



REPUBLIC OF KENYA

IN THE KADHI'S COURT OF KENYA AT BUNGOMA

CIVIL CAUSE NO. 2 of 2019

FM alias D.....PETITIONER

=VERSUS=

AW.....RESPONDENT

J U D G M E N T

Introduction.

1. The Petitioner (hereinafter **F**) filed a suit against the Respondent (hereinafter **A**) on 22nd January 2019 for divorce, division of matrimonial property, payment of dowry and costs among other reliefs. F and A cohabited as husband and wife and later formalized their marriage on 20th September 2015 in accordance with Islamic law and finally established their matrimonial home in Bungoma. Their marriage was not blessed with any issue. They stayed peaceful prior to problems that form basis of this suit.

Petitioner's Case

2. F in her petition said that, they cohabited with A as husband and wife, later formalized their marriage in accordance with Islamic law on 20th September 2015 and the marriage was not blessed with any issue. She accused A of cruelty; assaulting her for no reason, forceful expulsion from the matrimonial home/house along with her belongings, adultery with both known and unknown women. She averred that A divorced her through a letter dated 16th December 2018, an action that prompted her to leave after reconciliation proved difficult.

3. On 14th February 2019 F told court that; they met in 2008 – 2009 while on attachment at [Particulars Withheld] Company where A used to work, cohabited from 27th July 2010 and formalized their marriage in accordance with Islamic law on 20th September 2015. She disclosed that in May 2012; A assisted her to secure a job as a field assistant at [Particulars Withheld] Company, disclosed his relationship with Dr. J to her husband and was beaten/assaulted close to death. She produced blood stained cloth in court to that effect.

4. It was her narration that in April 2013; A brought one N – a woman friend in matrimonial house, stayed together with her until 8th May 2013 when F left for a rental house at Shibale. A followed her up at Shibale, Bocus and later convinced her to stay at Musikoma where they jointly purchased a plot at Ksh 225,000/-. She said, apart from the Harambe home which belonged to his first wife, they lived in rental houses until they settled at Musikoma. At Musikoma they constructed a semi – permanent house as their first matrimonial house on 29th May 2014 and later a permanent house where they both lived together until this divorce. She also said that; after a year one R came with a six – months child claiming to belong to A, she secured a loan of Ksh.500,000/- in 2016 to finish up their matrimonial house, part of which was used to purchase a plot behind their matrimonial home at Ksh.370,000/- for expansion.

5. F further told court that on 2nd June 2016; A assaulted her for lending a neighbour Ksh. 2000/- leaving her with permanent marks on her body after treatment at then Lumboka Hospital. She was also beaten for coming home past 5pm from work in 2017. She accused A of adultery with her sister and that in October 2018, his woman friend One H spent a night with him in the matrimonial house. She disclosed that though she allowed A to marry another wife because of their eight- year stay without a child, his actions traumatised and embarrassed her. She supported her husband in everything and including financial matters but did not keep most of the records because as husband and wife did not anticipate walking out of marriage.

6. She averred that on 28th November 2018, A organized a family trip to Mombasa just to embarrass her for failing to adhere to Islamic ethics and forgot that he had never taken her through basic Islamic education. On 16th December 2018 when his sister was admitted at Lumboka hospital, she had a get – together party at members club, Bungoma with his consent. A came to check on her at the club but when she went for him, he drove away and later asked her back home through a message, only to find her belongings out of the bedroom and a divorce letter. She also said that when A came back home at about 8pm, she accessed his bedroom and reminded him of her right to three months' waiting period (eda) and payment of her dowry balance of Ksh.19,800. She further disclosed that on 25th December 2018 during her waiting period, A invited her for talks in bedroom but when she hesitated, was beaten/assaulted with rubber material and promised to kill her which prompted her to leave.

7. In cross-examination, F stated that; has never been taught Islamic ethics nor gone to a Mosque, jointly purchased Musikoma plot by instalments in 2010, used her money for completion of matrimonial house but could not remember the amount, matrimonial home plot was part of E. Bukusu/S. Kanduyi/xxxx due for succession, she bought a plot adjacent/behind the matrimonial home witnessed by A at Ksh. 370,000/- which was part of the same land due for succession. She further disclosed that; was still a Muslim by faith, filed documents to prove she secured a loan of Kshs. 500,000/-. This was her first marriage and demanded equal share of matrimonial property at market value.

