



**H S v K A (Divorce Cause 22 of 2018) [2018] KEKC 34 (KLR) (4 September 2018) (Judgment)**

*HS v KA [2018] eKLR*

Neutral citation: [2018] KEKC 34 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT ISIOLO  
DIVORCE CAUSE 22 OF 2018  
AH ATHMAN, PK  
SEPTEMBER 4, 2018**

**BETWEEN**

**HS ..... PLAINTIFF**

**AND**

**KA ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff seeks dissolution of the marriage, custody and maintenance of the minor children. She claims is the defendant has a female friend in Mombasa who he claims is better than her, insults and has attempted to strangle her. She further claims the dowry was not paid.
2. The defendant through his defence denies the petitioner's claims and opposes the prayer for divorce.

**Facts**

3. The parties were married under Islamic law in Isiolo in 2012. The plaintiff is not employed while the defendant is an officer [particulars withheld] based in Mombasa. The parties are blessed with one issue from their wedlock: MK aged [5]. The defendant has six other children from another marriage who are being taken care of by the plaintiff.

**Issues**

4. The issue for determination in this matter are whether or not the plaintiff is entitled to divorce and if the marriage should be dissolved the issue of dowry, children custody and maintenance.

**Divorce**

5. The Imam of [Particulars Withheld] - Mombasa and elders tried to reconcile parties without success. The court, at pre trial, also attempted reconciling the parties but was not successful either. While the



defendant apologised and was ready to have his wife back, the plaintiff would hear nothing of it and insisted on divorce. The matter proceeded to full hearing.

6. The plaintiff reiterated under oath that the defendant told him he has another lady who was better than her, that she travelled to Mombasa and saw the lady, that he accepted before the Imam of [Particulars Withheld] that he had a relationship with the lady but he refused to divorce her despite her request.
7. The plaintiff called no witness or filed any documentary evidence to support her claim.
8. The defendant admitted insulting the plaintiff but apologised and stated it was because she had travelled all the way to Mombasa without informing her and when she arrived she slept at a colleague [a married man] house for two days instead of staying at his house. He stated that since January she has been evading her and denied her conjugal rights. He denied that he has any relationship with any lady or that she saw him with any lady. He argued that the plaintiff has refused elders' and Imam of [Particulars Withheld]'s advice to return to her husband insisting on divorce despite severally apologising to her.

### **Analysis**

9. The plaintiff produced called no witness or produced any document in support of her case. It is clear from her own testimony that she did not see the defendant with any lady. Again from her own testimony the lady in Mombasa alleged to having a relationship with the defendant only stated she knew the defendant and she was told by another person that she is the lady the defendant has a relationship with. The identity and evidence of which was not given in court. There is no evidence at all to support to support her claims of defendant's infidelity. It is trite law that the claimant has the burden to support her claim.

"...say produce your proof if you should be truthful". Qur'an Al Naml:27:64

Ibn Abbas [R.A.] narrated that the prophet PBUH] said: 'The onus of proof lies on the plaintiff and the oath is to be taken by the defendant'. Reported by Bukhari [4552], Muslim [1/1711], Al Baihaki [10/252]

10. The plaintiff's prayer for dissolution of marriage cannot be granted for lack of evidence. The court is however cognisant of the reality that two human beings cannot be forced to forced to live together. Marriage cannot be forced at the onset. Islam envisages that couples may have during their marriage differences that negate the very objective of marriage and provided for divorce and khul'u. However the instrument must be exercised with discretion and caution.
11. In the instant case, the plaintiff is clearly temperamental. She is rightly angered by defendant's insults but her lack of forgiveness despite numerous apologies by defendant is to the say least unwarranted. She is vengeful and taking advantage of defendant's appreciation of her good care of his children from another marriage. The divorce will have negative impact on the couple and all the children. This is why, while the court appreciates it cannot force her to remain in the marriage, it requests her to re-consider the ramification of her action. Allah will not be compassionate to one who does not show mercy on others especially those that are vulnerable.

Having found no evidence to support grounds for dissolution of marriage, the prayer is rejected. The parties are directed to reconcile and observe their matrimonial vows and invest in improving their marriage. The plaintiff is at liberty, in the event the marriage still does not work, to apply for Khul'u after three months from date hereof.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ISIOLO ON 4TH SEPTEMBER 2018.**



**ABDULHALIM H. ATHMAN**

**PRINCIPAL KADHI**

**In the presence of**

Mr. Mohamed Nur Jattan, Court Assistant

Plaintiff

Defendant

