



REPUBLIC OF KENYA

IN THE KADHIS COURT

AT KISUMU

KCDC CASE NO. 7 OF 2020

AKA.....PETITIONER

VERSUS

AK.....RESPONDENT

JUDGEMENT

The Petitioner's case

1. In this petition by AKA, the petitioner seeks dissolution of her marriage to the Respondent, AK. The petition is premised on irretrievable differences between the parties.
2. The Petitioner and the Respondent were married in 2006 and they have 6 children from the said marriage. The Petitioner accuses the Respondent of throwing her out of the matrimonial home. She also notes that the Respondent had previously accused her of having relations outside marriage, an allegation she denies.
3. The Petitioner, in arguing for the dissolution of marriage takes cue from the decision by the Respondent to ask for return of her dower, a procedure known in Islamic law as *khul'*. Since then, the parties are no longer living together as husband and wife.
4. The Petitioner also asks this court to grant her custody of the children, all the children. She argues that she has been taking care of the children alone, now that the Respondent does not have any source of income. The Petitioner further asks this court to bar the Respondent from accessing her premises, and he should only come during the day if he wants to see the children. Otherwise she is even ready to take the children to him whenever he needs to see them.

The Respondent case.

5. The Respondent has no objection for the prayer for dissolution of marriage. He notes that the marriage died a long time ago, and there were no efforts from both parties according to him to resuscitate it.

He further argues that they have not known peace and tranquility since both families were not in support of the marriage. The Respondent's only concern is about custody of some of the children.

6. It should be noted that the Respondent at cross-examination produced a divorce letter purported to have been written in 2018. The court did not admit the letter because pleadings had already been closed, but the letter coincides with the same time the Petitioner returned her Mahr and as such corroborates the *Khul'* procedure the Petitioner had alluded to beforehand.

The Law

7. There is an interplay of three ways of dissolving a Muslim marriage in this Petition: First, the Petitioner seeks judicial dissolution of marriage but then submits that she returned Mahr to the Respondent after he demanded for that return. Then the Respondent alleges that he wrote a divorce letter, but did not include it in the pleadings nor in his submissions, but was only an afterthought at his cross-examination.

8. The fact that the Respondent has no objection for the prayer for dissolution of marriage is in law, enough to dispense of the matter, save for the fact that we have to ascertain which method of ending the marital tie has been proffered by the parties. Knowing the exact method has implications in Islamic Law which are as follows:

For both judicial dissolution and unilateral repudiation by the husband, the petitioner would ordinarily be entitled to her *mahr*. For *Khul'*, it is the husband who is entitled to return of *mahr*.

9. It can be gleaned for the submissions by the Petitioner that she was not coming to court seeking judicial decision. She only sought a confirmation of the *Khul'* arrangement of 2018 that resulted in the separation of the parties and the ultimate end of their marital tie.

In Quran 2:229 Allah says:

Then if you fear that they would be unable to keep the limits ordained by Allah, there is no sin on either of them if she gives back (the mahr) for her Khul (divorce).

In the book "Al-Az"z Sharh al-Waj"z" of Im"m al-Rafi"" al-Qazw"n", he says and I quote(Translations from Arabic are mine):

[The scholars say: she (wife) only returns (to the marital fold after Khul') when he does not acknowledge the Khul' settlement, or denies receipt of the dower or keeps silent (about it), and she brings evidence. If he acknowledges the Khul settlement and denies coercing (her to Khul) then the talaq is definitive and there is no return (of the wife to the marital tie)]

[1994, D'r al-Kutub al- 'Ilmiyyah, Beirut, pg.397]

In the case before this court, the Respondent has neither confirmed nor denied the existence of *Khul'*, and the return of the dower and that leaves the court to confirm that the submissions by the Petitioner are true.

10. The Respondent's prayer for the custody of some of the children was not supported by particularization of the children he wished to have custody over nor did he elaborate on how such custody would be enforced. It is also apparent that for the last 2 years he has not had the custody of the children and the fact that the Petitioner has been singularly taking care of the children in the recent years has not been rebutted by the Respondent. The status quo therefore remains.

Determination

Arising from above, this court proceeds to make the following orders:

1. That the marriage between the Petitioner and the Respondent is dissolved by operation of the *Khul'* arrangement of 2018. *Eddah* elapsed and that divorce is confirmed.
2. That the Petitioner arising from (1) above is free to enter into marital relationship as the *eddah* had already lapsed.
3. That the custody of the children shall retain with the Petitioner.

4. That the Respondent is entitled to visitation of the children during the day time at the premises of the Petitioner, without interfering her peace, security and privacy.

5. That any other arrangement for visitation of the children preferred by both parties is allowed so long as peace and security is maintained.

As ordered.

DATED DELIVERED AND SIGNED AT KISUMU THIS 18TH OF AUGUST 2020

Before

HON. T.J. KUNYUK

SENIOR RESIDENT KADHI



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