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SOME LEGAL RIGHTS AND OBLIGATIONS OF WOMEN IN KENYA:
A LAY - PERSON LANGUAGE APPROACH

By
S.F.O. GUTTO
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INSTITUTE FOR DEVELOPMENT STUDIES
UNIVERSITY OF NAIROBI
P.O. BOX 20197
Nairobi, Kenya

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The Primary purpose of this paper is to communicate in non-technical language some basic rights and obligations under Kenya law that affect women, both as general members of the society and in their peculiar position as women. Although intended primarily for women, the information is deemed useful for general public consumption to make the public aware of and sensitive to some basic requirements in Kenya law, particularly in the field of family law.

The scope of the areas of law covered is limited to some basic statutes, including the constitution, and very little coverage of case law has been included. This is deliberate in the interest of brevity and also because statutes are considered to be more precise and comprehensive in their treatment of particular legal regime. The lay public are also more easily in contact with statutes than case law since the former may be found in most senior administrative government offices.

It is the hope that this paper will give guidance to those with problems or those who may be faced with problems of law as well as social and community workers who are called upon regularly to advice women. Since only important elements are included in this paper there will continue to be need to seek competent legal advice in points of detail. Ignorance of the law is no defence in many areas where one has breached the laws and it is the hope that the level of ignorance of the law that is pervasive in Kenya society will be slightly reduced among those who will have the chance to read and comprehend this paper.

M A R R I A G E

A. FOEMS OF MARRIAGE

There are two major forms of marriage recognised under the Kenyan law. These are:-

- 1) Monogamous
- 2) Potentially polygynous or Polygynous.

(1) Monogamous Marriages.

A Monogamous marriage is considered to be a voluntary union of one man and one woman for life to the exclusion of all others; until dissolved by

death of one or both spouses or by a competent court order, a monogamous marriage persists irrespective of the conduct of the parties to it.¹

Any person irrespective of his/her religion, sex, or ethnic group can contract a monogamous marriage under the Marriage Act (Cap.150). Persons who are Hindu by religion, including Jains, Sikhs and Buddhists can contract monogamous marriage either under the Marriage Act or under the Hindu Marriage and Divorce Act (Cap.157). Africans may marry monogamously under the Marriage Act or, where one or both profess the Christian religion, they may contract a monogamous marriage under the African Christian Marriage and Divorce Act (Cap.151).

In contracting a monogamous marriage under the Marriage Act it is required that:-²

- (a) The marriage be celebrated in a licensed place or a place of worship by a church minister
- (b) one of the parties must have resided in the district of marriage for at least 15 days.
- (c) the parties must notify the registrar or the appointed church minister of the district where they intend to celebrate their marriage at least 21 days before the celebration of the marriage
- (d) the registrar or the appointed church minister shall post a notice of the intended marriage in a public place for a period of 21 days to allow those with lawful objections to notify him/her.
- (e) where an objection has been made the High Court will hear the reasons of the objection and make a ruling whether or not the marriage should be contracted.

1). Following an English court decision in Hyde V. Hyde (1866) L.R. I.P.D. 130, 133, as adopted under: Matrimonial causes Act (Cap.152) Sec.2; Marriage Act (Cap.150) Secs.37, 49-50; African Christian Marriage and Divorce Act, (Cap.151) Secs.3-4,9; and Hindu Marriage and Divorce Act (Cap.157) Sec.7.

2). Marriage Act (Cap.150) Secs. 8-12, 15-16, 19, 23, 29, 35, and 49-50.

- (f) the parties to a marriage must be 21 years of age and must give free consent; in any case where any of the parties is at least 16 years of age but not 21 the guardian must give the consent; where the guardian is not available or refuses to give the consent the Provincial Commissioner or the Attorney-General, or a Judge of the High Court may give the required consent.
- (g) the parties to a marriage must not be close blood relatives, close relatives by marriage or other types of relations that are morally or legally objectionable.
- (h) both or either of the persons intending to marry must not already be in an existing marriage to a third person whether the marriage is customary Mohammedan or any other form.

