

THE LEGAL IMPLICATIONS OF RELATIONSHIPS OUTSIDE MARRIAGE
WITH PARTICULAR REFERENCE TO THE ENGLISH TYPE OF FAMILY
LAW AND CUSTOMARY LAW IN KENYA.

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Abbreviations

1.	A.C.	Appeal Cases.
2.	A.G.	Attorney General
3.	All E.R.	All England Reports
4.	C.A.	Civil Appeal
5.	C.C.	Civil Case
6.	Ch.	Chancery
7.	C.O.R.L.R.	Court of Review Law Reports
8.	E.A.	East Africa
9.	E.A.C.A.	East African Court of Appeal
10.	E.A.L.R.	East African Law Reports
11.	E.A.L.R.	East Africa Law Review
12.	G.L.R.	Ghana Law Reports
13.	H.C.	High Court
14.	H.C.D.	High Court Digest
15.	H.A.L.	Journal of Africa Law
16.	K.B.	King's Bench
17.	K.H.D.	Kenya High Court Digest
18.	L.Q.R.	Law Quarterly Review
19.	Misc.	Miscellaneous
20.	Nbi	Nairobi
21.	N.L.R.	Nigerian Law Reports
22.	P.	Probate
23.	P.	Page
24.	Q.B.	Queen's Bench
25.	Q.B.D.	Queen's Bench Division
26.	T.L.R.	Times Law Reports
27.	V	Versus.
28.	W.L.R.	Weekly Law Reports
29.	Z.L.R.	Zambia Law Reports.

I. THE LEGAL IMPLICATIONS OF RELATIONSHIPS OUTSIDE MARRIAGE
WITH PARTICULAR REFERENCE TO THE ENGLISH TYPE OF FAMILY
LAW AND CUSTOMARY LAW IN KENYA.

INTRODUCTION

Elopement has been defined as:-

"The act of a wife who voluntarily deserts her husband to go away and cohabit with another man. The departure of a married woman from her husband and dwelling with an adulterer. Also the act of a man in going away with a woman who has voluntarily left her husband, to indulge in sexual intercourse with her.

In a more popular sense, the act of an unmarried woman in secretly leaving her home especially with a view of marriage without the parents' consent." (1)

This definition refers to two situations. (a) where a wife runs away from her husband to live with another man in an adulterous relationship (b) where an unmarried girl runs away from home without her parents' consent with an intention of getting married. The former lacks capacity to marry⁽²⁾ while in the latter case, there is no marriage because besides lack of ceremony, there is lack of parental consent.

Elopement is a phenomenon that is rising because of the rise of an egalitarian society. Besides, other factors, particularly those pertaining to the economy make a ceremony both expensive and a luxury and so the parties opt for elopement.

Elopement arises (a) where parties intend to marry at a later date, but would, until then wish to have unlimited access to each other, (b) where the parties lack capacity to marry because they have spouses from whom they have separated, and they may or may not wish to marry on resumption of capacity, (c) where the parties are under a delusion that they are married under some law. Whatever the reason or nature, elopement evokes certain legal and social considerations.

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Since the parties are staying together in a relationship Sui Generis, the question arises whether this relationship is or can be considered a marriage. The question of marriage is sensitive one "Since it affects matters of legitimacy and matters of title which stirs religious feelings which the most difficult of any why a government need cope",⁽³⁾ the question of elopement must be evaluated carefully. The parties to elopement lack compliance with the legal preliminaries to a marriage. We shall endeavour to examine the legal position of elopement.

In some instances, elopement has been treated as if it were a marriage. We shall examine the circumstances underlying this but suffice is it at this point to say that the parties to elopement experience a relationship which confers upon the parties legitimate expectations which the law ought to or has recognised.

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The high rate of elopement can be attributed to the increasing disappearance of communalistic tendencies. However, even under customary law, elopement is not unknown. The parties to it however take the earliest available opportunity to inform their parents and soon comply with the customary requirements.

Marriage creates rights and duties protecting the personality of each spouse in the human setting. It does permit development of the human personality in the environment of great intimacy and it bears with it elements of confidence, continuity and permanence. To the extent that all the above attributes can be read in elopement, for all intents and purposes, the law should accord elopement all that pertains to marriage. But, certain moral questions ought to be answered otherwise society might end up with a loose moral fabric with enormous adverse social consequences. We shall not sanction this this situation. Rather, the bona fide relationships which draw or ought to draw concrete, identifiable and maintainable emotional and passionate attributes which ⁱⁿ turn give the parties justification to obtain security for their relationship in terms of legal recognition of the same.

In Kenya, there are four systems of family law, namely: (a) English type of family law (b) Hindu Family law (c) Customary Family law (d) Islamic Family law. The English type of Family law is governed by two statutes.⁽⁴⁾ The moslems are governed by the Mohammedan Marriage, Divorce and Succession Act⁽⁵⁾, while the Hindus are governed by the Hindu Marriage, Divorce and Succession Act⁽⁶⁾. African Customary law applies by virtue of the Magistrate Courts Act⁽⁷⁾ and the Judicature Act⁽⁸⁾.

In this paper, we shall refer to statutes, Textbooks and case law which material we will obtain by library research.

Chapter one deals with the historical background to the Family law systems.

Chapter two attempts a definition of elopement. A discussion of the common law presumption of marriage shall also feature.

Chapter three shall be an undertaking whose primary concern will be an examination of the rights and duties of the parties to elopement. The positions of criminal and civil laws shall be examined.

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1. THE MARRIAGE INSTITUTION AND THE HISTORICAL BACKGROUND TO THE KENYA FAMILY LAW

In Kenya, there are four systems of family law just as there are four distinct communities to which these systems apply. The communities are African, Muslim, Hindu and European. The Africans do not have one common system as such but have as many systems as there are tribes but these systems are based on a philosophy that is common among the tribes and hence the system applying here is called "customary law". The laws of the four distinct communities have laws which are founded upon philosophies based upon the religious, political, social and economic experiences of the people concerned. These experiences are based on a definite mode of production that determines the philosophy of a community. Marx aptly says:-

"In the social production which men carry on they enter definite relations that are indispensable and independent of their will; these relations correspond to a definite stage of their material powers of production. The sum total of these relations constitute the economic structure of society - the real foundation on which correspond definite forms of social consciousness. The mode of production in material life determines the general character of the social, political and spiritual processes of life." (1)

The attitudes towards marriage and the laws pertaining thereto can therefore be traced in the philosophy of the community under study and this philosophy rests on a definite material base. The English concept of marriage as was authoritatively laid down in Hyde v. Hyde ⁽²⁾ is founded upon the belief that marriage is an individual affair and the parties should therefore exclude all others. Polygamy as an institution would not thrive in such a system because it would offend the rule enunciated in Hyde v. Hyde ⁽³⁾ by Sir Wilde who said:-

"I conceive that marriage as understood in Christendom may for the purpose defined as the voluntary union for the life of one man and one woman to the exclusion of all others ... Now it is obvious that the matrimonial law of this country is adapted to the Christian marriage and is wholly unapplicable to polygamy." (Emphasis added)

The case was decided when England had undergone revolutionary changes in the economic set up in what is known as the Industrial Revolution which changed attitudes and practises. The exigencies of industrialism strongly mitigated against communalist mode of living and hence the spirit of individualism inherent in Sir Wilde's Judgement.

On the other hand, the African mode of production allowed polygamy. Marriage was and is not an individual affair and it carries with it moral and religious obligations. It is in fact something that should be yearned for and is seen as the culmination of human achievement. One scholar says:-

"To an African, marriage is the focus of existence. It is a point where members of a given community meet, the departed, the living and those yet to be born. All dimensions of time meet here and the whole drama of history is repeated, renewed and revitalised. Marriage is a drama in which everyone becomes an actor or actress and not just a spectator. Otherwise he who does not participate in it is a curse to the community. He is a rebel, a law breaker, he is not only abnormal but "under human". Failure to get married under normal circumstances means the person concerned has rejected society and society rejects him in turn." (4)

*Apply this
100-100 P20-1000*

To an African, one does not have a choice on whether he should get married or not. Marriage is a sacred obligation. Since marriage leads to procreation, it tries to ameliorate the lost gift of immortality. (5)

The English concept of marriage is quite different. ^Pprocreation is not necessary for the consummation of marriage. (6) Marriage is a voluntary undertaking. It is a companionship between a man and woman for life to the total exclusion of all others. This is the basis for monogamy. In Hyde v. Hyde (7) even if Sir Wilde talks of "for life", the marriage institution in England is so permissive to the extent that it is not an institution sui generis that would require social participation whose rigours would require that it acquires some elements of

of permanence. Lord Denning observes correctly in a Foreward to a book⁽⁸⁾

"We have been brought to believe in the institution of marriage. It is the basis of family life which is the foundation of society. The christian concept of life is a long union of one man with one woman. Yet this very institution is threatened today. Young people are asking whether it is so sacred as their parents used to believe. Well, they may ask it."

