



**REPUBLIC OF KENYA**

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

**DIVORCE CASE NO. E028 OF 2021**

**SSG.....PETITIONER**

**VERSUS**

**SGR.....RESPONDENT**

**JUDGMENT**

1. The parties married under Islamic law in Isiolo on 5<sup>th</sup> November, 2011 and divorced after ten years of marriage on 13<sup>th</sup> June, 2021. They are blessed with four children aged 7, 6, 3 years and the last born is two months old. She had not been born at the time of divorce. The petitioner, a diploma graduate, is not employed. The respondent is an employee of the [Particulars Withheld]. The respondent has another family with one child.

2. The plaintiff prayed for:

- i. Confirmation of the divorce and issuance of divorce certificate
- ii. Edda Maintenance
- iii. Custody of the children
- iv. Children maintenance
- v. Mata' Conciliatory gift
- vi. Division of matrimonial property
- vii. An order restraining the respondent from evicting her from the matrimonial property.

3. The petitioner deposed the respondent unilaterally divorced her and absconded from providing maintenance for his family. She stated the respondent attempted to evict her from the matrimonial home, that he is rude, violent and abusive to her. She deposed further that he owns rental flats in [Particulars Withheld], a hardware, cosmetics shop and plots in [Particulars Withheld].

4. On his part, the respondent denied the claims through his answer to petition and counterclaim dated 25<sup>th</sup> June, 2021. He deposed that he is a responsible, loving father and has been dutifully and diligently taking care of his family. He stated he had been coerced by the petitioner to issue her a divorce letter and claimed she aims to get half of his property which she has not contributed to its acquisition, improvement or development. He stated that he educated the petitioner and financed the education of four of her

siblings and organized for one of her siblings to pursue studies in Australia. He counterclaimed for the marriage to be annulled, and he will pay for the children's Accommodation, sustenance, school and Madrasa fees, clothes, medication and the petitioner to take proper care and upbringing of the children.

5. At Pre-Trial, the petitioner abandoned the prayer for division of matrimonial property. Parties agreed the petitioner should get actual custody of the children. They differed on modalities of respondent's access to the children and rate of children maintenance. The respondent confirmed he divorced the petitioner.

6. The issues for determination in this matter are:

i. Confirmation of the divorce

ii. Edda Maintenance

iii. Children custody, access and maintenance

iv. Mata' conciliatory gift.

6. On the first issue of the status of the marriage, the respondent counterclaimed for marriage to be annulled. He confirmed he divorced the petitioner on 13<sup>th</sup> June, 2021. The petitioner was nine (9) months pregnant when she was divorced. She delivered her pregnancy on 28<sup>th</sup> July, 2021. The parties' marriage is confirmed annulled first minor irrevocable divorce with effect from 13<sup>th</sup> June, 2021 corresponding with 2<sup>nd</sup> Dhul Qa'da 1442 A.H. Divorce certificate to issue.

7. Edda is the legal waiting period of a divorced wife. A Divorced wife is entitled to maintenance by the husband during this period under the provisions of Q.2.241. Such maintenance is referred to as edda maintenance.

**'And for divorced women maintenance (should be provided) on reasonable scale. This is a duty on al Muttaqeen (the pious). Q.2.241.**

8. The period is about three lunar months for those who are not pregnant and the period of pregnancy to those who are pregnant under the provisions of Q.2.234 and Q.65.4. The petitioner delivered (45) days from the divorce. She is entitled to edda maintenance for one and a half month (45 days). I award her edda maintenance at the rate of KES 300.00. The respondent to pay KES 13,500.00 as edda maintenance.

9. Divorced wives married under Islamic law are entitled to *mata'* conciliatory gift under Q.2.241 read together with Q.33.28. **Al Qurtuby, in his 'Commentary of the Holy Qur'an' at vol. 2 pp 895 while commenting on Q.2.241, opined:**

**'Scholars differed on the provision verse 'And for divorced women maintenance (should be provided) on reasonable scale'. This is a duty on *al Muttaqeen* the pious'. Abu Thaur, Al Zuhry, Saeed ibn Jubair are of the view that the verse "affirmed conciliatory gift *mata'* for any divorced wife, whether or not the marriage was consummated. It is one of the views of Shafi'ites. Malikites are of the view only when a marriage is consummated is the divorced wife entitled to conciliatory gift.'**

10. **Sheikh Muhammad Ali Al Sayyis, Commentary on verses of Rulings, Vol.1, pp168** supported Ibn Jubair's position on the issue, stating:

**" It is much better for the Shariah courts to adopt Saeed ibn Jubair's opinion in the issue, which will not only compensate wives for arbitrary divorce but also reduce divorce rates. Many a husband would rethink of divorcing his wife if he is aware he will be obliged to pay *mata'* upon divorce."**

