



REPUBLIC OF KENYA
IN THE KADHI'S COURT AT GARSEN

DIVORCE CAUSE NO. 33 OF 2014

MEM.....PLAINTIFF

VERSUS

AD.....DEFENDANT

JUDGEMENT

This is a marriage matter herein is dated 25th September,2014. The applicant here by prays for the following;

- I. The plaintiff and defendant's marriage be dissolved.
- II. The defendant to pay the Mahr.
- III. The custody of the child.
- IV. The defendant be compelled to maintain the child including the past.
- V. Cost of the suit.
- VI. Any other grant the court deem to seem fit to grant.

The particulars of desertion are that the defendant after he had assaulted the plaintiff on 23rd January, 2014 travelled to Malindi to attend college never to return, communicate or even know how the child was doing. She contends that while in form three the defendant herein Mr. Abubakar kidnapped the plaintiff herein MRS. Munira disrupted her education. She was left alone at the homestead at Gomesa while Mr. Abubakar proceeded for further Education. The summary of the case is that the respondent/defendant is her legal husband but he has deserted her, he has ignored, neglected and hated her. He has denied the MUNIRA her rights, that the respondent has exposed the Applicant to emotional and psychological torture following lack of communication, that the Respondent has developed a non-caring attitude towards providing for the basic needs and requirements of the PLAINTIFF, and that The Respondent has continuously hurled abuses to the applicant's parents and GUARDIANS. The elders in effort to resolve the same bore no fruits and demanded that the plaintiff forego the .Mahr to be divorced

The particulars of Inability to provide were that since she returned to her home. no food, clothe medical care and all known expenses have been provided to the plaintiff or even the little child. Note for the other time since she was blessed with the little child.

It is the applicant's case that, despite the efforts to have the matter resolved by the extended family, friends and elders, the Defendant has refused and or declined to cooperate leaving the her to suffer. She contends that the marriage has irretrievably broken down due to the aforesaid cruelty, lack of provisions, lack of Abubakar to take husbandry obligations as required of him and desertion since 23/1/2014, and there is no hope of the parties herein ever reuniting whatsoever especially after the defence openly said they will divorce her if she don't claim Mahr. And that she has stopped loving the man, the marriage in issue should therefore be dissolved.

A perusal of the court records reveals that the said marriage was solemnized in accordance to Islamic Shariah on 13th May, 2013 but did not get the marriage certificate. It was done after the respondent eloped the applicant while very young in form 3. She says that although she agreed to be married she stopped loving her husband after birth of the child when she was mistreated and abandoned.

she produced to the court 5 witnesses who narrated the same and showed the court how long the matter had taken.

The defendant refuted all the allegations and repeated that he was willing to take back his wife. He detailed his defence saying that she suspected the plaintiff was engaging in immoral relationship. There was no quarrel, was denied access to the child. He approached the court

with p/O. with counter claim:

- a. Be given equal access to the child of the marriage
- b. the plaintiff be ordered to go back to the marriage
- c. The parents of the plaintiff be restricted from interfering with the marriage
- d. that in the event that she completely refuses to go back she should return the dowry(Mahr)

THE issues of determination in this case are:

1. *Whether the plaintiff and defendant's marriage should be dissolved.*
2. *Whether the plaintiff is entitled to her Mahr or not .*
3. *The custody of the child should be vested to the plaintiff or not*
4. *Whether the defendant should be compelled to maintain the child including the past maintenance or not.*

on dissolution of the marriage the courts attention was drawn to

On the issue of the divorce. ALLAH SAYS;

"....either take them back on reasonable basis or set them free on reasonable basis but don't take them back to hurt them...."

In this regard therefore, I am satisfied that the Plaintiff has established a *prima facie* and on balance of probability, she proves that, there's no guarantee that the Defendant will take her on the foot of kindness. The court in its process tried to initiate reconciliation but the parties adamantly stood by their hard stands and demands. The plaintiff feared that as per the responses of the defendant he will not care nor treat her kindly.

Throughout the proceedings the issues brought about by this was that

1. For the short period Mr. Abu-Bakr has knowingly denied the plaintiff to fulfill the purpose of a marriage in Islamic law by neglecting her and the child.
2. He has also been causing trauma, anguish emotional and psychological torture to the plaintiff who has also not obeyed him all along.
3. This is contrary to taking them back on reasonable basis

The court attention, was also drawn to Ash-shawkanii's ' *Nailul awtaar*' vol. 6 pg 236 also, AS-Saabiq's ' *Fiq-hu Sunnah*' vol 2 pg 162 where it stated that the Prophet (S.A.W) is alleged to have said that.

