



**CAA v AMA (Civil Appeal E008 of 2025)
[2026] KEHC 1810 (KLR) (19 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 1810 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL APPEAL E008 OF 2025
JN ONYIEGO, J
FEBRUARY 19, 2026**

BETWEEN

CAA APPELLANT

AND

AMA RESPONDENT

*(Being an appeal against the judgment of Hon. Osman Sheikh Abdi (P.K.)
and delivered on 14.05.2024 in Divorce Cause No. EXXX of 2023 at Wajir)*

JUDGMENT

1. The background of the suit herein stemmed from the fact that the appellant petitioned the Kadhi’s court for divorce via a petition dated 09.08.2023 seeking that upon the grant of divorce, the court compels the respondent to pay her dowry and further, that her Somali house (heeri) be handed back to her since she stayed together with her mother.
2. The brief facts of the case are that, the couple herein contracted their marriage sometime on 12-03-2013 and were blessed by one child aged 4 years by the time the suit was filed. That the genesis of their marital problems started when she gave birth through C.S. and the husband forced her to do hard work by looking after their livestock in the bush an order she declined to obey forcing the husband to order her go back to her mother and stay with her.
3. It was further averred that the respondent demanded to forcefully have sex with her before she could heal hence an act of rape. That as a consequence, she reported to the elders who fined the respondent Kshs 10,000/= but he failed to pay. As a consequence, she filed the current suit.
4. The respondent entered appearance on 17.08.2023 and filed defence wherein he denied the allegations by the appellant. He denied raping the appellant and further urged that the marriage between the parties was not only stable but also viable. However, he blamed the relatives from the respective parties’



families for their role in trying to make their marriage fail. He thus urged the court to dismiss the petition.

5. The matter proceeded full hearing as follows:
6. During the hearing, the appellant (pw1) reiterated the content contained in her plaint.
7. In the course of cross-examination, the respondent noted that the appellant had not alleged violence in the original plaint. As a response, the appellant stated that she did not include the particulars of violence noting that the provided spaces on the plaint was not adequate.
8. PW2, YMF testified that the respondent is his brother-in-law, being the son of his biological father and therefore his younger brother, though from a different mother. He stated that the respondent and the appellant had been married for some time, but disagreements arose between them. According to the witness, the respondent, his brother, is a jealous man and, as a result of this jealousy, he is a violent person. He further described the respondent as abusive, noting that he would insult the appellant by calling her “useless.”
9. PW3, GMF testified that the respondent is his real cousin and for that reason, he knows him to be a jealous man. He stated that the couple frequently disagreed and that the appellant would often desert the respondent as a result of his jealousy. The witness further explained that the respondent preferred to remain alone with the appellant and avoided joining other family members, which he attributed to the respondent’s jealousy. He added that the respondent was irresponsible in his marital responsibilities, as he failed to provide for the appellant.
10. DW1, AMA testified that he married the respondent in accordance with Shariah law in the year 2013 at Barmil location in Wajir County. He stated that the agreed dowry for the said marriage was eight goats, which has not been paid. He further testified that the marriage was blessed with one male child, now nine years old, who remains under his custody. The witness denied the allegations made by the appellant and urged that the petition be dismissed for lack of merit.
11. DW2, MIN testified that he and the respondent had lived together in Barmil for eighteen years without any disputes arising between them. He stated that the conflict only emerged when the respondent’s paternal brothers, Khamis Yusuf and Ugass Yusuff, began inciting the appellant against the respondent. According to him, the respondent expressed his disapproval of their conduct before the Barmil community elders, but his efforts were unsuccessful. He further stated that the respondent paid Kes. 100,000 in an attempt to facilitate the appellant’s return, yet the elders declined to allow the respondent back into her matrimonial home.
12. Upon deliberating on the evidence and the law, the trial court via a judgment delivered on 14.05.2024, dismissed the appellant’s case with costs urging that the same was destitute of merit.
13. Aggrieved by the said judgment, the appellant proffered a memorandum of appeal dated 22.05.2025 citing the following summarized grounds:
 - i. That the learned Kadhi erred in law and fact by coercing the appellant through his judgment to live with the respondent despite the marriage herein being irretrievably broken.
 - ii. That the learned Kadhi erred in law and fact by failing to consider and appreciate that the appellant proved her case on a balance of probabilities.
14. The appellant sought for orders that:
 - i. The appeal be allowed.