In contracting a monogamous marriage under Hindu Marriage and Divorce Act (Cap.157) it is required that:-⁽³⁾

- (a) Both the parties profess Hindu religion, and this includes Jains, Sikhs and Buddhists of Indian Origin,
- (b) Neither party has contracted a marriage with a third person and that third person is still living,
- (c) Neither party is legally insane
- (d) The Bridegroom has attained the age of 18 and the bride 16, except that where a bride is younger than 16, a legal guardian who must be at least 21 years old must give consent; if a guardian's consent is not given or is not obtainable the Provincial Commissioner, the Attorney-General or a Judge of the High Court can give the consent.
- (e) The parties are not so closely related lineage or marriage as to come within what is called "Prohibited degrees of consanguinity" which are clearly spelled out in the Act.
- (f) The marriage can be solemnised or ceremonised according to either party's customary practices which include saptapadi or Anand Karaj

Africans can conduct monogamous marriages under the African Christian Marriage and Divorce Act (Cap.151) provided one or both the parties are professing the Christian religion. It is required that the Marriage be conducted in a place of public worship and that neither of the parties is already married to some other person in any manner

and that marriage is still subsisting. Both the bridegroom and the bride must freely consent to the marriage.⁽⁴⁾ Africans who are already married in the customary way, which is potentially polygynous, may also convert their marriage into a monogamous one under this Act and here too, it can be done through a Church Ceremony by a licensed Church Minister or before a registrar of marriages.⁽⁵⁾

GENERAL CONSEQUENCES OF MONOGAMOUS MARRIAGES.

A Monogamous marriage is monogamous in the sense that once one has entered into it, one is legally not capable of contracting any other valid marriage with someone else in any other form. One is also not capable of contracting a monogamous marriage if one is already in a marriage union with someone else and that marriage is not dissolved. In any of the two cases, the second purported marriage will be illegal and therefore null and void.⁽⁶⁾ The party entering into such a second purported marriage would be also committing a criminal offence of bigamy.⁽⁷⁾ Parties to a monogamous marriage are also prohibited from involving in sexual intercourse with any third person. This leads to adultery which is a civil wrong and is a ground that can be used by the innocent party in the monogamous union to ask for divorce or judicial separation, which we shall see in more detail later.

2. Potentially Polygynous and Polygynous Marriages.

Potentially polygynous marriages are polygamous marriages where the husband is permitted by law, if he so chooses, to contract marriages with more than one woman. There are two types of potentially polygynous marriages which are recognised by law in Kenya:-

- i) those contracted under Mohammedan law
- ii) those contracted under the various African customary laws.

4. Sec.8 of the Act.
5. Secs. 9 and 11 of the Act.
6. Rv. Robinson (1938) 1 All E.R. 301
7. Sec. 171, Penal Code, (Cap.63)

Potentially polygynous marriages can be contracted under Mohammedan law according to principles of Mohammedan law to parties who both profess the Mohammedan faith. Many laws give authority for this in Kenya: including the Constitution.⁽⁸⁾ It is also possible to convert a marriage previously contracted under African customary law into a Mohammedan Marriage. Polygynous marriages under Mohammedan law differs in one important aspect with those under customary law in that the husband is permitted to contract marriage with more than one woman and not more than four at any one time. In contracting a Mohammedan Marriage in accordance with Islamic traditions the courts have put a condition that both parties must give free consent to marriage.⁽¹⁰⁾ Islamic customary practices have established that a guardian, Walii, of a minor or unmarried adult woman may arrange a marriage on behalf of the ward even without her consent, but this is now not permissible since it would amount to a criminal offence of abduction to force someone into a marriage.⁽¹¹⁾ There is a requirement that widows and women divorcees must observe a period of IDDA, which range between 3 and about 4 months from the date of death of the former spouse or date of divorce with a former husband before a woman can contract a Mohammedan Marriage. This period is to allow for ascertaining whether or not the woman was left pregnant by the dead husband or divorced husband. This is done to determine paternity of children that are born in a marriage. Normally Muslim women may only marry muslim men according to Mohammedan law, although men are allowed to marry women from other recognised religions. Close blood relatives may not marry each other under Mohammedan law.

Marriages contracted under Mohammedan law are designed to last for life unless a valid divorce is declared. There exist a form of Mohammedan marriage, the MUTA, which is practised by very limited schools in Kenya. This allows for a marriage which lasts for an agreed period only. It has been established that the payment of Mahr by the bridegroom to the bride is essential in Mohammedan marriages although the amount may vary from case to case.⁽¹²⁾

8) Constitution of Kenya, 1969. (Act. No.5 of 1969) Sec.66 (5); Kadhi's Courts Act, (Cap.11) Sec.5; Mohammedan Marriage, Divorce and Succession Act (Cap.156) and, the Sharia as directed by Saliha V. Thabit (1968) 2 K.L.R.131

9) Mohammedan Marriage, Divorce and Succession Act, Sec.6.

10) Bashford V. Shabani (1971) E.A. 257; Athman bin Mohammed V.Ali bin Salim (1915) 6 E. A. L. R. 91.

11) Penal Code, Sec. 142.

12) Abdulreheman V.Ali (1916) 6 E.A. L.R. 145.

The law also requires that all marriages contracted under Mohammedan law be registered; failure to so register them is an offence.^(12A) It is, therefore, the obligation on the part of the man and the woman to notify the registrar of Mohammedan marriages of their marriage within 7 days of such marriage.

