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**Citation**

Stiles, E. (2002). Buying a Divorce in Zanzibar. *Isim Newsletter*, 10(1), 33-33. Retrieved from <https://hdl.handle.net/1887/16770>

Version: Not Applicable (or Unknown)  
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Downloaded from: <https://hdl.handle.net/1887/16770>

**Note:** To cite this publication please use the final published version (if applicable).

East Africa

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# Buying a Divorce in Zanzibar

In Zanzibar, all family law matters are handled in Islamic courts. Most of these concern marital disputes. Field research on disputes and court cases shows that it is difficult to understand judicial decision-making without considering the cultural context of the cases; court documents often do not tell the whole story. One area of particular interest is under what circumstances a judge, called a *kadhi* in Kiswahili, will uphold social norms or cultural practices that he actually considers religiously unlawful. A recent example from a rural court shows how a *kadhi* uses the principle of fairness and the attribution of fault to allow such a practice.

Zanzibar is a semi-autonomous island-state of Tanzania with its own president, parliament and legal system. *Kadhis* have been arbitrating disputes for at least two centuries, and the Islamic courts were most recently established at the primary and appellate levels by the Kadhi Act of 1985. The courts have jurisdiction over all family and personal status matters for Zanzibar's Muslims, who make up over 95% of the approximately one million inhabitants. Decisions of the primary courts may be appealed to the Chief Kadhi, whose office is in the High Court in Zanzibar town. Family law is not codified, and most Zanzibaris, *kadhis* included, are Shafi'i.

There are nine primary Islamic courts on the islands – three on the northernmost island of Pemba and six on the southern island of Unguja. Primary *kadhis* are selected by the Chief Kadhi based on their reputation as religious scholars. As there is no mandatory training or educational prerequisites for acquiring the post, the *kadhis* have a variety of educational backgrounds.

The jurisdiction of the Islamic courts is limited to family and personal status mat-

and their role is an interesting one in the recent history of Zanzibar. In the past they were selected from within their communities by elders, but today are appointed by the government and are thus most often acknowledged supporters of the ruling political party. Although they have no formal training in either religious or secular law, *shehas* are in principle responsible for all types of community dispute resolution; people with marital disputes bring their issues to the *sheha* before opening a case in the *kadhi* court.

Although only the *kadhi* may decide cases and issue judgments, or *hukumu*, clerks have an important role in court procedure. Once a claimant has a referral letter from his or her *sheha*, the dispute is presented to the clerk, who determines whether or not the issue is suitable for the *kadhi* court. If a case is opened, the clerks aid in the preparation of the plaintiff's official claim, the *madai*, and the defendant's counterclaim, the *majibu ya madai*. They also schedule court dates, manage case files, write summons, and explain procedure to litigants, their families, and witnesses. Clerks are not required to have any special religious or legal training, but most have finished secondary school.

## Case study

Shaykh Khamisi\* comes to court by boat every Monday through Thursday. He arrives

While preparing her *madai*, the court clerk asked if she and her husband got along, and gave examples of the kind of strife they might have – foul language, arguing, or rudeness. Although Mosa agreed that they did not get along well, she stressed that her main problem was lack of a house, inadequate food, and the fact that Juma did not support all of her children. In the *madai*, however, the clerk highlighted their inability to get along and Juma's bad language. The document referred to maintenance problems only in a general way.

When Juma was summoned, he argued that he had done nothing wrong and that their marital problems stemmed from Mosa leaving him for no reason. His counterclaim stated that he had not verbally abused Mosa, and that she blamed him for negligence to hide the fact that she had left him. It also stated that he wanted her back.

They came to court together a week later, and Mosa argued that she did not receive any clothing and the food that Juma provided was not sufficient to feed all of her children. Juma countered that he was blameless and that they began having problems when Mosa left him. He also claimed that he had problems with her children, because they were disrespectful and foul mouthed. When the *kadhi* asked him about his demand for money for a divorce, Juma replied that he had indeed asked because she was away for such a long time, but that now he no longer wanted a divorce.

