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IN THE COURT OF APPEAL
KADUNA JUDICIAL DIVISION
HOLDEN AT SOKOTO.

ON THE 13TH JULY, 2001.
BEFORE THEIR LORDSHIPS:

MURITALA AREMU OKUNOLA
MAHMUD MUHAMMED
SALIFULAHI HANTAKA COOMASIE

JUSTICE, COURT OF APPEAL
JUSTICE, COURT OF APPEAL
JUSTICE, COURT OF APPEAL

CA/11/156/S/2000

BETWEEN:

ALHAJI DIKKO SETTO APPELLANT

AND

MOTSIBBE & 1 OR RESPONDENT

JUDGMENT
(DELIVERED BY MURITALA AREMU OKUNOLA JCA)

This is an appeal against the judgment of the Kebbi State Sharia Court of Appeal wherein the earlier decision of the Upper Area Court Dakin Gari was reversed.

The facts of this case briefly put were as follows:

The Appellant herein as Plaintiff at the Upper Area Court, Dakin Gari (hereinafter referred to as the UAC) sued the 1st Respondent herein his former wife for sending Kolanut to him for the marriage she contracted with one Rugga Anaruwa and the person who contracted the marriage. According to the Plaintiff/Appellant at page 1 of the records:

" I want to know the reason of contracting the marriage and why Kolanut was sent to me to assure me of the marriage contracted. I don't know the reason of this act of not seeking for trouble. Therefore I am pleading with the Court to investigate".

On being confronted with the case filed by the Plaintiff/Appellant, the 1st Defendant/Respondent admitted that the Plaintiff divorce her, though she did not report to the Court she contracted a new marriage. The Court turned to the Appellant and ask whether it was true that he divorce his wife, the Appellant replied thus:

Court therefore revoked the marriage between the 1st and 2nd Respondents for being contracted in the period of Iddah. The Court consequently ordered the 1st Defendant to go back to her family house and observed the Iddah period as stipulated by the Sharia since she still sees her menses. The court ordered that she should observe her Iddah of three months from the day of judgment 7/6/99.

Dissatisfied with the judgment, the 2nd Defendant lodged a complaint at the office of the State's Chief Inspector of Area Courts claiming he was sure that the 1st Defendant, his new wife had completed her Iddah before their marriage was contracted. The Office of Chief Inspector of Area Court on receipt of the complaint went out to investigate the complaint and come up with the following observations:

1. Firstly, the court should have taken cognisance of the differences of duration of Iddah period by women.
2. If the court took this into consideration, it will then look at the date the wife was divorced and the length of the time before she contracted the new marriage with the second husband. At page 7 of the U.A.C. copy of proceeding it indicated the duration of two month and 16 days between the time, she was divorced and the time the new marriage was contracted. And in this duration of time, most women can complete their menses period.
3. No where in the lower court copy of proceeding was the wife asked so that the court will know whether the wife has observed the 3 menses period or not before she contracted the second marriage. This is because the testimony of a wife is the most substantive evidence, since prior to the divorce, the case was not taken before any court of law, so that the court can confirm the termination of Iddah period and allow the wife to contract another marriage.

The Office of Chief Inspector through one of their officer's Alh.Nasir Umar reported the complaint to the Kebbi State Sharia Court of Appeal for their review by way of appeal noting their above observations attached. It can be noted that the power of Inspector of Area Court to initiate appeal to the SCA is in Section 50(1) Area Court Edict 1968. See ADAMU V BASHIRU (1997) 10 NWLR (Part 523) 81. The Kebbi State Sharia Court of appeal holden at Birnin Kebbi (hereinafter referred to as SCA) accepted the report as well as the certified copy of the record of proceedings as the UAC. The Court invited both parties and requested from each of them what he or she had to say. The Appellant herein restated his case as presented before the lower court. That the 1st Respondent visited her family house and came back to be abusing her. She became angry as a result of which he wrote her the divorce letter.

" Yes, I have divorce her and she did not report to the Court and also she did not complete her Iddah period before contracting the new marriage, this is my objection against the marriage, the new husband and their marriage Guardian, Alh. Bi-ubah. This is my objection".

On being confronted with the claim of the Plaintiff, the marriage Guardian, Alh. Bi.ubah admitted that it was a big mistake on his part for sending Kolanut to the Plaintiff. On being confronted by the Court on the allegation by the Plaintiff, the 2nd Defendant/Respondent new husband admitted that it was the marriage Guardian who said that the 1st Defendant had completed her Iddah hence he went into the marriage contract. He further admitted that he would not have entered into the marriage if he knew that the divorce had not been confirmed by the Court, later the 1st Defendant presented to the Court on demand, the paper of divorce given to her by the Plaintiff. The Court went through the divorce paper dated 11/3/99 which the Court found containing the following:

" I, Dikko Setto has divorce you Motsibbe in one pronouncement".