Response

8. A in his response stated that; he met F in 2008, cohabited and married her in accordance with Islamic law in September 2015 at an agreed dowry of Kshs.20,000/- which marriage was not blessed with issues. He said, facilitated her employment and that of her sister at [Particulars Withheld] Company and paid fees for her three siblings in secondary schools. He termed himself a very responsible man and denied assaulting F. He however accused F of denial of conjugal rights, refusal to wear modestly, insulting his sister, publicly denouncing Islam, going to Bungoma Members Club meant for alcohol, shouting, abusing and insulting him before friends/guests with intention of embarrassing him. He admitted divorcing F and said she had no right to dowry for instigating dissolution and be made to return what was paid to her. A further averred that they acquired no jointly property save a chicken coop of about eight iron sheets. He therefore prayed for dismissal of suit with costs.

9. On 15th February 2019, A told Court that, he met F while on attachment at [Particulars Withheld] Company in 2008 where he used to work. Their communication continued until 2010 when they started cohabiting as husband and wife before formalizing their marriage in September 2015. He said they stayed together with her siblings paying their fees in secondary schools. He also disclosed that they once went together to Kakamega but F disappeared until he left alone, she came back home at 8.10 p.m. and was chased away until the following day.

10. It was his narration that F later disappeared and came back in company of her father and other siblings to carry her belongings. He allowed them, hired a car and escorted them together with his people but when a meeting was convened at her home, they were allowed back to matrimonial home/house. A further admitted assaulting F for disclosing to Dr. J's husband a marital affair with his wife when they were only members of a board.

11. He told Court that F moved from the matrimonial house, rented at Shibale, Bocus and later on agreed to put up a semi-permanent house on Musikoma plot in June 2010 where they lived and established their matrimonial home together with her siblings who schooled around. He paid fees for her siblings with little help from her parents. He also said that the construction of a permanent house at Musikoma consumed his pension of Ksh 2.4 million and later completed construction through proceeds of his consultancy work. He further said **that F purchased an adjacent plot at Ksh. 370,000/= with his consent from a loan she secured but only paid Ksh. 100,000/= and yet to clear the balance.**

12. A admitted beating/assaulting her for lending Ksh 2000/- to a neighbour without consent. He said that until completion of a Ksh. 5 million house; F contributed; ten iron sheets for poultry shed, Ksh 50,000/= for ceiling, Ksh 10,000/= for toilet tiles and had a '21' TV and fridge left in matrimonial home/house upon her departure. He promised to refund her money for the adjacent/behind plot in case of divorce. He further disclosed that he was angered by the way F preferred to attend a friends get-together party instead of a visit to his sister in hospital. He said F's action prompted him to pack her belongings and prepared a divorce letter. A said though he allowed her observe mandatory waiting period (eda), she proved difficult to deal and was chased away. He however told Court that; F contributed very little in marriage and was only keen on financial gain, there was no matrimonial property to be divided, paid Kshs 2,000/= out of a Ksh. 20,000/= dowry and requested the Court to deny divorce unless it offered her happiness.

13. In cross-examination A stated; left her in Kakamega to attend to work, assaulted her on 18th February 2013 for misinterpreting his photo with Dr. J to her husband, stayed with N not as a girlfriend but helped her and later marriage by consent of her parents under African Customary Tradition, Musikoma plot was identified by both of them, that Ksh. 40,000/= she paid for Musikoma plot in M's house was his, she lent Ksh. 2000/= to a neighbour without his consent, committed adultery with H with consent of F but has since chased her away, he chased F away after divorce before completion of eda because she started embarrassing him before visitors. He disclosed that F was initially a good wife, went to members club to confirm her presence at an alcohol selling place and promised to refund her father his Ksh. 60,000/= debt.

14. RW1 said parties were married in 2010, encouraged F to adhere to Islamic values, bought her Islamic books to boost her knowledge though could not remember titles of the books and was ready to offer herself for reconciliation. RW2 stated, A purchased part of his father's land in June 2010, accompanied A to Bungoma Members Club on 16th December 2018 and saw men and women including F taking drinks but drove off before recognizing them. In cross examination, RW2 told Court that, the plot F purchased was also part of his father's land and had an access road behind their matrimonial land. RW2 admitted the photo he saw marked FDM-16 at Members Club had no men, he did not know what they were drinking, was absent during 2010 land sale to the couple and admitted F's plot had access.

