



REPUBLIC OF KENYA

IN THE KADHIS COURT

AT KISUMU

DIVORCE CASE NO. 14 OF 2018

HAA.....PETITIONER

V E R S U S

JOG.....DEFENDANT

J U D G M E N T

Introduction

1. This matter before me relates to the perennial war between husband and wife over divorce. This matter came before me seeking on advisory opinion on how to reconcile the prolonged misunderstanding between the petitioner one HAA and JOG. It was brought by the respondent. After the court ordered for arbitration the petitioner rejected and brought this current matter seeking mainly divorce and other ancillary reliefs.

2. The background information of the couple dates back to 15th April, 2010 when they were solemnized in Marriage in accordance with Islamic Law in Mombasa. The agreed upon Mahr was Kshs. 50, 0000/= not paid until the filing of this matter.

3. They were blessed with two children namely.

4. (I) HJ – 8 years

5. (ii) AJ – 3 years

6. The petitioner claims against the respondent included.

(a). Irresponsibility, drunkenness, miraa chewing, beating, unfaithfulness and violent.

(b) In company of bad friends he is working and has business but do not provide at will save from pressure by the petitioner. He is stingy and self-centered/ selfish.

(c) He spends alone on children to a tune of Ksh. 15,000/= the respondent is not bothered does not assist.

7. The respondent filed his response on 23/10/2018. He also filed a counter claim. He denied all the allegations.

(a) He averred that he had paid Kshs. 10,000 part of the Mahr.

(b) He particularly denied being drunk, unfaithful, and averred that as a matter of fact the petitioner taught him chewing miraa and she is the one who hangs out with women friends and returned home drunk.

(c) He averred that the petitioner is the one unfaithful and that is why she is insisting on divorce.

(d) That he has been sending her money infarct on 22/8/2018 he sent Kshs. 5,000/= which was planning to file divorce. The petitioner secured a job and was expected to settle urgent bills at the at the respondent's pay delayed.

(e). the petitioner refused to stay at the house that had been search and kept the children at her parents on her own. She has no right

to ask for provision while she stays away from the children.

(f) Out of fatherly love the respondent he always sends Kshs. 1000/= on need and demand.

(g). the petitioner is arrogant and disrespectful leaves the house without permission and travels alone to any place without information.

(I) Effort by the respondent bore no fruits as they fell on deaf ears of parents, relatives brothers and herself.

8. He elaborated other particulars of cruelty. They include physical abuse, brutality and uncaring attitude, engaging in extra marital affairs with other men, denial of conjugal rights from May 2018, and denial of freedom to reside in the matrimonial home. Failure to provide wifely love and motherly love to the children, harassment in public and before the family and relatives, treating the respondent with contempt.

The Respondents counter claim was for:

(a) The dismissal of the petition.

(b) Return the children to Kisumu in case she insists on divorce.

(c) Maintaining that she must be divorced he requests for the leave to pay in installment the remaining Mahr and any other.

9. This matter came up for hearing on 29/10/2018. The petitioner reiterates her petition. She only insisted that her main objective in court was for the respondent to divorce her. That she had, had enough of the accusations and unstable relationship between her and he estranged husband. Their marriage was mired by mistrust which is not essential for the continuity of the said marriage. She had informed the court that she had already quit her work due to the fact that the respondent husband had joined her at her station. She contended that the marriage between her and the husband was over since June 2018. Their love had ended long time ago that Jamal should accept divorce her and move on.

10. The petitioner called one witness. **PW1** The brother Abdallah Ahmed Abdul Rahim. He took notice that he was not ready to be a witness of divorce. That he was not aware of the problems causing the crumbling of the marriage. He narrated to court that the two have had problems and differences which was settled by the indulgence of the parents and the couple re – united though the sister left the child at his mother and started working. He agreed that the two had raised imminent issues which he doesn't want to be witness to their divorce.