Denning further observes in the same book that Divorces have increased twentyfold, and that the society's view of divorce has radically changed to the extent that it now even considered fashionable.

2. THE HISTORICAL BACKGROUND TO THE KENYA FAMILY LAW

Kenya is a former colony of Britain. It is a budding Nation, barely two decades old in nationhood and lacks homogeneity of culture mainly due to her colonial history.

The Africans, though having as many cultures as there are communities, seem to share certain fundamental ideas relating to marriage. The communities led communalistic lives as cultivators, pastoralists and hunters. There are therefore certain areas where the laws of respective communities intersect including the area of customary Family law. Colonialism with its market economy characteristics carried with it the so called banner of civilisation and weakened the African way of life but the basic structures and attitudes could not be corroded away particularly in the rural areas. The scramble for Africa put Africans within new borders.

Colonialism adopted certain attitudes that have shaped the present family law. The African was considered subhuman whereas the British way of life was considered the best and most civilized. The Africans were considered in their state of nature and lay at the "basement of the ladder of civilisation" they were mere "things" to be viewed with fascination just like wild animals in parks. Not that they were loved but they were a despised lot and invariably called savages.⁽⁹⁾ The court

in furtherance of this paternalism was willing to call Africans "savages without religion".(10)

The professed goal of colonisation was to civilize Africans. There was therefore a systematic phasing out of African customary law for the English law subject to the exigencies of colonialism which at times demanded that certain aspects of African traditions be left alone and as one writer observes, interference with such areas would have led to rebellion⁽¹¹⁾ It is here submitted that even if this was the case, the whole period of colonialism was riddled with rebellion culturally and otherwise. For the values that were sought to be imposed on an otherwise African experience that had established roots for time immemorial would not only be extremely difficult but wanting in logic because the standards being used were foreign. The concept of justice prevailing for instance was foreign. Section 20 of the East African Order in Council, 1897 provided that the substance of common law, doctrines of equity and statutes of general application applied while the courts were to be guided by customary law in all civil and criminal cases, so far as it was applicable and was not repugnant to justice and morality. The influence of English law in customary cases was enormous since the higher courts were English and could through "justice and morality" catch-phrase invalidate any decisions of the African courts which were not viewed favourably by English law. The Africans courts were to be merely guided by customary law and not bound by it. Hence it can be said that English concepts applied with overwhelming impact notwithstanding that there seems to have been a recognition that justice and morality are subjective values as Wilson J. observed:-

"Morality and justice are abstract conceptions and every community probably has an absolute standard of its own by which to decide what is justice and morality ... To what standard, then, does the order in council refer ... I have no doubt whatever that the only standard of justice which a British court in East Africa can apply is its own British standards.(12)

There seems to have been a contradiction among the British Jurists on this fundamental concept which was always resolved with the background that the African system was substandard. Perhaps, Wilson J. was not considering the African community as a community for the purposes of his decision such that in deciding what law applied to the Africans, their own law could not be applied since it was deemed to be no law. The game continues in post independence Kenya due to the background of the prevailing dominant ideas and particularly that the leaders are of British training. It is not uncommon to find attitudes that favour the English type of family law on the pretext that the English type of family law is in line with the modern new state.

Colonial paternalism led to the operation of the law that was akin to apartheid. The different communities were allowed to have different marriage laws. The dominant colonial legal system was intended to ultimately replace the others. The emerging situation was that each race had its traditional marriage law as its basic law. English law, adopted in some insignificant respects to meet the peculiar needs of the "civilised African" was promulgated to facilitate anglicisation. The Indians looked to India for cultural guidance while amongst the Africans different laws united in what is known as customary law applied.

Colonialism operated within the framework of capitalism. This mode of production struck a blow to the communalist life among the African indigenous groups. The Africans, having had their land taken away by the settlers had to migrate to European farms in order to pay the taxes imposed upon them by the colonial government. Inevitably, the African family composition disintegrated and ultimately the sum total of this was the deculturalisation of the Africans though the tenets of precolonial life could still be evident in the rural areas. Hence the new developments directly affected family life such that marriages could not be celebrated the way they were during the precolonial times.

As aforementioned, paternalist ideas mitigated against dispassionate and unbiased application of the law. The colonial jurisprudence was deemed superior and was or was intended to be transmitted wholesale into the East African colony. This was done notwithstanding that Africa was a foreign land with a distinct culture and indeed in recognition of this fact, Denning L. J. said:-

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"The next proviso provides however that common law to apply 'subject to qualifications as local circumstances render necessary'. This wise provision should ... be liberally construed. It is a recognition that common law cannot be applied in a foreign land without considerable qualification. Just as the British oak, so with common law. You cannot transplant it in the African continent and expect it to retain the tough character which it has in England ... so with the common law. It has principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all world over."¹⁹
(Emphasis added). (13)

Laudible as Denning L. J.'s statement may be, it seems to suggest that in the ultimate system of law to be adopted is the English type of law. At best, he suggests that English common law respond to established African values by necessary modifications yet in the same breath, he considers the English common law as being the "justice and good sense to be applied to people of every race and colour to all world over". Hence African values had to be phased away gradually to give way to British jurisprudence. Denning's statement therefore could not be said to preserve African values but rather provide a better tactic for the final phasing out of all law save English common law. It is hereby submitted that there was no moral justification for the imposition of foreign law in Africa to the detriment of established African values.

The classification of wrongs into civil and criminal hitherto unknown to the Africans was extended to apply to the two communities. The colonialists also introduced the institution of the court. Prior to this, the Africans traditional and muslims had their own system of elders who settled disputes

In the case of the former while the latter had religious leaders at hand to settle disputes among muslims. The courts were therefore a new institution. The personnel manning these courts were essentially of British legal training and were least disposed to the conditions and customs of the colonised. These people, imbued with paternalistic tendencies were expected to and did apply the law such that the supremacy of the British way of life was manifest. In fact, the needs of colonialism demanded no less.

The foundation to the present Kenyan family law was laid by the 1897 East African Order in Council promulgated under the 1890 Foreign Jurisdiction Act. The order in Council gave the commissioner powers to make regulations for the proper administration of justice. Acting under these powers, the commission passed the 1897 Native Courts Regulations. These regulations⁽¹⁴⁾ indicated that the colonial government did not intend to interfere with the personal laws of different communities. They made it clear that there was to be a class of native courts manned by Europeans which was to apply the Indian penal code inter alia. They also provided for the application of islamic law in the relevant jurisdiction. The 1897 order in Council provided for the application of Indian Acts of Parliament such as the Indian Evidence Act and the Indian Divorce Act, 1869 and the Indian Transfer of Property Act. These Acts were codifications of the English law and applied to Europeans. Article 11 (a) of the 1897 East Africa Order in Council is the first version of Section 3 (2) of the Judicature Act.⁽¹⁵⁾ The 1897 regulations retained their basic form even though they were repeated by the promulgation of the 1907 Courts Ordinance.⁽¹⁶⁾

In 1902, there was passed the East Africa Order in Council to replace the one of 1897. Section 20 of the 1902 East Africa Order in Council provided for the application of customary law. This is the second version of S. 3 (2) of the Judicature Act. This order in Council however did not provide for the application of English law. However, this omission was made good by the 1911 East Africa Order in Council whereupon S. 3 (2) of the Judicature Act got its present form.

in 1902, there was passed the East African Marriage Ordinance. This was an ordinance whose intention was to provide the law for the English people. The ordinance contained provisions relating to form and capacity in marriage. In 1904, the Native Christian Marriage Ordinance was passed. This was the first version of the present African Christian Marriage and Divorce Act.⁽¹⁷⁾ This ordinance made provisions to cater for those who accepted the western way of life. This meant that any person, being non English and having married under the ordinance abandoned his personal law totally and embraced the English way of life. Basing its decision on a law akin to that in Kenya, the Nigerian Court in Cole v. Cole⁽¹⁸⁾ held that an African who accepted the western way of life abandoned his customary one completely. But this decision seems to have been out of reality. For as the Kenya Commission on the law of Marriage and Divorce⁽¹⁹⁾ at paragraph 50 observed it is not uncommon for Africans who had contracted marriages under the Marriage Act or the African Christian Marriage and Divorce Act to acquire other wives while such monogamous marriages are still subsisting. This is notwithstanding the provisions of section 50 of the Marriage Act that provides that such persons would be committing a criminal offence. Moreover, criminal prosecutions based on this section are few and far between. In fact before a statutory marriage can be contracted certain preliminaries like negotiation for and payment of dowry must be observed. In most African communities it is accepted that without dowry, a statutory marriage may not be contracted. It must be observed that payment of dowry is very central in these communities customary laws.