"Divorce is the most detestable before the Almighty God for all permitted thing"

The court attention was drawn also to "*Talak*" encyclopedia of Islam,Laiden 1934 vol. 10 pg 336-640 and also 'Zuhalylis ,'*fiq-hul Islamic Wa-adhilatuhu*" 4th . Vol 018 pg 88/9 -337/9. text where in is stated that:

Divorce, since it disintegrates the family union, is, of course, a social evil in itself, but it is a necessary evil. It is better to wreck the unity of the family than to wreck the future happiness of the parties by bonding them to a companionship that has become odious.

The court attention was also drawn, to Ash-shawkanii's. "*Fat-hul Qadiir*" Vol. 3 pg 21 where it states that.

Divorce has been allowed in Islamic Law as a remedy in incompatible union"

Furthermore marriage in Islamic law is a contract that must fulfill the conditions which include;

- 1) Capacity.
- 2) Consent.
- 3) Consideration (Mahr).
- 4) Witnesses.

In regard to the evidence availed to court the plaintiff have declared that she can't continue living with the man in the said conditions. Nevertheless the defendant has declared his unwillingness to divorce her but has not seriously adhered to the process induced by the court hence I find that the plaintiff is entitled to divorce.

The grounds for dissolution of the marriage are stipulated in SHARIAH

Maalik, al-Shaafi'ee and Ibn Hanbal allow a woman to demand separation before a judge on certain grounds, of which some are the following:

1. Non-provision of maintenance: These three Jurists concur that when the incapability of a husband to provide essential maintenance is proved, it is valid for his wife to demand separation. But if his inability is not proved and he refuses to provide maintenance, al-Shaafi'ee observes: The two may not be separated; Maalik and Ahmad remark: Separation may take place, because the failure to provide her maintenance is similar to insolvency. The law in Egypt explicitly validates the right to claim separation on the failure to provide maintenance.

2. Causing harm to the wife with word or deed: Abu Zuhrah, in al 'Ahwaal al-shakhsiyyah (page 358), says: It is stated in Egyptian law, Act 25 of 1929, that if a wife pleads harm being caused to her by the husband, so that the like of her cannot continue living with him, the judge will divorce her irrevocably on her proving her claim and after the judge's failing to reform the husband. If the wife fails to prove her claim but repeats her complaint, the judge will appoint two just arbitrators related to the couple to find out the reasons for the dispute and to make an effort to resolve it. On their failing to do so, they will identify the party at fault, and if it is the husband or both of them, they will cause their separation through an irrevocable divorce on the judge's order. This law is based on the opinion of Maalik and Ahmad.

The Sunni Shari'ah courts in Lebanon rule separation if a dispute arises between them and two arbitrators specify the necessity of separation.

I hold that BEING A WAY AND NOT DOING MUCH TO GIVE the applicant conjugal rights, lack of provisions as well stated and articulated with no evidential denial by ABUBAKAR amount to cruelty, HURTING, as well as abandoning her without any communication and laying all the blame on the parents is lack of responsibility as husband.

However, I want to state here that I AM of the same mind with the DEFENDANT that he has not been given enough opportunity to take care of the wife which has caused the marriage to break down irretrievably. There is no denying that in the circumstances the said marriage is indeed dead, nevertheless I cannot Condon his excuse. MUNIRA had come several times in her own capacity to complain of the challenges and distress and I see no reason why this court should not grant the order sought as it is obvious to the court that the couple herein has lost all love for THE defendant and the likelihood of reunion is remote.

The marriage lacks the basic ingredients of The objects of marriage as envisaged in Qur'an:Rum:30:21 are tranquillity, love and affection and mercy between spouses.

'And among His signs is this, that he has created for you your wives from among yourselves that you may find repose in them and He has put between you affection and mercy. Verily, in that are indeed signs for men of sound knowledge'. Rum 30: 21

Islam further provides for a maximum of four months to resolve disputes. It is the period a wife can withstand lack of conjugal rights. Extension of this period results to her enslavement or could put her piety to great test, which infringes on her religious rights

'those who take oath not to have sexual intercourse with their wives must wait for four months, then if they return (change their minds in this period) verily Allah is oft forgiving, most merciful' Al Baqarah : 226

Desertion not only hurts ones wife and children but exposes them to risks on their livelihood and piety. It also infringes on their marital and individual rights.

