



**SB v BG (Divorce Cause 22 of 2019) [2019] KEKC 25 (KLR) (13 November 2019) (Judgment)**

*SB v BG [2019] eKLR*

Neutral citation: [2019] KEKC 25 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT ISIOLO  
DIVORCE CAUSE 22 OF 2019  
AH ATHMAN, PK  
NOVEMBER 13, 2019**

**BETWEEN**

**SB ..... PETITIONER**

**AND**

**BG ..... RESPONDENT**

**JUDGMENT**

1. Through amended petition dated May 14, 2019 the petitioner prayed for dissolution of marriage, legal and actual custody of the issues of the marriage and respondent be compelled to give her one of his many buildings to shelter the petitioner and their children. She claimed the respondent is adulterous, disrespectful, cruel and failed to give her emotional support. She stated the respondent abused her in public and does not provide for the family's basic needs including school fees for their children. She contends the marriage has irretrievably broken down.
2. The respondent through amended statement of defence dated September 18, 2019 denies the petitioner's claim. He specifically denied being adulterous, cruel, abusive, not providing for his family's needs. He stated that the petitioner neglected his ailing mother compelling him to remarry a wife he had earlier divorced and that since then she has been demanding that he either divorce the other wife or divorce her.

Facts

3. The parties were married under Islamic law in Garbatulla within Isiolo County on February 2, 2004. They are blessed with five children from their marriage: A, Y, R, Z and S B aged 14, 12, 11, 9 and 4 years respectively. The plaintiff is a clinical officer stationed at [particulars withheld] General Hospital.
4. The respondent is a sergeant with [Particulars Withheld] Service, stationed at Industrial area, Nairobi, DCIO. The respondent had two previous marriages. The plaintiff was married as a second [younger] wife. He has five other children from his other marriages and his new wife is expectant. He has



developed a five room rental house in Garbatulla while the plaintiff has developed a rental house in Isiolo Town. The parties were residing in a two bedroom staff house at the [Particulars Withheld] General Hospital.

5. The parties had a quarrel and disagreements early this year [2019]. Elders sat several times trying to resolve the parties marital dispute without success. At pre Trial, parties and elders declined Court's proposal of mediation to try to settle the dispute.

#### **Issues:**

6. The issues for determination in this matter are whether or not the plaintiff is entitled to dissolution of marriage, dowry, custody and maintenance of the children.

#### **Divorce**

7. The plaintiff prayer for dissolution of marriage is grounded on the claim of respondent's extra marital affairs with other women, insulting the plaintiff and not maintaining his family. The laws of evidence applicable in this matter under section 6 of the *Kadhi's Court Act*, Cap 11 laws of Kenya is Islamic law of evidence. It provides:

"The law and rules of evidence to be applied in a Kadhi's court shall be those applicable under Muslim law"

8. The burden of proof on any claim lies on the claimant. Qur'an Al Naml:27:64 provides:

"...say produce your proof if you should be truthful".

9. The same is emphasised in Prophetic tradition Hadith narrated by Ibn Abbas [R.A] and reported by Bukhari 3/213 [214], Muslim 5/128, Baihaki 10/252, Nasai' 2/311, Ahmad 1/342, Abu Daud 3619, Al Tirmidhi 251, that the Prophet [PBUH] said: " If people be given only on the basis of their claims they would claim the blood and property of others, but the [onus of] oath is on the defendant." In the version narrated by Ibn Abbas, the prophet [may peace and blessings be upon him] said: 'The onus of proof lies on the plaintiff and the oath is to be taken by the defendant'

10. Under Islamic law of evidence parties' submission or 'evidence in chief' does not qualify as evidence, unless there is admission therein or under cross examination. Only tested documentary or witness evidence has evidentiary value. The plaintiff called two witnesses none of whom gave any evidence regarding defendant's alleged promiscuity, mistreatment or insults. Their evidence was limited to the issue of maintenance. The plaintiff produced a statement dated November 18, 2015 where she alleged the defendant and a lady insulted her. It was allegedly filed with the Police. It is not signed, does not indicate if it was received by the Police department and there is no finding on the issue. Further it is not sufficient to sustain the claim of promiscuity. Under cross examination the plaintiff admitted not having seen the defendant in any relationship with a lady. She claimed to have only see her clothes and that the plaintiff confessed he had a relationship, a claim denied by the plaintiff.

