

**PROCEDURAL LAW IN MARITAL DISPUTES UNDER SHAFII AND MALIKI JURISPRUDENCE
IN KADHI'S COURTS IN ZANZIBAR TANZANIA AND KWARA STATE OF NIGERIA**

Issa Babatunde Oba

Kampala International University, Kampala Uganda.

*E-mail of Correspondence Author: issa.oba@kiu.ac.ug

ABSTRACT

This paper explores the dynamics of procedural law in marital disputes under Islamic jurisprudence. Procedural law is an essential aspect of Islamic justice system; it is of divine flavor and of classic origin. In some Muslim regions of the world Islamic procedural law are still in use, particularly in regions with sizeable Muslim population. Marital disputes settlement are common matters handled by the Kadhi's Courts. The courts system adopts the jurisprudence peculiar to each region. In Zanzibar, Muslim Courts also known as Kadhi's Courts while in Nigeria Kadhi's courts are Sharia or Area Courts. The official jurisprudence of Zanzibar is Shafii jurisprudence while the Constitution of Nigeria recognizes Maliki jurisprudence on Muslim personal matters such as marriage, divorce, inheritance and other related matters. This paper highlights on the variations between the Shafii and Maliki jurisprudence on marital disputes. The paper uses of Zanzibar and Kwara State of Nigeria as the case studies. Recently decided cases from the two regions of Africa used to illustrate the dynamics of procedural law under Islamic jurisprudence.

Keywords: Procedural Law; Kadhi's Courts; Marital Disputes; *Shafii* and *Maliki* Jurisprudence.

1.0 INTRODUCTION

Procedural law is an integral part of Islamic legal system. Zanzibar and Kwara State of Nigeria use similar procedural law in Kadhi's Courts though with slight variations. The discourse addresses marital mutual rights under Islamic jurisprudence. Besides, the paper examines marital disputes under Islamic jurisprudence with emphasis on the position of *Shafii* and *Maliki* jurisprudence and areas of agreement on the two schools of jurisprudence. The paper uses recently decided cases from Kadhi's Courts in Zanzibar and Kwara State of Nigeria for analysis of the variations of the *Shafii* and *Maliki* jurisprudence on marital disputes. On the way forward, the paper makes recommendations in order to make Islamic jurisprudence relevant to contemporary era.

1.1 Marital Mutual Rights under Islamic Jurisprudence

Islamic Jurisprudence gives guidelines on marital relationship as it relates to social and legal consequences of a marriage contract that is properly consummated. The legal effects of a valid marriage under Islamic jurisprudence include the fact the wife enjoys the right to maintenance and her quick portion of the bride price. Sexual relationship becomes legitimate and the offspring of the union as legitimate. The husband has marital authority and privileges with his status as a husband (Al-Mutari, 2004). The woman retains her basic identity: such as her maiden name, her religious status or school of jurisprudence and her legal status or personality. Mutual rights of inheritance under Islamic jurisprudence this allowed if the couple is of the same religious background. On the other hand, after the demise of the husband or the dissolution of the marriage, the wife has the right to the deferred portion, if any, of the bride price, and may not remarry before the observation of the legal waiting period. (Al-Mutari, 2004) The moral basis of marital duties of the husband-and-wife relationship is of divine guidance. This is to ensure an abode of peace and tranquility, a union of mutual affection and empathy. The husband been divinely instructed to treat the wife with charitable behavior, respect and patience.

The husband must free her wife from hardship and not cause her injury or sadness. (Quran 4:19; and Quran 30: 21) The fundamental role of the wife, in this regard to what is equitable, but the husband enjoys a slight degree of privileges over the wife. *Shafii* and *Maliki* jurisprudence support their position on the matter with textual verses from the Quran. The Quran recommends that the virtuous a wife to be sincerely willing to comply with the dictates of the husband. (Quran 2: 184-234)

The first type of mutual rights is the solemnization of the couple. By extension, mutual gratification, in this regard is a basic human behavior that happens on a legitimate basis. This is as it relates with vital goals for which marital union is ordained, to provide reproduction, and preservation of offspring. *Shafii* and *Maliki* jurisprudence differ as to whether the physical union is a right or a duty entrusted to the husband and wife. *Shafii* maintains silence on the matter. *Maliki* jurisprudence argues that the physical union is the right of husband and wife and each party may request this right and constrain the other by law. *Shafii* and *Maliki* agree that the husband has exclusive right to have intercourse and make use of verses from the Quran to illustrate their position (El-Alami:1990). However, in the exercise of the right, no injury or harm be sustained by the wife.

