# Muslim Family Law and Judicial Protection of Women's Rights in Kenya: An Assessment

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## DECLARATION

I, **John Tito Kunyuk**, declare that the mini-thesis titled '**Muslim Family law and Judicial Protection of Women's Rights in Kenya: An Assessment**' is my own work and has not been submitted for degree or examination to any university, college or institution of higher learning. All the sources I have used or quoted have been indicated and acknowledged by complete references.

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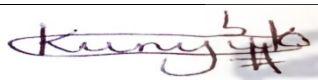

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## ABSTRACT

The status of women in Muslim majority and minority states is a major question in the articulation of rights in non-Western settings. Contestations over women's rights in these societies are thought to stem from conundrums that Muslims face when they struggle to comply with constitutional and statutory norms that reify equality and non-discrimination, while staying true to the teachings of their religious tradition, which may not necessarily reflect those norms. This study set out to explore the practice of Muslim Family Law in Kenya in order to assess whether and the extent to which the law, as it is currently adjudicated in Kenyan courts, protects the rights of women. The study examined the evolution of Muslim family law and the legal and institutional frameworks that underpin the protection of Muslim women's rights in Kenya. The study relied on case law from the Kadhis' court, the High Court and the Court of Appeal in the assessment of judicial protection of women's rights. Findings reveal that women assert their family law rights in the courts by using tools within the Islamic legal tradition and taking advantage of state laws, which promote an egalitarian vision of rights. Courts are found to be proactive in allowing women's access to their rights and redressing violations of rights in the adjudication of Muslim family law. However, the lack of clarity on jurisdictional questions and the absence of a definitive *madhhab* or school of law in the administration of Muslim family law are found to be drawbacks that may hamper women's enjoyment of their rights. It is recommended that amendments of the laws be made to redress legal indeterminacy.




**Key words**: Muslim family law, women's rights, Kenya, Kadhis' courts, Constitution, equality, non-discrimination, judicial.

## ABBREVIATIONS AND ACRONYMS

CEDAW – Convention on the Elimination of all forms of Discrimination Against Women

CKRC- Constitution of Kenya Review Commission

eKLR – Electronic Kenya Law Reports

ICCPR –International Covenant on Civil and Political Rights

KNCHR – Kenya National Commission on Human Rights

LSA – Law of Succession Act

MPA – Matrimonial Property Act

NCLR – National Council for Law Reporting

NGEC – National Gender and Equality Commission

UDHR - Universal Declaration of Human Rights

## DEFINITIONS

*Ahlul Kitab* – The People of the Book in reference to Christians and Jews.

*Hadith* – The words, actions, omissions and approvals of Prophet Muhammad (peace be upon him)

*Kadhi/ Qadi/ Qadhi* – Judge or judicial officer trained in Islamic law and determining disputes according to the laws and the rules of Islamic law.

*Khul'* – The wife's act of 'buying herself' out of a marriage through return of dower (mahr) to the husband.

*Li 'an* – Legal imprecation.

*Madhhab* – The school of law according to Islamic jurisprudence.

*Madrassa* – A traditional institution of Islamic learning.

*Mahr* – Dower.

*Mata'a* – Consolatory payment to the wife after divorce.

*Maqasid al-sharia* – Objectives of Islamic law.

*Mubaaraat* – Divorce by mutual consent.

*Mufti* – Muslim jurisconsult.

*Nashiza* – In a state of being recalcitrant.

*Talaq*- Unilateral repudiation of marriage.

*Wakf* – Muslim endowment

# CHAPTER ONE

# INTRODUCTION AND BACKGROUND

## 1.1. Introduction

The protection and advancement of women's rights is a fundamental issue in the law and politics of the modern nation state. Indeed, it is emphasised in many constitutions and laws across the world. The significance of the recognition of women's rights as human rights was laid down by Latin American and Indian feminists in the negotiations that led to the adoption of the Universal Declaration of Human Rights (UDHR) in 1948.[1] Key provisions in the UDHR include equality and non-discrimination; right to life, liberty and security of the person; right to property; the right to marriage and family and the freedom of conscience, belief and religion.

Despite the passing of the UDHR and the subsequent international and regional instruments that recognise women's rights, women in developing countries still struggle for the recognition and advancement of their rights by state and non-state actors. One of the major reasons for this is the legal and cultural pluralism inherent in many developing countries that were subject to domination and conquest by Western Europe's colonial powers. European colonisers found communities governed by their local norms and religious traditions, which were gender egalitarian. The combination of aspects of globalization and European legal transplants with the adoption of human rights instruments led to the marginalisation of indigenous and religious laws in the colonial and post-colonial imagery of states in much of Africa, Latin America, the Middle East and South East Asia.[2] Islamic law and indigenous African laws, for example, existed and flourished in Africa before the coming of the colonisers, who imposed Western education, legal systems, and the Christian religion on the African peoples. To date, indigenous laws and Islamic laws still compete for normative attention and recognition with state laws. The area of family law is one of the spheres within which such contest is very pronounced.

The question of the status of women in Muslim-majority countries and in countries with a significant Muslim population is a major aspect of the articulation of rights in non-Western settings. States that adopted constitutions have made provisions on equality and freedom from

[1] Hebert LA *Gender and Human Rights in a Global Mobile Era* (2022) 24.

[2] Diala AC & Kangwa B 'Rethinking the Interface between Customary Law and Constitutionalism in Sub-Saharan Africa' (2019) 52 *De Jure* 189.

discrimination as key elements in their versions of Bill of Rights. Alongside this, and especially in Muslim-majority countries, Islamic law is regarded as a source of law or *the* source of law in constitutional or legislative codes. In such countries, the controversy is on whether Islamic law as the dominant law in the state, is by human rights standards oppressive, antagonistic and indifferent to the plight of women both in the private and public realms.

Where Muslims are a significant minority, the recognition of Islamic precepts in the state's legal documents has the ability to pluralise the source and content of law in addressing concerns of minorities in multicultural settings. The struggle here is whether Muslim law as applied in constitutional or liberal democracies does protect women's rights according the human rights standards recognised under the constitution.

The post-independence constitutions guaranteed some fundamental rights and freedoms and that included women's rights. The opening up of political spaces in the 90s gave rise to constitutions that guarantee equality, human dignity and freedom from discrimination which are key tenets in the Bill of Rights of many African constitutions.[3] In Muslim majority countries in Africa such as Egypt, Morocco and Northern Nigeria, the question of protection of women's rights has been at the forefront of the discourses on rights and the implementation of international instruments. Egypt for example introduced the Law No.1 of 2000 which granted women the right to seek a judicial *khul'* divorce after so much struggle for the recognition of such wife-initiated divorces. Accordingly, they now enjoy the right to end their marriages by filing for no-fault based divorces in court.[4] In Morocco, a new Family Code known as *Moudawana* was promulgated in 2004 in response to pressure by the Moroccan feminist movement to have equality between men and women recognised within the family sphere.[5] The much-publicised case of Amina Lawal in Nigeria represents instances in which frameworks within the Islamic legal tradition are appropriated to protect and advance the rights of women in the criminal justice system as against over-reliance on the human rights frameworks.

In Kenya, Muslim law is recognised as one of the sources of law and is litigated before both the subordinate courts and superior courts. As one of the subordinate courts, Kadhis' courts are

[3] Mutunga W 'Human Rights and Societies: A Reflection from Kenya' In Sahle EN(ed) *Human Rights in Africa: Contemporary Debates and Struggles* (2019) 19.
[4] Al-Sharmani M 'Egyptian Family Courts: A Pathway of Women Empowerment' (2009) 7 *HAWWA* 89.
[5] Prettitore PS 'Family Law Reform, Gender Equality and Underage Marriage: A View from Morocco and Jordan' (2015) 13(3) *The Review of Faith and International Affairs* 32.

the major and primary forum where parties file cases seeking determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance. Women are the majority of litigants in the courts owing to the vulnerabilities of neglect, desertion, domestic violence and discrimination they experience as mothers, daughters and wives in family life.

### 1.2. Statement of the Problem

Muslim law is regarded as the 'the epitome of Islamic thought, the most typical manifestation of Islamic way of life and the core and kernel of Islam itself.'[6] As such, Muslim communities have privileged it across the world as against other Islamic disciplines. Muslim attachment to Muslim law is the reason for the ubiquity of the law in pre-colonial, colonial and postcolonial Muslim majority countries, and even in minority contexts such as Kenya.

At independence, Kenya inherited a plural legal system that included the application of Muslim family law. Various attempts at the passing of a code of family law uniform for all Kenyans have been futile as the experiments in 1967 and 2014 suggest. The Law of Succession Act, Matrimonial Property Act and the Marriage Act 2014 are some of the laws that recognise the application of Muslim law to marriages, divorce and inheritance while the Kadhis' courts Act and the Constitution of Kenya 2010 outline the jurisdictional limits of the Kadhis' courts with regard to the application of Muslim family law.

The rights of women under Muslim law are a contested issue not only in Kenya but in many parts of the world with significant Muslim populations. Muslim women, like their non-Muslim counterparts, struggle to achieve political, social and economic rights and freedoms against state and non-state actors. Most of this struggle is against deeply entrenched patriarchy. The right to work, the right to own property, the right to equality and freedom from discrimination based on gender continue to generate considerable debates. Recently in Kenya, there have been debates among actors within the Muslim community as to whether women should be appointed as kadhis (magistrates) to serve in Kadhis' courts. Senior Muslim politicians and clerics vehemently opposed such appointments as they were deemed offensive to the teachings of Islam and unprecedented in Islamic legal history.[7]

[6] Schacht J *Introduction to Islamic Law* (1982) 1.
[7] Kunyuk T 'The Female Kadhis Controversy' (2021) available at https://www.theelephant.info/features/2021/11/12/the-female-kadhis-controversy/ (accessed 6th July 2022).

Many Muslim women in the family sphere are denied the freedom to choose a marriage partner and even to opt for divorce. They are either left to suffer in an irretrievably broken down marriage or would only have to achieve freedom by buying themselves out of their marriage contract through the *khul'* procedure. They are also denied the right to maintenance upon divorce, the right to matrimonial property, and the right to the share of inheritance they are ordinarily entitled to under Muslim law.

Fundamentally, Muslim law emphasises the complementarity of roles between the male and the female in the family sphere. There is a hierarchy of authority and division of labour within the family and between the two genders. Thus, the responsibilities the law assigns to both are distinct and disparate. This subsequently affects their rights negatively upon divorce or death of a family member.

The scenario painted above tends to offend the constitutional imperatives of equality and non-discrimination. It usually plays out in litigation in both the subordinate courts and the higher courts in Kenya. The contestations on women's rights can thus be said to stem from the conundrums that Muslims face when they struggle to comply with constitutional and statutory norms that reify equality and non-discrimination while staying true to the teachings of their religious tradition, which may not necessarily reflect those norms.



### 1.3. Research aims and objectives

Given this context, this thesis seeks to examine the position of women living under Muslim family law in Kenya. It looks at whether Muslim family law as understood and applicable in Kenya does protect and advance women's rights and if so, the extent to which it does guarantee the rights to equal dignity, equality, and freedom from discrimination under the Constitution.

This study explores the current practice of Muslim family law in Kenya to determine whether the law, as it currently obtains, protects the rights of women. To do this, the study first considers the contribution of Muslim law to the plurality of the Kenyan legal system. It also examines how judicial officers handling matters of a Muslim family law nature navigate between the constitutional imperatives on equality and non-discrimination, and the duty to uphold the rights of religious minorities whose law is recognised by and enforceable under the constitution.

### 1.4. Research questions

The major question this research intends to answer is this: In what ways does the application of Muslim family law assist in the protection of women's rights in Kenya?

In order to answer this question, the following sub-questions are explored:

a) What is the status of Muslim family law applicable in Kenya?

b) What are the legal, policy and institutional frameworks that underpin the adjudication of Muslim family law for the protection of women's rights in Kenya?

c) How does judicial interpretation and application of Muslim family law affect the protection of women's rights in Kenya?

### 1.5. Significance of the Research

The continued existence of Muslim family law as a system of law within the hegemonic constitutional framework is seen as a threat to constitutionalism, rule of law, and protection of the rights enshrined in the constitution. This research is significant because it seeks to advance the argument that the courts in Kenya can still protect women's rights guaranteed under the constitution, while still preserving the application of Muslim family law.



### 1.6. Research Methodology

This study is desk-based. This involves a critical analysis of primary sources such as the existing laws on the protection of the rights of women under Muslim family law in Kenya, including case law on marriage, divorce, matrimonial property and inheritance.

Secondary sources are also used. These include relevant books, journal articles, reports and internet sources.

### 1.7. Literature Review

The main debates among scholars on the rights of women under Muslim family law revolve around the critique of the concept of Muslim law as applicable within the modern nation state and the scholarship on the compatibility of Islamic law and human rights regimes. These

debates have the effect of shaping how Muslim family law is conceptualised and applied within the Kenyan territory with respect to protection and advancement of women's rights.

Wael Hallaq takes issue with how the West problematises the conceptual boundaries of Islamic law.[8] He notes that the West has a penchant for othering Islamic law and any other normative tradition that does not reflect Western philosophical origins. His argument is that the terms 'law', 'religion' with reference to Shari'a have particular Western connotations and therefore distort the conceptual sense of the faith and legal tradition that Muslims owe their attachment to. Law is that which the sovereign says it is and is distinct from social and moral considerations that are the hallmark of say, the Muslim legal tradition.

Religion also falls into this category. As the scientific revolution came into loggerheads with Christendom, there a rose a distinction between revelation (a carrier of morality) and reason thus any use of the term religion in reference to the Muslim legal tradition necessitates, in the view of the West, a 'foreclosure of the force of the moral within the realm of the jural'.[9]

The law governing the Muslim family has always been jurist's law.[10] It arose from scholars' interpretation of the foundational sources such as the Qur'an and hadith in specific lived realities of space and time. Muslim communities have always been self-regulating as the legal norms of Islam permeate their everyday life, influencing action that benefits the individual in both mundane and spiritual affairs. With this background, the coming of the nation state is considered disruptive of Muslim way of life. Muslims have struggled throughout colonial and postcolonial era to assert their identity as a faith group with distinct cultural realities, against the hegemonic influence of a human rights based constitution that seeks to ignore this distinction.

At the practical level, An-Naim engages both the notions of sharia as the governing law of a state and the applicability of such in liberal democracies.[11] He agrees with Hallaq in the sense of the impossibility of a state governed by sharia in the era of the modern nation-state.[12] His argument is that pre-modern Islamic law and state law are two normative systems whose sources of authority and legitimacy are significantly disparate and therefore may not be both

[8] Hallaq WB *Shari'a: Theory, Practice, Transformations* (2009) 1.
[9] Hallaq *Shari'a* (2009) 5.
[10] Peters R 'From Jurists Law to Statute Law or what Happens when the Shari'a is codified' (2007) 7 *Mediterranean Politics* 82.
[11] Al-Naim AA 'The Compatibility Dialectic: Mediating the Legitimate coexistence of Islamic law and State Law (2010) 73 *The Modern Law Review* 1-29.
[12] Hallaq WB *The Impossible State: Islam, Politics and Modernity's Moral Predicament* (2013) ix.

the governing law of the state.[13] Since the state is the predominant order that organizes individuals and communities in the contemporary world, any pretensions of Islamic law to dominance as against state law would be rendered futile.[14]

On the applicability of Islamic law in modern liberal democracies, an- Naim concedes that such is only possible where there is a rapprochement of methodology and normative content between the two, and where there is a purposeful advancement of Islamic law as a jurisprudential tradition that is capable of elasticity in a manner that leads to real synthesis with state law.[15] This is where much of debates concerning Islam and human rights arises. Some of this involves framing Islam and human rights as binaries while another approach is to concentrate on the utility of Islam as a framework for the advancement of human rights, women's rights included.

Dunn perhaps seems to propound a definitive framework for Islam and rights in Muslim and non-Muslim societies.[16] Some Muslims, she argues are contented with the secular conception of rights as outlined by UDHR and other relevant instruments. Others privilege an Islamic conception of rights in opposition to secular conceptions. Another group of Muslims would consider a rejection of rights as an imposition of western colonial powers and their agents while others prefer to see human rights as a logical extension of rights as enshrined in the Muslim legal tradition. Saeed for example engages the scholarship on Islam and women's rights by first painting a picture of how the Qur'an as the foundational text of Islam promotes women's rights to equality and non-discrimination, but then goes on to blame cultural practices for the failure in the realization of these rights.[17] Others like Chaudhry[18]and Bauer[19] blame the male-dominated exegetical and hermeneutical tradition in the understanding of Qur'an 4:34 for the regeneration of women's rights in Muslim societies.

The interventions to protect and the rights of women in Muslim majority and minority jurisdictions have been varied. In most of these societies, the state through codification has managed to introduce as well as promote elements of protection of women's rights in the

[13] Al- Naim The Compatibility Dialectic (2010)3.
[14] Hallaq *The Impossible State* (2013) 140.
[15] Al-Naim The Compatibility Dialectic (2010)4.
[16] Dunn S 'Islamic law and Human Rights' in Emon AM & Ahmed R (Eds) *The Oxford Handbook of Islamic Law* (2018) 820.
[17] Saeed A *Human Rights and Islam: An Introduction to Key Debates between Islamic law and Human Rights Law* (2018) 126-128.
[18] Chaudhry A *Domestic Violence and the Islamic Tradition* (2014).
[19] Bauer K '"Traditional" Exegeses of Q 4: 34' (2006) *Comparative Islamic Studies* 129-142.

constitution, codes and statutes. Codification brings certainty and closure on the content of law even in the face of constant influence on the law from non-state actors.

Muslim feminist scholars and advocacy groups such as Musawah have in the past decades fought within the Islamic legal tradition to assert women's rights.[20] Publications by Amina Wadud, Asma Barlas, Fatima Mernissi, Kecia Ali have sustained discourse on women's rights using interpretational and hermeneutical methodologies that are recognised within the Islamic tradition. This has helped shape narratives on how women's rights should be appreciated in Muslim communities.[21]

In jurisdictions where Muslim family law is applied, various methodologies have been used to protect women's rights in courts. Studies done in Israel, Malaysia and Pakistan show that protection of women's rights is increasingly gaining traction and favour before courts where the law is applied.[22]There is a greater awareness on the part of litigants and judges on these rights and the decisions churned from the courts reflect various methodologies from within Islamic law that the judges employ to arrive at gender-just conclusions.

The studies done in Kenya on the Kadhis' courts and Muslim Family law are majorly historical. Kenyan academics such as Mwakimako and Ndzovu have written on the history and the struggles of the Kadhis' courts in colonial and postcolonial Kenya, none of which have a focus on women's rights.[23]It is understandable that the questions of rights were not much in vogue then, as they are today.

On gender, Hirsch has an important anthropological work on how women use narratives to frame their cases before the kadhis in Mombasa and Malindi courts of Kenya. The work concentrated on discourses of disputing in the Kadhis' courts by women from within the

[20] https://www.musawah.org/ (accessed 5th July 2022).

