



REPUBLIC OF KENYA

IN THE KADHI'S COURT AT MOYALE

DIVORCE CAUSE NO. 16 OF 2019

ASU.....PETITIONER.

-VS -

JMS.....RESPONDENT.

JUDGEMENT

1.This is a petition for divorce filed by one **ASU** (herein after 'the Petitioner')against one **JMS** (herein after 'the Respondent') on 3rd April, 2019 for a decree for a dissolution of marriage, an order to compel the respondent to pay plaintiff's costs, the legal custody of issue of marriage and other reliefs this court may grant.

2.The background is that the Petitioner's Marriage to the Respondent was conducted on 8/4/2017 under the provisions of Islamic law. They cohabited as husband and wife in Moyale.

3.The said marriage was blessed with one (1) issue.

4.The petitioner case is that the marriage has irretrievably broken down on account of the respondent's extreme cruelty leading to the petitioners mental torture.

5.On 27th June 2019 the court sermon the families of both parties in court, where the court instructed the family to solve the matter locally in the spirit of promoting alternatives dispute resolution mechanism. But unfortunately the elders unable to reach amicable solution to the matter.

6.On 5th July 2019, matter came for hearing where the respondent denied the allegation brought against him by the petitioner but agreed on the fact that the marriage between him and the petitioner has irretrievably broken down on account of the petitioner's behavior.

7.At the trial both parties testified on oath and choose to call their respective witnesses. The Petitioner testified that after their marriage they cohabited as husband and wife in Moyale, Their marriage was not peaceful. The respondent was cruel to her, beating her and verbally abusing her .

8.The Petitioner further stated that the respondent has absolutely been un-corporative and has despised and undermined efforts by the petitioner to sort out their problems through ADR . Lastly, she prays for a judgment to be entered against the respondent as prayed.

9.The respondent denied the allegation brought against him by the petitioner , he however acknowledged the existence of matrimonial rift between him and the petitioner, he also confessed that since she left, he have not sent her anything for upkeep of the child.

10.I have given due consideration to the petition and the ground it's based on *vis a vis* the defence of the respondent. The question that falls for my consideration is:

1) Whether the marriage between the parties has irretrievably broken down.

The court attention was drawn to the Quranic textual elucidation of functional and fundamental ingredients that fuel an ideal marriage among Muslim- tranquility, love and mercy - which have been captured by the Holy Quran chapter 30 v. 21 wherein is stated that.

"And among His Signs is this, that He created for you Mates from among yourselves, that ye may dwell in tranquility with them, and He has put Love and Mercy between you. Verily in that are signs for people who reflect."

11. The Parties the manner they testified and the demeanor when making submissions and during cross-examination reflect deep-seated tensions between the parties.

12. The parties has endeavored to extend a hand of reconciliation and attempts were made to employ Alternative Dispute Resolution mechanisms before having recourse to judicial separation as envisaged by the Holy Quran Chap 4 v. 35 which says:

" If you fear dissension between them twain (the man and the wife), appoint two arbitrators, one from his family and the other from hers, if they both desire reconciliation , A will cause it between them. Indeed A is Ever Knowing and Acquainted (with all things).

13. The court attention was also drawn, to Ash-shawkanii's. "Fat-hul Qadiir" Vol. 3 pg 21 where it states that.

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

14. There is evidence that the parties are no longer living together in harmony. It's the view of the court that ,Divorce since its disintegrate the family union is of course a social evil, It's better to wreck the unity of the family than to wreck the future happiness of the party by bonding them to a companionship that has become odious!

15. Whether the petitioner or the respondent should have the custody of the minor?

The court attention was drawn to Al-Bayhaqees' ' Al- Kubra 8/4 and also Abdulrazaq's 'Mussanaf's' No. 12605. In case of **(Umar (R.A) v umm Asim (R.A).**

Abubakar (R.A) gave Judgment in favour of Umm Asim and stated that she is more compassionate, gentler, more tender – hearted and more merciful (mother-nature) and she is more entitled to have custody of her son as long as she doesn't get married."

16. The court attention was also drawn in support of the above case to constitution , Art 53(2) where its stated that;

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

17. The court attention was also, drawn to Art 3(1) of the UN convention on the right of the child. 1989 (to which Kenya is a party) which states;

"In all actions, concerning children whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies the best interest of the child shall be the primary consideration".

18. The court persuaded by the above Hadith and grant the petitioner the physical custody of the minors. The court caution both party to always maintain harmonious relationship especially in relation to child thus the right to access should be seen as a means to protect the interest of the child as well as the right of the both parties and this is to avoid a tag of war situation since both parties are equally responsible for the child.

The upshot of all the above is, that the court make the following orders.

- 1. The marriage solemnized in respect of the petitioner and Respondent be and is hereby dissolved.**
- 2. Divorce certificate be issued forthwith.**
- 3. The physical custody of the issue of marriage named herein before be granted to the Petitioner.**
- 4. The legal custody of the minors named herein above is granted to the respondent.**
- 5. The Respondent shall have unrestricted access to the child.**
- 6. The Respondent shall contribute towards the maintenance of the child. The modality of such maintenance be agreed upon or ordered upon later.**
- 7. Order as to cost each party shall bear his/her own cost.**

Ordered accordingly.

DELIVERED and SIGNED at Moyale this 5th day of August, 2019.

Hon A .D. WAKO.

SENIOR RESIDENT KADHI

