



**AMW v HAW (Civil Appeal E002 of 2023) [2025] KEHC 9006 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9006 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
CIVIL APPEAL E002 OF 2023**

**FR OLEL, J  
JUNE 26, 2025**

**BETWEEN**

**AMW ..... APPELLANT**

**AND**

**HAW ..... RESPONDENT**

*(Being an appeal from the judgment of Senior Resident Kadhi Hon (Mr) Mustafa.G. Shunu delivered on 8<sup>th</sup> August 2023 in Marsabit SPM ( Kadhi) Matrimonial suit No. E003 of 2023)*

**JUDGMENT**

1. This appeal arises from the judgment/decreed of Honourable (Mr) Mustafa G Shuna Senior Resident Kadhi delivered on 8<sup>th</sup> August 2023 in case Marsabit Kadhi Matrimonial Case No.E003 of 2023, where he dissolved the parties marriage, allowed the petitioner to stay in her matrimonial home for three (3) months as stated in the Talaq(1), directed the Appellant to be providing Kshs 18,000/= to the respondent excluding Ksh3,800/= for mboga due to the financial strain she faced but this order was open for review once the respondent opened her business. He was also directed to provide clothes thrice every year, and provide medical cover when need arose using NHIF.
2. The learned trial Kadhi further awarded custody of the children of the marriage to the respondent, and also issued a protective/restraining order against the Appellant, directing him not to breach peace in a manner that would affect the respondent and/or their children.

**Pleadings & Evidence**

3. The Respondent instituted the primary suit by filing a divorce petition on the ground that the Appellant had been cruel and violent towards her, had failed to give her sufficient maintenance money, had declined to buy food at home, moved out of their matrimonial home, and was abusive and physically violent towards her. In one instant, he had assaulted her and as a result, fractured her left arm and smashed her mobile phone.



4. She further averred that she had not connived with or condoned the respondent's action and thus urged the court to grant the prayers sought in the said petition.
5. In response the Appellant denied all the allegations made against him and filed his counter claim where he averred that it was the respondent who did not understand her marital roles, did not value him as her husband despite working hard to be able to providing for his family and that the respondent would mock, undermined his authority and threaten him in the presence of their children/family members. He therefore urged the court to allow the counterclaim by dissolving the marriage, sought custody of their children, and also sought eviction orders directing the respondent to move out of their matrimonial home
6. PW1, the respondent herein, testified and stated that their problems started when she was pregnant with their last-born child, during which period, the Appellant would provide her with minimum support of Kshs 600/= per day, which was not sufficient to sustain her and her children. She had referred their dispute to the clan elders for mediation, and despite their intervention, the Appellant had remained intransigent and demanded that she vacates their matrimonial home.
7. The respondent also accused the appellant of being abusive and physically violent against her. She recalled one incident when the Appellant battered her and, in the process, fractured her left arm. He had also moved out of their matrimonial bed and removed all of his belongings therefrom. As a result of all these problems, their communication had broken down and their enmity had grown wider.
8. Finally, she contended that the Appellant had married a second wife, whose consort he preferred over her. Given the prevailing circumstances, their marriage had irretrievably broken down, and prayed that the orders sought in her petition be granted.
9. In response, the Appellant stated that the respondent had never been a good wife, would berate and dishonour him, would refuse to wash his clothes or cook for him, and as a result, they had no tranquillity at home. He had thus opted to move out of his bedroom and changed the door locks to his room to safeguard his security. Further, the Appellant accused the respondent of mocking him when his brother died and blamed her intransigence on bad peer friends whom she wrongly emulated.
10. As regards maintenance, he had provided the respondent with Ksh 20,000/= monthly for house upkeep but blamed her for being extravagant in the management of the said sums. He had engaged elders to intervene in resolving their marital problems, but the said problems continued to exist and thus also requested the trial court to allow his counterclaim and dissolve the said marriage. He also sought for orders to compel the respondent to move out of the matrimonial home and lastly also prayed to be granted custody of their children.
11. Both parties called two (2) witnesses each to testify on their behalf. PW2 MLB and PW3 AWG, the respondent's father, confirmed that they had mediated to resolve the simmering matrimonial dispute between the parties herein, and their evidence was also affirmed by DW1 AAM, & DW2 HBA.
12. The learned trial Kadhi did consider the evidence adduced and decreed as follows:
  - a. That, the court puts an end of their conflict by dissolving the marriage union in Faskhili way of resolution since their issues are irreconcilable.
  - b. That the petitioner to stay in her matrimonial home by observing Eddah (wailing of 3 consecutive months as stated in Talaq (1)).
  - c. That the respondent to provide Kshs 600 per day, summing to Kshs 18,000/= exclusive of Kshs 3,800/= for mboga due to financial constraints facing him,



