



REPUBLIC OF KENYA.

IN THE KADHI'S COURT

AT MOYALE.

KCC NO. 32 OF 2017.

NA.....PETITIONER

VERSUS-

HIO.....RESPONDENT

JUGDEMENT

The Petitioner in this cause is one NA. she filed her petition dated 20th Sep 2017 in this court.

In her petition the petitioner prays for judgment against the respondent for;

- a) Their marriage be dissolved.
- b)The respondent be compel to pay her dowry.
- c)The respondent be compel to pay past and future maintenance for the issue of the marriage.

This Petition was founded on the ground of negligence and cruelty.

No entry of appearance and filing of Answer to petition was effected within the requisite period. When the matter was called for mention the respondent again failed to appear before the court, notwithstanding his absence the court went ahead and ordered the petitioner to serve them with a notice of hearing.

When the file was called for hearing on 13th November 2017 both the petitioner and the Respondent attended the court and matter proceeded

The parties herein married on relevant date in 2014 under islamic sharia, and veracity thereof is not objected to, by both Petitioner and Respondent. Similarly it's also not in dispute that the Union was blessed with one issue;

At the trial both parties testified on oath and choose to call their respective witness. The Petitioner testified that after their marriage they cohabited as husband and wife in Godoma location, Moyale sub county, Their marriage was not peaceful. The respondent was cruel to her and neglected his responsibility.

The Petitioner herein listed that she had on several occasion together with elders held a meeting to solve the matter however their attempt was rendered futile since the Respondent use to claim of his marriage expenses that he incurred during marriage ceremony.

All the petitioner witness attested to her favor.

The respondent claim that the petitioner filed this proceeding before this court in order to marry other person after dissolution of our marriage, and concerning the maintenance the petitioner refuse and become violet to him but also admitted that he had not maintained for a period of 8 months, the respondent declares his readiness and willingness to take a step in a bid to save their marriage,

Having given due consideration to the submission of both petitioner and respondent, the question which therefore, fall for my consideration is:

(a) Whether there is enough ground of dissolution of the said marriage.

a. (b) Whether the Respondent has responsibilities towards the issue of the said marriage.

On the first issue for consideration, that is whether there is enough ground of dissolution of the said marriage. A woman who married under Islamic Sharia be entitled to obtain a decree for the dissolution of her marriage any of the following grounds :

a. That the whereabouts of the husband have not been known for period of three or four years.

b. That the husband has neglected or has failed to provide for her maintenance.

d. That the husband has failed to perform his marital obligations.

d. That the husband has been insane for the period of two years.

e. That the husband treat her with cruelty, that is to say

- Habitually assaults her or makes her life miserable.

Attempt to force her to lead an immoral life.. However, upon hearing the petitioner's submission and given due consideration to the submission she made in court, it emerges from her submission, that she lacks enough evidence and above all the petitioner's allegation against the respondent does not meet the above threshold which is grounds of dissolution of marriage.

The court attention was drawn to Abdulrahman's. 'The Islamic law' (1997 Reprint) pg. 168 where its stated that; **In Islam marriage is a contract and the contract should be made to work but, not when it becomes humanly impossible to do so. It's only in such unavoidable circumstance that divorce is permitted under shariah.** It emerges from submission on record, before the court the petitioner's prays be treated as Khul (stripping off).

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)....

The court attention was drawn also to Bukhari's, 'Sahihul – Bukhari, 'Vol.7 Hno.197 and also, As Suyuti's sinnanu-Nisaai vol. 8 page 5-16 also Sunnanu - abu dawud vol. 4 page 268-69 in case of **Habiba** versus **Thabit (R.a)**,

The wife of Thabit (Habiba) came to the prophet (S.A.W) and said 'O' Messages of God. I don't hate Thabit neither because of his faith nor his nature except that I fear unbelief (If I remain with him). On that God's messagers (S.A.W) said (to her) “will you give back his orchard? She said 'Yes and she gave it back to him and He (Prophet) ordered him and so they separated.

In the above the prophet ordered him to divorce his wife, after she returned to him the orchards which he gave her, as a dower. But the consent of Thabit was sought after. It is my view that the petitioner simply wishes to release herself from a marriage contract.

