



REPUBLIC OF KENYA
IN THE KADHIS COURT AT NYERI
CIVIL CASE NO. 30 OF 2017

FW.....PLAINTIFF

VERSUS

NA.....DEFENDANT

JUDGEMENT

The matter before this court was filed by FW on 4th august 2017 against NA seeking the following orders:

1. Dissolution of the marriage.
2. Cost of the suit
3. Any relief the court may deem fit to grant.

On hearing the plaintiff complained that the defendant refused the Hiv test which to her was of great importance and this was the beginning of the problems. The defendant did not cooperate and later on left the matrimonial home without her attention./

Pw1 ZW pw2 MK and pw3 hI all agreed that there is no peace in this marriage from day one.

On the other hand the defendant argued that it is the plaintiff who initiated the problem. He was forced to do the Hiv test by strangers whom he described as unqualified personnel purporting to be doctors. He refused and the following day accepted when he was assured of the doctors. Elders were involved and the test was conducted voluntarily and they were all found negative.

Dw1 SJ dw2 GD and dw3 HW submitted that there were problems before marriage and during marriage. The parties have never stayed together as husband and wife. There was chaos from the first day of their marriage.

I have considered the arguments from both sides and have realized that there is no peace and harmony in this marriage.

Allah says,

And among his signs is this that he created for you wives from among yourselves that you may live in peace and harmony with them and has put love and mercy between your hearts. Verily in that are signs for those who reflect. Quran 30:21

Prof.Abdulrahman. I. Doi. In his book Shariah, the Islamic Law (1997 reprint) page 168 states that;

“In Islam marriage is a contract and the contract should be made to work but not when it becomes humanly impossible. It is only in such unavoidable circumstances that divorce is permitted in Shariah”.

And that,

“... when marriage becomes impossible to work, it is better to separate amicably rather than drag on indefinitely, making the family home a hell”.

Allah says,

“The divorce is twice, after that, either you retain her on reasonable terms or release her with kindness”. (Quran 2:229).

Mufti Abdul Jaleel qasmi in his book **the complete system of divorce (talaq)** page 42 states that,

“Islam has placed the choice of a delicate and important issue such as talaq in the hands of man. It has also placed barriers and limits for its implementation, so that it cannot be abused.”

Since talaq has failed to take place the only way for separation is through khulua. what is Khul’a

Sheikh Hammudah Abdl Ati in his book **the family structure in Islam** page 239 describes Khul’a as

“Khul’ (divestiture/self-redemption). This is another irrevocable form of divorce, which is initiated by the wife rather than the husband. If she is unhappy in her marriage for her own reasons, and he has no overt fault or guilt, she may seek a divorce from him.”

The Islamic charter on family page 406 states that;

“Khul’a may take place by agreement between the two parties, or else the case is presented to the judge to grant her a decree of irrevocable divorce from her husband. It is understood that in such a case, the husband is refusing to effect divorce, and thus the judge will issue the divorce decree”

In Mombasa High Court civil appeal no 136 of 2001; A.A versus A.J. Judge J.W. Mwera citing the same book (shariah the Islamic law) and the Hon Chief Kadhi Hammad Kassim sitting as an accessor reinstated that,

“As for the divorce sought by a wife as in our present case Prof Doi has chapter 12 divorce at the instance of the wife (khul).that a wife can ask for a divorce from the husband due to cruelty or desertion. He sets out the following grounds for khul to succeed and emphasizes that that type of divorce should never be on flimsy grounds. The grounds are;

- 1. Habitual ill treatment of the wife.***
- 2. Non-fulfilling of the terms of the contract.***
- 3. Insanity.***
- 4. Incurable in competency.***
- 5. Quitting the conjugal domicile without making provision for the wife.***
- 6. Any other similar causes which in the opinion of the Qadi (Kadhi) justifies divorce.”***

I am sure that the plaintiff herein is seeking Khul’a from the defendant underground two and five as stated in paragraph nine and eleven in her plaint.

Allah says;

“And if a woman fears cruelty or desertion on her husband’s part, there is no sin on them both if they make terms of peace between themselves; and making peace is better. And human inner-selves are swayed by greed. But if you do good and keep away from evil, verily, Allah is ever well-acquainted with what you do.”(Quran 4:128)

From the foregoing, it is evident that the ill-fated marriage celebrated between the parties here on 8th July 2017 has irretrievably broken down and there is no will from both parties to salvage the marriage.

Therefore the first prayer of the petitioner herein which is dissolution of the marriage is hereby granted by this honorable court. The petitioner is entitled to divorce through Khul’a. It is her legal right and divorce certificate will be issued to prove the same.

On dowry, though it was not among the prayers but for the benefit of the parties, this honorable court will address it.

The parties’ dowry was agreed as one heifer of three years. The defendant confirmed before this honorable court that he didn’t pay the dowry.

The defendant also raised a **counter claim** in his defense in paragraph twelve and stated that he incurred expenses of Kenya shillings one hundred and forty thousand in purchasing food and beverages which the same must be refunded by the plaintiff. This is a court of law and only Islamic law will be applied.

In Islamic law and practice a man is only allowed to pay dowry. Dowry is the right of the women upon the man.

Allah says

And give to the women (whom you marry) their mahr obligatory bridal money given by the husband to his wife at the time of marriage) with a good heart but if they of their own good pleasure remit any part of it to you take it and enjoy it without fear of any harm (as Allah has made it lawful) sura 4 an nisai 4

Dowry has no specific minimum or maximum. It can be delayed or given in advance.

I therefore don't understand whether this one hundred and forty thousand (140,000/=) was a gift or a debt. If it is a debt then this is the wrong forum. I advice the defendant to take the matter to the right court.

There is also the issue of consummation as stated by the plaintiff in paragraph five and six of her plaint and the same was captured by the defendant in paragraph five (ii) of his defense.

Allah says

And if you divorce them before you have touched (had a sexual relation with) them and you have appointed to them the mahr (bridal money given by the husband to his wife at the time of marriage) then (pay) half of that (mahr) unless they (the women) agree to forego it, or he (the husband) in whose hands is the marriage tie, agrees to forego (and give her full appointed mahr).And to forego (and give her full mahr) is nearer to AT taqwa (piety, righteousness) And do not forget liberality between yourselves. Truly, Allah is All seer of what you do. (Surah Albaqarah 237)

This is not a normal talaq; it is Khul'a whereby the plaintiff was supposed to return the dowry paid to her unfortunately the defendant didn't pay the dowry. Therefore nothing will be returned to him.

“It is reported in Sahihul-Bukhary that, a woman came to Prophet Mohammed (P.B.UW) and said, “I hate my husband and like separate from him. The prophet asked, would you return the orchard he gave you as dowry? She replied “Yes” even more than that, the prophet said return what he gave you as dowry and he ordered the companion to divorce once”.

On cost of the suit each party will bear its cost. Right of appeal thirty days.

Signed dated and delivered in open court this 31ST day of October 2017.

MOHAMED ABDALLA

KADHI – NYERI

In the presence of the plaintiff.

In the presence of the defendant.