



REPUBLIC OF KENYA

IN THE KADHI'S COURT AT BUNGOMA

DIVORCE CAUSE (KCDC) 4 OF 2017

OSM ..... PETITIONER

VERSUS

MMO..... RESPONDENT

JUDGEMENT

**Introduction**

1. The Petitioner (hereinafter O) filed a divorce suit against the respondent (hereinafter M) on 24<sup>th</sup> April, 2017 for divorce, custody, costs and other reliefs. O and M solemnized an Islamic marriage in 1995, lastly established their matrimonial home at [particulars withheld] – Malakisi Bungoma and blessed with four issues prior to problems that form basis of this suit.

**Petitioner's Case;**

2. Omar in his petition accused M of being unfaithful, irresponsible and cruel; which included adultery, desertion from matrimonial home for long, denial of Conjugal rights, love and affection thus subjecting him to psychological trauma and mental anguish, hostile, quarrelsome, abuses and insults that caused him humiliation before relatives, children and peers. He further accused her of non – provision of proper care of issues, failing to share meals with family, refusing to provide issues of marriage with proper Islamic code of dressing and personal needs, chasing him away from matrimonial house, creating division between children and him, threatening him with witchcraft and making it impossible for reconciliation meetings to mend family.

3. On 15<sup>th</sup> June, 2017 in presence of M, O stated; he legally married M in accordance with Islamic law in 1995, lastly established their matrimonial home in [particulars withheld] – Bungoma and blessed with the four issues aged between 19 years and 4 years. O said, the elder daughter was under his custody for discipline purposes and the rest in custody of M. He disclosed that through the area village elder who is also the chairman of Malakisi Mosque, learnt that his son one A Std V dropped out of [particulars withheld] primary school and looked after neighbours' cows for a daily pay of Kshs. 50/= . This made him take all the children leaving M with one last born aged 4 years.

4. Omar further accused M of alleging attempted rape by somebody she knew but withdraw the case without his knowledge, she sold his goat and sheep and later turned the blame of stealing the animals on the mother of the boy alleged to have attempted rape on her. He disclosed that M falsely reported him to children officer for children neglect, when she was only in custody one child. The children officer later discovered that the parties were not divorced, M stayed on the matrimonial land/home and children in school under his custody and care. O also cited a day when M was almost assaulted by neighbours for alleged adultery had she not locked herself in house and later fled to her father's home after realizing that the petitioner was about to come for August 2016 holidays since he worked in Nairobi.

5. Omar told court that together with his father attended a reconciliation meeting convened by area assistant Chief but M and her people skipped the meeting. He said together with his father and uncle among other five people visited M's home for a scheduled reconciliation meeting on 21<sup>st</sup> December 2015 in which no solution was found but full of humiliation. He however disclosed that, even though reconciliation failed, she allowed M back to Matrimonial home but in June 2016, she filed a civil suit against him seeking to restrain him access to Matrimonial home/ land forgetting he fully provided for family.

6. O further accused M of change of Christianity and disclosed that on Sunday 12<sup>th</sup> March, 2017 he found her worshipping in Prophetic living ministries church – Matunda which matter was reported to Malakisi police station – OB 14/12/03/2017. He accused her of sending him threatening messages (Pexh. Osm – 05) reported at Kabete police station OB 39/26/3/2017.

7. He also accused M of failing to disclose that their elder daughter had left school to stay with a boyfriend one EW while in her custody. Though the girl came back home after his intervention and her belongings surrendered back through the girl's boyfriend's brother one 'Amos' he discovered that the girl used the mother's phone to communicate to boyfriends with her consent. The matter was reported to Malakisi police station – OB 25/17/04/2017. O further narrated that their elder daughter whom he paid fees for, promised never to come back home until he took an initiative of counseling her through M/s BM – CS Education – Bungoma. The girl later realized her mistakes apologized and

promised to work hard in school through her letter dated 15<sup>th</sup> June, 2017 – Pexh. Osm – 04.