It is accepted Islamic jurisprudence that sexual desire is unisex; not performing the duty by the husband may result in injury to the wife. Islamic jurisprudence forbids the right of the husband as regard that he may not engage in intercourse with the wife in a manner that may cause harm to her. A case in point is a situation where the wife is too weak for such exercise. In such a situation, the wife may not expect to consent to the husband request for an intercourse. (Hammsdah : 1982) Other grounds of exemption from intercourse is if such a relationship would cause injury to the wife especially in situation where the husband suffers some sexually transmitted diseases.

Injury caused to the wife due to the husband the negligence and the probable cause of death is sexually transmitted diseases from the man. The husband may be liable to pay blood wit, depending on the cause of the probable death. The rule is that though the husband has the right to intercourses with his spouse but must not result in injury or death. (Hammadah : 1982). Another platform of examining the mutual rights of intercourses is the scenario where the husband withholds from the exercise of his exclusive right to sex with his spouse, depriving her of enjoying her natural desires.

This not allowed under Islamic jurisprudence, such situation permits the wife right of divorce on the ground of injury to her desires. Scholars argue that if it is seen as the right of the husband alone, it is not operational in reality since it variable is in fact outside the influence of law and its safeguarded by estimation. The confirmation of which is the union of connection formed between the families of the couple. Because of this, marriage thereby prohibited between the husband and the female line of lineage of the wife and vice versa. (El- Alami, 1990)

1.2 Marital Disputes under Islamic Jurisprudence

Under Islamic jurisprudence in the situation, that dispute takes place within the marriage adequate provisions made either through a mutual meeting or through open conversation. However, in difficult situations, when the woman has engaged in immoral conduct to overlooking marital involvements, the Quran recommends a multi-step approach. Furthermore, no matter the level of misconduct on the part of the woman, the Quran caution on any form of a physical attack against the woman. The Multi-step approach recommended reducing the limit of unnecessary physical assault at the material time of conflict. First, the husband is expected to discuss the matter with the parents and if the approach cannot resolve the dispute the couple should stop sleeping together for the time being (Alkhateeb, 2019) If the dispute is unsettled, the next step is symbolic canning and the final mode of settlement. (Quran 4:34-35) Again, if the conflict is unresolved, the man or woman advised to approach a family member to assist in resolving the matter. In the situation where the dispute is rather difficult to settle, divorce is the ultimate option (Alkhateeb, 2019) Islamic jurisprudence presents alternatives once the husband and wife have endorsed the marriage contract, which solemnize their union and decides to divorce. If the union not perfected and the bride price estimate not known, the husband expected to give a reasonable gift to the wife. (Alkhateeb, 2019). Furthermore, if the husband and wife have not perfected their relationship and a specified bride price, the husband expected to give half of the known bride price unless the wife rejects it. (Quran 2: 233-237)

1.3 The Position of Imam *Shafii* Jurisprudence on Marital Disputes

The issue of domestic matters, as it relates to the wife regarded as homemaker and the husband fends for the upkeep of the home. Under Islamic jurisprudence, the wife expected to be under the same roof with the husband. The wife, under Islamic jurisprudence, is responsible for domestic matters, while the husband assists her or maybe helped by domestic servants.