[21] See for Example Wadud A *Inside the Gender Jihad: Women's Reform in Islam* (2006) Barlas A *Believing Women in Islam: Unreading Patriarchal Interpretations of the Qurán* (2002) Ali K *Marriage and Slavery in Early Islam* (2010).

[22] See for example, Reiter Y 'Judge Reform: Facilitating divorce by Shari'a Courts in Israel' (2009) 11 *Journal of Islamic Law and Culture* 13; Hak NA 'Just and Equal Treatment in Polygamous Marriages: The Practice in the Sharia courts in Malaysia' (2008) 16 *IIUMLJ* 141; Abbasi MZ 'Women's Right to Divorce under Islamic Law in Pakistan and India' (2017) available at https://islamiclaw.blog/2017/01/27/womens-right-to-divorce-under-islamic-law-in-pakistan-and-india/ (accessed 6th July 2022).

[23] See for example Mwakimako H 'Kadhi Court and Appointment of Kadhi in Kenyan Colony' (2008) 2 *Religion Compass* 424; Ndzovu H *Muslims in Kenyan Politics: Political Involvement, Marginalization and Minority Status* (2014).

Swahili community and did not reflect practices in various Muslim communities across the country.[24]

In the past few years, the attention of some of these scholars has shifted to how Muslim family law is understood and applied in courts. Hashim for example, has sustained exploration on how the Kadhis' courts relate with other courts in the resolution of disputes pertaining to the application of Muslim family law.[25]This, together with Mujuzi's work however focus majorly on the jurisdictional aspects of the court, with some attention given to the conflicting jurisprudence between the courts on the substance of the law applicable.[26] Literature is thin on the assessment of how the Kadhis' courts or higher courts protect women's rights in the various jurisdictional aspects of Muslim family law, hence the essence of this study.

### 1.8 Chapter outline

Chapter Two entails a discussion of the nature and status of Muslim family law applicable in Kenya during the pre-colonial, colonial periods and postcolonial periods up to the 2010 Constitutional moment.

Chapter Three analyses the legal and institutional frameworks for the protection of the rights of women living under Muslim family law in Kenya.

Chapter Four examines how the Kadhis' courts and the superior courts in Kenya have resolved disputes that require determination of questions of Muslim family law with a view to assessing the impact of such decisions on the protection of women's rights. This involves assessing the debates raised in the decisions, the methodologies used by the judicial officers and how such decisions impact on women's rights.

Chapter Five shall contain conclusions and recommendation.

[24] Hirsch SF *Pronouncing and Persevering: Gender and the Discourses of disputing in an African Court* (1998).
[25] Hashim A 'Application of Muslim Personal Law in Kenyan Courts: Problems and Prospects' (2020) 11 *Islamic Africa* 208.
[26] Mujuzi JD 'Contentious Jurisdiction: The Kenyan Kadhis Courts and their Application of Islamic Law of Custody and Maintenance of Wives and Children' (2020) 7 *JCLA* 93.

## CHAPTER TWO

## EVOLUTION OF MUSLIM FAMILY LAW IN KENYA

### 2.1. Introduction

This chapter discusses the definitional boundaries of Muslim family law throughout history, and its historical application in Kenya. More important is its assessment of changes in the nature and status of Muslim family law in the pre-modern, colonial, and postcolonial periods and how the scope of the law in these periods relates to the protection of the rights of women subject to Muslim family law.

### 2.2. The Sharia Origins of Muslim Family Law

Muslim family law is that branch of Sharia that pertains to 'heterosexual spousal relationship, parental relationship, succession and other family relationships in so far as they give rights to legally regulated rights and obligations such as maintenance and responsibility of minors'.[1] It is what is regarded as the last bastion of Islamic law applicable in today's modern world, as the other branches have been overtaken by codes, statutes and constitutions, though references to Muslim law or Sharia may be part of the modern legal documents.[2] The term Sharia has been used interchangeably with Islamic law or Muslim law depending on the historical, social and geographical character of the jurisdiction that uses it. Islamic law is the anglicized version of Sharia that gained provenance upon the imposition of European norms and laws in colonized territories.[3]

Etymologically, Sharia means a path, a way or a road to a watering hole. Water is that which gives life, and the ways to the watering source may well be multiple, clear or may otherwise be treacherous thus needing clearance. That is the metaphor of the sharia that can be gleaned from Qur'anic exegetical literature on verses that reference Sharia.[4]

[1] Welchman L 'A historiography of Islamic family law' in Emon AM & Ahmed R (eds) *Oxford Handbook of Islamic Law* (2018) 888.
[2] Karcic F 'Applying the Shari'ah in modern societies: main developments and issues' (2001) 40(2*) Islamic Studies* 207.
[3] Dupret B *What is the Sharia* (2018) 20.
[4] Verses that reference Sharia include Qur'an 45:18 and Qur'an 5: 48.

Sharia as law is an arena of contestation. While law understood in the modern sense refers to a system of rules enforced by or through the power of the state, Sharia regulates both the spiritual and the mundane affairs of Muslims, the latter including those that require state regulation and enforcement. An ordinary manual or treatise of Islamic law contains chapters dealing with rules on worship, commercial transactions, criminal law, international relations, family law and laws governing judicial adjudication.

Sharia is understood from its sources, and from the socio-historical development of the law and its institutions before and after modernity. The Qur'an and the Hadith - both of which Ali Khan refers to as the Basic Code - are the basic sources of Islamic theology, ethics and law.[5] Being of divine origin, these sources are, according to Muslims, universal and timeless pieces of wisdom that guide vertical and horizontal relationships between humans and the sovereign and among humans respectively. Despite being immutable, the interpretation and application of the sources can be adapted to various settings through the use of jurisprudential tools such as analogical reasoning, consensus building and advancement of the purposes of the law (*maqasid al-sharia*).

The Qur'an contains about 500 verses of legal content, some of which touch exclusively on Muslim family law. Some of the verses are clear and explicit in their signification. Some are speculative in meaning and therefore need exegetical and legal interpretation, and that is the domain of juris consults (muftis), judges (kadhis) and public officials affiliated to the executive head of the polity. Rules of Sharia are deduced by Muslim scholars not only from the explicit words of the Qur'an, but also from the implicit meanings through the application of inference and logical construction.[6]

Prophet Muhammad was deemed by jurists as the expositor of the Qur'an through his words, actions, omissions and approvals that came to be subsumed under a discipline of Islamic studies known as hadith. Hadith, sometimes referred to as Sunnah, is considered one of the primary sources of Islamic law, second only to the Qur'an. Kamali defines Sunnah as 'a clear path or a beaten track but it has also been used to imply normative practice or an established course of

[5] Khan LA 'Fana and Baqa Infinities of Islam: Approaches to Islamic law and behaviour' (2010) 7 *University of St. Thomas Law Journal* 511.
[6] Kamali H *Principles of Islamic Jurisprudence* (1991) 27.

conduct'.[7]As a source of law however, the hadith is not like the Qur'an in authority due to authenticity claims that seem to accompany a number of hadith.

The compilation of hadith in book form and subsequent canonisation was a rather late exercise undertaken by scholars, almost two centuries after the compilation of the Qur'an. Nevertheless, the Prophet had already inaugurated the building blocks for Islamic law by his performance of various roles in the nascent polity of Madina. These roles are recorded in the canonical books of hadith and they include his role as imam (political figurehead), rasul (messenger of God), mufti (juris consult) and kadhi (judge). The 13th century jurist Al-Qarafi explains in his *al-Ihkam* various jurisdictions that the Prophet performed. As a messenger of God, he relayed to the people what God had revealed to him; as a mufti, he rendered legal opinions that communicated his understanding of the revealed texts of God's law; as a judge, he rendered judicial decisions that settled disputes between parties and as the political head (imam) of the nascent Muslim community, he made political decisions such as declaration of war or truce.[8]

The hadith that contain family law content are scattered in the specific chapters of the canonical collections of hadith, which are often arranged according to the chapters in an Islamic law manual.[9] In the Muwatta of Imam Malik for example, there are chapters on nikah (marriage), Divorce (talaq), nafaqah (maintenance and custody), wasiyyah (wills) and mirath (inheritance).[10] Subsequent scholars not only in the field of hadith criticism but also in Islamic jurisprudence (usul al-fiqh) or in legal theory, have across the centuries subjected these canonical books to commentary and critical evaluation.

The scholars' interaction with the two sources yielded the schools of law that are still ubiquitous today in the articulation of Islamic law even with the rampant changes in the legal landscape of many Muslim majority countries. First, there was the process of compilation of the Qur'an.[11] Then, legal rules derived from the Qur'an and hadith were transmitted by the companions of the Prophet who were dispersed in the caliphates established after the Prophet's death. Early Muslim jurists developed the law in the geographical locations of the Islamic

[7] Kamali H *Principles,* 44.

[8] Fadel M *Criterion for Distinguishing Legal Opinions from Judicial Rulings and the Administrative Acts of Judges and Rulers* (2017) 120-122.

[9] On canonisation of hadith, see for example Brown JAC *Canonization of al-Bukhari and Muslim: The formation and function the Sunni Hadith Canon* (2007).

[10] A recent translation of the Muwatta was done by Fadel M & Monette C *al-Muwatta by Malik ibn Anas [The Recension of Yahya b. Yahya al-laythi d. 244/848]: A translation of the Royal Moroccan edition* (2019).

[11] For compilation of the Qur'an and its canonisation, see Al-A'zami MM *The History of the Qur'anic Text from Revelation to Compilation*: *A Comparative Study with the Old and New Testaments* (2003).

polity, which included Mecca, Madina, Basra, Kufa Damascus and Egypt.[12] Each of these cities produced a distinct body of jurisprudential output from the works of muftis, kadhis, Qur'anic exegetes, and the scholars who taught the law and other Islamic disciplines in various mosques that later became madrassas (colleges).

When the process of canonisation of hadith began, Islamic law had already taken shape in the form of the Hanafi school with the eponymous founder Abu Hanifa being among the first well known jurists in Iraq. Abu Hanifa distinguished himself by use of deduction and analogical reasoning. He developed the law through extensive debates with other jurists in order to arrive at sound legal opinions. His methodology was the adoption of legal rules extant in the Qur'an. When he did not find anything in the Qur'an that answers a specific legal question, he resorted to the hadith that he regarded as authentic. Since little hadith was transmitted during his time, he relied on the opinions of the companions of the Prophet that answered the specific legal question and ignored other non-relevant opinions.

Other jurists also thrived in cities like Imam Malik in Madina, Al-Shafii in Mecca and later Ahmad ibn Hanbal in Iraq. These later jurists made extensive use of hadith and published various legal texts that majorly used hadith alongside the Qur'an as a source of the derivation of law. The schools of law or madhhabs inaugurated by the four jurists in the eighth and ninth centuries went through a process of development and systematization in various geographical locations where Islam spread, and still survive to date owing to sustained scholarship and output by subsequent jurists across the centuries.[13] The output was in the form of textbooks for teaching (*mutun*), commentaries (*shuruh*), glosses (*hawashi*), abridgements (*mukhtasaraat*), legal maxims (*qawaid*), legal opinions (*fatawa*) and manuals for judges (*adab al-qadi*) literature. All these were composed within the specific legal schools and across legal schools. Contemporary scholars have sustained the attention to these texts through edition, commentary and critical study. Lost manuscripts of the classical age of Islam are also subjected to these processes.

Islamic law spread as far as China to the East and as far as Spain to the West. The Ummayad and the Abbasid periods of Islamic law are deemed the classical age during which the institutions of Islamic law flourished. The decline of attention to Islamic law came with

[12] Bernards M & Nawas J 'The geographic distribution of Muslim jurists during the first four centuries AH' (2003) 10(2) *Islamic Law and Society* 168.

[13] For systematization of the schools of law, see Melchert C the *Formation of the Sunni Schools of Law, 9th-10 Centuries CE* (1997).

modernity and colonization during the Ottoman Empire until its abolition in 1924 and the establishment of nation states. Even with the end of Islamic empire, Islamic law continues to be practised in the geographical locations that the madhhabs spread.[14] The Hanafi School is the largest school of law and is practised in China, the states that comprise the former Soviet Union, the states in the Indian Sub-continent and in some Arab states. The larger part of North Africa and West Africa follows the Maliki tradition of law and the same is followed by Kuwait and United Arab Emirates. The Shafii legal tradition is practised in Oman, Yemen, Eastern Africa and states in South East Asia including Malaysia and Indonesia, while Saudi Arabia and a few other states are known for the Hanbali madhhab. Muslim family law has been part of the laws in the various texts authored according to the genres of Islamic law adverted to above.

### 2.3. Historical Development of Muslim Family Law in Kenya up to 2010

Until the onset of modernity, the four schools of Islamic jurisprudence 'constituted the preeminent formal institution through which Sunni legal doctrine in Muslim lands was interpreted and debated and legal cases involving Muslims adjudicated'.[15] Even after modernity, the madhhabs still inform the nature of Islamic law applied in specific nation-states and are used as a framework for instruction in Islamic law in various Muslim *madrassa*-colleges. The origins of Muslim family law in Kenya can be traced to two periods: The pre-colonial and colonial periods. These periods have influenced the Shafii-Hanafi character of Muslim family law that has been practised during the colonial and post-colonial times not only among Muslim communities but also within the judicial apparatus of the Kenyan nation-state.

#### 2.3.1. Islamic law in pre-colonial Kenya

Islam is understood to have reached the Kenyan coast in the early eighth century after the Umayyad Caliph Abd al-Malik Ibn Marwan sent the Syrian armies to the East Coast of Africa. Their settlement and interaction with the local population led to the conversion of indigenes to Islam and the emergence of Lamu, Malindi, Pate, Zanzibar, Mombasa and Kilwa as Muslim

[14] For a systematic study of the reach of the schools in today's world, see al-Naim A *Islamic Family Law in a Changing world: A global resource book* (2002).

[15] Sheibani M, Toft A & El-Shamsy 'The Classical Period: Scripture, Origins and Early Development' in Emon A & Ahmed R (eds) *Oxford Handbook of Islamic Law* (2018) 419.

coastal cities.[16] The medieval times witnessed Arab migration and settlement in the East African Coast, some fleeing persecution due to political infirmities in places like Hadhramawt, Yaman, Oman and the Persian Gulf coast and some because of trade.[17]

At the time of the coming of the Portuguese in 1498, Islamic law was already thriving in the East coast of Africa. Pouwels records that Muslims had arrived from Southern and Eastern Arabia and settled in Mogadishu and Barawa areas from around the ninth and tenth centuries, and clans known for greater learning like the Banu Qahtani were made qadis of the towns.[18] In his travels, Ibn Battutta mentions that when he sailed to Maqdashaw (Mogadishu) in the East Coast, he was welcomed by the qadi's students and taken to the qadi who later introduced him to the Shaikh who was the Sultan of the city. On the particular Saturday he spent there, Ibn Battutta narrates how judicial procedure in the qadis court was conducted:

> "The Shaikh then goes into his residence, and the qadi, with the viziers, the private secretary, and four of the principal amirs, sits for deciding cases among the population and petitioners. Every case that is concerned with the rulings of the Divine Law is decided by the qadi, and all cases other than those are decided by the members of the council, that is to say, the viziers and amirs. If any case calls for consultation of the sultan, they write to him about it, and he sends out the reply to them immediately on the reverse of the document as determined by his judgement. And this too is their fixed custom".[19]

In these travels in East Africa, there is constant mention of the populations in Mogadishu, Mombasa and Kilwa as being of the 'Shafiite rite', and that is with reference to the proliferation of the Shafii school of law and thought.[20] However, that does not mean that Shafii law was the only law practised in East Africa in the pre-colonial era. There is mention for example by Ibn Battutta of the presence of Shia sects in places like Zaylai just before he arrived in Mogadishu. Another of the Muslim sects with a law school in East Africa during the pre-colonial period

[16] Kooria M 'Zones of Origin: The formation of Islamic law in the Indian Ocean littoral c 615-1000 CE' in Kooria M & Ravensbergen S(Ed) *Islamic Law in the Indian Ocean World: Texts, ideas and Practices* (2022) 18.
[17] Martin BG 'Arab migrations to East Africa in medieval times' (1974) 7(3) *The International Journal of African Historical Studies* 367.
[18] Pouwels RL 'The medieval foundations of East African Islam' (1978) 11(2) *The International Journal of African Historical Studies* 201.
[19] Gibb H.A.R. (transl.) *The Travels of ibn Battuta* (1962) Vol 2, 378.
[20] Gibb H.AR. (transl.) *The Travels of ibn Battuta*, 379,380.

was the Ibadhi sect.[21] During the early years of the Sultanate of Oman rule in pre-colonial Zanzibar, the Ibadhi sect-that is neither Sunni nor Shia-competed with the Shafi'i school and kadhis were later appointed from both schools to oversee the administration of justice way into the British rule over the Sultan's dominions in the late nineteenth century. Shafii law has however been conspicuous in the writings of many scholars who have studied the Islamic intellectual tradition in the Indian Ocean littoral.[22]

Islamic law in Kenya during the pre-colonial period has its antecedents in the intellectual tradition of the Omani Arabs and the Yemeni Arabs from Hadramaut who had emigrated into Kenyan and Zanzibari coastal cities even before the establishment of Omani Sultanate in Zanzibar, and even before the borders of present-day nation states were drawn. There existed kadhis appointed by the political heads of the cities from among the ulama (Muslim scholars) class to administer Islamic law and handle disputes between the inhabitants. When the Busaidi dynasty of the Omani Sultanate was established and the capital moved to Zanzibar in 1832, Seyyid Said as the Sultan appointed kadhis who adjudicated matters locally while final appeals went to the Sultan himself.[23] This marked the beginning of formalization of the structures of the Kadhis' courts as known today.

Stiles notes that while the Arab immigrants from Oman and their descendants were Ibadhi in creed and law, the rest of the population who were majorly indigenous Africans followed the Shafii law.[24] The Sultan appointed a principal kadhi for each group supported by other kadhis spread across Zanzibari towns. Stiles further notes that these kadhis held court at their homes, while some like in Pemba held court on the streets. Stockreiter further reports that kadhis in Zanzibar town held court at the Sultan's palace and in their own homes.[25]

Bakari credits the intellectual development of Islamic law in Kenya to the efforts of the Sharifite and the Mazrui families that have been responsible for the spread of Islam in East Africa.[26] The Sharifite families migrated from Hadhramaut in present-day Yemen, and they

[21] On Ibadhi origins and development see Wilkinson JC *Ibadism: Origins and Early development in Oman* (2010).
[22] See for example Bang AK *Sufis and Scholars of the Sea: Family Networks in East Africa, 1860-1925* (2003).
[23] Stockreiter E *Islamic Law, Gender and Social Change in Post –Abolition Zanzibar* (2015)29-30.
[24] Stiles E *An Islamic Court in Context: An Ethnographic Study of Judicial Reasoning* (2005) 13.
[25] Stockreiter E '"British Kadhis" and "Muslim Judges": Modernizations, inconsistencies and accommodation in Zanzibar's colonial judiciary' (2010) 4(3) *Journal of Eastern African Studies* 560.
[26] Bakari M 'The New 'Ulama in Kenya' in Bakari M & Yahya SS (eds) *Islam in Kenya: Proceedings of the National Seminar on Contemporary Islam in Kenya* (1995) 168-170.

are acclaimed to have a continuous lineage that goes back to the Prophet, hence the title Sharifs or Sayyids. They are majorly called Hadhramis with reference to their origin in Hadhramaut, and they include the scholarly families of Jamal al-layl, the Ahdali, the Saggaff, the Shatri and others. For instance, the first Chief Kadhi of Kenya was one Shariff Abdulrahman Saggaff, who was appointed in 1895 at the command of the British colonial administration. He hailed from the Saggaff family. The latest member of the Sharifite families to hold the position of Chief Kadhi of Kenya is Shariff Ahmad Hussein al-Muhdhar who retired from the judiciary in October 2022.

