



REPUBLIC OF KENYA.

IN THE KADHI'S COURT AT MOYALE.

DIVORCE NO. 8 OF 2019.

BA.....PETITIONER

VERSUS

II.....RESPONDENT

JUDGEMENT

1. The Petitioner and the Respondent were married sometime in year 2009, their marriage was solemnized in the terms of the Islamic law and consequently the parties were blessed with three (3) issues.

2. On 12th Feb. 2019, the Petitioner filed her Petition for a decree for a dissolution of the marriage, an order for the maintenance in her favor by the Respondent, custody of the issues of the marriage and any further relief that this Honorable Court will deem fit. This Petition was founded on the ground of cruelty.

3. On 25th Mar 2019, the Respondent filed a response to the petition wherein he denied the allegations and prayed for dismissal of the petitioner's suit with cost and an order to the petitioner to resume her matrimonial home.

4. Before the trial commence the court with it wisdom refer the matter for arbitration involving families from both side on several occasion but unfortunately the effort had not bear any fruit.

5. The petitioner testified on oath in court that after their marriage they cohabited as husband and wife in Dabela. Their marriage was not peaceful. The respondent was cruel to her, beating her, verbally abusing her and attacked her, she also lamented that the respondent indulged in extra marital affairs which is against teaching of Islamic sharia.

6. The PW1 by the name shk Ibrahim Mohamed and PW2 Mrs MadinaTepo Jaro testified in court and they stressed in support of the petitioner pleading, they also asserts that the Respondent is irresponsible person who does not respect marriage institution by threatening the petitioner life, the PW2 stated that the Respondent has never bothered to assist the petitioner in meeting the numerous needs of the home, thus leaving petitioner to struggle to meet the same alone, causing her suffer stress and anguish.

7. The Respondent also testified in court and lamented that it is the petitioner who has an affair with other man outside wedlock, none of his witnesses echoed his statement in regards to the alleged adultery.

8. From the evidence of the parties it shows that their marriage has irretrievably broken down and as a result of that they no longer staying together for the past three years.

9. Neither party seemed interested in reconciliation from their appearance during the trial.

10. In view of the fact that the breakdown of a marriage irretrievably is objectively assessed by the court, invariably where the body language of parties on the day of the trial shows that they are no longer desirous of continuing the relationship, there is nothing court can do but to accept that the marriage has indeed irretrievably broken down. Looking at the evidence in totality, it's the view of this court that the upholding of the marriage state is only one of the several objects of public policy where a marriage has been wrecked beyond hope of salvage, the argument of public policy loses much of its force. To keep the parties tied to one another in the bonds of a marriage which has

become a sham is obviously conducive to immorality and potentially more prejudicial to the public interest than a dissolution of the marriage bond.

11. The two parties are no longer living together neither are they planning on reconciling and the existence of irreconcilable deference render the conjugal union impossible. In short, the marriage is in existence in name and nothing more. It is a shell and hence it serves no useful purpose for it to stand.

"Divorce has been allowed in Islamic Law as a remedy in incompatible union"

Custody.

12. The Petitioner's evidence was to the effect that she is the more suitable parent to have custody of the children. She has more time for the children than the Respondent. The Respondent did not asked for the custody of the minor.

In ascertaining which parent to award custody , court must be guided by what is in the best interest of the child. See Art 53(2) of the constitution where its stated that;

“A child best interest are of paramount importance in every matter concerning the child.

The above principle 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'.

13. .While I agree that the welfare principle is the paramount consideration in deciding the custody of the child I am also of the view that the welfare of the minor will be served better where both parents are involved in the upbringing.

14. The roles of both parents should be complimentary and the question of who has a superior right to the custody should be secondary.

15. The child need to interact and know both parents so that the current arrangement where the child almost exclusively stay with the mother with limited or no visitation rights to their father should not be encouraged.

16. To me the best arrangement would be to allow the child to spend sometimes with the father because he needs to know the child as much

as child needs to know him and giving an allowance for each parent to visit the child during the time they are living with mother or father.

17. After all has said I am of the view that Petitioner has not been shown to be an unsuitable parent to have the custody of the child of the marriage . It has not been shown that granting custody to the Petitioner will not be in the best interest of the child of the marriage. Petitioner will thus be awarded physical custody of the child of the marriage.

18. On the issue of maintenance of the child Sec. 24 of the child act and the Constitution as well as Al hidaya put a duty on parents to maintain their children. That duty gives the minor a right to education and guidance, immunization, adequate diet, clothing, shelter and medical.

19. Sometimes, a plea is advanced by the husband that he does not have the means to pay, for he does not have a job or his business is not doing well, or he's married to another wife.

20. These are only bad excuses and, in fact, they have no acceptability in law. If the husband is healthy, able bodied and is in a position to support himself is under the legal obligation to support his children, for children's right to receive maintenance under Chap. 2 V 233 of the Holy Qur'an, is an absolute right.

21. Grant of maintenance to children should be perceived as a measure of social justice Chap. 2 V 233 of the Holy Qur'an is a measure of social justice and is specially enacted to protect children and falls within constitutional sweep of Article 19(2) reinforced by Article 21(3) and Article 53 of the Constitution . It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the Children.

22. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves.

23. This being the position in law, it is the obligation of the husband to maintain his children. He cannot be permitted to plead that he is unable to maintain the children due to financial constraints as long as he is capable of earning.

24. Thus the responsibility of the father for the maintenance of his child is unconditional and absolute as such no father should be treated unfairly and or harmed on account of his child; physically, mentally or morally. In the circumstances Respondent is ordered to look after the children of the marriage unconditionally since he is person of mean running electronic shop and rental houses.

In the result, I make the following orders:

1. That the said marriage that was solemnized in respect of the petitioner and the respondent in the year 2009 be hereby dissolved.
2. That arising from (1) above the certificate of divorce be issued forthwith.
3. That the Petitioner is granted the custody, care and control of the children of the marriage.
4. That the Respondent shall be at liberty to visit the minors at a reasonable and/or an agreed time of the day.
5. That the Respondent shall provide Kshs. 6,000/- monthly towards the maintenance of the children.
6. That the Respondent shall provide eddat maintenance for three (3) months on a reasonable scale to the Petitioner.
7. Each party shall bear its own costs.

It is so Ordered.

Dated, Signed and Delivered in Moyale this 8th day of July, 2019.

Hon. A.D. WAKO

Senior Resident Kadhi