



ABA v HKB (Civil Appeal E009 of 2024) [2025] KEHC 6924 (KLR) (28 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6924 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL APPEAL E009 OF 2024**

JN ONYIEGO, J

MAY 28, 2025

BETWEEN

ABA APPELLANT

AND

HKB RESPONDENT

(Being an appeal from the judgement and decree of Hon. Osman Sheikh A delivered on 27.05.2024 in K.C.D.C No. E141 of 2023 at PK's Court at Wajir)

JUDGMENT

1. The respondent via an undated petition moved the Wajir Kadhi's court seeking for orders that:
 - i. The court dissolves her marriage to the defendant, the appellant herein.
 - ii. The court directs the defendant/appellant to pay her dowry/mahar.
 - iii. Provision for the upkeep of the children.
 - iv. Any other order deemed fit by the court.
2. From the petition, it is clear that the appellant and the respondent were previously married and their marriage blessed with two children in as much as the respondent had some children from a previous relationship. The respondent accused the appellant for neglect and failing to provide for her and their children. She averred that the appellant was in the habit of abusing her in front of her children and family members. That despite the elders trying to help solve their marital problems, the same bore no fruits. She thus urged the trial court to grant her prayers as sought in her petition.
3. The appellant entered appearance and then filed a defence dated 19.01.2024 denying the allegations by the petitioner/respondent. To the contrary, he averred that he still loved his wife. That it was the petitioner/respondent who chased him out of their matrimonial house. He averred that the petitioner



having not complained that he has failed to provide for her, the prayers for divorce ought to fail. The trial court was therefore urged to dismiss the petition as the grounds for divorce were unfounded.

4. During the hearing, PW1, HKB testified that she got married to the appellant in accordance with the Islamic Shariah Law on 31.03.2020 at Wagberi Location in Wajir County. That the agreed dowry of the said marriage was Kes.100,000 which is still outstanding. It was her evidence that during the subsistence of their marriage, they were blessed with two children who were under her custody. She stated that the appellant failed to satisfy her sexual needs despite organizing for the appellant to be read a Quran, a move that the appellant flatly refused.
5. She went further to state that the husband was ill mannered as he was in the habit of urinating in front of her female children from a previous marriage. Additionally, that he was in the habit of deserting their matrimonial home whenever they disagreed. She implored the court to grant her prayers.
6. PW2, HMA testified that he was aware of the disagreement existing between the parties and that as elders, they had tried to help them find a solution in vain. He was of the view that given that the parties had declined to listen to their advice, it was fair that the marriage be dissolved. On cross examination, the witness stated that he has known the petitioner for a long time and that this was her fourth marriage.
7. PW3, IKA, the petitioner's uncle testified that he was aware of the disagreements between the parties. He narrated an instance when the parties disagreed and he was involved in bringing them together. He stated that he informed the petitioner to have a goat slaughtered and Quran be read to her by the sheikhs. On cross examination, the witness confirmed that there was a time when the petitioner chased the appellant away from their matrimonial home and that he spent in his house.
8. DW1, ABA stated that the petitioner/respondent was his wife after having married her according to the Islamic law. That the dowry agreed of the said marriage was Kes. 100,000/- which was still outstanding. He reiterated that his marriage was blessed with two children and that he had been providing for his family. That the allegation that he was not good in bed was unfounded as the petitioner was guilty of denying him his conjugal rights. He further stated that the stepdaughters were like his children and therefore it could not be true that he treated them badly. He stated that the petitioner treated him harshly and has in some occasions chased him away from their house and even refers to him as gay. He urged the court not to dissolve the marriage as he still loved his wife.
9. DW2, OAM testified that both parties were his relatives. That on a date that he could not remember, the appellant asked him to take Kes. 23,000/- to the petitioner/respondent. Additionally, on 01.05.2024 the appellant requested him to take Kes. 4,000 to the petitioner.
10. DW3, IAM, a relative testified that he participated in the marriage of the parties at the inception. That there is a day when he passed by their home and found the appellant missing and upon asking, the petitioner, she informed him that he had been away as he had failed to satisfy her sexual desires. In the same breadth, that the appellant was in the habit of urinating before the female children. It was his evidence that he talked to the appellant over the same to which the appellant agreed to change and further, the appellant told him that the petitioner did not have respect for him as her husband. It was his evidence that while he was still talking to the appellant, the petitioner/respondent grabbed the appellant by his collar and attempted to hit him but instead, the blow landed on him(DW3).
11. DW4, HMA, a cousin to the appellant testified that there was a day he requested the appellant to assist him purchase a mattress in preparation for his wedding when the appellant advised him otherwise thus prompting the petitioner/respondent to insult the appellant by calling him nasty names.
12. The trial court upon considering the facts and the law as presented before it delivered its judgment on 27.05.2024 thus making the following pronouncements;