15. After a failed reconciliation, the Court's visit to the scene revealed that; the matrimonial home was on two plots (100sq. feet), home had a permanent house of about Ksh 5 million, semi- permanent house of about Ksh. 150,000/=, a borehole of about Ksh 200,000/=, a permanent toilet of about 200,000/= and A admitted that a 21' TV and fridge belonged to F. The plot behind the matrimonial home belonged to F, there existed a access road to her plot but was blocked and a borehole constructed at the entrance for they could access from the matrimonial home according to A. A argued that the access road was blocked during the second survey in 2017, in her absence, but consented. This argument was denied by F. The borehole was constructed by A for his cousin brother who bought one of the neighbouring plots.

16. The Petitioner in her submission identified three main areas of determination; whether marriage was broken down, whether there existed a matrimonial property due for distribution and payment of her dowry of marriage. She said demonstrated that A; was adulterous, guilty of assaulting her, kicked her out of matrimonial home/house, issued divorce (talaq), reconciliation failed and therefore referred the marriage as broken. She further disclosed that she proved her contribution to the construction of the matrimonial home/house with some receipts and statements from [Particulars Withheld] Sacco and Mpesa. She however said that her financial, emotional and supervisory contribution

towards the construction of matrimonial home/house was clear before Court. She cooked for and paid workers (fundis) their dues. **She also said A tendered no evidence to show his contribution towards purchase of her adjacent/behind plot and therefore solely belonged to her.** She further disclosed that, looking at the cruelty, infidelity and upon considering divorce (talaq) issued by A, it was only fair that her dowry balance of Ksh. 19,800/= was paid.

17. The Respondent submitted that; he offered F all the financial assistance required, helped her secure employment at [Particulars Withheld] Company, paid fees for her siblings, assisted whole of her family, all this while on employment but when he left employment things changed. She also said that they cohabited, embraced Islam, and later formalized their marriage in accordance with the new faith but F later refused to follow the faith. He noted that the matrimonial home plot was purchased in June 2010 but F only secured a loan in July 2017 making it impossible for her contribution. He pointed out that according to the records F only contributed Ksh 17,000/= and disclosed that the plot alleged to belong to her was purchased in 2014 while employed at [Particulars Withheld] at a salary of Ksh 32,000/=. He disclosed that F accused him of impotence despite having children with his other two wives. He however confirmed committing adultery with H by F request and consent. He again asked the Court for 30 days reconciliation for he believed F could have been influenced by wrong company. On alternative, he prayed for dismissal of suit with costs.

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

(a) **Whether the marriage was broken down.**

(b) **Division of matrimonial property.**

(c) **Payment of dowry and other reliefs.**

Determination

19. 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) 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 parties profess the Muslim Religion and submit to the jurisdiction of the Kadhi's Court.”

(ii) Kadhi's Court Act Cap II, 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 Kadhi's Court shall be those applicable under Muslim Law.”

(iii) Marriage Act 4 of 2014, Section (71);

“The dissolution of marriage celebrated under part vii (Marriage under Islamic Law) shall be governed by Islamic law.”

(iv) Matrimonial property Act 49 of 2013;

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

(a). **Whether the marriage broken;**

20. Parties herein met in 2008, cohabited and formalized their marriage in accordance with Islamic law on 20th September 2015. This was after establishing their matrimonial home at Musikoma since 2010. A in response to allegations of cruelty disclosed that; he chased her away for coming back from Kakamega late at 8.10 pm, assaulted her for disclosing to Dr. J's husband a marital relationship that never was and also beaten her up by rubber for lending 2000/= to a neighbour without his consent. He said, one Nancy stayed under his care and later married her with consent of her parents under **African Customary Tradition**. He denied was a girlfriend. A as a head of family, instead of exploring other ways of solving his marital problems resorted to fighting and/or assaulting F against the Islamic principles of patience and either retaining her on reasonable terms of releasing her with kindness.

Quran: 2:229, “... *either retain her on reasonable terms of release her with kindness...*”

21. If A meant discipline for this, then Islam gave him three stages to be carefully followed; admonish them (talk) first, (next) refuse to share their beds, and last beat them (lightly, if it is useful). A blood-stained cloth was produced in Court owing to the beating.

