



**REPUBLIC OF KENYA**

**IN THE KADHI'S COURT AT BUNGOMA**

**DIVORCE 5 OF 2015**

**BAKHITA IMRAN ..... PLAINTIFF**

**VERSUS**

**MAHMUD HASSAN ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Plaintiff (hereinafter BAKHITA) filed divorce suit against the defendant (hereinafter MAHMUD) for divorce, custody and maintenance, payment of Dowry, costs and other reliefs on 2<sup>nd</sup> April, 2015. BAKHITA and MAHMUD solemnized an Islamic marriage on 11<sup>th</sup> December, 2009 and established their matrimonial home at Kakamega, Nairobi and Finally Bungoma. The marriage was blessed with one issue – JIMIA MAHMUD aged about 4 years.

**Plaintiff's Case:**

2. In her Complaint averred that prior to her marriage, was widowed with four issues – MARIAM, FENUN, AFHAM, and SUMEIYA (hereinafter ORPHANS) aged between 16, and 10 years which MAHMUD accepted to take care of.

BAKHITA accused MAHMUD of cruelty and neglect; Physical assault that caused her bodily harm, denial of the ORPHANS access to their Matrimonial house, love and affection, abused and eventually chased her from matrimonial house. BAKHITA said, MAHMUD was guilty of denial of Conjugal rights and general family maintenance.

3. On 16<sup>th</sup> June, 2015, BAKHITA stated was married to MAHMUD in accordance with Islamic Law at an agreed dowry of; Teaching her memorize 5 (five) chapters of Quran and General maintenance of the ORPHANS. The marriage was blessed with one issue and stayed peaceful prior to problems that form basis of this suit. The ORPHANS stayed in Kakamega and Mombasa and only met during December holidays. They were denied access to matrimonial house during holidays. MAHMUD parents intervened in vain. She further narrated that was chased away along with the ORPHANS in December 2012 before neighbours and later on returned to Matrimonial house with assistance of her mother.

4. BAKHITA further accused MAHMUD of denial of Conjugal rights by spending nights chewing MIRAA and sleeping during the day, abandoning to pay Sumeiya's fees, abusing her and breaking down communication especially in May 2014, when he was suspended from work and later on dismissed.

She also recalled that was chased away until she spent at AMINA ADAN'S house and later with the help of her mother was accommodated at YASMIN BAKHRESA until she rented own house. MAHMUD followed her up and stayed in the house pending parents reconciliation meeting that never took place leading to their separation since a year.

5. In cross-examination BAKHITA said; MAHMUD chased her from Matrimonial house, they have never engaged both parents to mend their marital relationship and was sure that the parents/elders cannot meet. She disclosed that MAHMUD knew of the ORPHANS before marriage, promised to Maintain them as part of dowry but never heeded to the promise, demanded her dowry and was denied conjugal rights since February 2014.

She further said that she earned Ksh. 9,000/= enough to provide maintenance if given custody. She allowed custody of the issue to MAHMUD on condition that be given access during holidays.

**Defendant's case:**

6. MAHMUD in response stated; he married BAKHITA on 11<sup>th</sup> November, 2009, established their matrimonial house in Kakamega, Nairobi

and later Bungoma, and blessed with one – JIMIA MAHMUD aged 4years 8 months. It was the testimony of MAHMUD that while in Bungoma she worked at a Safaricom shop owned by FARAJI MOHAMED FARAJI, he knew BAKHITA had four Orphans before marriage, accomodated them but due to space they left to Kakamega and Mombasa and only visited them during holidays.

7. MAHMUD admitted having fought her on suspicion over HADIJA (his daughter), WADHIFA (his daughter's Cousin) and AISHA (her sister). He denied her Conjugal rights and family maintenance since 29<sup>th</sup> June, 2014 (Ramadhan) because of her desertion from matrimonial house. He disclosed he raised about Ksh. 90,000/= fees for MARIAM and was responsible for rent and fees for other Orphans but stopped after was dismissed from work on 28<sup>th</sup> November, 2014.

8. It was the narration of MAHMUD that; he had already completed payment of Dowry agreed upon, and best suitable for Custody for he had stayed peaceful with the issue for the last one year with consent of BAKHITA. He discussed he had no income but his sisters have taken charge, enrolled the issue at AL-NUR INTERGRATED – NAIROBI and fees for 2015 fully paid.

9. In cross-examination MAHMUD said; they sat severally to solve problems surrounding the ORPHANS in vain, BAKHITA deserted the Matrimonial house after he promised to chase her daughter (MARIAM) away. He further said it was not possible for their elders to meet over marriage problems, still loved the Plaintiff and willing to release the issue to her during holidays if offered custody, though divorce was his only relief.