Shafii jurisprudence argues in accordance to the Sunnah of the Prophet. However, on an act of disobedience on the part of the wife *Shafii* jurisprudence recommends that the husband must not abuse the right to discipline the wife. (El-Alami, 1990) For short-tempered husband, separation recommended and not divorce, until the moment the husband regains his balanced emotion. *Shafii* jurisprudence explains that the maintenance of the wife must continue during the period in question. On the issue of maintenance of the wife *Shafii* jurisprudence argues that if man separates from the woman while she is in state and then dies, the woman maintenance shall not stop. *Shafii* jurisprudence explains further that if the woman is not pregnant, such woman is not to benefit from maintenance, but if otherwise, the woman shall be entitled to accommodation alone. If the woman vacates the house during the waiting period without any justifiable reason, terminate her maintenance. There are certain grounds that maintenance forfeited, suspended or out rightly according to *Shafii* jurisprudence, if the wife leaves her matrimonial home without the consent of the husband. (El-Alami, 1990)

There are exceptions to this rule where maintenance not forfeited, if the woman goes out without the consent of the husband and not regarded as been disobedient especially if it is important or that it is customary for her to go out at the material time in question. Scholars argue that the husband should make provision of domestic servants to the wife if the husband can afford it and that if the husband is of limited income; such husband is not required to make such arrangement. *Shafii* jurisprudence position is that the husband to make adequate provision of domestic help for his wife no matter the status of the husband. This is on the condition that the wife belongs to the social class that provides for domestic servants. (El-Alami, 1990) Other grounds for such provider include if the wife is sick or aged to perform any domestic chores. On the estimation of maintenance to give to the wife, the *Shafii* jurisprudence align with verses of the Quran and the Sunnah of the Prophet. (Quran 65:7) Moreover, if the husband is absent from without making adequate provision for the maintenance of the wife. *Shafii* jurisprudence contends that if the woman approaches the Kadhi on this ground to seek separation, such request not accepted and that the Kadhi should not divorce her even if due to long absence or even his destination not known. (El-Alami :1990). The aforementioned highlighted area of marital disputes in accordance to *Shafii* jurisprudence. Maliki jurisprudence, on the other hand, holds a different position on marital disputes under Islamic jurisprudence.

1.4 The Position of Maliki Jurisprudence on Marital Disputes

On domestic matters, such as the husband is the breadwinner and the wife regarded as housewife both living under common roof with the responsibility to engage in domestic activities *Maliki* jurisprudence examines the social background of the wife. Whether or not the wife is of exempt a social class that would waive such assignment such a wife from domestic chores due to her family background. On the abuse of the right to the discipline of the wife, *Maliki* jurisprudence position is that if the wife sustains injury form the act of discipline of the husband. The wife may seek divorce on the ground of abuse committed by the husband. The issue of the wife leaving marital home without the consent of the husband, and suspension or forfeit of maintenance. *Maliki*

endeavors to distinction on the ground whether the woman is in state or not. If in-state maintenance is compulsory. If on the other hand, the woman is not pregnant forfeit the woman maintenance accordingly. (El-Alami, 1990)

On provision of domestic servants if the husband is, affluent and if of poor status not required to make such provision. *Maliki* jurisprudence subscribes to the provision of domestic servants to assist the wife in domestic chores with the additional specification. The husband should bear the medical bills and other related expenses regarded as the responsibilities of the husband. In the situation of which the husband is absent from home without arrangements for maintenance. *Maliki* jurisprudence position is the may approach the Kadhi and exercise her right to request for separation and the Kadhi is expected to acknowledge her request accordingly. The husband is divorced after been communicated to the status of his marriage. This is on the ground that his destination known and after a reasonable period has passed for the transmitted message to reach the husband. What amounts to be a reasonable time according to *Maliki* jurisprudence is one year of waiting for the husband has to acknowledge. (Al-Azhari, 1997)

1.5 The Areas of Agreement on Marital Disputes between *Shafii* and *Maliki* Jurisprudence

Although *Shafii* and *Maliki* jurisprudence varies on matters relating to marital disputes, yet they agree in certain areas as it relates to marital disputes. *Shafii* and *Maliki* jurisprudence hold the same view on the discipline of woman due act of disobedience. They concur to the position of the verses of the Quran and Sunnah on the matter.

