



**REPUBLIC OF KENYA**

**IN THE KADHI'S COURT**

**AT BUNGOMA**

**CIVIL SUIT NO. 1 OF 2019**

**DAJ .....PLAINTIFF/RESPONDENT**

**VERSUS**

**HMA .....DEFENDANT/APPLICANT**

**JUDGMENT**

**Introduction:**

1. The Plaintiff (hereinafter D) filed a suit against the defendant (hereinafter H) on 22<sup>nd</sup> January 2019 for custody, general family maintenance and payment of dowry D and H solemnized an Islamic marriage on 29<sup>th</sup> November, 2015, established their matrimonial home at Langata – Nairobi, blessed with two issues aged two (2) years and seven (7) months respectively and stayed peacefully prior to problems that form basis of this suit.

**Plaintiff's Case**

2. D in her plaint stated that; she got married to H on 29<sup>th</sup> November 2015 in accordance with Islamic law, established their matrimonial home at Langata, blessed with two issues namely LH and MH both aged two (2) years and seven (7) months respectively. She averred that she left her matrimonial home owing to a quarrel and accused H of failing to follow her up, non-provision of general family maintenance, non-payment of her dowry of **US Dollars 2000** and **one set of Gold**. She further averred that she struggled to fend for herself and minors herein save little assistance from H and therefore demanded a monthly family maintenance of Ksh. 40,720/=.

3. On 14<sup>th</sup> March 2019, she told Court that she was married to H in November 2015 and blessed with the two issues aged two years and seven months respectively. She averred that though H's mother lived in a self-contained room within their matrimonial house with her consent; frequent disagreements over control of the matrimonial house by H's mother reduced her to a mere house help. She accused H of avoiding to reconcile them, failing to guarantee her privacy for the matrimonial house was full of his relatives, refusal to attend to a gynecologist to help address his weakness in conjugal rights and searching her bag on departure like a thief, an action that arose permanent hatred and said divorce was the only relief.

4. It was her testimony that their two (2) year old daughter suffered from heart disorder and was the only one who understood her. She said that the younger daughter was seven months, breast feeding and owing to the minors ages, she had the right of custody. She further disclosed that though H agreed to pay her dowry within 180 days, cater for school and medical expenses, he should also be made to offer monthly children maintenance of Ksh. 40,720/=.

5. In cross-examination, she told Court that doctors at MP Shah and Nairobi hospitals confirmed the existence of a tiny hole in the heart of their two-year old daughter, the child was admitted at MP Shah hospital for malnutrition where the heart problem was also discovered, they had separated since October 2017, wanted to live in different houses with his mother in vain, five people stayed in their matrimonial house, H owned a trailer, supplied petrol and the matrimonial house was his property.

**Response:**

6. H in his response stated; he married D in accordance with Islamic Law on 29<sup>th</sup> November 2015 at an agreed dowry of US Dollars 2000 and one set of Gold, established their matrimonial home at Langata and blessed with the two issues aged 2 years and 7 months respectively. He averred that, he was very responsible and provided family maintenance. He accused D of leaving the matrimonial house along with issues of marriage and efforts to return her back proved difficult. He prayed for custody and costs.

7. On 14<sup>th</sup> March 2019, Hussein told Court that; he married D on 29<sup>th</sup> November 2015 at a dowry of US Dollars 2000 and one set of Gold,

established their matrimonial home at Langata and blessed with the two issues. He disclosed that, he used to work with [Particulars Withheld] Company that closed down on 31<sup>st</sup> May 2016 and left on 11<sup>th</sup> June 2016 to engage in business to this day. He averred that before marriage herein, he used to stay with his mother and brother but later on rented a separate house for them on marriage. He however allowed his mother back to the matrimonial house with consent of D. He said that was responsible and despite unemployment, he paid family hospital bill of Ksh. 242,000/= on addition to provision of general family maintenance. He accused D of stopping child breast feeding that costed him Ksh.82,000/= for malnutrition at Getrude hospital. He further said they were referred to a Cardiologist at Nairobi hospital who discovered a minor heart problem. He narrated that between 4<sup>th</sup> and 11<sup>th</sup> October 2017, the child was again admitted to MP Shah for malnutrition but when he advised Dayman to prepare porridge for the child, she fled the matrimonial house to this day.

8. In cross examination H told Court that; a doctor at Nairobi hospital discovered a tiny negligible hole in the heart of the child, malnutrition was not cause by vomiting, his mother stayed in the matrimonial house by consent of D, he knew about mother and wife disagreement and provided conjugal rights. He further disclosed that he did not believe children needed Oilatum, house help and Liptomine as per the budget provided by D. He said though he may provide more for the children but at the moment could only afford Ksh.20,000/= monthly children maintenance as opposed to Ksh. 40,720/= in demand. He further said that D was irresponsible and caused child malnutrition, needed custody of both or at least the two-year old daughter, promised to pay her dowry of marriage in six months' time and admitted would provide school and medical expenses. He also disclosed that D had bad moods, difficult to deal and divorce was the only relief.