- i. Dissolution of marriage is hereby granted to the petitioner.
 - ii. The defendant to pay dowry of Kes. 100,000.00/- to the plaintiff within 90 days from the date of judgment.
 - iii. Maintenance and Custody of children be dealt with by the Childrens Court.
 - iv. Each party bears its own costs.
13. The appellant being dissatisfied with the judgment and decree of the trial court filed a memorandum of appeal dated 18.06.2024 on grounds as follows:
- i. That the learned trial Kadhi erred in law and fact by failing to find that the petitioner failed to prove the case to warrant the divorce.
 - ii. That the learned trial Kadhi erred in law and in fact by failing to appreciate the grounds for divorce provided and directed in the Holy Quran.
 - iii. That the learned trial Kadhi erred in law and in fact by finding that the appellant had failed to fulfil his marital (conjugal) duty without evidence and therefore his decision was unfounded.
 - iv. That the learned trial Kadhi's judgment was marred with numerous contradictions hence unenforceable.
14. The appellant sought for the following prayers:
- a. That the appeal be allowed.
 - b. That in the alternative, the parties be referred to the Kadhi for a de novo hearing.
 - c. The Honourable Court set aside the divorce and nullify the certificate of divorce.
 - d. Costs of the appeal.
15. The Court heard the appeal 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 the 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.”
16. Thus the court sat with Senior Principal Kadhi Hamisi Bedzenga and Senior Resident Kadhi Muyihidin Mohamed Sambul. In their joint opinion dated 12.05.2025, they urged in reference to two issues as follows:
- i. Whether or not the trial Kadhi dissolved the marriage between the petitioner and the respondent in accordance with Islamic law.
 - ii. Whether or not the trial Kadhi erred by granting custody of minors to the respondent.
17. On the first issue, it was urged that the Islamic law permits the dissolution of marriage through various means including talaq (divorce initiated by the husband), Khul'a (divorce initiated by the wife with compensation) and judicial dissolution by a Kadhi under certain circumstances. That in the present matter, it was clear that the marriage was irretrievably broken as there was no love, care and respect as adduced in the evidence. It was their view that the trial Kadhi prioritized mawadda wa rahma (love and



mercy) in marriage and consequently dissolved the same. As such, it was their collective view that the Kadhi did not err by dissolving the marriage.

