



REPUBLIC OF KENYA

IN THE KADHI'S COURT AT BUNGOMA

DIVORCE CAUSE 1 OF 2016

HNJ.....PETITIONER

VERSUS

KWS.....RESPONDENT

a.k.a. KWS

JUDGMENT

Introduction

1. The Petitioner (hereinafter Hadija) filed a divorce suit against respondent (hereinafter Kassim) for divorce, custody and maintenance, costs and other reliefs. Hadija and Kassim solemnized an Islamic marriage on 7th February 2015 and established their matrimonial home at Bungoma. The marriage was blessed with one RW aged about four(4) months. They stayed peaceful prior to problems that form basis of this suit.

Petitioner's Case;

2. Hadija in her petition accused K of being cruel, irresponsible and unfaithful which included; desertion for six months, quarreling, abusing and insulting her, denial of general family maintenance, denial of conjugal rights, love and affection, humiliating her before people thus subjecting her to psychological trauma and mental anguish. She further accused him of non-payment of her dowry of marriage.

3. On 17th March, 2016, H stated was legally married to K in February 2015 and used to own and or operated a hotel business together with wines and spirit shop. She said the business has since closed down owing to witchcraft brought about by K's first wife. She averred that after closure of the business, K deserted to Nairobi and could only be seen in his office at cyber coach-Bungoma and back to Nairobi. She followed him up in Nairobi, disagreed and assaulted her forcing her seek medical attention at Kitengela hospital that costed her Ksh.5,800/-. Fearing for her life she travelled back to Bungoma.

4. It was her narration that the following day after her return from Nairobi and at about 2200 hours was assaulted by two boys at her house now undergoing trial and was treated at Lumboka hospital. H further averred that, was later admitted at Bungoma District Hospital and paid delivery charges of Ksh.5,000/-. She however lamented that with his full information, K never paid any of her hospital bills, rent and has totally refused to submit any child or family maintenance.

5. H further accused K of facilitating his employee one J who reported her to DCIO – Bungoma on family issues accusing her abuses though the case collapsed.

6. In cross examination she told Court that; both started cohabiting as husband and wife on 7th February, 2015 and child of marriage born on 21st November, 2015 the witchcraft alleged to be in the centre of her business closure was discussed at a family meeting in which PW1 and his sister R were in attendance.

She also disclosed that when she followed him up in Nairobi, found him talking to a Kamba lady in a miraa selling shop, on reaching their house in Kitengela was assaulted and treated at Kitengela hospital. She averred that K had never paid any of her hospital bills and that both had no joint business and therefore no joint property.

7. H further narrated that K repaid Ksh.10,000/- debt out of Ksh.12,000/- borrowed from Mama Jonny to secure him off accusations of car theft. She accused him of concentrating on construction of his first wife's house while she was suffering, requested for custody until 18 years, demanded her unpaid dowry of Ksh.150,000/- and said no longer loved K.

She further disclosed that since K had refused to change, another reconciliation meeting will be a waste of time. She therefore prayed for

divorce, custody and maintenance, costs and other reliefs.

8. It was the narration of PW1 that he knew parties herein as husband and wife married in accordance with Islamic Law in February 2015, had no doubt that the child belonged to his brother – Kand could not remember talking about witchcraft.

He said H reported to him accusing K of being irresponsible for he had never visited or assisted the child herein since birth and or sent maintenance. He advised parties accordingly but when complaints persisted, he remained silent though believed parties needed more reconciliation.

PW2 told Court that K had abandoned and deserted H to Nairobi from pregnancy to this time and has never sent family maintenance but promised in vain. He disclosed that he had tried to assist his sister according to his means, was not aware of respondent's financial crisis, had reconciled parties in vain and believed the marriage cannot stand.

Response

9. K in his response stated legally married Hadija in accordance with Islamic Law on 7th February 2015 as second wife with her consent, blessed with one RNW aged about three(3) months, had remained faithful to the said marriage and had not married any other wife apart from the two herein.

He further said; he respected H, observed her matrimonial rights, provided family maintenance accordingly to his means and communicated and promised in the absence of the same. He therefore denied allegations of cruelty, insults, abuses and humiliation before friends for nothing to that extend had been charged against him.

10. K admitted he had never paid her dowry of marriage or bought her any sharia clothes/dresses. He however denied restraining her use of sharia dresses or accusing her of unfaithfulness and disclosed that he had convened three meetings to mend their marriage in vain.