(ii) Potentially Polygynous or Polygynous Marriages Under Customary Law.

During the colonial administration, African Customary marriages were considered legal only for limited purposes.⁽¹³⁾ As a result there were strong pressures to dissuade Africans from contracting marriages under their respective ethnic rules. This attitude has now changed a little and potentially polygynous marriages contracted under the various customary laws in Kenya are as legal as those contracted under any one of the monogamous systems.⁽¹⁴⁾

Potentially polygynous African Customary marriages differ in the type of vital ceremonies and requirements. It is important to note, however, that free consent of both parties to such a marriage is considered a necessary pre-requisite. Where this is not obtained and any one of the parties is forced into a union will be invalid,⁽¹⁵⁾ and those taking part in forcing one of the parties into such a marriage run the risk of being charged with the crime of abduction.¹⁶ Because of this requirement for free consent, it is implied that the parties must be adults or else be of such age, usually puberty for girls, that they understand what they are doing and their parents or guardians ought to give approval.

Marriage gifts are considered to be essential for the validity of customary marriages.⁽¹⁷⁾ The amounts of such gifts varies from case to case and depends on customary practices of each ethnic group. One of the most troubling violations of the law in Kenya occur in cases where either men already married to some other person monogamously purports to marry any other under customary law or where one already married under a monogamous system purports to marry another under customary law. This is illegal and criminal. The second purported marriages in these instances are invalid.⁽¹⁸⁾

12A. Mohammedan Marriage and Divorce Registration Act (Cap.155)

13. Rex V. Amkeyo (1917) K.L.R. 14

14. Magistrate's Courts Act (Cap. 10) Secs.2 and 18; Mwagiru V. Mumbi (1967) E.A 639; Case V. Ruguru (1970) E.A. 55; the Evidence Act (Cap. 80) Sec.130 (2).

15. Mwagiru V. Mumbi, Supra.

16. Penal Code, Sec. 142.

17. Mange V. Manono (1958) E.A. 124; African Christian Marriage and Divorce Act Supra, Sec. 13

18. Marriage Act, Supra Secs. 37, 49-50.

B. DISSOLUTION OF MARRIAGE:

(1) Dissolution of Monogamous Marriages.

Monogamous marriages may be legally dissolved either temporarily or permanently through: (a) death, (b) declaration that the purported marriage is null and void, (c) divorce and (d) judicial separation. The laws governing dissolution of monogamous marriages are almost similar irrespective of how the monogamous marriage was contracted.

The Matrimonial Causes Act (Cap. 152) governs most dissolutions of monogamous marriages contracted under the Marriage Act, Hindu Marriage and Divorce Act and African Christian Marriage and Divorce Act except for temporary dissolution in the form of Judicial separation which can also be done under the Subordinate Courts (separation and Maintenance) Act (Cap.153). All dissolutions of monogamous marriages can only be ordered by the High Court and not magistrates' courts,⁽¹⁹⁾ except (a) temporary judicial separation which can be ordered by magistrates under the Subordinate Courts (separation and Maintenance) Act and, (b) monogamous marriages contracted under the African Christian Marriage and Divorce Act which may be dissolved by order of senior magistrates as well as the High Court.

Divorce: Before parties may be allowed to divorce in monogamous marriages, the marriage must have lasted for 3 years or more, except in very exceptional cases,⁽²⁰⁾ and whoever is petitioning for divorce must be ordinarily resident or domiciled in Kenya. The party who petitions for divorce must make sure that she/he is not also guilty of the matrimonial offence which she/he alleges the other party is guilty of.⁽²¹⁾ Where a woman party to a monogamous marriage wants to petition for divorce she must prove that the husband has committed one of the following matrimonial offences or wrongs:⁽²²⁾

- (a) adultery
- (b) deserted her for no good reason for at least 3 years
- (c) cruelty to her
- (d) of incurably unsound mind
- (e) guilty of rape, sodomy (homosexuality) or bastiality (carnal knowledge of an animal).

19. Matrimonial Causes Act, Sec.3

20. Ibid Sec. 6

21. Ibid, Sec. 10

22. Ibid, Sec. 8

Nullity: A wife may also petition the Courts for a degree which orders that the marriage between her and her husband is null and void for the following reasons:-(23)

- (a) that the husband is permanently impotent or is not able since the alleged marriage to have natural adequate sexual intercourse (consummation) with her
- (b) that she and the man are close blood relatives - a fact they did not know at the time of the marriage
- (c) that at the time of the marriage the husband had entered into a marriage with someone else and that other marriage was still legal and the other woman living
- (d) that her consent to the marriage was obtained by force or fraud
- (e) that husband was insane at the time of the marriage
- (f) that husband was at the time of the marriage suffering from a communicable venereal disease.