but the court shall review this order once the respondent's business opens up and this sum be sent to Mpesa number 0715xxxxxx in the name of Hawo Adan Woche, the petitioner.

- d. That the rights of clothes thrice yearly.
- e. That the rights of medication when need arise (NHIF).
- f. That the custody of the children is vested with the mother.
- g. That the court issues a protective order to the respondent from breaching the peace of the petitioner and children for whatever reason or any person acting on his behalf, is also restrained from the same.
- h. That parties to come for a divorce certificate upon lapse of the Eddah period.
- i. That the issue of battery is a criminal matter, thus the court has no jurisdiction, it is appropriate that it be placed before the magistrate court for action.
- j. Each party to bear their own costs in this matter

### **The Appeal**

13. The appellant, being wholly dissatisfied with the said judgement, filed his memorandum of appeal and raised the following grounds of appeal;
  - a. That the learned senior Kadhi erred in law and in fact in finding that the Kadhi court had jurisdiction to hear and determine questions of custody, maintenance, care, and protection of children matters.
  - b. That the learned senior Resident Kadhi erred in fact and in law in finding/ ordering that the respondent is entitled to monthly payment of Kshs 18,000/= and Kshs 3,800/= for mboga maintenance of the children.
  - c. That the learned senior Resident Kadhi erred in finding that custody of the child is vested in the mother.
  - d. That the learned senior Kadhi erred in law and in fact by failing to find that the Kadhi's court does not have jurisdiction to hear and determine questions of custody, maintenance, care, and protection of children matters.
  - e. That the learned Senior resident Kadhi erred in law and in fact by failing to appreciate that the Kadhi's court cannot make orders as to custody and maintenance of children as it has no jurisdiction to do so because the same is a preserve of the children's court and the jurisdiction of the kadhi court emanates from Article 170(5) of the *Constitution* which limited its jurisdiction to deal with Muslim law relating to personal status, marriage, divorce or inheritance in proceedings where all the parties professed to Muslim religion and submitted to the court's jurisdiction.
  - f. That the learned senior Kadhi erred in law and in fact in not holding that constitutional provisions of the Kadhi court are couched in mandatory terms that set the limit on the areas upon which a Kadhi court would have jurisdiction.



- g. That the learned senior kadhi erred in law and in fact in not applying that the *Children's Act*, 2001 relates to all children irrespective of their religious affiliations and/or cultural background and does not distinguish between a child of a Muslim parents from other children for purposes of protection under the law custody, guardianship and maintenance.
- h. That the learned senior resident Kadhi erred in law and in fact in not holding that even if the Kadhi's court had jurisdiction for as long as the appellant did not submit to the jurisdiction of the said court as stipulated under Article 170(5) of the *Constitution*, the court had no power to compel him to appear before that court, and further that the party had the option of heading to the children's court which is vested with jurisdiction to handle children's matters.
- i. That the learned senior resident Kadhi erred in law and in fact in not holding that the respondent had been cruel to him by threatening his life, and keeping the company of women of ill repute, staged the marriage for purposes of financial gain, hoodwinking him into supporting her family financially and failed to act as a wife.
- j. That the learned senior resident Kadhi erred in law and in fact in not considering that maintenance, regard must be given to provisions of Article 45(3) of the constitution of Kenya which recognises that: "parties to a marriage are entitled to equal rights at the time of marriage, during marriage, and at the dissolution of marriage".
- k. That the learned senior resident Kadhi erred in law and in fact by failing to note that marriages involve and recognizes personal rights of each spouse to enjoy equal rights to property, personal freedoms and to receive equal treatment without discrimination on the basis of gender and without being shackled by repugnant cultural practices or social prejudices. Article 45(3) was in harmony with Article 21(3) of the constitution, which enshrines equality of men and women and specifically states that, "women and men have the right to equal treatment".