11. The respondent testified and called two witnesses. He denied all the accusation/allegations leveled against him. He reiterated his defence. He informed the court that the petitioner had turned uncooperative took the children away without his permission. She had become unfaithful, infidelity came up from her that through reliable and authentic sources he had established she was moving around with the supervisor and later the contractor.

12. Then he averred that he was ready to do anything to salvage the marriage only if the petitioner was ready but he was beaten and would agree to divorce if the petitioner would buy the divorce from him. She completely defied her pleas to let go and start up another life.

13. He called two witnesses **DW1**- T K – A brother who had stayed with the couple for some time in Kisumu and Nairobi. He informed the court that the two married happily stayed happily but the problems commenced when the petitioner left home with all the belongings to stay at her parent's for a year. They resolved she returned was given work and started staying at Oyugis. He insisted that the petitioner had become unfaithful she began a relations with the inspector and when they informed the brother he ignored. She later moved with the sub – contractor called Abdulmalik consultancy and the information was all over the company.

14. **DW2** The cousin expressed how the two met loved each other and stayed well blissfully. The court should consider that they have children and they can make up the misunderstanding.

15. The respondent as stated herein above approached the court in an effort to salvage the marriage on 29/5/2018. We order for arbitration but it was not possible as the petitioner adamantly asked us to dissolve the marriage which could not be done in an advisory opinion sought. She later on 22/8/2018 filed the divorce matter. This is the proceeding on record.

16. The petitioner is seeking dissolution of marriage The issues for determination in this case will then be:- on the grounds of Cruelty, Adultery and irresponsibility committed by the Respondent during the subsistence of the marriage on cruelty and other abuses at first. Precisely, the petitioner testified that the Respondent is a compulsive drunkard and severally physically and verbally assaulting her. She further testified that the Respondent has failed to provide to substantially maintain her and the issues of marriage. He does not care for the wellbeing of the children both medical and education wise. The whole duty has been left to her while he is in gainful employment. Turning to allegation of adultery, the petitioner testified that when the defendant is unfaithful, he went to Nairobi and spent time with other women.

17. In response to the Petitioner's complainants the Respondent filed a defence. In the defence the Respondent denies the accusation brought against him by the petitioner. However, acknowledges the existence of matrimonial rift, between him and the petitioner but he described them as minor and capable of resolution. The Respondent acknowledges the content of paragraph 3 but he stated that the dowry agreed was Kshs. 50,000/= and he paid Kshs.10, 000/= as part of Mahr to the petitioner. The Respondent declares his love to his wife and children and prays to court to dismiss the petitioners and order to go back to her matrimonial home or buy out her divorce.

18. Grounds of divorce under Islamic law; a) Absence of husband, Where the husband has deserted his wife, the wife is also entitled on application and proof, to dissolution of the marriage. Scholars differ on the period of desertion from four years, two and one year. b) Failure

or inability to maintain. It is the responsibility of husbands to provide for their wife according to their means. Right to provision is considered fundamental. It is primary and more important than conjugal rights where the wife can be patient for months or years but one cannot last a month without sustenance. **Men are protectors and maintainers of women, because Allah has made one of them to excel the other, and because they spend (to support them) from their means...**” Nisa: 4:34 ...and they (women) have rights (over their husbands as regards living expenses) similar (to those of their husbands) over them (as regards obedience and respect) to what is reasonable, but men have a degree (of responsibility over them. And Allah is All Mighty, All Wise. Baqarah: 2: 228 Muawiyya al Qushairiy reported that his father asked the Prophet: **What are the rights of our wives on their husbands?” The Prophet (PBUH) said: “Feed her when you eat and clothe her when you clothe yourself, do not beat her face and do not migrate (stay away from her) except (if it be necessary) in the (same) house.”**