The Mazrui is another important scholarly family that has straddled the Muslim intellectual landscape of Kenya and East Africa for many years. The most notable among them is the late public intellectual Prof. Ali Mazrui. The Mazrui, according to Berg, first came to Mombasa as governors representing the Yarubi Imams of Muscat in present day Oman.[27] They ruled Mombasa from 1735 to I837 when they were ultimately deposed by the Busaidi dynasty, who subsequently established their rule over the coastal cities including Mombasa. Though the intellectual networks of the Mazrui scholars coincided with those of the Sharifite families, the Mazrui contribution to the development of Islamic law was felt in the twentieth century as they have dominated appointments to the position of the Chief Kadhi and kadhis in colonial and post-colonial Kenya.[28] The last of the Mazrui kadhis was Hammad ibn Muhammad ibn Kassim al-Mazrui who retired from the position of Chief Kadhi of Kenya in the year 2010.

During the period of pre-colonial Kenya, there was no particular attention given to the status and the rights of women as far as the application of Islamic law is concerned. This is because the judicial system was not bureaucratised and there were no distinct institutional structures apart from those ordained by the Sultan. The attention of the state was also on the eradication of slavery, and the pressures from imperialists especially the British did not allow them to concentrate on internal critique of legal and administrative systems.

### 2.3.2. Islamic law in colonial Kenya: 1895-1963

The Zanzibar Sultanate had its dominions spread across the East African coast. Its survival was pegged on the economic relations it had with the Persian Gulf, India and nations in the Far East

[27] Berg FJ 'The Swahili Community of Mombasa, 1500-1900' (1968) 9(1) *Journal of African History* 35.
[28] Bakari M 'The New Ulama', 170.

on one hand, and its strategic and diplomatic relations with USA, Germany and Britain on the other.[29] Germany and Britain in particular had imperial interests in East Africa with the latter having succeeded in establishing a long-lasting rule over India. The Busaidi Sultanate erected by Seyyid Said in Zanzibar entered into headwinds with his death in 1857. The heirs jostled over control of the territory, coupled with the snooping of imperial powers over Zanzibar. Although they succeeded in the caravan trade and in increased trade connections with India, the subsequent Sultans Seyyid Majid and Seyyid Barghash failed to stem German and British influence over East African mainland. Barghash was forced to relinquish a large part of mainland territories to Germany in 1885 and Britain and Germany signed the Delimitation Treaty in 1886. The two nations later divided the interior of Kenya and Tanzania amongst themselves without the Sultan's acquiescence. The result was that the Sultan's dominion was limited to the ten-mile wide coastal strip that ran from River Tana in Kenya to Tanzanian River Ruvuma in the south.[30]

In 1888, the Imperial British East African Company took over the administration of Kenyan territory on behalf of the Sultan. However, when hit by a financial crisis in 1895, the Company's roles were taken up by His Britannic Majesty's government through a new pact with the Sultan. The new agreement gave the British Government full executive and administrative powers over the whole of Kenyan territory, including the ten-mile coastal strip.[31]

The British legal and administrative apparatus that had been applied over a century in the Indian colony came to bear on the East African Coast. According to Metcalf, British motivations for reform of law in the colonies were two: The desire that the colonies adhere to the rule of law coupled with the desire to have regard and respect for the customs and the traditions central to the people that are under British dominion.[32] The Indian Muslim interaction with English law in the administration of the Indian colony gave birth to a regime of law known as Anglo-

[29] Lodhi AY 'The Arabs in Zanzibar: From Sultanate to People's Republic' (1986) 7(2) *Institute of Muslim Minority Affairs Journal* 404.
[30] Lodhi AY 'The Arabs in Zanzibar, 404.
[31] Hashim A 'Coping with Conflicts: Colonial policy towards Muslim Personal Law in Kenya and Post-Colonial Court Practice' in Jeppie S, Moosa E & Roberts R (Eds): *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-Colonial Challenges* (2010)223.
[32] Metcalf TR *Imperial connections: India in the Indian Ocean Arena, 1860-1920* (2007) 17.

Muhammadan law, defined by Hussain as a 'hybrid legal system that combined English common law and principles of equity with a distilled version of Islamic jurisprudence'.[33]

Anglo-Muhammadan law developed from two major sources: translation into English, of texts in the Hanafi legal school that is the dominant school in the sub-continent, and the case law developed by British and Indian judges in the interpretation and application of Muslim law. Among the texts translated were the *Hedaya* of Al-Marghinani and *Fatawa alamghiri*. These translations were subsequently used by judges in the colonial courts and are still used to date in the interpretation of Muslim personal law in India, Pakistan, Bangladesh and other countries with a predominant Hanafi presence. These were then followed by legislations, which included the Muslim Personal Law (Shariat) Act of 1937 and the Dissolution of Muslim Marriages Act of 1939.[34]

The British in Kenya, as in other jurisdictions like Nigeria applied indirect policy in the administration of Islamic law. According to Sodiq, Lord Lugard initially promised non-interference with the religion of native Nigerians and that included Muslims.[35] However, the realities of administering a colony as pluralistic as Nigeria demanded a restructuring of relations. Thus, Lord Lugard relegated Islamic law from being a full-fledged legal system to the status of native law administered by native courts. English courts subsequently checked the administration of Islamic law on appeal and through the application of the repugnancy test in judicial decision-making. A similar scenario applied to Kenya.

The first East Africa Order in Council of 1897 was enacted by the British consul in Zanzibar, which when published in 1898 provided for the establishment of a system of courts for the East Africa Protectorate.[36] The Native Courts Regulations of 1897 established two categories of native courts: Those administered by European officials and those administered by natives. Kadhis' courts, otherwise known as Mussulman Ecclesiastical courts were among those administered by natives. The procedures to be followed in all these courts except the Kadhis' court was the Indian civil procedure, criminal procedure and penal codes. General principles of Islamic law were to apply in the Kadhis' courts.[37] The motivation for applying Indian laws

[33] Hussain SA 'Anglo-Muhammadan Law' in Emon A & Ahmed R (Eds) *Oxford Handbook of Islamic Law*, 537.
[34] Hussain SA 'Anglo-Muhammadan Law', 543-547.
[35] Sodiq Y *A History of the Application of Islamic law in Nigeria* (2017)39-40.
[36] Mwakimako H 'The historical development of Muslim courts: The Kadhi, Mudir and Liwali courts and the Civil Procedure Code and Criminal Procedure Ordinance, c 1963' (2011) 5(2) *Journal of Eastern African Studies* 329.
[37] Hashim A 'Coping with Conflicts', 225, 226.

was that 'they were simpler to implement than English law in that they presented fewer difficulties to administrators who lacked special legal training'.[38]

A raft of other changes followed the establishment of the Protectorate: Appeal courts were established in 1902 under the Eastern African Protectorates (Courts of Appeal) Order in Council; Subordinate Courts were unified in 1907 and the appeal systems from the subordinate courts and Kadhis' courts to the High courts were established.[39] What is remarkable during this period is the gradual delimitation of jurisdiction of the Kadhis' courts to matters of personal law when they had both civil and criminal jurisdictions. The kadhis were also affected by changes in the civil procedure and the law of evidence. These changes privileged Indian laws of evidence up to the passing of the Evidence Decree No 1 of 1917, which provided for the application of English law of evidence and the termination of the application of Muslim evidence law.[40]

In 1920, the Mohammedan Marriage and Divorce Registration Act[41] and the Mohammedan Marriage, Divorce and Succession Act[42] came into place to govern various aspects of the application of Muslim family law in the colonies. There is however little or no mention of whether the kadhis and judges applied these Acts in judicial decision-making.

A distinguishing feature of this period is the prevalence of law reporting in Eastern Africa. Where one may not be able to know the status of women in the application of Muslim law in the colonial period, the law reports came in handy. A number of cases stood out during this period. In *Athman bin Mohamed v Ali bin Salim & Another,*[43] the first Defendant had married Amina, a sister to the Plaintiff and the second Defendant as a kadhi had solemnized that marriage. The Plaintiff sued to have the marriage set aside and for rectification of the marriage register, because they did not seek his consent as the sister's wali or legal guardian. In dismissing the case, the Liwali (representative of the Governor General) opined that the marriage was a legal one because Amina was married of her own free will and the marriage had already been consummated. The Plaintiff's appeal to the High Court was also dismissed as

[38] Hashim A 'Shaping of the Sharia courts: British policies on transforming the kadhi courts in colonial Zanzibar' (2012) 38(3) *Social Dynamics* 381.
[39] Mwakimako H 'The historical development'
[40] Hashim A 'Shaping of the Sharia courts'
[41] Cap 155 of the Laws of Kenya.
[42] Cap 156 of the Laws of Kenya.
[43] Court of Appeal 5 of 1914 [1916] E.A.L.R. Vol 6, 91.

the facts showed that the Plaintiff had refused consent. Passages in the *Minhaj* of al-Nawawi, a popular text in the Shafii school in East Africa were quoted:

> 'The Sultan can help a free woman to marry, in his position as guardian of every woman who has no guardian or whose guardian hinders the marriage through abuse of his power'.

The Plaintiff further appealed to the Court of Appeal of Eastern Africa, which agreed with the courts below as to the law applied, but remitted the matter to the Liwali's Court to make a finding of fact as to whether the Plaintiff's refusal to consent to his sister's marriage was proved before the kadhi.[44] This is an example of a case in which the Kadhis' court, the High Court and the Court of Appeal asserted the Muslim women's right to marriage in a time there was little attention to women's rights.

One of the decisions pertaining to the rights of women to divorce in colonial Kenya is *Saliha binti Baraka v Thabit bin Salim.*[45] The Appellant, a resident of Lamu, Kenya was deserted by her husband and decided to migrate to Mombasa and live with her parents where she petitioned for divorce. The kadhi at Mombasa refused to grant divorce on the preliminary point that by leaving the matrimonial home without her husband's consent, she was deemed *nashiza* or disobedient hence no longer entitled to such reliefs as divorce. Saliha appealed this decision. Abdurrehman bin Ahamed, the Sheikh ul-Islam[46] who sat as assessor with Judge Hamilton opined that since the husband was in Arabia and the appellant was with her parents, there was no disobedience. The case was remitted to the kadhi for decision according to Sharia. Once it was proven by oath before Kadhi Mahomed bin Kassim that the husband went to Arabia without paying dowry, providing maintenance and a dwelling place to the Petitioner, the marriage was dissolved.

Islamic law in the colonial period was majorly developed through judicial interpretation and application. Quite a number of reported decisions favoured women's rights. The human rights discourse was not yet developed in most of the colonial era, but the industry of the kadhis and

[44] These were courts where government administrators known as Liwalis (Arab governors during the Busaidi Sultanate) administered justice to the Arab natives. The Kenyan Government at Independence abolished them.
[45] Court of Appeal No. 56 of 1908[1909] E.A.L.R. Vol 2, 131.
[46] A title given to the Chief Kadhi in colonial Kenya since he acted as a mufti (jurisconsult) for the colonial state alongside his judicial functions. He announced the sighting of the moon during Ramadhan fasting and he acted as assessor in appeals with an element of Islamic law.

judges in the application of the law to serve justice to both men and women can still be seen in the decisions made during this period.

### 2.3.3. Islamic law in postcolonial Kenya upto 2010

In the run-up to independence in 1963, the British colonial administration in Kenya held talks with the Sultanate of Zanzibar over ceding the Sultan's dominions in the Kenyan Protectorate to Kenya at independence. In the concluding agreements between the Prime Minister of Zanzibar, Mohammed Shamte and the Prime Minister of Kenya, Jomo Kenyatta, there was an undertaking that the Kenyan government would preserve Muslim faith, lands, language and courts as the Sultan ceded the ten-mile coastal strip to the newly independent Kenya.[47] The Kadhis' courts were subsequently entrenched in the 1963 Constitution and they were empowered to exercise jurisdiction within the former Protectorate or areas that were under the former Protectorate.[48]

The post-colonial period saw the review of the Mohammedan Acts and the enactment of the Kadhis' Courts Act of 1967.[49] The Kadhis' Courts Act provided the administrative, territorial and the jurisdictional aspects of the Kadhis' courts coupled with provisions on the laws and rules of evidence applicable in the Kadhis' court and the manner of application. There also exist in the Act provisions on the rules of procedure applied in the Kadhis' courts.

This period also witnessed the enactment of the Law of Succession Act,[50] which had significant provisions on the application of Muslim law to the devolution of the estates of deceased Muslims. This was after the government set up two commissions to look into the statutory law, common law, Islamic law and Hindu law with the purpose of making recommendations for a practicable uniform law that applies to all persons in Kenya in matters relating to marriage, divorce and succession.[51] While the attempt to codify the law of succession succeeded, the one on the codification of the marriage law failed. Part of the contention, according to Cotran was that the recommendations were too pro-women's rights and they would prove unacceptable to

[47] For a copy of the agreement see https://www.cvce.eu/content/publication/2015/10/13/b261f2a3-d7e8-4eb0-9e49-d0160813b492/publishable_en.pdf (accessed 12th January 2023).
[48] Section 179(4) of the Constitution of Kenya, 1963.
[49] No.14 of 1967, Cap 11 of the Laws of Kenya.
[50] Cap 160 of the Laws of Kenya.
[51] For the some of the reports of these commissions see http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Commission-on-the-Law-of-Marriage-and-Divorce-1968.pdf (accessed 12th January 2023).

a nearly all-male parliament.[52] The Muslims particularly challenged the work of the two commissions and termed it as an intrusion on their free-exercise of religion. They specifically flagged the application of the Guardianship of Infants Act as an encroachment of civil law in the sphere of the personal law of Muslims.

The postcolonial era was a turbulent period for Kenya. There were about twenty-seven amendments to the constitution and the presidencies of Jomo Kenyatta and Daniel Arap Moi oversaw the regression of Kenya to one-party rule.[53] They passed laws on detention without trial and detained many pro-democracy activists some of whom fled the country. The judiciary became as an appendage to the executive since the state machinery was gradually eroding its independence. The efforts by the Law Society of Kenya (LSK), civil society and various religious pressure groups led to the re-introduction of multiparty democracy in 1991 and set in motion the clamour for constitutional change that culminated into the passing of the 2010 constitution.

The Muslim leadership and religious organizations in Kenya took part in the constitutional review process generally and in the question of the constitutional status of the Kadhis' courts as they vehemently fought the efforts to have the Kadhis' courts removed from the Constitution. The case of *Jesse Kamau & 25 Others v Attorney General*[54] was the hallmark of such agitations against the Kadhis' courts. At the height of constitutional review led by Constitution of Kenya Review Commission (CKRC), the twenty-six Christian evangelical clerics petitioned the High Court to have the Kadhis' courts excluded from the agenda of constitutional review as they termed them discriminative to peoples of other faiths and an attempt to broaden the agenda of establishment of Islamic rule within Africa. Part of their arguments relevant to this study is that Kadhis' decisions were at the sole discretion of the Kadhi and did not follow any codified rules, thus Muslim women may not get a fair hearing and their welfare and fundamental human rights may not be guaranteed. Although the High Court allowed this petition, the entrenchment of the Kadhis' court in the final draft of the 2010 Constitution rendered the question irrelevant at least for the near future.

The law reports captured little on the application of Muslim law during this period more so on appeals from the Kadhis' courts. The reliance on the Shafii school of law by the superior courts

[52] Cotran E 'The development and reform of the law in Kenya' (1983) 27(1) *Journal of African Law* 42.
[53] For a record of constitutional amendments, see http://kenyalaw.org/kl/index.php?id=9631 (accessed 12th January 2023).
[54] [2010] eKLR.

dissipated, and much reference was had to the decisions and law texts from the Indian sub-continent, which were of Hanafi construction. Some reference was also made to decisions that emanated from the Court of Appeal of East Africa during the colonial period. Nevertheless, this period saw some important decisions handed down, which had a bearing on the question of protection of Muslim women's rights. In the case of *Essa v Essa,*[55] the Appellant had resigned from a well-paying job just a year after the solemnization of her marriage to the Respondent. The purpose of resignation was to assist in the management of her husband's business in Mombasa, Kenya. They acquired three prime plots, two of which were registered in the husband's name and one was the matrimonial home jointly registered in their names. The Court of Appeal awarded her half a share in one of the commercial properties since she proved her contribution. It was the first time contribution was considered in the division of matrimonial property for couples married under Islamic law.

In *In the matter of the Estate of Ishmael Juma Chelanga-Deceased,*[56] one of the questions was whether Chebet and Nuru, daughters born to the deceased out of wedlock were entitled to inherit from the estate of the deceased. While relying on expert evidence of the Chief Kadhi as an assessor, and on the provisions of the law espoused in Dr. Nishi Patel's *Principles of Mohammedan Law*, Etyang J. ruled that Chebet and Nuru did not qualify to inherit from the estate of the deceased, as they were illegitimate children. Chebet was also barred from inheriting because she was a self-confessed Catholic. Islamic law disqualifies non-Muslims from intestate inheritance of the estate of a deceased Muslim. This decision set the tone for subsequent decisions that invoked illegitimacy and difference of faith in succession proceedings.



### 2.4. Conclusion

The nature of Muslim family law applicable in Kenya derives partly from the Sharia origins of the law on the one hand, and the development of the law by Muslim jurists across time and geography on the other. The Islamic intellectual tradition that developed in Oman and Yemen was entrenched in the East Coast of Africa many centuries ago and has been responsible for the Shafi'i character of Islamic law practised by Muslim communities and applied in the Kadhis' courts. The Hanafi school of law on the other hand, was introduced into Kenya at the

[55] Court of Appeal No.101 of 1995(Unreported).
[56] [2002] eKLR.

onset of colonisation, as Indian administrative officers and Kenya-Uganda railway workers came to Kenya to aid in the administration of colonial Kenya. This was coupled by the transplantation of Indian statutes, legal thought and precedents into colonial Kenya, during which British judges constantly used Anglo-Muhammadan precedents and referred to translations of Hanafi texts in judicial decision-making.

There are glimpses of protection of women's rights in the decisions with an element of Muslim law in colonial and post-colonial Kenya. However, as seen in the subsequent chapters, the question of protection of rights of women under Muslim family law gained traction and prominence in the decade that followed the promulgation of the Constitution of Kenya 2010. The chapter that follows this shall discuss the legal and institutional frameworks for the protection of the rights of women under Muslim family law in Kenya.