The purpose of the introduced law was to enable Africans to contract monogamous marriages because this was the only form of marriage recognised in English Family Jurisprudence. In Hyde v Hyde⁽²⁰⁾, the court held that that was the only kind of marriage known in christendom. Even within the context of English law, such import would definitely be subject to challenge because it cannot be authoritatively asserted that the English system was then or has at any time been purely christian. This was a situation where a faith was being equated with a culture and by opting for a marriage under the ordinance, the African was being deemed a christian and

by extension, a western culture convert. Whereas, it could be true to say so in respect of a few African cultural turncoats, to say so of the whole African race would obviously be wrong.

There were a series of amendments to the marriage laws that eventually the marriage laws took their present form. (21)

The paramount attitude was that the indigenous customary law was inferior. Indeed, until 1963 when the matter was put to rest, it was still open for the argument that the African customary marriage was no marriage. In R V Amkeyo (22) Hamilton C.J. held that for the purpose of the law of evidence, the African customary was not a marriage. He said;

"The use of the word "marriage" to describe the relationship entered into by the African native with a woman of his tribe according to tribal custom is a misnomer ... there is no limit as to the number of women that may be ... purchased by one man ... I do not think that it may be said that nature custom approximates in any way the legal idea of marriage."

Yet, the same Hamilton C.J. in R. V. Odar Odegu (23) held that such a marriage was a valid in what seems to be a contradictory judgement to his earlier one. It is clear that there was an inclination on the learned judge to arrive at a conviction rather than an acquittal and use all sorts of tricks to do so. It is particularly disturbing in view of the fact that notwithstanding a privy council decision to the contrary (24), throughout the colonial period, the judicial circles were prone to put the issue of the validity of the customary law marriage to debate. It is here submitted that African customary law was not treated with the seriousness it deserved. In not giving this due respect, the court in the Amkeyo case was involved in a transparent and flagrant abuse of the principles upon which the marital privilege for the purpose of the law of evidence was based.

R. V. Amkeyo (25) was followed in Tanganyika in Laila Mawji V.R. but this case was later overruled by the privy council where it was held that the term "husband and wife" applied equally to an African couple in Tanganyika.

It is in this treatment of the African that the seemingly contradictory judgements on the issue of elopement must be evaluated. For the courts have had occasion to be invited to give effect to elopement and in failing to do so, the courts have at times applied the English concepts as regards formalities to leave aggrieved parties without remedy. On occasion, the courts have applied the English equivalent of elopement, presumption of marriage with disastrous results. For failure to comply with formalities in common law does not necessarily deny the aggrieved party remedy. Rather, where the parties have had long cohabitation, this in itself raises a presumption of marriage which can be rebutted. This is where this concept differs with the African concept of elopement as will emerge later in this paper.

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CHAPTER TWO

ELOPEMENT

1. DEFINITION

The term elopement refers to the relationship existing between parties who are cohabiting outside marriage. According to dictionary definition, it refers to the act of a wife who deserts her husband to live with her lover while in a more popular sense, it refers to the act of unmarried woman who secretly leaves her home to live with a man.¹

However, no proper definition of elopement has so far been offered. Each definition has had shortcomings in one way or another. Various terms like, special friend, current companion, domestic associate to describe the parties to elopement have not offered conclusive assistance in the definition of elopment.² Various judicial alternatives are mentioned in the law but they are not of common use. These include illegitimate wife and illegitimate husband, defacto wife and unmarried housewife. In common law use are common law wife and mistress both of which are expressive but inaccurate.³

It is those relationships which are capable of being defined in terms of marriage that are accorded legal recognition. In other words, a cohabiter, as a matter of tendency is defined in terms of spouse⁴. This definition is consistent with the tendency to presume that a couple living together are married. In Re Taplin⁵, a couple lived together for ten years and held themselves out as husband and wife. The childrens' birth certificates recorded the marriage of their parents but there was no record in the appropriate register of marriages and there was a reference in a deed of covenant by the children's paternal grandfather to his son's reputed children. The court ruled that the absence of any entry in the relevant register of marriages and the words in the deed of covenant was insufficient to rebut the presumption of marriage.

The legal definition of cohabitation depends upon the qualitative and quantitative nature of the cohabitation and the purpose for which it is being claimed or denied that a couple are cohabiting. A distinction for example is drawn between short term and long term cohabitations, between the casual affair and the stable relationship, between relationships which have resulted in children and those which have not and between couples who live together and couples who do not.

A critical examination of elopement with a view of defining it is an exercise that leaves one more confused than he began. It would require definitions and counter definitions and one wonders whether it is really worth the effort. It would be a comprehensive summary of the marital phenomenon to say that elopement refers to the relationship existing between a couple that has not complied with the requirements precedent to enjoying the reputation of being married. In the long and short, elopement refers to the relationship that is wanting in formalities. Even in a traditional African society, elopement means what it means to an English setting. It refers to a situation where the woman leaves her parent's home to go to live with a man in a relationship similar to that of a married couple.

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Marriages in traditional African societies were based on particular standards. Elopement was not fashionable therefore elopements were rare. Normally, the parties resort to it due to hindrances that stand in their way. Lack of dowry for instance might lead to it. This arises out of the parties' feeling that they cannot wait any longer in order that the required dowry is raised. Besides dowry being a very central institution in marriage, it gives the parents the opportunity to wield a heavy hand in marriage arrangements. Given that the parents cannot give consent where the prospective husband has not met his obligations as regards dowry, the parties resort to elopement hence bringing in the second issue, lack of consent. Parties to elopement rarely desire to enter into marital life in a manner not authorised. They are forced by circumstances. Traditionally, marriage was a family affair⁶. The family was under obligation to collectively enable a member to pay dowry to ensure that he

undertook a most fashionable traditional marriage. Hence elopement was very rare.

Elopement in the western sense can be possible without the parties intending that the relationship be permanent. The conditions leading to it as existing in a traditional African setting are, to say the least non-existent. Therefore, the parties enter it not in consequence of compulsion but rather as a matter of choice. It is therefore a system that is so permissive that it would be an irrelevant enterprise for the court to inquire into the intentions of the parties as regards the duration of the cohabitation. Hence, the court is content to presume a marriage by enquiring into the parties presentation and the reputation enjoyed thereof.

In the traditional setting on the other hand, parties to elopement tend to resort to it due to conditions existing in the way of a fashionable traditional marriage. Hence, inherent in this relationship is the desire of the parties to give their cohabitations the blessings of permanence. Thus are the essentials of elopement:-

- (1) The girl must live with a man without parental consent.
- (2) There must be an intention to formalise the relationship as soon as is practicable or else it might be contrary to social policy for the parties to live together without the intention of permanently doing so. The intention might be formed during the subsistence of such unlawful cohabitation. Lack of intention means that the parties to it might never formalise it and hence make it a marriage.
- (3) The parties must subsequently comply with the legal requirements of an ordinary customary marriage.

The society entrusts the parents of the parties the task of bringing up the child hence once the parties have eloped, the first thing to do is to inform the parents and therefore by extension to society.⁽⁷⁾ This is done in accordance with the requirements of a particular community. Under Kikuyu customary law, for example, where the parties fail to make such report,

the family or the girl send girls to inquire about the whereabouts of the girl and with whom she has eloped. The elopees then give the girls a goat as a manifestation of their commitment to comply with the formalities in due time.⁽⁸⁾ Afterwards the formalities are complied with.

Where the parties may not intend to marry, they signify this by either failing to report the elopement or refuse to give the goat. The woman's parents either:-

- (i) Claim for "Ruracio" (the marriage consideration) from the man who has eloped with their daughter. There is a meeting of elders and the man is asked whether he intends to marry the girl. If the answer is in the affirmative, then the man undertakes to pay the "Ruracio" within the conditions set at the meeting.
- (ii) In case the man does not wish to marry the girl, then he is liable for fornication. He is considered not married to the girl and therefore in accordance with Kikuyu customary law, the parents of the girl have the right to obtain compensation for fornication of their daughter. However, this remedy is not available when it is clear that it is the girl's parents who are refusing to grant consent to the marriage which refusal is unreasonable.
- (iii) Sue for pregnancy compensation where the elopement leads to pregnancy.

Therefore, for elopement to be given the sanction of society the parties must show an intention to marry or else the man finds himself in a situation where his ~~he~~ has to meet the consequences of his "fun".

2. FACTORS BEHIND ELOPEMENT

Elopement occurs in several situations. Firstly, it may occur where the parties are so passionately disposed to each other that the idea of seeking the consent of their respective parents and the formalities pertaining thereto might delay their cohabitation. This ^{is} a living fear because the parents of the girl are prone to ask for dowry as a condition for giving the

required consent. In most cases, the husband to be might not be in a position to worsen the dowry. Originally as we shall soon see, the economic set up enabled the family of the man to pay the dowry. Now that this is increasingly not the case, the man is left with the burden of meeting the requirements of dowry.

