



**REPUBLIC OF KENYA.**

**IN THE KADHI'S COURT**

**AT MOYALE.**

**KCC NO. 23 OF 2017.**

**AHG.....PLAINTIFF.**

**VERSUS**

**I ALIAS RAG.....DEFENDANT.**

**JUDGEMENT**

- 1.The Plaintiff in this cause is one AHG she filed her plaint dated 26th July 2017 in this court.
- 2.The plaintiff and the defendant celebrated their marriage under the provision of Islamic Law on relevant date in 2012.
- 3.After the marriage the two lived and cohabited as husband and wife. the said marriage was blessed with two (2) issues namely:
  - a) MI -aged 4 years.
  - b)HI-aged 1year.
- 4.In her plaint the plaintiff prays for judgment against the defendant for;
  - a) Their marriage be dissolved
  - b)custody for two issues of marriage
  - c)Maintenance for the issue of marriage
  - d)The respondent be compel to pay the plaintiff's cost.
5. This Plaint was founded on the ground of negligence and cruelty
- 6.In response to the Plaintiff's pleadings the defendant filed a defence on 26<sup>th</sup> Aug, 2017, in the defence the defendant denies the accusation brought against him by the plaintiff and further stated that the plaintiff has been having unlawful relationship outside wedlock. However acknowledges the existence of Matrimonial problems and further contended that he has not yet paid the dowry as agreed.
- 7.The parties herein married on relevant date in 2012 under Is, and veracity thereof is not objected by both Plaintiff and defendant,

Similarly it's also not in dispute that the Union was blessed with two issues;

8. At the trial both parties testified on oath and choose to call their respective witnesses. The Plaintiff testified that after their marriage they cohabited as husband and wife in Township location, [particulars withheld] sub county, Their marriage was not peaceful. The defendant was cruel to her and verbally abusing her.

9. The Plaintiff testified in the court with other one(1) witness in support of the her pleading, she also asserts that defendant is drunkard person ,violent and not maintaining the family as required and the defendant has never bothered to assist the plaintiff in meeting the numerous needs, of the home, thus leaving plaintiff to struggle to meet the same alone, causing her suffer stress and anguish.

10. The plaintiff further told the court that she no longer hold any love and affection towards the Defendants only she needs dissolution of their union.

11. The defendant testified with other two witnesses in support of the defence. The defendant stated that the Plaintiff has absolutely been un-corporative with the defendant and the Plaintiff has despised and undermined efforts by the defendant to sort out their problems through family members.

12. The defendant witnesses further stated that the Plaintiff deserted the marital home without defendant's permission and that there have since been reconciliation attempts for the Plaintiff and defendant ,and still it's not yet exhausted to iron out their differences which have apparently not been successful.

13. I have given due consideration to the plaint and the ground it's based on vis a vis the response of the defendant. It emerges from the evidence on record, before the court the Plaintiff's pleading be treated as Khul (stripping off) since she failed to proof her case in balance of probability and Plaintiff is legally rightful before the court to seek Judicial separation with the defendant if she does not hold any love and affection toward the defendant.

The court attention was drawn to **Q2:229**, where in stated that:

**“.....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, Mahr (dower) or a part of it for her Al-khul' (divorce).....”**

14. The court attention was also drawn to Abdulrahaman's. 'The Islamic law' (1997 Reprint) pg. 168 where its stated that;

**In Islam marriage is a contract and the contract should be made to work but, not when it becomes humanly impossible to do so. It's only in such unavoidable circumstances that divorce is permitted under shariah**

And that:

**“ .....When a Marriage becomes impossible to work it's better to separate amicably rather than drag on indefinitely making the family home a hell”.**

15. The court attention was drawn also to Bukhari's, 'Sahihul – Bukhari, 'Vol.7 Hno.197 and also, As Suyuti's sinnanu-Nisaai vol. 8 page 5-16 also Sunnanu - abu dawud vol. 4 page 268-69 in case of **Habiba** versus **Thabit (R.a)**,

**The wife of Thabit (Habiba) came to the prophet (S.A.W) and said 'O' Messages of God. I don't hate Thabit neither because of his faith nor his nature except that I fear unbelief (If I remain with him). On that God's messagers (S.A.W) said (to her) “will you give back his orchard" She said 'Yes and she gave it back to him and He (Prophet) ordered him and so they separated.**

16. In the above Hadith. the prophet ordered him to divorce his wife, after she returned to him the orchards which he gave her, as a dower. But the consent of Thabit was sought after.

17. It is my view that the Plaintiff has failed to prove the defendant as a recalcitrant (naashiz) and it's further clear that the Plaintiff simply wishes to release herself from a marriage contract.

18. And in such a case the Plaintiff shall ransom herself to secure a way out of marriage due to an aversion for her blameless husband and hence the plaintiff will gain a total control over her own self and freedom.

19. I have also considered the fact that Divorce since its disintegrate the family union is of course a social evil, in itself but it's a necessary social evil. It's better to wreck the unity of the family than to wreck the future happiness of the party by bonding them to a companionship that has become odious!

20. As regard to the issues of custody the court attention was drawn to Al-Bayhaquees' ' Al- Kubra 8/4 and also Abdulrazaq's 'Mussanaf's' No. 12605. In case of **(Umar (R.A) v umm Asim (R.A))**.

**Abubakar (R.A) gave Judgment in favour of Umm Asim and stated that she is more compassionate, gentler, more tender – hearted and more merciful (mother-nature) and she is more entitled to have custody of her son as long as she doesn't get married.”** 7

21. The court attention was also drawn in support of the above case to constitution , Art 53(2) where its stated that;

**“A child best interest are of paramount importance in every matter concerning the child”.**

The court attention was also, drawn to Art 3(1) of the UN convention on the right of the child. 1989 (to which Kenya is a party) which states;

**“In all actions, concerning children whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies the best interest of the child shall be the primary consideration”.**

22. It's very much clear on record that to the both plaintiff and defendant children is not a stranger and both should bears all responsibility pertaining their welfare and hence the plaintiff has a right to live with them, however, the defendant is not denied his right of access and visitation.

*The upshot of all the above is, that I make the following orders.*

1. The marriage solemnized in respect of the plaintiff and defendant on relevant date 2012 be dissolved in way of Khul.

(That the plaintiff ransoms herself or relinquishes her dowry to secure a way out of marriage)

2. Divorce certificate be issued forthwith.

3. The custody care and control of the children of the marriage named herein before be granted to the Plaintiff.

4. The defendant shall have unrestricted access of the children. The modality of such access be agreed upon or ordered upon after.

5. The defendant shall contribute towards the maintenance of the children. The modality of such maintenance be agreed upon or ordered upon after.

6. Order as to cost each party shall bear his/her own cost.

Ordered accordingly.

N/B: Aggrieved party has a right to file an appeal within a period of 30 day

**DATED and SIGNED at Moyale this 23<sup>th</sup> day of March, 2018**

**A. D WAKO**

**SENIOR RESIDENT KADHI**



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