And in such a case the petitioner shall ransoms herself to secure a way out of marriage and will gain a total control over her own self and freedom.

I have also considered the fact that Divorce since its disintegrate the family union is of course a social evil, in itself but it's a necessary social evil. It's better to wreck the unity of the family than to wreck the future happiness of the party by bonding them to a companionship that has become odious.

As regards to the maintenance of the issues of marriage,

The financial support of any children – both during marriage or after divorce – rest solely with the father. This is the children right upon their father.

Therefore the children entitled to maintenance following evidence from the Quran, the prophet's traditions and logical reasoning.

1. Evidence from the Quran

a. “The duty of feeding and clothing nursing mothers in a seemly manner is upon the father of the child. No one should be charged beyond his capacity. A mother should not be made to suffer because of her child, nor should he to whom the child is born (be made to suffer) because of his child. And on the (father's) heir is incumbent the like of that (which was incumbent on the father). 2:233

This verse provides the evidence that the duty of maintaining the child falls upon the father for two reasons

1. Allah the almighty makes it the father's duty to provide food and clothing for the mother and the style used in this verse confirms

this duty because of the child. Therefore, if the child's mother is entitled to maintenance, the child is all the more entitled to it.

2. The child belongs to the father, for this verse makes it clear that child maintenance is the father's duty.

2. Evidence from the Sunnah

The prophet's sunnah is replete with traditions which command child maintenance, the following are some of these traditions

a. "Aaishah (may Allah be pleased with her) narrated that Hind Bint Utbah, the wife of Abu Sufyaan, came the messenger of Allah (may Allah bless him grant him peace) and said "messenger of Allah, abu Sufyaan is tight-sited man who does not spend enough on me or my children except for what I take from his wealth without his knowledge. Is there any sin on me for doing so? The prophet replied, take only what is sufficient for you and your children on a reasonable basis".

Saheeh-Al Bukhaari Book of supporting family, hadeeth no.5049, 5/2025.

This tradition shows that the prophet (may Allah bless him and grant him peace) allowed Hind bint Utbah to take what was sufficient for her children from her husband on a reasonable basis even without his permission. If were child maintenance not the father's duty, the prophet (may Allah bless him and grant him peace) would not have allowed her to do so.

b. Abu Hurayrah (may Allah be pleased with him) narrated, "the prophet (may Allah bless him and grant him peace) commanded (us) to give charity. A man said, "messenger of Allah, I have dinar". He said, spend it on yourself, ' He again said, I have another". He said 'spend it on your children'. He again said 'I have another', he said, 'spend it on your servant'. He finally said 'I have another'. He replied, 'you know best (what to do with it). This narration indicates that the prophet (P.B.U.H) commands spending on children after spending on others before one's relatives is definitely not the right thing to do. It also shows that spending in this case is obligatory unless something prevail one from doing so.

3. Unanimous Agreement of Muslim scholars.

Muslim scholars are generally agreed that maintaining children who have no wealth or sources of income is the duty of their father's.

4. Logical Reasoning

a. Spending when the need arises is a form of saving life, a child is a part of the father, and thus saving his life is obligatory just as saving his own life is obligatory, hence the father's duty to spend on his children.

b. The father-child relationship must be maintained and severing such a relationship is forbidden in Islam, according to the consensus of muslim scholars, spending on one's children is a form of maintaining such a relationship.

c. Spending on one's children is a form of kindness which Allah commands His servant to observe. A father is therefore duty-bound to show kindness to his dependant by spending on them, an act for which he will be rewarded in this life before the hereafter as Quran states

Therefore, the form of maintenance a father must provide for his children consist of three basic types, which constitute necessities, that one must have cannot possibly manage without which is food and drink, clothing and shelter, maintenance also include other types such as medical treatment and education.

The upshot of all above that i make the following order;-

1. The first prayer made by the petitioner is hereby dismissed, but the petitioner is at liberty to relinquishes her dowry to secure a way out of marriage.

2. That the respondent shall pay past maintenance to petitioner for the last 8 months and future according to his mean.

3. Order as to cost each party shall bear his/her own cost.

Ordered accordingly.

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

DATED and SIGNED at MOYALE this 11th day of Dec, 2017.

A. D. WAKO.

SENIOR RESIDENT KADHI .