The textual position is that first warn, ignore of the marriage bed and lastly, slight beating as recommended by the Prophet. However, the beating according to the Sunnah, no injury caused to the woman in the exercise of the right to discipline. (El-Alami, 1990). On the other hand, in cases of the wife commits a violent offense, dissolution of the matrimonial bed recommended for such dispute accordingly. *Shafii* and *Maliki* agree to the fact that there is a dispute and the husband is of short temper nature. Before the relocation of the wife, the Kadhi must properly investigate the matter before the separation of husband and wife in the cause of marital disputes. In like manner, they both hold the same position on the right of maintenance of the wife as obligatory on the part of the husband since it is one of the legal effects of a valid marriage. (Quran 4:19)

Shafii and *Maliki* jurisprudence see the maintenance of the wife as a recommended norm and that the maintenance of divorcee is a recommended norm only during the waiting period of a revocable divorce. *Shafii* and *Maliki* jurisprudence argue that a woman observing the waiting period following the demise of her husband is not entitled to maintenance, whether she is in the state or not. Such a woman is only entitled to accommodation in this kind of situation. Furthermore, *Shafii* and *Maliki* hold a similar position on the fact that no maintenance for a woman throughout her disobedience. Based on the fact of her non-submission to the authority of the husband due to the woman's fault. If the dispute is on the woman, recant Islam. *Shafii* and *Maliki* jurisprudence position is that the woman shall forfeit her right to maintenance out rightly, whether validly

married or observing her waiting period. Al-Ghazali, 1992) On the issue of fairness, equitable treatment and mutual trust especially in a polygamous setting. *Shafii* and *Maliki* believe that all wives be treated equally by the husband as recommended by the Quran and the Sunnah of the Prophet. This paper argues that though there are divine rule and prescriptions from the Sunnah on how to remedy marital disputes. These laudable mechanisms need reformation in line with modern expectations. Contemporary Muslim women are not only highly educated, now hold responsible positions of authority both locally and international their status in marriage has changed. The trends are likely to continue to improve with the demands of modern trends. Jurists and scholars need to reflect on the way forward to make settlement of marital disputes conform to the expectations of modern situations. (Al-Ghazali, 1992)

2.0 Case Studies of Recently Decided Cases From Zanzibar and Kwara State of Nigeria on Marital Disputes Under Islamic Jurisprudence

This study collects relevant recently decided cases during the field assignments in Zanzibar and Kwara State of Nigeria for scrutiny and analysis on the impact of *Shafii* and *Maliki* jurisprudence on the decisions of Kadhis in adjudication process on marital disputes. The analysis of the case study assists in having an insight on degree of jurisprudential influence on Kadhis Court decisions in recent times.

2.1 Court Holding from Zanzibar, Tanzania Perspective

Muhammed Mustapha Muhammed v. Salha Said Juma. (Appeal Civil Vuga Number /2013) Under Islamic law, it is the responsibility of the husband to provide maintenance for the children of a valid marriage.

2.1.1 Summary of Facts

This case is an appeal against a Kadhi Court Judgment. At the trial stage, the plaintiff sought the ruling to obtain the custody of the children of the marriage. He narrated that the wife was married under Islamic marriage rites. The union blessed with a set of twins and are twelve years of age and the other is three years old. He remarked that though he was polygamous yet he tried to maintain a balance according to his income. According to him after sometimes, his conditions became difficult. With frequent disputes, the wife requested for divorce and given accordingly. The woman left his house with all the children. The grounds of appeal were that the court should annul the decisions of earlier court as canceled; the court should look at the maintenance cost of the children awarded; the court should award him the custody of the twelve years old children being the lawful father of the twins. Moreover, that his present income cannot maintain the cost awarded for maintenance of the children. Issues identified by the court on the matter: that the issue of divorce brought about disputes particularly the children; that the maintenance provided was rather in small amount; the woman-wanted compensation for two years the children had stayed with her.

2.1.2 Decisions of the Court

The court gave adequate considerations for both parties, concurred to the ruling of the lower court at the same amended certain aspects of the ruling. The court ruled as follows: it annulled the 540000 Tanzanian shillings, awarded as maintenance cost, and 50000 Tanzanian shillings per month being installment payment under that arrangement. Instead, the court ruled that each child awarded 20000 Tanzanian shillings, per month. This court order provided for 60000 Tanzanian shillings per month for the children as normal maintenance cost; the court ordered that the father to these children must provide clothing and other related matters; and that since woman has not remarried, she has the right of custody of the children. The ruled that this decision was based on the Sunnah of the Prophet with the legal maxim “Do not injure yourself or harm yourself at the same time injure or harm another person” in addition, the court gave the children the option to choose between the parents in line with the traditions of the Prophet. The children ignored staying with their paternal grandmother. They preferred staying with their mother. This in particular is the position of *Shafii* jurisprudence.

