
REASONS FOR FAILURE TO FORMULATE ISLAMIC RULES AND PROCEDURES TO BE APPLIED IN KADHI'S COURT IN ZANZIBAR

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ABSTRACT

Kadhi's Court is an institution established under the Kadhi's Court Act and has been mandated to deal with matters concerning marriage, divorce, custody of the children, wakf and trust properties, gift, inheritance, will and the division of matrimonial properties on the contrary in Zanzibar the situation is not as good hence the expected rules and procedures to be applied in Kadhi's Court is not typically done according to Islamic rules and procedures. This is because of several reasons such as the presence of various legal constraints that hinder the application of Islamic rules of procedures. Hence despite being said in the Kadhi's Court Act that Kadhi's Court will use Islamic rules of procedure in the proceedings of its case still some reasons hinder the application of Islamic rules and procedure in Kadhi's Court. The methodology used in this paper is qualitative and content analysis method. This paper provides some suggestions and recommendations for a legal framework that will bring about better means for the application of Islamic rules of procedures in Kadhi's Court in Zanzibar.

Keywords: Kadhi's Court, Islamic rules and procedures, legal implications, Zanzibar.

1.0 Introduction

Zanzibar is an island that Muslims mainly populate. It is believed that before the advent of Islam in Zanzibar, there was no system of law until the vacuum was filled by Shariah or Islamic laws, which assumed the significance of being the fundamental law of the land over time. Muslims in Zanzibar form 97% of a little over one million population. In this position, as was rightly argued by Majamba that the existence of Kadhi's Courts in Zanzibar needs no further justification and clarification. This means quite clearly that there is every reason that Zanzibar should have the strong and well-established Kadhi Courts in its judicial system as it has several people to serve through those Courts.

Kadhi's Courts have existed in Zanzibar since the arrival of Islam to the East African Coastal area. Kadhi's Courts in Zanzibar are both Constitutionally recognized and statutorily established. However, Kadhi's Courts in Zanzibar exercise only limited jurisdiction in determining the question of Muslim law relating to personal status, marriage, divorce, or inheritance in those proceedings in which all the parties profess the Muslim religion. Despite dealing with Muslim personal matters, some rules of procedure that the Kadhi's Courts are statutorily directed to use in Kadhi's Court are not Islamic, for example, Kadhi's Court Act and its Regulations, Civil Procedure Decree etc. This may have adverse effects on Islamic Courts' decisions using non-Islamic substantive and procedural laws.

The broad objective of this article is to study the reasons failure to formulate Islamic rules and procedures to be applied in Kadhi's Court in Zanzibar as highlighted by the writer;

1.1 Absence of a specific guiding book for handling Islamic cases in making a judgment in Kadhi's Court

This is one of the reasons failure to formulate Islamic rules and procedures to be applied in Kadhi's Court in Zanzibar as the absence of a specific guiding book for handling Islamic cases in making a judgment in Kadhi's Court leads to the application of the judgment based on the Common law principles. Though Section 6 provides that the law and procedure of evidence to be used in Kadhi's Court are that of Islam, the practices in Kadhi's Court do not meet this requirement as seen in the case below have used laws other than Islam. This may lead to the legal implications of an Islamic

perspective on the decision made because in the Holy Qur'an Allah has revealed the use of the Holy Qur'an and the Guidelines of the Hadith of the Prophet (Peace be upon him) also, we have Ijmaa and other sources of Islamic Law. According to the above-cited Section, these are the Islamic guiding books and others that might come from these are the ones to be used in Kadhi's Court as witnessed in the case of *Semeni Haji Juma vs. Khalid Masoud Wazir*. This case was concerned with the maintenance of the Children in which the Appellant was the only witness on her cause, something which does not follow the Islamic procedure as the Appellant cannot be a witness in her case.

In the alternative, if Kadhi's Court could have well-settled and known Islamic rules and procedures it would be very easy for the District Kadhi to direct the parties on the position of their status as the witness.

