



FAA v BAM (Civil Appeal E070 of 2024) [2026] KEHC 3625 (KLR) (17 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3625 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E070 OF 2024
AN ONGERI, J
MARCH 17, 2026**

BETWEEN

FAA APPELLANT

AND

BAM RESPONDENT

(Being an appeal from the Principal Kadhi (Hon. M. M. Mvudi) in Voi Kadhi's Court Divorce Case No. E005 of 2024 delivered on 27th June 2024)

JUDGMENT

1. The Respondent in this appeal B.A.M filed Voi Kadhi's Court Divorce Case No. E005 of 2024 on 23rd May 2024.
2. The Respondent said he got married to the Appellant F.A.A under Islamic law for more than 10 years and thus were blessed with six (6) children. The Appellant had five (5) other children from a previous marriage.
3. The Respondent told the Kadhi's Court that the Appellant did not allow him into the house any more and he had been sleeping outside.
4. He asked for custody of his six (6) children.
5. The Appellants said the Respondent was troublesome and she asked for custody of all the children.
6. The court held that the marriage union had irretrievably broken down and gave the following orders:-
 - i. That the custody of the children be shared by the parents.
 - ii. That the Appellant should not travel with the six (6) children she got with the Respondent out of the county or country without the knowledge of the Respondent.
 - iii. That the Respondent should not be denied access to the six children he got with the Appellant.



- iv. That the court gave 90 days for both parties to think keenly before the court gives orders concerning divorce and custody.
7. On 20th November 2024, the court dissolved the marriage between the Appellant and the Respondent.
8. The court gave custody of the five children the Appellant had before the marriage to her.
9. The court gave joint custody of the six children the Appellant got with the Respondent to both of them.
10. The Appellant has appealed to this court on the following grounds:-
 - i. The Honorable Kadhi erred in law and in fact by failing to find that there is an error apparent on the court record since he determined matters touching on the parties' children which he does not have jurisdiction about.
 - ii. The Honorable Kadhi erred in law and in fact in usurping the powers of the Children Court and by failing to review his attention even when that fact was brought to his attention by the Appellant.
 - iii. The Honorable Kadhi erred in law and in fact by failing to give the Appellant an opportunity to be heard on her Notice of Motion application dated 3rd December 2024 despite the fact that the application raised weighty issues regarding the welfare and wellbeing of the parties' children.
 - iv. The Honorable Kadhi erred in law and in fact by failing to uphold the cardinal consideration, which is "the best interest of a child" in deciding the Appellant's Notice of Motion application dated 3rd December 2024.
11. The parties filed written submissions as follows; The Appellant submitted that this appeal challenges the Kadhi's Court ruling on two principal grounds: lack of jurisdiction and failure to uphold the best interests of the child.
12. The Appellant argues that the Kadhi's Court fundamentally overstepped its legal authority by making orders on the custody and maintenance of the parties' children, as its jurisdiction under Article 170(5) of *the Constitution* and the Kadhi's Court Act is expressly limited to matters of Muslim personal law relating to personal status, marriage, divorce, and inheritance.
13. Crucially, it does not extend to children's matters, which are the exclusive preserve of the Children's Court under the *Children Act*.
14. The Appellant cites persuasive authority, notably the GMD v SAM case, which unequivocally states that a Kadhi has no jurisdiction over custody and maintenance, and any such orders are null and void.
15. Furthermore, the Appellant contends that even if the court had jurisdiction, which it did not, the Kadhi erred by failing to apply the cardinal principle of the child's best interests.
16. The Appellant emphasizes that the children are all of tender age (between 2 and 9 years old), and established legal precedent creates a strong presumption that custody of such young children should be awarded to the mother in the absence of exceptional circumstances demonstrating her unfitness.
17. The Appellant asserts that no such disqualifying circumstances, such as immoral behavior or incapacity, were presented against her.