11. The standard of proof required to prove a claim of adultery under Islamic law is above beyond reasonable doubt, it is without any doubt at all. Under Qur'an:24:4 the act must have been witnessed by at least four male witnesses.

"And those who accuse honourable women but bring not four witnesses, scourge them (with) eighty stripes and never (afterward) accept their testimony - They indeed are evil-doers " Quran:24:4

12. I cannot find that the defendant had any extra marital relationship or insulted the plaintiff for lack of evidence.



13. On the ground of lack of adequate maintenance, the plaintiff argues the defendant does had not been providing adequately provide for the children's education and other needs compelling her to take all parental responsibilities relating to children's welfare and education. She produced receipts for school fees for Y, R and A for 2019 [31,500.00; 27,500.00; 62,819.00 respectively]
14. She stated despite severally complaining to elders on this, in 2011, the defendant married another wife, that they were reunited after elders intervention but problems recur and he married another wife who has children from another marriage, that the defendant takes care of despite not providing adequately for his own children. The plaintiff witnesses HJB [PW1] and DKG [PW2] evidence is that the plaintiff complained to them early this year, that despite not providing for his family he went ahead to marry another wife who had children from another marriage, they advised the defendant to take care of his family and to divorce the new wife. It is their evidence that the plaintiff demanded the defendant divorce his new wife if she is to return to him. It is also PW1's evidence that before he had married another wife, they had heard no complaints from the plaintiff about their marital problems, PW2 stated there was one complaint relating to maintenance before he had married another wife.
15. On the other hand the defendant argued he had always provided for his family and produced m-pesa statement for the months of March - August 2019 that indicate he transferred at least Kes 10,000.00 per month to the plaintiff [10,000.00; 17,100.00; 13,900.00; 8,300.00; 17,000.00 and 12,000.00 respectively]. He had also just paid Kes 10,000.00 school fees for Aisha, who studies at [Particulars Withheld] Girls High School, Igoji. He argued the receipts of school fees produced by the plaintiff were paid by her from the money he sent her for the same and that he had been compelled to get loans to educate the children.
16. His Pay slip for August 2019 indicate his total earnings is Kes 72,710.00. He is servicing two Kenya Police Sacco Loans and one commercial loan totalling 1,666,498.00 He also contributes shares monthly to the [Particulars Withheld] cooperative [4,912.00 p.m.]. His total deductions was Kes 54,824.40, Kes 31,066.00 of which goes to loan servicing. He had a net income of 17,885.60 as at the end of August 2019.
17. From the evidence adduced in court it shows both parents have been financially contributing to the welfare of their children, at least since the beginning of this year [2019]. It is also clear there is no sufficient evidence of lack of maintenance in the past [14] years of the party's marriage. What the evidence prove is that since the defendant married another wife early this year, the plaintiff has demanded divorce, either of the other wife or herself and more maintenance from the defendant. Accordingly I cannot find against the defendant on lack of maintenance and provision for his wife and children as a ground for dissolution of marriage.
18. The court took judicial notice of submission on the issue of defendant's marrying another wife. She argued, Islamic law allows Muslim men to marry up to four wives provided they are able to cater for her. She contends, the defendant having to provide for his own family, did not qualify to marry another wife, especially as the other wife had other children of her own. The defendant argued the other wife did not do anything wrong, she has conceived and is expectant. He contends he is prohibited by Shariah from divorcing her to please the plaintiff. He further argued it was the plaintiff's negligence to give him comfort and lack of care of himself and his mother that compelled him to marry another wife. He stated the plaintiff was herself not his first wife and had agreed to the polygamous nature of his marriage.
19. This is a serious question of law that should have been specifically framed for argument and determination. In any case since the parties are lay persons in law, I have a duty to address the same.



