



REPUBLIC OF KENYA
IN THE KADHI'S COURT AT GARBATULLA
MATRIMONIAL CAUSE No. KCMC 2 OF 2019.

OK PLAINTIFF

VERSUS

HNA (B) DEFENDANT

RULING

1. On 28th May 2019, the plaintiff filed a plaint seeking for orders;
 - a) To return the defendant to the matrimonial home,
 - b) His character is defamed for allegation of lacking manhood hence he needs for any legal action to be done,
 - c) The defendant to return back his belongings including; Techno wx3 smart phone, one room wall curtain and ceiling, food stuff worth ksh 5000/=, cash kshs 5000/=, thermos flask, two pillows and one bed sheet.
2. The plaintiff and defendant were married on 27th May 2018, under Islamic shariah and were blessed with no child. The plaintiff paid 10 shoats for marriage, out of which 5 shoats are dowry and 5 shoats meant for the defendant's parents so as they would offer their daughter to be married by the plaintiff.
3. The plaintiff claims that in the first two months of their marriage they lived in peace. He said, later the changes appeared from the defendant part, whenever they had a normal disagreement concerning the family matters, the defendant blow it out of proportion. He also blame her of disrespect and abusive language towards him, poor dressing and refusal to perform daily prayers, does not like to perform her chores at home, and desertion without any reason or disagreement.
4. He further claims that she possessed two supernatural beings (Ruhan) that caused worrying situation at night whenever he wanted to have his conjugal right, he says she could shiver and sweats a lot, feels headache and pulls down her hair showing signs of possession by Jinns, as the main issue which has brought marital dissatisfaction in their home. He also claimed that the defendant defamed his character for alleging defect in his manhood.

5. The plaintiff states that on several times, elders sat to intervene the matter and the defendant's father was the blame for delay he cause to return back the defendant to marital home as in the elders resolution, also refused to convey elders meeting to resolve the matter, hence the plaintiff moved to this court for legal action.

6. On 14th June 2019, the defendant entered appearance and filed defence statements, admitting the marriage, the dowry and what the plaintiff paid in for marriage. She also admits that there was no child blessed out this marriage.

7. The defendant denies all the other allegations against her. Hence, she termed it as baseless that holds no grounds. She raises counter claim that it is the plaintiff who harassed her through beatings, throwing her belongings out of the house and locking the house then going away. She states that these are the issues that made her leave the matrimonial home before the intervention of elders. However, she avers that she doesn't aware of the elders intervention on issue concerning her immoral behaviour, but she states only aware of when she herself called the elders to arbitrate about the unfair divorce she received from the plaintiff. Hence she prays for the plaintiff to take the responsibility to perform the necessary rites to bring her back, and that she is ready to do whatever he wishes. This contrary to what she sought for on hearing of the matter, thus she is praying for dissolution of the marriage.

8. Issues for determination are:

a) Whether the defendant has immoral behaviour, that whether she has poor dressing contrary to Islam, lack of respect and abusive language towards the plaintiff, not performing daily prayers and neglect to conduct her chores at home?.

b) Whether the defendant possessed supernatural being (Ruhan) which interfered with their marital life and caused dissatisfaction?

c) Whether the defendant deserts marital home without any reason or disagreement. Whether she collected plaintiff household items?

d) Whether the defendant went on business trip to Belgish and involved in illegal act?

e) Whether the plaintiff failed to provide the defendant with conjugal right due his inability to satisfy her with sexual intercourse since their marriage?

f) Whether the plaintiff gave full divorce (3 Talaka) at once? Whether he mistreats the defendant by beating her often, chases and throws away her belonging?

9. To determine the question on whether the defendant has immoral behaviour, that whether she has poor dressing contrary to Islam, lack of respect and abusive language towards the plaintiff, or not performing daily prayers and neglect to conduct her chores at home?

PW1 the plaintiff submits that they had stayed in peace for two months after the marriage consummation. But later the defendant changed her behaviour, that she had no respect for him, she changed her talks towards him. PW1 testifies that she also changed her mode of dressing which were contrary to her Muslim faith and refused to pray. She replies negative whenever he advised her. He testifies that he had even raised this problem to her mother and father.

10. He also mentioned other issues that the defendant keeps on watching TV up to late hours, thus she wakes up late. She does not attend to her duties. The plaintiff does everything for himself, even cooking and cleaning. He said to have raised these problems to her parents and the elders around who called for resolution on several times but no good change from her side.

