



REPUBLIC OF KENYA
IN THE KADHI'S COURT AT NAIROBI
MLIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 124 OF 2014
S M KPLAINTIFF
-VS-
R H HDEFENDANT
J U G D E M E N T

In her plaint filed in this Court on 12th May 2014 **S M K** (herein referred to as the Plaintiff/Defendant in Cross Petition) sought the following orders from this Court;

- a. An order vesting legal custody, care and control of M R (Aged 9.5 years), H R (Aged 6 years), I R (Aged 3 years) in the Plaintiff.
- b. An order for the defendant to provide an inpatient and outpatient medical insurance cover with a reputable insurance company upto Kshs 1,200,000 for inpatient and Kshs 200,000 for outpatient.
- c. An order for the defendant to enroll M R , H R, I R at [Particulars withheld] Group of Schools.
- d. An order for the defendant to provide Ksh 174,000 per month being the maintenance of his children.
- e. An order restraining the defendant from stalking or following the plaintiff whether directly or through his agents or employees.
- f. An order for the defendant to provide the plaintiff with maintenance of Ksh 150,000/
- g. Costs of this suit.
- h. Any other reasonable relief that this Honourable Court may deem just and fit to grant.

In reply to the plaint, the defendant/Cross Petitioner denied in toto the allegations and cross petitioned on the ground that the said purported marriage in 2001 was illegal and void abinitio. He prayed for the following orders;

1. A declaration that there is no valid marriage that existed between the plaintiff and defendant.
2. A declaration that there can be no known legal rights and/or obligations that can arise from the

purported marriages of 2001 and that of 2013 between the plaintiff and the defendant, including maintenance , mahar(dowery) and ownership of properties and chattels.

3. A declaration that the three issues of marriage who were born out of the purported marriages of 2001 and that of 2013 between the plaintiff and the defendant may be biological issues but not legitimate under Islamic law and cannot give rise to any legal obligation in form of maintenance and inheritance capable of being enforced , in law. (sic)

4. A declaration that the plaintiff illegally benefited from a void contract of marriage , and must account for all such benefits so received.

5. An order directing the plaintiff to refund a sum of Ksh 470,000 received pursuant to an elder negotiated settlement which the plaintiff breached.

6. An order directing the plaintiff to surrender the birth certificate of Suyfudin Abdi and that of Amina Eymoy and all other personal effects of the defendant and his family members.

7. An order directing the plaintiff to surrender the title documents and physical ownership and duly executed transfers of motor vehicle registration number KAT 330V and Apartment Number D2 situate at Lantana Thompson L.R. No. [Particulars withheld].

8. An order evicting the plaintiff , her family and friends from Apartment D2 Lantana Thompson situate on L.R. No. [Particulars withheld].

9. A permanent order vesting the physical and legal custody of the children M, H and I with the defendant, to the exclusion of the defendant.

10. An order directing the plaintiff to pay a sum of monies to be assessed by the court to the defendant as refund for benefitting from the illegal void marriage.

11. An order declaring the plaintiff to be a Nushuz(recalcitrant) and not entitled to any mahar and a refund of the sum of Ksh 100,000/- already received by the plaintiff on account of mahar from the defendant.

12. An order restituting the plaintiff and the defendant to the pre-marriage(contract) position as practically as possible.

13. Any other order as deemed appropriate by this Honourable Court.

14. Costs of this suit, and the counter-claim.

The return of service traced on the file reveals that a process server by the name Juma .K Dange deponed a R/S on 11th January 2016 to effect that the plaintiff had been duly served with a statement of defence and counterclaim on 5th June 2014.

The case was fixed for hearing by the defendant on 11th February 2016. At the hearing Mr. Muhydin Counsel for the defendant prayed for the court to dismiss the plaint under Order 10 Rule 4, 9 and 10 of the CPR and allow him to proceed with the hearing of the counterclaim. The court granted the prayers and hearing proceeded ex-parte.