The Plaintiff admitted writing the letter of divorce to the 1st Defendant when she refused to come back to him. The Court again went through the Divorce paper and observed that it was dated 11/3/99 while the new marriage was contracted on 19/5/99 making a period of 2 months and 8 days after the divorce had taken place while this action was filed on 25/5/99. On further questions from the Court, the 1st Defendant confirmed that she used to observe her menses every month. She apologised to the Court that she did not report to the Court that she had completed her 3 menstrual period before going into the new marriage. She claimed that, that was a mistake as she did not know that the matter will come to the Court as it is now.

At the end of the admission, the Court asked each of the parties whether they had anything to say before or present before judgment is delivered. To this, each of them replied in the negative. At the end of trial, the trial Area Court reviewed the admissions made by the parties observed that even if she sees her menses monthly, she had not completed the waiting period of 3 months as stipulated under Islamic Law before contracting the new marriage contract. Consequently, the Court held that the new marriage is not valid for lack of proper evidence of the completion of her Iddah. Consequently the

The Appellant herein restated his case at the UAC. He said, "we did not dispute with Mutisibe, she said she went to visit her family house. When she came back when I talked to her, she will respond abusively, she become angry and he tried to reconcile with her but she refused to come back. Consequently, he wrote a divorce letter to her in one repudiation only. She withheld the letter until after 40 days when she has arranged with Amruwa and they got married. She then sent someone to me with colanut to give me and a message that she constructed a marriage with Amruwa and that I should do whatever I like. He continued, consequently I went to the court and filed a case against her, Amruwa and the person who contracted the marriage, including the person or persons who took the colanut to me. After investigation by the court, the court decided the case by revoking their marriage. They filed a complaint before the Inspectorate and the Judge was ordered to rescind his judgment and he confirmed their marriage. The Judge told me that he has confirmed their marriage, I asked him how can he do that after revoking their marriage and making me pay for her divorce certificate and her feeding allowance to her, how can you confirm their marriage?"

The Judge said because I used to murder people.
Therefore I went to the D.P.O. and reported. As such I now revoke my divorce for she spend only 40 days, her Idda is not completed.

On all the Appellant said the Court requested for the comment of the 1st Respondent who replied as follows:

I heard what he said, I contracted the marriage 3 month after he divorced me and I completed the idda. And I spend 3 years in our family house and he doesn't feed me, before I sued him I did not send colanut to him and the Judge did not rescind earlier decision as my marriage with him is still binding, then how can he not pay me feeding allowance. He said he confirm our divorce I should go back to our house.

The 2nd Respondent also replied the Court thus: "my comment is he gave the Judge ₦21,000.00 intending that we be detained. We were detained and our marriage revoked. She went back to their house but her marriage with Alb. Dikko was not said to be binding. I told the Judge that I married her after she completed her idda. But Alb. Dikko swore that no body will marry his wife." Therefore I lodged a complaint before the Inspectorate and the Judge was invited and ordered to go and confirm our marriage since they have seen the divorce paper issued by Alb. Dikko. The Judge summoned us and said he has confirmed our marriage.

The Judge summoned us and said he has confirmed our marriage. As such she is now leaving in my house, which the 1st Respondent confirmed.

" Yes, it is true I am leaving in his house for the Judge has said I should go back to his house".

At the end of the parties addresses the Court ordered Motsibhe to go back to her parent house until the determination of this appeal case since they have confessed that after the trial by the lower court which revoked her marriage with Anaruwa and ordered her to go back to her parent, on the intervention by the Chief Inspector, the Judge rescinded his judgment and allowed her to go back to Anaruwa's house. The SCA ordered that 1st Respondent should go back to her parent house until the final determination of this appeal before the Court.

The Court then set down the appeal for hearing. On being asked whether they had anything to say each of the parties replied in the negative. Thus after going through the records at the UAG and the report of investigation as well the addresses given by the parties the SCA observed thus:

1. That A. Dikko Setto instituted an action that he divorce his wife, Motsibhe, and she contracted another marriage with one Anaruwa, and Kolanut was sent to him, he wanted to know the reason why?
2. We notice that the Court summoned Motsibhe, Anaruwa, the marriage contract.
3. That from the very beginning that A. Dikko has not stated any substantive ground under Sharia Law which can prevent the marriage between Anaruwa and his (A. Dikko) wife.
4. That he was alleging that she did not go to the Court to confirm the divorce and the U.A.C Dakingari even supported his assertion but the issue of divorce between spouses does not have to be reported in court to make it valid. When a person divorce his wife, it becomes valid, it does not has to be in written form where as Alh. Dikko put it in writing therefore this act of A. Dikko does not require evidences of witness to make it legally valid.

