



THE REPUBLIC OF KENYA
IN THE KADHI'S COURT AT MOYALE
DIVORCE CAUSE NO. 31OF 2018
LHJ.....PETITIONER
VERSUS
AGDRESPONDENT

JUDGMENT

1. The petitioner filed this petition on 20th September, 2018 against the respondent for a decree that the marriage between the petitioner and the respondent be dissolved, that an order against the respondent to pay dower/mahr of one cow, that the custody of the issue of the marriage and the maintenance, the cost of the suit and that the petitioner be granted such other reliefs as the honorable court may deem fit.
2. The respondent filed an answer to the petition on 22nd October 2018, and praying for Islamic sharia be not applied upon him and access to his children.
3. The brief facts are that the petitioner and respondent were married under provisions of Islamic Law on the 14/04/2011 in Butiye , Moyale sub county.
4. The marriage was blessed with two issues namely;
 - i) QA.
 - ii) AA.
5. That during the subsistence of the marriage, the parties established their matrimonial home in Moyale sub county.
6. The petitioner complained of extreme psychological abuse and depression by the respondent which resulted to separation between them in August 2015 to date eventually she seeks refuge in her family's place.
7. The petitioner lamented also that the respondent abandoned the religion (Islam) and openly declared he has left the religion, also criticized her Islamic dressing and prayers.
8. In paragraph 6 the petitioner stated that the respondent drinks alcohol and chew miraa.
9. The respondent agrees in his answer to petition that he drinks alcohol and also declare is no longer a Muslim.
10. The agreed facts are ; -
 - i) The petitioner and the respondent got married on 14/4/2011 under provision of Islamic shariah.
 - ii) The marriage was blessed with two issues.
 - iii) The respondent disannounced Islamic faith.
 - iv) The parties are no longer staying together.
11. On 1st November 2018 when trial began the petitioner summoned four witnesses before the court, they testified on oath in her favor, while the respondent opt not to summoned any witnesses before the court but rely on his cross examination of petitioner's witnesses.

12.The issues to be determined are:-

1. whether the respondent request for not be subjected to Islamic shariah has impact on the case?
2. Whether there are grounds established for the dissolution of that marriage?
3. Whether the dower was paid by the respondent?
4. Custody of the issues of the marriage.

13.With regards to the first issue, it is evident that the petitioner filed the suit before this court seeking for the dissolution of marriage that was solemnized under Islamic law.

14.The Respondent concedes that the marriage was celebrated under Islamic Law.

15. The petitioner's contention is that she no longer professes the Islamic religion.

Section 5 of the Kadhi's Court Act, Cap 11, states as follows: -

“A Kadhi's Court may have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion;

16.Article 170 (5) of the Constitution provides for the jurisdiction of the Kadhi's Court in the following terms: -

“The jurisdiction of a Kadhi's Court shall be limited to the determination of questions of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's Courts.”

17.Sections 71 and 72 of the Marriage Act states as follows: -

71. The dissolution of marriage celebrated under Part VII shall be governed by Islamic Law.

72. Where a Kadhi, sheikh Imam or person authorised by the Registrar grants a decree for the dissolution of a marriage celebrated under Part VII, the Kadhi, sheikh, Imam, Mukhi or authorized person shall deliver a copy of the decree to the Registrar.

18.Section 48 of the Marriage Act provides for Islamic Marriages. It states that Islamic Law shall only apply to persons who profess the Islamic faith. Under section 49, an Islamic Marriage shall be officiated by a Kadhi, Sheikh or Imam as may be authorized by the Registrar. The two sections form part VII as referred to by section 71 of the Act.

19. It is agreed that the marriage between the parties was celebrated under Islamic Law. In the current divorce petition, it is the wife who is seeking the divorce. The respondent raises the issue of the Islamic law be not apply upon him to deal with the dissolution of an Islamic Marriage.

20.The core of the dispute is the dissolution of the marriage. The prayers in the divorce petition only seeks the dissolution of the marriage. The issue is whether the marriage should be dissolved by the Kadhi's Court. Section 3 (4) of the Marriage Act states that parties to an Islamic Marriage shall only have the rights granted under Islamic Law.

