



F B M v M S (Civil Case 17 of 2015) [2015] KEKC 31 (KLR) (23 April 2015) (Judgment)

F B M v M S [2015] eKLR

Neutral citation: [2015] KEKC 31 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOMBASA
CIVIL CASE 17 OF 2015
AH ATHMAN, PK
APRIL 23, 2015**

BETWEEN

F B M PLAINTIFF

AND

M S DEFENDANT

JUDGMENT

1. This is a divorce matter. The plaintiff prays for dissolution of the marriage and custody of children. She claims the defendant deserted her for three ten [3] years and does not communicate or provide for her that he has denied her conjugal rights. She prays for:
 1. Dissolution of the marriage
 2. Costs
 3. any other relief the court may grant.
2. Service of plaint and summons to enter appearance were effected through substituted service under order 5 rule 17 [1] *Civil procedure Rules*.

Brief Facts

3. The parties were married under Islamic Shariah on August 26, 2012 at Mombasa. The plaintiff is a [27] year old lady employed by the [particulars withheld] as a forklift operator. The defendant is an Australian national of Ethiopian descent. He came to Kenya and married the plaintiff. They lived for about one month then he left for Australia on the agreement he would later return to live in Kenya. He didn't. They are not blessed with any child.



Issues

4. The issue for determination in this matter is whether or not the plaintiff is entitled to dissolution of the marriage.

Divorce

5. The plaintiff, in her evidence in chief, submitted she had been deserted by the defendant for four [4] years since 2012 and the defendant does not communicate with her or send her maintenance.
6. I find as fact the defendant's desertion of his wife for two years and seven months, has denied his spouse her conjugal rights and has not been providing for his wife.
7. The objectives of marriage in Islam are for spouses to enjoy love, affection, mercy and tranquillity. Family is the primary and important unit of society. The husband is expected to provide leadership to establish a strong family as a basis to a strong society. Desertion negates these objectives. Divorce is allowed as a measure of last resort where these objectives cannot be attained or to remove a harm on a spouse.

‘And of His signs is that He has created for you from yourselves mates that you may find tranquility in them; and He placed between you affection and mercy. Indeed in that are signs for a people who give thought’. Rum 30 : 21

8. Denial of conjugal rights is prohibited. Desertion violates this right. After lapse of four months the wife is entitled to seek dissolution of the marriage.

"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"

Maintenance provision for wives is the responsibility of husbands.

“Men are protectors and maintainers of women, because Allah has made one of them to excel the other, and because they spend (to support them) from their means. therefore the righteous women are devoutly obedient (to Allah and to their husbands) and guard in the husband's absence what Allah orders them to guard (e.g. their chastity, their husband's property. as to those women on whose part you see ill-conduct, admonish them (first), (next), refuse to share their beds, (and last)beat them (lightly, it is useful); but if they return to obedience seek not against them means (of annoyance) . surely Allah is Ever Most High, Most Great”. Nisa:4:34

9. Lack of provision is more hurtful and detrimental to a wife than the lack of intercourse. There is juristic consensus that a marriage can be dissolved for inability to intercourse due to the harmful effect to the wife. Her right to ask for dissolution due to lack of maintenance is therefore stronger than that for lack of ability to intercourse.
10. Article 88 of the [*Islamic Charter on Family*](#) provide:

"It is the wife's right to request divorce if her husband refuses to provide financial support for her wife or if is absent for a long time and there is no news from him or if he is lost or imprisoned for a long period of time and does not have any apparent wealth from which she



can spend. She may request divorce if she is harmed by his absence from her, and this right is subject to the regulations and stipulations mentioned in the rulings of Shariah."

11. [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, D 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]
12. I hereby grant the plaintiff's prayer for dissolution of the marriage. The parties marriage is hereby pronounced and declared dissolved with effect from April 23, 2015 corresponding with 3rd Rajab 1436 AH Divorce certificate to issue.
13. The plaintiff is entitled to past maintenance for [31] months at the rate of Kes 20,000.00 per month ie Kes 620,000.00
14. Costs to the plaintiff.
Orders accordingly.

DATED AND DELIVERED AT MOMBASA ON 23RD APRIL 2015.

ABDULHALIM H. ATHMAN

PRINCIPAL KADHI

In the presence of

Mr. Yusuf K. Abdulrahman, Court Assistant

Plaintiff.

