



**REPUBLIC OF KENYA**

**IN THE KADHI'S COURT**

**AT BUSIA**

**DIVORCE CAUSE NO. 1 OF 2019**

**YOG .....PETITIONER**

**VERSUS**

**KMD .....RESPONDENT**

**JUDGMENT**

**MARRIAGE**

The fact of this cause is that the Petitioner got married to the Respondent in the year 2009 in accordance with the teachings of the Islamic Law.

The Petitioner and Respondent cohabited as a husband and wife at Nairobi – Pumwani area. The said couples were blessed with three issues namely:-

- a. RAY
- b. FAY
- c. SGY

The Petitioner filed his petition on 25<sup>th</sup> June, 2019 against the Respondent for a decree for a dissolution of the marriage, an order for costs of this cause and any further relief that this court

will deem fit.

The petition was founded on the grounds of ignorance and cruelty.

The petition as well as the notice to appear were both served to the Respondent vide the affidavit of service by a process server dated 25<sup>th</sup> June, 2019, who accepted the service and declined to sign.

No entry of appearance and filing of the response to the petition within the given period. The Petitioner further requested for a judgment against the Respondent who has been duly served with a petition, verifying affidavit, written evidence affidavit and notice to appear/enter appearance but unfortunately respondent failed to file memorandum of appearance within the time limit.

[Under order 10 Rule 4 and 10 of the Civil Procedure Rules 2010, under Section 1B (1) and Section 3A of the Civil Procedure Act and chapter 21 of the Laws of Kenya]

When the file was called for hearing on 24<sup>th</sup> Jul, 2019 only the Petitioner attended the court and the matter proceed by way of undefended cause.

The Petitioner from his uncontroverted testimony that the Respondent has been treating him in a manner which is not expected to be meted out from a spouse in marriage, that is since he got married to the second wife in the year 2018.

The Petitioner testified that the Respondent had already given promise before he got married to the second wife that she won't accept him

getting married to another woman The Petitioner further testified that the Respondent commenced denying him conjugal rights, also ceased him from accessing his children in their matrimonial home, saying that she is not even ready for any financial support from the Petitioner.

The Petitioner also testified that the Respondent denied him some more important information like educational affairs for his 3 kids. The Respondent further moved the kids from their matrimonial home to the new one where the Petitioner does not know exactly.

The Petitioner avers that the Respondent is so abusive which is terribly affecting him and causing him to suffer psychological trauma.

The Petitioner further stated that their marriage had irretrievably broken down into pieces as the two are physically separated and live separately from the time of filing this petition.

However, the court attention is drawn to *Ash – Shawkanii’s “Fat-hul Qadiir” Vol. 3 page 21* where it states that:-

**(Dissolution of marriage has been allowed in Islamic Law as a remedy in compatible union.)**

## **CUSTODY**

The Petitioner’s evidence was to the effect that Respondent is more suitable to have custody of the 3 children, they are still young and the Respondent has more time for them.

In ascertaining which parent to award custody, the court must be guided by what is in the best interest of the child.

Article 53 (2) of the Constitution states that;

**“A child’s best interest are of paramount importance in every matter concerning the child.”**

The above principle has been corroborated by Sharia, see *Ibn Quadamai; Al Mughni pg. 613 – 614*, which states 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 jeopardy and faith of the children.”**

Also the minors themselves need to interact and know both parents so that the current arrangement where the minors almost exclusively stay with the Respondent (mother) with limited or no visitation rights to the petitioner (their father) should not be encouraged.

To me the best arrangement would be, to allow minors spend sometimes with the father because he needs to know them as much as they need to know him as well.

## **MAINTENANCE**

The Petitioner testified that he will take charge of maintenance for his children together with the Respondent within her waiting period – 3 months (Edda).

Quran chapter 65, V.7-((**Let a man of wealth spend from his wealth, and he was provision is restricted, let him spend him spend from what Allah has given him...**))

Quran chapter 65,V.1((**O prophet when you divorce women ,divorce them for commencement of their waiting period and keep count of the waiting period.....**))

The Petitioner declared his readiness to provide for the minors within his means stating that he will cater for the following on monthly basis;

- **Food**
- **Clothing**
- **Medication**
- **Education**

On the issue of maintenance of the minor, Sec. 24 of the Child Act as well as Al – Hidayah put a duty on parents to maintain their child.

That duty gives the minor a right to education, guidance, immunization, adequate diet, clothing, shelter and medical.

## **MARITAL ASSETS**

The Petitioner testified that no any shared assets in their matrimonial home excluding: - A table & kitchen utensils that those are for the Respondent.

**CONSOLATORY GIFT**

The Petitioner also testified in court that he will reward the Respondent a business worth 250,000/- as a send-off for her upkeep.

The upshot of the above, I make the following orders:

- i. That I declare and confirm the marriage between the parties hereby dissolved.**
- ii. That arising from (i) above, the certificate of divorce be issued forthwith.**
- iii. That the Respondent is granted the custody, care and control of the minors named herein above.**
- iv. That the Petitioner shall be at liberty to visit the minors of a reasonable or agreed time of the day.**
- v. That the Petitioner shall provide financial support monthly towards the maintenance of the minors when they arise.**
- vi. That the Respondent shall provide 100% towards rent for both business shop and her residence.**
- vii. Each party shall bear its own costs.**

**DELIVERED AND SIGNED AT BUSIA THIS 06<sup>th</sup> DAY Aug 2019**

**HON. J.I. OPACHA,**

**RESIDENT KADHI**

**BUSIA KADHIS COURT.**

**In the presence of:**

C.A – Mohammed

Petitioner –present

Respondent-absent