18. On the second issue, the learned Kadhis opined that in Islamic law, custody (hadhana) of minors and particularly during their formative years, is ordinarily awarded to the mother unless it is proven that she is unfit. That the paramount consideration remains the maslaha (best interest) of the children. In this case therefore, it was their view that the respondent being the mother of the minors, she was thus responsible for their care noting that nothing had been presented before the court to suggest otherwise. That the appellant did not show any compelling reasons to justify a deviation from the general Islamic principle that favours maternal custody, especially for younger children. In the end, this court was urged to uphold the finding of the trial court.
19. The court directed that the appeal be canvassed by way of written submissions.
20. The appellant via his submissions dated 16.12.2024 submitted that his marriage with the respondent had indeed experienced challenges however, the same had not reached a level where their differences could not be resolved as he demonstrated in court that he used to seek elder's assistance wherever disagreement occurred. That they used to settle their differences and that life would go back to normal.
21. That a wife can institute for divorce proceedings where the following grounds are in subsistence: that the whereabouts of the husband have not been known for a period of 4 years; that the husband has neglected or has failed to provide for her maintenance for a period of two years; that the husband has been sentenced to imprisonment for a period of seven years or upwards; that the husband has failed to fulfil his marital obligations for a period of three years; that the husband has been insane for two years or is suffering from leprosy or a virulent form of venereal disease and that the husband was impotent at the time of marriage and continues to be so.
22. That none of the above was listed as a reason in the petition filed before the court. That a Muslim woman is not allowed to ask her husband for divorce without a genuine reason and to the contrary, she is required to honour the strong bond of the marriage.
23. Counsel faulted the trial Kadhi for finding that the divorce herein was normal noting that the respondent requested to be divorced by her husband but she never tendered any valid reasons to support the same. That therefore, her divorce petition ought not be treated as normal divorce (Fashak) but ought to be classified as Khul'a. To that end, reliance was placed on the narration by Shaykh Salih Al – Fawzan who said that 'such a woman. A woman who has been revocably divorced is still a wife so long as the Iddah continues, and she is entitled to the same as other wives of maintenance, clothing and accommodation.' But if the divorce is not revocable, such as third divorce, then she is not entitled to maintenance or accommodation.
24. That Abd A- Razzaq narrated in Al – Musannaf (4/90) that Ash-Sh'bi was asked about a woman who is divorced by Khul'a – is she entitled to maintenance? He said; 'How can he spend on her when he takes from her' because if the Khul'a is done, the husband cannot take her back, so she is like one who is irrevocably divorced and is not entitled to maintenance. Additionally, reliance was placed on the case of AAA & Another vs KAM Civil Appeal No. 2 of 2019 [2022] KEHC 18062 (KLR) J.K. Sergon J while citing FW vs NA [2017] eKLR where the court stated that;

“This is not normal talaq; it is Khul'a whereby the plaintiff was supposed to return the dowry paid to her unfortunately the defendant didn't pay the dowry. Therefore, nothing will be returned to him. 'It is reported in Sahihul-Bukhary that, a woman came to prophet Mohammed (p.b.u.h) and said, 'I hate my husband and like separate from him. The prophet asked, would you return the orchard he gave you as dowry? She replied 'Yes' even more than



that, the prophet said in return what he gave you as dowry and he ordered the companion to divorce once.”

25. The Honourable Kadhi was further faulted for deliberating on extraneous matters which were not part of what had been pleaded in the petitioner’s pleadings. To that end, this court was urged to allow the appeal herein.
26. The respondent on the other hand filed submissions in a pleading named as defence and dated 11.09.2024. She urged that she is already divorced and that she is not ready to get back with the appellant as her marriage was characterized with hardship and lack of love. It was her prayer that she should not be forced to stay in the said relationship as she has since settled and living a peaceful life. She urged this court to grant her an opportunity to live her life peacefully by dismissing this appeal.
27. Having reviewed the evidence adduced before the trial court, the respective pleadings filed herein, submissions, authorities cited, the opinions of the assessors and the applicable law, I discern the following as the issue for determination: Whether the trial court reached a determination that was not supported by the facts and law when he granted divorce as urged by the respondent.
28. The petition herein was anchored on grounds that; the appellant had failed to meet his marital and parental obligation; he was abusive and violent to the respondent; was disrespectful to the respondent and his step children. On the other hand, the appellant denied the allegations. Instead, he accused the respondent of being disrespectful; being cruel to him and denying him his conjugal rights.
29. On the ground that the trial court’s determination was not supported by the facts herein, it is trite that he who alleges must prove. [See section 107(1) of the *Evidence Act*].
30. It follows that grounds of divorce under Islamic law must always be proved to the required standards. From the testimony of both parties and their witnesses, one common thing that came out clearly was that the marriage in question has irretrievably broken down. Each party blamed the other of disrespect, harassment and denial of conjugal rights. The respondent was accused of non-performance in bed while the appellant denies the same. Elders who testified from both sides confirmed that the marriage in question was not working despite numerous intervention.
31. The respondent urged that she has since moved on and therefore, this court ought not bind her to the appellant by way of marriage.
32. This being a civil matter, it is trite that the standard of proof is pegged on the degree of probability. This view is supported by the Court of Appeal judgment in the case of Alexander Kamweru vs Anne Wanjiru Kamweru (2000) eKLR, where it was observed that: Certainly cruelty or desertion may be proved by a preponderance of probability, that is to say that the Court ought to be satisfied as to feel sure that the cruelty or desertion, or even adultery (all being matrimonial offences) has been (as the case may be) established.
33. The above notwithstanding, Islamic law vests the husband with original powers to divorce his wife. The wife also enjoys the right to terminate her marriage under the provisions of Qur’an 2.229, legal prophetic precedent in Hadith Qays Ibn Shimas (Bukhari: 4990, Al Shaukany, Nail Al Awatar, 6/246) and Article 89 of the Islamic Charter on family, subject to refund (if paid) of the dowry.