2.1.3 Analysis of the Case Study

The appellant in this case lost outright at different levels of Kadhis Courts. This is to buttress the fact that under Islamic Jurisprudence adequate provisions and considerations given to the welfare of the children as demonstrated in this case study. Maintenance of the children is one the main responsibilities of the man under Islamic jurisprudence. However, for a man to shy away from this responsibility under Islamic marital jurisprudence seen as an act of disobedience to divine provisions on marital jurisprudence. (Al-Mutairi, 2004). The responsibility of children was one of the main duties of the father to the children. This duty continues to be that of the father if his daughter is married or divorced while she has not reach the age of majority. (Ambali, 1982) Children regarded as blessings of God and parents should not cause harm on them, and protected always. (Quran, 2:233) Parents are human beings hence have their strengths and weaknesses. They are bound to make mistakes on issue of caring for the children. Parents are like compass to the personality traits of the children. They must exhibit good conduct at all times. Under *Maliki* jurisprudence, the laid down rules on custody strictly followed and children not given option to choose between the parents that they prefer to stay with *Maliki* Court will rule in favor of the mother of the children on issue of custody and no waiver on the matter.

2.2 Court Holding from Kwara State, Nigeria Perspective.

AbdulRasheed AbdulKadir v. Aminat AbdulRasheed. (KWS/SCA/CV/AP/IL/02/2015).

Maintenance of the children is sole responsibility of the husband under Islamic law.

2.2.1 Summary of Facts

The summary of facts of the case as deduced from the content of petition written by the respondent to the case. The couple got married in 2013 in accordance with Islamic rites and the marital union was blessed with a boy given the name Hamzah Abdul Rasheed who was a year and

half at the of initiating the suit. She petitioned that in the marital relationship no love and was often assaulted and maltreated by the husband. She explained that whenever her parents wanted to resolve the dispute, her husband treated them badly. The Upper Area Court upheld her petition. The aggrieved party, the appellant filed an appeal the following after the judgment of the lower court, for the Sharia Court of Appeal to overrule the decision of the Upper Area court and rule in his favor.

2.2.2 Decisions of Kwara State Sharia Court of Appeal, Ilorin

On the issue of instant judgment, the trial judge at the Upper Area court was rather unnecessarily in a hurry to deliver judgment whatever were the reasons. The claims not placed before him, yet judgment made on the same day. The court ruled that this contrary to the Sunnah of the Prophet. For according to the Prophet, God hate the sight of divorce no matter the situation. The court ruled that is as an ugly matter in eyes of our creator treated with great caution. Another oversight of the lower court was fundamental procedure of Islamic jurisprudence ignored. The option of reconciliation not given consideration with the hasty decision of the court. In any dispute under Islamic jurisprudence, reconciliation is a viable option. On the second claim, the award of 15000 naira as cost for maintenance allowance for the only child of the marriage. With the quick delivery of decision on the matter, the court failed to investigate the issue before expressly arriving at a decision. This this court ruled was an error in adjudication process of the Upper Area court decision.

With the aforementioned considerations, the court granted the appeal of the appellant and ordered that the same Upper Area court should rehear and address the issue of maintenance in the case *DE novo*. The court ordered that proper investigation of the financial capability of the appellant be required in order to determine a fair and just decision. The court ruled that the Appeal of the case granted.