8. Omar told court that in April 2017, he requested for another reconciliation meeting to mend the marriage but the respondent refused saying the same will be handled in court. He therefore prayed for divorce, custody and limited visitation by respondent as he enrolls children in integrated Islamic school to equally enjoy right of religious education among others. In cross examination, though M had no questions; O said; should the court allow sharing of children, then he requested for custody of young innocent ones to nurture them as she takes care of older ones since they have brains to be taken astray. He said, he has been responsible for provision of school expenses and General maintenance, has prepared NHIF cards for three (3) children and threatened with witchcraft. Pexh. Osm – 07. (Kwa nini majini ya kwenu ikasema mimi iniwezi) showing she goes to witchcraft.

9. It was the testimony of PW1 that together with his brother, the petitioner and his father (now deceased) went for a reconciliation meeting at respondent's home on 31<sup>st</sup> December 2015. apart from the Respondent's demand for reallocation for another land to stay, her family showed no interest to mend this marriage. He also said that M sold the family's cow, goat and sheep, misused proceeds and never disclosed why she fled the matrimonial home. In Examination, PW1 told court that thought they pleaded with M to be back to matrimonial home during petitioner's father funeral, she heeded not. He disclosed that owing to hard positions by both parties herein, a further reconciliation will be a waste of time.

10. PW2, the village elder and also area mosque chairman where the respondent stayed said: the couple herein bought land in his area in 2013 and purchased a cow, goat and sheep which were later reported by M to have got lost. He told court that he saw the couple's children looking after neighbours' cows instead of being in school, and as a village elder, he informed the petitioner who came and took them away to school in Nairobi. He said M is difficult to reconcile and cited an occasion where the area assistant chief invited them for the purpose and none of her family members attended and thereafter left for father's home in Mumias for one year before coming back.

It was the narration of PW2 that M used to attend mosque prayers/lessons but stopped and started attending church services in Sirisia. He informed the petitioner and introduced him to a village elder of Sirisia who together with the petitioner on a Sunday found M in church worshipping. Though M had no question, PW2 proposed a further reconciliation.

11. PW3, a village elder in Sirisia narrated how she was approached by O to witness Musdalifa in Church together with the parties last born which she confirmed. In examination she disclosed the said church still existed in her area to date.

#### **Response;**

12. M in her reply to the petition admitted that they were married in accordance with Islamic law in 1995, lastly established their matrimonial home in Sirisia and blessed with four issues aged between 19 years and 4 years. She however denied the particulars of adultery, cruelty and abuse attributed to her. She averred that the issue of custody may be solved by Bungoma Children case 16 of 2016 seeking enhancement of monthly maintenance. It is important to note that M absconded court attendance for her oral submission.

13. On 28<sup>th</sup> August, 2017 Mr. Ken for the petitioner requested for judgement against the respondent who seemed to have absconded attending twice as the petitioner submitted that since M changed to Christianity, and restrained the elder daughter from attending school and not ready to come to court for her oral submission, he demanded full custody and limited visitation by the respondent.

14. Having given attention to documents filed and considering evidenced adduced by parties and witnesses, I believe this court is duty bound to determine:

- a). whether the petitioner adduced reasonable grounds to guarantee dissolution.
- b). custody

#### **Determination:**

15. The issues at hand demands reading Article 170(5) constitution of Kenya 2010 together with Section (5) and (6) of the Kadhi's court Act Cap 11.

(i). Article 170(5): "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 Court."

(ii). Kadhi's Court Act Cap II Section (5) and (6):

Section (5): "The Kadhi's court has been given jurisdiction to determine questions of Muslim Law relating to personal status, marriage, divorce and inheritance in proceedings in which all parties profess the Muslim Religion. "

Section (6): "The law and the rules of evidence to be applied in a Kadhi's court shall be those applicable under Muslim Law."

(a): Whether the petitioner adduced reasonable grounds to gurantee dissolution:

16. Desertion is the intentional permanent forsaking and abandonment of one spouse by the other without others consent and/ or reasonable cause. Omar and PW1 said M left the Matrimonial home to her father's home after an alleged adultery without his consent and came back

after one year.