14. The Appellant therefore urged this court to allow his Appeal and set aside the orders issued by the learned senior resident Kadhi dated 8<sup>th</sup> August 2023.

### **Analysis And Determination**

15. I have considered the pleadings, evidence presented, and submissions of the parties in this appeal. This court, first and foremost, is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusion.

16. A first appeal is a valuable right of the parties and, unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising, along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact, the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See *Santosh Hazari v Purushottam Tiwari (Deceased) by L.Rs* (2001) 3 SCC 179.



17. A first appellate court is also the final court of fact, and litigants are entitled to full, fair, independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko v Varkey Joseph* AIR 1969 Kerala 316.
18. Though the Appellant filed an elaborate memorandum of Appeal raising eleven (11) grounds of Appeal, the same can be condensed to two issues. First, the Appellant challenges the jurisdiction of the Kadhi's court to hear and determine children matters and secondly, he also challenges the award of Kshs 18,000/= payable monthly to the respondent as maintenance money less Kshs 3800/=, which order was for open for review once the respondent opened her business and the same picked up.

#### **i. Jurisdiction of the Kadhis court to determine children's Matters.**

19. The subject of jurisdiction is now well settled by the Constitution, the law, and legal principles. *Halsbury's Laws of England* 4th Ed Vol 9 defines it as ;

“...the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.

20. In *Words and Phrases Legally Defined* Vol 3, John Beecroft Saunders defines jurisdiction as follows:

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

21. Article 170(5) of the *Constitution* of Kenya 2010, specifies that the jurisdiction of the Kadhi's court shall be limited to determine questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's court. The elephant in the room is whether “personal status” provides for room/extends the court's jurisdiction to determine children matters (custody and maintenance) where both parents profess Muslim faith.
22. This question has been a live issue in Kenyan courts. In some cases, it has been argued that children's matters are incidental to marriage issues, where the Kadhis courts have jurisdiction to deal. In other cases, it is argued that only the Children's court has jurisdiction to hear children's matters and that Kadhi's' courts are not Children's court.
23. For instance, in *THJ v SMO* (2014) eKLR, *Najma Ali Mohamed v Swaleh Rubea* (2010) eKLR, *Amin Mohammed Hassan v Zabra Mohammed Abdulkadir* (2009) eKLR, *Abdirahman Mohammed Abdi & another v Adan Yusuf*, Garris High court, Civil Appeal No 13 of 2012 (2013) eKLR and *ZUDG v SJKUR* (2020) the courts held that children matters are incidental to marriages and therefore Kadhi's Courts have jurisdiction to handle the same by virtue of Article 170(5) of the *Constitution*, which gives Kadhi's Courts the jurisdiction to deal with personal matters involving parties professing Muslim faith.