19. Reported by Imams Ahmad, Abu Daud, Nasaiy; ref: Subulul Salam vol. 3 pp 220 Abu zanad was reported to have asked Saeed Ibn Musaib for a ruling on a person has no ability to provide for his wife, could they be separated? Ibn Musaib said ‘yes’. Abu Zanad asked whether that was sunnah. Ibn Musaib said ‘yes it is sunnah to separate such couple. Al Zuhaily, Fiqh Al Islami wa Addillatuhu 9/7042- 7045. Imprisonment of a husband, Impotency of husband, Insanity, leprosy or venereal disease, Repudiation of marriage by wife,

20. **Cruelty of husband.** A Muslim woman can seek a decree of divorce associated to her husbands’ cruelty. Insults, physical or psychological assaults are not allowed in marriage. Husbands are enjoined to treat their wives with honor, love and affection. **o you who believe! You are forbidden to inherit women against their will; and you should not treat them with harshness, that you may take away part of the mahr you have given them, unless they commit open illegal sexual intercourse; and live with them honourably. If you dislike them, it may be that you dislike a thing and Allah brings through it a great deal of good. Qur’an:Nisa: 4:19 S...and when you have divorced women and they have fulfilled their term of prescribed period, either take them back on reasonable basis or set them free on reasonable basis. But do not take them back to hurt them and whoever does that then he has wronged himself; and treat not the verses (laws) of Allah as a jest, but remember Allah’s favours on you (i.e. Islam) and that which He has sent down to you of the book (i.e. the Qur’an) and Al Hikmah (the prophet’s Sunnah- legal ways; Islamic jurisprudence) whereby He instructs you. And fear Allah, and know that Allah is All aware of everything.’ Al Baqarah: 231** ‘Narrated Ibn Abbas (R.A.) that the Prophet (Pbuh) said: **“(initiating) harm or (reciprocating in) harm is prohibited (in Islam).** The Hadith is reported by Imams Malik (Al Muwatta’ vol 2. pp 352), Ahmad (Al Musnad pp 239 hadith No. 6865), Baihaki (Sunanul Kubra vol. 6 pp 257 hadith no. 1909) Some men have intentionally misapprehended Qur’an: Nisa 4: 34 **So Good women are obedient guarding in secret that which Allah hath guarded. As for those whom ye fear rebellion, admonish them, and banish them to beds apart, and scourge them. Then if they obey you, seek not away against them. Lo! Allah is ever High, Exalted, Great To** mean permission to beat their wives. The Qur’an must not be interpreted literally but as interpreted by Prophet [PBUH] and the companions and early scholars. Al Qurtuby in his commentary on the verse said: **“beat them lightly, a beating that leaves no mark on them”** Al Qurtuby vol.3 pp 121. **Ata’ said, ‘I asked Ibn Abbas what “beat them lightly” means’ Ibn Abbas said : “ to beat with a light object like a toothbrush”** The prophet [PBUH] is reported to have said **Fear Allah in your wives for you take them in trust with Allah and they become lawful to you through Allah’s covenant and they are obliged to not bring any body in your house whom you dislike, if they do beat them lightly...Narrated by Jabir al Tawil, reported by Imam Muslim.** The prophet (PBUH) said: **“blessed is the man who retires his stroke and (inculcates) discipline on his wife.”**

21. Clearly husbands are prohibited from harming their wives in any way. Harmful actions that constituted grounds for dissolution of marriage include: -

- i. Dispossession of her property and her rights over it.
- ii. Attempt to force her to lead an immoral life.
- iii. Associates with women of ill-repute.
- iv. Obstruct in the observance of her religious practice.
- v. If he has more than one wife then he does not treat them with equity as per Qur’anic injunction.
- vi. Physical or psychological assault and / mistreatment

Dissolution of marriage

A marriage conducted under Islamic Shariah, can be dissolved due to several or one of the following conditions:

- i. Apostasy: - means the renunciation of a religious faith. (Ridda) under Islamic law apostasy is an offence, a male apostate was liable to death sentence and a female apostate to life imprisonment
- ii. Death of either party – A valid as well as an irregular marriage stands dissolved on the death of either party.
- iii. Divorce – Valid marriage under the Islamic Shariah law may be dissolved by divorce in any one of the manner prescribed by Shariah law.
- iv. Option of Repudiation at puberty where the marriage of a lady was contracted by her legal guardian when she was a minor, she has a right and liberty, at the attainment of age of puberty, to either ratifies or repudiates it.
- v. Nullity of an irregular marriage. Under the Islamic Shariah Law an irregular marriage is null and void unless the legal impediments are removed. The absence of formal dissolution is not sufficient for it to be validated.