...Then if you fear that they would not be able to keep the limits ordained by Allah then there is no sin on either of them if she gives back (the mahr or part of it) for her al- khul’u (divorce). These are the limits ordained by Allah so do not transgress them and whomsoever



transgresses the limits ordained by Allah then such are the zalimun (wrongdoers)' Al Baqarah: 229.

34. As noted above, the wife can divorce her husband by way of Khul'a thus this kind of divorce is allowed on the assumption that it is the wish of the wife to exit the marriage without any mistake or instigation on the part of the husband. It must never be used to deny a married wife her fundamental right to dowry. Al Zuhaily, in 'Islamic jurisprudence and its evidences' at 9/7027 states:

One of the conditions for Khul'u is that the request must be made by the wife of her own free choice and wish to leave the husband without any coercion or mistreatment by the husband. If any of these conditions fails, talaq, and not Khul'u becomes effective... if a husband, intentionally mistreats his wife to compel her to seek for Khul'u, it is not lawful, according to the Hanafi, Hanbali and Shafi'i schools of jurisprudence, for him to take of the consideration she offers because Allah said in Q.2.23 'and do not take them back to hurt them...' and said in Q.4.19 and you should not treat them with harshness that you may take away part of the mahr you have given them'. This means, Khul'u executed without legal basis is illegal, because it harms the lady, and harm is prohibited by the prophet when said: 'initiating or reciprocating in harm is prohibited'

35. Ibn Juzy (d742H), Al Qawanin al Fiqhiyat, pp 352 states:

For Khul'a divorce to be effective it must satisfy three conditions. First, the consideration must be lawful to transact in under Islamic law. This removes acceptability of alcohol, pig and the likes as a consideration for Khul'u. Others have accepted an unknown and detrimental object as a consideration for Khul'u. Second, it must not be a means to an illegality such as taking, deferment or settlement of loan. Thirdly, it must be as a result of the woman's choice in her desire to divorce the husband without any coercion or as a result of mistreatment by the husband, if either is lacking, the annulment of the marriage becomes effective through divorce and not Khul'u"

36. In this case, the respondent urged that she no longer wants to return to her matrimonial home in as much as the appellant desires otherwise. Having read and understood the pleadings herein, clearly, this marriage was over immediately it was celebrated. And for the appellant to urge that he is still in love with the respondent in my view, is being insincere. It is clear that the appellant's appeal solely seeks to evade paying the respondent mahar for the reason that she is the one who initiated the proceedings herein and in accordance to his understanding, the grounds cited were unfounded.

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. In my view, the trial court did not err in any way by dissolving the marriage in question and ordering payment of dowry. Accordingly, the judgment of the trial court is upheld and the appeal dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF MAY 2025

J. N. ONYIEGO

JUDGE

