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| Case Action: | Advisory Opinion |
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| History Magistrates: | - |
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REPUBLIC OF KENYA

IN THE KADHI'S COURT AT NAIROBI ELGON ROAD OFF UPPERHILL ROAD

DIVORCE CAUSE NO. 63 OF 2015

IN THE MATTER OF ADVISORY OPINION ON DIVORCE UNDER ISLAMIC LAW

M S APETITIONER

-VERSUS-

I L A.....RESPONDENT

ADVISORY OPINION

1. The question which calls for opinion of this court upon the oral submission of the respondent on 15th September 2015 whose prayers are whether the petitioner , who was divorced by the respondent irrevocably ,should observe the eddat" and whether the petitioner , who was the wife to respondent, should be entitled to maintenance during eddat ,supposing the first question is answered in affirmative"

The respondent submitted that among many reasons why Islamic law stipulates that a woman should observe her Eddat in her husband's house while the husband is still maintaining her is to allow the parties to have re-think and properly reconcile amicably.

He further stated that the aim of eddat is to determine the state of the wombs to secure the legitimacy and identity of the child (if any).

From a foregoing, the respondent further submitted that he had snapped off the nuptial-tie irrevocably with no prospects of salvation unless he is married to another man and divorced by the latter after the consummation of the intermediate marriage.

Lastly, the respondent stated that it's almost eight (8) months since the respondent and petitioner had a congenial relationship thus the prospect of the petitioner being pregnant is almost impossible. No objection was raised on the part of the petitioner during the oral submission.

2. I may state at the outset that the question under consideration is by no means easy of determination and can only be satisfactorily determined by taking into account the extent and the mode in which an irreversible talak affects those marital rights, obligations and disabilities which go to constitute in law the relationship of husband and wife.

Talak, however, is regarded as a social evil , because it puts an end to marriage, an institution in which temporal and spiritual concerns not only of the husband and the wife but of the children and of the society in general are involved.

The law while it permits divorce, having regard to the fact that sometimes it may not be possible for the parties to live together in peace and harmony, fulfilling all those religious and moral duties which are associated with married life, insists not only that there shall be some guarantee that the husband should not be acting from caprice or upon a momentary provocation, but takes care that the interests of the children that may be born in consequence of the marriage should not be jeopardised.

In answering the first question as to whether the petitioner should observe eddat, the courts attention is drawn to Holy Qur'an Chao 2 Verse 235 where in its stated that:

And do not resolve any thing about marriage untill the waiting period expires'

The above verse clearly states that a woman irrevocably or irrevocably divorced after consummation of the marriage shall never contact a new marriage during her waiting period , this is the consensus of all the learned jurists. Imam Malik further explained that if a marriage is consummated during a woman's eddat that marriage is null and void and in the meantime those parties should never come together because of the permanent prohibition resulted there from . **see Imam Abul-walid Muhammad Al- Qurtubi(1425-1426/2005), Bida'ayat at-Mujtahid wa Nihayat ul- Muqtasid, Dar El Fikr,Beirut, Vol II, P. 100.**

The first precaution lies at the root of the distinction between a revocable and an irrevocable divorce and the enforcement of the eddat, or the period during which a woman whose marriage has been dissolved by divorce or death is bound to wait before she is free to marry again, it is not only sufficient to ascribe the eddat in safe-guard ensuring correct ascertainment of the paternity of the child that may be born to the woman after such dissolution, the eddat period can as well be attributed in safe-guarding the reputation of our mothers and sisters in society.

In the premises this the first question is answered in affirmative .

3. The effect of an irrevocable divorce cannot, as the description implies, be recalled even during eddat. In both cases on the expiry of eddat all those relations which are incident to a marriage come to an end. But the immediate effect of an irrevocable divorce, unlike that of a revocable divorce, is to make it unlawful for the husband to co-habit with the wife, and if he co-habits with her with knowledge of the unlawfulness of the act, he becomes liable to punishment. They may marry again, but if the irrevocable divorce was by three pronouncements of three talaks, the law places a further difficulty in the way of such union, namely, that before re-marriage the woman should have been married to another man and divorced by the latter after he had consummated the intermediate marriage; and if one of them dies during eddat the other gets no share in the inheritance. That being the result of an irreversible divorce according to all the Sunni Schools, the Shaff'is hold **that itcompletely and effectually severs the marriage tie, and they, therefore, on that ground would not allow, during eddat, maintenance to the woman so separated, unless she is already pregnant, and permits the husband to marry her sister for a fouth wife.**

The Hanafi lawyers, however, recognize the existence of the right and the disabilities just mentioned during eddat following upon an irrevocable divorce, and both the Hanafi and the Shafei lawyers recognize her, right to residence and her subjection to the custody of her husband. see shamsuddin Muhammad, Hashiyah D (ND), Vol. II. Darul Fikr Beirut ,pp.218-459.