It should be noted that the husband has a right to petition for nullity where he discovers after marriage that at the time of marriage the wife was pregnant by someone else.

In all cases of divorce or nullity the courts will award a temporary order, degree nisi, which must last for 6 months within which period the parties may wish to reconcile or new evidence may come up which indicates that the marriage should not be dissolved. It is only after the 6 months have expired that the order of divorce or nullity becomes final and binding.⁽²⁴⁾ Judicial Separation: This is a temporary order by the court ordering that the wife is no longer obliged to cohabit or live and perform matrimonial duties to the husband until the court orders that the parties may resume cohabitation. It is given for the same reasons as those for divorce (above()) and within the time that it is in force the property which the wife acquires within that period are considered to be her own as if she were a single woman and the husband, therefore, has no legal claim to that property as part of the matrimonial property.⁽²⁵⁾

23. Ibid, Sec. 23
24. Ibid, Sec. 15
25. Ibid. Secs. 17-18

The grounds for divorce under the Hindu Marriage and Divorce Act are similar⁽²⁶⁾ to those under the Matrimonial Causes Act (above) with the following additions:-

- (a) that the husband has since the marriage ceased to be a Hindu by religion.
- (b) that the Husband has renounced the world by entering a religious order for a period of at least 3 years
- (c) there is a decree of judicial separation which has lasted for 2 years.

The grounds for nullity under the Hindu statute are similar to those in the Matrimonial Causes Act (above).⁽²⁷⁾ Similarly the grounds for judicial separation under the Hindu Statute are the same as those for divorce with the single addition that where the husband has refused to resume cohabitation after the court has ordered so then the wife may petition for an order of judicial separation.⁽²⁸⁾

The grounds for divorce, nullity and judicial separation for those married under the African Christian Marriage and Divorce Act are the same as those in the Matrimonial Causes Act (above), except, as has been said earlier, Senior Magistrates' Courts may order all these.

Special Judicial Separation and Maintenance Rights.

Although husbands on a reciprocal basis share most of the grounds for divorce, nullity, and judicial separation which we have seen above, wives in monogamous marriages⁽²⁹⁾ have rights of judicial separation and maintenance which are not shared by their husbands under Subordinate Courts (separation and Maintenance Act (Cap.153)). The main reason for this "favouritism" in the law is to be found in the sex discrimination regarding property control that is characteristic of sexist class societies.

26. Hindu Marriage and Divorce Act, Sec.10

27. Ibid, Sec.11.

28. Ibid, Sec. 12

29. Subordinate Courts (separation and Maintenance) Act (Cap.153) Sec. 15

The grounds for which a wife may petition the courts (high Court and Magistrates' Courts) for judicial separation and maintenance under this statute are:-⁽³⁰⁾

- (a) that the husband has been convicted of offences committed against her which offences are provided for in the Penal Code (Cap.63); these include doing grievous harm,⁽³¹⁾ malicious administration of poison with intent to harm,⁽³²⁾ wounding and unlawful administration of poison,⁽³³⁾ failure to provide necessaries of life to her,⁽³⁴⁾ and assault which causes bodily harm to her,⁽³⁵⁾
- (b) that the husband has deserted her
- (c) that the husband is guilty of persistent cruelty to her or her children (where children include illegitimate children) or has failed to maintain either her or her children
- (d) that the husband has a venereal disease and insists on having sexual intercourse with her
- (e) that the husband is either a habitual drunkard or habitual drug taker, and
- (f) that the husband has forced her to submit to prostitution.

A woman may petition for separation and maintenance under this statute only if she is ordinarily resident in Kenya and has not been guilty of adultery.⁽³⁶⁾ Applications may be made to courts which are in the area where the husband is convicted with the relevant crime or where the complaint took place fully or in part.⁽³⁷⁾

30. Ibid, Sec. 3

31. Penal Code, Sec.234

32. Ibid, Sec. 236

33. Ibid, Sec. 237

34. Ibid, Sec. 239

35. Ibid, Sec. 251

36. Subordinate courts (separation and Maintenance) Act, Secs. 5 and 14.

37. Ibid, Sec.4

When a woman applies to court for an order of separation and maintenance, the courts, if convinced, may order that:-(38)

- (a) the woman is no longer bound to live with the husband as man and wife (cohabit),
- (b) custody of the children under 16 be given to the women with the man being required to make monthly payments for their up-keep,
- (c) the husband should pay the cost of the legal action that the wife instituted against him.

It should be noted that an order for separation and Maintenance under this statute like other such orders, is subject to the following conditions:-(39)

- (a) that the victim or husband in this case may apply to court for a revision of the order if there is evidence to show that things have changed for the better,
- (b) that the wife has voluntarily resumed to live with him as man and wife,
- (c) that the wife has not committed adultery during the period of separation except where the wife has done so because the husband has refused to pay the sums ordered by the court.

