



REPUBLIC OF KENYA

IN THE KADHI'S COURT AT GARBATULLA

KCDC NO. 6 OF 2018

TJ ..... PETITIONER

VERSUS

AA..... RESPONDENT

JUDGEMENT

INTRODUCTION

1. This petition sought for: i) dissolution of marriage, ii) house hold utensils, iii) any other relief. The petitioner based her prayers on the claims that the respondent fed her together with his sister from the same pot who implied that she (the petitioner) cannot attend to the domestic chores which according to her was not true. She further alleged that the respondent was reckless, careless, and irresponsible, chews miraa and does not provide for maintenance. She also claims of beatings that made her to move to Sericho. She also claims that she married to a stranger without the consent of her parents as she was brain washed by a woman related to the respondent.

2. The respondent enters appearance and filed response against the allegations, in which he admits the marriage, the dowry paid and that no child was blessed as result of this marriage. He denies all the other allegations including feeding the petitioner from the same pot with his mother and sister. Not being a stranger, reckless, careless, and irresponsible and not that he does provide for maintenance.

3. Wherefore, the respondent also prays for:

- i) None dissolution of the marriage,
- ii) Return of the petitioner,
- iii) Orders to restrain external interferences,
- iv) Any further relief.

4. Both the parties in this suit were married in accordance to Islamic shariah in the year 2015 at a dowry of one cow which was paid in form of cash money kshs 26000. They made their home at [particulars withheld] of Wajir County at the respondent's residence, until the year 2016 in the month of April, when the petitioner ran away due to family disputes involving his mother and sister. Their marriage was not blessed with any child. They submit to this court for just determination of the matter, thus issues to be address herein are:

- i) Whether the respondent was reckless, careless, and irresponsible? Whether he chews miraa

and does not provide for maintenances?

ii) Whether the respondent fed the petitioner together with his sister?

iii) Whether the respondent smokes Bhang hence beats the petitioner? Whether she ran away due to the beatings?

iv) Whether the respondent made follow up the matter for resolution to the petitioners home at Sericho? Whether he was chased away as a result of follow up?

## SUBMISSION

The petitioner's case

5. On 12<sup>th</sup> July 2018, the matter went on hearing; both parties submit and adduced evidences orally. The petitioner testified that she joined the marriage on 19<sup>th</sup> September 2015, contrarily to the date she mentioned in the petition paper on filling, which was recorded as 30<sup>th</sup> July 2015. She states that the nikah was conducted in [particulars withheld] and later on the marriage ceremony held at Sericho, although they were on later moved to reside in [particulars withheld] at the respondent's residence.

She avers that the respondent housed her in the same plot together with his mother and sister, but in different rooms, they share the same pot, sometime she cook and most of the time they cook. After sometime, she demand to prefer cooking alone, but she avers that the respondent refused the idea of separation from his mother and sister.

She mentioned another problem that the respondent chew miraa, which according to her testimony, an issue she got to know on the day she decided to follow him for the marriage, before she enter nikah (marriage contract) with him. She admits to have seen his teeth were destroyed as a result of chewing miraa. She also complained of him smoking bang, and beats her which was her main problem that cost her to run away from him, without taking her utensils, that was on 6<sup>th</sup> April 2016.

She further said that the respondent stayed for two months after which he came to resolve the matter with the elders, the wrong was found on his side who apologized, although she was not there at the moment to know the end result of the meeting. She finally submits to seek for dissolution of the marriage and return of her household items.

6. The petitioner presented witness PW2 an old person who is a neighbor at [particulars withheld] testified in court, he was in the company of the petitioner and the respondent when they got married, who involved in solving the dispute between the petitioner and the respondent on cooking and the issue concerning the food. Finally, he states that they were separated, the cooking and the kitchen, but on later the petitioner ran away to Sericho. Pw2 deny seeing the respondent smoking Bhang, he testified never saw the Bhang and how it looks like.

The Respondent's case

7. The respondent testified in court, he deny all the allegations concerning being reckless, careless and irresponsible, smoking the bhang and beating the petitioner until she ran away. The petitioner says that he doesn't understand what she means by being married by a stranger when they got into the marriage upon knowing each other after few days. He also deny none provision of maintenance, hence he challenge her asking, who else apart from him was providing her all the time she has been there since they join marriage? He termed that the petitioner was not real in her claims. Despite, he further admits to combine the petitioner, his mother and sister in cooking and feeding from the same pot, on first time, but later on owing to her demand he separated the petitioner to cook alone. He bought for her separate utensils and food staff except that she decided to ran away after he even meet her demand.