11. PW2 who is a resident of IK gave evidence in support that he understands well about the issue concerning the plaintiff and the defendant because they gave him accommodation in their home. He

found them at Bendera (or Mogore) when they are not in good relationship between the two. PW2 said in most of the time he found defendant refused to serve her husband she refused to respond positively to his demand, and refused to put on Islamic accepted clothes. He saw the defendant sleep up to late hours and wakes up late, until the plaintiff goes to his job of a school teacher. He testified that he saw the defendant not respectful to her husband.

12. PW2 responded to question from the defendant, which asking on how many times she reported her case to him (PW2). The PW2 said that he had asked the plaintiff on what happened between the two, and advised him to stop anything she (the defendant) dislikes, but since then she did not report further issue concerning their disputes.

13. The issue on whether the defendant possessed supernatural being (Ruhan) which interfered with their marital life and caused dissatisfaction? PW1 also testifies that the defendant possessed supernatural being (Ruhani) as the main issue which caused a lot of problems in their marriage. He testifies that, whenever she had the presence of Ruhani she even not prays, even not covering her head, she will soon have headache, and sweats. He avers that on most times she had a problem of headache, breathing, abdominal pain, irregular menstrual bleeding and mostly these problems occurs at night when they had to share the bed and have sexual intercourse. The plaintiff further testifies that she even informed him that she had no urge to have sex. He also says that sometimes she talks to unseen things. PW1 states to have engaged the local herbalists to treat the defendant about this ruhani, but still no permanent recovery he observes as the problem still exists.

14. PW3 who is a resident of Kombola and an herbalist because she does treating women on health issues of birth and evil spirit that affect women. She uses herbal medicine from tree. She testified to have treated the defendant on two times. On first time she said to have treated her when she was brought by her (the defendant) father. On second time it was her mother who brought but the bill was paid by her husband who allowed her the medication at his expense. The PW3 testified that on this time the defendant left abruptly without notification after she started treatment and did not complete her dose as expected. The PW3 responded to the question upon cross examination, that she treated the defendant on Ruhani (evil spirit) for two days, but then she (the defendant) disappeared unexpectedly.

15. PW6 AT, a resident of Merti. He understands well the plaintiff and the defendant. The defendant is his close family. He found them at Bendera (or Mogore) in peace on first time. On his second visit he found the defendant looking sickly. He asked her what's problem with her since she is dirty and not praying. The defendant responded that she is sick due that she had two Ruhani which stop her from praying. PW6 advised the plaintiff to take her to sheikh Yahya the person who treats this kind of Ruhani (spirits), where he agreed but she refused claiming that she had been already treated by said person.

16. But the defendant denies possessing this Ruhani without evidence to support her denial. Which she admitted on her previous case in this court with her first husband. It was on record that this Ruhani was the cause that led to separation from her previous husband.

17. About the question on whether the defendant deserts marital home without any reason or disagreement. Whether she collected plaintiff household items? PW1 testifies that on last time, she ran away from matrimonial home, on his absence. He said she had even asked him to purchase for her hair oil. On later, when he came back from Merti, he did not find her at the matrimonial home. Then he looked for her, he could not find her, then he called her on phone, she replied that he divorced her on last night, which according to him was not true. The plaintiff states that when he came the house also closed. It was the defendant who informed him where she put the keys. She (the defendant) informed him where the keys were over the phone.

18. PW1 testified that she took his smart phone, destroyed his certificate, and other household items. He shown some elders; Jare Korma and Jonis Fayo to see what she did to him. The plaintiff produced in court P1 certificate which was torn on one side. He also said that he had witnesses to proof that she collected his household items, including smart phone, curtains etc.

19. PW4 Yunis Fayo (nick named Jonis), a resident of Mogore (or Bendera). He understands well the two parties in this case. PW4 testified that on the day the plaintiff went to Merti, he passed by him at 1pm carrying one sheep and a gas cooker in his description. Later on, in the evening he (the plaintiff) came and shown them together with Jare Korma, the destroyed (torn off) certificate and some pieces were on the ground. The PW4 testified that he suspect that the plaintiff left behind in the house his wife (the defendant) and he saw the defendant in the morning at her house. He does not know who was residing in their house apart from him and her, and no other person has keys to open the house. They have no theft of such kind as their thief mostly takes away something like a sheep. PW4 replied to cross examination that he had not seen the defendant destroying the certificate but she was there in the morning.

20. PW5 Jare Korma a resident of Kombola. He gave evidence that he cannot tell at what time the plaintiff went for Merti, but he was called to see the destroyed certificate. Thereafter, they told the plaintiff that, they cannot ask the defendant about the incident right away. Since she is not there to be asked for what happened. PW5 testified that he saw the house was closed.