24. On the other hand, courts in *ABMM v SMY & Another* (2019 eKLR, *SMH v SAA* (2014) eKLR, *AAI v HAD* (2018) eKLR, and *HMM v KJO* (2014) eKLR all took the view that Kadhi's Courts have no jurisdiction to deal with custody and maintenance of children and that the Children's Court established under Section 73 of the *Children's Act* has exclusive jurisdiction to handle such matters.
25. The Supreme Court of Kenya in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & others* (2012) eKLR stated as follows: -
- A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.
26. And, in *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others* [2018] eKLR, the Court of Appeal further stated: -
- (44)... A party cannot, through its pleadings, confer jurisdiction to a court when none exists. In this context, a party cannot, through draftsmanship and legal craftsmanship, couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and the relief sought that determines the jurisdictional competence of a court...
27. The provisions of Article 170(5) of the constitution and Section 5 of the *Kadhi Courts Act*, Cap 11, are couched in mandatory terms and set the limit on the areas within which the Kadhi Court would have jurisdiction. The term 'shall' is used. It is also noted that nowhere in the Kadhi's Act does it mention that the court shall deal with issues of custody and child maintenance. Therefore, in my view, it is clear that the drafters of the above provisions of the law never intended the Kadhi's Court to handle matters relating to custody and maintenance of children, and nothing prevented them from expressly stating so.
28. Further, the *Children's Act*, 2022 (No 29 of 2022) provides a comprehensive legal framework for child protection and aligns our law with international standards, including the *UN Convention on the Rights of the Child*. The said Act also gives effect to Article 53 of the *Constitution* of Kenya, which outlines various children's rights, including the right to education, healthcare, and protection from abuse and exploitation. It also provides for parental responsibility, alternative care, children in need of care and protection, as well as for children in conflict with the law.
29. Part VIII of the *Children's Act* 2022 establishes the "children's court" and specifically provides that;



Section 90(1) of the *Childrens Act*;

“The Chief Justice may, by notice in the Gazette, designate children's courts in such counties and sub-counties as the Chief Justice may determine.

Section 90(2) of the Children's Act further provides that;

“The Chief Justice may, by notice in the gazette, appoint a Magistrate to preside over cases involving children in respect of any area of the country.”

30. The said provisions empower the Honourable Chief Justice to set up children's court and designate/ gazette specific magistrates to handle the said matters. The Honourable Chief Justice has not designated the Kadhi's court to be one with jurisdiction to handle children's matters.
31. Finally, I do also note from the pleadings filed before the trial court, that the main issue before the court pertained to the divorce between the said parties. The issue of children custody and their needs were insufficiently pleaded. The parties did not specify their particulars and specific needs nor did they delve into the same in their evidence.
32. My finding, therefore, is that the Kadhi's Court does not have jurisdiction to deal with matters concerning children, unless specifically gazetted by the Honourable Chief Justice. The said court, therefore, cannot entertain any proceedings before it concerning the custody and maintenance of children, and the Honourable Kadhi's decision to that extent was void ab initio.

**ii. Whether the Respondent is entitled to Masruf Payment of Kshs 18,000/= exclusive of Kshs 3800 to be sent for food.**

33. The respondent pleaded to be provided with “Masruf” amounting to Kshs 20,000/= monthly and testified that the Appellant would provide her with Kshs 600/= per day, which was not sufficient for her and her minor child. The Appellant also confirmed that he provides the respondent with approximately Kshs 20,000/= monthly, and this contention was also supported by two elders (PW2 Mamo Luba Boru & DW1 Adan Ali Mare), both of whom had mediated over their dispute
34. The Honourable Kadhi's finding on this matter cannot be faulted in light of the Appellants' admission that he provides the respondent with maintenance of approximately Kshs 20,000/= monthly. He was also allowed to review the said order once the respondent had set up her business

**Disposition**

35. The upshot is that this Appeal is partially successful. The finding of the Honourable Kadhi relating to the custody of the couple's children is hereby set aside, but all other grounds of Appeal are dismissed.
36. Each party will bear their own costs of this Appeal.
37. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MARSABIT THIS 26<sup>TH</sup> DAY OF JUNE 2025.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

Delivered on the virtual platform, Team this 26<sup>th</sup> day of June, 2025.

In the presence of: -



.....Appellant  
.....Respondent  
.....Court Assistant