## CHAPTER THREE

## LEGAL AND INSTITUTIONAL FRAMEWORKS FOR PROTECTION OF WOMEN'S RIGHTS UNDER MUSLIM FAMILY LAW IN KENYA

### 3.0. Introduction

It is common that patriarchal societies such as Kenya do not guarantee women's rights within the family sphere owing to the dominance of cultural and religious norms.[1] Muslim women, as previously mentioned in the preceding chapters, belong to this category of persons who suffer violation of rights in the family sphere. The rights that accrue to women living under Muslim family law in Kenya include the right to consent to marry, the right to divorce, custody of children, maintenance, inheritance, individual property and matrimonial property. Among the organs charged with the responsibility of protecting Muslim women's rights is the state.

The law entrusts the state with the responsibility of safeguarding the sanity, sanctity and integrity of the family through legal and institutional means. It requires the members of the family unit to respect the rights of family members and discharge their responsibilities as provided for under the laws of the state. Article 45(1) of the Constitution of Kenya 2010 states that 'the family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the state'.[2]

In that regard, this chapter assesses the state's legal and institutional apparatus geared toward protection of women's rights in the application of Muslim family law. The discussion first centres on the legal frameworks, and the focus then shift to institutional frameworks. These are evaluated to determine their efficacy in protecting women's rights.

### 3.1. The legal frameworks

The legal frameworks for the protection of women's rights in the application of Muslim family law can be gleaned from the Judicature Act, which sets outs the sources of law and governance

[1] Kamau W 'Law, pluralism and the family in Kenya: Beyond bifurcation of formal law and custom' (2009) 23 *International Journal of Law, Policy and Family* 133.
[2] The Constitution of Kenya, 2010.

in Kenya.[3] These sources include the constitution, all other written laws, the substance of the common law, the doctrines of equity and statutes of general application in force in England on 12th August 1897, and the procedure and practice observed in the courts of England as at that date. There is also African customary law, which is only applicable in civil cases as long as it is not repugnant to justice and morality, and is consistent with any written law.

### 3.1.1. The Constitution

The Constitution of Kenya, 2010 is the supreme law of the land, and any law including customary law, is invalid to the extent of its inconsistency with the Constitution.[4] This is an important aspect when dealing with protection and advancement of the rights of women under Muslim family law. If a provision or a rule under Muslim family law were found to be in violation of constitutional principles, the courts would not hesitate to declare it invalid.

Women's family law rights like any other rights are anchored within the equality provisions in the Bill of Rights which binds all law, all State organs and all persons.[5] Equality is with respect not only to a person's status (and that includes gender), but also the person's socio-economic rights and cultural rights. Article 27 of the Constitution of Kenya 2010 emphasizes equality before the law, equal enjoyment of rights, equal protection of the law, non-discrimination by state and persons and the employment of legislative and other measures including affirmative action to redress disadvantage.

Support for gender equality in the advancement of women's rights within the family sphere is more pronounced in Article 45(3) of the Constitution which states that 'parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage'. This provision, as shall be seen in the next chapter has been one of the hotly debated provisions in courts especially with regard to women's right to matrimonial property.

The equality provisions in the Bill of Rights can however be delimited in their application in certain circumstances. Article 24(4) of the Constitution for example provides that 'the provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the

[3] Section 3 of the Judicature Act Cap 8 of the Laws of Kenya.
[4] Article 2 of the Constitution 2010.
[5] Article 20(1) of the Constitution, 2010.

application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance'.

The significance of this provision has also been a subject of debate in a number of decisions discussed in the next chapter. It suffices to say at this stage that it appears the motivation to delimit the application to Kadhis' courts and Muslim law was to provide an avenue for the Muslims considered a minority community, to exercise what they deem an essential part of their faith. In the Islamic law of succession for example, gender is one of the factors considered in the distribution of the estate of the deceased and the shares for each heir are specifically determined in the Qur'an.[6]

Human dignity, equality, equity, human rights, non-discrimination[7] and the right to a fair trial[8] are some of the other rights and values that the Constitution emphasises. They apply both horizontally and vertically in the sense that they are binding on all persons and all State organs since they are part of the Constitution.

### 3.1.2. International and Regional Legal Instruments

Before 2010, Kenya had a dualist approach to the application of international law within its jurisdictional boundaries. A treaty or any international convention would only apply if parliament passed a law domesticating the treaty or convention.[9] After 2010, international and regional laws now form part of the laws of Kenya and any treaty or convention ratified by Kenya still forms part of its laws.[10] Provisions for the protection of women's rights generally and provisions on gender equality within the family sphere are found in many of the international treaties and conventions recognised in Kenya.

The Universal Declaration of Human Rights (UDHR) requires states to take appropriate measures to ensure equality of persons by using appropriate steps including administrative, constitutional, legislative, judicial and other legal measures. Article 16(1) states that men and women of full age have the right to marry and are entitled to equal rights as to marriage, during

[6] Coulson N 'A comparison of the law of succession in the Islamic and British legal systems' (1978) 26 *American Journal of Comparative Law* 227.
[7] Article 10 of the Constitution, 2010.
[8] Article 50 of the Constitution, 2010.
[9] Orago NW 'The 2010 Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective' (2013) 13 *AHRLJ* 415.
[10] Article 2(5) and 2(6) of the Constitution, 2010.

marriage and at its dissolution. The International Covenant on Civil and Political Rights (ICCPR) on the other hand provides in its Article 23 that State parties to the covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during the marriage and at its dissolution. Similar provisions exist in The Convention on the Elimination of all forms of Discrimination against Women (CEDAW).[11]

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (The Maputo Protocol) contains a comprehensive set of family law provisions that particularly seek to address inequalities and injustices against women, some of which with hindsight target the application of Muslim family law. On marriage, it sets a minimum age of marriage at 18 with free consent of both parties and allows women to acquire and administer their own properties freely among other provisions.[12] On divorce, it promotes the judicial intervention instead of unilateral divorces (talaq), asserts women's right to seek divorce or annulment and their right to custody of children and to division of matrimonial property.[13]

These provisions in international and regional instruments are significant in judicial decision-making especially for kadhis applying Muslim family law. This is because many of the issues flagged in the Protocol pertain to practices within the Muslim communities that directly or indirectly perpetuate discrimination and indignities against women. It is for the same reason that some Muslim majority countries such as Chad, Egypt, Morocco, Somalia and Sudan have not yet ratified the Maputo Protocol.



### 3.1.3. Legislation

The legislative frameworks for the application of Muslim family law in the protection of women's rights are varied. The major laws in this regard are the Kadhis' Courts Act, the Marriage Act, the Law of Succession Act and the Matrimonial Property Act. There are also subsidiary laws such as the Kadhis' courts (Procedure and Practice) Rules of 2020 and the Marriage (Muslim Marriage) Rules of 2017.

[11] Article 16(c) of CEDAW.
[12] Article 6 of the Maputo Protocol.
[13] Article 7 of the Maputo Protocol.

### 3.1.3.1. The Kadhis' Courts Act

The Kadhis' Courts Act, though an old legislation, is the parent statute for most of the operations of the Kadhis' courts.[14] It sets out the administrative and jurisdictional dimensions for the court. A significant part of the law that relates with protection of women's rights are sections 5 and 6. Section 5 on jurisdiction states that:

> 'A Kadhi's court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it'.

Section 6 of the Act provides that Muslim laws and rules of evidence shall apply in the Kadhis' court under a set of some conditions. These include the condition that all witnesses shall be heard without discrimination on the grounds of religion, sex or otherwise; that each issue of fact shall be decided upon an assessment of the credibility of all the evidence before the court and not upon the number of witnesses who have given evidence and; that no finding, decree or order of the Court shall be reversed or altered on appeal or revision on account of the application of the law and rules of evidence applicable in the High court unless such application has in fact occasioned a failure of justice.

These provisions signify three things: One, a Muslim woman is free to approach any other court apart from the Kadhis' court where she feels the application of Muslim law in the Kadhis' court may occasion a failure of justice. Two, when applying Muslim law and rules of evidence, gender and number of witnesses should not be of prime consideration but regard has to be had on the weight of evidence. This addresses evidentiary rules in Islamic law that are mainly based on gender and the numbers. Finally, even if the Kadhis' court applies the provisions of the Evidence Act instead of Muslim rules of evidence, the appeal court will not reverse the decision based solely on the kadhis' use of the Evidence Act. The court will assess whether his application of the Evidence Act led to an injustice.[15] This provides an avenue for women who

[14] No.14 of 1967, Cap 11 of the Laws of Kenya.

[15] Section 2 of the Evidence Act, Cap 80 of the Laws of Kenya provides that the Act shall apply to proceedings before any other court apart from the Kadhis' court. This affirms the Kadhis' Courts Act as the primary statute for provisions regarding the use of evidence in the Kadhis' court.

do not wish to be subjected to the strictures of Islamic rules of evidence to have the provisions of the Evidence Act be applied in the determination of their cases.

### 3.1.3.2. The Marriage Act, 2014

The Marriage Act of 2014 is one of the statutes passed after the 2010 constitutional moment with the aim of amending and consolidating various laws relating to marriage and divorce and for other purposes connected to this.[16] The Act recognises five regimes of Marriage: Christian, Civil, Hindu, Islamic and customary marriages with the latter two being polygamous or potentially polygamous.[17] Among the general provisions of the Act are those relating to the minimum age of marriage[18], equal rights and obligations[19], the legal status of marriages[20] and the application of rights guaranteed in Islamic law to parties under an Islamic marriage.[21] Other provisions include those relating to conversion of marriages[22], prohibited marriage relationships[23], void and voidable marriages[24], rights of widows and widowers[25] and termination of marriage relationships.[26]

Provisions on Islamic marriages in the Act only apply to persons professing the Islamic faith.[27] This restricts the definition of an Islamic marriage to that between Muslims, whereas Islamic law has always included the marriage of a woman from the ahlul-kitab (Christians and Jews) to a Muslim man within the definition of Islamic marriages.[28] Alongside the kadhi, there exist Muslim marriage officers such as sheikhs, mukhis and imams, who are authorised by the registrar of marriages to solemnize and register Islamic marriages.[29] The same officers are also authorised to register Islamic divorces under section 72 of the Act. This section reads as

[16] No. 4 of 2014.
[17] Section 6(3) of the Marriage Act.
[18] Section 4 of the Marriage Act.
[19] Section 3(2) of the Marriage Act.
[20] Section 3(3) of the Marriage Act.
[21] Section 3(4) of the Marriage Act.
[22] Section 8 of the Marriage Act.
[23] Section 10 of the Marriage Act.
[24] Section 11 and 12 of the Marriage Act
[25] Section 15 of the Marriage Act.
[26] Section 16 of the Marriage Act.
[27] Section 48 of the Marriage Act.
[28] Qur'an Chapter 5 verse 5 allows such marriages. See Al-Hilali MT & Khan MM *The Noble Qur'an: English translation of the meanings and commentary* 142-143.
[29] Section 49 and 57 of the Marriage Act.

follows: 'Where a Kadhi, sheikh, imam or person authorised by the Registrar grants a decree for the dissolution of a marriage celebrated under Part VII, the Kadhi, sheikh, imam, Mukhi or authorised person shall deliver a copy of the decree to the Registrar'.

An interesting thing with this provision is that it allows persons like the sheikh, imam or mukhi who are not judicial officers to grant decrees of divorce for the sake of its registration and issuance of a divorce certificate. This provision is open to abuse, as the marriage officers mentioned above would dissolve Muslim marriages without proper judicial intervention thus running contrary to the rules of fair trial in the Constitution and those envisaged by Article 7 of the Maputo Protocol. I argue here that decrees of Islamic divorces should only be granted by a competent court such as the Kadhis' court. This not only safeguards women from unilateral divorces at the instance of those marriage officers, but also allows the court's intervention where unilateral divorces have been used to abuse women's marital rights.

### 3.2.3.3. The Matrimonial Property Act of 2013

Before the passing of the Matrimonial Property Act (MPA) of 2013, the Married Women's Property Act (MWPA) of 1882 applied in Kenya as statute of general application recognised under the Judicature Act.[30] As alluded to in the previous chapter, this Act applied to all persons in Kenya including Muslims. This holding has been reiterated by post-2013 Court of Appeal decisions including *R.M.M. v B.A.M.* where the Court of Appeal reiterated the holding in *Essa v Essa* by ruling as follows:

> 'There was nothing *obiter* about the pronouncement made by the Court of Appeal. The parties before it were both Muslim, which allows polygamy, and were disputing about matrimonial property. The Originating summons pleaded *Section 17* of the Married Women's Property Act, 1882'.[31]

The MPA regulates the rights and responsibilities of spouses in relation to matrimonial property. It defines contribution, matrimonial home and matrimonial property and contains provisions regarding polygamy[32], gifts[33] and separate property.[34] Section 6 states that for the

[30] No. 49 of 2013.
[31] *R.M.M. v B.A.M* [2015] eKLR.
[32] Section 8 of the MPA, 2013.
[33] Section 15 of the MPA.
[34] Section 13 of the MPA.

purposes of the Act, matrimonial property means the matrimonial home; household goods in the matrimonial home, and any other movable or immovable property jointly owned and acquired during the subsistence of the marriage. Trust property including customary trusts are not included in the meaning of matrimonial property. The law also allows and encourages the making of prenuptial agreements regarding matrimonial property. Property acquired or inherited before marriage is not part of matrimonial property according to this section of the Act.

Subject to any prenuptial agreement, matrimonial property vests in the spouses according to the contribution of each towards its acquisition.[35] The contribution stated in the Act is both monetary and non-monetary[36]. It includes domestic work and management of the matrimonial home; childcare; farm work; companionship and management of family business and property during the pendency of the marriage. The spouse who contributes towards the improvement of property acquired by the other spouse acquires a beneficial interest in the property that is equal to the contribution she made.[37]

There are other specific provisions that hinder alienation of an estate or interest in matrimonial property through sale, lease, and mortgage except with the express consent of the other spouse or spouses.[38] These provisions also relate to the matrimonial home. For example, a spouse can only be evicted from the matrimonial home through a court order. A spouse or former spouse can also move to court for a declaration of rights to any property that is a subject of contestation between them.[39] This is important that in order to safeguard individual property and beneficial interests in matrimonial property even when the parties have not divorced.

The equality of spouses is reiterated in Section 4 of the Act. Thus, a married woman has the same rights as a married man: the right to own and dispose of property; the right to enter into a contract and the right to sue or be sued in her own name.

There is only one provision in the Act that touches on the application of Islamic law, and it states that 'a person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property'.[40] The use of 'may' instead of the mandatory 'shall'

[35] Section 7 of the MPA.
[36] Section 2 of the MPA.
[37] Section 9 of the MPA.
[38] Section 12 of the MPA.
[39] Section 17 of the MPA.
[40] Section 3 of the MPA.

signifies that Muslim women are at liberty to choose the applicable law they think safeguards best their matrimonial property rights.

### 3.2.3.4 The Law of Succession Act

Parliament passed the Law of Succession Act (LSA) in 1975 but the application of the law commenced in 1981, as there was so much contention especially by Muslims about its application to them.[41] There were many amendments to sections of the Law of Succession Act, the final one being the Law of Succession (Amendment) Act 2021. The LSA was passed to amend, define and consolidate the law relating to intestate and testamentary succession, and the administration of the estates of deceased persons.

The LSA does not apply to testate and intestate devolution where the deceased is a Muslim. However, provisions of the LSA pertaining to administration of the estates can apply to the estates of a deceased Muslim if they are not inconsistent with Islamic law. The relevant provision in the application of Muslim family law is Section 2(3) and 2(4) and it states as follows:

> '(3) Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that *in lieu* of such provisions the devolution of the estate of any such person shall be governed by Muslim law.
>
> (4) Notwithstanding the provisions of subsection (3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991.'

The Kadhis' courts have jurisdiction to entertain inheritance matters concerning devolution of the estates of Muslims and any other question relating to such estates under the Act.[42]The appeals from the Kadhis' courts lie at the High Court on matters of both the procedure and the substance of Muslim law, and at the Court of Appeal on matters of Muslim law only.[43] Whether Islamic law of succession as applied in Kenya protects the rights of women depends on the

[41] Cap 160 of the Laws of Kenya.
[42] Section 48(2) of the LSA.
[43] Section 50(2) of the LSA.

understanding and interpretation of the law by the relevant judicial officers. Such assessment is made in the subsequent chapter.

### 3.2. The institutional framework

The institutional framework for the protection of women's rights in Kenya refers to those state institutions authorized by law to safeguard the rights of persons within its territory. The Constitution of Kenya, 2010 places a fundamental duty on the state and all state organs to observe, respect, promote, and fulfil the rights and fundamental freedom in the Bill of rights.[44] It further demands of all State organs and public officers to diligently exercise their duty in addressing 'the needs of vulnerable groups in society including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities'.[45] The more pronounced institutions in that regard are the Parliament, the Judiciary, the Kenya National Human Rights Commission and the National Gender and Equality Commission. The role of these institutions in the protection and advancement of the rights of women in relation to the application of Muslim family law in Kenya is explored here.

#### 3.2.1. Parliament

The Parliament of Kenya derives its legislative authority from the people of Kenya[46], manifests the diversity of the nation, represents the will of the people and exercises their sovereignty.[47] Its mandate is to protect the Constitution and to promote democratic governance.[48] The Constitution requires of the State to take legislative, policy and other measures, in order to achieve progressive realisation of socio-economic and cultural rights.[49] It further asks of the State to enact and implement legislation that helps it to fulfil its obligations with regard to respect of human rights and fundamental freedoms.[50]

[44] Article 21(1) of the Constitution, 2010.
[45] Article 21(3) of the Constitution.
[46] Article 94(1) of the Constitution.
[47] Article 94(2) of the Constitution.
[48] Article 94(4) of the Constitution.
[49] Article 21(2) of the Constitution.
[50] Article 21(4) of the Constitution.

With regard to the protection and advancement of rights of persons and groups including women, Parliament has already enacted the Kenya National Commission on Human Rights Act and the National Gender and Equality Commission Act, which both give effect to Article 59 of the Constitution of Kenya. Concerning the application of Muslim family law, Parliament enacted the Kadhis' Courts Act, the Marriage Act, the Matrimonial Property Act and the Law of Succession Act whose connections to the protection of women's rights have been highlighted before.

### 3.2.2. The Judiciary

The judiciary is arguably the most important organ in the protection and advancement of rights of marginalized persons and groups. It derives its judicial authority and legitimacy from the people and exercises it through courts and tribunal established under the Constitution.[51] Article 159(2) of the Constitution delineates the principles that should guide courts and tribunals in their exercise of judicial authority:

a) Justice shall be done to all irrespective of status

b) Justice shall not be delayed

c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)

d) Justice shall be administered without undue regard to procedural technicalities

e) The purpose and principles of this Constitution shall be protected and promoted.

The role of the courts is to interpret and apply provisions of the law. In doing so, they are not only required to adopt an interpretation that favours the enforcement of a right or fundamental freedom but are also mandated to promote democratic values and the object, purport and object of the Bill of Rights.[52] The Courts that deal with matters of Muslim family law include the Kadhis' courts, the High Court and the Court of Appeal. Rarely do Magistrates courts handle matters involving questions of Muslim family law.