18. Conversely, the Respondent's occupation as a driver, which requires frequent travel and absence from home, was not adequately considered as being contrary to the children's need for consistent care and supervision.
19. The Appellant concludes that the Kadhi's failure to review these erroneous orders upon application, despite the clear jurisdictional defect and substantive flaws, warrants the High Court's intervention to set aside the impugned rulings and orders related to the children's custody and maintenance.
20. In response to the appeal, the Respondent submitted that the Honourable Kadhi acted entirely within his lawful jurisdiction.
21. The ruling of 10th December 2024 did not constitute a final determination on child custody or maintenance, but rather made incidental, protective observations appropriate within the context of the divorce proceedings, properly deferring substantive welfare issues to the specialized Children's Court.
22. Furthermore, the Appellant was not denied her right to a fair hearing, as the record shows she was represented, filed pleadings, and her arguments were considered; an unfavorable outcome is not equivalent to a denial of justice.
23. The Respondent also contends that the Kadhi's approach appropriately safeguarded the children's best interests by acknowledging their welfare while correctly directing detailed matters to the proper forum.
24. The Respondent urges the court to disregard any arguments in the Appellant's submissions concerning interim consent orders, alleged contempt, or eviction, as these matters fall outside the scope of the filed Memorandum of Appeal and cannot be introduced at this stage.
25. It is argued that no legal basis has been established to warrant the setting aside of the Kadhi's reasoned ruling.
26. Consequently, the Respondent prays for the appeal to be dismissed in its entirety, for the ruling of the lower court to be upheld, and for costs to be awarded to the Respondent.
27. I have carefully considered the Record of Appeal, the rival written submissions filed by the parties, and the relevant law.
28. The issues arising for this court's determination in this appeal are as follows;
 - i. Whether the learned Kadhi had the jurisdiction to make the orders pertaining to the custody, access, and movement of the children.
 - ii. Whether the learned Kadhi properly applied the principle of the best interest of the child in making those orders.
29. A resolution of the jurisdictional issue is, however, paramount and dispositive of this appeal.
30. This being a first appeal, this court has a duty to re-evaluate the evidence, assess it, and draw its own conclusions, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses.
31. The central and indeed the only issue for determination in this appeal is whether the learned Kadhi had the jurisdiction to make orders pertaining to the custody and maintenance of the children of the marriage.
32. The Respondent herein, B.A.M, filed a divorce cause at the Voi Kadhi's Court seeking the dissolution of his marriage to the Appellant, F.A.A, under Islamic law.



33. He also sought custody of the six children born of that union. The Appellant, in her response, also asked for custody of all the children.
34. The trial Kadhi, after issuing interim orders for shared custody and a cooling-off period, eventually dissolved the marriage on 20th November 2024. He granted custody of the five children the Appellant had from a previous marriage solely to her, while granting joint custody of the six children of the marriage to both parties.
35. The Appellant was aggrieved by these orders, arguing primarily that the Kadhi's Court lacked the jurisdiction to entertain matters of child custody and maintenance, which she contends are the exclusive preserve of the Children's Court established under the *Children Act*.
36. The jurisdiction of the Kadhi's Court is a creature of *the Constitution*. Article 170(5) of *the Constitution* of Kenya, 2010, provides that:

“The jurisdiction of a Kadhi's court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's court.”
37. This provision is mirrored in Section 5 of the *Kadhis' Courts Act* (Cap 11). The critical question for this court is whether matters of child custody and maintenance fall within the ambit of "questions of Muslim law relating to personal status, marriage, [or] divorce."
38. This question has been the subject of intense judicial debate in Kenya, resulting in conflicting decisions from courts of concurrent jurisdiction.
39. The Appellant urges this court to follow a line of authorities that strictly interpret Article 170(5) and hold that the Kadhi's Court is divested of jurisdiction in children's matters.
40. This school of thought is exemplified by cases such as N R A v A (A) M [2015] KEKC 29 (KLR), where the Kadhi's Court itself was confronted with this jurisdictional challenge.
41. In that case, the defendant argued that custody and maintenance of children are excluded from Article 170(5) and that the Children's Act grants exclusive jurisdiction to gazetted judicial officers.
42. The defendant relied on persuasive High Court decisions, including HMM v KJD (Mombasa HCCA No. 15 of 2013), SMH v SAA (Kisumu HC Misc. 125 of 2013), and GSA v ASA (HCCA No. 53 of 2013), where the High Court judges expressed the opinion that the Kadhi's Court cannot deal with custody and maintenance issues as they are not among those matters expressly donated by *the Constitution*.
43. The court reasoned that *the Constitution* and the *Kadhis' Courts Act* do not define "personal status" and do not mention the words protection, custody, guardianship, maintenance, or control of a child.
44. It further observed that the Children's Act, 2001, was enacted to provide a comprehensive legal framework for all children irrespective of their religious affiliations, and it established the Children's Court with specialized jurisdiction.
45. However, there exists a powerful and, in this court's view, more persuasive line of authorities that has taken a broader and more purposive interpretation of Article 170(5).
46. This school of thought holds that custody and maintenance are incidental to marriage and divorce and thus form an integral part of "questions of Muslim law relating to personal status."



