



**REPUBLIC OF KENYA**  
**IN THE KADHI'S COURT AT NAIROBI**  
**MLIMANI COMMERCIAL COURTS**  
**DIVORCE CAUSE NO. 44 OF 2015**

**J S ..... PETITIONER**

**-VS-**

**H Y..... RESPONDENT**

**J U D G E M E N T**

This is a petition for divorce filed by one **JS** (herein after 'the Petitioner') against one **HY** (herein after 'the Respondent') on 12th May, 2015 for a decree for a dissolution of marriage, an order for the custody of the issues of the marriage, an order for the maintenance of the issues of the marriage, an order for mehr and arrears of maintenance during eddat and other reliefs this court may grant.

The background is that the Petitioner's Marriage to the Respondent was conducted in Burundi under the provisions of Islamic law. They cohabited as husband and wife in Ramonge, Burundi and later established their matrimonial home in Nairobi.

The said marriage was blessed with five (5) issues namely:-

- I. JH - 21 years.**
- II. ZH - 14 years.**
- III. TH - 12 years .**
- IV. YH - 7 years.**
- V. IH - 5 years.**

The petitioner case is that the marriage has irretrievably broken down on account of the respondent's extreme cruelty leading to the petitioners mental torture.

On 10th June 2015, the respondent filed an answer to the petition wherein he denied the allegation brought against him by the petitioner but agreed on the fact that the marriage between him and the petitioner has irretrievably broken down on account of the petitioner's behavior.

At the trial both parties testified on oath and choose not to call any witness. The Petitioner testified that she and the respondent wedded on 22<sup>nd</sup> November 1997 in Burundi. After their marriage they cohabited as husband and wife in [Particulars Withheld], Burundi and [Particulars Withheld], Nairobi respectively.

Their marriage was not peaceful. The respondent was cruel to her, beating her all and verbally abusing her as it appears in PExt 2,3 and 4, in addition he has taken her sister to be his second wife while she was in Burundi for a short visit. The petitioner further stated that after her visit to Burundi she was thrown out of matrimonial home and was forced to seek refuge in nearby mosque as it appears in PExt 1.

The Petitioner further stated that the respondent has absolutely been un-corporative and has despised and undermined efforts by the petitioner to sort out their problems through ADR as it appears in PExt 5. Lastly, she prays for a judgment to be entered against the respondent as prayed.

The respondent denied the allegation brought against him by the petitioner , he however acknowledged the existence of matrimonial rift between him and the respondent.

The respondent stated that the petitioner left the respondent with the issues of marriage without his consent to Burundi , where she sold the plot belonging to him without his consent and that is what lead to the current misunderstanding between both parties.

He further stated that the petitioner is harsh on the children of marriage as well abusive. The respondent further testified that on 2nd April 2015 he dissolve the union between him and the petitioner unilaterally vide talaq letter dated 2nd April 2015 as Lastly, he prays for official issuance of divorce certificate, maintenance of the issues of marriage, custody of the issues of marriage and any other relief.

I have given due consideration to the application and the ground it's based on *vis a vis* the defence, of the respondent. The question that falls for my consideration is:

a) Whether the marriage between the parties has irretrievably broken down.

The court attention was drawn to the Quranic textual elucidation of functional and fundamental ingredients that fuel an ideal marriage among Muslim- tranquility, love and mercy - which have been captured by the Holy Quaran chapter 30 v. 21 wherein is stated that.

**"And among His Signs is this, that He created for you Mates from among yourselves,that ye may dwell in tranquility with them, and He has put Love and Mercy between you. Verily in that are signs for people who reflect."**

The submissions and evidence adduced by the parties , the manner they testified and the demeanor when making submissions and during cross-examination reflect deep-seated tensions between the parties.

Neither party has endeavored to extend a hand of reconciliation and no attempts were made to employ Alternative Dispute Resolution mechanisms before having recourse to judicial separation as envisaged by the Holy Quran Chap 4 v. 35 which says:

***" If you fear dissension between them twain (the man and the wife), appoint two arbitrators, one from his family and the other from hers, if they both desire reconciliation , Allah will cause it between them. Indeed Allah is Ever Knowing and Acquainted (with all things).***

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 that the parties are no longer living together in harmony. It's the view of the court that, Divorce since its disintegrate the family union is of course a social evil, in itself but it's a necessary social evil. It's better to wreck the unity of the family than to wreck the future happiness of the party by bonding them to a companionship that has become odious!

In present case it is a common ground that the existence of cruelty 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.

The divorce letter fails to stand in form and law, its content suffers ambiguity as to the number of the talaq granted by the petitioner, as well it doesn't reflect the witness present during the talaq and as to the unpaid dower, the petitioner has failed to satisfy the court as to the required standard, the court of law doesn't presume the existence of fact based on assumption unless or /and otherwise provided by the law as such the claim of unpaid dowry fails.

2. Whether the petitioner or the respondent should have the custody of the minor?

The court attention was drawn to Al-Bayhaqees' ' Al- Kubra 8/4 and also Abdulrazaq's 'Mussanaf's' No. 12605. In case of **(Umar (R.A) v umm Asim (R.A)**.

**Abubakar (R.A) gave Judgment in favour of Umm Asim and stated that she is more compassionate, gentler, more tender – hearted and more merciful (mother-nature) and she is more entitled to have custody of her son as long as she doesn't get married.”**

The court attention was also drawn in support of the above case to constitution, Art 53(2) where it is stated that;

**“A child best interest is of paramount importance in every matter concerning the child”.**

The court attention was also drawn to Art 3(1) of the UN convention on the rights of the child, 1989 (to which Kenya is a party) which states;

**“In all actions, concerning children whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies the best interest of the child shall be the primary consideration”.**

Am persuaded by the finding of the children officer vide Social inquiry report dated 11th August 2015 and grant the petitioner the physical custody of the minors. The court cautions both parties to always maintain a harmonious relationship especially in relation to the child thus the right to access should be seen as a means to protect the interest of the child as well as the right of both parties and this is to avoid a war situation since both parties are equally responsible for the child.

***The upshot of all the above is, that I make the following orders.***

- 1. The marriage solemnized in respect of the petitioner and Respondent be and is hereby dissolved.**
- 2. Divorce certificate be issued**
- 3. Respondent shall provide Kshs. 10,000/- towards eddat maintainance of the petitioner for three months.**
- 4. The physical custody of the issues of marriage named herein before be granted to the Petitioner.**
- 5. The legal custody of the minors named herein above is granted to the respondent.**
- 6. The Respondent shall have unrestricted access to the children**
- 7. The Respondent shall contribute towards the maintenance of the children. The modality of such maintenance be agreed upon or ordered upon after.**
- 8. Order as to cost each party shall bear his/her own cost.**

**Ordered accordingly.**

**DELIVERED and SIGNED at Nairobi this 9th day of October 2015.**

Hon A .I. Hussein - Kadhi II