The defendant from his uncontroverted testimony testified that the marriage celebrated between him and the plaintiff in year 2001 was void ab initio for the following reasons;

a) That in July 2001 the plaintiff and the defendant eloped and entered into a marriage contract without the consent of the plaintiff's father while the plaintiff was pregnant without his knowledge.

- b) That the plaintiff was passing herself off as a virgin when she was not at the time of the said purported marriage in July 2001.
- c) That the purported marriage was solemnized in the absence of the consent plaintiff's guardian(Wali).
- d) That the second purported marriage presided over by the plaintiff's father was also invalid and void as the plaintiff was pregnant even though her father was present and gave his consent.
- e) That the defendant did not willfully entered into the purported marriage contract. The same was occasioned by fraud, misrepresentation, deceit, duress, coercion, mistake and above all a spell of witchcraft (sihr) cast upon the defendant by the plaintiff and her family.

He further contended that the said union was blessed with three issues namely; M, H and I who are his biological children but not legitimate attracting any legal responsibilities in form of maintenance, inheritance and other rights.

He further accused the plaintiff of illegally withholding crucial personal document and other personal effects of the defendant and his family members.

In the premises, the defendant contended her marriage to the plaintiff was void ab initio and the court should dismiss the plaintiff suit.

I have given due consideration to the application and the ground it's based on *vis a vis* the plaintiff's pleadings. The question that falls for my consideration are:

- a) Whether the marriage celebrated between the parties herein in year 2001 is valid Islamic marriage capable of being recognized by law?
- b) Whether the issues of the said marriage are legitimate?

The defendant led evidence of how he got married to the plaintiff in year 2001. He also gave accounts of the 2nd marriage that were performed in presence and with the consent of the plaintiff's father between him and the plaintiff.

He contended that there was no real marriage except a semblance of marriage. The plaintiff was pregnant by whoredom, at the time of both marriages and the three children born out of the purported marriages are not his legitimate children.

A woman cannot claim maintenance unless she proves that she is either the wife or the divorced wife of the defendant against whom she claims maintenance. So the question which is crucial in this case is, whether there was a valid marriage between the plaintiff and the defendant. If the marriage is not valid, the plaintiff would never become the wife of the

defendant and that in such a case she can never claim to be a woman who has been divorced by or has obtained a divorce from her husband because they were not at any time husband and wife.

The defendant submits that there was no marriage at all under Islamic Law , the plaintiff has not become at any time the wife of the defendant . The question posed calls for consideration of the content and nature of marriage under Islamic Law.

A learned commentator and exponent of Muslim Law Tyabji in his book 'Muslim Law' observes that marriage brings about a relation based on and arising from a permanent contract for intercourse and procreation of children between a man and a woman, who are referred to as parties to the marriage and who after being married, become husband and wife. Neil B.E. Baillie in the book 'Digest of Moohummudan Law' tells us that "marriage is a contract which has for its design or object the right of

enjoyment, and the procreation of children. But it was also instituted for the solace of life, and is one of the prime or original necessities of man".

Hedaya on the Mussulman Laws informs us that nikah in its primitive sense means carnal conjunction. Some have said that it signifies conjunction generally. In the language of the law it implies a particular contract used for the purpose of legalizing generation. Marriage is contracted, that is to say, is effected and legally confirmed, by means of declaration and consent, both expressed in the preterite, because although the use of the preterite be to relate that which is past, yet it has been adopted in the law, in a creative sense, to answer the necessity of the case. Sir Roland Knyvet Wilson in his book ' Anglo-Muhammadan Law' says that marriage is a contract for the purpose of legalising sexual intercourse and the procreation of children. It involves the rights and duties between the married persons themselves, and between each of them and the children born from the marriage. Sacred Koran teaches:

"O men, fear your Lord, who hath created you out of one man, and out of him hath created his wife, and from them two hath multiplied many men and women" Sacred Koran chap. iv. 8.

"The Holy Prophet said : Men marry women for their piety, or their property, or their beauty : but ye should marry for piety." Trimizi, Jami, 1.331.