In the light of these observations, the SCA entered judgment in favour of the Respondents reversed the decision of the UAC which was that the 2nd Respondent had contracted a marriage in someone's marriage. The Court confirmed the marriage contract between 1st and 2nd Respondents as being valid since 1st Respondent was not at the time of marriage the wife of the Appellant.

Dissatisfied with this judgment of the SCA the Appellant herein appealed to this Court on the following four grounds:

1. The Sharia Court of Appeal turned away its face from the fact that my wife has not completed the prescribed waiting period (Iddah) observed by divorce women.
2. The Sharia Court of Appeal B/Kebbi in its judgment relied solely on the report presented by the Chief Inspectorate Office.
3. The Lower Court failed to take cognisance of the letter of divorce I gave my wife showing the date I divorced her.
4. The S.C.A delivered its decision after more than 4 months of the parties submission.

By way of reply, the Appellant's urged this Court to set aside the decision of the Sharia Court of Appeal and affirm the decision of the trial U.A.C dakin-gari. When this appeal came before us on 24/4/01 both parties appeared in person as they did not file any brief and were not represented by Counsel. The Appellant in person adopted and relied on his case as presented at the UAC and the SCA as contained in the records of proceeding including the Notice and grounds of appeal. He urged the Court to allow the appeal. By way of reply, the Respondent adopted and relied on this case as presented at the two lower Courts including the Notice and grounds of appeal and urged the Court to dismiss the appeal. I have considered the case presented by each side at the two lower Courts viz-viz the records and the Prevailing Law. IN my view their submissions boil down to the following two principal issues viz:

1. Whether a divorce by the parties inter se needs to go to Court before it is valid.
2. Whether concerning a matter affecting the private part of a lady, the Court needs to believe her or ask for an oath to be taken before she is believed.

On the 1st issue I have considered the case of the parties as presented at the two Lower Court viz-a-viz the records and the prevailing law. The types of divorce under Islamic Law had come for adjudication and determination by the Sharia Appellate Bench of this Court in many cases to the effect that there are three types of divorce under Islamic Law. This was clearly put by the Sharia Appellate Bench of this Court in HUSAINA V TSIRIKO (1991) 1 NWLR (356 at page 364 per Okunola JCA thus:

"It is trite that there are 3 types of divorce recognised by traditional Sharia Law viz:

1. Talaq or Unilateral repudiation of the wife by the husband;
2. Divorce by mutual consent and;
3. Divorce by Judicial Decree."

From the above division of divorce under Islamic law, it can be seen that only (iii) is judicial divorce while (i) - (ii) are non judicial divorce. For purposes of this judgment we shall be concerned with the non judicial divorce in (i) & (ii) supra. Talaq or Unilateral repudiation of the wife by husband is very common. The husband may pronounce the talaq once or thrice. Just as we have in the instant case, the appellant reduced the talaq in writing thus:

"Dikko Sitto has divorced you Motsibbe in one (talaq) pronouncement."

This has the effect of a final divorce under the Islamic law. See also BAHAJA Vol.1 P.50. As regards divorce by mutual consent, this had been explained in HUSAINA V TSIRIKO Supra P.364 as follows:

" There are two forms of divorce based on mutual consent. These are 'Khul' and Musawa. The latter is dissolution of marriage on the basis of the mutual release of the spouses from any outstanding financial commitment arising from the marriage relation. This is less common among the Nigerian Moslems. We shall therefore concentrate on the former. Khul' is derived from khul' al-Thaub releasing or removing the dress from the body, because a woman is a dress of a man, and vice versa confirmed in the Holy Quran Ch.2:182 thus:

"The women are your dress and you are their dress."

Having dealt with the etymology of the word khul' it is necessary to consider its legal meaning. Thus, in his "Maliki Law", a summary from French translation of the MUKHTASAR OF SIDI KHALIL by F.H. Ruxton (hereinafter referred to as Ruxton)S.XVI p 121, khul is explained as one of the 8 different ways in which dissolution of marriage Talaq can take place as follows:

"where there is aversion on the wife's part for her husband, and the former leads her husband to consent to a dissolution in return for compensation. This mode is known as khul' or release".
(cf Kisalah Rules 80, 118-120).

From the foregoing, it can be seen that a non judicial Talaaq (Divorce) as contained in the Appellant's letter does not need the judicial stamp for its validity and I so hold. In sum principal Issue No 1 is resolved in favour of the Respondent.