11. **Imam Ibn Jarir Al Tabary** is categorical *mata'* is obligatory on divorcing husbands. While commenting on **Q.33.28** stated:

**‘the verse implied it is obligatory for Muslim husbands to provide mata’ upon divorcing their wives based on the verses ‘but give them [a gift of] compensation – the wealthy according to his capability and the poor according to his capability – a provision according to what is acceptable, a duty upon the dowers of good’ and ‘ O prophet say to your wives, “If you should desire the worldly life and its adornment, then come, I will provide for you a gracious release”’.**

12. This is further supported by an eminent contemporary Muslim scholar, **Sheikh Ibn Uthaimin** who in his *Shirh al Mumti’* at 12/308 reported Ibn Taymiyyah to have said:

**‘mata’ is obligatory to every divorced woman, even those whose marriage was not consummated based on the general provision in Q:2:241 stating the verse referred to its payment as a duty on the pious indicating it is obligatory...’**

13. On the rate of *mata’*, **Article 457 of the Kadhi’s Court bench book** states:

**‘the value of the gift should be commensurate with husband’s financial ability and duration of the marriage’**

14. Considering the parties have been married for ten years, and the husband is an employee of the national government and owns a property fetching income. I award the petitioner KES 100,000.00 as *mata’* conciliatory gift.

15. 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"**

16. Children 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.

17. 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.”**

18. 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'.**

19. 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.**

20. The children have been living with the petitioner, their mother. The respondent has not contested the issue of physical custody. Accordingly actual Custody of the minor is granted to the plaintiff. The respondent requested for access of the children on weekends and holidays. Petitioner, while agreeing the respondent can get access to the children, stipulated that the children should not sleep over at their father's residence. Her argument is that she is the only one who can best take care of the children especially at night. The right to access to children is a fundamental right to the children and is in their best interest. They need to bond well with both parents. It has not been demonstrated that they will be in any danger. Accordingly, the respondent is granted access to the children in weekends and holidays. For avoidance of doubt, the children may sleep over at their father's residence. It must though not interfere with their Madrasa program.

21. 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**

22. The petitioner in her pleadings had prayed for KES 100,000.00 per month as children maintenance for the four children. The expenses are for accommodation, food and maid. At trial she reduced it to KES 50,000.00 per month arguing it is reasonable as the respondent is employed by the CDF and owns rental apartments fetching an income of KES 100,000.00 per month.

23. The respondent offered to pay KES 26,500.00 as children maintenance for food, accommodation, food. He deposed that he earns KES 146,200.00 per month, has another family in Isiolo, his parents and siblings and he lives for gain at [Particulars Withheld] where he also has to support himself and a colleague. He stated that he has to travel to Isiolo every weekend. He filed an affidavit of means showing how he distributes his income. He argued he will pay school fees for the children, transport to and from school, medication and clothing.

24. The respondent had not disclosed that he owns a commercial property for rent. He did admit same at trial but said it only fetches KES 54,00.00 per month and that he owes KRA rental income tax arrears. He offered to pay KES 26,500.00 as children maintenance.

25. The primary responsibility of the respondent is to his parents, children and spouse. He is at liberty and indeed encouraged to assist his siblings and kin but it should not significantly and negatively affect his chore responsibility towards his primary dependants. His net monthly income from his salary and rental income is at least KES 200,000.00 Considering his families, parents and other expenses, I order the respondent to pay KES 45,000.00 per month as children maintenance to cater for the children's accommodation, sustenance and school and Madrasa transport. The respondent will continue to cater separately for the children's school fees, medication and clothing.

26. In conclusion, we make the following orders:

- i. Parties marriage is confirmed annulled first minor irrevocable divorce with effect from 13<sup>th</sup> June, 2021 corresponding with 2<sup>nd</sup> Dhul Qa'da 1442 A.H. Divorce certificate to issue.
- ii. Prayer for past division of matrimonial property was abandoned.
- iii. The respondent to pay KES 13,500.00 as edda maintenance.
- iv. The petitioner is awarded 100,000.00 as *mata'* conciliatory gift.

v. Actual custody of the minor is granted to the petitioner, the respondent to get access of the children on weekends and holidays. Parties share joint legal custody of the minor. Children may sleep over at their father's house but same should not interfere with their Madrasa program.

vi. The respondent to pay KES 45,000.00 per month as children maintenance to cater for accommodation, sustenance and school and Madrasa transport.

vii. The respondent will continue to cater separately for the children's school fees, medication and clothing.

viii. Each party to bear its own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT ISIOLO ON 29<sup>TH</sup> SEPTEMBER, 2021**

**HON. ABDULHALIM H. ATHMAN**

**SENIOR PRINCIPAL KADHI**

In the presence of

Mr. Adano Roba, court assistant

Petitioner

Mr. Jarso for respondent



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