21. The issue on whether the defendant went on business trip to Belgish and involved in illegal act? The plaintiff testified that the defendant went to Belgesh to undertake illegal business. He claims that she had another partner who operates motor bike and who is suspected of being HIV victim. He said to have done his own investigation concerning her outside affair and had information from everybody around.

22. He also responds upon cross examination that he had several people who witnessed that she operates business at Belgesh which to him a place not good because of immoral practice goes on there. He had some people whom she informed that she is not his (the plaintiff) wife, because she has her own man. The plaintiff states that some of those people whom she informed are his relatives and she never knows them. But on this allegation the plaintiff could not manage to proof on whether the defendant had involved in illegal act. He alleged on assumption that he had information from everybody around which cannot be counted as evidence according to the rules of evidence in Islamic Shariah. However she cannot deny her business trips to Belgesh. Except that she did not mentioned excuse to be having prior permission from the plaintiff her husband who also have the authority to let her go on business trip, because he still claims to be his wife, apart from she is on ran away from the matrimonial home.

23. Whether the plaintiff failed to provide the defendant with conjugal right due his inability to satisfy her with sexual intercourse since their marriage? On this claim, the defendant submits that she was the one who agreed to be married by the plaintiff, but she states that she did not get happiness and love from the plaintiff. She states that he beats her now and then, without reasonable cause. She said to have feared for herself, he sent her away on five times. The last time, her father engaged the elders to solve the matter, which she complained about the issue of not getting conjugal rights. She said the plaintiff sleeps outside the room for eight good months, in which she never get her conjugal right. She avers that whenever his other wife comes he would afford to spend the night with her. She testified that she saw them sharing the bed through the window. Hence she felt that the plaintiff did not have that love for her.

24. The defendant testified that she had full maintenance which was provided by the plaintiff. She said but that alone would not make her happy unless with the provision of conjugal right. The plaintiff gave evidence that she complained against the plaintiff in the elders meeting for the same problem, where he admitted the issue of conjugal right, hence the elders resolved her to resume back her home, which she did it.

In response to cross examination, she replied that she stayed for eight months without having conjugal right, just because she had patience and did not rise any complain because she feared people's words, which they may imply against her.

25. DW2 JC, a resident of Mogore (or Bendera). He understands well the two litigants as they are from the same village, and the plaintiff is his close relative. He gives testimony in support of the defendant, he had intervened their disputes on several times, the defendant was complaining of none provision of conjugal rights, she said he had the problem of dysfunction which the plaintiff admitted the same. Where they advised him to seek for treatment and which he did. But there the problem still exists.

26. On cross examination the DW2 answered that the plaintiff told him that he was sick and had problem of sexual intercourse, thus he went to Sheikh Hassan for treatment. He also responds that he did not inform the court, because he doesn't want to tell the court. Hence DW2 deny giving testimony on problem which the plaintiff is suffering from the defendant's side, whereas he give testimony against the plaintiff. This is a clear indication that DW2 is biased on giving evidence, because he refused to tell the truth of the other side while he is the elder who should be responsible to both sides.

27. DW2 further replied that he do not know whose sheikh the plaintiff went to seek treatment. As he just heard that the plaintiff went to sheikh. He do not identify who the sheikh? And he heard that the defendant was complaining of the issue. In this instance DW2 contradict his previous statement when he does not know who was the sheikh that treated the defendant? The DW2 replied that he has completed ninety years old, he cannot tell the exact age. This shows that DW2 could not have vivid memory to give accurate evidence. He said that do not know about the divorce issued by the plaintiff and how many are they.

28. DW3 GD, a resident of Bendera (or Mogore). He understands the parties in this case. He had involved to settle the disputes between the plaintiff and the defendant on two times, the first being on issue of defendant's absent from home most of the time, and which was resolved that she keep staying in her home. On second time it was about the issue of none provision of conjugal right raised by the defendant, where as the plaintiff denied the same, blaming that it was the defendant who was sick as she had evil spirits (Ruhani) which comes up whenever they go to bed so as to have conjugal rights, she jumb up from the bed and refuse to have the conjugal right. He said this hindered by the evil spirit thus creates problem between the two. DW3 finally testify that the plaintiff took her to one Sheikh Hassan who treated her.

29. DW4 the defendant's father who testified that he used to send back the defendant to her matrimonial whenever there were disputes and she happens to ran away. He said except that the plaintiff was ungrateful to him, by making discouraging statements to the defendant whenever she is bought back to him, that she is definitely returned back, and not on his demand.