9. The parties herein objected to any reconciliation and agitated for divorce. According to the Plaintiff and owing to the minors age, she submitted that custody was her right and maintenance of children as per the annexed monthly budget of Ksh.40,720/= be borne by the defendant. Defendant submitted that was capable, able and with the help of his mother would assume custody of both children or the first born.

10. Having given due attention to documents filed and considering evidences adduced by both parties, I believe the Court was duty bound to determine;

- (a) Whether dissolution was a relief
- (b) Custody and maintenance
- (c) Other reliefs

**Determination:**

11. 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 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 Muslim 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.”

**a. Whether dissolution was a relief:**

12. Parties herein agitated for dissolution of their marriage based on normal matrimonial issues that could have been solved out of Court. This was probably their elders were unable to mend their fragile relationship or because of their own experiences in their marital relationship. H was put in a dilemma to choose between staying with his mother or wife in the matrimonial house and preferred the mother thus the separation. May be the separation of the mother and wife could have saved their relationship. The fear of separation could be because of;

(i). What was narrated by Buhari (5971) from Abu Huraira (RA) according to which a man from the companions of the messenger of Allah (PBUH) asked the prophet (PBUH); ‘O prophet of Allah, towards whom should I exhibit goodness and kindness.’ *The prophet replied: “your mother... your mother ... your mother ..... then your father...”*

(ii). The prophet (PBUH) stated: ***“the mother is in the middle of doors of paradise.” (Ahmed v.198) and “paradise is under the feet of mothers.” (Nasai, jihad, 6).*** Meaning children’s respect to their mothers rather than state of their mothers shall earn them paradise.

13. Though H did not consider separating their houses, it was important to note that the parties blocked any further reconciliation preferred by the Court and agreed that dissolution was the only relief. I did not believe so, but submit that the two cannot be forced to stay together owing to hatred so displayed before Court.

**(b) Custody and maintenance:**

14. The issues at the centre of custody and maintenance are aged 2 years and 7 months respectively. According to H, he was capable and able to assume custody of the minors or one of them with the help of his mother. H did not avail his mother for the court to determine her ability and suitability for custody. He accused D of denying child breastfeeding leading to malnutrition that costed him heavily which was in denial. Though H had means as compared to her and afraid that if custody was offered to D, he would still incur expenses that could have been avoided; but would his assumption of custody be in best interest of the issues below two years of age?

**Section 4 (2) of the Children Act:** ***“In all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.”***

15. 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 remarried or otherwise. 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 to 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 was 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 the father.

16. Custody is keeping and raising the child. Hence a person's right to custody is lost if he/she was immoral and corrupt, or careless and heedless, or traveled 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 to enable the court interfere with the current custody. Irrespective of who has the right of custody, the other party has visitation rights according to mutual understanding and consent or otherwise.

17. Maintenance of children is a joint responsibility but more so a duty of the father, according to scholarly consensus unless otherwise restricted by means. 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 and 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 what Allah has given him, Allah will grand after hardship ease.”***

18. It should be noted that maintenance of children included but not limited to provision of accommodation, food, drink, clothing, education and health services and anything that they needed on reasonable basis. H worked as a businessman and in response to the monthly budget of Ksh. 40,720/= (DAJ -02) presented by D said that save a few items, the content was correct but the prices were exaggerated. Though he failed to disclose the exact prices of the items, he said did not believe the children needed Oilatum lotion, the house help and Liptomine. He agreed to submit Ksh.20,000/= monthly towards the budget. The Court in determining maintenance has the duty to balance parental responsibility for the best interest of the minors herein and in accordance with Section 90(a) of the Children Act 8 of 2001. In so doing the Court will exclude the items so disputed.

**(c) Other reliefs**

19. Parties were in agreement that the marriage was contracted at a dowry of US Dollars 2000 and one set of Gold which was still in debt. Hussein promised that the same will be paid within the next six months. He further accepted the responsibility of school and major medical expenses of the issues herein.

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

**21. Orders:**

1. Marriage between D and H dissolved.

2. Custody of LH and MH to D until 18 years of age.

3. H to submit Ksh. 26,000/= monthly children maintenance to D by Mpesa before 5<sup>th</sup> of each proceeding month with effect from 1<sup>st</sup> May 2019.

4. School and major medical expenses responsibility of H.
5. General children care and breast feeding until age of two years responsibility of D.
6. Minor medical expenses responsibility of D.
7. H to pay D her dowry of US Dollars 2000 and one set of Gold within the next 180 days.
8. D to cause issues access to H during all school holidays from age of two years.
9. H also allowed visitation during Saturdays and sundays.
10. Parties to observe peace.
11. Parties to bear own costs.

**Judgment delivered and signed** this 30<sup>th</sup> day of **April**, 2019.

**HON. D. S. RATORI**

**PRINCIPAL KADHI**

**In the presence of:**

Court Assistant: Okwaro

DAJ - Plaintiff/Respondent

HMA– Defendant/Applicant

**HON. D. S. RATORI**

**PRINCIPAL KADHI**