



REPUBLIC OF KENYA

IN THE KADHI'S COURT AT MOYALE

CIVIL CAUSE NO. 40 OF 2017

RAHMA MOHAMED ISACK.....PLAINTIFF

VERSUS

ABDINASIR MOHAMED JILLO.....DEFENDANT

J U D G E M E N T

1.This is a civil cause filed by one **Rahma Mohamed Isack** (herein after 'the Plaintiff') against one **Abdinasir Mohamed Jillo** (herein after 'the Defendant') on 11th Dec, 2017 for an order for the custody of the issue of the marriage, an order for the maintenance of the issue of the marriage, and other reliefs this court may grant.

2.The background is that the Plaintiff Marriage to the Defendant was conducted on relevant date in the year 2015 in Moyale Sub county under the provisions of Islamic law.

3. The parties are no longer married together they have divorced each other, during their marriage union was blessed with one (1) issue who is one and half years old and plaintiff is expectant with second child .

4.On 2nd Jan 2018, the Defendant filed an answer to the plaint wherein he denied the allegation brought against him by the plaintiff but agreed on the fact that they married in the year 2015 and was blessed with one issue and they expecting second child.

5. At the trial both parties testified on oath and choose not to call any witness, the plaintiff in her oral submission lamented that the defendant after divorcing her took away from her their minor child and denying her access to the child despite her effort through elders to persuade the defendant to allow her the custody of the minor.

6.The plaintiff closed her submissions by stating that she wanted to be granted the custody of the minor and the maintenance of ksh 9000/= the defendant is man of means, since she is expecting Defendant second child.

7. The defendant in his submissions in response stated that after he divorced the plaintiff, a meeting was convened and it was agreed that the defendant should provide an upkeep of ksh 4000/= every month until the plaintiff delivers their expected child and ksh 2000/= for rent every month, he further avers that he has paid the ksh 4000/= only but failed to pay the ksh 2000/= meant for rent since the plaintiff failed to rent a house as greed.

8.The defendant in his closing submission stated that he retained his child because he believes that he can accord a better care than the plaintiff.

9. I have considered the submissions of both the plaintiff and the Defendant, and have also perused the entire records before the court, the question which therefore, fall for my consideration is:

i. who has more right to custody of a child.

ii. the duty of upkeep of the issue of the marriage and the maintenance of the expectant mother.

10.On the issue of custody the plaintiff argued that on a virtue of being a mother and the involved child is in her tender age (one and half years) who need close supervision and care she deserved right to custody.

11. The defendant also lamented that he deserve right to custody than the plaintiff because she is not responsible mother, but no proof was recorded to that effect.

12. In Islam women have more right to custody of children than men, because generally they are more compassionate and more kind ,and

they know better how to raise small children, and they are more patient in dealing with difficulties involved.

13. The condition of custody are ; being accountable (i.e an adult of sound mind) being of good character, and being able to fulfill all obligation towards the child, therefore since there no evidence on record was adduced by the defendant to challenge the aforementioned condition showing that the plaintiff does not meet the above threshold, the right to custody is hereby restored and granted to the plaintiff.

14. The court attention was drawn to the following authorities;

i) Al-Bayhaquees' ' 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.”

ii)Hadith; A woman came to the prophet and said; 'O messenger of Allah ! I carried my son in my womb, suckled him my breasts and held him on my lamp; yet his father has divorced me and wants to take him away from me. The Prophet replied; 'you have more right to him as long as you do not re-marry'

15. As regards to the maintenance of the issue of marriage ,the financial support of any children – both during marriage or after divorce – rest solely with the father. This is the children right upon their father, therefore the children entitled to maintenance following evidence from the Quran, the prophet’s traditions and logical reasoning.

16. Evidence from the Quran

(a) “The duty of feeding and clothing nursing mothers in a seemly manner is upon the father of the child. No one should be charged beyond his capacity. A mother should not be made to suffer because of her child, nor should he to whom the child is born (be made to suffer) because of his child. And on the (father’s) heir is incumbent the like of that (which was incumbent on the father). 2:233

This verse provides the evidence that the duty of maintaining the child falls upon the father for two reasons

(1) Allah the almighty makes it the father’s duty to provide food and clothing for the mother and the style used in this verse confirms this duty because of the child. Therefore, if the child’s mother is entitled to maintenance, the child is all the more entitled to it.

(2) The child belongs to the father, for this verse makes it clear that child maintenance is the father’s duty.

17. Evidence from the Sunnah

The prophet’s sunnah is replete with traditions which command child maintenance, the following are some of these traditions

(a) “Aaishah (may Allah be pleased with her) narrated that Hind Bint Utbah, the wife of Abu Sufyaan, came the messenger of Allah (may Allah bless him grant him peace) and said “messenger of Allah, abu Sufyaan is tight-sited man who does not spend enough on me or my children except for what I take from his wealth without his knowledge. Is there any sin on me for doing so? The prophet replied, take only what is sufficient for you and your children on a reasonable basis”.

Saheeh-Al Bukhaari Book of supporting family, hadeeth no.5049, 5/2025.

This tradition shows that the prophet (may Allah bless him and grant him peace) allowed Hind bint Utbah to take what was sufficient for her children from her husband on a reasonable basis even without his permission. If were child maintenance not the father’s duty, the prophet (may Allah bless him and grant him peace) would not have allowed her to do so.

(b) Abu Hurayrah (may Allah be pleased with him) narrated, “the prophet (may Allah bless him and grant him peace) commanded (us) to give charity. A man said, “messenger of Allah, I have ddinaar”. He said, spend it on yourself, ‘ He again said, I have another”. He said ‘spend it on your children’. He again said ‘I have another’, he said, ‘spend it on your servant’. He finally said ‘I have another’. He replied, ‘you know best (what to do with it). This narration indicates that the prophet (P.B.U.H) commands spending on children after spending on others before one’s relatives is definitely not the right thing to do. It also shows that spending in this case is obligatory unless something prevail one from doing so.

18. Unanimous Agreement of muslim scholars.

Muslim scholars are generally agreed that maintaining children who have no wealth or sources of income is the duty of their father’s.

19. Logical Reasoning

(a) Spending when the need arises is a form of saving life, a child is a part of the father, and thus saving his life is obligatory just as saving his own life is obligatory, hence the father’s duty to spend on his children.

(b) The father-child relationship must be maintained and severing such a relationship is forbidden in Islam, according to the consensus of muslim scholars, spending on one’s children is a form of maintaining such a relationship.

(c) Spending on one's children is a form of kindness which Allah commands His servant to observe. A father is therefore duty-bound to show kindness to his dependant by spending on them, an act for which he will be rewarded in this life before the hereafter as Quran states

Therefore, the form of maintenance a father must provide for his children consist of three basic types, which constitute necessities, that one must have cannot possibly manage without which is food , drink, clothing and shelter, maintenance also include other types such as medical treatment and education.

21. The defendant is an employee of county government of Marsabit as registered nurse and man of means has ability financially to maintain his dependant.

22. To conclude, I hereby grant right to custody to the plaintiff, and defendant has right to access to the child, lastly I order the defendant to contribute monthly towards the upkeep of the child and maintenance of the expectant mother (the plaintiff) ksh 8000/=

23 As to costs, I order that each parties will bear their respective costs.

Dated and delivered at moyale on 12th February, 2018

A. D WAKO.

SENIOR RESIDENT KADHI.

MOYALE LAW COURTS.