22. I have given due consideration to the application and the ground it is based on vis a vis. the defence of the Respondent. The questions which, therefore, fall for my consideration are:-

- i. Whether or not the petitioner has established a case to enable this court in granting a decree of dissolution?
- ii. Whether or not the petitioner be granted the custody of the issues of the marriage named herein above?
- iii. Whether or not the Respondent is obliged to provide maintenance for the issues of the marriage name herein above?
- iv. Whether or not the petitioner is entitled to unpaid dowry?

23. To answer the first question whether or not the marriage warrants dissolution on the ground of cruelty, adultery and negligence, the court? The grounds of cruelty and desertion are all questions of fact which require this Court to assess them based on the evidence adduced by the parties. The standard of proof in establishing the above grounds of divorce is a preponderance of probability. This view is supported by the Court of Appeal judgment in the case of **ALEXANDER KAMWERU V. ANNE WANJIRU KAMWERU (2000) eKLR**, where it was observed that: **Certainly cruelty or desertion may be proved by a preponderance of probability, that is to say that the Court ought to be satisfied as to feel sure that the cruelty or desertion, or even adultery (all being matrimonial offences) has been (as the case may be) established.** Cruelty is a question of fact and the establishment by a court of law of the fact of cruelty depends on the circumstances of each case. In the present case, in order to prove the Petitioner's allegation of cruelty on the part of the Respondent, this Court must satisfy itself that there is evidence indicating that the Respondent, without any justifiable cause, deliberately conducted himself in such a manner as to endanger the Petitioner's physical or mental health, or cause her anxiety over the imminence of such danger. The standard of proof for cruelty was elaborated in the case of **DM v TM (2008) 1 KLR 5**, where Chesoni J (as he then was) stated that: **To establish cruelty the complainant must show to the satisfaction of the court: – misconduct of a grave and weighty nature, real injury to the complainants health and reasonable apprehension of such injury, that the injury was caused by misconduct on the part of the Respondent, and that on the whole the evidence of the conduct amounted to cruelty in the ordinary sense of that word.**

24. The allegations made by the Petitioner concerning the Respondents cruelty have not satisfied this Court of their gravity. In particular, the allegations of violence and physical abuse have been not supported by any convincing evidence. The petitioner did not adduce any witness while the respondent has produced I partially agree with the respondents witness that indeed had there been nothing at the working station then she won't have quit the work.

25. I have given due consideration to the application and the ground it's based on vis a vis the response of the Respondent. It emerges from the evidence on record, before the court the Petitioner's petition be treated as Khul (stripping off) and Petitioner is legally rightful before the court to seek Judicial separation with the Respondent. The court attention was drawn to Q2:229, where in stated that: **".....then if you fear that they would not be able to keep the limits, ordained by Allah then there is no sin on either of them, if she gives back, Mahr (dower) or a part of it for her Al-khul' (divorce)....."**

26. It's clear that a wife has a right to seek for divorce. When the Petitioner's wish for Khul may be driven by Irrationality and jealousy, having taken into account the fact that polygamous marriage cause severe marital harm to the first marriage as the husband lost interest in his first wife and children and mere often than not reduce the money he spends on them and in some case he completely stop providing for them and this has forced Petitioner to shoulder the financial responsibility for the family.

