



**REPUBLIC OF KENYA**

**IN THE KADHI'S COURT AT ISIOLO**

**DIVORCE CASE NO. E034 OF 2021**

**MMU ..... PETITIONER**

**VERSUS**

**AMH ..... RESPONDENT**

**JUDGMENT**

1. The parties, a young couple, were married under Islamic law in 2018 at Isiolo. The parties had a marital dispute KCMC No. E007 of 2021 which was filed in this court. It was heard and determined in favour of the petitioner. The respondent was largely to blame for letting his sister assault the petitioner and his family micromanage his marriage. In judgment delivered on 1<sup>st</sup> April, 2021, the respondent was directed to *'apologise to the respondent's guardian, her paternal uncle and provide an independent accommodation, within his means, for his wife. This must be done in any event but within at least two months from date hereof'*. He took no steps to comply with court's directions to salvage his marriage but had a divorce letter that was neither signed nor dated, delivered to her. This prompted the petitioner to file this case three days upon receipt of the divorce letter.

2. The petitioner prays for

- i. Dissolution of marriage
- ii. Edda maintenance
- iii. Conciliatory gift *mata'*
- iv. Any other relief

3. The petitioner claimed the respondent abdicated his marital and never provided for his wife since February, 2021 and that efforts at reconciliation have been met with resistance from the respondent. She deposed that deserted and neglected his family exposing her to immense physical and mental anguish. She averred that the respondent wrote her an undated, unsigned and unwitnessed divorce letter delivered through third party on 8<sup>th</sup> August, 2021.

4. The respondent opposed the petition through his answer to the petition dated 26<sup>th</sup> August, 2021. He deposed that the petitioner left the matrimonial home of her own volition and without his consent. He stated that the petitioner abandoned him and let her family to interfere in their marriage leading to the marriage being irretrievably broken.

5. The issues for determination in this matter are divorce, edda maintenance, conciliatory gift.

6. The respondent failed to appear on the date scheduled for hearing of the maid case. He had been duly served. His statement of

reply to the petition (defence) remain mere statements without any probative value. In **North End trading Co Ltd (carrying on the business under registered name of Kenya Refuse Handlers Ltd v County Council of Nairobi (2019) eKLR, Civil Case No 731 of 2008 at Milimani commercial and Tax division**, the court stated:

**'it is my view that a party to a case having filed his pleadings should call evidence where the matter is considered to proceed by way of evidence. It is trite law that where a party fails to call evidence in support of its case, the party's pleadings are not to be taken as evidence but the same remain mere statements of facts which have no probative value since the same remain unsubstantiated pleading which have not been subjected to the required test of cross examination. A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff's case. The failure to call evidence means the evidence adduced by the plaintiff remain uncontroverted therefore unchallenged. In such a situation the plaintiff is taken to have proven its case on the balance of probability.'**

7. On the issue of divorce, the respondent had moved this court in KCMC No. E007 of 2021 to have his wife, the petitioner ordered to return to the matrimonial home. The court found him in err and directed him to apologise to petitioner's guardian, provide accommodation for his wife and take back his wife within specific timelines. He clearly failed to comply with any of the court's directions aimed at salvaging the marriage. It was confirmed that he wrote and had a divorce letter delivered to the petitioner on 8<sup>th</sup> August, 2021. Both parties agree the marriage is irretrievably broken. Divorce once pronounced or written by the husband becomes effective. Hadith reported by the five Imams of Hadith except Al Nasa'i , on the authority of Abu Huraira [R.A.] that the Prophet [PBUH] said:

**'Three issues are considered effective upon pronouncement, whether one is serious or joking: marriage, divorce and *raj'at* [returning wife to marriage contract after divorce before expiry of edda period in a revocable divorce].**

8. **Muhammad Al Sharbiny Al Khatib in 'Al Mughni Al Muhtaj, at 3/279-280** stated:

**'Divorce is effective from a Muslim or non-Muslim through an express (divorce) statement, without any need of intention, even if he states he did not mean divorce. This is such statement that literally has no other meaning except divorce. Al Khataby records juristic consensus in this case. It is also effective through implication by pronouncement of a statement that means divorce and has another meaning as well. The latter is effective only if the husband intends it as a divorce'.**

9. The respondent has written a divorce letter and had it delivered to the petitioner. However the divorce letter is neither dated nor signed. Further it is not unequivocal. It states '*Mimi Abdinoor Molu nimeamua kumpa Mali Mohamed Ungiti talaka zote tatu*' I Abdinoor Molu, have decided to give Mali Mohamed Ungiti all three divorces' the term 'I have decided' denotes intention but not actual execution of the talaq' It would depend on the intention of the respondent, which we could not establish due to his non-appearance at trial. In any case the party's marriage, be and is hereby confirmed dissolved with effect from 8<sup>th</sup> August, 2021 corresponding with 28<sup>th</sup> Dhul Hajj, 1442 A.H. Divorce certificate to issue.

The petitioner is entitled to edda maintenance for ninety days under Q.2.241. I award her KES 200.00 per day for (90) days. Respondent to pay KES 18,000.00 as edda maintenance

10. The petitioner is entitled to *mata'* conciliatory gift under Q.2.241 read together with Q.3.28. I award her KES 50,000.00 as *mata'*.

11. Past maintenance was not pleaded by the petitioner. However, the respondent had been expressly directed to take steps towards satisfying the marital rights of his wife. He has been intentionally negligent of his marital obligations despite adequate directions from the court. Accordingly, he is hereby ordered to pay past maintenance for six months (April to September, 2021) at the rate of KES 200.00 per day; that is KES 36,000.00

12. Each party to bear its own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT ISIOLO ON 30TH SEPTEMBER, 2021**

**HON. ABDULHALIM H. ATHMAN**

**SENIOR PRINCIPAL KADHI**

In the presence of

Mr. Guyo Adan, Court assistant

Petitioner

Respondent



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