21.Before a marriage is dissolved, the parties are deemed to be still married. It is the act of dissolution of the marriage which brings the marriage to an end. Dissolution of the marriage is done through divorce proceedings. The Black's Law Dictionary (9th edition) defines a **“divorce”** as the legal dissolution of marriage by a court. Before the marriage herein is dissolved, it is still being regarded as an Islamic marriage. The reverting of the respondent to other faith does not change the status of the marriage. The parties are therefore are married under the Islamic Law as of now. Until the marriage is dissolved, the parties are deemed to be still married even if the marriage only exist on paper.

22.Given the fact that the respondent converted to Islam and submitted himself to a marriage under the Islamic Law, I do find that it would be prudent if the issue of the dissolution of the marriage is handled by the Kadhi's Court. Issues relating to the dissolution of a marriage celebrated under Islamic Law shall be governed by Islamic Law as stated under section 71 of the Marriage Act. The fact that the respondent no longer professes Islamic faith does not change the situation. The petitioner can equally contend that she is a Muslim and does not wish to have her marriage dissolved under any other form of law other than the law it was solemnised. therefore the petitioner and the respondent should exit from the marriage through the same door they entered into the marriage.

23.on the second issue Whether there are grounds established for the dissolution of that marriage? It's a trite law that a court may grant a decree of divorce on the grounds of irretrievably breakdown of the marriage if it is satisfied on evidence adduced that the marriage relationship between the parties has broken down to such an extent that there is not reasonable prospect of the restoration of a normal marriage relationship between the parties. Section 66(5) of the Marriage Act 2014 , and also Shaukani's , Fathul Qadir vol. 3 pg 21, outlines

the facts or circumstances which may show the irretrievably break down of the marriage.

24. From the parties confession is that the parties are now incompatible mainly due to the existence of irreconcilable difference and that this has resulted in the parties not living under the same roof, as husband and wife since August 2015.

25. Further, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, the courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the court's verdict, if the parties are not willing.

26. This is because marriage involves human sentiments and emotions and if they are dried-up there is hardly any chance of their springing back to life on account of artificial reunion created by the court's decree.

27. In present case it is a common ground that the existence of irreconcilable difference and even a reasonable apprehension of violence render the conjugal union impossible. In short, the marriage is in existence in name and nothing more. It is a shell and hence it serves no useful purpose for it to stand.

28. On other aspect the respondent clearly stated that is no longer a Muslim this means when one of the couple becomes a murtad (a postate) the marriage breaks straight away.

Whether the dower was paid by the respondent?

29. The court's attention was drawn to Holy Quran Chapter 4, verse 4 where it is stated that:

“And give to the woman (whom you marry) their Mahr (obligatory bridal – money given by the husband to his wife during marriage) with good heart.....”

30. It is the opinion of the court based on the above source that dower is enjoined by the law merely as a token of respect for the woman, therefore the prompt payment of it is not absolutely essential to the validity of a marriage and for the same reason, a marriage is also valid although the man is obliged to payout the dower, if differed, as sine qua non of marriage celebrated under Part VII of The Marriage Act 2014.

31. The petitioner stated that after dowry negotiation the parties agreed to a dowry of one cow which has not yet been paid by the respondent.

32. The respondent submitted that the agreed dowry was fully paid promptly together with other customary gift that usually accompany during such occasion.

33. The eventual objective of any judicial scrutiny is to unravel the truth on the face of clinching evidence the court must separate the grain from chaff, by ascertaining if dowry was paid, but the petitioner have not proof to the court on the balance of probability during the trial of the suit.

34. The burden of proof is the obligation of the a party in a trial to produce the evidence that will prove the claims they have made against the other party.

35. The messenger of Allah said " if the people were given what they claimed, men would claim the wealth and blood of the people, but the burden of proof is upon the claimant....."

36. On the issue concerning the custody of issues of marriage and the maintenance, since one party to the suit is not a Muslim I find it is prudent be addressed in a court of competent jurisdiction.

37. Disposition

In the result, I make the following orders :-

1. That, the marriage celebrated between the petitioner and the respondent on 14th April, 2011 be and is hereby dissolved.
2. That, arising from (1) above, the Certificate of divorce be issued forthwith.
3. Lastly this being a family dispute, parties shall meet their own respective costs.

Dated and delivered at Moyale this 24th day of Dec 2018.

Hon. A. D. WAKO

Senior Resident Kadhi