Secondly, elopement might result in cases where the parties originally engaged in illicit sexual relations. In communities where the discovery of such leads to certain consequences especially social shunning for the girl, the man might decide to elope with the girl to save her from embarrassment particularly when such illicit intercourse leads to pregnancy.

Thirdly, elopement may result where the parties are denied consent by their parents for whatever reasons other than that the parties fall within prohibited degrees. For the parties consider themselves aggrieved when the consent is denied unreasonably. Moreover in the case where the parties fall within prohibited degrees, theirs cannot be elopement since one of the essentials of elopement is eventual compliance with the requirements of a valid marriage and since here there can never be compliance with the requirements, it can never be elopement but an illicit union which can be subject to customary actions. Where the consent has been unreasonably denied, the parties elope to force the hands of their parents.

In the rural areas, the way an individual leads his life is subject to the general dictates of the community of which he is more likely to succumb to public pressure and eventually comply with the formal requirements. But in the wider Kenyan context, marriage can no longer be claimed to be purely communal an affair. The respective families of the parties are only given, if at all, a minimal role to play. The economic situation forces people to face problems individually. The husband to be, even in the rural areas cannot expect much assistance from the community in meeting his marriage obligations. This is partly due to the fact that the father has numerous burdens about the family that he is unwilling to shoulder the son's burdens relating to marriage. Moreover the formal education son's get is seen as replacing the father's responsibilities

to him. Parties are able to fend for themselves and are therefore less dependent on their parents. Consequently, parental control is diminished. This diminished control has in turn given way to some measure of autonomy which is a very fertile ground for elopement or other relations outside marriage. In fact the new economy introduced in Africa has bred a new class of what one writer describes as "adventurous African". Marriage is seen as a union of two spouses alone. The traditional economy has been completely weakened; inter tribal marriages and other related developments in the area of family law have resulted in change of attitudes as one writer asserts: ⁽⁹⁾

"In recent years, the law governing the family and analogous units has been in a state of transition throughout the world. At the same time, there have been radical changes in the nature and structure of domestic relations. Legal changes are not however the cause of institutional changes as much as they are a manifestation of shifts in underlying values. In particular the last decade has seen an ever increasing focus on the needs and desires of the individual in contrast to the traditional emphasis on family and other personal relationships. While the focus on the individual may tend to operate to the detriment of the family as a unit, this same focus has led to equality of partners. Similarly, concern for the rights of individuals may lead to a lessening of parental authority but at the same time has resulted in the blurring of the destination between legitimate and illegitimate children."

This long quotation summarises the current situation. In fact, cohabitations without marriage for most legal purposes have been treated as though they were marriages. ⁽¹⁰⁾ In one case ⁽¹¹⁾ the court held that the English law of presumption of marriage applied where the parties had a long cohabitation as husband and wife and have been accepted as so by the community. There the court here considered urban trends. With respect, the court should have applied the African concept of elopement because part of the requirements of a valid customary marriage had been complied with namely part payment of dowry.

There has been a marked increase in the number of couples living together without the marriage ceremony. The law has tended to respond to this phenomenon by treating the relationship

as though it was a marriage. Indeed there is an inclination for the courts to give effect to a stable relationship.

3. PRESUMPTION OF MARRAIGE UNDER COMMON LAW

It is now settled in law that where a cohabiting couple hold themselves out as husband and wife, this in itself raises a presumption that they are legally married. It is upon the person alleging want of legality to prove that there is in fact no marriage. It is not upon the parties alleging the marriage has been solemnized. ⁽¹²⁾

There are two attitudes inherent in this legal presumption. Firstly, that sometime, there was solemnisation of the union and secondly that the parties had capacity to marry.

(a) PRESUMPTION OF FORMAL VALIDITY

This is a presumption that the parties went through a ceremony of marriage that was valid in all material form. This is a rebuttable presumption and it cannot stand in the light of evidence that in fact there was no such ceremony. In Re Bradshaw ⁽¹³⁾ it was rebutted by evidence that the parties had subsequently undergone a ceremony of marriage. In this case Bennet J. said:-

"I cannot bring myself to believe that they would have permitted these things (declarations of bachelorship and spinstership respectively to be done if the truth had been that they had been validly married to each other many years earlier." (Emphasis added).

The presumption can be also rebutted by evidence that that there were some formal defect or defects rendering the purported marriage null and void. But one must satisfy the tribunal beyond reasonable doubt. ⁽¹⁴⁾

(b) PRESUMPTION OF CAPACITY

This capacity is ~~discussed in Chapter Two, and it~~ is presumed when the parties have represented themselves as husband

and wife and have been accepted as such by the community. This presumption is rebuttable by evidence being led that the marriage is in fact a nullity owing to the fact that the parties did not have such capacity. The question might arise as to what evidence is sufficient to rebut this presumption. There is no authority as yet on this matter but as a tentative proposition, one writer¹ contends that the presumption in favour of validity of the marriage is rebutted if any evidence is availed that the parties lacked capacity, and the question has to be decided on a balance of probability in the light of all available evidence. It might be easier to prove that the parties were not of age at the time of marriage or fell within prohibited degrees of consanguinity and affinity than proving that there was a subsisting marriage to either or both parties then. Whether or not a spouse of an earlier marriage was living is always a question of fact.¹⁶

From the discussion above, there seems to be some difference between elopement as known in customary law and the common law presumption of marriage. The latter is rebuttable while the former is not. The former is only possible in circumstances where the parties cannot do otherwise while in the common law presumption of marriage, the parties have some measure of choice. A further observation is that due to the rebuttability of the common law presumption of marriage, the union is essentially impermanent while as discussed, elopement must comply with certain requirements because it has been accepted as a stage in marriage.

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4. THE JUDICIAL ATTITUDES TOWARDS ELOPEMENT IN KENYA.

Generally, the courts in Kenya have treated elopement as though it was a marriage in the few decided cases on this subject, many of which are discussed under various heads in Chapter Four. In doing so, the courts tend to be responding to a standard phenomenon. It has been observed that:-

"... there has been a substantial increase in the number of couples living together without the benefit of a ceremonious marriage or the requisites of an informal one. The law has tended to respond to this phenomenon by treating married and unmarried couples similarly. Indeed, it has been suggested that marriage as a legal concept may no longer be necessary." (17)

Elopement is a fact and has been accepted as such. The law would therefore be relevant if, for legal purposes it failed to recognize the union. New moral standards have evolved and in giving elopement judicial recognition, the law is keeping abreast with the realities. What is immoral ought to be adjudged by current standards of morality. One Australian judge correctly says:-

"... the sacred judgements of today upon matters of "immorality" are different from those of the last century as is the bikini from a bustle." (18)

In recognising elopement, the courts show an inclination to conform to the expectations of the parties especially when there is nothing in public policy against it. The courts indeed should avoid invidious comparisons with persons who are living in a lawfully established family.

There is need to fix liability on persons living in a family like relationship. Further, recognition of elopement protects the community from the burden of catering for those who would otherwise be entitled to social assistance.

Elopement in East Africa has been treated as a customary law phenomenon and treated as though they were marriages. In one case⁽¹⁹⁾ however, the court failed to hold as elopement where it should have. Here, the parties had shown intention to formalise the relationship and the man had paid part of the dowry. All this constitutes elopement. The court however considered the missing "Ngurario" ceremony to hold that this was not a valid Kikuyu marriage.

In some instances however, the courts have held elopement to be a valid customary law marriage. In Zipporah Wairumu v. Paul Muchemi,⁽²⁰⁾ the parties were of the Kikuyu tribe. The plaintiff claimed custody of four children, 3 of whom she had had with the defendant with whom she had lived for 6 years. She claimed that the relationship was not a marriage since certain requirements of a valid Kikuyu customary marriage had not been met. The defendant on the other hand argued that they were married as he had paid part of the dowry after they started

conabiting. He claimed the custody of the children as entitled under Kikuyu customary law. There court held that there is a valid customary law marriage were part of the dowry has been paid and the parties live like married people under customary law, although some of the requirements of a marriage remain unperformed. In not many words, the court was addressing itself to elopement and seems to have considered a marriage. This contradiction will be evaluated in the conclusion. There are a few other cases on the subject which are discussed in the following Chapter.

In two cases, ⁽²¹⁾ the courts resorted to the common law presumption of marriage. With respect, it was unnecessary for the courts to do so when they could as well have relied on elopement to reach its decision.

CHAPTER THREE

THE LEGAL IMPLICATIONS OF ELOPEMENT.

Marriage creates status. It creates the condition of belonging to a particular class of persons whom the law assigns certain legal capacities or incapacities.¹ It is a public institution because the family is the "cornerstone of any nation". Therefore, society has established standards which must be complied with for it to accord recognition of any marriage and confer upon it peculiar legal capacities or incapacities which in turn determine privileges, rights and duties accorded to married couples and the effect of the same to third parties.