11. In cross examination he narrated that he could not tell whether and when he had money, last slept on matrimonial bed on 31st December, 2015, gave J (his employee) H's phone number to help sort out his matrimonial problem later solved at DCIO – Bungoma and denied assaulting her in their Kitengela house.

He admitted to non-payment of rent for both cohated in her house and that he was aware of the inadequacy of family maintenance he submitted.

12. K disclosed that he owned a bus transport (cyber coach) and Kentreks security firm since three years, both of which are operating at a loss. He said he could not be able to submit any family maintenance until after the accounts audit in two year's time. He again asked for two months to be able to determine any initial submission of family maintenance. He later on said, in case of divorce; custody may be offered to Hadija and could only afford Ksh.200/- and Ksh.100/- daily child maintenance and rent respectively.

13. It was narration of K that; he could not have paid Kitengela hospital bill because it was not brought to his attention and also assaulted by her, a matter he reported to police. He said that it was due to lack of money that he avoided payment of her delivery bill at Bungoma District hospital and was ready for a possible reconciliation meeting.

14. K further disclosed that he could not remember what he used to send as family maintenance, not ready to pay her any send off (gift) in case of divorce, had never seen child of marriage since birth though aware of her existence and was silent on whether he still loved H.

15. The Court proposed an ADR to enable parties mend their fragile young relationship. They later on disagreed over the proposal prompting Court proceed with disposal.

16. Having given due attention to documents filed and considering evidence adduced by parties and witnesses, I believe the Court has the duty to determine:

(I) whether the petitioner adduced reasonable grounds to guarantee divorce.

(II) custody and maintenance

(III) parties entitlement upon divorce

Determination

17. 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 and section (3) matrimonial property Act No.49 of 2013 along with other enabling provisions of Law.

(a) 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”.

(b) Kadhi's Court Act Cap 11, 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.

(c) Matrimonial Property Act No.49 of 2013 Section (3); "A person who profess the Islamic faith may be governed by Islamic Law in all matters to matrimonial property".

(I) Whether the Petitioner adduced reasonable grounds to guarantee divorce:

18. Desertion according to Black's Law Dictionary is the willful and unjustified abandonment of a spouse duties or obligations towards the other without others consent and or reasonable cause.

K acknowledged that he owned and operated a bus transport between Bungoma and Nairobi and a Kentreks Security firm both of which have office in Bungoma. Even with this, he disclosed had never seen and or visited the child of marriage since birth about four(4) months ago. The same issue was also disclosed by his brother PW1. Considering these circumstances on addition to his unjustified family maintenance, the Court believes his behaviour amounted to desertion of family that tantamount to total repudiation of the matrimonial ties.

19. K narrated that he could not remember the monthly subscription he used to send though admitted it was inadequate. He however acknowledged that he had never bought the Petitioner sharia dresses nor paid rent for their matrimonial house. He further told Court that, he could not be able to submit any family maintenance until after financial audit of his business in two years' time, and later asked for two months to make any initial commitment. After long he disclosed that in case of divorce, he may submit Ksh.200/- and Ksh.100/- daily child maintenance and rent respectively. He proved to be hard on issue of maintenance and the Court wonder whether he had any sense of humor towards his child and or interested in the marriage herein.

20. In cross examination he disclosed, it was because of financial crisis that he was unable to settle the delivery bill and that he Kitengela hospital bill was not brought to his attention and more so, he could not have paid because he was also assaulted by H and reported to police. He admitted using his employee one J to help solve his matrimonial problems.

Apart from avoiding to solve his matrimonial problems and deligating an outsider, it was clear that he knew and was involved in the Kitengela assault as opposed to his earlier denial.

21. It is important to note that K has proved to be irresponsible for failing to provide reasonable care, protection, or support to his family in needy circumstances.

Considering his desertion and unjustified family maintenance, if left unaddressed, will further harm and or violate fundamental rights of the child herein, which this Court should protect.

I am convinced that the marriage has lacked love, affection, good will and divorce is a relief. K as the head of his family is to blame for its collapse.

(II) Custody and Maintenance:

22. 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 the age of understanding recognized at seven or otherwise provided she has not remarried.