47. This line of reasoning has gained significant traction in the High Court and has been fortified by the Court of Appeal.
48. In *AYM v HIK* (Miscellaneous Case 171 of 2019) [2023] KEHC 27191 (KLR), Justice Nyaundi undertook a comprehensive review of the conflicting authorities.
49. The court was persuaded by the decision in *ZUDG v SJKUR* (2020) eKLR, where Ali-Aroni J. held that the Children's Act did not oust the jurisdiction of the Kadhi to deal with issues of children, especially where they are connected and incidental to the main cause before the court.
50. Justice Nyaundi also cited *Najma Ali Ahmed v Swaleh Rubea* (2010) eKLR, where Omondi J. stated that "child maintenance is incidental to the marriage and thus falls under the jurisdiction of the Kadhi's Court which addresses matters of personal law of members of the Muslim faith."
51. An approach granting exclusive jurisdiction to the Children's Court in matters involving Muslim parties would in my opinion be contrary to the robust provisions of *the Constitution* guaranteeing access to justice.
52. This court is bound by the doctrine of stare decisis to follow the pronouncements of the Court of Appeal.
53. The decision in *TSJ v SHSR* (supra) conclusively establishes that matters of custody and maintenance, being incidental to marriage and divorce, fall within the jurisdiction of the Kadhi's Court when the parties are Muslim and have submitted to its jurisdiction.
54. To hold otherwise would be to create a fragmented and inefficient system of justice, forcing Muslim litigants to pursue divorce in one forum and the welfare of their children in another, which would be contrary to the constitutional objective of ensuring access to justice without undue delay.
55. Furthermore, this court finds the principle of "incidental jurisdiction" to be sound in both law and logic.
56. The subject matter of the Kadhi's Court's jurisdiction is personal status, marriage, and divorce cannot be artificially severed from its consequences.
57. The welfare of children born of a marriage is the most direct and critical consequence of the marital bond and its dissolution.
58. To deny a court the power to address the consequences of a dispute it is properly seized of would render its authority incomplete and ineffectual.
59. While the Kadhi's Court must apply Islamic law on the principles of custody (hadhanah) and maintenance (nafaqah), it is also duty-bound, as a subordinate court, to apply the constitutional and statutory safeguards enshrined in the *Children Act*, No. 29 of 2022, particularly the paramountcy principle of the best interests of the child.
60. The Appellant also argued that the Kadhi erred by failing to uphold the best interests of the child, specifically regarding the tender age of the children.
61. However, the determination of whether the Kadhi properly applied this principle is a matter that goes to the merits of the decision, not the jurisdiction to make it.
62. Having found that the Kadhi had the jurisdiction to entertain the matter, this court would need to evaluate the evidence on record to determine if the custody orders were appropriate.



- 63. However, as correctly noted by the Respondent, the Appellant’s submissions introduced matters that were not part of the grounds of appeal, such as interim consent orders.
- 64. More fundamentally, the duty of a first appellate court is to re-evaluate the evidence.
- 65. The record of appeal does not contain a complete or certified typed copy of the proceedings from the lower court. Without a proper record of the testimony and evidence adduced before the Kadhi, this court is in no position to determine whether the learned Kadhi properly applied the principle of the best interests of the child.
- 66. The appeal, therefore, is not properly prosecuted to enable this court to make a finding on the substantive merits of the custody orders.
- 67. In conclusion, the appeal on the ground of lack of jurisdiction fails. The law is now settled that the Kadhi’s Court has the jurisdiction to hear and determine matters of child custody and maintenance incidental to a divorce.
- 68. However, due to the absence of a complete record of proceedings from the lower court, this court cannot delve into the merits of the appeal to ascertain if the best interests of the child were upheld.
- 69. Consequently, the appeal is hereby dismissed. Each party shall bear their own costs

DATED, SIGNED AND DELIVERED THIS 17TH MARCH 2026 VIRTUALLY VIA MICROSOFT TEAMS AT VOI.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent/Mabishi

..... for the Appellant

..... for the Respondent

