



REPUBLIC OF KENYA

IN THE KADHIS COURT AT KISUMU

KCDC 2 OF 2020

NAA.....PETITIONER

VERSUS

AM.....RESPONDENT

JUDGEMENT

This matter was filed by NAA hereinafter the Petitioner seeking dissolution of her marriage to the Respondent AM. The two have one issue from their marriage. The matter was heard on 13th March 2020.

The Petitioner submits that they married with the Respondent in 2016 while the Respondent worked in The Kingdom of Saudi Arabia, and the Respondent subsequently migrated to establish with her a home in Kisumu.

The Petitioner accuses the Respondent of being a violent man who has been using every opportunity of disagreement to inflict physical harm on her. She says that the Respondent has abused her and slapped her many times when they disagreed over an issue. She also cites an incident where after they separated and she wanted to take a fridge from him, the Respondent became wild and took a panga and chased them away from the matrimonial home.

The Petitioner also submits that she has been taking care of the expenses of the home from the proceeds of her employment and the Respondent, who is mandated by law to provide for the family has reneged on his responsibilities.

Another accusation is that the Respondent wanted, and has allegedly tried before to penetrate her at the back during intercourse and she has resisted that, citing Qur'anic injunctions against using a spouse from the part of the body that is not allowed during sexual intercourse.

The petitioner argues further that they have lived separate lives for about a year after she fled the matrimonial home from the numerous problems with the husband she has cited. She considers marriage to the Respondent a sham and therefore seeks its nullification.

The Respondent vehemently denies the allegations by the Petitioner. He submits that families ordinarily have issues and the better way out was to give amicable settlement an opportunity. He notes that the Petitioner just wants out of marriage and the allegations are only compounded so as to make a case. He denies wanting to use her from behind. He also disputes that he has refused to provide for the family. He argues that he does not have a permanent job and he strives to spend from what he gets on the wife and child.

He wants the marriage sustained, and visitation rights for the child.

Three witnesses testified for the Petitioner and three witnesses testified for the Respondent.

I have perused the petition, the defence and the cross-petition. I have also had the opportunity to hear the parties and take evidence of witnesses. This court is invited to answer the question as to whether this marriage can be nullified based on the submission and evidence of the two contending sides.

The Petitioner seeks nullification of the marriage by the court since the Respondent, despite separating with the wife for a period of about a year, has not exercised his option to unilaterally divorce her. The Petitioner has also not sought severance of the marriage tie through *khul* because she believes she is not at fault for the breakdown of marital relations.

The major allegations the Petitioner relies on for seeking dissolution of marriage are that of cruelty and that using or desiring to use the male sexual organ on the Petitioner inappropriately. Let me first tackle the second allegation.

The Qur'an Chapter 2:222 talks about intercourse with wives when it says **"...And when they have purified themselves, then go in unto them as Allah hath enjoined upon you..."**

In the verse that follows, it says **"Your women are a tilth for you (to cultivate), so go to your tilth as ye will..."**

The meaning of the two verses have been made clear by Muslim exegetes and jurists of yore. Imam al Nawawi and Ibn Taymiyya cite consensus of Muslim jurists on the prohibition against sexual intercourse through the anal canal. Ibn Taymiyya specifically says

"If he has intercourse through the anus, and she accedes to the act, they are both punished through Ta'zir, but if she doesn't accede to it, they are divorced from each other..."

Imam al Shafii in his book *Al-Umm* argues that the permission to have intercourse in the "tilth" as in verse 233 of the Chapter 2 of the Qur'an presupposes a prohibition on what is not "tilth" since there is nothing (no child) that can be "harvested" from the other part after "cultivation".

The most important point to make here is that concerning evidencing such allegations of impropriety in sexual relations between spouses. As is with adultery and fornication, it is near impossible to prove such in Islamic law because witnesses are required to have witnessed the parties in the very act and the threshold is that of criminal law, beyond reasonable doubt. Even circumstantial evidence would not be accepted in the absence of primary evidence. The Petitioner in this case imputed acknowledgement on the part of the Respondent but she told the court that she could not retrieve the message that showed the Respondent's acknowledgement of past mistakes concerning this question. As it stands, the allegation stands not proven. This however does not mean that such acts do not occur, as such allegations are increasingly coming to the attention of this court.

On the question of cruelty, the respondent has admitted during the hearing to have slapped the Petitioner in two or three occasions, and the incident of *panga*-wielding when they came to take the fridge is also admitted. The Respondent explains that he was in a fit of anger in all those occasions and suggests that he could be forgiven for those incidences which he submitted did not represent his true nature.

For the mere fact that domestic violence has been proven to have occasioned the flight of the Petitioner from the matrimonial home; and for the failure of the parties for almost a year to find an amicable solution to solve the problems within their family, this court does make a finding that this marriage has irretrievably broken down. It would be harmful to subject the Petitioner and the Respondent to a marriage they do not intend to continue in. As the Prophet Muhammad says (I' "harara wa I' "hir"r) thus there should be no harm, nor reciprocation of harm.

There was no inventory of the matrimonial property/things belonging to each party, how they acquired and the shares of each so I am not in a position to make a determination on the same.

As to the question of child custody and maintenance, I wish to reiterate that child maintenance is a Qur'anic responsibility that is enjoined upon the father of the child. On child custody, Children of tender ages always stay with their mothers as that is in their best interest, and there are texts of Quran and hadith on the same.

The upshot of all of the above is that I proceed to make the following orders:

- a) That the marriage between the Petitioner and the Respondent is hereby dissolved and the Petitioner is required by law to stay on *eddah* for 3 months
- b) That the custody of the child shall still retain with the Petitioner
- c) That child's maintenance shall be the responsibility of Respondent at rates agreed by the parties or fixed by this court or any other court of competent jurisdiction
- d) Child visitation times to be agreed by the parties or fixed by this court or any other court of competent jurisdiction
- e) No orders as to matrimonial property.

Orders accordingly

DATED, DELIVERED BY E-MAIL AND SIGNED AT KISUMU THIS 23RD DAY OF APRIL 2020

Before

HON. T.J. KUNYUK

SENIOR RESIDENT KADHI

KISUMU LAW COURTS



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