4. The question now is to what we are to attribute the Hanafi law on this point, to the subsistence of the marriage tie in spite of such divorce or to some other ground. Here it is necessary to clear the ground by pointing out that the observance of eddat has no necessary connection with the completeness or non-completeness of the severance of conjugal relations. For eddat is to be observed on the death of the husband when there can be no pretence of the subsistence of a marriage, and it is not to be observed at all by a woman who has been divorced by her husband before he has had any sexual connection with her. Eddat, it should be borne in mind, is primarily imposed with a view to ascertain whether the woman is pregnant, so that the paternity of the child that is born to a woman whose marriage is dissolved may be fixed; though the rules regulating the period of eddat cannot be said to be conterminous in all cases with that object. This is a matter to which the Islamic Law, which recognizes legitimate descent only, attaches considerable importance, not only in the interests of the child which may be born subsequently so that its father may be made responsible for

its maintenance and up-bringing, and it may not suffer the stigma of being of "unknown descent" (Maj'hul-un-nasib) but also in the interests of the father and his relatives so that their lineage may be preserved. No doubt in cases in which eddat is imposed the woman does not recover her complete marital liberty until the period has expired but this only shows that in the Islamic Law the marriage tie may no longer exist as on the death of the husband, and yet some of the legal incidents usually associated with a subsisting marriage may survive for sometime. But it cannot be taken to prove the converse proposition that because some of such rights and obligations are suspended or lost, the relationship of husband and wife has necessarily ceased to exist.

5. To what then are we to ascribe in the first place the continued incapacity of the husband who has irrevocably divorced his wife to marry her sister during eddat or to marry a fourth wife if he has already three wives excluding the woman who has been divorced. It seems that the law on this point can be satisfactorily explained only upon the hypothesis, that the marriage still subsists so that the divorced woman still retains the status of wife and that is the ground on which Hedaya bases the law (see Hamilton's Grady's Edition, pp. 30 and 32.) Ibn Hammam, the author of Fathul Qadir, a well-known commentary of Hedaya, and whose opinions are undoubtedly entitled 'to an independent, weight, however, observes in this connection (see fathul Qadir, Egyptian Edition, Vol1, page 132), that it would be more accurate to say that some of the consequences of marriage subsist during eddat of an irrevocable divorce rather than the marriage itself. But this hardly affords any explanation of the law.

6. As to the rights of maintenance and residence these are also upheld by the author of Hedaya substantially on the same ground, that is to say, subsistence of marriage during eddat so far as some of its consequences including these rights are concerned. The argument is that one of the most important ends for which marriage is legalized is the begetting of children, and as eddat of divorce is enforced for the purpose of ascertaining whether the woman is bearing a child and she is, therefore, obliged to live under the protection of her husband, he is not only bound to provide her with residence but also with maintenance, because maintenance is a return for the custody of the husband with reference to the chief end in view in marriage.

And the Hanafi lawyers draw a distinction between this case and the case of a woman undergoing eddat of widowhood holding that the latter has no right of maintenance, because the marriage no longer subsists, while her eddat and right to be provided with residence are based on special texts (see

Hamilton, Grady's Edition p.145)... I may, however, mention that i should not have thought it necessary to deal with the Question at such length but for the fact that in none of the reported cases, brought to my notice, is the question discussed with reference to its obvious difficulties.

In Gulam Mohidin v. Kesara Bibi Weir's Criminal Rulings Vol. II p. 617 the ground upon which C.J., basis his decision is that under the Islamic Law a wife irrevocably divorced is entitled to maintenance during eddat, but, as has already been pointed out, that does not conclude the question whether she is so entitled to maintenance.... In the matter of the petition of Din Mohammad 5 A. 226, in which Mahmood, J. considered the question in its proper aspect, the learned Judge mainly satisfied himself with quoting a passage from Hamilton's Hedaya (Grady's Edition, p. 100), which runs thus: "Marriage is accounted still to subsist during the eddat with respect to various of its aspects such as the obligations of alimony, residence and so forth, and hence it may lawfully be accounted to continue in force with reference to the woman's inheritance, but as soon as the eddat is accomplished a further procrastination is impossible, because the marriage does not continue in any shape whatever."

The case of Shah Abu Ilyas v. Ulfat Bibi 19 A. 50 merely adopts Mahmood J.'s judgment on the point. In the premises I inclined towards the view of Imam shafii but considering the physical custody of the child of the marriage who will be residing with the petitioner as alluded by the parties herein the toto consideration will give an effect to the view of Abu Hanifa that's to say the respondent shall provide maintenance and residence for the petitioner during eddat .

No order as to cost.

Dated and delivered at Nairobi this 6th day of October, 2015.

Hon. A. I. Hussein (Mr)

KADHI



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