[51] Article 159(1) of the Constitution.
[52] Articles 20(3) and 20(4) of the Constitution.

The Kadhis' court is the primary court whose mandate is to handle matters of 'Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's court'.[53] Kadhis' courts are established as subordinate courts.[54] The Judicial Service Commission (JSC) appoints kadhis from persons of Muslim faith who possess such knowledge of Muslim law applicable to any sects of Muslims as qualifies them to hold a Kadhi's court.[55] Currently, there are 47 Kadhis' courts spread across Kenya with the number of kadhis being 49.[56]All kadhis are male although there have been agitations for women to be employed as kadhis.

The High Court has original unlimited jurisdiction to hear disputes of civil and criminal nature. This means that Muslim parties can bypass the Kadhis' court and instead file their family law matters at the High Court. This forum shopping power sometimes raises conundrums on the choice of law. The High court also hears appeals from the Kadhis' courts, and the Chief Kadhi or two other kadhis sit as assessors to advise the court on the substance of Islamic law.[57]

The Court of Appeal is the final appeal court for matters arising from the Kadhis' court. Such appeals are only on matters of law, not procedure and there is no requirement for kadhis being assessors. For appeals from original applications in the High Court, procedure and the substance of the law is considered at the Court of Appeal. Only matters certified by the Court of Appeal as being of general public importance are referred to the Supreme Court. To date, there are no such matters involving the application of Muslim family law.



### 3.2.3. The Kenya National Commission on Human Rights

The Kenya National Commission on Human Rights (KNCHR) is one of the independent commissions in Kenya and is established under Section 3 of the Kenya National Commission on Human Right Act pursuant to the provisions of Article 59(4) of the Constitution.[58] The functions of the Commission include promotion of human rights and development of the culture of human rights; promotion of the protection and observance of human rights in all

[53] Article 170(5) of the Constitution.
[54] Article 169 of the Constitution.
[55] Article 170(2) of the Constitution.
[56] Judiciary of Kenya '*State of the Judiciary and Administration of Justice Report (SOJAR) 2021-2022*' (2022) Annex 2.11.
[57] Section 65(1) (c) of the Civil Procedure Act, Cap 21 of the Laws of Kenya.
[58] No.14 of 2011.

spheres; monitoring, investigating and reporting on the observance of human rights across the republic; investigation, research and making of recommendations for action on the violation of human rights and formulation, implementation and overseeing of programmes intended to raise public awareness of the citizens' rights and obligations.[59]

In the discharge of its mandate, the Commission has the power to receive complaints, investigate, issue summons, and make recommendations to relevant state organs for action on violations of all human rights apart from those within the mandate of the National Gender and Equality Commission. They can also adjudicate on some of the issues and make awards.[60] This commission is important for the protection of women's rights family rights, especially through advocacy and the making of recommendations for action by state organs.

### 3.2.4. The National Gender and Equality Commission

The National Gender and Equality Commission (NGEC) is the partner commission to the KNCHR as it is established under section 3 of the National Gender and Equality Commission Act also pursuant to provisions in Article 59(4) of the Constitution as the KNCHR.[61] The functions of the Commission include promotion of gender equality and freedom from discrimination, monitoring, facilitating and advising on the integration of the principles of equality and freedom from discrimination in all national and county policies laws and administrative regulations; ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination involving minorities and special interest groups like women, youth and the persons with disabilities; coordinating and facilitating the mainstreaming of gender and persons with disabilities in national development; conducting research and coordinating of public education on its mandate and recommending for action on complaints about violations of the principles of gender equality and freedom from discrimination.[62]

In the discharge of its mandate, the NGEC has the power[63] to receive complaints, issue summons, investigate and even adjudicate on matters relating to violations of the principles of

[59] Section 8 of the KNCHR Act.
[60] For powers of the Commission, see sections 23, 27, 28 and 33 of the KNCHR Act.
[61] Section 8 of the NGEC Act.
[62] Section 8 of the NGEC Act.
[63] For the powers of the NGEC, see sections 26, 27, 27 of the NGEC Act.

gender equality and freedom from discrimination. The procedure for making and processing of complaints is delineated in the National Gender and Equality Commission Act.[64]

It is noteworthy that the Commission has been involved in a number of public interest litigations, especially on the question of gender representation in various elective and appointive positions in national and county bodies.[65] Most of the litigation on gender representation in issues of family law is however done by non-governmental bodies such as FIDA-Kenya. Therefore, there is need for NGEC to be more vibrant on matters of family law as violations of gender rights happen at a basic level within the family.

### 3.3. Conclusion

The manner and the extent to which the state protects Muslim women's family law rights in Kenya cannot be understood without assessing the legal and institutional framework that underpins the state's interventions. The Constitution of Kenya, 2010 stands as a key pillar in this regard. The Constitution's supremacy over other laws and its broad-based provisions on human rights in general and the rights of women and other marginalized groups have been helpful in shaping a better future for Kenya with regard to the protection of women's rights.

The Constitution's language has had greater influence on the nature and the character of legislations on family law passed after its promulgation. Such laws include the Marriage Act of 2014 and the Matrimonial Property Act of 2013. In all these laws, there are provisions for the application of Muslim family law, some of which favour gender egalitarian principles and others that require the intervention of the courts to declare their validity under the Constitution. There are however, other laws that provide general frameworks that actors in the justice system can tap into in order to advance women's rights. These include international and regional instruments and statutes establishing the human rights and equality commissions in Kenya.

Alongside laws, there are institutions charged with the responsibility of protecting and advancing women's rights in Kenya. These include Parliament, independent commissions and the courts. Parliament makes and reviews laws and the independent commissions provide frameworks for advancing women's rights alongside avenues for interventions and redress of

[64] See sections 32-38 of the Act.

[65] See for example, *National Gender and Equality Commission v Independent Electoral and Boundaries Commission & Another* [2013] eKLR.

violations. Courts however are the most important institution because of the work of interpreting the Constitution and the laws, quashing discriminatory laws and delivering justice to those seeking redress for violations of rights. Since this study revolves around the application of Muslim family law, Kadhis' courts and the higher courts have been vigorously engaged in this regard. Whereas this chapter has looked at the laws and institutions involved in protecting and advancing women's rights in the application of Muslim family law, the next chapter assesses the efficacy of the courts in protecting these rights.

# CHAPTER FOUR

# JUDICIAL PROTECTION OF WOMEN'S RIGHTS UNDER MUSLIM FAMILY LAW

## 4.0. Introduction

As adverted to earlier, one of the major interventions towards the protection of women's rights in the application of Muslim family law in Kenya is through judicial decision-making. Courts are the ultimate deciders of controversies between the state and persons, as well as among persons themselves. For the sake of the application of Muslim family law, the work of the Kadhis' court, the High Court, and the Court of Appeal are important in assessing how women's rights are protected. This chapter examines the case law emanating from these courts. The High Court and the Court of Appeal are superior courts and their decisions are ordinarily found in the Kenya Law Reports or in the electronic Kenya Law Reports (eKLR) database. Some of the Court of Appeal decisions assessed in this chapter are unreported, but they are included because they have been fundamental in shaping the jurisprudence of Muslim family law in Kenya.

The Kadhis' court on the other hand is a subordinate court and the decisions from this court would ordinarily not find their way into the law reports. However, a decision was made by the National Council for Law Reporting (NCLR) to have some of the decisions from the Kadhis' courts reported as a way of allowing public access to decisions emanating from these courts.[1] This was geared towards improving public knowledge of Islamic law and enabling judges handling appeals from the Kadhis' courts to have a better idea of the law applicable in the courts and the legal reasoning of kadhis. Following this opening, a number of kadhis have had their decisions reported since the year 2014. This chapter majorly concentrates on decisions by Kadhi Abduljabar Ishaq Hussein and Kadhi Abdulhalim Athman Hussein, as their decisions form the bulk of the cases reported from the Kadhi's courts.

Another preliminary point concerns the jurisdictional scope of assessment. This chapter looks at both the procedural and the substantive aspects of judicial decision-making with an emphasis

[1] The frustrations by kadhis with lack of public information on procedural and substantive aspects of Islamic law practised in Kenya was highlighted by Kadhi Abduljabar in *SMK v RHH* [2015] eKLR where he opined that without access to legal information, the substantive rules of Islamic law will be of limited value and access to family justice would be greatly hampered.

on the protection of women's rights in the application of Muslim family law. Furthermore, the substantive application of Muslim family law, specifically the rights of women regarding marriage, divorce, matrimonial property, succession and the attendant ancillaries are assessed. For example, matrimonial rights include the right to divorce, the right to eddah (waiting period) maintenance, the right to khul' in lieu of divorce and the right to mata'a (alimony).

### 4.1. Procedural issues in the application of Muslim family law

The procedural issues assessed in the chapter include unchallenged decisions, transfer of suits, the application of the doctrine of functus officio, recusal of the judicial officer and jurisdictional conundrums. These are explored from the standpoint of some litigants, including Muslim women benefiting from procedural technicalities of the law. Others include where men seek to introduce procedural aspects in the administration of cases, majorly in order to defeat or slow down the process of access to justice by Muslim women. In what follows, I show how some of these procedural issues affect the judicial protection of women's rights in Kenya.

#### 4.1.1. Unchallenged decisions

In Kenyan law, unchallenged decisions refer to those cases where a party failed to enter appearance, file a response or at least appear during the hearing of the matter. Such matters normally proceed ex parte and the applicant benefits from the award of the orders sought.[2] Kadhis generally award such orders in protection of women's rights and can only deny the issuance of such orders where it is unconscionable to do so. In *XMC v SHA*,[3] the Plaintiff, a citizen of the UK met the Defendant, a Kenyan citizen in Abu Dhabi and they solemnized their marriage under Islamic law in Kenya in the year 2017. The Plaintiff subsequently returned to the UK where she processed for her husband to join him there. Despite being a professional, the husband refused to look for full time employment and he abdicated his marital responsibilities of providing for the family. The Plaintiff felt overburdened by familial responsibilities, which were essentially the burden that the husband has to bear according to Islamic law. The husband having failed to enter appearance or file a defence, the matter proceeded ex parte and the kadhi granted the Plaintiff her prayer for dissolution of the marriage.

[2] See Rule 68(1) (b) of the Kadhis' Courts (Procedure and Practice) Rules, 2020.
[3] [2016] eKLR.

In *ZSM v SNN*,[4] the Petitioner, a 54-year-old Kenyan, was married to the Respondent, a UK citizen in 2019. The latter promised to visit his wife every three months or at least once a year, but he reneged on that promise. He was served with court papers, but failed to enter appearance. In dissolving the marriage, Kadhi Abdulhalim adverted to the 'harm must be removed' maxim of Islamic law provided for under Rule 5(2) (d) of the Kadhis' courts (Procedure and Practice) Rules, 2020. A similar case[5] involved a 32-year-old Kenyan woman who got married to a Somali refugee in 2014. The couple had three children from the marriage. In 2016, the Respondent was repatriated to the USA and he promised to be visiting Kenya. The Petitioner alleged neglect and desertion for six years, the last two years being the cruelest to her as the Respondent stopped talking to her. The Respondent was served with court papers but there was no response and hence the matter proceeded ex parte. The kadhi granted the Petitioner's prayers for dissolution of marriage and custody of the children.

### 4.1.2. Transfer of suits

Transfer of cases from one court to another happens when justice is deemed better served by having the case handled by another court. Section 18 of the Civil Procedure Act vests the High Court with the power to transfer suits or appeals pending before it to a subordinate court or transfer cases pending in subordinate courts to other subordinate courts. Odunga J. (as he then was) in *Hangzhou Agrochemical Industries Ltd v Panda Flowers Ltd*[6] delineated the factors a High Court may consider in ordering the transfer of a case to another court. These include the motive and the character of the proceedings; the nature of the relief or remedy sought; the interests of the litigants; the expenses incurred in transporting and maintaining witnesses; the balance of convenience and the possibilities of undue hardship.

In some of the cases that involved the application of Muslim family law, the Respondents have sought transfer to other courts of cases whose potential outcome they are uncomfortable with, most probably to delay the outcome or to frustrate the Petitioners who are mostly Muslim women. In *YAA v AHA*,[7] the Applicant applied to the High Court seeking the stay of the proceedings in the Kadhis' court in Nairobi and the transfer of the case to Mandera, a town

[4] [2022] KEKC 2 (KLR).
[5] *NMA v DIA* [2022] KEKC 12 (KLR).
[6] [2012] KEHC 1937 (KLR).
[7] [2014] eKLR.

more than a thousand kilometres away. The Applicant's reasons were that they were both residents of Mandera where he worked; that he would suffer great travel costs; and that it may even end up affecting his employment if the case was not transferred.

The Respondent opposed the application. She stated that she lived with the children in Nairobi and that some maintenance orders had already been issued by the Kadhis' court where the Applicant had entered appearance. The Respondent further argued that the intention of the application was to evade the ruling of the court and the final determination of the case. She further expressed her fears of having the matter transferred to Mandera due to past assaults by the Applicant when she visited her other children in Mandera. After balancing the interests of both parties and the welfare of the children, the judge eventually dismissed the application and allowed the matter to proceed in the lower court.

In a similar application, the Applicant sought transfer of a divorce case from a Kadhis' court in Nairobi to the Kadhis' court in Elwak town, Mandera County.[8] He alleged that they both resided in Elwak, having solemnised their marriage there. The Applicant had raised a preliminary objection before the Nairobi Kadhis' court challenging the territorial jurisdiction of the Kadhis' court to handle the matter. After the dismissal of the preliminary objection, the Applicant opted not to appeal the ruling, but resorted to invoking the High court's supervisory role in his quest to have the matter transferred to Elwak.

The Respondent argued that after their marriage broke up, she moved to Nairobi where her relatives and friends resided, and where she got much assistance in earning a living and raising her children. She asserted that it would be oppressive to have her incur travel expenses to Elwak and she would prefer that the hearing of the matter proceed in Nairobi. In dismissing the application, the High court faulted the Applicant for not following the proper procedure of appealing the Kadhis' court ruling since the exercise of supervisory powers of the High court did not apply to cases where a party was aggrieved by the decision of a lower court.

### 4.1.3. The doctrine of functus officio

The doctrine of functus officio is a principle of law that ensures that courts that pronounced themselves with finality on a matter do not re-open the case. Thus, a person vested with adjudicative or decision-making powers may exercise such powers only once in relation to the

[8] *Abdirizak Mohamed Ibrahim v Nasteha Muktar Alio* [2021] eKLR.

same matter.[9] There are instances in the administration of Muslim family law in Kenya where parties would want to re-open a matter already dealt with by a court with finality. Thus, it takes the intervention of a higher court to re-state the proper position of the law.

In *Peter Mucheru Njuguna v Fatuma Ahmed Abdulrahman & 3 Others*,[10] the Appellant was a judgement creditor in a High Court matter between him and the Respondents' father. The Respondents' father died soon afterwards. The daughter, Noor Mohsen Mohamed, initiated succession proceedings in the Kadhis' court in Mombasa, which rendered a judgement on 24th April 2014. On 5th May 2015, the taxing master declined to tax the Appellant's bill of costs when he found that the suit had abated and therefore the Appellant was not able to enforce the High court's decree against the Respondent's father.

The Appellant subsequently filed an application at the Kadhis' court in Mombasa seeking his enjoinment in the Kadhis' court proceedings and an order setting aside the proceedings in the Kadhis' court with regard to the suit property, on the ground that the property was under attachment by an order of the High court. The kadhi dismissed the Appellant's application on three grounds: (1) the Appellant had no locus standi being a person not professing the Muslim faith; (2) the Kadhis' court was functus officio as the matter before him had been finalised and the estate of the deceased distributed; and (3) the Kadhis' court lacked jurisdiction to hear the matter as the decree in favour of the Appellant had been issued by the High Court and it was only the High Court that should enforce its decree. In agreeing with the kadhi, Thande J. observed as follows:

> "The record shows that the Hon. Principal Kadhi delivered his judgement in the succession petition on 24.4.14. The Appellant filed his application 1 ½ years later on 30.10.15. The moment the judgement was entered by the Hon. Principal Kadhi, other than for purposes of execution, the court's function was done. The attempt by the Appellant to reopen the proceedings by his application of 30.10.15 thus went against the principle of finality expressed in the doctrine of *functus officio*."

[9] *Raila Odinga & 2 Others v The Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR.
[10] [2017] eKLR.

### 4.1.4. Recusal of the judicial officer

Recusal of a judicial officer is one of the administrative procedures that guarantees the integrity of the judicial process. The Supreme Court of Kenya in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*[11] noted that the object of recusal of a judicial officer is that '*justice* between the parties be uncompromised; that the *due process* of the law be realised and be seen to have had its role; that the profile of the rule of law in the matter in question be seen to have remained uncompromised.'

The regulations governing the conduct of judges and judicial officers contain provisions for their recusal where their impartiality was reasonably questioned in the conduct of judicial proceedings.[12] Rule 75 of the Kadhis' courts Rules provides that a kadhi may recuse himself on his own motion or on the application of a party made on reasonable grounds.[13] In *Abdallah Nono Obony* v *Monica Kiia*,[14] the Applicant filed at the High Court for stay of proceedings at the Kadhis' court Kisumu and the transfer of the case to any other kadhi other than the one handling the case. The grounds in support of the application included that the kadhi refused to recuse himself and proceeded to hear a land dispute that was outside his jurisdiction. He also averred that the Kadhi was giving more attention to the Petitioner with the intention of delivering a wrong judgement.

The Respondent opposed the application and sought the dismissal of the application as she deemed it filed in order to delay the conclusion of the case in the Kadhis' court and deny her justice. In dismissing the application, the judge alluded to settled practice where one had to make an application in the same court seeking recusal of the judicial officer handling the case. There was no such application before the kadhi. Secondly, there was no application before the kadhi challenging his jurisdiction to handle the case where it involved land matters. The judge noted that if such applications were presented before the kadhi and he dismissed them, the only remedy available for the applicant would have been to appeal to a higher court and not seek transfer of the case to another kadhi.

In *Ali Mohamed Karama* v *Amina Sheikh Mohamed*,[15] the Appellant in his application to the High Court sought the Chief Kadhi's disqualification and recusal from sitting as an assessor.

[11] [2013] eKLR.
[12] Regulations 21 and 47 of the Judicial Service (Code of Conduct and Ethics) Regulations, 2020.
[13] Kadhis' courts (Procedure and Practice) Rules, 2020.
[14] [2018] eKLR.
[15] [2020] eKLR.

The Appellant was apprehensive that the Chief Kadhi could not be seen to act impartially as an assessor as he delivered the judgement appealed against at the trial court, yet he did not preside over the trial. He argued that the Chief Kadhi did not even read the judgement. He just signed it and then instructed the court assistants to pass the same on to the parties waiting in open court. He further submitted that the trial kadhi was within the precincts of the court on the day the Chief Kadhi delivered the judgement.