Quran: 4:34 “... *And to those women on whose part you see ill-conduct, admonish them (first), (next) refuse to share their beds, (and last) beat them (lightly, if it is useful) ...*”

22. A further disclosed that, he was angered by the way she preferred to attend a friends get-together party over a visit to his sister in hospital. He packed her belongings outside the bedroom together with a divorce letter dated 16th December 2018 (FDM 4). He said, though he allowed her observe eda (mandatory waiting period), she misbehaved prompting him to kick her out of the matrimonial house. He also said that he committed adultery with one H with consent of F and could not be blamed. A keen look at the actions of A herein, it was clear that, he portrayed himself a very cruel, arrogant, irresponsible, careless and a man who liked women and never bothered to follow the marriage procedure and this Court believed the marriage could not have stood to be termed harmonious and A was to blame for its collapse. The Court wondered why he requested it to deny **divorce** when he had already issued the same and reconciliation failed. A relief must be found.

(b). Division of matrimonial property

23. Division of matrimonial property right is safeguarded by vesting in each spouse ownership according to their respective contribution be it monetary or non-monetary. It is for this reason that I shall strive to give effect to any monetary or non-monetary contribution that F would have proved in development of their matrimonial house/home and/or role played in marriage to guarantee her a share and or sendoff.

Quran: 2:236: “*There is no blame upon you if you divorce women you have not touched nor specified for them an obligation BUT GIVE THEM A (A GIFT OF) COMPENSATION – the wealth according to his capability and the poor according to his capability – a provision according to what is acceptable, a duty upon the doers of good.*”

24. According to F, they jointly purchased the matrimonial home plot at Ksh. 225,000/= by instalments in 2010, constructed on it a semi-permanent house, later a permanent house and lived until this divorce. She secured a Ksh. 500,000/= loan to finish up the construction of this house part of which was used to purchase a plot behind their matrimonial home at Ksh. 370,000/=. She said that she made a recommendable financial, emotional and supervisory contribution towards development of matrimonial home/house with less records because as husband and wife did not anticipate walking out of marriage. She submitted that receipts of payment and statements of [Particulars Withheld] Sacco loan and Mpesa showed some of her contribution to the said developments. She therefore demanded for her 50% share.

25. A disclosed and admitted that; the matrimonial plot was identified by both of them, F contributed ten iron sheets for a poultry shed, Ksh. 50,000/= for ceiling, Ksh. 10,000/= for toilet tiles, a 21' TV and fridge. Apart from what was admitted, F did not prove any further monetary contribution. A also admitted that the adjacent/behind plot was purchased by her and that he was ready to refund her money for the plot as she left which was in objection. According to A this was her contribution towards the development.

26. What one deserves must be arrived at by considering his/her respective contribution whether monetary or non-monetary. The bigger the contribution, the bigger the entitlement. Where there is evidence that a non-monetary or monetary contribution entitled a spouse to half of the property then, the courts should give it effect. But to hold a 50:50 sharing could imperil the marriage institution. It would give opportunity to one to contract a marriage, sit back without making any monetary or non-monetary contribution, distress the union and wait to reap the marital property. This will oppress the spouse that makes the bigger contribution.

27. Parties acquired the properties herein during their stay as husband and wife and therefore referred to matrimonial properties. It is important to note that each party possessed a non-monetary contribution and interest towards the property of the other. The Court will now handle monetary contribution only. I direct that F would only receive what was proved and admitted to belong to her and on addition will retain ownership of her adjacent/behind plot. It was clear that, the access road to petitioner's plot was blocked by action of respondent or with his consent.

(c). Payment of dowry and other reliefs:

28. Parties herein agreed that the marriage was contracted at an agreed dowry of Ksh. 20,000/=. According to A he paid Ksh. 2000/= which was in objection by F who admitted receiving Ksh. 200/=. In the absence of another evidence of payment and under circumstances herein, the receiver's word was final. A also promised and admitted he would refund F's father his Ksh. 60,000/= debt.

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

30.

ORDERS:

1. Marriage between A and F was dissolved on 16th December, 2018.

2. A to pay F her dowry of Ksh. 19,800/= within the next thirty (30) days by Mpesa.

3. A to refund F Ksh. 90,000/=being her matrimonial property share within the next ninety (90) days by Mpesa.
4. '21' TV and fridge in matrimonial house be given to F immediately.
5. A to offer F an access road to her plot within the next 21 days.
6. Plot behind the matrimonial home belonged to F.
7. A to pay F's father his debt of Ksh. 60,000/= directly within the next 120 days by Mpesa.
8. No orders to costs.

Judgment delivered, signed in Court this 1st day of April, 2019

HON. D. S. RATORI

PRINCIPAL KADHI

1.4.2019

In the presence of:

1. C/A Metiach
2. Both parties in person

HON. D. S. RATORI

PRINCIPAL KADHI

1.4.2019