



REPUBLIC OF KENYA
IN THE KADHI'S COURT AT ISIOLO
DIVORCE CASE NO. E024 OF 2021

SB PETITIONER

VERSUS

MI RESPONDENT

JUDGMENT

1. The parties married under Islamic law in Isiolo on 4th April 2015. The petitioner works with [Particulars Withheld] of Isiolo while the respondent is a businessman based in Nairobi. They are blessed with one child, a son (MMI) aged six years, from their legal wedlock. The parties initially lived in Nairobi. The petitioner moved to Isiolo upon appointment to the Isiolo County Assembly. The couple still maintained their marriage despite inevitable minor problems. Sometime on 18th June, 2019, the respondent divorced the petitioner by writing her a divorce letter. The respondent married a second wife on 6th July, 2020. The petitioner contends the respondent abdicated his marital and parental responsibilities since he married the second wife. The respondent contend it may be the only reason she wants divorce. He claims they shared the marital bed one week after the divorce, thus the divorce is deemed renounced. This claim is disputed by the petitioner.

2. The plaintiff prays for

i Dissolution of marriage

ii Dowry of USD 2,000.00 and upkeep of KES 3,000.00 per day for the last two years.

iii Children maintenance

3. The petitioner claimed the respondent refused to contribute towards the child's school fees and other upkeep expenses and abandoned their matrimonial bed. She further deposed that the respondent mistreated her by insulting and quarrelling with her occasioning her mental pain. She stated the respondent divorced her on 17th June, 2019.

4. The respondent denied the claims through his answer to petition dated 16th June, 2021. He deposed that he did divorce the petitioner but they reconciled and shared the matrimonial bed thus cancelling the talaq. He denies subjecting the petitioner to cruelty, that it was in fact, he claimed, the petitioner who was cruel to him by insulting him and locked him out from their matrimonial home in Isiolo. He averred further that he transferred KES 900,000.00 to the respondent as child maintenance in advance, paid for her post graduate education, built their matrimonial home in Isiolo and bought a Toyota Prado motor vehicle for her use. The respondent contends the petitioner is not entitled to the dowry as she is the one who is seeking divorce.

5. The issues for determination in this matter are:

i The status of the marriage and if not divorced whether the petitioner should be granted divorce.

ii Dowry

iii Past maintenance

iv Child Custody and Maintenance

6. On the first issue of the status of the marriage, although the petitioner contends she was divorced she prays for dissolution of the marriage. The right prayer would have been confirmation of the divorce. Most litigants, being inexperienced in Islamic law use the terms interchangeably and do not make the subtle difference between the two prayers. We can excuse their ignorance. It is not disputed that the respondent divorced the petitioner on 18th June, 2019. It has not been submitted or claimed that the respondent took back his wife in marriage through an oral pronouncement. The dispute that significantly affects the status of the marriage is whether the couple enjoyed conjugal rights before expiry of the edda period and whether the same is considered a renunciation of the divorce. The petitioner, contrary to respondent's assertion is categorical they didn't share the matrimonial bed after the divorce.

7. Islamic family law vested original jurisdiction of divorce to the husband through pronouncement of the talaq. Once pronounced and / or written by the husband it becomes effective. Husbands have three opportunities to renounce the divorce and reunite in legal matrimony provided it is within the edda period, which is approximately three lunar months. Upon pronouncement of the third divorce, the divorce becomes irrevocable and the couple cannot remarry unless some very stringent conditions are satisfied; that is, the wife has to be married to another husband, the marriage be consummated, the new couple eventually divorce and only upon expiry of the edda of the new husband. These are gleaned from the provisions of Q.2.229 & 230

'The divorce is twice, after that either you retain her on reasonable terms or release her with kindnesses. Q.2.229

'So, if a husband divorces his wife [irrevocably], he cannot, after that, re-marry her until after she has married another husband and he has divorced her. In that case there is no blame on either of them if the re-unite, provided they feel they can keep the limits ordained by Allah'. Q. 2:230

8. The same way the husband has original jurisdiction to divorce, so too he has original jurisdiction to return his wife in legal matrimony, provided the edda period has not expired. This he can do through clear oral pronouncement of revocation of the minor revocable divorce or action through intimacy or enjoyment of conjugal right. The latter though, is a point of disagreement among Muslim jurists. The Hanafi and Hanbali school consider intimacy and cohabitation between couples a revocation of minor divorce. The Maliki school also considers it a revocation of the minor divorce provided the husband intended with the act, the revocation of the divorce. The Shafi' school hold a dissenting view, that revocation of divorce can only be effected through oral pronouncement and do not consider cohabitation as sufficient to revoke a divorce even during edda. In *Al Qawanin al fiqhia, Ibn Juzzy (d.741 H) at page 377* states:

'revocation of a minor divorce is effected orally by saying, I have taken you back in marriage or through action by having intimacy or intercourse, Shafi' said revocation of divorce can only be effected orally provided there is specific intention for revocation of the divorce by the pronouncement or action. Abu Hanifa holds to the contrary'.