Further, in the case of *Khamis Moh'd Khamis vs Hudayna Abdalla Haji*. In this case, the Hon Appeal Kadhi used section 5 (a) to (g) of the Kadhi's Courts Act No. 9 of 2017. This Act was enacted by the House of Representatives of Zanzibar in which the mandate to do so is vested by section 78 (1) of the Constitution of Zanzibar of 1984 Revised edition 2010 which is typically common law grand norms. The orders granted by District Kadhi in the above-cited case were seven (7) from the disputed issues well analyzed by Islamic Shariah i.e. divorce, maintenance of the Children, and claim of money were among the issues disputed before the Court. Unfortunately, none of the mentioned issues was determined in detail as per the teachings of Islamic Shariah. Not only that but also the same case was subjected to appeal where by the Appeal Kadhi confirmed six orders of the lower Court except one which was also not discussed by the principles of Islamic Rules and procedures. Hence the intervention of this study is of no choice other than to reveal and recommend what is required to be done to make everything in its place.

If the Islamic Books were strictly applied in Kadhi's Courts in Zanzibar, the previous case would not have used the common law section, and also the Kadhi would labor much on analyzing the issues raised in the case based on Islamic principles in the Books of Islamic Religion. The result of this study revealed that 46% of the interviewed respondents said that there is a failure to formulate Islamic rules and procedures due to the absence of specific guiding books for handling Islamic cases. The findings of this study mention that the absence of a specific guiding book for

handling Islamic cases in making a judgment in Kadhi's Court is one of the reasons for the failure of formulating Islamic rules and procedures to be applied in Kadhi's Court in Zanzibar, where it was supposed to have its own Kadhi's Court rules that are purely derived from Islamic Shariah.

1.2 Absence of approved strict laws to be applied in judging Islamic-related cases

According to the Kadhi's Court of Zanzibar, Islamic-related cases are the ones provided in Section 5 which include marriage, divorce, custody of the children, wakf, and trust properties, gift, inheritance, will, and the division of matrimonial properties. In Islam, there are well-known approved strict laws governing the above-mentioned matters though they are mentioned in Common Law. For example the issue of the maintenance of children, in Zanzibar we have two distinct laws with two distinct courts that can entertain this matter whereby the parties are professing Islamic religion, it is the opinion of this study that Islamic religion has its way and principles of handling this matter which are governed by the Qur'an and Hadith of the Prophet (PBUH).

The above notion can be justified in the case of *Abdalla Seif Marijani Vs. Rauhiya Addalla Kombo*. The main disputed issue in this appeal was the maintenance of the children. Maintenance of the children is a phenomenon widely laid down in Islamic Shariah, it was the duty of the Kadhi to focus on those principles and deliver his rationale verdict by the Shariah laws and procedures. Something that has never been seen in any page of his judgment. This might render the ruling to be nugatory in Islamic Shariah.

The main responsibility of the Adjudicator in the above-mentioned case was to use the principles laid down in the Qur'an and Sunnah relating to this issue and make a decision. The study found that the majority of the court clerks, about 23 (76.6%) said that there are no specific rules used in deciding Islamic cases in Kadhi's court. The majority of the court clerks said that there are no specific rules used in deciding Islamic cases in Kadhi's court. This shows that in Kadhi's court, there are no specific Islamic rules in deciding Islamic cases something that can make the ruling to be Islamically nugatory.

1.3 Regulations used in making a legal decision in Islam

Regulations means rules or directives made and maintained by an authority. Authority means the power or right to give orders, make decisions, and enforce obedience. In other words, the State. In Kadhi's Court, there are Regulations made in 2021 by the authority (Chief Justice) upon the power conferred to him under Section 7. This means the Kadhi's Court Regulations have their origin from the mother Act which is purely and typically Common Law Act, and therefore the regulation itself has its basis in Common Law. It cannot be said that these Regulations conform with Islamic rules and procedures.