30. The plaintiff denied the allegation on him failed to provide the defendant with conjugal rights. He testified that the matter was determined in the elders meeting that the defendant to return back to her matrimonial home, and to report in case there may arise the issue of none satisfaction of sexual intercourse. They directed her to report to the close family of the plaintiff, before she will raise it to the elders. Because the elders found no proof to what she alleged.

31. PW1 testified that the defendant stayed for two weeks without returning back to her matrimonial home, hence the elders raised the blame against her father for failing to comply with their resolution.

Whereas the father threw the blame to the defendant saying that she refused to go back to her home. PW1 dismissed this excuse saying that her mother was to return the defendant back but the father was not ready for it.

32. Then PW6 happened to involve in the elders meeting to resolve the case of the defendant and the plaintiff. Which she ran away from her matrimonial home alleging lack of conjugal rights whereas the plaintiff blaming her of possession of Ruhani and related problem. PW6 states that finally elders reached decision that the defendant to return back to her matrimonial home so as they will have thorough investigation on the issue of lack of conjugal rights. PW6 said that elders feared to give wrong decision because the said issue is strange to them and cannot be just decided on mere claims, it requires investigation, the defendant has to proof the fact that the problem exists with the plaintiff. They could not decide the case against the plaintiff for lack of proof. Rather they had to resort only to return the defendant back to her matrimonial home, than to separate them.

33. PW7 GG (AS) resident of Kombola, who is a relative to the defendant. He testified that they agreed to return the defendant back to her matrimonial home because she did not managed to establish her claims based on evidence. PW7 testified that it was the defendant's father who refused to return the defendant back to her matrimonial home.

34. PW8 AB resident of Kombola. He understands well the plaintiff and the defendant. He knows the plaintiff as their teacher but the defendant is their closed relative. He testified, to have intervened about the issue between the plaintiff and the defendant together with the elders, in which the defendant alleged that the plaintiff never slept with her as husband for the last eight month. She claimed that he sleep outside the house, and sometime sleep with his other wife. PW8 states that the plaintiff also counter claimed against the defendant about her sickness which hindered him from having the bed with her. PW8 testified, finally they afford to decide that the defendant to resume her home as they will find who has the problem. PW8 states that the defendant did not comply with their decision to resume back her matrimonial home.

35. Whether the plaintiff gave full divorce (3 Talaka) at once? Whether he mistreats the defendant by beating her often, chases and throws away her belonging? Concerning this specific issue the defendant testify that the plaintiff divorced her on 1st time in writing and she went to show divorce letter to her witnesses. But on second time, she did not have witness and did not shown the letter to anybody. On cross examination, the defendant answered that she do not know the content of the divorce letter, because she does not know how to read, she had not taken to any person so as it is read for her.

36. Whereas the plaintiff rejected the divorce letter alleged to be issued by him on second time. Since the second divorce letter shown to the court had no date, place of issue, did not have the defendant full name. It is only stated to divorce Barwaqo. It is not clear whose Barwaqo is? And the handwriting is not his. The plaintiff further highlights that the divorce letter had no his signature. It is also indicated that the divorce issued were 3 nikah, which is not clear on whether what he issued are 3 Talaka or 3 nikah? He further avers that however it cost him he cannot issue 3 Talaka at once. Lastly, the plaintiff demanded for the said witnesses to be called up on to prove the fact of this divorce letter which is not known to him. Which the defendant did not produced even a single proof.

37. On cross examination, the plaintiff responded that he divorced the defendant on one Talaka for the first time upon noticing from her a bad behaviour. That was on him coming from the Shamba, but he held her back and the matter was resolved.

38. Finally, after critical examination of the evidences from both sides, I find that the plaintiff established his claims on lack of respect from his wife the defendant, neglected her chore duties, and desertion on petty issues which can be overlooked. It is right of the plaintiff as defendant husband to be respected and served well by the defendant. This clearly provided in the Quran al-Baqara 2:228;

“And they (women) have rights (over their husband as regards living expenses) similar (to those of their husbands) over them as regards to obedience and respect to what is reasonable, but men have a degree of responsibility over them”

Ibn Abbass (may Allah be pleased with him) said concerning this verse: **“this means that women are entitled to kind treatment from their husbands, just as they are required to obey them in matters in which they are enjoined to obey their husband. Al-Qurtubi said: the verse includes all marriage rights and duties”**

39. It is also found that the defendant left her husband unexpected and stayed for long away even after the elders advised her to return back. This is counted as nushuuz (wilful defiance) and she is sinning thereby, and she forfeit her rights to maintenance so long as she has no excuse for leaving such as any harm or wrong doing that may have done to her.

