



REPUBLIC OF KENYA
IN THE KADHI'S COURT AT NAIROBI
MLIMANI COMMERCIAL COURTS
DIVORCE & MAINTENANCE CAUSE NO. 228B OF 2013
MNM..... PLAINTIFF
VERSUS
AK DEFENDANT

J U D G M E N T

The brief fact of this case are that the plaintiff contracted a marriage with the defendant on 18th July 2012 in accordance with the provisions of the Mohammedan Marriage and Divorce Registration Act Cap.155 (repealed).

Subsequently, they were issued with the certificate of marriage by the presiding registrar of marriage as appears in PExhibit "A" . They cohabited as husband and wife together at various residences. They said union was not blessed with any issue.

On 16th October 2013, the Plaintiff filed her Complaint dated 15th October 2013 against the defendant for a decree for a dissolution of the marriage, an order for the maintenance in her favour by the defendant and any further relief that this Honourable Court will deem fit. This Complaint was founded on the ground of cruelty.

On 15th November 2013, the Defendant filed a defence and counterclaim to the complaint wherein he denied the allegations and prayed for dismissal of the plaintiff's suit with cost, an order for a declaration that the marriage between the plaintiff and defendant is void abinitio and for the costs of this suit and of the counterclaim.

On

3rd March 2014 and 10th June 2014 respectively , the plaintiff testified and was cross-examined together her witness. The plaintiff's case was closed on 25th June,2014.

When the matter came up for the defendant's case on 23rd July 2014, Counsel for the defendant informed the court that the court should grant leave to recall PW2 for the purpose of cross-examination. In fact the record of the court reflect that on 10th June 2014 when the matter was called out for further hearing only the Plaintiff counsel was present , the record of the court also demonstrated that defendant was duly served but failed to attend the hearing. Notwithstanding the failure occasioned by the defendant the court went ahead and granted a leave to recall PW2 again the defendant did not attend the court. After a series of adjournments, the defendant neither call any witness nor produce any document in support of his claims as contained in the defence and Counter claim filed on 15th November 2013.

The plaintiff testified on oath that she and the defendant wedded on 24th July 2012 in Nairobi, upon which they were issued with a marriage certificate, tendered in evidence as exhibit "A". After their marriage they cohabited as husband and wife in various residences.

They co habited until 16th June 2013 and since that time they have lived apart. Their marriage was not peaceful. The defendant was cruel to her, beating her and verbally abusing her as it appears in exhibit "B", in addition he has failed to offer financial support to the plaintiff . The defendant deprived the plaintiff sexual intimacy for a considerable period without any justifiable reasons. The defendant deserted the matrimonial home for lengthy periods without knowledge, fault or provocation on the part of the plaintiff.

She further testified that they have both seek professional and family help on many occasions with no success as appears in Exhibit "C" and that efforts to reconcile/redeem their marriage have been grossly and contemptuously disregarded by the defendant.

She therefore asked the court to dissolve the marriage which has been rocky and irretrievably broken down on account of the defendant's extreme cruelty, desertion and negligence leading to the plaintiff's torture and to compel the defendant in providing maintenance for the her and lastly any further relief that this Honourable Court deems fit I have given due consideration to the application and the ground it's based on *vis a vis* the defence and the counter claim of the defendant. 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...."

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"

The foregoing evidence is not denied or rebutted by the defendant. The plaintiff's case has been subsequently proved before me to the required standard by the plaintiff

Looking at the evidence in totality, the entire matrimonial relations between the parties, including their conduct and personality, the defendant's conduct amounts to cruelty. This is manifest in his denial of sexual intimacy to the plaintiff, physical and verbal abuse.

The two parties are no longer living together neither are they planning on reconciling and the existence of pre-emptive 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 the issue of maintenance upon the termination of marriage by divorce the wife is entitled to maintenance whether the divorce is revocable or irrevocable and whether she is pregnant or not as held in ***Rashid Ahmad v. Anisa Khatun. AIR 1932 PC 25.***,

In ***Arif Muhamood Mian v Mst. Tanvir Tatuma and other 2***, the divorce wife had claimed maintenance which was awarded by the Arbitration Council vide ex parte against the husband at the rate of rupees 10,000 per mensem. in the view of the court, *maintenance can be claimed till the time talaq becomes effective as well as during the eddat period.*

The court also observed that maintenance should not be a bare minimum sustenance allowance but a convenient to the need of the wife. However the court refused to award any maintenance post iddat period..

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

In the premises, there being response to the plaint and on the evidence adduced by the plaintiff, I find for the plaintiff. Accordingly, judgment is entered as prayed against the defendant for the following orders:-

- i) A decree is granted for the dissolution of the marriage between the plaintiff and the defendant.
- ii) The certificate of divorce be issued forthwith.
- iii) The defendant shall provide Kshs. 70,000/ monthly towards the maintenance of the plaintiff for three months.
- iv) The defendant shall provide consolatory gift to the plaintiff. The modality of such support shall be ordered upon the assessment of the defendant financial strength or upon a strong evidential proof from the plaintiff.

DELIVERED and SIGNED at Nairobi this 8th day of September 2015.

Hon A .I. Hussein

Kadhi II