27. Thus I did not see any difficulty if I said that he was no prove that the respondent cruel in the sense that he ignored his family while he is a man of means. As per the allegation of adultery against the Respondent I am aware that the allegations of adultery are quasi-criminal in nature and have to be proved in great efficacy to the standard of proof on balance of probability required in civil cases. I thus do find that the petitioner failed to prove the allegation of adultery per the standard required by Law. The Court's attention was also drawn to ash-shaskands fat hurl Gadidr Vol. 3 Pg 21 wherein it is stated that **"Divorce has been allowed in Islamic Law as a remedy in incompatible Union".**

28. In Court of Appeal decision of A V S (and) IKCR G and F the court stated that: **"..when a marriage becomes impossible to work it is better to separate amicably rather than drag on indefinitely marrying the namely home a hell. "** In present case it is a common ground that action of threat cruelty to marriage renders the conjugal union impossible. In short the marriage is in existence in name can nothing more. It is a shell and hence it serves no useful purpose for it to stand.

29. In the premises given above the Court hold that he petitioner has not established a case to enable this court in granting decree of dissolution. However I have the consideration that since the petitioner has been demanding for the divorce Khul' is how she can be is divorced as means to the end. The words of Allah Almighty, "It is not lawful for you to keep anything you have given them unless a couple fears that they will not keep within Allah's limits. If you fear that they will not keep within Allah's limits, there is nothing wrong in a wife ransoming herself with some of it. These are Allah's limits so do not overstep them. Those who overstep Allah's limits, they are the wrongdoers." (2:229) 'Umar allowed a khul' without the presence of an authority. 'Uthman allowed a khul' in return for everything except a hair binding. Tawus said, "If they fear that they will not keep within Allah's limits" refers to what each of them owes the other in intimacy and companionship." He did not take the position of fools that it is not lawful unless she says, "I will not wash from you on account of janaba." . It is related from Ibn 'Abbas that the wife of Thabit ibn Qays came to the Prophet, may Allah bless him and grant him peace, and said, "I do not do criticise Thabit ibn Qays for his character or his deen, but I dislike ingratitude in Islam." The Messenger of Allah, may Allah bless him and grant him peace, said, "Will you return his garden to him?" "Yes," she answered. The Messenger of Allah, may Allah bless him and grant him peace, said, "Accept your garden and divorce her once." Abu 'Abdullah [al-Bukhari] said, "It is uninterrupted from Ibn 'Abbas." It is related from 'Ikrima that the sister of 'Abdullah ibn Ubayy related this. He said, "Will you return his garden to him?" "Yes," she said and she returned it and he commanded that he divorce her." It is reported from 'Ikrima that the Prophet, may Allah bless him and grant him peace, said, "Divorce her." It is related from 'Ikrima that Ibn 'Abbas said, "The wife of Thabit ibn Qays came to the Prophey, may Allah bless him and grant him peace, and said, "Messenger of Allah, I do not criticise Thabit ibn Qays in his deen or his character, But I cannot endure him." The Messenger of Allah, may Allah bless him and grant him peace, said, "Will you return his garden to him?" "Yes," she said. It is related from 'Ikrima that Ibn 'Abbas said, "The wife of Thabit ibn Qays ibn Shamma came to the Messenger of Allah, may

Allah bless him and grant him peace, said, 'Messenger of Allah, I do not criticise Thabit in his deen or his character, but I fear ingratitude.' The Prophet, may Allah bless him and grant him peace, said, 'Will you return his garden to him?' 'Yes,' she said. She returned it to him and he ordered him to part from her." 'Ikrima related that Jamila (and he related the hadith.). Discord and whether khul' is suggested when it is necessary. The words of Allah, "If you fear a breach between a couple, send an arbiter from his people and an arbiter from her people." (4:35)

30. To answer the question whether the petitioner should be granted the custody of the issues; The Court's attention is drawn to section 4(3) of the Children's Act which requires this court to treat the interest of the children as of first and paramount consideration to the extent that it is in conformity with a cause of action that is calculated to safe guard and to promote the best interest and welfare of the children. This applicable principle of Law in this case is that set out in:

a) Ibn Qudam's Al-Mughini; pg 613-614 which states that; ***"Purpose of custody have been introduced in view of the welfare of the children, Hence then enforcement shall not be proper in a way that shall put in Jeopardy the person and faith of the children"***.