On the part of MAHAR The Mahr (Dowry)

The mahr (dowry) is something that is paid by the man to his wife. It is paid to the wife and to her only as an honour and a respect given to her and to show that he has a serious desire to marry her and is not simply entering into the marriage contract without any sense of responsibility and obligation or effort on his part.

It has been referred to by many names in the texts and the books of fiqh:

Proof that the Mahr is Obligatory

Allah says in the Qur'an:

"And give the women their dowries with a good heart..." [Noble Quran 4:4]

This verse is addressed to either the husbands or the guardians. It is addressed to the husbands because it is their responsibility to pay the dowry. It could also be addressed to the guardians, not because they have to pay the dowry, but because in pre-Islamic jahiliya (and in much of today's "post-Islamic" jahiliya), they used to take the dowry of the women and not give it to them. This verse shows that the dowry must be given to the women and not kept by the guardians. The following verses also shows the obligatory nature of paying the dowry to the

women:

"...So for that pleasure which you have enjoyed from them, give them their prescribed compensation.. " [Noble Quran 4:24]

"...All others have been made lawful for you provided you seek (them in marriage) with your property..." [Noble Quran 4:24]

Regarding one of the Companions who was poor and wished to marry, the Prophet (peace and blessings be upon him) said to him:

"Search for something, even if it is just a ring made from iron." [Bukhari & Muslim]

Regarding this case I have heard the defendants averments that if the court dissolves the marriage the plaintiff should return the Mahr. I am aware that the only thing received was to the father as sadaqa but as per the Islamic practice and sharia the Mahr is paid to the wife and its compulsory and must paid even on death. I cannot abandoned the law of Allah and rule by the wish and whim of individuals. Munira is entitled to her full dowry it will be against the law for me strip it off.

As regard to the issues of custody the court attention was drawn to Al-Bayhaquees' ' Al- Kubra 8/4 and also Abdulrazaq's 'Mussanaf's' No. 12605. In case of **(Umar (R.A) v umm Asim (R.A). Abubakar (R.A) gave Judgment in favour of Umm Asim and stated that she is more compassionate, gentler, more tender – hearted and more merciful (mother-nature) and she is more entitled to have custody of her son as long as she doesn't get married."** 7

The court attention was also drawn in support of the above case to constitution, Art 53(2) where its stated that;

"Child best interests are of paramount importance in every matter concerning the child".

The court attention was also, drawn to Art 3(1) of the UN convention on the right of the child. 1989 (to which Kenya is a party) which states;

"In all actions, concerning children whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies the best interest of the child shall be the primary consideration". The child in question is of tender age and in fact strange to the defendant. It therefore follows that here the mother has the specialty to have it.

The upshot of all the above is, that I make the following orders.

1. **The plaintiff is young. She has been deserted by her husband for more than eight(8) months in which I find contrary to our laws accordingly I grant the applicant's prayer for dissolution of the marriage. The parties' marriage solemnized in respect of M E M and A D on MAY 13th 2012 is hereby declared DISSOLVED with effect from 20th January, 2015 corresponding with 29th Rabbiul Awal 1436 A.H. The eddah starts today and ends after three months which 20th April,2015 . THAT as the practice of Islamic Shariah a woman who asks for Talaka cannot be given Eddah maintenance.**

2. **Divorce certificate be issued**

3. **The custody care and control of the child of the marriage named herein before be granted to the Plaintiff.**

4. **The Defendant shall have unrestricted access of the child. The modality of such access be agreed upon or ordered upon after.**

5. **The defendant should accomplish the obligation and debt before Allah which is 3 cows or its equivalent market rate of kshs. 20,000/= a total of Kshs. 60,000/= IMMEDIATELY.**

6. **The defendant shall contribute towards the maintenance of the child. The modality of such maintenance be agreed upon or ordered upon after. No past maintenance should be paid but as from this date the father should start his fatherly work to provide maintenance of kshs. 150/ = daily which is 4,500/= monthly.**

7. **Order as to cost**

Each party shall bear his/her own cost.

Ordered accordingly.

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

DATED and SIGNED at GARSEN this 20th day of January, 2015.

R. K. OTUNDO (MR)

RK

GARSEN LAW COURTS

20/01/2015