In her opposition to the application, the Respondent submitted that the trial kadhi had been transferred to a different workstation and the Chief Kadhi or the parties were not aware of his presence within the court premises. She further argued that the Appellant did not demonstrate any prejudice suffered, and the apprehension of bias on the part of the Chief Kadhi was without basis and should therefore not be used to disqualify him as an assessor in the High Court. She further noted that the Chief Kadhi's role on appeal was restricted to advising the court on the questions on Islamic law.

After perusal of the Kadhis' court proceedings, the High court judge found against the Appellant that there was no evidence the Chief Kadhi wrote the judgement and that his involvement in the lower court was limited to the delivery of the judgement. In dismissing the application, the High court further stated that the Chief Kadhis's role on appeal was that of an assessor on matters of Islamic law and that the opinion of the Chief Kadhi did not bind the High Court. Hence, the perception of bias on the part of the Chief Kadhi was misplaced.



### 4.1.5. Jurisdictional conundrums

Since the promulgation of the 2010 Constitution, jurisdictional questions have dominated decisions pertaining to the administration of Muslim family law in Kenya. Judges specifically, have called out the Kadhis' courts many times for exceeding their jurisdictional boundaries. Almost all applications and appeals presented to the High court from the proceedings and decisions in the Kadhis' courts are grounded on the Kadhis' court not having or rather exceeding their jurisdiction, the most common being the jurisdiction to handle children's matters. Other questions include a party not professing the Muslim faith, a party not submitting to the jurisdiction of the Kadhis' court and the pecuniary jurisdiction of kadhis.

Although jurisdiction is a key element in the administration of justice, some parties have used that question to delay or frustrate the cases brought by women seeking access and protection

of their rights in the Kadhis' court. However, some women have also benefited from High courts' intervention on jurisdictional issues.

As mentioned earlier, article 170(5) of the Constitution of Kenya limits the Kadhis' court's jurisdiction to the determination of questions of Muslim law to matters pertaining to personal status, marriage, divorce or inheritance where both parties profess the Muslim religion and submit to the jurisdiction of the Kadhis' courts. With regard to the subject matter, the jurisdiction on children's matters is subsumed by kadhis to be under the law of personal status.[16] However, judges such as Muchelule (as he then was), Odero and Musyoka have all maintained the Kadhis' court's lack of jurisdiction to handle children's matters and they never hesitate to nullify Kadhis' court's decisions where the matter involved the determination of custody and maintenance of children.

In *IK* v *RMS*[17] for example, Justice Muchelule nullified the decision of the Kadhis' court on the account that it exceeded its jurisdiction by dealing with the question of custody and maintenance of children. The Appellant has petitioned the Kadhis' court for custody and maintenance of children after the Respondent fled with the children from the matrimonial home. When the matter came up for hearing at the Kadhis' court, the kadhi awarded actual custody to the Respondent, legal custody to the Appellant and rights of visitation to the Appellant and his parents. The court also ordered him to provide for school fees and related expenses. Aggrieved by this decision, the Appellant moved to the High court and instead of concentrating on the merits of the appeal, he resorted to raising the question of the Kadhis' courts' jurisdiction on children's matters.

The best interests of children are always of paramount importance when dealing with children's matters and sometimes women are at a point of advantage when such is considered. In *EAM* v *MS*,[18] the Appellant had deserted the matrimonial home while pregnant, because the Respondent was cruel to her. After the child was born, the Respondent sought interim orders in the Kadhis' courts to have access to the minor pending the hearing and determination of the divorce petition. The kadhi granted the orders, but the Appellant ostensibly refused him access as she alleged that she was fearful of the Covid-19 pandemic as the Respondent wanted to visit with his family members. The Respondent filed contempt of court proceedings and the kadhi,

[16] *Najma Ali Ahmed* v *Swaleh Rubea* [2010] eKLR.
[17] [2020] eKLR.
[18] [2022] KEHC 11521 (KLR).

having found for him proceeded to order that Appellant pays Ksh. 20,000 or risks being jailed for three months.

Aggrieved by the ruling, the Appellant moved to the High court seeking the quashing or setting aside of the ruling. Among the grounds was that the Kadhis' court did not have jurisdiction on children's matters. In allowing the application, Muchelule J (as he then was) steered clear of the question of jurisdiction and reserved it for appeal. The dilemma to be resolved urgently was whether to punish the Appellant for contempt for the reasons explicated in his opinion below:

> "The question that this application deals with is, what happens before the appeal is heard and determined. This is because, over and above the question of jurisdiction, the applicant complained that the Kadhi's court had not considered her evidence before reaching to the conclusion that she was in contempt, and that the court had misconducted itself on the interpretation of the law regarding contempt of court order and consequently arrived at a decision that was erroneous, unjust and illegal. If the punishment is allowed to be executed, with the prospect of the Applicant going to jail, I determine that substantial loss will have been occasioned on her. She may go to jail with the child or leave it behind. Either way, I find, that would not be in the best interests of the child."

As is evident in the writings of Mujuzi, the controversy on the Kadhis' courts' jurisdiction pertaining to children's matters seems to have no end.[19] In fact, kadhis have continued to defy the doctrine of stare decisis over this question. It is fundamental to point out that even with the controversy, women as primary care givers continue to benefit from the decisions of the Kadhis' courts with regard to custody and maintenance of children as that accords with the laws and the rules of Islamic law on custody and maintenance.

The condition of professing the Muslim faith is one of the sticking points with regard to the exercise of Kadhis' court's jurisdiction. Although the Marriage Act, 2014 has distinguished various marriage regimes, interfaith marital unions still thrive. These unions do not always command attention until they are a subject of litigation in divorce, inheritance and matrimonial property disputes before the Kadhis' courts and the superior courts. In some of the cases, a party in an interfaith marriage who married a Christian woman at the Attorney General's

[19] Mujuzi, Contentious Jurisdiction (2020), 93.

chambers expected after some years that the woman would convert to Islam. He raised this expectation as one of the grounds for seeking dissolution of the marriage by the High Court.[20]

In *VK* v *SA*,[21] the Respondent challenged the jurisdiction of the Kadhis' court to handle divorce on the ground that she had only converted to Islam in order to get a husband and now that she had one, she had reverted to Christianity and no longer professed the Muslim faith. In *CAO* v *JAA*,[22] the Applicant sought transfer of her case from the Kadhis' court to the Magistrates court as she alleged undue influence in her conversion to Islam during marriage and has since reverted back to Christianity. In both of these cases, Justice Muchelule ruled that the Kadhis' court was no longer of seized of jurisdiction, thereby asserting the rights of women to a forum of their choice.

Justice Chitembwe has a different approach to the question of jurisdiction when dealing with interfaith unions. In *MSR* v *NAB*,[23] he ruled that before dissolving the marriage, the parties were deemed to be married under Islamic law. Therefore, despite the fact that the Petitioner had reverted to Christianity, the reversion did not change the status of the marriage. It was only prudent that the parties exited the marriage through the same door of Islamic law in which they entered. Thus, the Kadhis' court, according to Justice Chitembwe, was the appropriate forum for divorce proceedings.

The condition of submission to the jurisdiction of the Kadhis' court is another area of contestation. Not only are parties required to profess the Muslim religion, but they are also required to have submitted to the jurisdiction of the Kadhis' court. In *RB & RGO* v *HSB & ASB*,[24] a widow and a mother-in-law petitioned the High Court for a limited grant *ad colligenda bona* and for full grant of representation to the estate of the deceased. The son and the widow from the first marriage raised a preliminary objection seeking the striking out of the petition for want of jurisdiction, and the transfer of the case to the Mombasa Kadhis' court. The Petitioners' reply was that they did not to submit to the jurisdiction of the Kadhis' court. In agreeing with the Petitioners, Muriithi J. opined as follows:

> "This right of choice is consistent with the constitutional values of liberty of the person embodied in the principles of "human dignity, equity, social justice, inclusiveness,

[20] *NHA* v *RT* [2015] eKLR.
[21] [2020] eKLR.
[22] [2022] eKLR.
[23] [2017] eKLR.
[24] [2014] eKLR.

equality, human rights, non-discrimination and protection of the marginalised" under Article 10 (2) (b) of the Constitution. To compel all Muslims to subject themselves to the jurisdiction of the Kadhi's Court would be contrary to all notions of choice which is the basis of rights and freedoms in the Bill of Rights. Hence the provision for the Muslims to *submit*, rather than compulsion to subject themselves, to the jurisdiction of the Kadhi's Court."

This has been held to be the position of the law on submission to the jurisdiction of the Kadhis' court by various High courts[25] and even the Courts of Appeal.[26] As seen in many of the decisions, women benefit from raising the jurisdictional questions in the High court as they seek to assert their right to have an appropriate forum hear their matters. At some other instances, the raising of jurisdictional issues by other parties leads to nullification of their cases and slows their cause for justice.

### 4.2. Substantive issues in the application of Muslim Family Law

As mentioned earlier, the substantive issues pertaining to the application of Muslim family law in the protection of women's rights include marriage rights, divorce rights, the rights to matrimonial property and inheritance rights. The cases analysed here are those involving Muslim women who seek to assert their rights provided for under the substantive Islamic law as interpreted in the Kadhis' courts and the superior courts.



#### 4.2.1. Marriage Rights

Section 3(4) of the Marriage Act, 2014 stipulates that parties to an Islamic marriage shall only have rights granted under Islamic law. Marriage rights in Islamic law include the right to informed consent during marriage, the right to dower (mahr) and the right to maintenance. These are discussed below.

[25] *AAM* v *MSM* [2014] eKLR; *Zogllo Zolleyn alias Alis Said Ahmed* v *Abdalla Said Ahmed* [2014] eKLR.
[26] See for example *Hassan Mohammed Abdalla & 2 others* v *Nadh'ya Mohammed Abdulhussein* [2018] eKLR.

#### 4.2.1.1. The right to consent for marriage

Under Islamic laws of marriage, the legal guardian is under obligation to seek informed consent of the daughter especially when she is of age and of sound mind. Age, consent of the bride and the consent of marriage guardian are some of the prerequisites of marriage solemnisation and registration under the Muslim marriage rules applicable in Kenya.[27] In an application brought by *MIM*[28] before the Kadhis' court in Nairobi, the Applicant sought an advisory opinion of Islamic law on the validity and legality of a marriage celebrated through proxy. The Applicant was a Kenyan married to a Swedish national working and residing in the United Kingdom. The marriage was solemnised in Kenya while the bride was physically in the United Kingdom. Both the bride and her waliy (legal guardian) gave consent. The High Commission of the United Kingdom raised questions about the authenticity of the marriage certificate since the bride was not physically present at the marriage ceremony. The kadhi in his ruling opined that under Islamic law, the presence of the bride was not a requirement during solemnisation provided her consent to the marriage was authenticated.

#### 4.2.1.2. The right to dower (*Mahr*)

The women's right to dower (mahr) is another fundamental aspect in the Islamic laws of marriage and this right accrues immediately at the solemnization of marriage. Mahr is money or property given or agreed to be given to the wife by the husband in consideration of marriage or as a token of appreciation.[29] Not only is it a symbol of ownership of property by women, but it also serves as a form of savings and economic security for women after the death of a husband or after divorce.[30] Parties to a marriage normally stipulate the mahr at marriage, but in cases where it was not, the marriage would still be considered as valid. Mahr can be paid prompt or its payment can be deferred.

Petitions for divorce in the Kadhis' courts many times involve orders for payment of mahr, meaning that the payment of mahr during the pendency of marriage is mostly deferred.[31] The type of mahr varies from society to society. In rural areas, mahr may be in form of cows and in

[27] Section 14 of The Marriage (Muslim Marriage) Rules, 2017.
[28] [2022] KEKC 6(KLR).
[29] Section 3 of The Marriage (Muslim Marriage) Rules, 2017.
[30] Azahari R & Ali HM 'Mahr as a form of Economic Security: A preliminary Study' (2015) 29 *Arab Law Quarterly* 296.
[31] See *SMH* v *AHA* [2018] eKLR and *HAS* v *AAL* [2020] eKLR.

urban areas, it may be in form of money, a set of furniture or a set of gold. Contestations over mahr revolve around the type of mahr; the quantum thereof; whether it was paid and the manner of making payments. *JMA* v *SHA*[32] involved parties who disagreed on the manner of paying the deferred mahr as the Appellant was a man of little means who worked as a casual labourer. The court confirmed that the wife was entitled to Ksh. 100,000. It further asked the man to pay Ksh. 5000 per month as ordered.

In *ZMH* v *SSM*,[33] the Defendant divorced the Plaintiff, and the latter sued for the payment of her mahr and return of her household items. The contention was whether the mahr was Ksh. 120,000 or furniture worth Ksh. 150,000. The kadhi noted that both the evidences were strong and he had to resort to the Islamic legal maxim, which provides that where strong evidences clash, both sets of evidence collapse and the original status is retained. On a balance of probability, he found that the mahr was furniture worth Ksh. 120,000 and proceeded to order the Defendant to release the same to the Plaintiff.

#### 4.2.1.3. The right to maintenance

The right to maintenance of wives during the pendency of marriage involves the provision of food, shelter, clothing and other expenses relevant for their physical and mental well-being. The Qur'an[34] provides for this right and some Kenyan laws, as mentioned earlier have provided for it. Failure to maintain is a ground for divorce and is commonly asserted by women during divorce proceedings as they apply to court for past maintenance. However, a Muslim woman need not wait for divorce to claim maintenance. Rule 160(1) of the Kadhis' courts (Procedure and Practices) Rules provides that 'a married woman may apply to the Court obtain for an order against her husband for the payment, from time to time, of any such sums in respect of her maintenance as she may be entitled to in accordance with Muslim law.'[35]

In *FBM* v *MS*,[36] the Applicant petitioned for dissolution of marriage and payment of past maintenance having been neglected by the Defendant for a period of four years. Kadhi Abdulhalim computed her maintenance at the rate of Ksh. 20, 000 per month and ordered the

[32] [2019] eKLR.
[33] [2017] eKLR.
[34] Qur'an 4:34.
[35] Kadhis' courts (Procedure and Practice) Rules, 2020.
[36] [2015] eKLR.

marriage dissolved and the Defendant to pay a total of Ksh. 620,000. Some other instances include *MMU* v *AMH*[37] where a party did not plead past maintenance in court papers, but it become a subject of consideration during the hearing of the cases. Past maintenance may also be for injuries caused to the wife during the pendency of marriage as set out in *NAM* v *ARA*[38] where Kadhi Abdulhalim directed the Defendant to pay Ksh. 500,000 for the physical injuries he caused his wife.

### 4.2.2. Divorce Rights

Divorce disputes form the bulk of the subject areas of litigation in the administration of Muslim family law in Kenya. The first order sought in many of the petitions in the Kadhis' court is that of divorce or dissolution of marriage. Women who have suffered cruelty, neglect and desertion in marriage bring almost all the petitions for divorce. Men rarely bring petitions for divorce for the simple reason that Islamic law allows them to divorce their wives without the court's intervention. Such divorce is unilateral, and is what is normally referred to as *talaq*. Islamic law does not allow women the right to talaq for the reason that the law gives men the mandate to protect and maintain women. This would only mean that under Islamic law, women are considered to be in a subordinate position and would therefore not be entitled to divorce men, unilaterally.

Although husbands can unilaterally divorce their wives, the Kadhis' courts Rules provide that the court shall, upon an application for divorce registration retain the mandate to check on the validity of the unilateral talaq and whether it meets the standards set out under Islamic law.[39] This provision enables women who have been unilaterally divorced to claim some of their rights that had accrued to them in marriage and upon divorce.

*Khul'* on the other hand, is a wife-initiated divorce but it requires the approval of the court. Women therefore have to petition the court and specifically plead for khul' if they want to extricate themselves out of a marriage they no longer want to be part. They are required to return the mahr to the husband or forfeit the mahr if not paid beforehand. Before the 2010 Constitution, little was known about khul' until a flurry of decisions from the post 2010 kadhis reached the High Court and the Court of Appeal on a number of questions pertaining to the

[37] [2021] eKLR.
[38] [2015] eKLR.
[39] Rule 152 of the Kadhis' courts (Procedure and Practice) Rules, 2020.

interpretation of Muslim law. These decisions, especially those on khul' benefitted a lot from comparative common-wealth common law jurisprudence on khul' and helped entrench the understanding of khul' among the litigating women, the lawyers drafting divorce petitions and the judges determining questions of Muslim divorces.[40]

Parties can mutually consent to divorce without the intervention of the court. This type of divorce is known as *mubaaraat* and it is a rare occurrence in Kenyan Kadhis' courts. Its rarity is due to the effect of the general prohibition in the common law applicable in Kenya against consensual divorces. The most common type of divorce in the Kadhis' courts, however, is *faskh* or judicial dissolution. Here, parties exercise the option to petition the court to dissolve the marriage based on the grounds acceptable in Islamic law. Further, divorce by stipulation and divorce after *li'an* or legal imprecation are some of the other recognised forms of divorce under the Kadhis' courts Rules.[41]

Matrimonial rights that accrue to women include the right to divorce, the right to exercise the option of khul', the right to eddah maintenance and the right to payment of mata'a or consolatory gift.

#### 4.2.2.1. The right to divorce

The right to divorce provides avenues for aggrieved parties to free themselves from the marital tie where it is no longer tenable. In *NHA* v *MMMSA*,[42] the Respondent sought the intervention of the kadhi to bar the hearing of a divorce petition filed by Plantiff. He raised a preliminary objection to the suit on the grounds that the Plaintiff lacked locus standi for the reason that none of the types of divorce recognised under Islamic law was applicable in the case. The other reason was that Section 3 of the Mohammedan Marriage and Divorce Act (now repealed) listed grounds for filing divorce, none of which was applicable in the case.

The Plaintiff in her reply to the preliminary objection contended that the list set out in the said Act was not exhaustive, and that the right to divorce was a right of the wife guaranteed under Islamic law. In dismissing the preliminary objection, Kadhi Abdulhalim confirmed that there was no list of grounds provided for in the Mohammedan Acts. He further noted that the

[40] See for example the Court of Appeal decision in *SYT* v *TA* [2019] eKLR.
[41] Section 154 and 155 of the Kadhis' courts (Procedure and Practice) Rules, 2020.
[42] [2015] eKLR.

Marriage Act, 2014 which provided that Islamic law should govern dissolution of Islamic marriage, had already repealed the Mohammedan Acts.[43] Further, Kadhi Abdulhalim buttressed his decision by making reference to Article 50(1) of the Constitution which provides that 'every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body.'[44]

In *MASPK* v *(Y) RWK*,[45] the parties both converted to Islam in October 2019 and solemnized their marriage in Kenya according to the laws and the rules of Islamic law. On 4th January 2021, the Respondent filed for registration of divorce at the Kadhis' court and annexed an email of a divorce letter he issued the Applicant. The Kadhis' court issued him with a divorce decree and a divorce certificate. The Applicant by then had filed divorce proceedings in Germany where she resided and in reply to her application, the Respondent attached the divorce decree issued by the Kadhis' court in Kenya. To prevent her application in Germany from dismissal, the Applicant filed a notice of motion in the Kadhis' court seeking the suspension of the certificate of divorce issued.