40. On issue of none provision of conjugal rights, or inability to perform sexual intercourse by the plaintiff not established by the defendant. She brought a witness DW2 who is very old such that cannot give accurate and correct information. Despite been biasness in his testimony because he gave testimony which inclined on one side as he refused to give the other side of the story on information about the problem concerning the defendant that he had even intervened sometimes back.

41. The defendant has to proof the fact, not just a mere claim that the plaintiff has inability to perform

sexual intercourse. The defendant stayed in this marriage for eight months without making further claim, she said to fear peoples' word, which not convincing reason. She has to proof that the plaintiff has inability to perform sexual intercourse at the very time of their marriage, and that he continues to be like that until at the time of filling of this suit. Based on this she can get dissolution of the marriage, if both the above facts are fully established. But it is significant here that before deciding against the plaintiff on this ground the court is bound to give to the husband (the plaintiff) one year time to proof his impotency provide he make an application for it. Where the plaintiff is successful in proving his potency within the period of one year, the dissolution cannot be passed, but if the plaintiff failed to do so the marriage will be dissolved based on this ground. The requirement is that the plaintiff was impotent at the time of the marriage, and such impotency continued since then and was permanent, and incurable. See section 2(v) read with proviso (c) sec 2 in the dissolution of Muslim Marriage Act 1939. See also Text book on Muslim Law, By Rakebh Kumar Singh.

42. It is also in my finding that the defendant went on business trips without the prior permission of the plaintiff. According to Islamic Shariah it is permissible for a Muslim woman to go out for work provided that the job she is going to do is deem permissible in Shariah and does not include anything that contradicts legal rulings, that the woman guarantees safety for her person, chastity and religion from temptation, that the job suits woman's physical and psychological nature. Consequently, a woman work should not contradict righteousness or oppose her guardian's responsibility over her. See fatwa dar-alifta.org.

43. It is not on record that the defendant was working for gain before or when she got married to the plaintiff. Neither had she had prior permission from her husband or the kind of business she went for yet known to the husband. Therefore, the defendant's going on business without the prior permission of her husband was impressible and blameworthy.

44. It is not denied that the plaintiff went to Merti in the morning and left behind the defendant at the matrimonial home. Then she ran away from matrimonial home on claim that she is divorced and which yet she did not proved. It is on a reasonable assumption that she collected the household items including the plaintiff's smart phone and destroyed the plaintiff P1 certificate, because she is left to be taking care of the matrimonial home. It is also not disputed that the house was closed and the defendant informed over the phone where she kept the keys for the house, neither not mentioned that a thief broken the house.

45. To my reasonable assumption it is either the defendant who may have collected the house hold items and probably torn off the plaintiff P1 certificate. Or undoubtedly she failed to take charge of her duty to take care of the matrimonial home. Because according to Islamic shariah a woman is deemed responsible for her husband's property on his absence as it is one of the rights of husband from his wife.

46. It has been narrated on the authority of Ibn 'Umar that the Prophet (May be upon him) said:

“Be aware, every one of you is a shepherd and everyone is answerable with regard to his flock. The Caliph is a shepherd over the people and shall be questioned about his subjects (as to how he conducted their affairs). A man is a guardian over the members of his family and shall be questioned about them (as to how he looked after their physical and moral well-being). A woman is a guardian over the household of her husband and his children and shall be questioned about them (as to how she managed the household and brought up the children). A slave is a guardian over the property of his master and shall be questioned about it (as to how he safeguarded his trust).

Be aware, every one of you is a guardian and every one of you shall be questioned with regard to his trust”

Sahih Muslim 1829.

47. Finally I hereby give my finding that the plaintiff's case has merit prevailing over the defendant.

i) Thus I determine the marriage in question to be irreparable because the defendant become adamant for dissolution, hence I dissolve this marriage on Khul'ah terms, and she will observe idat period of 30 days from the date of this ruling.

ii) That the defendant will not marry any other person within the idat period, rather she can resume her marriage within the period or with a new marriage conduct with the plaintiff in case they have to do after the idat period elapses.

iii) That where the defendant will be free on compensating the plaintiff the dowry of 11 shoats she received.

iv) That she will also give back the smart phone which has some important documents or files saved in the said phone. Or refund back amount equivalent to market price of the smart phone.

v) That she will be held to pay the cost of the suit including cost of processing new P1 certificate to be paid to the plaintiff upon assessment done in court.

vi) That any of the parties who are not satisfied with this ruling shall have right of appeal within 30 days with effect from the ruling date.

Dated and Delivered at Garbatulla on 17th July 2019.

By Galgalo Adan – SRK

In the presence of :

Court Assistant – Abdullahi Mohamed Guyo.

The plaintiff – present

The defendant - present