Shaykh Khamisi heard witnesses and decided the case the following week. He told Mosa that both she and Juma had made mistakes, and ruled that they must try living together again. His written judgment was in the form of *masharti*, or terms that each person must follow. This is typical in cases where the *kadhi* thinks the couple capable of reconciliation. Although it was not written that Mosa return to Juma, Shaykh Khamisi explained that she would be expected to do so. Although Juma was ordered to improve his behaviour and support her, he was not ordered to support the children who were not his own because he had no legal responsibility for them.

Three months later, Juma came to court claiming that Mosa was not fulfilling her terms. He brought a letter from the *sheha* stating that Mosa was not upholding her end of the terms of the judgment. Mosa showed up two days later, claiming that Juma still did not maintain her properly. The *kadhi* listened, but strongly reminded her that she must first go to the *sheha* if she has marital problems, as it was set out in the ruling.

When they came to court together the following week, Shaykh Khamisi told them that they had 'two laws' to fulfil: maintaining the terms set by the court and going to the *sheha* if they have problems – failure to do so was a violation of court orders. He decided that they must try to live together one more time and that if Mosa could not bring herself to live with Juma, she must buy her divorce in a court-ordered *khul* – when a wife compensates her husband for a divorce, usually by returning the marriage gift, or *mahari*.

## The *kadhi's* final words

Mosa did not return to Juma, and two weeks later Shaykh Khamisi ordered her to buy her divorce. She agreed, but much debate ensued about how much she would pay. Juma asked for 70,000 shillings, but the

*kadhi* told him he was breaking the law by asking for more than he paid as *mahari*. However, he did permit them to negotiate the amount, and eventually the sum was set at 25,000 shillings – still greater than the original *mahari*.

Shaykh Khamisi explained that he allowed the negotiation because they had *both* caused problems in the marriage. Since Mosa no longer wanted to be married to Juma, but he wanted her, she must buy the divorce with a *khul*. Since she was not without blame in their marital strife and had broken court orders, fairness dictated that she pay more than her *mahari*.

This case shows Shaykh Khamisi's justification of a local norm that he considers religiously unlawful. He allowed Juma to receive more financial compensation than his original *mahari* payment because he deemed Mosa to have broken procedural regularities and to be at fault in the marriage by leaving him and allowing her children to misbehave. He allowed this type of negotiation in a number of other cases as well, and justified it in the same way – as a wife at significant fault in a failing marriage. It is interesting to note that other *kadhis* and scholars have different ways of handling this type of situation. Some insist that they would not allow such negotiation at all while others justified it religiously. Shaykh Khamisi, however, had often mentioned that a Zanzibari *kadhi* was not able to apply *sheria za dini* (Islamic law) in full, and that although many scholars rejected the position when it was offered to them because of this, he himself had accepted the position mindful of that aspect of the job.



PHOTO: ERIN STILES, 1999

## Courthouse at Mkokotoni

ters and the vast majority of cases opened concern marital disputes. Of these, maintenance disputes, divorce suits, and husbands' pleas for the return of absent wives are common. Men in Zanzibar have the unattenuated right to divorce their wives unilaterally through repudiation, and women may file for divorce in the courts. The latter are granted a divorce on a variety of grounds, the most common being desertion and lack of maintenance. About 65% of all cases in the courts are opened by women.

Opening a case follows a fairly regular procedure. One interesting precondition is a mandatory reference letter from a local community leader, or *sheha*. *Shehas* preside over groups of villages in the rural areas and over urban neighbourhoods in towns,

early in the morning and hears cases until the early afternoon. On average, he hears about three cases each week. It is not unusual for a case to remain open for many months, and disputants often come to court several times.

One interesting case was opened in October 1999 by a woman in her fifties named Mosa. She explained that her husband, Juma, did not provide adequate maintenance for her and her children, some of whom were from a previous marriage. When describing her problems, she emphasized that Juma refused to support the children from her first marriage. She said that she had not asked him for a divorce, but that Juma had previously asked her for money to divorce her; although this is a fairly common practice in Zanzibar, it is considered unlawful by religious experts.

## Note

\* I worked for more than a year with Shaykh Khamisi Hamza, the *kadhi* of the primary court at the village of Mkokotoni. Shaykh Khamisi was trained in Zanzibar and in Tanga, a coastal city on the Tanzanian mainland.

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