- ii. That the subordinate court’s judgment delivered on 14.05.2024 be set aside.
 - iii. That this Honourable Court issues any other such order that it deems just.
 - iv. Costs hereof be provided for.
15. The appeal was canvassed by way of written submissions.
16. The appellant via undated submissions urged that she had been subjected to cruelty, beatings and constant violence by the respondent and that the respondent had repeatedly deserted and chased her away. She said this evidence was undisputed. She submitted that these facts met the statutory grounds for divorce and demonstrated an irretrievable breakdown of the marriage. She argued that by refusing to dissolve the marriage and instead referring the parties back to elders, the trial court had failed in its duty to apply the *Marriage Act* and *the Constitution*, thereby subjecting her to continued suffering and violating her rights to human dignity, equality and freedom from inhuman treatment.
17. She maintained that the trial court had erred in law and fact, that the marriage could not be salvaged, and that continued subsistence of the marriage would perpetuate injustice. She prayed that the court allows the appeal, set aside the Kadhi’s Court judgment in Case No. E080 of 2023, grant a Decree Nisi followed by a Decree Absolute dissolving the marriage, award the costs of the appeal to her, and grant any further relief the court deemed fit.
18. On the other hand, the respondent did not participate in the proceedings herein despite being served.
19. This being the first appellate court, it is thus bound to reconsider, re- evaluate and re-assess the evidence tendered before the trial court together with the assessors’ opinions and arrive at an independent determination without losing sight of the fact that the trial court had the advantage of seeing and listening to the witnesses to be able to assess their demeanour. [See *Selle and another v Associated Motor Boat Co. Ltd and others (1968) E.A 123* and *Peters v Sunday post limited (1958) E.A 424*].
20. I have considered the record of appeal, grounds of appeal and submissions by the parties. Issues for determination are;
- i. Whether the marriage between the appellant and respondent should be dissolved.
 - ii. What are the appropriate orders in the circumstances herein?
21. The Court heard the appeal herein with the aid of two assessors pursuant to section 65 (1) (c) of the *Civil Procedure Act*, which provides for appeals to the High Court from original decree of a Kadhi’s Court as follows:
- “c) from a decree or part of a decree of a Kadhi’s Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.”
22. For the hearing of this appeal, this court sat with Hons. Fahad Ismail (P.K) and Ibrahim Tulu (P.K). In his opinion, Hon Fahad stated that cruelty, domestic violence, negligence, physical and psychological harm and the irretrievable breakdown of a marriage are recognized under Islamic law as legitimate reasons for dissolution. He cited inter alia Qur’anic verses 17.78, 4,19, Hadith, Legislation on divorce under article 83 Islamic Charter on family and scholarly opinions to emphasize that harm must be removed, that spouses must live honorably with one another, and that divorce is permitted when marriage no longer fulfills its Shariah objectives of affection, mercy, and dignity.
23. He further contended that the Kadhi failed to appreciate that love cannot be forced upon unwilling parties. According to him, marriage in Islam is based on mutual consent and equal rights, both at its



inception and dissolution. By disregarding her consent and equal rights, the trial court imposed a union that had already collapsed, contrary to constitutional provisions and prophetic teachings.

24. On the third ground, he maintained that the trial Kadhi ignored admissible evidence demonstrating that the marriage had broken down irretrievably. He pointed to the appellant's pleadings, her own testimony, and that of two witnesses, all of which supported the appellant's claims. He stated that indeed, the appellant had discharged her burden of proof under the *Evidence Act*, yet the court failed to act on it. In conclusion, he held the view that the appeal be allowed, the marriage dissolved, and appellant's dowry of four she-camels be awarded.
25. In his opinion, Kadhi Ibrahim Tulu (P.K) basically concurred with his colleague. He observed that the marriage between the two parties had irretrievably broken down and that the trial court erred by insisting that the parties do continue staying together. He urged the court to dissolve the marriage and payment of dowry.
26. In as much as this court is not bound by the Kadhis findings, it is important to note that the court has considered the same for guidance in determining the judgment herein and consequential orders thereof orders;
27. *The Constitution* envisages a marriage union where every spouse participates with dignity and equality regardless of gender. According to Article 45 (2) of *the Constitution*, it is stipulated that:
Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.
28. Similarly, section 3 (1) of the *Marriage Act* describes 'marriage' as follows:
Marriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act.
29. In the same breadth, in the case of ABA v HKB (Civil Appeal E009 of 2024) [2025] KEHC 6924 (KLR), this court stated that:

“ 37. It is not lost to this court that a marriage is a voluntary union between a man and a woman whether in a monogamous or polygamous union and registered in accordance with the law. Secondly, it is against good practice to compel two adults to live together against their will or one of them. This is predicated upon parties of a marriage union having mutual respect and happy life together. See G O A v R A A (Divorce Appeal E053 of 2023) [2024] KEHC 6842 (KLR) (3 June 2024) (Judgment) where the court held that;

In the instant case, the parties herein had separated for seven years prior to the filing of the divorce petition. The respondent clearly left her matrimonial home and she does not want to be in a marriage with the appellant. In light of the foregoing factors, this court cannot force the parties, especially the respondent to continue in such a union. Marriage being a voluntary union, this court has no powers or jurisdiction to compel the respondent to accept a relationship that has by law, broken down irretrievably, particularly on account of the long separation between the couple.”