However, the strict law pertaining to strict compliance with formalities has been modified to extend the rights, duties and privileges to parties who, though having not complied with the legal preliminaries lead lives as though they were married. No longer does the society believe in the view expressed by Lord Asquith in Grahams v. Evans² when he said:-

"To say of two people masquerading as these two were, as husband and wife (there being no children to complicate the picture) that they were members of the same family seems to be an abuse of the English language."

The word family has now acquired new meaning that ordinarily parties living as husband and wife but without having gone through the formalities are considered as though they were married.³

This Chapter will consider the legal implications of elopement as it now stands both in criminal and civil law. These are areas where elopements raise legal implications which either positively or negatively affect partners living as though they were as husband and wife.

(A) CRIMINAL LAW

(1) BIGAMY⁴

This is an offence committed when a person, having been

monogamously married, goes into a ceremony of marriage with another person, a ceremony which would be valid but for want of capacity inherent in it.

There are very few prosecutions for bigamy in Kenya but given that the law of bigamy has ^{not} been repealed elopement is likely to be interrupted by bigamy proceedings. Since the law in most instances treats elopement as though it was a marriage, then it might be construed to deny capacity for one to enter into a "second marriage" during the subsistence of the cohabitation.

(ii) THE DEFENCE OF PROVOCATION IN MURDER CASES

This a defence available to diminish criminal liability in murder cases. When successfully pleaded, provocation, will lead to a reduction of the murder charge to that of manslaughter and at times, it can even lead to an absolute acquittal. Under the law⁵, the spouse who murders his mate's lover is either absolved of criminal liability altogether or is entitled to plead guilty to a lesser charge of manslaughter in case of a murder charge.

In Kenya, it was held⁶ that the defence of provocation is available to a cohabitee who murders on discovering a stranger to the cohabitation in bed with the other cohabitee.

There is no clear authority in Kenya as to what type of cohabitation enjoys this privilege but in one Zambian case,⁷ the criterion was to be the stability of the relationship. The law was stated as follows:-

"Where a man and a woman are living together in a stable relationship but are not formally married either under statute or customary law, it seems to us quite unrealistic to suggest that the depth of feeling for one another must be less than if they were married."

Courts in Kenya have tended to consider the intimacy or "depth of feelings" treated in the parties by the cohabitation in determining whether the circumstances are such that one can say that the party is likely to be provoked to murder on finding

a stranger to the cohabitation in a compromising situation with his fellow cohabitee.

(iii) COMPETENCE AND COMPELLABILITY IN THE LAW OF EVIDENCE.

The Kenya Law of Evidence is derived from the English law of evidence. It is contained in the Evidence Act (Cap 80) which itself is a "duplicate copy" of the Indian Evidence Act, 1872 which applied to Kenya prior to independence that it, during the colonial era.⁸

Generally, a spouse is not a competent witness against the other in a prosecution and cannot be compelled to disclose communication made during the subsistence of the marriage⁹. This rule is based on the recognition of the fact that marriage creates a highly personal relationship and it is in the interest of the very vital institution of marriage that spouses enjoy some privileges not ordinarily enjoyed. It is also humanely possible that a spouse reveals to the other very confidential facts and given the very special nature of the marriage institution and the fact that it needs to be so maintained, a spouse needs at least someone who can be imbued with one's inner feelings, successes and failures and at law, this person, the spouse cannot be compelled to disclose confidential communication obtained in matrimony.

Cohabitation does evolve expectations akin to those of married couples. Marriage is in the evidence Act defined as follows:-

"In this section, "marriage" means a marriage, whether or not monogamous, which is by law binding during the life time of the parties thereto unless dissolved according to law, and includes a marriage under native law or tribal custom."¹⁰

Prima facie, this section does not cover cohabitation outside marriage. There is no clear authority whether the privileges as regards competence and compellability of spouse in the ^{area} of evidence extends to cohabitess. But, it is submitted that the principles underlying this provision do encompass elopement. Moreover, as a matter of practise, whenever this

privilege is sought, the courts do not normally require that the alleged marriage be strictly shown as having complied with the formalities of marriage.

(iv) ENTICEMENT

This is an offence committed when a person induces another to leave his or her matrimonial home.¹¹ This enticement invariably leads to cohabitation and inevitably, in a prosecution for enticement, this cohabitation is susceptible to disturbance.¹²

B. CIVIL LAW

(a) CUSTOMARY FAMILY LAW

1. WHEN THE COHABITATION IS THE FIRST ONE FOR THE PARTIES

(i) Action for fornication - It is common knowledge that sexual intercourse is an essential aspect of cohabitations outside marriage. Where, under the putative customary law, parties to it are not recognised as husband and wife, the father of the girl can sue the man cohabiting with his daughter. However, in Kenya, no court case has reached the higher courts on this issue but one writer has noted that this action is available among the Taita and Kikuyu ethnic communities.¹³

Fornication is a civil wrong in those African communities where it applies. It is considered a wrong for one to have a sexual relationship with a woman otherwise than in a marital relationship. This wrong is capable of being committed regardless of one's marital status. The African community at large considers children part and parcel of the whole community. They belong to it and the father is deemed to be entrusted with the duty of bringing up children on behalf of the community. This wrong is therefore committed to the community whose "agent", the father of the girl is entitled to compensation. But now, this situation seems to have changed with the fast changing values occasioned by the mode of economy Kenya has adopted. This mode of production (capitalist) has adversely affected African communalistic values and it is doubtful whether the

courts will entertain this action for damages for fornication. Moreover, elsewhere, the courts have shown extreme reluctance to entertain the action.¹⁴ Judges are prone to act in accordance with the standards of the culture that bore them and it is not surprising that this customary claim would not be considered favourable since the English culture does not know it and our Judges are either British or of British legal training.¹⁵

(2) Pregnancy Compensation - If the cohabitation results in pregnancy, the father of the girl can bring an action for pregnancy compensation under the relevant customary law.¹⁶ In Ndegwa v. Wandurwa,¹⁷ this action was maintained. The Africans are of the view that when fornication is committed, it is a wrong committed to the family whose head is entitled to compensation.¹⁸ Pregnancy compensation proceedings emerge from the assumption that the offender is not married to the girl and if they are successful, they will disturb the cohabitation.

(3) Affiliation proceedings to procure maintenance of a child born outside marriage.

In Kenya, during the colonial era, the marriage law applying to Europeans was always amended to keep abreast with the developments of law in England. This was done to enable the Kenya cononists to have the same kind of life led in England. When he moved the 1939 Matrimonial Causes Bill, the Colonial Secretary said:-

"The present law relating to divorce in this country was enacted as far back as 1904, and since then, there have been very important Acts passed at home: One as recently as 1925 and the latter one in 1937 ... This Bill now before the Council brings the law of this colony relating to divorce, etc into line with that at present in force in England."¹⁹

This matrimonial cause ordinance was amended in 1952 to reflect changes that had occurred in England in 1949.

In accordance with this spirit, the committee on young persons and children, 1953 recommended that English Affiliation

law be applied to Europeans.²⁰ But the relevant customary law applied to Africans.²¹ In 1959 the Affiliation Ordinance which was based on English law and which was to apply to all communities including Africans was enacted. Due to pressure from the Africans against it, it was repealed in 1969.²²

The Affiliation law assumes that a child is entitled to maintenance from the father. In African tradition, the child born outside marriage belonged to the mother's family²³ and the child's right to maintenance and inheritance is enforceable against the girls' family members. In some communities, the father is entitled to the custody of the child on condition that he makes certain customary payments.²⁴ Yet in others the father can obtain custody of the child without making any payments at all.²⁵

✧ A child who is the subject to maintenance proceedings by an unmarried mother sometimes can occur during the cohabitation. If the mother is by the conduct of the father of the child, is not living with the father, then, if the cohabitation as it does in most cases, confers rights and duties true of a marriage, then the action can be maintained.

(4) Breach of promise to marry.

Some cohabitations are accompanied by mutual promise to marry.²⁶ The cohabitation may be precedent or subsequent to the agreement. Under customary law, no action for breach of promise to marry lies.²⁷ But under common, this action lies.²⁸ In case v. Ruguru, it was held that since the parties regulated their affairs in accordance with customary law, it was this law that applied to them. The court further held that under the law applying the parties were not married as the one of the essential requirements to wit, the Ngurario ceremony was missing.

(5) Claims based on the existence on non existence of a customary marriage.

When the cohabitation ends, a party to it or a third party may make claims based on either the existence on non existence

of a customary marriage. The following claims may be made:

- (i) damages for the enticement of an unmarried woman.
- (ii) dowry which is claimed by the man's family
- (iii) the return of the wife to the man to the alleged husband.
- (iv) the custody of the children.
- (v) maintainance for the wife and children.
- (vi) divorce which seeks to dissolve the purported marriage
- (vii) inheritance when it is claimed that the survivors are widows and children of the deceased.