Marriage is recognised in Islam as the basis of society. The Koranic injunction regarding marriage is that marriage as an institution gives the uplift of man and is a means for the continuance of the human race. Religious significance of marriage is revealed in full when the Holy Prophet compared it with Sacred Sunnat. Spouses are strictly enjoined to honour and love each other. The Holy Prophet asked the people to see their brides before marrying them and taught that nobility of character is the best reason for marrying a woman. It has to be remembered that infibulations and defloration in public was not an uncommon practice to assure premarital chastity.

Now, returning to the case, the uncontroverted facts tell us that at the time of marriage, the woman was having illicit pregnancy - in the language of Islamic Law - the woman was pregnant by whoredom. The question is how the loss of virginity and the fact of nuptial pregnancy , that was terminated, would affect the contract of marriage.

Marriage under Islamic law is classified as : (1) valid, (2) void and (3) irregular. According to eminent Jurist, the classification is as follows : (a) lawful - that is, a marriage which is contracted in compliance with all legal requirements; (b) unlawful - that is, a marriage which, has been solemnized in violation of one or another legal requirement; (c) void - that is, a marriage which, though claimed to have been solemnized, has no legal recognition at all; and (d) irregular - that is, a marriage which is unlawful but not void.

Fyzee observes that a union between a man and a woman may be either lawful or unlawful. Unlawfulness may be either absolute or relative. If the unlawfulness is absolute, the marriage is void. If it is relative, the marriage is irregular. He has given five classes of marriages which are irregular. They are : (1) a marriage without witnesses; (2) a marriage with a woman undergoing iddat; (3) a marriage prohibited by reason of difference of religion; (4) a marriage with two sisters, or contrary to the rules of unlawful conjunction; and (5) a marriage with a fifth wife. Tyabji has also adopted the same classification. He has classified irregular marriages under Section 82 : Under Hanafi Law a marriage contract entered into (a) without the presence of witnesses or (b) between persons prohibited from intermarrying by unlawful conjunction or iddat or divorce or religion or supervenient illegality is irregular and not void.

Definitely the classification as such does not tell us that a marriage with a woman pregnant by whoredom is valid, irregular or void. The early jurist differed in opinion regarding this issue. According to Maaliki, Hanbali and Abu Yusuf from the Hanafi school of Jurisprudence opine; that a pregnant woman is incapable of contracting a valid marriage .

On the other hand, the Shafii and Hanafi scholars are of view that it is permissible to marry a woman who is pregnant from zina because the sperm of zina has no sacanctity. Their evidence is that family lineage is

not confirmed with it, as confirmed by the Prophet (S.A.W) said; " The child is attributed to the owner of the bed(al Bukhari & Muslim) .

A man may marry a woman pregnant by whoredom.- A man may lawfully marry a woman pregnant by whoredom, but he must not cohabit with her until after her delivery according to all jurist. This is the doctrine of Haneefa and Mohammed. Aboo Yousaf says that a marriage made under such a circumstance is invalid : if, however, the descent of the foetus be known and established, the marriage is null, according to all doctors. The argument upon which Aboo Yoosuf supports his opinion as above, is, that the illegality of the marriage, in cases where the parentage of the foetus is established, originates purely in a principle of tenderness towards the foetus, and a foetus is an object of this tenderness, although it be begot in adultery since it is innocent of any offence; whence procuring the abortion of it is illegal; marriage, therefore, with a woman pregnant by adultery is invalid, equally with one where the parentage of the foetus is ascertained, and for the same reason. Our doctor(Shafii) and Hanafi, upon this point, argue that the woman is lawful in matrimony, on the authority of the sacred writings, the Koran saying, "All women are lawful to you, excepting those within the prohibited degrees : " and the prohibition of cohabitation until after delivery, is merely on account of the impropriety of sowing seed in a soil already impregnated by another, a prohibition which occurs in the traditions.

