



REPUBLIC OF KENYA

IN THE SENIOR RESIDENT KADHI'S COURT AT MARSABIT

DIVORCE CASE NO. 45 OF 2019

AGJ.....PETITIONER

VS

GD.....RESPONDENT

JUDGEMENT

The marriage between the petitioner and respondent took place in April 2003, and the marriage was blessed with six children. The husband went out of his matrimonial home and stay with his brother, the petitioner tried to look for her husband to her surprise she found him leaving with his brother. The respondent told his wife that there is no need of her looking for him, I was charging my phone in my brother's house, I was planning to tell you if my phone is fully charged.

The petitioner also complains against the respondent that she is the one to maintain him instead of husband maintain his wife.

The respondent refutes all that and said it was just allegation against me, I have rental houses, she is the one who collects money and didn't ask her any coins from those rental houses, when the court asked the parties whether the case was taken to the elders, she told the court that the respondent has never come and ask my parents to return his wife, when the court asked the respondent he told the court that it is against his culture to ask the wife to go back to her matrimonial home if she left by her own.

CROSS EXAMINATION

- i. When the court cross examined both parties, the petitioner said that she won't go back to her matrimonial simply because she fear for her life, also one time he burnt all her cloths into ashes.
- ii. PW1: Also confirmed before this court that as village elders we arbitrated between the parties, but the arbitration did not yield any fruits. That's why we advised the parties to come to Kadhi's court to get the solution.
- iii. The petitioner states in her petition that she fears for her life if ordered by the court to go back to her matrimonial home.
- iv. The parties were married under Islamic Law in 2003, the marriage was blessed with six children both parties are business (man), (woman). The petitioner claims that she is the one to look after her children without being supported by the respondent.

FINDINGS AND ANALYSIS

The main issues to be analysed here is that children maintenance by the respondent, divorce.

Maintaince of the Children.

Unlike Statutory Law, Islamic Law provides that the responsibility of providing of children belongs entirely to their father, in this case Section 90 of the Children's Act Cap 141;

“Unless the court otherwise directs and subjects to any financial contributions ordered to be made by any other person, the following presumptions, shall apply to the maintenance of a child:-

- a) Where the parents of a child were married to each other at the time of birth of the child and both are living, the duty of maintenance shall be their joint responsibility.

A child under Islamic Law is entitled to be supported to have a reasonable standard of living.

Article 107 (i) provides;

The child shall have the right to a standard of living that benefit

The Quran places the responsibility of children on the child's father. **The Quran 2:233 provides**

A child best interest are a paramount importance in every matter concerning the child. Abdallah Ibn-Amir Al Aaas narrated the prophet (P.B.O.H) It is a serious sin for one to abandon (Not maintain his dependants Abu Daud (3/118)

It is authenticated by Albany in al. Mishkaat (3/340)

CONCLUSION

The appellant stated before the Hon. Kadhi and before this court that she did not wish to go back to the respondent for reason of neglects of her and her children and as well threats by respondent to her. Hon. Kadhi found that its only scenario whereby the respondents burnt her clothes, which is a sort of cruelty in it.

For Kadhi to order the appellant to go back to her matrimonial home It is violation of the Rights of Freedom which is also against Freedom of Association provided under Article 36 of the Constitution of Kenya 2010, as neither the constitution nor the written laws allows a court to force someone to live with another when other persons feels like not doing so. The only way out here is that the appellant divorce herself from her husband through Khul'u which is an Arabic terminology where a lady request her divorce and forfeit her dowry, Islamic accept that.

Therefore, the Kadhi has dissolved their marriage and dowry to be paid by the respondent which are four cows as agreed by the parties during marriage.

To conclude I order that the marriage between the appellant and respondent be dissolved.

A decree Eddat its hereby granted which becomes absolute of 3 months from today. I also order the appellant to pay back the dowry of four cows which is equivalent to Kshs. 80,000/= to the current market price of the cows here in Marsabit County.

As respondent requested for the cost of this suits the petitioner to pay the costs of this suits.

DATED AND DELIVERED ON 15TH DAY OF OCTOBER, 2019

In the presence of:-

1. Petitioner
2. Respondent
3. Court assistance - Qabale

HON. ADAN I. TULLU

SENIOR RESIDENT KADHI

MARSABIT LAW COURT