due to respondent's alleged cruelty, adultery, desertion and exceptional depravity as a result the said marriage has broken beyond repair and it should be dissolved.
7. On contrary the respondent refuted the allegation raised by the petitioner and submitted that he separated and divorced informally the petitioner sometimes in January 2015 and thereafter the petitioner has been married and in her last marriage she conceived and gave birth on 13th December 2017 at Mother and Child Hospital in Eastleigh as appears in birth notification No. [particulars withheld] and that in essence, there is no marriage to be dissolved, no alleged denial of conjugal rights or failure to provide maintenance to the petitioner as the claim is unmaintainable under the law.
8. In regard to divorce, it is a trite Law that every Muslim husband is vested with a primary faculty of dissolving the marriage, not withstanding wife's approval, if the wife by her indocility or her bad character renders the union unhappy but in the absence of serious reasons no man can justify a divorce , either in the eyes of law or religion, if he abandon his wife or put her away in simple caprice, he draws upon himself a divine wrath.
9. The respondent admission at the trial indicating that duly granted the petitioner talaq sometimes in January 2015 is admissible. It's a trite law that admission is a conclusive proof and no **fact need be proved** in any civil proceeding which the parties thereto or their agents **agree to admit** at or before the hearing whether reduced in writing or not.

10. Further, the Court have a duty to administer, without in any way circumventing from the original text, the law as promulgated by the Islamic law givers. The Courts are not at liberty to refuse to administer any portion of those tenets even though in certain respect they may sound strange. Accordingly I hold that the marriage between parties herein was dissolved unilaterally and be registered.

11. On the issued of custody, the petitioner case is that the defendant has neglected her together with the two children of marriage by moving out of matrimonial house leaving her to look after the children singlehandedly. That there were attempts to take the children to their paternal grandparents after the respondent's demand but the children of marriage were returned back to the petitioner's house dirty and that the petitioner would later on take them to the respondent's house upon his demand but he too returned them back. As such the petitioner claims that none among the respondent's family member is ready and willing to stay with her children and since she is willing and ready to take care of them, she be granted their custody.

12. Conversely, the respondent refuted the claim raised by the petitioner and further stated that he's in a better position to look after the children and that the petitioner cannot be entrusted with the custody of the minors since she's habitual miraa chewer who entertains many people in her house at the risk of the minors and that she's not concerned with the education of the minors and he relied on the children report on record showing that, since the petitioner's remarriage, he his better placed to look after the minors.

13. The relevant law on custody is as contained in **Article 53 (1) & (2) Constitution of Kenya and Section 4 (3) of Children Act 2001** focus on the best interest of the child as paramount in any matter regarding a child [ren]. The principles applied in awarding custody orders are contained in **Sections 82, 83, 84 & 85 of the Children Act 2001**.

14. The above principles has been corroborated by Sharia, see Ibn Qudama; Al Mughni pg. 613-14, which state that; '**Principles of custody have been introduced in view of the welfare of the children. Hence their enforcement shall not be proper in a way that shall put in jeopardy the person and faith of the children**'.

15. At the International level, the legal instruments on rights of the Child, the International Convention on Rights of the Child (UNCRC) and the African Charter on Rights and Welfare of the Child (ACRWC) focus on child's best interests, welfare and considerations as paramount. All these provisions confirm that the prevailing issue is what is in the best interest of the child. Would a petitioner's remarriage affect her custodial rights? Who is best placed to ensure the best interests of the child?

16. The Mother's remarriage may affect the maternal priority in case of custody of the child. This principle is literally deduced from the prophetic sayings, which states;

[Y]ou have more right to look after him , so long as you don't remarry.

17. The law presumes that the quality of maternal bond and care may reduce due to mother's commitment to a new husband. However, the above saying does not indicate that merely by remarriage by mother would reduce the love and affection for her children through the first husband and, that she will automatically lose the right to custody upon her remarriage though some of schools (Shafi's, Maliki's and Hanafiyyah) interpret this saying literally as having a mandatory effect. While others (Hasan Basr and Ibn Hazm) dissenting on the basis that the Prophet himself married a woman (Ummu Salamah) who had a child with her previous husband in her custody. In interpreting the above prophetic sayings the court must be objective the explanation given by the 1st school of legal thought is purely based on rebuttable presumption thus the fact that a mother to the child remarries doesn't automatically bar her from enjoying the custodial rights, unless evidence of non-fit is presented to court the respondent's reliance of this ground fails.

18. The allegation raised by the respondent regarding petitioner's behavior of using khat and shisha disregarding the children's asthmatic condition has been corroborated by children officer's report thus allowing the children to be under the custody of the petitioner will subject them to both health and moral risk and contrary to their best interest.

19. I have also considered the wishes expressed by the children. The Islamic law gives a child who attained the age of discernment a right to choose either to live with the father or the mother. The principle is based on a rebuttable presumption that the parent chosen by the child is more kind and loving. The said law is deduced from the prophetic sayings, which states:

[A] woman came to the Prophet and said " my husband wants to take away my son, and he provides drinks and other benefit for me". The Prophet said, "this is your father and this is your mother's hand, so take whichever of them you wish by your hand". He took his mother's hand and she went off with him.

20. Notwithstanding the rationale of giving the right to the child to choose, the court must exercise caution on the fact the childish whims shall be in conformity with the sole cause od the custody, any child would prefer the less harsh parent who will allow him/her to spend time with friends unlike the parent who sends him/her to school everyday. The court must be therefore be objective in considering the expression of the child and make a decision that will promote the best interest of the child for both present and long term period.

21. Considering, the aforementioned the custody, care and control of the children of marriage be and is herby granted to the respondent and the petitioner is granted access to the minors.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF MARCH 2019.

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Hon. A.I. Hhussein

