



BMS v MHM (Civil Case 21 of 2015) [2015] KEKC 48 (KLR) (26 March 2015) (Judgment)

BMS v MHM [2015] eKLR

Neutral citation: [2015] KEKC 48 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOMBASA
CIVIL CASE 21 OF 2015
AH ATHMAN, PK
MARCH 26, 2015**

BETWEEN

BMS PLAINTIFF

AND

MHM DEFENDANT

JUDGMENT

Introduction

1. The plaintiff prays for:
 1. confirmation of party's divorce and issuance of divorce certificate
 2. E maintenance
 3. Dowry balance plus Kes 40,000.00 for Kilemba and Maziwa
 4. Mut'a compensation
 5. Costs
2. She claims the defendant married her in 2013 but arbitrarily divorced her in 2015 and asked her to leave the matrimonial home.
3. The defendant was served with the plaint and notice to enter appearance and hearing notice of formal proof. He had not entered appearance or file defence, the plaintiff prayed for interlocutory judgment which was granted but directed to give formal proof. The defendant apparently appointed an advocate to represent him but neither the defendant nor his advocate appeared on date of formal proof hearing. He did not file any application to set aside the interlocutory hearing. The hearing proceeded as scheduled.



4. The parties were married under Islamic law on October 20, 2013 at Likoni. They are blessed with one child, T M [born November 8, 2014]. The defendant is a fire appliance maintenance crew, Marine operations, Kenya Ports Authority. The plaintiff is a [31] years old lady.

Issues

5. The issues for consideration in this matter are:
 1. Confirmation of divorce.
 2. Dowry.
 3. Edda maintainance.
 4. Whether or not the plaintiff is entitled to Mut'a compensation.

Divorce

6. The plaintiff annexed a divorce note dated January 7, 2015 where the defendant in his own handwriting wrote twice that the plaintiff is no longer his wife. Divorce beocmes effective upon pronouncement and / or writing by the husband.

Narrated Abu Huraira [RA] that the Prophet [PBUH] said: Three issues are considered effective upon pronouncement, whether one is serious or joking: marriage, divorce and raj'at [returning wife to marriage contract after divorce before expiry of edda period in a revocable divorce]. Reported by the five Imams of Hadith except Al Nasa'i.

7. Accordingly, the parties marriage is hereby confirmed annulled, one revocable [within 90 days] with effect from January 7, 2015. Divorce certificate to issue.

Dowry

8. The claims some of the dowry was not paid. She annexed marriage certificate No [Particulars withheld] issued by Sheikh Rama Mwajembe of Tiwi. It indicated the dowry was furniture worth Kes 100,000.00 not paid. The plaintiff however admitted some of the furniture, a bed and a coffee table was paid. She submitted the other pieces not paid are: Sofa set, dining table, dressing, wardrobe and showcase. She is entitled to be paid her dowry balance estimated to be Kes 75,000.00
9. Kilemba and Maziwa are customary gifts to the bride's parents. The claim for kilemba and Maziwa was not supported by evidence, it is also not mandatory and not a requirement of marriage under Islamic law. It is rejected.

Edda Maintenance

10. A divorced wife is entitled to be maintained by the husband during the edda period. He is prohibited from chasing from the house or even herself to leave the matrimonial home. The husband is obliged to provide for her accommodation and sustenance during this period under Qur'an 2:241, Talaq 65:1 and 6.

And for divorced women maintenance (should be provided) on reasonable scale. This is a duty on al Muttaqeen (the pious) Al Baqarah: 241

'O Prophet, when you divorce women, divorce them for [commencement of] their waiting period and keep count of the waiting period and fear Allah your Lord. Do not turn them out



of their [husband's] houses, nor should they [themselves] leave [during that period] unless they are committing a clear immorality, and those are the limits set by Allah and whoever transgresses the limits of Allah has certainly wronged himself. You know not perhaps Allah will bring after that a [different] matter'. Qura'n :Talaq: 65:1

'Lodge them (the divorced women) where you dwell, according to your means, and do not straiten them (that they may be obliged to leave your house). And if they are pregnant, then spend on them till they lay down their burden. Then if they give suck to the children for you, give them their due payment, and let each of you accept the advice of the other in a just way. But if you make difficulties for one another, then some other woman may give suck for him (the father of the child). Qur'an :Talaq 65: 6

11. The defendant erred in compelling the plaintiff to leave the matrimonial home before expiry of the edda period. The plaintiff is entitled to edda maintenance Kes 500.00 for [90] days, totaling Kes 45,000.00

Mut'a Compensation

12. Mut'a literally means a gift. It is encouraged to be given to divorced wives both to console them and to assist them in their new life and it is aimed at reducing the rate of divorce. It has basis in Qur'an but is discretionary due to lack of consensus on the matter among jurists.
13. Saeed Ibn Jubair's [RA] opinion is that the verse 'For divorced women Maintenance (should be provided) on a reasonable (scale). This is a duty on the righteous.' Qur'an: Baqarah 2: 241 provides for Mut'a compensation to all divorced women. This view is supported by Sheikh Muhammad Ali Al Sayyis to enable compensate divorced women from loss through (arbitrary) divorce.
14. Ref: commentary on verses of rulings, *Sheikh Muhammad Ali Al Sayyis, Vol. 1* pp 168 Article 86 of the Islamic Charter on family provides:

'Islamic Shariah encourages the man to give wife material gift, known as al mut'ah, when he divorces her. The value of the gift should be proportion to the husband's financial abilities and the duration of the marriage. the purpose of the gift is to console her and to lessen the harm she endures as a result of the divorce.

[The Islamic charter on Family is published by the International Islamic Committee for women and Child IICWC with contributions from eminent Muslim scholars: Dr Abd El Lateef Aamir, Dr Abdurrahman El Naqeeb, Dr AHmad Assal, Dr Ahmad El MAhdi Abd el Haleem, Dr Ali Gomaa, Dr Fathi Lashin, Dr Jamal Al Din Atiyyah, Dr Makarim El Deeri, Dr Mohammad Emarah, Dr Muhammad Kamal El Din Imam, Dr Salah Abd El Mutaal, Dr Yusuf Al Qaradawi].

15. The plaintiff has demonstrated she has been arbitrarily divorced. Divorcing a [31] year old lady after only fifteen [15] months of marriage is irresponsible, inhuman and inconsiderate. The plaintiff is entitled to mut'a compensation. I award and do order the defendant to pay Kes 300,000.00 as Mut'a compensation.
16. The parties have one issue from their wedlock. The plaintiff submitted the issue of the child custody and maintenance is before the children's court. It shall be dealt with at that forum.

Costs to the plaintiff.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA ON 26TH MARCH 2015



ABDULHALIM H. ATHMAN

PRINCIPAL KADHI

In the presence of

Mr. Yusuf K. Abdulrahman, Court assistant

Mr. Abubakar for plaintiff

Mr. Kamoti for defendant