8. The respondent submits that his sister and the petitioner had disagreement over a small issue of Henna used by women to decorate themselves, that which led to fighting. On this time, he supported the petitioner against his sister, but the petitioner left him unexpected to Sericho, hence he made effort to resolve the matter through the elders four times but she refused to go back. On one time he was chased away together with his elders, he has even pleaded with them so as to get the petitioner back, but all were in vain. He avers that his efforts were fruitless because the petitioner refused and even made for him difficult to visit her at Sericho. Likewise, sending maintenance was a problem to him. The respondent finally submits that he prays for return of his wife (the petitioner), since he loves her, and if the petitioner is not willing to resume matrimonial home he demand for compensation from the petitioner so as he divorces her.

### ANALYSIS

9. From the evidences adduced herein, it is not in disputes, that the parties were Muslims married sometimes in the year 2015, in accordance to Islamic practice. It was to the consent of both and that of their parents, the marriage ceremony conducted at Sericho, the petitioner's home residence.

10. Nothing was strange to the petitioner concerning the respondent; it was not hidden from her that the respondent chews and operates miraa business at the time she enters the marriage contract with the respondent. The petitioner was aware of the issue him chewing mirraa, and has no reason to claim on issue of miraa chewing by the respondent, she knew about it on before when she engaged with him in this marriage.

11. The petitioner did not present evidence to proof the claims on the respondent being reckless, careless, and irresponsible and does not provide for the maintenance of the petitioner. She did not also proof her allegations on smoking Bhang and beatings by the respondent, since she did not prove sufficiently to the fact that the respondent smokes bhang and beats her often.

12. As well it is clear that the parties had disagreement while at [particulars withheld] on issue of combine cooking between the petitioner and the respondent's mother and sister, but which was resolved to separate the petitioner alone. Despite, the petitioner decided, to run away after even her demand was realized. The question is whether the petitioner was justified to leave matrimonial home, after even her demand to separate cooking and kitchen from the respondent's mother and sister was realized? As this one of the claims came before the elders and was resolved, she had no reasonable cause to warrant her move based on this specific claim and which was resolved. Therefore, I find no convincing grounds to believe the petitioner is justified to leave away matrimonial home.

13. According to the records, the respondent's mother, had two children; the respondent as her only son and an unmarried daughter. The respondent's mother testified that she loves the petitioner because she is the wife of her only son respondent. She further averred that she does not want the petitioner to do all the home duty alone that is why they combine the cooking, so as they can help her. The petitioner throughout the proceeding did not mention any dislike from the respondent's side.

### DETERMINATION

14. Finally, it is my view that the petitioner's move to run away from matrimonial home and she had not satisfactorily present sufficient grounds to warrant her desertion, hence, she shown disobedience and willful defiance. She did not seek further resolution, which the respondent sought on several times through the elders. By doing this the petitioner had committed sin, wherefore she forfeits her right of maintenance, so long she has no valid excuse.

15. It would have been wise if the petitioner's parent welcomed the respondent for discussion to solve the matter amicably, instead of chasing him away, since nowhere in the records that the petitioner's parents well received the idea to solve the matter.

Allaah Says (what means):

***{And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allaah Will Cause it between them.}*** [Quran 4:35]

16. However, now that the petitioner had refused to resume matrimonial home, she has the option to free herself out of the marriage bond upon refund, if the respondent accept to take the refund. This is on khul'a divorce, as provided by Islamic shariah that the spouses to resort to divorce in return for compensation by the wife to the husband, if there is no harmony between them, such that there is no hope for them to live a happy life.

**17. The Prophet (peace be upon him) said to the wife of Thabit bin Qais ;**

**"Will you return his garden?" She said, "Yes", and then the Prophet (peace be upon him) ordered Thabit to accept the garden and divorce her." [Reported by Imam al-Bukhari ].**

This indicates that Islam provides rights and freedom to stay in marriage.

18. In this instant case, the petitioner, if she does not want to resume her husband (respondent), she has to refund the dowry of one cow which was paid to her or equivalent amount in Kenya shillings at the current market price be paid to the respondent.

19. She also has to compensate the petitioner by paying refund of the expenses he incurred during the conduct of this marriage, which includes; the token money which were paid on demand during engagement for this marriage, together with refunds of other items which were paid by the respondent. Since this marriage not blessed with any child, and the cause of the problems were mostly from the part of the petitioner.

20. But in case the parties herein resolve to return back to their marriage, after the divorce on khul'a, then most scholars held that the husband cannot take back the wife after it, except with a new marriage contract. They can only do it with a new nikah before the idda expires, which can be done in the same marital home, they do not have to inform other family members. It is a condition that the petitioner's wali and two witnesses be present when conducting new nikah.

21. Also the petitioner shall pay cost of the suit.

22. That all the payment will be made after assessment being made in court.

23. Orders accordingly.

Dated and delivered at Garbatulla in open court on the .8<sup>TH</sup> day of August.,2018.

By G. ADAN – Senior Resident Kadhi

In the Presence of :

1. Court Assistant – Guyo A. Guyo
2. Petitioner – Tanu Jaldesa
3. Respondent – Abdikadir Abdi