This is because of the report narrated by Ahmad (6707) and Abu Daudi (2276) from Abdullah Ibn Amr (RA) according to which a woman said; "O messenger of Allah, my womb was a vessel for this son of mine and my breasts gave him to drink and my lap was a refuge for him, but now his father has divorced me and wants to take him away from me. The messenger of Allah (PBUH) said to her; "You have more right to him so long as you do not remarry." The reason for this is that in early years, the mother is more suitable for raising the young child (regardless of sex) with love, mercy, attention and motherly care than the father.

23. It should be noted 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 travels a great deal which will harm children's interest or be detrimental to the child's upbringing.

Mr. K has deserted/neglected his child and or second family and left the care and protection in hands of Hadija. Apart from being irresponsible, the Court found him careless and heedless and travelled a great deal, therefore cannot be entrusted for custody of the issue herein.

24. Irrespective of who had right of custody, the other party has visitation rights according to mutual understanding and consent.

(i). Generally, maintenance of the children is a duty of the father according to scholarly consensus unless otherwise. In the event custody is with her, then the children's maintenance **MUST** 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 spend according to his means and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him. Allah will grant after hardship, ease."

(ii) . A divorced nursing mother is entitled to breast feeding dues paid by the father of the child.

QURAN: 65:6; "... then if they give suck to the children of you, give them their due payment..."

As a matter of sharing responsibilities, I direct that H should provide motherly care and free breast feeding services to the issue.

26. Maintenance of children include providing accommodation, food, clothing, education and health services and everything that they need on reasonable basis.

K needed two years to determine family maintenance though again asked for two months to make an initial commitment at the expense of the innocent child. He later promised that he **MAY** submit Ksh.200/- and Ksh.100/- daily for child maintenance and rent respectively translating to Ksh.9,000/- monthly. He proved to be very hard to deal in this matter and completely refused to disclose his financial capability to enable Court arrive at a fair decision.

(III) Parties entitlement upon divorce:

27. It was evident that K owed H unpaid dowry of Ksh.150,000/- (see marriage certificate A041971 issued at Bungoma) P. Exhibit 1 that deserved consideration upon divorce.

28. Division of matrimonial property right is safeguarded by vesting in each spouse ownership according to their respective contribution be it monetary or non monetary. I shall strive to give effect to any monetary and non-monetary contribution that H could have proved so far or role played in marriage to guarantee her a send off.

It was the narration of H that they had no joint business and therefore no joint property but struggled to send for herself and child of marriage herein.

In the absence of clarity on monetary contribution, I have no doubt that H made a non-monetary contribution that deserved acknowledgement.

29. Divorced women are entitled to send off (gift of property) as at divorce according to most scholars and depending on husband means. According to Shafi scholars widely spread in Kenya, since a divorced woman was entitled to dowry as at marriage is equally entitled to gift of property (send off) on divorce.

QURAN: 33:28; "*O prophet (P Butt) say to your wives 'if you desire the life of this world and its glitter, then come! I will make a provision for you and set you free in a handsome manner (divorce).'*"

QURAN: 2:241; "*And for divorced women, maintenance (should be provided) on reasonable scale. This is the duty on the pious.*"

QURAN 2:236; "*...the rich according to his means and the poor according to his means, a gift of reasonable amount is a duty on the doers of good*".

Mr. K took a hard position and completely refused that he could pay sent off and or disclose his financial capability to enable Court reach a fair decision, perhaps thinking that the Court would expose much. In regard to his business, I belief Ksh.100,000/- is fair enough on both sides especially if paid at once.

30. All other issues raised by both parties and witnesses had no evidence and therefore dismissed.

31. Orders:

1 – Marriage between H and K dissolved.

2 – H to observe three month's eda period under maintenance of K

3 – Custody of the child to H until 18 years of age.

4 – K to submit to H Ksh.10,000/- monthly child maintenance and rent once through Court or M-Pesa with effect from April 2016.

5 – Education and health services responsibility of K.

6 – K to pay H unpaid dowry of Ksh.150,000/- immediately.

7 – K allowed visitation of the child at Petitioner's home on Saturday's and Sundays between 2p.m and 5p.m.

8 – K to pay H Ksh.100,000/- send off within next three months.

9 – H to provide motherly care and free breast feeding to the child.

10 – Parties observe peace

11 – No orders to costs and right of appeal granted.

D. RATORI

KADHI 1

31/3/16

Delivered in presence of:

1. CA – Caroline Kimaru
2. M/s Lucy Nanzushi for Respondent present
3. Petitioner present in person