With respect to what Aboo Yoosaf alleges, that "the illegality of the marriage in cases. where the parentage of the foetus is established, originates purely in a principle of tenderness towards the foetus,"- it is altogether unfounded, because the nullity of the marriage in that case originates in a regard for the right, not of the foetus, but of the father.

It is not a general rule of interpreting under Islamic Law that whenever there is a difference of opinion between the leading schools of legal thoughts , that the opinion of a majority out of the four will prevail, or that the opinion of a particular school of legal thought will prevail over the others; there is no fixed rule of universal application in such cases.

The court's attention is drawn to the Law of marriage and divorce Pg 36 wherein it states the essential ingredient of Islamic marriage.

The validity of marriage contract depends on the parties or their guardian being of sound mind and mature and on the proposal and acceptance being made by the consenting parties in one meeting.

In presence and hearing of two or more mature and prudent witnesses provided there is no legal disability on the person of any contracting party or parties of a nature that it may prove to be an impediment to the marriage contract.

The Jurist have classified the conditions of a marriage contract as follows:-

The first condition concerning the parties to a valid marriage contract is being of sound mind, a mad or imprudent youth is not competent to contract marriage, and that there should be no legal disability or bar to the union of the parties.

The second condition is the age of the parties. The competence of contracting the marriage depends upon the parties having attained the age of marriage.

The third condition is the consent of the parties to the marriage contract. Marriage contracted without a valid consent of the parties is invalid ,thus, the consent of a woman is necessary whether she be a major virgin or with coverture experience. Her guardian, according to Hanafi lawyers, cannot compel her to enter into a marriage contract. Therefore the marriage contract of a major woman/virgin or feme covert, divorced or widowed with her consent in front of her father, grandfather or brother can take effect.

See al-Sarkhasi's almabsut cairo vol 5 pg 2, also in the case of Muhammed Zaman V Naima Sultan PLD 1952, Pashawar, 47.

A void marriage is no marriage at all. 11 does not create any civil rights or obligations between the parties. (Vide - page 237 - Mulla's Principles of Mahomedan Law).

Our conclusion from what we understand from the doctrines and formulations of the Muhammadan Marriage Law as expounded by the learned authors and commentators is that the marriage of a muhammadan male with a muhammadan female pregnant by whoredom is legal and can have any legal consequence of a marriage among the followers of shafii school of legal thought.

We have now considered only the question of validity of the marriage in the light of the principles and doctrines of Muslim Law. We think we have to consider the question in a different angle, namely whether the contract of marriage is valid applying the principles that have to be employed in ascertaining the validity of a contract pure and simple. The defendant submitted that the contract is invalid and void in the sense that really no contract was formed at all since a free consent of the parties to the contract is the core of the different elements for a valid contract and that such a free consent was absent in the contract of marriage in question.

He also submits that the contract is vitiated by fraud. Normally a contract, if vitiated by a vitiating cause, the party can rescind that contract but it will not in all cases nullify the contract so as to treat the contract as not born or has not come into existence at all.

If we treat the contract of marriage as a contract *uberrima fide*, certainly the nondisclosure of the fact that the petitioner was five months pregnant by whoredom is certainly a fact which will render the contract void. As stated earlier, it is really a case of lack of free consent in the formation of the contract. The crucial and important material fact which would have

affected the judgment of one of the parties to the contract was happened to be a fact which was in the exclusive knowledge of the other party. This fact remained undisclosed when the contract was formed. This will make the contract only a semblance of a contract, since the core element of the contract, namely free consent is wanting.

Another view that is possible in this case is to say that the case involves a perpetration of deceit or an exercise of fraud by the respondent. If the contract has been formed as a result of a fraud practiced by one of the contracting parties on the other innocent party, certainly the contract is voidable at the instance of the party who has been defrauded.