17. Omar disclosed that several reconciliatory meetings were convened; at the area Assistant Chief, at M's home, and during the funeral of his father and M and her family showed no interest in such meetings. She decided to be back in her matrimonial home and filed suit in Bungoma Children case 16 of 2016 seeking to restrain him access to matrimonial home and enhancement of monthly maintenance. This was also according to PW1 and PW2 who were part of the reconciliation meetings.

18. According to O, M changed to Christianity and found her worshiping in Prophetic living ministries church Matunda. On Sunday 12<sup>th</sup> March, 2017, a matter he later reported to Malakisi Police Station OB 14/12/03/2017. The worshiping was witnessed by PW2 and PW3 area village elders. The change to Christianity and the requirement of belief that Jesus is Lord(not prophet) as herein, and witchcraft (if proved) renders ones belief a nullity in Islam and was enough to dissolve the marriage herein.

Quran – 4: 48; “Verily, Allah forgives not that partners Him in worship but forgives anything else to whom He wills; and whoever sets partners with Allah has indeed inverted a tremendous sin. ”

Quran – 6:88;”But if they had joined in worship others with Allah, all that they used to do would have been of no benefit to them.” “of no benefit to them.” I.e broken their deeds and marriage is deed.

19. O testified that M allowed their elder daughter to stay with a boy friend one EW until the girl avered to 'stay away from home' which matter was reported to Malakisi police station OB 25/17/04/2017, Pexh. osm – 03. He took the girl for counseling before M/s BM CS – Education – Bungoma. The girl later apologized and promised to work hard through letter dated 15<sup>th</sup> June, 2017 – Pexh. osm – 04. She had also boycotted school attendance - Pexh. osm – 01. Omar also said other children who were in custody of the respondent were made to drop out of school to take care of people's cows and that he came and took them away and enrolled in School in Nairobi. This was also narrated by PW2 who termed M a very irresponsible character. O said M sold his cows, goat and sheep and misused the proceeds in line with the testimony of PW1 and PW2.

20. It is important to note that after hearing the petitioner and all his witnesses in the presence of the respondent, the respondent was relaxed and appeared to have less or no question to them. She later on absconded court sittings that were meant to have her oral submission to assist the court reach a fair decision. The court believed her absence attributed to the truth herein. I do believe the marriage herein has lost meaning to be termed harmonious, and the court believe and which I so hold that M and her family are to blame for collapse of marriage herein.

#### **(b). Custody**

21. In Islamic law and with due regard to the ability and capability of the parties, the mother has more right to custody of her children (Regardless of sex) until age of understanding recognized at seven or so provided she has not remarried. This is because of the report narrated by Ahmad (6707) and Abu Daud (2276) from Abdullah ibn 'Amr, according according to which a woman said; 'O Messenger of Allah, my womb was a vessel for this son of mine gave him to drink and my lap was a refuge for him but his father has divorced me and wants to take him away from me.' The messenger of Allah (PBUH) said; “you have more right to him so long as you do not remarry.”

The reason for this is that in early years of life, the mother is more suitable for raising the young (regardless of sex) with love, mercy, attention and motherly care than the father. This could only apply to SO who is four(4) years old.

22. If the mother has not remarried and the child has reached the age of 7 years;

(a). The male child should be given the choice between his father and mother and left to live with his choice, because of the report narrated by an-Nasaai (3496) and Abu Daud (2277), according to which a woman came to the messenger of Allah (PBUH) and said; 'May my father and mother be sacrificed for you. My husband wants to take my son away even though he benefits me and brings me water from the well of Abu 'Anbah. Her husband came and said; who is disputing with me concerning my son? The Prophet (PBUH) said; “O boy this is your father and this is your mother, take the hand of whichever of them you want.” And he took his mother's hand and went away with him.