Where a separation and Maintenance order has been revised by the Courts and the parties are allowed to cohabit the court may still order that custody of the children remain with the wife and the husband to continue to pay a nominal maintenance fee to her for the children.(40)

A woman who has committed adultery and is, therefore, not permitted to petition for separation and maintenance may request the Attorney-General as a representative of the public to petition on her behalf in the interest of the children.(41)

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- 38. Ibid, Sec. 4
 - 39. Ibid, Sec. 6
 - 40. Ibid, Sec. 9
 - 41. Ibid, Sec. 12

2) Dissolution of Potentially Polygynous or Polygynous Marriages.

Polygynous or potentially polygynous marriage unlike monogamous marriages may be dissolved outside the courts as well as by court orders.

Mohammedan Marriages are dissolvable under Islamic law and practice and the statutes merely confirm this.⁽⁴²⁾ The law requires that the person relying on a Principle of Mohammedan law must prove that it exists and is recognized,⁽⁴³⁾ although in practice Kadhi's Courts have expertised in these areas. There is also a requirement that upon divorce either or both of the parties notify the registrars so that the divorce may be registered⁽⁴⁴⁾ failure to do so is an offence punishable by a fine of up to 3000/= and/or imprisonment for upto 6 months.⁽⁴⁵⁾

Generally it is Muslim men who have the power to divorce their wives by unilaterally pronouncing three talakas.⁽⁴⁶⁾ Wives may pronounce divorce through talaki tafivid with agreement with their husband or they may pay their husband to allow them to pronounce divorce in the form of Khul.⁽⁴⁷⁾ A wife may petition the Kadhi to dissolve a marriage in the form of faskh⁽⁴⁸⁾ on grounds that the husband has either committed adultery or repudiated Islam.

Marriages under customary laws may be dissolved either in the courts of law⁽⁴⁹⁾ or through arrangement by the parties or families concerned. The reasons for their dissolution vary from group to group although the main emphasis is not so much on commission of rigidly defined "matrimonial offences" but rather a consideration of all circumstances of the case which may establish that the marriage has irretrievably broken down. From the cases decided before 1963 by the then court of Review, it is evident that marriages among many groups

42. See footnote 8, above and Mohammedan Marriage and Divorce Registration Act (Cap.155).

43. Mohammedan Marriage, Divorce and Succession Act, Sec. 34.

44. Mohammedan Marriage, and Divorce Registration Act, Sec. 9.

45. Ibid Sec. 25

46. Alawi V. Alawi (1954) 22 E.A.C.A. 105

47. Salum V. Asumani (1969) E.A. 255

48. Omar V. Said (1952) 20 (1) K.L.R. 49.

49. Magistrates' Courts Act, Sec.2

would be considered dissolved by mere dissolution of the wife, her subsequent remarriage, and return of the price. Death of either party however do not automatically dissolve customary marriages as the wife may if she chooses remain in her late husband's family and stay with a levir, usually a male relative of the late husband.⁽⁵⁰⁾ In many instances the widower may also enter into a union with a girl relative of the deceased wife and the second union would be considered a continuation of the first.

C. RIGHTS AND DUTIES OF CUSTODY AND MAINTENANCE OF CHILDREN

Within the limits of his/her ability every parent is under the duty to maintain his/her children during marriage and after the dissolution of a marriage. Children born outside of marriage are unfortunate in that the law as it stands now assumes that such a child "belongs" to the mother⁽⁵¹⁾ the father may be called upon only to pay token pregnancy compensation⁽⁵²⁾ which is not sufficient to maintain a child: Traditionally such arrangement was satisfactory since the parents of the pregnant spinster would adopt the children and maintain it.

Since parents within a subsisting marriage are assumed to have custody, charge or care of their children and juveniles in general, the Children and Young Person's Act (Cap.141) imposes a duty on them to provide the children with necessities of life, including food, clothing, medical aid and shelter. Failure to do this amounts to a criminal offence which is punishable with a heavy fine and/or imprisonment⁽⁵³⁾ Failure to provide for the child may also lead to the child being committed to a relative, local government authority or a children's home in which case the parent loses the right of custody over the child.⁽⁵⁴⁾ A mother married monogamously may also petition for judicial separation and maintenances under the subordinate Courts. (Separation and maintenance) Act whenever the husband wilfully neglects to provide maintenance for her children.⁽⁵⁵⁾