In (1923) AC 733 (*Abram S. S. Co. v. Westville S. S. Co.*) it was observed : "In the words of Lord Atkinson 'where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it and refuses to be bound by it, the expression of his election, if justified by the facts terminates the contract, puts the parties 'in status quo ante' and restores things, as between them, to the position in which they stood before the contract was entered into'. The same principle is stated by the Supreme Court in . (*Central National Bank Ltd. v. United Industrial Bank Ltd.*)"

In some cases, consent induced by false representation may not be free but may nevertheless be real. In such cases, the consent is negated and the transaction is held merely voidable but not void; so that the party misled by the fraud, has the option to treat the transaction either as valid or as altogether void even as against innocent third persons; but the party guilty of fraud is estopped from denying the contract if the party deceived chooses to affirm the transaction. (Vide - Singhal & Subrahmanyam's *Indian Contract Act* - 2nd Edn. Page 412).

The plaintiff at time of her marriage with the defendant concealed her illicit pregnancy; the parties live together and presumably contracted a second marriage in presence and with a consent of the plaintiff's father, the said marriage was consummated . The marriage was blessed with three issues begotten by the plaintiff and defendant , later in year 2013 both parties contracted 3rd marriage. if indeed the defendant had option to treat the marriage as void at the instance when he learnt about the fraud but chooses to affirm the marriage by his act of contracting 3 marriage within one without a termination of nuptial-ties in

the said marriage and they have remained husband-wife for more than 10 years. He is therefore estopped from denying the contract .

To answer whether or not the three children of marriage are legitimate is;-

In Islamic Law paternity of a child is confirmed by any of the three (3) ways viz;

- **Marriage**
- **Acknowledgement**
- **Evidence**

The first is the most important. From the marriage there comes the offspring. It presupposes that the child had parent from the valid marriage. Paternity of a child therefore under sharia is quite important.

A child without traceable father does not command respect and honor from the eyes of the public. He suffers psychological debasement in the society for not just fault of his.

This is why legitimacy is viewed with all seriousness in Sharia legal system. That is why the

Great prophet (S.A.W.) once admonished this:

“A woman who ascribes a child’s legitimacy, to someone who has not responsible for it is conception has committed a grave offence thereby alienating herself from God and will be denied the bliss of eternity. Likewise a father who obscures his child’s legitimacy by denying his responsibility from its conception has offended God and inflicted on himself universe disgrace.”

It follows from the above Hadith, therefore, that if a child is born outside wedlock is not considered legitimate. But if the illicit relationship is established appropriate sanctions on the parties involved are given.

However, when a child is born in wedlock the delivery must have been within the generally acceptable period of gestation, being the minimum or maximum. The general view of majority of Islamic jurist is that a period of six months less five days, after consummation of the marriage or possibility of consummation of marriage, is regard to be the minimum period of gestation.

Imam Malik , Shafi and Ibn Hanbal agree to this view. Imam Hanifah on the other hand considers the child legitimate six months after the conclusion of the marriage contract not necessary consummation of the marriage.

See Ad-Dasuki’s Hashiyat ala al sharh al Kabir vol. 2 page 459 and Ibn Rushd’s Bidayat al Mujtahd wa Nnihayat al Muqtasid vol. 2 pg 352.

Taking general view of the majority of the Islamic Jurist into consideration where a child is born in a legal wedlock but under a period of six lunar months less five days from the date of marriage then the child cannot be attached to that husband.

The authority of this statement is to be found in the *Jawahir al ikhil* in pg 381.

“Under no circumstance shall pregnancy or child (of marriage) be denial where the wife delivers complete baby within a period lesser than six months five or six days less, from date of the marriage contract. In that situation, paternity can denied without the necessity of having resource to lian (Mutual imprecation) as there exists a legal barrier (between the child and its suspected father)”.

Therefore by way of summary for the purpose of Islamic Law, a paternity is presumed where:-

- Marriage contract exists between the spouses either de jure or de facto.
- There is actual consummation or possibility of consummation between the spouses without any hindrance. This include seclusion between the spouses (Khalwah) sleeping together (mabeet); letting loose the curtain.
- The child is born between the minimum or maximum period of gestation.
- There is no legal denial, done by the spouses.

In the premises given above the Suleiman Hassan was born in a lawful union between the applicant and the deceased and that he was born within the minimum period required by law and that Suleiman Hassan is a legitimate child of the deceased.