(i) Claims for dowry and damages for enticement of an unmarried girl.

Generally, under customary law, there is a duty upon the family of the husband to pay dowry to the family of the wife,²⁹ Dowry, as discussed in Chapters Two and Three is a necessary prerequisite to a valid customary law marriage, unless it is waived. It is normally paid in form of livestock, cash or labour depending on the community in question and it can be paid in instalments. This dowry signifies formal consent to the marriage where there has been a cohabitation before all the requirements of a valid customary marriage have been met. When such cohabitation has taken place, the family of the woman cohabitee can claim dowry, in recognition of the fact of the elopement and that the parties want to go on with it anyway. In Nyakanga V Mehero³⁰, the appellant claimed unpaid dowry from the respondent who had eloped with his daughter. The court held that the elopement had resulted in a customary marriage under Kikuyu customary law and ordered that the dowry be paid. Thus, the respondent could not be heard to deny the marriage since, as mentioned in chapter 3, elopement is but a stage in marriage but of a special type since some cases arise where it is treated as though it is a marriage.

(ii) Custody

The court may be required to decide which of the two parties cohabiting outside marriage is entitled to the custody

of the children. In determining matters of custody, the welfare of children is the overriding consideration.³¹

In Africa, the child, who is considered as belonging to the society is bestowed to the custody of a party depending on the applying customary law. In some communities as aforementioned earlier in this Chapter, the woman's family has right to custody where the dowry has not been paid while in others it is the husband who is entitled to the custody of the children whether or not dowry is paid. But in all cases, the married couple has all rights of custody. In those societies where custody is bestowed on the husband on payment of dowry, where this has not been done the woman is not considered married to him and anyone who can pay dowry and therefore married the woman automatically assumes custody unless he abdicates it.³² In Lerionga ole Ntutu v. Sundoi ole Sindena,³³ the court held that the children belonged to the girl's family notwithstanding the cohabitation since under customary law, if the mother is not married to the father of the child, the child belongs to the mother's family.

(iii) Claim for maintainance and order for non-cohabitation

Basing a claim on the fact that there was elopement and that it should be considered a marriage, the woman can claim to be maintained and have an order for non cohabitation made in her favour. In one such case, Mary Wanjiku v. Peter Hinga,³⁴ Mary Wanjiku contended that she was married to the defendant under Kikuyu customary law and claimed inter alia for (a) maintainance (b) custody of children (c) and an order for non-cohabitation ten years earlier, she and her children had left the "matrimonial home" after a series of violent confrontations with her "husband". The defendant thereafter got married to another woman monogamously in the church. In the suit, he contended that the plaintiff was not his wife.

The cohabitation had been occasioned by the plaintiff's pregnancy while in school. Children born to the two cohabitees were named in accordance with Kikuyu customary law. The man then started neglecting the family. The plaintiff then left the home whereupon the defendant in accordance with Kikuyu

customary law went to negotiate the return of his wife with her parents. The court held that under Kikuyu customary law, the plaintiff was the wife of the defendant as he had paid part of the required dowry. The court then proceeded to consider the welfare of the children and in the circumstances awarded them to the mother. The court further ruled that the plaintiff was entitled to maintenance. Order for non-cohabitation was accordingly issued. A divorce order was issued.

(iv) Divorce

When elopement is treated as though it was a marriage, then it follows that it can only be dissolved by way of divorce. A preliminary question may arise whether the marriage sought to be dissolved is a marriage at all. In Barthazar v. Mary Benedicto³⁵, the petitioner petitioned for divorce. He had been with the defendant for 17 years and had had 6 children with her. The defendant claimed that there was no marriage to be dissolved since the petitioner had not met his dowry obligations as required. The court held that payment of dowry was not essential in a customary marriage and therefore the divorce granted to the lower court was proper. With due respect, the court ought to have applied the common law presumption of marriage to arrive at the decision it did otherwise there is no customary marriage possible unless there is full, partial or promise of payment of dowry.

(v) Inheritance

Inheritance issues always arise when one is dead and it is to be determined who his or her heirs are as the case may be. One's heirs always include the spouse and children. The relatives of the deceased wishing to disinherit the surviving spouse might contend that the spouse was not such to the deceased.

The courts have shown an inclination to protect the surviving cohabitee and have often relied on the common law presumption of marriage. In Yawe v. Public Trustee,³⁶ the Public Trustee petitioned the High Court to determine inter alia whether the appellant who had cohabited with the deceased without complying with the formal requirements was the deceased's

widow for the purposes of inheritance. The appellant, belonging to the Kikuyu tribe contended that she married the deceased, a Muganda under Kikuyu customary law. The trial court relying on Cotran's Restatement³⁷ rejected this argument. On appeal, the relatives of the deceased challenged the alleged marriage. They recognised the children as heirs but not the wife. The East Africa Court of Appeal held that the presumption of valid marriage was known in customary law, which presumption had not been rebutted and therefore the appellant was the widow of the deceased.

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(vi) Return of wife; Caveat under monogamy law

Besides a claim for the custody of the children, a man may claim the return of his wife when the wife is either cohabiting with a stranger or she is with her parents. This was the case in Omwoyo Mairura v. Bosire Angida³⁸ here the court rejected the claim. It seems that the court was inclined to give the second stable relationship a chance, the first one apparently having failed. But strictly speaking, under customary law or any other law applying in Kenya, once one complies with the formal requirements pertaining to a marriage, his wife remains so until there has been a divorce in accordance with the law applying. With respect therefore, the above immediate decision is wrong in law and in complete divergence from what happens in practice.

It would further appear that customary marriages are voidable and when the woman leaves her husband, she effectively avoids the marriage. This seems to have been the basis in the decision of Omondi v. Nyafula.³⁹ In a sense, the courts seem still to doubt whether or not customary marriages are marriages at all.

An attempt might arise by an elope^e to prevent a man from marrying another woman monogamously. This especially may be the case where the elopement is of such nature that it, has to be treated as though it was a marriage. In the matter of a caveat entered by GCL,⁴⁰ a woman who had eloped with a man sought to prevent the man by way of caveat under the marriage. She in effect contended that elopement was effective a marriage

under kipsigis customary law but the court, relying on Cotran's Restatement held that she was not married to the defendant under Kipsigis customary law. With due respect, the court seemed to have totally subjected itself to the work of the learned author and on this issue, Cotran was wrong since elopement is known in Kipsigis customary law. Indeed, Yawe v. Public Trustee⁴ had sounded a warning against dogmatic application of Cotran's Restatement.

II. WHEN THE COHABITATION IS NOT THE FIRST ONE TO THE PARTIES.

This kind of cohabitation raises questions which are not true of a situation where the parties are cohabiting for the first time;-

- (a) Whether or not the marriage(s) of which both or one of the parties belonged respectively to had been dissolved.
- (b) Whether or not there is divorce by conduct under customary law.
- (c) What happens to the children as regards custody of children especially where the customary law applying to the parties does not cover the present situation.

The spouse in the first union or a relative of such spouse may claim custody by reason of the first marriage. A party to the second cohabitation might claim custody of the children on ground of biological ties with children born out of the union. Alternatively, it might be alleged that the second union is indeed a marriage. The courts have shown a propensity to hold that the children stay with their natural parents to give that cohabitation the stability it deserves. In doing so, the courts in effect hold that there is divorce by conduct.

In the majority of African societies, by customary law, it is the husband who has custody of the children whether born within or without cohabitation.⁴² In Kenya, husbands do use customary law to obtain custody of children and they do resist attempts by women to have their marriages dissolved so as to

be enabled to enter into second marriages, with an intention of the children. This can be illustrated by the case of Momanyi Nyaberi v Onwoŋga Nyaboga⁴³. Where the second union appears to be stable with indications of an eventual marriage, courts are prepared to depart from customary rules as illustrated by the case of Ngoko Nyanduko v Kerubo Motanya⁴⁴ where the court stated:

"The customary law on this subject is clear and long established namely that the children of any irregular union between a woman and a man other than the husband, as well as children of the marriage, belong to the husband of the union. In the case of Momanyi Nyaberi v Onwoŋga Nyaboga ... modified the customary law to the extent that when the principles of natural justice required such modifications upon the facts of the particular case, the court expressed its unwillingness otherwise to interfere with the customary law.

Hence, customary law applies in so far as it is consistent with the principle of natural justice which demands that customary law applies in situations where the children do not belong to the second union and where there is little likelihood that the second man will accept the children⁴⁴ or where there is a likelihood that the marriage will not be stable⁴⁵

(b) ENGLISH TYPE OF FAMILY LAW

Some Africans embrace the English type of family law. A brief look at the Kenyan history reveals that the African Christian Marriage and Divorce Act⁴⁶ was intended to make provisions for this type of Africans. For such people therefore, that cohabit without undergoing the required formalities of marriage, it is the English type of family law that applies⁴⁷.