(b). The female child is also given choice according to Shaafi (RA) but according to Abu Hanifa(RA) the mother is entitled to custody until marriage or start of menstruation, with Malik (RA) preferring the mother until consummation after marriage. However according to Ahmad(RA), the father is more entitled to custody because it is more appropriate for him to provide care, discipline and protect her from harm and/ or shame upon her and her family.

23. Accordingly, the determination of custody of the three children above seven years demanded parties especially the petitioner to avail them for cross examination, by court as ordered to reach an informed decision on their interests and welfare. O instead of availing the issues in question, filed letters of strict school rules and schedule that were very irrelevant to what is required – (Pexh. Osm. - 09 and 10). Out of the three children, only one HO, 11 years of age in standard 4 at [particulars withheld] primary was availed in court and disclosed that he stayed well with his paternal uncle but also felt comfortable if he stayed with his mother.

24. Since O prepared NHIF cards for the three issues, secured the elder daughter from immorality and or early marriage and returned her to school together with other two issues who had dropped out of school and promised to enroll them in integrated Islamic schools in fulfillment of their right to religious Education, the court will not interfere and directs the same be offered to a four year SO. This is also in line with section 8(1) and 9 of the children's at 8 of 2001 on the right to religious education and health care.

25. It is worth to note that custody is keeping and raising the child, hence a person's right to custody is lost if she/ he is immoral and corrupt, or careless and heedless or traveled a great deal which will harm children's interest or be detrimental to their upbringing.

The issues raised against the respondent that remained unanswered in respect of the old daughter's immorality and the boys who dropped out of school to take care of the neighbours' cows while in her custody and the change to Christianity that affected her marriage built on Islamic principles among others portrayed her immoral and corrupt, and careless and heedless and could not be entrusted for custody of issues herein unless she changed.

A close consideration and look at a four year old S, made the court to be convinced that the child needed more motherly love and care than anything else. Omar did not disclose how this young one will be taken care of if offered custody.

26. Irrespective of who has right of custody, the other party has visitation rights according to Mutual understanding and Consent.

27. Generally, Maintenance of the children is the duty of the father, according to Scholarly consensus unless otherwise restricted by means. In the event custody is with her, then the children maintenance will be paid by their father on reasonable basis and depending on his circumstances and means.

Quran – 2:233; "but the father of the child shall bear the cost of food and clothing on a reasonable basis."

Quran – 65:7; "let the rich man spend according to his means and the man whose resources are restricted, let him spend according to what Allah has given him. Allah will grant after hardship ease"

28. Maintenance of Children include everything they need on a reasonable basis. It is clear that O provided education and health expenses among other necessities for the three children in his care and sent monthly maintenance of Kshs. 2000/= to Musdalifa for maintenance of the younger child as per the agreement before Bungoma Children officer – (Pexh.mmo – 03) dated 13<sup>th</sup> May, 2015. This court will not interfere with the maintenance agreement and may be determined by Bungoma Children court case 16 of 2016 which is on going on the subject matter.

29. It should be noted that there no other entitlement of the parties upon dissolution of marriage that were brought to the attention of the court. All other issues raised had no evidence adduced and therefore dismissed.

### 30. Orders

1- Marriage between O and M dissolved

2- M to observe three months Edda period under care of O.

3- Meanwhile three older issues remain in custody of O.

4- Custody of four year old S to M for now.

5- M to cause S attend School along with Islamic Studies of the Petitioner's choice.

6- O to Submit to M Kshs. 2000/= monthly by Mpesa until determined otherwise by Bungoma children court case 16 of 2016 on the subject matter.

7- School and Major medical expenses responsibility of O within his means and choice.

8- Minor medical expenses and care of S responsibility of M.

9- Omar to avail NHIF card for SO as done to others.

10- Visitation rights of issues allowed during weekends and school holidays.

11. Parties to directly and indirectly observe peace and no orders to costs.

HON D.S. RATORI

PRINCIPAL KADHI

15/9/2017

In Presence of;

1- CA - Okwaro

2- The Petitioner – OSM