50. Indirect reference is made to this in African Christian Marriage and Divorce Act, Sec. 13 (1).

51. This morality is borrowed from England, see Re. M. (1955) 2 Q.B. 479 (E.A.)

52. Magistrates Courts Act, Sec.2

53. Children and Young Person's Act (Cap.141), sec.23

54. Ibid Sec. 25

55. Subordinate Courts (separation and maintenance) Act, sec.3(1), (4).

As parents mothers may be required to appear before any court where their children under 18 years of age are charged with an offence. (57) They may also demand that they be allowed to attend. Since they have a duty to maintain their children, they may be ordered to pay for whatever damages their children have caused or pay some money of security to the court to guarantee that their children will behave properly. (58)

Generally whenever there is a dissolution in any form of monogamous marriage, the woman petitioner may request and the courts may order that the woman should have custody of the children and the matrimonial property would be ordered to be for the benefit of the children and the wife. (59)

In all matter of custody and maintenance of children whenever there is marriage dissolution of any form and irrespective of whether the marriage was polygamous or monogamous, the law is the same and the principles are contained in the Guardianship of Infants Act (Cap.144). This statute provides that: ()

- (a) upon death of the husband, a wife has right of custody of the children.
- (b) Before her death a wife has the power to appoint a guardian for her children who may, upon her death, either become co-custodian with the father of the children or a sole custodian in the event that the father is unable to take custody of the children:
- (c) in all matters of custody it is the interest of the children which is paramount and not customary rights as to which of the parents has priority over the other:
- (d) Mothers and fathers have equal right to claim custody of the children and
- (e) custody orders are not permanent, but may be changed whenever either of the parents satisfies the court that the welfare of the children are no longer best protected while they are on the company of the other.

56. Children and Young Person Act (Cap.141), sec.9

57. Ibid, sec. 19.

58. Matrimonial Causes Act, secs. 27 and 30

59. Guardianship of Infants Act, (Cap.144), scs.3, 4, 6, 17.

Another customary practice of the courts in Kenya is that children of tender years are normally put under the custody of their mothers unless there are special reasons to justify why they should not. (60)

D. ILLEGITIMACY AND PARENTAL DUTY OF MAINTENANCE

Due to influence of English law and culture in Kenya, children born out of wedlock are considered illegitimate and suffer from extreme neglect particularly by the natural fathers. Legal obligations of fathers of such children are minimal as compared to those imposed on their mothers. As we have seen under English common law illegitimate children were considered to belong to the mothers only. (61) Generally in Kenya, the only claims on fathers of illegitimate children are limited to compensation for pregnancy.

UNDER THE MATRIMONIAL CAUSES ACT

Whenever an order of nullity has been declared on a purported monogamous marriage, children born within that union are considered legitimate and both parents share responsibilities for them as if they were married properly. (62) Under the Legitimacy Act (Cap.145) a child which is born illegitimate and then the parents subsequently marry becomes legitimate from the date of the parents marriage provided the father is domiciled in Kenya either by birth or residence. (63) Mohammedan Law also presumes that a child born within about 6 months of a marriage or within 10 months of dissolution of a marriage is also legitimate. Most customary laws also presume that children born within a marriage are legitimate, including those born in a leviratic union after the death of a husband. All these presumptions may however be proved wrong by evidence that point to the contrary in which case the children concerned become illegitimate.

Women married monogamously are entitled to apply to court for separation of maintenance if their husbands fail to maintain them and their children including illegitimate children born to her before the marriage which the husband is liable to take care of. (64)

60. Abdulla Bin Mohamed v. Zena Binti Abedi (1912) 4 K.I.R.86
Karanu V. Karanu (1975) E.A. 18 (C.A.)

61. Re. N. (1955) 2.E.B. 479 (C.A.)

62. Ibid. Secs. 3,4. (64 Evidence Act (Cap.80), Sec.118)

63. Subordinate Courts (Separation and Maintenance) Act, sec. 3 (1)

64. African wills Act, (Cap.169) Sec.4

E. INHERITANCE

The law of inheritance is commonly called the law of succession. There are two forms of succession:-

- (a) testamentary, i.e. where there is a valid will and;
- (b) intestate, i.e. where there is no valid will left by the deceased, or where a will is left which does not provide for the distribution of all the deceased's property. Most customary successions are intestate.

A person who leaves a valid will is a testator or testatrix (women) and one who leaves more or one which only cover part of his/her property is an intestate.

The law allows both men and women to make wills in order to dispose of their property after their death. Wills are normally required to be in writing and signed by the testator/testatrix and witnessed by signature of two people who must both be present when the testator/testatrix signs the will. The witnesses must sign their witnessing of the will together and in the presence of the person making the will. The witnesses are supposed to witness the signature of the testator/testatrix whether the document is a will or not.