b) The Court of Appeal decision of AN v MN (2006) IKCR G & F Pg 66 that; ***"In all matters of custody of children the welfare of the children is given a paramount consideration"***. The principle has statutory under penning of Act 53 (2) of the Constitution which states that; ***"A child's best interest is of paramount importance in every matter concerning the child"***. The Court's attention was also drawn to al-Boyhages al-Kubra 8/4 and also Abdul razag's 'Messaraf No. 12605 in case of Umar (R.A) v Umm Asim (R.A). Abubaka (R.K.) gave judgment in favour of Umm Asim and stated that she (mother) is more compassionate, gentler, more tender hearted and more merciful and she is more entitled to have custody of her son..."

31. I take this view that at this stage the children's psychological development and formalization is of great importance and it cannot be left to Respondent when the mother is available, able and ready to give the minors emotional support and care necessary. In the premises given above the custody, care and control of the children of the marriage name herein before be granted to the petitioner. However the Respondent is not denied his right of access and visitation. The Court cautions both parties to always maintain harmonious relationship especially in relation to children thus the right to access should be seem as a means to protect the interest of the children as well as right of the both parties and this is to avoid a tag of war situation since both parties have equal responsibility towards the children.

32. To answer the question whether or not the Respondent is obliged to provide for the issues of the marriage name herein above; The Court's attention is drawn from Ibn -al-Humam fath-al Qudir, Caro, 1356 (A.H.), vol. III, pg 314, wherein it is stated that; "The Responsibility of the father for the maintenance of his children is unconditional and absolute (3)". The father cannot escape from his responsibility merely on the ground of his children being disobedient is that they are under the custody of their mother. Thus it is the bounded duty of the father to maintain his sons till they attain the age of maturity and the daughter till they are contracted into marriage. In the premises stated above, the respondent, according to his means, is responsible for the maintenance of his sons till they attain the age of maturity and his daughters till they are contracted into marriage.

33. To answer whether or not the petitioner is entitled to dowry? The Court's attention was drawn to Holy Quran chapter 4 V4 where it is stated that: ***"And give to the woman (whom you may) their Mahr (obligatory bridal money given by the husband to his wife during marriage) with good heart..."***

34. It is the opinion of the Court based on the above source that dower is enjoined by law and essential to the validity of marriage and firms. Unpaid Mahr is considered as an unsecured debt payable to wife by the husband or from his estate therefore Muslim widows and divorcee have a right to receive the debt during the life time of husband or his estate, if she prefectures her heirs are entitled to the dowry and such right is enforceable upon the termination of the marriage between the husband and wife.

In the premises stated above the Courts hold that the petitioner is not entitled to the mahr in which the actual figure is yet to be confirmed.

The upshot of all the above is, that I make the following orders:

1. The marriage solemnized in respect of the petitioner and Respondent on April, 15th 2010 be dissolved in way of Khul. (That the petitioner ransoms herself to secure a way out of marriage)
2. Divorce certificate be issued
3. The custody care and control of the children of the marriage named herein before be granted to the Petitioner. This is if the petitioner will have them under her care failure of which the respondent will take over the custody.
4. The respondent shall have unrestricted access of the children. The modality of such access be agreed upon or ordered upon after.
5. The Respondent shall contribute towards the maintenance of the children. The modality of such maintenance be agreed upon or ordered upon after.
6. Order as to cost each party shall bear his/her own cost.

N/B: Aggrieved party has a right to file an appeal within a period of 30 day.

Orders accordingly

Dated, delivered and signed at KISUMU this 4th day of December, 2018.

.....
R.K. OTUNDO

SENIOR RESIDENT KADHI

In the presence of:

C/A: Rose Migwalla

Petitioner – present in person

Respondent- present in person