On the custody of the minor Art. 53(2) of the constitution, Al-Mughni and Children Act provide that the best interest of the child should be the paramount consideration in all matter concerning the child. While I agree that the welfare principle in the paramount consideration in deciding the custody of the minor I am also of the view that the welfare of the minor will be served better where both parents are involved in the upbringing.

The roles of both parents should be complimentary and the question of who has a superior right to her custody should be secondary.

The minor herself need to interact and know both parents so that the current arrangement where the minor almost exclusively stay with the mother with limited or no visitation rights to her father should not be encouraged.

To me the best arrangement would be to allow the minor to spend sometimes with the father because he needs to know her as much as she needs to know him and giving an allowance for each parent to visit the minor during the time she is living with mother or father.

After all has said I am of the view that plaintiff has not been shown to be an unsuitable parent to have the custody of the child of the marriage . It has not been shown that granting custody to the plaintiff will not be in the best interest of the child of the marriage. Plaintiff will thus be awarded custody of the child of the marriage.

On the issue of maintenance of the minor Sec. 24 of the children act and the Constitution as well as Al hidaya put a duty on parents to maintain their children. That duty gives the minor a right to education and guidance, immunization, adequate diet, clothing, shelter and medical.

The issue of equal responsibility has not been equated to only direct contribution towards the monthly up-keeping, it also encompasses non monetary contribution meted by a parent who has a physical custody of the minor.

Thus a father according to his means is responsible for the maintenance (monetary) of his sons till they attain the age of maturity and of his daughters till they are contracted into marriage. See Holy Quran Chap 2 V 233.

Thus the responsibility of the father for the maintenance of his children is unconditional and absolute as such no father should be treated unfairly and or harmed on account of his child; physically, mentally or morally.

On the issue of maintenance of the plaintiff as far as the Muslim personal Law is concerned, it is well settled that a divorcee is entitled to maintenance only during the period of eddat. This finds supports from

the Holy Quran and also from the classical authorities on this subject matter.

Upon answering the first two issues in affirmative and there being pleading from the plaintiff and on evidence adduced by the defendant accordingly I make the following order.

- 1) That plaintiff is granted the physical custody of the minor.
- 2) That the defendant is granted the legal custody of the minor.
- 3) That the defendant shall be at liberty to visit the minor at a reasonable and/or an agreed time of the day.
- 4) The defendant shall provide Kshs. 25,000/= toward the maintenance of the minor
- 5) The defendant shall provide 75% towards the school fees of the minor while the plaintiff shall provide 25% as from January, 2016.
- 6) The plaintiff is not entitled to further maintenance and/or support from the defendant.
- 7) The defendant shall continue providing medical cover for the minor.
- 8) No order is to cost.

It is so ordered.

A critical barrier to the Public's access to Justice is the legal information, which can be prohibitive not only to illiterate but also to liberate in our society. There is an urgent need to address the consequences of the large and growing number of litigant representing themselves.

Within a short period of time almost all the self representative litigant (SRL), Representative litigants, (RL) and their advocates may become disillusioned, frustrated and in some cases, overwhelmed on the complexity of the cases and the inaccessibility of substantive law.

And if the litigant don't have adequate access to family justice...without access to applicable legal information the substantive rules have limited value.

Comprehensive codification is likely to bring more dramatic improvement in the quality of justice, and also provide a useful starting point for transformation and mainstreaming the Kadhi's courts.

Also the courts took pains to arrive at their judgment and Ruling by consulting the voluminous opinions of all the leading Islamic school of thought, in order to reform legal system and to make rules more palpable to the public. There is an urgent need to enact Sharia-fied codes of law, that are meant to protect the rights of family, women and the children, as it is the spirit of the constitution.

I therefore refer the matter to the Chief Justice and Attorney General for their proper consideration.

Dated, delivered and signed on this 23rd day of October 2015.

HON. A.I. HUSSEIN

KADHI – NAIROBI