Every person is allowed to make a will, however the power to dispose of one's property is somehow limited. Hindus can dispose of their property only in accordance with Hindu law as provided under the Hindu Succession Act (Cap.158). Africans can do so but not in a manner that disinherit their dependent's or people who they are required to maintain nor can they dispose of property which they could not dispose of at will while a live.⁽⁶⁵⁾ Mohammedans may make wills within the principles of Mohammedan law.⁽⁶⁶⁾ Apart from these few limitations the law of succession in Kenya to-day gives a lot of freedom to individuals to disinherit people whom they could not disinherit at customary law. Where one has made a valid will most of the rules that govern the distribution of property are found in the Indian Succession Act, 1865 which is part of Kenyan Law. Where an African dies testate or intestate the courts when called upon may apply the existing customary law.⁽⁶⁷⁾ Within polygynous unions whenever the husband dies intestate, the share

65. African wills Act, (Cap.160) Sec.4

66. Mohammedan Marriage, Divorce and Succession Act. Sec.4

of his property among the houses may depend on the seniority of the houses or equality of distribution depending on the number of sons in each house.⁶⁹

Where a mother of an illegitimate child dies without a valid will, the child or the child's children are entitled to inherit her property.⁽⁷⁰⁾ A child born illegitimate but legitimated by a court declaration has equal rights as legitimate children of the parents although in terms of seniority the legitimated child is considered to be born on the date of legitimation and not on the actual date of birth.⁽⁷¹⁾

When writing a will, a part from naming the intended heirs, a person has the power to name an executor/executrix or administrator/administratrix who will manage the property and see that it is property distributed. One may name a human person, a corporation or company,⁽⁷²⁾ or the public trustee.⁽⁷³⁾ The public trustee has also power to distribute property of those who die without valid wills.⁽⁷⁴⁾

A Comprehensive and unifying law of inheritance was enacted by parliament in 1972 called the Law of Succession Act.⁽⁷⁵⁾ It has not come into operation and will do so when the Attorney-General gives a notice to that effect. Without going into detail, since it is not yet effective, it is important to note that it will affect the present law in the following ways:-

- (a) by treating male and female children as equals in matters of succession,
- (b) by reducing the individuals* powers of disinheriting their dependants through a will

69. A summary of cases on this are in G.K. Kuria, "The Law of Inheritance and the Child", in GUTTO, S.B.O. (Editor) Children and the Law in Kenya, I.D.S. Occassional Paper No.35, 1979.

70. Legitimacy Act, Sec.10

71. Ibid, Secs. 5 and 6

72. Administration of Estates by Corporations Act, (Cap.163)

73. Public Trustee Act (Cap.168)

74. Ibid, Sec.4.

75. Law of Succession Act, No.14 of 1972 as ammended by Acts.No.7 No.7 of 1975. No.8 of 1976 and No.160 of 1977, When it comes to force it will not automatically apply to all areas in Kenya - Secs. 32,33.

- (c) by expanding the definition of "dependants" to include some aspects of the extended members of the family
- (d) by improving the rights of "illegitimate children so as to be able to inherit from their natural parents,
- (e) by trying to equalise the position of individual households within a polygynous union.
- (f) by providing fixed proportions of what shares widows could be entitled to irrespective of whether customs allow this or not.

F. DOMICILE

The law of domicile is important in that it entitles a country in international relations to protect the interests of those domiciled in it. Domicile is also important locally in that many courts petitions regarding matrimonial problems requires that the petitioner or the respondent be domiciled in Kenya. Domicile can be that of choice or of origin. The Law of Domicile Act (Cap.37) provides that:⁽⁷⁶⁾

- (a) at the time of birth every person, if legitimate, shall acquire the domicile of the father but if illegitimate that of the mother.
- (b) a woman's domicile changes to that of the husband upon marriage.

G. MATERNITY LEAVE

Every woman employee in Kenya is entitled to two months maternity leave with full pay except that in the year when she has taken this she loses her right as a worker to a paid annual leave of twenty-one working days.⁽⁷⁷⁾

76. Law of Domicil Act, (Cap.37), Secs.7 and 9 (2)

77. Employment Act (Cap.226) Sec.7

Abortion is however illegal and any one who gives a woman any drug or uses force to procure abortion is liable to imprisonment for upto 14 years.⁽⁷⁹⁾ The general law however, allows abortions to be done by medically qualified doctors only in necessary cases where the continuation of the pregnancy is likely to endanger the life and health of the mother.⁽⁸⁰⁾ Because of this vagueness in the law, doctors are usually unwilling to accept to perform abortions in cases which are not very serious. Abortions through surgical operations may also be done for the same reasons.⁽⁸¹⁾ There is no law specifically on sterilisation as a family planning method although being a surgical operation, qualified doctors may perform them if they are convinced that their patients need it.

