



REPUBLIC OF KENYA
IN THE KADHI'S COURT AT NAIROBI
MLIMANI COMMERCIAL COURTS
DIVORCE CAUSE NO. 58 OF 2015

S S N.....PETITIONER

-VS -

H A.....RESPONDENT

J U D G E M E N T

By a petition for the dissolution of Marriage dated and filed on 22nd June 2015, the Petitioner sought for the dissolution of Marriage with the Respondent on the ground of cruelty and negligence, secondly the Petitioner prays for a custody of the issues, thirdly the Plaintiff prays for the maintenance of the issues of the marriage and lastly the She prays for any other relief the court may deem fit to grant.

The Petitioner who gave her name as SSN told the court that she is a resident of Nairobi and she got married to the Respondent on 12nd November 2011 in accordance with Islamic Law in Moyale.

They resided together in [Particulars Withheld], their Union was blessed with two issues namely;

- 1) Z H age 3 years.
- 2) H H age 1 year and 5 months.

The Petitioner asserts that since she was seven month pregnant the respondent treated her with physical, mental and emotional cruelty.

Particulars of cruelty are stated as follows:

- i) That throughout the subsistence of marriage the respondent has been rude and abusive to the petitioner in presence of her child and neighbors .
- ii) That respondent has been reluctant in contributing to matters affecting the development of the family.
- iii) That respondent has been accusing her of extra marital affairs .
- iv) That Defendant has been issuing threats to kill her if they got divorced.
- v) That throughout the subsistence of the marriage the respondent has been abusive to the

petitioner's parents and relatives.

In response to the Petitioner's above complaints the respondent filed a defence on 29th June, 2015. In his defence the respondent denies the accusation brought against him by the petitioner, However acknowledges the existence of matrimonial problems and wish the court to intervene and save the marriage.

The respondent stated that he has been sending money to the petitioner through her grandmother by the name Mama Asha until when the petitioner gave birth to her second born child.

The respondent further states that the petitioner left the matrimonial home without his permission with all the household items to Moyale and acknowledges that he has been attempting to reconcile which has apparently not been successful.

I have given due consideration to the application and the ground it's based on *vis a vis* the defence, of the respondent. It emerges from the evidence on record that the respondent has been guilty of cruelty against the petitioner and Petitioner is rightfully before the court to seek judicial rescission (fask) with the respondent.

The court attention was drawn to Holy Quran chapter 2 v. 231 wherein is stated that.

"...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 Petitioner has established a *prima facie* and on balance of probability, she proves that, there's no guarantee that the respondent will take her on the foot of kindness.

The court attention, was also drawn to Ash-shawkanii's '*Nailul awtaar*' vol. 6 pg 236 also, AaS-Saabiq's '*Fiq-hu Ssunnah*' 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 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"

There is evidence adduced under oath by the petitioner , that the respondent was on several occasions cruel to the petitioner. This is manifest in physical and verbal abuse, negligence, and unreasonable abandonment of the matrimonial home. This conduct caused mental and psychological torture to the petitioner. There is evidence that the parties are no longer living together. There is evidence that the respondent neglected the petitioner and the children. He never contributed to the children maintenance. Children are living with petitioner and it is the petitioner who meets the expenses.

In present case it is a common ground that the existence of pre- emptory cause, particularly, assault and even a reasonable apprehension of violence render the conjugal union impossible. In short, the marriage is in existence in name and nothing more. It is a shell and hence it serves no useful purpose for it to stand.

On custody of the child, Article 53(2) of the Constitution and section 4(3) of the Children Act provide that the best interests of the child shall be the primary consideration in all matters concerning children. On the issue of custody, this court finds that the petitioner has been caring for the children. The cardinal principle on whom to grant custody of a children in cases of this nature is the welfare of the child. At this stage , the children needs to live with the parent who has cared for them rather than the parent who has been absent from their life and has not catered for them.

On maintenance of the child, section 24(1) of the Children Act puts a duty on parents to maintain their children. That duty gives the child a right to education and guidance, immunization, adequate diet,

clothing, shelter, and medical attention.

I am satisfied that the petitioner has proved her claim against the respondent to the required standards on all the prayers.

- 1. The upshot of all the above is, that I make the following orders:**
- 2. The marriage solemnized in respect of the petitioner and respondent on 12nd November, 2011 be dissolved.**
- 3. The custody, care and control of the child of the marriage named herein before be granted to the petitioner.**
- 4. The petitioner shall have unrestricted access of the child. The modality of such access be agreed upon or ordered upon after.**
- 5. The petitioner shall provide a sum of Ksh. 10,000/- towards the maintenance of the children.**
- 6. The petitioner shall provide a reasonable medical cover for the issues of the marriage.**
- 7. Divorce certificate be issued.**

Order, as to cost each party to bear its cost.

Orders accordingly

Dated and signed at Nairobi, this 29th day of July, 2015

Hon. A. I. HUSSEIN (MR.)

KADHI

In Presence of:

Petitioner

Respondent