The Applicant deposed that she had renounced Islam on 31st December 2019 and reverted to Christianity. Thus, the kadhi did not have the requisite jurisdiction to issue a divorce decree. She further deposed that the divorce proceedings commenced without her knowledge and consent, and that she only knew about her divorce when he responded to the case in Germany. In a review of the decision at the Kadhis' court, Kadhi Abdulhalim ruled that although there was proof the Applicant was served with divorce notice, there was however no proof that the Respondent served her with hearing notice or the court's virtual links. Hence, the finding that the Applicant's right to a fair hearing was infringed upon.

The Kadhis' court did not grant the right to divorce in some other circumstances. In *SB* v *BG*,[46] the kadhi did not dissolve a marriage for the mere fact that the Defendant married another wife as that other marriage was valid under Islamic law, and there was no evidence of lack of maintenance by the Defendant. Thus, the court urged the Plaintiff to resume marital responsibilities towards her husband. In *STM* v *RMD*,[47] the Plaintiff accused the Defendant of

[43] Section 71 of The Marriage Act, 2014.
[44] The Constitution of Kenya, 2010.
[45] [2022] KEKC 153 (KLR).
[46] [2019] eKLR.
[47] [2015] eKLR.

deserting the matrimonial home and unlawfully marrying another man. In her defence, the Defendant claimed desertion, lack of conjugal rights and lack of maintenance from the Plaintiff. On cross-examination, Kadhi Abdulhalim found that the parties had been meeting regularly and the Defendant had no evidence to prove her case. He subsequently ordered the Defendant to return to the matrimonial home. The Petitioner would have easily divorced her having found that she already married another man, but because he desired continuity of his marriage tie, he came to court seeking restitution.

#### 4.2.2.2. The right to opt for khul'

Although Kadhis may sometimes order for restitution, it is not clear whether realisation of such is possible in a constitutional framework that emphasises personal liberty and dignity in the Bill of Rights. The option of khul', as recommended by Kadhi Abdulhalim for example in *HJA* v *AIG*[48] is however always available for parties who insist on walking out of marriage where their grounds for dissolution presented before court fail. The option for khul' has been exercised by women in the Kadhis' court as seen in the decisions by Kadhi Abdulhalim and Kadhi Abduljabar[49] and many other kadhis which have been upheld by the superior courts.

In *SB* v *MI*,[50] the petitioner was divorced through a talaq, and it was doubtful whether they shared the matrimonial bed afterwards. This has a significant impact on the status of the talaq since by exercising conjugal rights, the husband was deemed under Islamic law to have renounced the divorce. The general rule, as Kadhi Abdulhalim opines in this decision is that where the wife disputes the husband's claim that he renounced the divorce, his claim is upheld if it was before the expiry of eddah. But if it was after the expiry of eddah period, and the husband had no proof, the wife's position is upheld provided she took oath to the effect that the original position was that there was no intercourse during eddah. This option was presented to the Petitioner but she elected not to take the oath, and instead asked the court to annul the marriage through the option of khul.' The court thus annulled the marriage.

In *NK* v *AL*,[51] the kadhi had ordered that the marriage be annulled through khul', and the Petitioner to return to the Respondent the mahr valued at USD 500 and 75% of the wedding

[48] [2022] KEKC 9 (KLR).
[49] See for example *ASR* v *AA* [2015] eKLR.
[50] [2021] eKLR.
[51] [2020] eKLR.

expenses incurred including gifts and gold ornament. At the High court, the order that the marriage be dissolved by way of khul' was upheld but the Judge set aside the order for refund of dower, wedding expenses and ornaments as the kadhi did not ascertain the amount of mahr, expenses and gifts to be returned. In this case, the judge also held that the kadhi was wrong in denying the Appellant eddah maintenance and in directing her to spend eddah away from the matrimonial home.

#### 4.2.2.3. The right to eddah maintenance

In Islamic law, a divorced woman observes a grace period of three months before entering into a new marriage contract, unless the divorcing husband revokes the divorce issued. During this period, she is entitled to all rights a married woman enjoys in matrimony including the right to food and shelter.[52] Rule 160(2) of the Kadhis' courts Rules provides that 'a woman who has been divorced may apply to the Court for an order against her former husband for the payment, in respect of the period of iddah, any such sum in respect of her maintenance as she may be entitled to in accordance with Muslim law.'[53]

Eddah maintenance has been granted by both the Kadhis' court and the High court. In *SSG* v *SGR*,[54] the Respondent had unilaterally divorced the Petitioner and was alleged to have neglected the maintenance of his family after he entered into another marriage. The Petitioner asked for, among other things eddah maintenance and Kadhi Abdulhalim awarded her Ksh. 13,500. In *AA* v *HSS*,[55] there was contention in the High Court as to whether eddah maintenance should be paid to a woman who had left her matrimonial home before a unilateral divorce was issued. After assessment of facts, the High Court found that the Appellant had told the Respondent not to return to the matrimonial home, thus she did not run away from the matrimonial home. It awarded her Ksh. 400 per day for 90 days.

[52] Qur'an 65: 6.
[53] Kadhis' courts (Procedure and Practice) Rules, 2020.
[54] [2021] eKLR.
[55] [2021] KEHC 55 (KLR).

#### 4.2.2.4. The right to mata'a

Another right that accrues to women upon divorce is the right to *mata'a* or consolatory award. Mata'a is the wife's send-off property that she is entitled to as a matter of right after divorce. The Qur'an sanctions this right, as it requires of men to advance a suitable award for the women they have divorced.[56] The major controversy that surrounds the award of mata'a is whether its award is obligatory upon divorcing husbands. Muslim jurists took up this discussion and it has since found a way into decisions in Kenyan courts.[57] Some jurists, as Masud notes regard mata'a as an entitlement arising from the marriage contract. Others regard its payment as compensation for divorce. Masud further observes that during the Umayyad period, kadhis saw mata'a as a right arising out of the act of divorce, and therefore mandated its payment in all types of divorces recognised under Islamic law.[58]

Kenyan courts now recognise mata'a as a right, and proceed to award it not only in the Kadhis' courts but also in the superior courts. In *SK* v *HM*,[59] the Kadhis' court dissolved a marriage between the parties and subsequently awarded the Applicant a send-off (mata'a) pending assessment of the Respondent's financial capacity. The Petitioner later brought this application seeking determination of the send-off. Kadhi Abduljabar delved into juristic opinions over the nature, the quantum and the factors to consider when awarding the send-off. The view of the majority of Muslim jurists, according to Kadhi Abduljabar was that the husband's financial capacity was of prime consideration. Since the Respondent was a man of means, Kadhi Abduljabar proceeded to award the Applicant Ksh. 2 million as mata'a.

In *MBV* v *FMBV*,[60] the parties at the High Court contested the mata'a awarded by the Kadhis' court in Mombasa. The Appellant argued that the award of Ksh. 2.5 million as mata'a was a misdirection of the teachings of the Qur'an and Islamic law on mata'a, and that mata'a should not be awarded merely because the Respondent was a mother to the Appellant's children. He also contended that the quantum of the mata'a awarded was excessive, especially where the court had found the Respondent's actions contributed to the divorce. In determining the appeal, Justice Nyakundi highlighted the historical evolution of the law on award of mata'a, citing majorly the jurisprudence from Indian courts. Based on the testimony and the evidence on

[56] Qur'an 2: 241.
[57] See for example *AA* v HSS [2021] KEHC 55 (KLR).
[58] Masud MK 'The award of Mata' in the early Muslim courts' in Masud MK, Peters R & Powers DS(eds.) *Dispensing Justice in Islam: Qadis and their Judgements* (2006) 377-378.
[59] [2018] eKLR.
[60] [2020] eKLR.

record, he asserted women's right to mata'a but chose to substitute the award with a lesser amount of Ksh. 1.5 million, which he deemed fair and reasonable in the circumstances.

The Court of Appeal in *MAAA (Suing in his capacity as the administrator of the estate of Abubaker Mohammed Al Amin (Deceased)* v *FSS*[61] also recognised mata'a as a right of women upon divorce. Having done so, it remitted the matter back to the trial court and ordered for the assessment of the financial ability of the estate of the deceased and the subsequent award of a fair amount of mata'a to the Respondent.

### 4.2.3. Matrimonial Property Rights

The notion of matrimonial property as a right is the least developed in Islamic law in Kenya. The default regime in the understanding of a majority of Muslim jurists is that of separate property that is practised in many Muslim majority countries especially the Gulf States and those in the Indian subcontinent.[62] According to the separability regime, each person owns personal property throughout the course of marriage, and where a spouse acquires assets, there is no presumption of co-ownership and may therefore have no right over his assets. Community of property regime on the other hand regards property acquired or owned during marriage, as belonging to both spouses referred to as partners or tenants in common. Muslim communities following this regime may share the property equally after divorce.

The social structure of marriage that privileges male headship of the Muslim family and asserts his role as provider and maintainer of women is seen to relegate women to the periphery of domestic chores, thereby limiting their chances of acquiring and owning personal property. There has been scepticism among the practitioners of Muslim law in Kenya concerning the question of matrimonial property. In *HSA* v *AAL*,[63] the Petitioner had made substantial financial and supervisory contributions to the development of the four bedroom house that was part of the matrimonial home and only asked for a refund of Ksh. 2 million as her share. While awarding her the said amount, Kadhi Abdulhalim noted the following about the right to matrimonial property:

[61] [2022] KECA 166 (KLR).
[62] Sait MS 'Our Marriage, Your Property? Renegotiating Islamic matrimonial property regimes' in Yassari N (ed) *Changing God's Law: The Dynamics of Middle Eastern Family Law* (2016) 245.
[63] [2020] eKLR.

> 'Although relatively a new concept in Islamic law and there is no explicit authority from original sources of Islamic law on this issue, it has strong legal foundation from general verses on equity, justice, respect and protection of wealth and investments of spouses in marriage. It certainly does not contradict any of the principles and doctrines of Islamic law.'

Justice Muriithi has reiterated this ruling in *EMK* v *SSS*[64] where he opined that it was not shown that the concept of direct or indirect contribution to acquisition of property during marriage was inconsistent with Islamic law or customary law applicable to the parties. The Kadhis' courts Rules now provide that any party may, may file an application at the Kadhis' courts, at any time seeking the division of matrimonial property.[65] This is in line with the provisions of the Matrimonial Property Act that recognise the application of Islamic law in the division of matrimonial property. Contests over matrimonial property include those pertaining to proof of marriage and the criteria for division of matrimonial property.

Parties applying to a court for division of matrimonial property have to prove that a marriage existed between them. The Marriage Act of 2014 recognises only five types of marriages. Parties to these marriages are required to register them with the Registrar of Marriages, but lack of registration does not render the marriage void. One of the questions that judges are grappling with regards the appropriate marriage law in the determination of matrimonial property disputes, especially where parties were subject to more than one regime of marriage. In *RMM* v *BAM*,[66] a party at the Court of Appeal challenged the jurisdiction of the Kadhis' court to handle matrimonial property case on the basis that the parties acquired the property in question when they were non-Muslims. The parties later converted to Islam and there was no further proof that they converted the existing marriage to a Muslim marriage. Similar to this is *RMM* v *M a.k.a. JKM*[67] where the High Court held that the Kadhis' court was bereft of jurisdiction since the parties converted to Islam eight years after celebrating a Kamba customary marriage, and there was no evidence of conversion of such marriage to Islamic marriage.

In the absence of direct proof of marriage, cohabitants usually ask the courts to presume the existence of a marriage. The motion for the presumption of a marriage may pass or fail,

[64] [2015] eKLR.
[65] Rule 157 of the Kadhis' courts (Procedure and Practice) Rules, 2020.
[66] [2015] eKLR.
[67] [2019] eKLR.

depending on the criteria outlined in the recent Supreme Court decision in *Mary Nyambura Kangara alias Mary Nyambura Paul* v *Paul Ogari Mayaka & Another*.[68] The Supreme Court of Kenya considered the question as to whether parties to a union arising out of cohabitation and/or in a marriage unrecognised by law can file proceedings under the Married Women's Property Act, 1882. While recognizing presumption of marriage as the exception rather than the rule, the Supreme Court in this decision held that this particular marriage could not be presumed. Despite that, the Court upheld the proprietary rights of the Respondent and he was entitled to 30% of the beneficial interest in the property as that was equivalent to his contribution.

The criteria for division of matrimonial property has been another contentious issue in Kenyan courts. The provisions on equality before, during and after the marriage have before presented conundrums for various courts including the Kadhis' courts with regard to division of matrimonial property.[69] The recent Supreme Court decision in *Joseph Ombogi Ogentoto* v *Martha Ogentoto & 2 Others*[70] delved into the question of equal distribution of matrimonial property. Although the Supreme Court affirmed the 50: 50 sharing of matrimonial property in the Court of Appeal, it did so not as a general rule but because of the particular circumstances of the case before it. Equality, the Supreme Court explained, 'underscores the concept that all parties should have the same rights at the dissolution of their marriage based on their contributions.' Thus, the High Court has upheld some decisions where kadhis affirmed the 50:50 sharing formula because the contribution by both parties was equal.[71] In many others, kadhis[72] and High Court judges[73] exercise their discretion and award matrimonial property rights to women based on their contribution.



### 4.2.4. Inheritance Rights

Inheritance rights are due when a member of the family dies, and the legal heirs recognised under Islamic law set out to initiate proceedings for the devolution of the estate of the deceased. Testate and intestate inheritance are both recognised under the laws of succession applicable

[68] Petition No. 9 of 2021 (Unreported).
[69] Article 45(3) of the Constitution of Kenya, 2010.
[70] Petition No. 11 of 2020 [Unreported].
[71] For example, *Najma Ali* v *Swaleh Rubea* [2010] eKLR.
[72] See for example *DBD* v *HDW* [2019] eKLR; *AGC* v *SSS* [2019] eKLR.
[73] See for example *MAA* v *ARR* [2020] eKLR.

in Kenya. Section 164(2) of the Kadhis' courts Rules provides that the court may grant and confirm probate and letters of administration in respect of an intestate or testate Muslim. Testate Muslims are those who die leaving behind a will detailing how their interests or property shall devolve to transferees. Intestate Muslims are those who, at the time of their death did not leave behind an oral or a written will. Testate succession comes before subjecting the net estate to the rules of intestate succession.

Petitions by Muslim women in the Kadhis' courts and in the superior courts regarding inheritance involve determination of questions of fact and law relating to testate and intestate succession. For testate succession, questions determined include whether the testator exercised his testamentary power justly; whether the will meets the requirements of validity under Islamic law and how the wills are enforced. For intestate succession, the focus is on whether the administrators exercised their power justly and whether the parties or the courts strictly followed the Islamic rules of intestate succession in the devolution of the estate.

#### 4.2.4.1. Validity of a will

*Maalim* v *Shoshi*[74] involved the determination of the validity of a will that bequeathed the entire property of the deceased to wakf purposes, to the detriment of the legal heirs. In the Kadhis' court, Kadhi Abdulhalim found that the bequest made to the madrassa through a wakf deed was valid. The High court in *Famau Madi Shoshi* v *Salim Abdalla Maalim*[75] faulted this ruling on two grounds: First, the wakf deed did not meet the requirements of a valid wakf. Secondly, the freedom of testation in Islamic law limits bequests to a third of the estate of the deceased. Having set aside the Kadhi's decision, the High court ordered the kadhi to distribute the estate of the deceased to the widow and his brother, the Appellant, as those two were the legal heirs of the estate. Aggrieved by the High Court decision, the Applicant at the Kadhis' court appealed to the Court of Appeal. However, the appeal was dismissed based on the grounds and the reasoning in the High Court.

The issue for determination in *Khadija Gubo Darche & 2 Others* v *Abdikadir Gubo Darche & 2 others*[76] was whether the Appellants were entitled to inherit the deceased's estate, and whether the deceased distributed his estate during his lifetime through an oral will. At the lower

[74] [2022] KECA 518 (KLR).
[75] [2018] eKLR.
[76] [2019] eKLR.

court, the kadhi had found that there was an oral will which was made pursuant to the deceased's local customs that interestingly had bequeathed the Dakabiricha plot to sons, to the exclusion of daughters and the widow of the deceased. The High Court found that the tradition was offensive to Islamic law, and that an oral will never existed. It therefore allowed the appeal and remitted the matter back to the Kadhis' court for valuation and distribution of the estate to all the beneficiaries according to Islamic law.

A similar scenario obtained in *Habiba Sharu Hirbo* v *Ibrahim Sharu Hirbo*[77] where a purported gift was made under Burji customs, which favoured sons against the widow and the daughters of the deceased. Similarly, the High Court set aside the kadhi's decision and allowed the widow and the daughters to inherit their portion of the estate of the deceased according to the laws and the rules of Islamic law. These two cases show how local customs and traditions that disadvantage women have pervaded even the administration of Muslim law.

#### 4.2.4.2. Construing a will

The Court of Appeal in *Saifudean Mohamedali Noorbhai* v *Shehnaz Abdehusein Adamji* explored the question of construction of wills.[78] The deceased wrote a will devolving the entire estate to his wife, Shehnaz. After the wife was granted the probate of the written will, the Appellant applied to the High court to have the grant revoked on the ground that as a cousin of the deceased, he was entitled to three-quarters of the estate of the deceased under the doctrine of representation. He also pointed out that the respondent fraudulently acquired the grant, since she failed to disclose that the deceased was a Muslim and Muslim law of inheritance should have applied. The High Court ruled that the will was valid and since the deceased did not choose to make disposition by referring to the Muslim law, there was no evidence that the deceased was a devout Muslim. Therefore, section 5(i) of the Law of Succession Act, instead of Muslim law applied to the devolution.

Aggrieved by this ruling, the Appellant moved to the Court of Appeal to have the High Court decision quashed. He asked the Court of Appeal to determine whether the deceased was a Muslim and whether he intended to dispose his estate according to Muslim law. After a lengthy exposition of the developments in the Muslim law of succession regarding bequests, and the

[77] [2020] eKLR.
[78] [2011] eKLR.

doctrine of representation, the Court of Appeal ruled that in the absence of ascendants and descendants, the wife of the deceased was the closest relation of her husband. Thus,

> 'in construing the will of the deceased therefore, the pertinent question to ask is whether he would have happily contemplated to see his widow and life companion, whose care and protection was a solemn duty imposed upon him by the Qur'anic teachings, deprived of three-quarters of the estate of his estate in favour of a cousin, a person presumably of independent means, and a person who has not been shown to have had, or likely to have, any concern or interest in the welfare of the respondent.'

Although the doctrine of representation was not useful in construing the will here, it has been very useful elsewhere. At a time when the doctrine of representation was unpopular in the Kadhis' courts, Kadhi Abduljabar in *Re Estate of Adamali Gulam Hussein Lakdawalla also known as Gullam Hussein Mulla Allibhai Lakdawalla (Deceased)*[79] allowed a grandson and two granddaughters of the deceased to inherit the portion of the estate of their deceased father.