Under this law, a married person lacks capacity to contract another marriage unless a decree of divorce has been issued by the court.

A situation may arise where a man marries monogamously and later lives with another woman as though they were husband and wife or, a man may so live with such a woman and then seek to marry another woman and this time comply with the statutory requirements. In the matter of the Estate of Ruenji⁴, and

in the matter of the Estate of Ogola⁴⁹, the courts held that any customary marriage contracted after the first monogamous one is invalid and the woman married after the first marriage cannot be the widow of the deceased.

The courts seem to operate on the view expressed in Coleman v Shang⁵⁰, that the monogamous type of marriage is the highest form of marriage. Therefore when one first marries monogamously, to the extent that the law considers elopement as though it was marriage, the second cohabitee will not be treated as a wife because the man, having contracted a monogamous marriage lacks capacity to marry another woman during the subsistence of the marriage even if he purports to marry under customary law.⁵¹

The cohabitation might last until the man dies. In this case the question will arise whether the woman will be treated as heir. Following the argument in the immediate Kenyan cases above, she will certainly not be a heir.

When the cohabitation loses stability, property rights may be disputed. In case v Ruguru⁵², case sought to evict Ruguru from his house on the ground that the woman was not his wife since he was already monogamously married and therefore lacked capacity to marry Ruguru. He succeeded. The argument by the woman that she had been married to him under Kikuyu customary failed because the vital "Ngurario" ceremony was missing.

In England, Equity has created rules which have proved handy in assisting persons cohabiting outside marriage in property disputes⁵³. Specifically, the courts have extended the law of trusts to offer protection to "underdogs" in a cohabitation outside marriage.

In Kenya, the English principles of equity apply subject to modifications rendered necessary by local circumstances⁵⁴. It can be therefore argued that these new developments in England will find their way into Kenya.

The reception clause also applies the "substance of common law and statutes of general application in force in England on 12th August 1897". In England, the English married Women's Property Act has been used to apply to property disputes of parties living as though they were married.⁵⁵ At common law, when a man purchases property and registers it under the spouse's name, it is presumed that he passes the property to her as a gift or as an advancement.⁵⁶ This presumption has been extended to a woman a man is engaged to and whom he later marries.⁵⁷ However, it is unclear whether it will apply to those cohabitations outside marriage which result into marriage. Denning mentions this problem in Eves v Eves⁵⁸ expressing that such situations are "familiar".

The courts and legislature in England seem to have noticed the problems those cohabiting outside marriage might be confronted with, which problems are akin to those of spouses and a new approach is seen as necessary since the idea of sex equality in England seems to have gained momentum. This idea presupposes division of labour and therefore the woman's contribution in the acquisition of property ought to be recognised. In Cooke v Head⁵⁹, Karminiski L. J. said:-

"I desire to express my entire agreement with what Lord Denning M.R., has said about the principles of law in a case of this kind between a man and his mistress when they intend to set up a home together and intend also to marry when they are free. It is in no way different from the principles applicable in cases of husband and wife who have built a home together. The duty of the court in deciding the correct proportions can be found in the opinion of Lord Diplock in Gissing v Gissing where he said "... on the basis of what would be fair having regard to the total contributions, direct or indirect which each spouse had made by that date".

The woman's labour contribution has been considered as vital for the acquisition of the property and has been held to confer property rights.⁶⁰ But in most cases, courts tend to consider only the financial contribution and given that as of practise it is men who provide finance for property acquisition, grave injustice is occasioned to the woman since

cohabitation is a mutual relationship based on equality much of the property acquired is normally by joint effort with the woman in most cases contributing in kind rather than cash. Lord Denning succinctly put it so in Cooke v Head.⁶¹ Therefore in all cases, a constructive trust will be implied.

One hopes that these noble contributions of equity will gain foothold in Kenya more forcefully.

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CONCLUSION

In considering questions posed by elopement, the courts seem to have a contradiction as to what elopement really is. It is not clear whether elopement is a marriage in itself or whether it is a stage in a customary marriage. On occasions, the courts have refused to consider elopement and in the alternative imported the common law presumption of marriage to reach decision to questions posed by cohabitations that have not complied with the formal requirements. On other occasions, the courts have treated elopement as a customary event. In both situations, the courts have considered such cohabitations as though they were marriages.

There is no dispute that social values have changed and that cohabitations that do not comply with formal requirements are on the increase as Denning M R observed in Eves v Eves¹. Kenya is a democratic country which is governed by the constitution as the supreme law of the land. The constitution guarantees the freedoms of association. Movement, expression and conscience in Chapter Five. Young men and women who have attained the "age of decision" as in Re An Application by Barbara Simpson², are free to choose where to stay and what to do so long as it does not conflict with the law of the land and is not inconsistent with public policy. The High Court in one unreported case as per Schofield J. said:-

"It is right and proper for Rose Akeyo to reside with the man with whom she has had two children if she wishes to reside with him. But, that is her fundamental right as granted by the constitution and it is not within the court's jurisdiction to make an order which determines where an adult should reside in such circumstances as these. Rose Akeyo is free to come and go and to reside where she chooses."³

The constitution protects one from being subjected to servitude. This was so held in R v Khadi⁴. This liberalism has its roots in the market situation in Kenya, a product of capitalism. This mode of production has led to changes in values and whereas in the past cohabitations devoid of compliance with formalities were rare, nowadays, they are the order of the day.

The question of whether these unions should be given effect by the law has been considered.

Indeed, the courts have shown an inclination to treat them as though they were marriages. The courts have often acted on the view that reliefs of the kind given to married spouses ought to be extended to the irregular unions. They have done so either by recognising elopement or by presuming a marriage under common law.

Elopement can loosely be described as a stage in a customary marriage which has evolved to cure the illegal action taken by the parties to elope. Elopement does not lead to an end of the husband's legal obligations but it is only the beginning. On the other hand, marriage absolves the husband of all legal obligations arising out of the relationship to his in laws. Moreover, elopement demands that part of the payable dowry be already paid. In some instances however, the courts have ignored this fundamental requirement of elopement.

It is submitted that elopement as known in customary law will not be of appropriate application in Kenya today especially to urban based parties where the cut throat inflation besides other factors cannot allow even partial fulfillment of the customary requirements of elopement. Moreover, even in the rural areas, views about some of the customary requirements have changed. This is especially true of dowry which has come under heavy fire especially from the youth whose opinion is that it is irrelevant as it is commercialised. Time and again the local dailies publish letters from the public arguing that dowry be scrapped.⁵

As for the presumption of marriage, under common law, it is recommended that it be rejected owing to the fact it is essentially imparment given that it is rebuttable. Moreover, this is a concept that developed in a society where public opinion does not necessarily influence one's course of action and this denies the union the essential element of permanence of public accountability. Notwithstanding a court's ruling in favour of the presumption, it seems to be the case that the

issue is left open for a rebuttal.

It is submitted that the terms elopement and the common law presumption of marriage are mutually exclusive. By its own definition, elopement has the essential requirement of eventual compliance with formalities while the common law presumption of marriage does not. Moreover, in elopement, it is not necessary for one to show prolonged cohabitation as in the common law presumption of marriage. What is essential is partial fulfillment of the customary requirements.

It is submitted that the courts ought to evolve new rules to cover a situation in which neither elopement nor the common law presumption of marriage apply. This is especially true in the urban areas where though the parties do not comply partially with the customary requirements, they cannot validly be deemed to be governed by common law given that there may be cases where such parties have not embraced the English culture. Yet these cohabitations too need legal recognition. It is submitted that given that such unions are prevalent, the courts should relax the requirements of elopement and specifically inquire into the stability of a union in order that just decisions are made.

In those cases where the cohabitation is the second one to the parties, the courts have upheld it by holding to the effect that there is divorce by conduct or operation of the law. This kind of divorce is unknown in the law of the land. Especially where this has been held in respect of a prior customary marriage, it seems that the colonial attitudes to customary law still linger on.

Although there have been efforts to protect elopement which serves identical purposes to the ones served by marriage, these efforts have been haphazard and inconsistent.

In civil law, the rigid consideration of rules that are obsolete has led to a denial of remedies available to parties who deserve them. These remedies include rights to inheritance and maintenance which proceed from elopement.

The various legal techniques used by different judges different judges working in the same court have led at times to grave injustice especially when the same lead to the grant or denial of relief. This can be attributed to lack of serious appraisal of the problem. It is hoped that serious consideration should be given to this phenomenon with a view of giving it its due place in society.

FOOTNOTES INTRODUCTION

1. Black's Law Dictionary; 5th Edition St. Paul Minn West Publishing Co, 1979.
2. See the Law relating to bigamy especially S 171 of the Marriage Act, Cap 150.
3. 1979 Journal of African Law, An article by Shirley Zabel: The Legislative History of the Gold Coast and the Nigerian Marriage Ordinances.
4. The Marriage Act, Cap 150 and the African Christian Marriage and Divorce Act, Cap 151 Laws of Kenya.
5. Cap 156, Laws of Kenya.
6. Cap 157, Laws of Kenya.
7. Cap 10, Laws of Kenya.
8. Cap 8, Laws of Kenya.