As regards Issue No 2 touching on the completion of the 3 menstrual (Iddah) period within a period of 2 months and 8 days stated by the 1st Respondent. Whether it is possible and whether in such a matter affecting the private part of a woman, her evidence should be believed? To start with Iddah has been defined in *MAYAKI V NDA* (1993) 3 NWLR (Part 261) 313 p.320 by the Court of Appeal thus:

"Iddah which literally in Arabic means number, is the term of Probation incumbent upon a woman in consequence of a dissolution of marriage either by divorce or death of her husband. It is for 3 months in the case of divorce and 4 months and 10 days in the case of the death of the husband. But where the divorced woman was pregnant at the time of the divorce then her Iddah ends with the birth of the child and not 3 months after the termination of the marriage."

On the effect of marriage to a woman observing Iddah the Court further held thus:

"The Holy Koran prohibits a woman observing her Iddah from remarrying during that period. This is because during the Iddah, the marriage is understood to be merely dormant but not ended, as there is room for reconciliation between the husband and wife. Thus, the Iddah serves as a post-divorce reconciliation measure. This is one of the main reasons why the husband is under a duty in Islamic law to maintain the wife observing Iddah. And since Islam forbids polyandry, a man is forbidden to marry a woman who is observing Iddah for the law still affixes the stamp of marriage on her. Any marriage contracted within the Iddah period as, in the instant case, is therefore a nullity. (Pp.320-321, paras G-C) Per OKUNOLA, J.C.A. at page 321, paras C-E.

"It was noted that between dissolution of the marriage between the 1st appellant and the respondent on 28/2/84 a) the solemnization of the marriage between the 1st and 2nd appellant on 3/5/84 there were 64 days. The point was not controverted by either side as it even agrees with simple arithmetical calculation. From the Islamic principle outlined above the Iddah of the 1st Respondent should be for 3 months from 28/2/84. It therefore follows that the marriage between the 1st and 2nd Appellants contracted 64 days after the dissolution of the marriage between the 1st appellant and the respondent was contracted within the 1st appellant's period of Iddah.

The effected of such a marriage in Islamic Law is a nullity as the marriage is void having been contracted during the period of Iddah of the 1st Appellant. See HOLY Quran Ch. 2 verse 235; Al-Hashiyat Al Saduqi vol 2 page 218 and Ruxton, Maliki Law Ch. V. pages 90-91 quoted supra"


Since the above judicial authorities define the period of Iddah and as three months or 3 menstrial periods, the issue raised in this appeal is whether the 3 menstrial periods can be observed within 2 months and 8 days?

I have considered the case of the parties on this issue. This matter had caught the attention of Islamic authorities to the effect that under Islamic Law when a woman said she has completed her 'Iddah' on the usual time she observed that menstrial period, the Sharia Law says she should be believed without adducement of swearing the oath. This was aptly put in FATHUL ALIYU MALIK VOL 2 pages 71 - 72 as follows:

" A woman should be believed without adducement of oath for womans trustworthiness in an issue that concerns their private part".

The above statement of Islamic Law becomes relevant in the instant case. Moreso when it has been asserted that within this duration most women complete their Iddah. In the circumstance the statement of 1st Respondent before the two lower Courts that she had completed her 3 menstrial period within 2 months and eight days instead of 3 months should be believed without advancement of swearing oath since it is a matter concerning her private part and I so hold. Consequently, I resolve this second principal issue in favour of the Respondent.

In sum this appeal fails, and it is dismissed. In view of the family nature of this appeal, parties shall bear their individual costs.


MURITALA AREMU OKUNOLA
JUSTICE, COURT OF APPEAL.

APPELLANT IN PERSON.

RESPONDENT IN PERSON.

(DELIVERED BY MAHMUD MUHAMMED JCA)

I had the privilege of reading in draft the leading judgment just delivered by my learned brother, Okunola JCA. He had painstakingly set out the facts of the case and discussed all the issues raised in the appeal. I entirely agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed. I too dismiss the appeal and abide by the consequential orders including the orders on costs made in the leading judgment.

(SCD)
MAHMUD MUHAMMED
JUSTICE, COURT OF APPEAL.

CA/K/1545/2000

(DELIVERED BY SAIFULLAHI MUNTAKA-COMASSIE, JCA)

I have had the benefit of the preview of the leading judgment just delivered by my learned brother, Okonola, JCA. I agree with his reasoning and the conclusion reached that the appeal is devoid of merit and should be dismissed. I too dismiss the appeal. I abide by the consequential order made in the leading judgment including the order on costs.

(SGD)
SAIFULLAHI MUNTAKA-COMASSIE
JUSTICE, COURT OF APPEAL.