20. Islamic law allows, nay encourages Muslim men to marry more than one wife, up to four wives under the provisions of Qur'an:4:3 provided one is able to be just and fair between his wives.  
 'And if you fear that you shall not be able to deal justly with the orphan-girl then marry (other) women of your choice, two, or three or four; but if you fear that you shall not be able to deal justly ( with them) then only one or (the slaves) that your right hands possess. That is nearer to prevent you from doing injustice' Al Nisa': 3
21. Equity is further emphasized in Qur'an:4:129 which directs husbands not to incline too much to only one or some of his wives. He is directed thus to be allocate his resources fairly and justly among his wives.  
 'You will never be able to do perfect justice between wives even if it is your ardent desire, so do not incline too much to one of them ( by giving her more of your time and provision) so as to leave the other hanging (i.e. neither divorced nor married). And if you do justice, and do all that is right and fear Allah by keeping away from all that is wrong, Allah is Ever oft –forgiving, Most merciful' Al Nisa': 129
22. Islam appreciates the arduous task of fairness between wives and that it is impossible to love all wives equally. Muslim men are not required to equally love their wives but to strive as much as possible to be fair in allocation of resources, time and not to be openly biased. The prophet Muhammad [may peace and blessings be upon him] had many wives and was very particular to allocation equal time and resources among his wives. [Bukhari 2/916] in a weak mursal hadith, the prophet [may peace and blessings be upon him] is reported to have said on his treatment of his wives, "O Allah, this is the much I am able to do, so do not blame on what is beyond my effort".
23. Islam prohibits wives to demand their co wives to be divorced in order to remain the only wife to the husband. Abu Huraira [may Allah be pleased be with him] narrated that the prophet [may peace be blessings be upon him said, 'it is not permissible for a wife to demand the divorce of her sister (co wife), she has only what is destined for her'. [Bukhari 5144, Muslim 1413]. Ibn Hajjar and Ibn Battal in commentary of the hadith stated, the term 'it is not permissible] is explicit in denotation of illegality of the act.
24. An Islamic marriage is thus potentially a polygamous marriage provided their is equity in treatment of wives. The cure in the case of claim of lack adequate maintenance is not to demand divorce, but to demand fair treatment. Only when, the husband upon request and directions ,is adamant in unfair treatment, would the wife be entitled to divorce.
25. In the instant case, the plaintiff benefited from her husband being a third wife. If the other wives had demanded the same, she would probably not have been married to the plaintiff. Further for close to almost [14] years they have lived together the challenges of life notwithstanding. Upon finding out the plaintiff was married, she threw him out of the matrimonial home, the staff house where she works.
26. Having found no evidence to support the plaintiff's grounds for dissolution of marriage, I should decline to grant the prayer, which I hereby do. The plaintiff is directed to resume her marital responsibilities towards her husband, the plaintiff herein forthwith.

### **Custody and maintenance**

27. Having declined to dissolve the marriage, the issue of custody of the children does not arise. For avoidance of doubt, the defendant has legal custody of the children while the plaintiff has actual physical custody.



28. The defendant to continue to provide children maintenance including school fees of the children at the current rate of KES 10,000.00 p.m. Maintenance should not be reduced to the detriment of the family on account of marriage of another wife.

This being a family dispute, each party to bear its own costs.

Orders accordingly.

**DATED, SIGNED AND ISSUED AT ISIOLO ON 13<sup>TH</sup> NOVEMBER, 2019**

**HON. ABDULHALIM H. ATHMAN**

**PRINCIPAL KADHI**

**In the presence of:**

**Mr. Adano Roba, Court Assistant**

**Plaintiff**

**Defendant**