10. Having given due attention to documents filed and taking into account evidences adduced by both parties, I belief I have a duty to determine three main issues;

(i) Whether BAKHITA adduced reasonable grounds to guarantee divorce.

(ii) Custody and Maintenance

(iii) Plaintiff entitlement upon dissolution of marriage.

11. In solving the issues at hand, this Court is guided by Article 170(5) Constitution of Kenya 2010, together with Section (5) and (6) of the Kadhi's Court act Cap II

(i) 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.

(ii) Kadhi's Court Act Cap II Section (5) and (6):

(a) 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.

(b) Section(6): The Law and the rules of evidence to be applied in a Kadhi's Court shall be those applicable under Muslim Law.

### **Determination**

12. It was the testimony of MAHMUD that he assaulted her on suspicion of unfaithfulness over HADIJA, WADHIFA and AISHA. He denied her conjugal rights and family maintenance since 29<sup>th</sup> June, 2014 owing to her desertion. He also said BAKHITA deserted because he once promised to chase her daughter - MARIAM – out of their matrimonial house, though disclosed that he paid fees Ksh. 90,000/= for her fees at MUKUMU GIRLS HIGH SCHOOL. MAHMUD admitted that due to space was not able to accommodate the ORPHANS and have sat severally to solve problems surrounding them in vain. Both parties ruled out the possibility of their parents meeting over their marital problems. According to BAKHITA, the defendant was obliged to provide maintenance to the ORPHANS arguing that it was part of dowry but no such evidence was provided.

13. The main reason that turned the marriage sour evolved around the stay and maintenance of ORPHANS. It was important for the parties to embrace dialogue, consult widely and engage their parents/ elders to mend their relationship. Even on the advice of the court, both obstructed the possibility of their parents/ elders meeting and insisted on divorce.

I do believe MAHMUD as head of the family avoided other available options in solving their disagreement and chose to fight BAKHITA in first instance. This is contrary to Quran; 4:34;

***“...but those (wives) from who you fear arrogance (first) advice them; (then if they persist), forsake them in bed and (finally), strike them (lightly if useful). But if they obey you (once more), seek no means against them. Indeed, Allah is ever exalted and grand ...”***

It is important to note that, both parties are to blame for collapse of their marriage and divorce is a relief.

### **Custody and Maintenance:**

14. In regard to the ability and capability of the parties, the mother has more right to Custody of her Children regardless of sex until age of

understanding recognized at seven or so provided. She has not remarried. This is because of the report narrated by Ahmad (6707) and Abu Daud (2276) from Abdullah Ibn 'Amr (r.a) 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; ***“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 (regardless of sex) with love, mercy, attention and motherly care than the Father.

15. MAHMUD said that; though had no Income, stayed with the Child with consent of BAKHITA for last one year since separation and with the assistance of his sisters, enrolled the issue at AL-NUR INTERGRATED – NAIROBI and fees for 2015 paid (Dexh.3). BAKHITA disclosed that she earned Ksh. 9,000/= monthly enough to provide maintenance and only allowed custody to MAHMUD on condition that be given access during holidays which the defendant agreed. Even though BAKHITA agreed to give out Custody on condition, the Court found her capable as compared to MAHMUD.

The reason for giving out the child could be because she experienced no problem for last one year or is busy held up with the ORPHANS. Should this Court decide to offer MAHMUD custody, then BAKHITA has the responsibility of monitoring the progress of the Child for the purpose of review of Custody should there be need.

16. Irrespective of who has the right of custody, the other party has visitation rights according to Mutual understanding and consent.

**Plaintiff's entitlement upon divorce:**

17. It was clear that MAHMUD and BAKHITA were married in accordance with Islamic Law at agreed dowry (Mahr) of: ***“Teaching her to memorize five chapters of Quran.”*** which had been accomplished. This is according to marriage certificate B1805 issued at MAKINA JAMIA MOSQUE – NAIROBI by Sheikh Ismail Mohamed Ibrahim – an assistant registrar, Islamic marriages and Divorce duly signed by parties (Dexh.1)

**Orders**

1. Marriage dissolved
2. Custody of issue to MAHMUD
3. Defendant to cause issue access Plaintiff during Holidays
4. Plaintiff may apply for review of Custody.
5. Parties to observe peace.
6. No orders to costs.

HON D.S. RATORI

KADHI 1

16/7/2015

**Corum:**

D.S Ratori – Kadhi 1

Lectica – CA

Plaintiff – Present

Defendant - Present