#### 4.2.4.3. Intermeddling

Apart from bequests, Kenyan women have also approached the courts to determine other questions concerning the intestate devolution of estates under Muslim law. For example, parties who intermeddle with the estates of deceased persons have been restrained by the courts, and the administrators of the estates have been asked to render full and accurate accounts of the dealings with the properties of the deceased. This can be seen in in *Re Estate of Haji Mohamed (Deceased)*.[80]

#### 4.2.4.4. Contested mode of distribution

There are other instances where parties have differed on the mode of distribution of the estates of the deceased. In *Fatuma Rama Mwaurinda & Another* v *Kusi Mukami Mwaurinda*,[81] the administrators were a widow and daughter of the deceased who sought a grant of letters of administration at the High Court. The Respondent who was a daughter of the deceased from another marriage objected to the issuance of grant on the ground of her exclusion from the list

[79] [2015] eKLR.
[80] [2016] eKLR.
[81] [2017] eKLR.

of beneficiaries of the estate of the deceased. The parties however consented that she be included as a beneficiary from the estate of the deceased.

The Respondent further objected to having the estate distributed according to Islamic law and claimed that she was not Muslim, and had not consented to have it distributed according to Islamic law. She instead sought it distributed equally according to the provisions of the Law of Succession Act (LSA). In ruling that the estate of the deceased be distributed according to Islamic law, the High Court relied on the Court of Appeal decision in *Re the Estate of Ismail Oman Adam (Deceased).*[82] In this decision, the Court authoritatively held that 'if the High court assumes jurisdiction to the estate of a deceased Muslim, then by virtue of section 2(3) of the Law of Succession Act, the law applicable in the High Court as to devolution of the estate is Muslim law and not the LSA.'

#### 4.2.4.5. The doctrine of survivorship

The doctrine of survivorship in a joint tenancy was brought to sharp focus in *Aliya w/o Jaganath Rama Charan Nagia alias Mahmoud Issa* v *Hussein Issa Nagia & 2 Others*.[83] The deceased married the Appellant after the death of the latter's husband. She had two children from the previous marriage, and did not have any with the deceased. The Appellant, two brothers and a sister survived the deceased. The High court was asked to consider whether the kadhi erred in finding that the disputed property and Ksh. 80,000 in the deceased's bank account formed part of the estate of the deceased. The Appellant contended that they jointly acquired suit property and registered it in their names. She further noted that her children added Ksh. 405,000 in the development of the house and the shops, and the spouses charged the property to Housing Finance Company for four million shillings. When they defaulted, half of the property was sold, and the other half was subjected to intestate proceedings at the Kadhis' court.

In declaring that the suit property did not form part of the estate of the deceased, Thande J opined that the joint tenancy between the deceased and the Appellant carried with it the right of survivorship. Thus, the property passed automatically to the Appellant, the surviving joint proprietor upon the demise of the deceased. Under Islamic law, individual property essentially

[82] *Noorbanu Abdulrazak* v *Abdulkader Ismail Osman,* Mombasa Civil Appeal No. 285 of 2009 (Unreported).
[83] [2017] eKLR.

does not form part of the estate of the deceased. In *Re Estate Ramadhani Wambi Tirimisi (Deceased)*[84] for example, the High Court at Kisumu faulted the Kadhis' court for holding that Plot No. 1039 belonging to the widow of the deceased formed part of the estate of the deceased.

#### 4.2.4.6. Illegitimacy and inheritance

Perhaps one of the most controversial issues pertaining to intestate succession of the estate of a deceased Muslim is the question of illegitimacy. Proof of marriage and of paternity are required where a widow and children respectively seek to claim inheritance of the estate of a deceased Muslim. There must be an Islamic marriage between the deceased and the widow, and the marriage must be existing at the time of the decease. For the children to inherit, they must be Muslim, born to the deceased within wedlock in an Islamic marriage.

In *Sharath Haley Neave (also known as Sharath Ismail Ibrahim) & another* v *Hafiza Khanam Ismail*,[85] the objectors filed a notice of objection to the making of the grant to the petition. They reasoned that as daughters of the deceased, the Petitioners did not recognise them as beneficiaries of the estate of the deceased, and that the assets forming the estate were undervalued. The Petitioner, a widow to the deceased contended that there was no marriage between the objector's mother and the deceased and the birth certificates of the children indicate their father to be one, Robert Insted Neave. The High court ruled that there was no evidence that the objectors' mother was married to the deceased and the objectors themselves were not his daughters.

Illegitimacy was at the centre of the interpretation of Article 24(4) and Article 27 of the Constitution of Kenya in the Court of Appeal decision in *CKC & another (Suing through their mother and next friend JWN)* v *ANC*.[86] Article 27 of the Constitution contains provisions on equality of people before the law, equal protection of the law, equal benefit of the law and the freedom from discrimination. The provisions in Article 24(4) of the Constitution provide for limitation of rights to equality and non-discrimination in the application of Muslim family law. The Appellants were born out of wedlock in a prolonged relationship never formalized by their parents. S, their putative father was entitled to inheritance from his deceased father CBH, but died before confirmation of the grant at the Kadhis' court. In his judgement at confirmation,

[84] [2020] eKLR.
[85] [2016] eKLR.
[86] [2019] eKLR.

Kadhi Abdulhalim noted that the CKC, CC and their mother JWN were not Muslims and their mother was not married to CBH. They would therefore not inherit according to Islamic law, which recognises legitimacy and marriage as conditions for inheritance. The Appellants sought a review of the judgement, but the kadhi relied on Article 24(4) to derogate from the application of the constitutional provisions on equality and non-discrimination law to the applicants.

Aggrieved, the Applicants appealed to the High court. JWN in her affidavit contended that Sharia was discriminatory to women, children and non-Muslims. Thus the Kadhis' court was not the right forum and Islamic law was not applicable in their case. In dismissing their appeal, Thande J opined thus:

> "…as long as the estate herein belongs to a deceased Muslim, and as long as Article 24(4) remains in our Constitution and further as long as Section 2(3) remains in the Law of Succession Act, the Court's hands are tied."

This ruling precipitated a further appeal to the Court of Appeal. The Appellants' contention was that the learned judge erred in the following: by holding that they were not legitimate children of S; by holding that they were not entitled to inherit from his estate; by discriminating against them on the ground of religion contrary to Article 27 of the Constitution; by failing to enforce fundamental rights and freedoms; by failing to hold that the Islamic law in question was inconsistent with the Constitution and therefore null and void; and by failing to hold that S was not subject to Islamic law by reason of his marriage to JWN who was a non-Muslim.

The Respondent opposed the appeal on the following grounds: That Islamic law applied to inheritance of the estate by virtue of Article 24(4) of the Constitution and Section 2(3) of the Law of Succession Act since the deceased lived and died as Muslim; that S was at liberty to make bequests to the Appellants as non- Muslims by way of will but elected not to do so, thus they could not possibly inherit under Islamic law; and that the Constitution must be construed as a whole such that no provision of the Constitution may be held to be inconsistent with another.

The three-judge bench of the Court of Appeal allowed the Appellants' application and concluded that '…it is the High Court that must determine the succession of S's estate under the law of succession Act because not all claimants to his estate are Muslims, and the Appellants in particular have not submitted to the jurisdiction of the Kadhi's court.' In arriving at this decision, the Court of Appeal established four conditions that must be followed before

one invokes Islamic law to derogate from or limit the right to equality and freedom from discrimination as provided for under Article 27 of the Constitution:

> "First, the derogation must be "**only to the extent strictly necessary**". Second, the derogation must relate to matters of personal status, marriage, divorce and inheritance. Third, the Persons involved must be persons who profess the Muslim faith. Fourth, as regards to jurisdiction, **all the parties** to the dispute must profess the Muslim faith and **submit to the jurisdiction of the Kadhi's court.**"

Mujuzi has criticized this ruling as conflating the issue of jurisdiction with that of applying Islamic law.[87] The High Court and the Court of Appeal following *Noorbanu*[88] have held severally that, the law applicable in the devolution of the estate of a deceased Muslim is Islamic law, whatever the forum. Mujuzi further adds that with the pluralism exhibited by the various schools of Islamic jurisprudence, it would still be possible that a non-Muslim widow inherits from a deceased Muslim. In fact, the Court of Appeal faulted the kadhi for not indicating the Islamic school of thought that S belonged to, as this was to help the court determine whether the law was applied correctly in the lower court. In that regard therefore, the judges noted that the application of the Kadhi's understanding of Islamic law to disinherit children born out of wedlock was at variance with the principles of justice and fairness renown in Islam.

In this decision, as in many other decisions involving the application of Muslim family law, children's rights are intimately tied with women's rights whether it be the right to custody, maintenance or inheritance. Despite taking a jurisdictional angle, the decision in *CKC* results from the struggles taken by JWN right from the Kadhis' court to the Court of Appeal for the sake of her own children.

### 4.3. Conclusion

Judicial intervention in the protection of women's rights is arguably the most efficacious compared to other interventions. As the last bastion in the administration of justice, the law mandates courts to solve with finality, controversies of both fact and law. More than any other institution, this mandate gives them authority and power to redress violations of women's rights.

[87] Mujuzi JD 'The Islamic Law of Marriage and Inheritance in Kenya' (2021) 3 *Journal of African Law* 377.
[88] *Noorbanu Abdulrazak* v *Abdulkader Ismail Osman,* Mombasa Civil Appeal No. 285 of 2009 (Unreported).

In the above context, this chapter dealt with decisions emanating from the Kadhis' court, the High Court and the Court of Appeal with respect to the application of Muslim family law. The focus of the decisions was on how women interact daily with the courts in accessing the rights guaranteed to them under Islamic law. In many of the decisions, women have been able to benefit from the procedural and substantive aspects of decision making in trying to realize their marriage, divorce, and matrimonial property and inheritance rights. Each of the four substantive jurisdictions require the judicial officer to interpret the facts and apply the law in a manner that is consistent with constitutional norms of equality and non-discrimination that are the hallmark of a progressive constitution. In many other times, the courts were able to do that, with the result that women's rights were guaranteed and the law developed in a progressive manner. In some other instances like in the *CKC* case, complexity in the issues led to findings that seem inconsistent with established principles of law, though in the end women's rights were still guaranteed.

The following chapter looks at the conclusions of the study and proposes a few recommendations that augment the role of the courts in the protection of the rights of Muslim women.

# CHAPTER FIVE

# CONCLUSION AND RECOMMENDATIONS

## 5.0. Introduction

The protection of women's rights in the wake of the wave of democratization and constitutional reforms that swept Africa in the past decades has seen Kenya adopt a constitution that has equality and freedom from discrimination as one of the key tenets of its Bill of Rights. The Constitution of Kenya, 2010 may be understood to have put an end to gender inequality in the social, economic and political spheres of the Kenyan society. Yet, with the Constitution's recognition of a plurality of ethnicities, cultures and laws within its architecture, the constitutional norms have to grapple with the inequalities embedded in, and brought about by such plurality. As most of the controversies regarding gender inequality happen within the family sphere, courts have been tasked with the mandate to redress some of these inequalities within the framework of the laws applicable.

This study set out to assess whether, and the extent to which courts within the Kenyan legal system have been able to protect women's rights in the application of Muslim family law. The widely held notion that Muslim family law is oppressive to women, and is antagonistic to the rule of law, human rights and constitutionalism is interrogated by this study. Kadhis and their courts are also deemed in some quarters as unbounded by rules in the administration of justice and that they just sit under a tree 'dispensing justice according to considerations of individual expediency.'[1] With a focus on the decisions of two kadhis and a host of other decisions from the superior courts, this Weberian notion of qadi justice is also addressed in this study.[2] This chapter concludes this study by focusing on a summary of its findings and suggested recommendations.

## 5.1. Summary of chapters and findings

[1] Justice Frankfurter in *The City of Chicago v. Terminiello*, 400 Ill. 23, 79 N.E.2d 39 (Ill. 1948).

[2] Rabb IA 'Against Qadijustiz: On the negative citation of foreign law' (2015) 48 *Suffolk University Law Review* 343.

### 5.1.1. Chapter one

As the introductory chapter, Chapter one provided a background to the study and a statement of the problem that the study sought to address. Muslim family law, like in many other Muslim societies has been practised in Kenya during the pre-colonial, colonial and postcolonial historical periods. The arrival of colonialism with the European legal codes permanently changed the legal landscape and introduced a form of legal pluralism that privileged transplanted laws over the indigenous African and Islamic laws. With the onset of constitutions, the domination of other laws was complete. It was argued that because Muslim family law was deemed detrimental to the rights of women, it may not survive constitutional muster. The chapter then proceeded with the assumption that Muslim family law could still protect women's rights under the Kenyan constitution. The questions that the study sought to answer in the subsequent chapters are as follows:

a) What is the status of Muslim family law applicable in Kenya?

b) What are the legal, policy and institutional frameworks that underpin the adjudication of Muslim family law for protection of women's rights in Kenya?

c) How does judicial interpretation and application of Muslim family law affect the protection of women's rights in Kenya?



### 5.1.2. Chapter two

Chapter two embarked on an explication of the trajectory of the evolution and development of Muslim family law in Kenya during the pre-colonial, colonial and post-colonial times up to the promulgation of the 2010 Constitution. This laid a background for the application of Muslim family law in Kenya with a highlight on the instances and periods where protection of women's rights was more pronounced.

The chapter linked the Sharia origins of Muslim family law to practice across the centuries. It was found that sharia had transformed from jurists' law to state law in the medieval period. With the arrival of British colonialism, the Anglo-Muhammadan version of Islamic law was introduced in Kenya from the Indian experience where the latter's statutes and precedents made their way into Kenyan colonial law and competed with indigenous Islamic law practised in the East Coast of Africa. Some reported decisions during the colonial and postcolonial periods

emphasised the protection of women's rights in the Kadhis' court, the High court and the Court of Appeal, and are deemed to have laid the foundation for future protection of women's rights in the application of Muslim family law in Kenya.

### 5.1.3. Chapter three

Chapter three set to answer the second question of the research. It concerns the role of the state and its institutions in promoting and protecting women's rights. Through its legal and institutional frameworks, the state provides a base not only for promoting women's rights but also protecting their rights in cases of violation. The legal frameworks include the Constitution and various statutory legislations that touch on the application of Muslim family law. The Institutional frameworks include Parliament, the Judiciary and relevant constitutional commissions authorized by the Constitution and relevant statutes. The laws allocate authority to the institutions while the institutions themselves exhibit the laws in motion as they act to operationalize what is provided for in the laws.

The Constitution is the overarching law in the administration of Muslim family law. It not only provides frameworks for the application of the law, but also checks through the courts the excesses of institutions applying the law. Much of the discussion on the jurisdiction of courts and the limitation on the provisions on equality and the validity of laws are tied to the norms that the Constitution promulgates. The Constitution also promotes the values of human dignity, equity, equality, non-discrimination and protection of the marginalized, all of which are capable of being utilized in protecting women's rights.

This chapter recognises the enormity of the tasks that courts are mandated with in relation to interpreting the Constitution purposively in a manner that favours the enjoyment of a right or fundamental freedom; quashing laws that are discriminatory against women and awarding appropriate reliefs to those women whose rights have been infringed on. The chapter's discussion of the courts as an institution is a precursor to chapter four's assessment of how judges deal with questions of Muslim family law in their protection of women's rights.

### 5.1.4. Chapter four

Chapter four delved into the workings of the judicial officers responsible for handling family law disputes in order to assess whether women's rights are protected in the adjudication of Muslim family law. Decisions from the Kadhis' court, the High Court and the Court of Appeal were highlighted and assessed according to thematic and procedural issues that arise in the application of Muslim family law. The chapter did not only focus on the substantive aspects of the law but regard was also had to the procedural laws applicable.

The decisions majorly composed of cases filed by Muslim women or cases where Muslim women were parties to. For the Kadhis' courts, the study relied on reported decisions of two kadhis whose work straddle the law reports. Major decisions from the Kadhis' courts, the High Courts and the Courts of Appeal that touch on marriage, divorce, and matrimonial property and inheritance rights of Muslim women were assessed. Among the findings from these cases is that women are asserting their rights more in the courts as they seek determination of family law disputes. This they do by resorting to tools within the Islamic legal tradition on the one hand, and taking advantage of state laws that provide an egalitarian vision for rights on the other hand. Before the 2010 Constitution for example, khul' was rarely used as an option for divorce, but it is now commonly invoked by women in order to free themselves from abusive marriages.

Another major finding in chapter four is that the courts are seen to be proactive in allowing women's access to their rights. The decisions assessed here point to the court's readiness to prefer an understanding of the law that most favours women's enjoyment of a particular family law right or fundamental freedom. This was greatly exemplified by the rulings in the *Saifudean* and the *CKC* decisions at the Court of Appeal.

It is evident from the study that women's rights are guaranteed in the application of Muslim family law so long as they approach the courts to determine their disputes and assert their rights through the procedural and substantive application of the law.

## 5.2. Recommendations

Two issues that require further attention stand out in the study. One is that the differing approaches by judges to the jurisdictional questions have been disruptive to women in the administration of justice. Most of the litigants especially in the Kadhis' court are women, and

most of them do not have the benefit of legal representation. Thus, the mere striking out of petitions for jurisdictional concerns hampers their right to access to justice since they would be required again to file their petitions in another court. This puts further financial strain and travel costs on them. The study recommends that the jurisdictional conundrums be settled with finality through amendments of the laws in order to provide clarity on the forum for litigation on matters in the domain of Muslim family law.

The other question pertains the applicable school of law or *madhhab* in the administration of Muslim family law in Kenya. This question was ably posited by the Court of Appeal judges in the *CKC* case. Throughout the application of Muslim family law in Kenya, the only provision that mentions the applicable school of Muslim law is Rule 21 of the rules regarding construction of wills pursuant to the Law of Succession Act. It states as follows: 'Unless a contrary intention appears from the will, where a testator declares that his property shall devolve according to Islamic law, the Islamic law applicable shall be the law of the sect or school of Islamic law to which the deceased belonged.'[3] This means that the bulk of Muslim family law applied in the Kadhis' courts of Kenya in matters regarding marriage, divorce, matrimonial property or intestate succession does not follow a particular madhhab. The legal indeterminacy emanating from such a scenario provides avenues for forum shopping. As a result, many women uncertain of the law applicable in a particular court may find themselves in the wrong forum that is purposely picked by their interlocutors. It is therefore proposed that if the Kadhis' Courts Act is amended, the school of law applied in the determination of family law disputes should be explicitly mentioned.



### 5.3. Conclusion

This chapter provided a summary of the chapters and the findings of the study and subsequently proceeded to suggest some recommendations to fill the gaps in the study. The study found that women's rights are generally protected in the application of Muslim family law in Kenya. It also found that women have immersed themselves into litigation to realize their rights and that courts have been proactive in allowing women's access to their family law rights. However, the major drawbacks in the implementation of Muslim family law included the jurisdictional conundrums and the absence of a law that specifies the definitive school of law that should

[3] See the First Schedule of the Law of Succession Act Cap. 160 of the laws of Kenya.

govern the administration of Muslim family law in Kenya. It was recommended that future amendments of the law should consider these concerns in redressing the drawbacks.

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