CHAPTER ONE FOOTNOTES

1. Karl Marx, Excerpt from a Contribution to the Critique of Political Economy in Marx and Engels, Basic Writings on Politics and Philosophy, Edited by Lewis S. Fenr, Fontana, 1969 p. 84.
2. (1860) 1 P & D 130
3. Supra
4. Mbiti J. S.; African Religions and Philosophy Heineman, London, 1969 p. 133.
5. Mbiti J. S. Supra at p. 133 explains this point.
6. Baxter v. Baxter (1948) AC 274.
7. Supra
8. William Latey; The Tide of Divorce, Longman, 1970 p. VII.
9. See for example Elfpeth Huxley; The Flame Trees of Thika; Penguin Books in assn with Cattu & Windus p. 10.
10. R.V. FerJulla Desur 1904 EALR 79, 80.
11. G.K. Kuria; Trends in Marriage and Succession in Kenya (Unpublished).
12. Gwao Bin Kilimo v Kisunda Bin Ifuti (1938) TLR 403.
13. Nyali v AG 1956 KB 1, 16
14. Articles 55 and 64 of the 1897 East Africa Order in Council.
15. Chapter 8, Laws of Kenya
16. Ordinance NO 13 of 1907
17. Chapter 151, Laws of Kenya
18. I NLR 15
19. A committee appointed by the late President Jomo Kenyatta to look into ways of unifying the Kanya Family Law.
20. Supra
21. For a discussion of this, see G.K. Kuria; Religion, The Constitution, Family Law and Succession in Kenya (Unpublished).
22. (1917) 7 EALR 14
23. (1918) 7 EALR 108
24. R.V. Mawji (1952) 2 WLR 277
25. Supra
26. (1952) 2 WLR 277.

CHAPTER TWO FOOTNOTES

1. Black's Law Dictionary, 5th Ed. St. Paul Minn West Publishing Co, 1979.
2. See Martin Parry; Cohabitation Sweet & Maxwell. 1981.
See the introduction - Martin Parry examines the various definitions including Judicial alternatives.
3. Supra.
4. As for example in the Consumers Credit Act 1974 S. 184 where reference to husband and wife includes "a reputed husband en wife." See also Reputed spouses in pneumocosis, etc (workers compensation) Act 1979.
5. 1937 3 All ER.
6. See Kenyatta Jomo, Facing Mount Kenya Heineman, Schools Ed. Nairobi.
7. G.K. Kuria, Cohabitation Outside Marriage in some English Speaking Countries (Unpublished).
8. Wambeu D.N. Kikuyu Customary Law with particular reference to elopement LLB Thesis.
9. See the preface to John Eekelar, Sanford N. Katz Editors of Marriage and Cohabitation in Contemporary Societies, Butter Worths Toronto.
10. Kamau, G.K. Supra.
11. Yawe v. Public Trustee E.A.C.A. CA No. 13/76.
12. Bromley; Family law 6th Ed. Butterworths, 1981, P. 65
13. (1938) 4 All ER. 143.
14. Mahadervan V. Mahadervan 1964, P. 233, 246.

FOOTNOTES CHAPTER THREE

1. See Allen; Status and capacity, 46 LQR Page 277 at Page 278.
2. (1952) 2 KB 328.
3. See the view expressed by James L. J. in Dyson Holdings Ltd v Fox (1976) 1 QB 503, 511.
4. See the legal provisions relating to bigamy S 171 of Cap 63, Laws of Kenya.
5. See the Penal Code, Cap 63, Laws of Kenya.
6. Kalume wa Tuku v R (1954) 21 EACA 20.
See also Chacha s/o Wamburu v R 20 EACA 339.
7. Band v R 1973 Z LR 111.
8. H.F. Morris, Evidence in East Africa, Sweet & Maxwell, London 1968.
9. See the Evidence Act (Cap 80) Sections 121 and 130.
10. Cap 80, Laws of Kenya.
11. See the Marriage Bill, 1976, S 151.
12. Such a case is going on in the District Magistrate's court at Migori. It is Case No. 9 of 1983. Here, a man, George Owino is charged with eloping with a married woman.
13. Cotran, Eugene, Restatement of Africa Law, 1968 P. 100 and 18 respectively.
14. In Tanzania, this was so in Abraham v Ouden, 1971 H C D 426 and Mapugilo v Gunza 1972 H C D 143.
15. See A. Swayer; Customary Law in the High Court of Tanzania; 1973, E.A.L.R. P. 265.
16. See Cotran E., Restatement P. 178
17. 1971 K H D 51
18. See Generally John S. Mbiti, African Religions and Philosophy, Heineman, London 1969.
19. 1939 Legislative Council Debates Govt. Printer Nairobi, Vol. 7 Col. 147.
20. See the report of the Committee on young persons and children, Government Printer, Nairobi, 1953, Paragraph 72.
21. Supra; Paragraphs 70 & 72.
22. The Affiliation (Repeal) Act 1969 No. 11
23. Cotran, Eugene; Restatement ... Supra Kikuyu, P. 18, Kamba P. 30, Kuria, P. 78, Taita P. 100, Taveta P. 110, Teso, P. 152.

24. For example the Luhya and Kisii. See Cotran E: Supra Pages 55 & 68 respectively.
25. Supra, Pokot at P. 42.
26. Shaw v Shaw (1954) 2 Q.B. 429.
27. See A.B. Kasunna and A.B. Salacuse; Nigerian Family Law Butterworths 1966, P. 44.
28. See Shaw v Snaw (Supra) and Case v Ruguru 1970 EA 55
29. See Generally, Cotran E, Restatement ... (Supra)
30. 1971 H C D 270.
31. Re B (S) An Infant 1968 Ch. 204.
32. The present writer observed in interviews conducted in Kisii, that this is the case with the Gusii community.
33. (1953) 1 C O R L R 8 .
34. High Court of Kenya at Nairobi Civil App. No. 94 of 1977
35. 1968 H C D 209
36. Court of Appeal of East Africa, Civil Appeal No. 13/76.
37. Supra
38. (1958) 6 C O R L R 4
39. 1972 H C D
40. High Court of Kenya at Nairobi, Misc. Case No. 6/76.
41. Supra.
42. See Momanyi Nyaberi v Onwonga Nyaboga (1953) 1 C O R L R Page 5, Nyanduko v Kerubo d/o Motanya (1955) 3 C O R L R 2.
43. Supra
44. Supra
45. Timina Olenja v Elam Keya 1962 10 C O R L R 8
46. Cap 151 of the Laws of Kenya.
47. See La look v Oboya 3 E.A.L.R. 175.
48. High Court of Kenya Misc. C.C. 136/75.
49. High Court of Kenya at Nairobi Misc. C.C. 19/76.
50. 1959 G.L.R. 390 and 1961 AC 483.
51. See Section 378 the marriage Act, Cap 150, Laws of Kenya.
52. 1970 EA 55
53. See Cooke v Head 1972 1 WLR 518, Eves v Eves / WLR 1338, Tanner v Tanner 1975/ WLR 1346.
54. S 3(1) of the Judicature Act, cap 8 of the Laws of Kenya. Though there is a specific reception date, the courts in Kenya cite recent court decisions in England. See Karanja V Karanja High Court of Kenya at Nairobi civil case no. 123 of 1975 and I V I 1971 EA 278.

55. Cooke v Head (Supra)
56. Pettit v Pettit 1970 AC 777
57. Moate v Moate (1948) 2 All ER 486.
58. 1975 / WLR 1338 at 1341.
59. See Cooke v Head 1972 2 All ER 38, 43.
60. See Footnote 53, the first two cases.
61. Supra.

FOOTNOTES CONCLUSION

1. 1975 / WLR 1338 at P. 1341.
2. 1959 EA 568
3. I somehow did not record the title of the case but it is civil Case No. 15/82, Kisii.
4. 1973 EA 153
5. See Daily Nation, December 20, 1983.
Daily Nation, February 1, 1984.
Daily Nation, February 8, 1984.

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9. Kenya Government; 1939 Legislative Debates Govt Printer, Nairobi Vol. 7
10. Kenyatta; Jomo; Facing Mount Kenya Heineman Schools Ed. Nairobi.
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1. Allen; Status and capacity.
2. Kuria, G.K.; Cohabitation outside marriage in some English speaking countries.
3. Kuria G.K.; The constitution, Family Law and Succession in Kenya.
4. Kuria G.K.; Trends in Marriage and Succession.
5. Swayer, A.; Customary law in the High Court of Tanzania.
6. Zabel; Shirley: The Legislative History of the Gold Coast

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