1. THE LAW OF RAPE

It is an offence for any man above the age of 12 to have carnal knowledge or sexual intercourse with a woman without her consent. Consent here implies free consent and where a woman is too drunk as not to be able to know what she is doing, or she has been threatened, intimidated, or made to fear that she would be harmed, then consent is not freely given. If a woman in the dark has sexual intercourse with a man believing that it is her husband then her consent is not freely given. In all these cases the man would have committed the offence of rape and if found guilty by a court of law would be imprisoned even for life with or without corporal punishment.⁽⁸²⁾ An attempted rape also carries similar punishment.⁽⁸³⁾ If a man has carnal knowledge of a girl below the age of 14 years he commits an offence of defilement and is liable to imprisonment for upto 14 years with hard labour and with corporal

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78. Penal Code, Sec. 158.
79. Ibid, Sec. 159
80. Singh Basal V.R. (1959) E.A. 813; R.V. Bourne. (1939)
1 K.B. 687
81. Penal Code, Sec. 240.
82. Penal Code, Secs. 139, and 140
83. Ibid, Sec. 141

punishment.⁽⁸⁴⁾ An attempted defilement leads to imprisonment for upto 5 years with hard labour and corporal punishment. With regard to girls below the age of 14, it is not enough to say that they gave consent since by virtue of their age they are considered in law to be too immature to give free consent.

In all these cases the victim is the chief witness for the prosecution and since the law requires that their evidence be "corroborated" or confirmed by some other evidence, it is important that they act with speed and care whenever their privacy is violated without their permission.

Immediately after the incident the victim should report the matter to the police or some other person. A medical person should be contacted to make an examination which can reveal whether the conditions of the victim prove that they have been violated and if possible to take sample of the semen and estimate the conditions of body injury. It does not matter that the victim is not a virgin since even common prostitutes have the same rights as any other member of the public.

Women who are either idiots or imbeciles are also protected by the law and anyone who has carnal knowledge with them with or without their consent like the case of girls under 14 is committing defilement and is liable to similar punishment also that given to those who violate girls below the age of 14 years.

Since rape and defilement are criminal offences, the victim may get no reparations redress, from the courts unless they file civil suits to claim for damages for the wrongs committed on their bodies.

84. Ibid, Sec. 145

J. W I F E B E A T I N G

Assaulting anyone is a punishable criminal offence in Kenya⁽⁸⁵⁾ and, given the constitutional equality of men and women in Kenya,⁽⁸⁶⁾ husbands have no "right" to beat their wives. Of course, the society condons some forms of violence and some amount of fighting or use of limited force as a means of resolving social conflicts may be acceptable. This however does not mean that men may claim that they have a right to beat their wives. This implies that men have a "right" to violate the laws:

K. A D O P T I O N

Adoption means a complete and final separation of a child from its natural parent, if there is one, and other relatives and the child becomes the child of the adopting parent for all purposes. "Fostering" a child is not adoption because it does not completely and finally sever the relationship between the natural parents and the child. Fosterage can take place without a court order, however, only a court of law can give an order for adoption. The present law applying to adoption is the Adoption Act (Cap.143) as ammended in 1978.

Any man or woman below the age of 18 and not married can be adopted provided they are resident in Kenya.⁽⁸⁷⁾ Any man, woman⁽⁸⁸⁾ or couple resident in Kenya have the power to adopt a child provided:-

- (a) they are at least 25 years old and 21 years older than the child they want to adopt,
- (b) if the/^{one}to be adopted is a relative of the adopting parent(s), the parent (s) must be at least 21 years old,
- (c) if one is the mother or father of a child there is no age limits,

85. Penal Code, Secs. 250 - 251
86. The Constitution of Kenya 1969 (Act No.5 of 1969) Sec.70
87. Adoption Act (Cap.143) as Ammended in 1978, Secs.2(1).
3 (1) and 4 (4)
88. Ibid, Sec.4

(d) that the child has been in custody of the adopting parents for at least 3 months prior to the adoption,

(e) only in special circumstances would the courts award an adoption order to a single male applicant, a spouse or spouses in a polygynous union and, where the applicant and the child are of different races,

Courts may give adoption orders only if the parents, guardians, or other relatives who might look after the child or the father of the child if the child is illegitimate or the parents of the child's mother, where the child is illegitimate, or the wife or husband of the applicant gives consent.⁽⁸⁹⁾ If any of these persons have failed to look after the child the court may disregard their withholding of consent.⁽⁹⁰⁾ Adoption orders only be given where the court is satisfied that it is in the interest of the child and the child also believes so. The courts can not give adoption to adopting parents who are being paid to do so. The courts must also ensure that relatives of the child to be adopted are informed in time before the adoption order is given.

89. Ibid Sec. 4

90. Ibid. Secs. 5 (1) and 8 (d)