2.2.3 Analysis of the Cases Study

From the review of the case study, the following identified as oversight of Sharia Court of Appeal. In the first instance, the Record of Proceeding of the lower court not clinically addressed. However, items marked in red mentioned which was not enough. Those items marked in red ink and in upper case by the lower court, not taken into consideration in the ruling of the court. (Daura, 1996) Under Islamic procedural law, this was an error. The red ink marks indicated pre judgment for parties to proper rest their case. This is common to pre judgment writing to both *Shafii* and *Maliki* jurisprudence. Ignored by the court, such decision was not good enough overlooking a fundamental procedural step known as *izar* under Islamic jurisprudence. This may assist the court in arriving at reasonable decision. The red marks was not for cosmetic purpose but it serves to assist the court ruling. Another issue from the decision of the court was the maintenance cost awarded by the lower court overruled. From the record of proceedings, the appellant twice ignored the summons of the lower. Attendance of the court may have given him the privilege to make counterclaims on the matters before the lower court.

After all, as the saying goes you cannot eat your cake and have it. Again, possibly the lower court has considered inflationary trend in arriving at the estimate for maintenance cost of 15,000 naira per month. If the maintenance is looked from this stand point, the best the Sharia Court of Appeal can do on the matter was to specify the cost, that 5,000 naira for feeding, same amount of clothing and other related matters and another 5,000 naira to take care of contingencies like medical treatment. In this wise, referring the matter back to the same court to investigate the maintenance allowance in line with the financial status of the appellant was not only time wasting but making cost of litigation on marital disputes rather expensive. The *Shafii* decision on the matter be viewed from the premise of that the husband must bear the burden of maintenance cost of the children of the marriage and may award more maintenance cost. This paper argues that there is need to make provisions for marriage counselling whereby parents are encouraged on mutual responsibilities and parental care to their children.

3.0 CONCLUSION

Procedural law on marital disputes under *Shafii* and *Maliki* jurisprudence had undergone reforms ever since many reforms had taken place due to the dynamics of modern times. The paper examined marital mutual rights under Islamic jurisprudence and identified that under Islamic law it is classified. The centerpiece of the discourse is the position of *Shafii* and *Maliki* jurisprudence in marital disputes. The discussion evaluated the variations between the two Schools of jurisprudence and their areas of agreements. The paper submitted that with women now better empowered, highly educated and entrusted with responsible positions of authority in contemporary world. There is the need for mutual relationship and treatment on marital disputes need a review to accord women respect the deserved status in marital matters particularly in Zanzibar and Kwara State of Nigeria. The paper, argued procedural law in marital disputes under *Shafii* and *Maliki* jurisprudence be more relevant to the dictates of contemporary era.

4.0 RECOMMENDATIONS

There is need for a comprehensive review of the legal framework and the institutional arrangements to meet the changing trends in the modern era, especially now that the world is becoming a global village. Besides, professional legal training to those that hold the position of the Kadhis. This on the long run may enhance job mobility within the judiciary. Package refresher-training programs for the Kadhis from time to time and be exposed to international conferences, workshops and regional interaction on matters related to Islamic jurisprudence. Comprehensive computer training need to be part of continuous training program for the Kadhis to assist in their daily assignments. Connect offices of the Kadhis as a matter of urgency to the internet in order for them to have contemporary touch of development on marital jurisprudence in other Muslim regions of the world.

Appoint women as Kadhis due their advancement in education in the recent times, in compliance to the international expectations in the modern era. There is need to depart from

conservative aspects of jurisprudence as it relates to marriage related matters because women should enjoy more rights in modern times than it was the case in the classical era. Modern world entrusted more rights and responsibilities on women than was the case during the times of the Prophet. More research works in *Shafii* and *Maliki* jurisprudence in order to expand the frontiers of knowledge for the well-being of the people of Zanzibar and Kwara State of Nigeria. To be able to achieve this laudable goal, all published works in relation to *Shafii* and *Maliki* jurisprudence written in Arabic be translated into other languages for these works to be useful and accessible to the jurists and scholars without the knowledge of Arabic.

This study recommends the need to harmonize the positions of *Shafii* and *Maliki* jurisprudence with organization of international fora for jurists, scholars and experts in international law and international human rights norms and other related experts on the courts system. Such international meetings may result in useful blueprints on Islamic jurisprudence particularly as it relates to matters concerning marriage and related matters for the future improvement on marital jurisprudence. Jurists and scholars need to reflect on the way forward to make the settlement of marital disputes conform to international Human Rights norms

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