Islamic regulations which this research meant are those derived from the Qur'an, Sunnah, and Ijmaa (consensus opinion of the Muslim Scholars). That means not the regulations made by only one person who is not even practicing in Kadhi's Court.

This signifies that Muslims in Kadhi's courts are judged by using both common laws and Islamic laws used in making decisions in other cases as enshrined in the case of Naima Salum Khalfan Vs. Said Nassor Zahor (2015) AP 26. The appeal concerning the custody of the child Nadhifa Said Nassor where the decision was given based on the agreement between parties that the child would be given to the respondent when the child reached 10 years, and the Kadhis court did not decide based on the Islamic law as it is already stipulated by the Islamic law that the custody of the child will be given to the father when the child reaches 7 years. This is quite wide of the mark in determining the in Islamic cases by not following Islamic rules and procedure. But this is done due to the failure to follow Islamic shariah in making decisions in Islamic cases. According to Islamic norms and teachings; all Islamic-related cases should be judged through Islamic Shariah.

It is evident that there are no rules that are used in deciding Islamic cases, this is because the majority of the advocates, respondents, 9 (60%), agree that the regulation used Common Law principles instead of Islamic principles.

Based on these findings obtained from both advocates and court clerks, it was discovered that in Kadhi's courts, there are no specific regulations applied in deciding Islamic cases. This is because the majority of the respondents replied that there are no specific regulations applied in making decisions in Islamic cases.

1.4 Guideline Used in Making Legal Judgment in Islamic Cases in Kadhi's Court.

After recognizing that there is no specific Islamic guideline used in making the decisions in Kadhi's Court; the researcher asked Kadhi to explain the guidelines or procedures they use in making judgments in Islamic cases. The data collected through interviews with Kadhis revealed that the guidelines used in deciding Islamic cases in Kadhi's Court are the ones that are used in making decisions in other secular cases. In addition, the respondents further added that the Zanzibar Constitution strictly binds these guidelines. Besides, the guidelines utilize the common law while implementing judiciary services exercises. This indicates that Islamic cases in Kadhi's Courts are exercised ousted jurisdictions of Islamic *sharia* as the Islamic religion teaches as in the case of *Tauhida Ramadhan Abdalla vs. Ali Ali Ali* (2021) AP 52. In this case, the respondent argued that appellate Kadhi failed to give a reason for returning the case to the primary Kadhi's Court rather he gave his judgment based on one principle used in Nigeria Court instead of using Islamic law.

In addition, in the case of *Said Shaib Hamad vs Zuwena Said Suleiman* (2022) AP 39. In this case, the Appellant was dissatisfied with the decision of the District Kadhi for the divorce that the husband cannot marry again his divorced wife. The Appeal Kadhi delivered his orders without justification of Islamic Shariah. All disputed issues in this case were legal issues that need the attention of Islamic Shariah as they are detailed and clarified.

The result of this study revealed that the main guideline used in making a judgment in Islamic cases is a Civil Procedural Decree. The majority of the respondents (54%) argued that the Civil Procedural Decree is the guideline used in deciding Islamic cases. The findings of this study find that there are no Islamic guidelines in the application of Islamic cases in Kadhi's Court as it is done in other jurisdictions.

1.5 Conclusion

Kadhi's court failed to formulate Islamic rules and procedures to be used; instead; it applies normal laws to implement legal implications in making a legal judgment. This results in severe legal impacts. Muslims were judged without applying Islamic laws, Muslims disbelieved and became incredible towards Kadhi's court, and Muslims faced false imprisonment. There are different

reasons for failure to formulate Islamic rules and procedures to be applied in Kadhi's court. These reasons are the absence of a specific guiding book for handling Islamic cases while making judgments in Kadhi's court, the absence of strict law to be applied in judging Islamic cases, and the absence of Islamic guidelines in Kadhi's court for managing Islamic cases. Last but not least the above study recommends the formulation of Islamic rules of procedures to be applied in Kadhi's Court in Zanzibar to have Islamically based judgment.

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