9. In *'Al Umm' at vol. 6 page 24, Imam Al Shafi'* states:

'Revocation of minor divorce becomes effective only through oral pronouncement and not intercourse, because it lacks a statement. The same way a marriage or divorce is not effective unless so pronounced, so too a husband must make an oral pronouncement to take back his wife for the revocation of the divorce to be valid ...'

10. The parties in this case belong to the Shafi' school. Under this school of jurisprudence, even if we were to consider that cohabitation took place during the edda period as contended by the respondent, such revocation is not valid. However, the practice in Kadhis' courts in Kenya, in the interests of preserving marriages, on this issue adopts the view of the majority and considers intimacy during edda as a revocation of minor divorce provided same was intended. The question that arises is what happens, as in this case, when the actual action of cohabitation during edda is disputed" Evidence on such issue is not easy to adduce. The parties' arguments remain unsubstantiated claims. The general rule is that where the husband's claim to renounce the divorce is disputed by the wife, if it was before expiry of edda, the husband's claims is upheld because revocation of the divorce is vested in him; but if it is after expiry of edda, and the husband has no evidence, the wife's position is upheld provided she takes oath. If the husband

claims intercourse took place during edda period, the wife's position is upheld provided she takes oath to that effect because the original position (*al-asl*) is that during edda there is no intercourse.

11. When directed by court to take denial oath to resolve the issue of whether or not the talaq was renounced through intercourse, the petitioner elected not to. She chose to have the marriage annulled through Khul'u by relinquishing the dowry. This was the position of the respondent.

12. Khul'a is a wife's right to exit the marriage contract under Qur'an.2.229, hadith and Article 89 of the Islamic Charter on Family [ICF] where she fears inability to fulfil her matrimonial obligations to her husband.

"...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 (the mahr or part o it) for her al- khul'u (divorce). These are the limits ordained by Allah so do not transgress them and whomsoever transgresses the limits ordained by Allah then such are the zalimun (wrongdoers)". Al Baqarah: 229

13. The Prophet Muhammad [may peace and blessings be upon] him ruled in favour of the wife for divorce through Khul'u provided she returns the dowry, in the celebrated case of wife of Thabit Ibn Qays Ibn Shimas. Ibn Abbas (R.A.) narrated that the wife of Thabit Ibn Qays Ibn Shimas told the prophet (PBUH): **'O prophet, I have no problem with my husband's conduct and piety but I hate to 'apostasy in Islam' (not able to observe the limits of Allah in marriage), the prophet asked her, 'will you return his farm' (dowry) she said 'yes'; the prophet then told Thabit, 'accept back the farm and divorce her.'** In Dar al Qutny's version, the lady said: 'I am ready to return the farm and more', the prophet said: 'return the farm only' Bukhari: 4990, Al Shaukany, Nail Al Awatar, 6/246

14. Accordingly, the parties' marriage is annulled through Khul'u with effect from 29th September, 2021 corresponding with 22nd Safar, 1443A.H. Certificate to issue. The respondent is discharged from payment of the dowry of USD 2,000.00

15. On the issue of past maintenance, the respondent demonstrated he transmitted funds to the petitioner, funded her higher education, bought her a vehicle. They have been living separately for about one year. There is no evidence he had abdicated his responsibility during pendency of marriage. Prayer for past maintenance is hereby dismissed.

16. It is noted that the respondent did not counterclaim or pray for division of matrimonial property. His arguments on the funding of petitioner's higher education, purchase of a vehicle for her and claim of contributing to development of a house in Tullu Roba in Isiolo were only meant to support his contention that he cared and provided for his wife. I have thus not made any findings on division of matrimonial property. It is not an issue for determination in this matter.

