



**S M H v A H A (Divorce Cause 20 of 2018)  
[2018] KEKC 37 (KLR) (20 November 2018) (Judgment)**

*S M H v A H A [2018] eKLR*

Neutral citation: [2018] KEKC 37 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT ISIOLO  
DIVORCE CAUSE 20 OF 2018  
AH ATHMAN, PK  
NOVEMBER 20, 2018**

**BETWEEN**

**SMH ..... PLAINTIFF**

**AND**

**AHA ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff prays for dissolution of her marriage to the defendant and payment of dowry. She claims they have separated for three years and the defendant does not care for or provide sustenance and medication to his children. She claims the dowry was not paid.
2. The defendant did not enter appearance or file defence. He however participated in the trial. He wanted to call his witnesses but failed to attend or avail them on the scheduled session set in court in his presence. On plaintiff's application, his case was closed and judgment date set.
3. The parties were married under Islamic law in 1991. Theirs is a [27] year marriage. They are blessed with eleven children from their legal wedlock, six of whom are minors. The plaintiff is a [38] young lady while the defendant is [61] year old man. Their plaintiff hails from Wabera - Isiolo while the defendant is from Merti. They were living in Mbarambate in Garbatulla. The couple like any family has had disputes that severally were deliberated by elders and resolved. Seeing this is an old marriage and one of the daughters was already affected as a result of the separation I urged reconciliation and referred them back to elders for arbitration. Unfortunately it bore no fruit and the trial had to proceed.

**Issues**

4. The main issue for determination in this matter is whether or not the plaintiff is entitled to divorce and dowry.



## Divorce

5. The plaintiff under oath stated that the defendant did not pay the dowry of two cows but she is willing to relinquish it if it is the only way to get her divorce. She stated that the defendant is cruel and attempted to kill her, that he insults her calling her a prostitute and severally assaults her compelling her to leave the matrimonial home but she has returned because of the children. Under cross examination it is apparent the defendant caused the plaintiff to be arrested by the police, a fact that broke the camel's back, as it were.
6. IHI [PW1] , testified that as an elder he heard parties dispute many times over his assaulting and attempting to kill her, that several times they returned the plaintiff to the defendant but the problems persisted. He further stated the defendant had the plaintiff imprisoned.
7. MAH [PW2] testified that the defendant refused to take care of treatment of his sick child. His evidence regarding the defendant causing the plaintiff to be imprisoned is not admissible as it is hearsay.
8. The defendant stated that the plaintiff denied him his conjugal rights claiming he is not Muslim and admitted that many times they had disputes where the plaintiff returned to her relatives and elders were able to reconcile them but she has now refused to return to the matrimonial home. He claimed the elders want to break their marriage and that if she insist for divorce, she should refund the dowry, the children and costs of the case but is still desirable to get his wife back as he loves her and his children. Under cross examination he admitted to have informed the police that she told him she knew about a boy from the Sekuye clan who was murdered and had requested them to interrogate her but not to arrest her.
7. The plaintiff has proven her case on the balance of probability, the required standard in civil matter, of existence of irreconcilable differences . Her witness and defendant 's admission of mistreatment and assaulting proves this as fact. The final straw, however, was the report the defendant made to the police that cause her to be arrested. This enraged the plaintiff and her relatives making reconciliation this time around extremely difficult.
8. Assault and mistreatment of wives offends fundamental rights of a wife under the law. It is inhumane and illegal.
9. The following hadith prohibit harm on any person especially a spouse.  
Narrated Abu Said Al Khudry [R.A] that the Prophet [PBUH] said: 'there shall be no infliction of harm on oneself or others' or 'there should be no harming or reciprocating harm' reported by Ibn Maja [2341], Al Dar Al Qutny [4/228] and Malik in his Muwatta' through Amr Ibn Yahya [2/746]
10. Article 87 of the [\*Islamic Charter on Family ICF\*](#) provide:  

"If the wife has been harmed by her husband to an extent that would be impossible for most people similar to them to continue marital relationship under such circumstances, then she shall have right to ask for divorce. If her husband refuses to divorce her, she can raise her case to the judge. If the harm is proven, then the judge shall rule in her favor thereby divorcing her from her husband..."
11. In the instant case, the defendant is a [38] years old lady. The parties have separated for close to three years, contrary to Islamic law, due to mistreatment and assault by the plaintiff and their differences are irreconcilable. She is, I find and hold, entitled to divorce. Accordingly I grant her prayer for dissolution of marriage. The parties' marriage be and is hereby declared dissolved with effect from November 20, 2018 corresponding with 12th Rabiul Thani 1440 A.H. Divorce certificate to issue.



## Dowry

12. The plaintiff submitted her dowry was two cows and was not paid. The defendant on his part claimed it was one cow and he had paid it. PW1 supported plaintiff's claim that it was two cows and had not been paid. Under cross examination the defendant stated the one cow is available in his boma. No marriage certificate was produced, it would have settled the issue. In the circumstances and based on defendant's admission, clearly the dowry was not handed to the plaintiff. Accordingly we find and hold that the dowry was two cows, not paid.
13. Under Islamic law dowry is an inherent and basic right of the wife.  
You [believers] are of one another. So marry them with the permission of their people and give them their due compensation (i.e mahr) according to what is acceptable. [They should be] chaste, neither [of] those who commit unlawful intercourse randomly nor those who take [secret lovers]. Nisa:4:25
14. The Prophet [may peace be upon him] said: 'the greatest sin before Allah is a person who married a lady and after fulfilling his desires divorced her and did not give her her dowry, and a person who engaged a worker and did not give him his dues and another who kills an animal in vain'. Reported by Al Hakim and Baihaki. Certified as correct by Al Albany.
15. The defendant to hand over the plaintiff's dowry of two cows. The area chief - Merti to supervise and confirm the handover.

## Custody

16. Section 83 (1), of the *Children's Act*, Cap 141 laws of Kenya provide:  
In determining whether or not custody order should be made in favour of the applicant, the court shall have regard to:
  - (e) whether the child has suffered any harm or is likely to suffer any harm if the order is not made
  - (j) the best interest of the child.
17. The general rule is that the mother has priority to custody of minor children. Article 106 [1] of the *Islamic Charter on family* provide:  
The child shall have the right to have someone to take charge of his custody, to care for and raise him and to provide for his physical and psychological needs. The mother has the greatest right to custody of the child according to Islamic Shariah.
18. The general principle regarding custody of minor children is that unless there exist peculiar and special circumstances, the mother has priority. In *Mehrunisa v Pravez* (1982-88) 1 KAR 18 the Court of Appeal stated:  
"The general principle of law is that custody of such children shall be awarded the mother unless special or peculiar circumstances exist to disqualify her from being awarded custody'.
19. The custody of the two minor children B and H is granted to the plaintiff, the defendant to get reasonable access. The defendant to provide for the children's reasonable upkeep and education.
20. No orders as to costs .
21. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ISIOLO ON 20TH NOVEMBER, 2018.**



**ABDULHALIM H. ATHMAN**

**PRINCIPAL KADHI**

In the presence of

Mr. Mohamed Jattan, Court assistant

Plaintiff.

Defendant