38. Marriage being a social contract based on mutual love and respect, nobody should be forced to stay in a broken marriage. Parties should be left to choose on how they would like to enjoy their life for the short time they are to live in this world.”



30. The appellant urged that the marriage herein is irretrievably broken and that there was no room for reconciliation. Additionally, it was not controverted that the appellant was no longer living at her matrimonial home as she claimed that she had been chased away by the respondent after she refused to be subjected to forceful sex and hard labour before she could heal following her delivery through C.S. She argued that by the trial court's failure to dissolve the marriage herein, the same was in violation of her constitutional rights as she no longer desired to return to her marriage.
31. On what irretrievable breakdown of marriage means, section 66 (6) of the *Marriage Act* provides that:
A marriage has irretrievably broken down if:
- a. a spouse commits adultery;
 - b. a spouse is cruel to the other spouse or to any child of the marriage;
 - c. a spouse willfully neglects the other spouse for at least two years immediately preceding the date of presentation of the petition;
 - d. the spouses have been separated for at least two years, whether voluntary or by decree of the court;
 - e. a spouse has deserted the other spouse or at least three years immediately preceding the date of presentation of the petition;
 - f. ...
 - g. ...; or
 - h. any other ground as the court may deem appropriate.
32. Irretrievable breakdown of the marriage denotes a state in which the spouses are no longer able or willing to cohabit, and the marital relationship has been permanently destroyed with no prospect of reconciliation or resumption of spousal obligations. While adultery, cruelty and desertion are recognized as distinct statutory grounds for divorce, they equally serve as compelling evidence of the irretrievable breakdown of a marriage.
33. In the case of *CCK v VKK* [2024] KEHC 15508 (KLR), the court was of the view that:
“What factors may a court take into account in determining whether a marriage has irretrievably broken down under that provision? Without in any way limiting the considerations, I am of the view that they would include: the length of the period of physical separation; the levels of antagonism, resentment or mistrust between the parties; the concern of the parties for the emotional needs of each other; and commitment of the parties. The respondent agreed that, indeed their communication is strained and that the appellant had moved away from the matrimonial bed. The appellant described the marriage as a dark place that she did not want to re-live’.
34. Equally, in the case of *MTM v SNM* [2024] KEHC 8241 (KLR), the court in dissolving the marriage between the parties noted that:
31. The petitioner in his testimony stated that he has deserted his matrimonial home. This fact is admitted by the respondent.
 32. The marriage has broken beyond repair as the petitioner has moved out of the matrimonial home.



33. ...
34. From these, the marriage only exists in name and paper; ...
35. In this court's view that, their differences are irreconcilable and the marriage has irretrievably broken down. An order of dissolution of marriage ought to be granted.
35. The fundamental question is whether, in light of their respective personalities, character traits, strengths and weaknesses and their conduct throughout the marriage, the appellant and respondent can reasonably be expected to continue living together? The answer is in the negative.
36. From the foregoing, there is an irretrievable breakdown of the marriage on grounds of cruelty and desertion. There is no legitimate purpose that will be served by the retention of the marital covenant which is better untied to set each spouse free. In any event the appeal was not challenged by the respondent.
37. The upshot is that, I am satisfied that the marriage between the appellant and the respondent ought to be dissolved. Parties cannot be forced to stay in an abusive marriage where a sick wife is forced to have sex. That is cruelty of the highest order. I do agree with the assessors that this marriage cannot be salvaged hence must be dissolved.
38. Consequently, the appeal is hereby allowed and the marriage herein dissolved. The respondent is directed to pay the dowry due to the appellant being a four-year old she camel. As to the issue of release of a Somali house, that is not for the Kadhi's court nor this court to determine as that is a question for the land court to resolve or a family court determining matrimonial property dispute.
39. Accordingly, the following orders shall abide;
 - a. The marriage between the appellant and respondent herein be and is hereby dissolved;
 - b. A decree nisi to issue and the same be declared absolute after 60 days.
 - c. The respondent shall pay the agreed dowry of a four-year old she Camel to the appellant within 60 days from the date of delivery of this judgment
 - d. As to costs, this is a family matter and each party shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF FEBRUARY 2026.

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J. N. ONYIEGO
JUDGE