17. Although parties have not contested the issue of jurisdiction of the Kadhi's Court in children custody and maintenance issues, I am obligated to address it as it is an issue for determination in this matter. Jurisdiction is only conferred by the constitution and statutes and not by parties. A constructive, sensible and purposive interpretation of the provisions of the Article 170 (5) of the Constitution of Kenya, and Section 5 of the Kadhis court Act, Cap 11 would affirm the Kadhi's court has been conferred with jurisdiction to determine questions of disputes of children custody and maintenance between parties who profess Muslim faith. For example, the preamble of Cap 11 declares it as:

"An Act of Parliament to prescribe certain matters relating to Kadhis' courts under the Constitution, to make further provision concerning Kadhis' courts, and for purposes connected therewith and incidental thereto"

18. Child custody and maintenance issues being incidental to the issue of marriage and divorce directly fall within the jurisdiction of the court. A legal historical study of the Kadhi's Court Act, the constitution and the children's Act reveal the Kadhi's court in Kenya has had jurisdiction to deal with the issues of custody and children before the enactment of the Children's Act and the promulgation of the new constitution (2010). The Kadhi's Court Act, Cap 11 laws of Kenya is conspicuously not among the repealed Acts listed in the Children's Act.

19. I am cognisant the matter is not settled; the High court having made conflicting decisions on the issue. I am persuaded by a recent decision of Ali-Aroni J, in **HCCA 85 of 2017 ZUDG v SJKUR (2020) eKLR**. It adopted a purposive interpretation of the constitution, is fairly balanced, well considered and resonates well with Article 159 (2) of the Constitution of Kenya (2020). The

court stated:

"This court for now, aligns itself, so did the Kadhis who sat in this matter with the thought that the Children's Act did not oust the jurisdiction of the Kadhi or other subordinate courts in dealing with issues of children."

20. The general principle regarding custody of minor children is that unless there exist peculiar and special circumstances, the mother has priority. **In Mehrunisa v. Pravez (1982-88) 1 KAR 18 the court of Appeal stated:**

"The general principle of law is that custody of such children shall be awarded the mother unless special or peculiar circumstances exist to disqualify her from being awarded custody'.

21. Under Islamic law, the same principle of priority of custody of children of tender age to mothers applies. It is based on ruling of the Prophet Muhammad (may peace and blessings be upon him) on a complaint over custody by a divorced wife (Reported by Abu Daud [2276] through Abdallah ibn Amr (may Allah be pleased with him) and **Article 106 (1) of the Islamic Charter on Family.**

22. The minor has been living with the petitioner. The respondent has not contested the issue of custody. Legal and actual Custody of the minor is granted to the plaintiff, the defendant to get regular and reasonable access.

23. Islamic law rests the responsibility of children maintenance fully on their fathers based on children's needs and the father's financial ability. The quantum on maintenance order is dependent on a subtle balance on the critical needs of the children and the father's financial ability under **Q.65.35** read together with **Q.2.233.**

"Let him who hath abundance spend of his abundance and he whose provision is measured let him spend of what Allah gave him, Allah asketh naught of any soul save that which He hath given it, Allah will vouchsafe after hardship ease". Qur'an.65.7

"...No person shall have a burden laid on him greater than he can bear. No mother shall be treated unfairly on account of her child; nor father on account of his child." Q.2.233

24. The petitioner prayed for KES 3,000.00 per day which would translate to KES 90,000.00 per month. The respondent is a businessman dealing in motor vehicles. He stated he had been providing his family with at least KES 35,000.00 per month. His obligation upon divorce is limited only to sustenance and welfare of the child. He is ordered to pay child maintenance of KES 25,000.00 per month plus school fees as necessary per term.

25. In conclusion, we make the following orders:

i Parties marriage is annulled through Khul'u with effect from 29th September, 2021 corresponding with 22nd Safar, 1443A.H. Certificate to issue.

ii Respondent is discharged from paying dowry of USD 2,000.00

iii Prayer for past maintenance is dismissed.

iv Actual custody of the minor is granted to the petitioner, the respondent to get regular reasonable access. Parties share joint legal custody of the minor.

v Respondent to pay KES 25,000.00 per month plus school fees as child maintenance.

vi Each party to bear its own costs.

Orders accordingly.

Dated, signed and delivered in open court at Isiolo on 29th September, 2021

HON. ABDULHALIM H. ATHMAN

SENIOR PRINCIPAL KADHI

In the presence of

Mr. Guyo Adan, court assistant

Mr. Kiriimi for petitioner

Mr. Karatu holding brief for Mr. Marete for respondent



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