

## KENYA<sup>1</sup>

### OVERVIEW OF MUSLIM FAMILY LAWS & PRACTICES (Updated as at 2 January 2022)

Family Law Matter	Description				
	Legislative Framework	Case Law	Policy	Procedure	Practice
<p><b>Equality of spouses in marriage</b></p> <p><i>Is there a Constitutional provision on equality and are there exceptions? Are there specific laws that recognise marriage as a partnership of equals i.e. are family laws and/or other laws relating to marriage and family relations codified or uncodified? If codified, what are the titles of all the applicable laws? If codified, do these laws apply to all citizens irrespective of religion? If not, do these laws</i></p>	<p>Article 27(1) of the Constitution provides that:<sup>2</sup></p> <ul style="list-style-type: none"> <li>• Every person is equal before the law and has the right to equal protection and equal benefit of the law;</li> <li>• Equality includes the full and equal enjoyment of all rights and fundamental freedoms.</li> <li>• Women and men have the right to equal treatment, including the right to equal opportunities in political, economic cultural</li> </ul>	<p>The case of <i>R.B &amp; R.G.O v H.S.B &amp; A.S.B</i><sup>14</sup> held that petitioners who meet the requirements to bring a case in Kadhis' Courts (subject matter, both parties Muslim) can submit their complaint in either the High court or the Kadhis' court.</p>	<p>Kenya acceded to CEDAW without reservations.<sup>16</sup></p> <p>The Government of Kenya in its 2016 report to the CEDAW Committee informed that the Marriage Act 2014 repeals the previous numerous pieces of legislation that had governed the</p>	<p>Kenyan Muslims are under no legal obligation to have matters relating to marriage and family relations adjudicated by the Kadhis Court. They may choose for their matters to be adjudicated by other competent courts including Magistrate courts and High Courts. However, these courts will also apply Muslim</p>	<p>According to the 2016 UNDP Human Development Report, Kenya ranks 146 on the UNDP Human Development Index and 135 on the UNDP Gender Inequality Index.<sup>19</sup></p> <p>According to Kenya's 2014 Demographic and Health Survey,</p>

<sup>1</sup> This Musawah project to map Muslim Family Laws globally was led by Zainah Anwar and coordinated by Lead Researcher Sharmila Sharma, with substantive support from Salma Waheedi and students at the International Human Rights Clinic, Harvard Law School. For this Kenya country table, we would also like to thank Alyssa Oravec from Harvard Law School, and Sheikh Suqyan Hassan Omar and Sureya Roble for their inputs in its preparation.

<sup>2</sup> Article 27(1) of Kenya's Constitution (2010), <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010>

<sup>14</sup> *R.B & R.G.O v H.S.B & A.S.B* [2014] eKLR, <http://kenyalaw.org/caselaw/cases/view/104814/>

<sup>16</sup> United Nations Treaty Collection Website, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=en)

<sup>19</sup> UNDP, "Human Development Report 2016", Table 5, pp. 214-217, [http://hdr.undp.org/sites/default/files/2016\\_human\\_development\\_report.pdf](http://hdr.undp.org/sites/default/files/2016_human_development_report.pdf)

<p><i>apply to all Muslims or are there different codified laws for different sects within Islam? If uncodified, or if codified laws do not sufficiently address a particular issue, how is the issue addressed e.g. what Muslim school of law is applicable? Do these laws explicitly state gender-stereotypical roles between husbands and wives e.g. the husband is the head of the household or the wife is the primary caregiver?</i></p> <p><u>Applicable CEDAW Provision</u></p> <p>Article 16(1)(c) Paras. 17-18 GR21 Paras. 54-55 GR29</p>	<p>and social spheres;</p> <ul style="list-style-type: none"> <li>• The State shall not discriminate directly or indirectly against any person on any ground, including sex and marital status;</li> <li>• A person shall not discriminate directly or indirectly on any ground including sex and marital status.</li> </ul> <p>Article 28 Constitution provides:</p> <ul style="list-style-type: none"> <li>• Every person has inherent dignity and the right to have that dignity respected and protected. (This applies to all citizens.)</li> </ul> <p>Article 45 of the Constitution provides that:<sup>3</sup></p>	<p>Kadhis courts are empowered with unlimited powers to apply Muslim family law without any restrictions. Consequently, Kadhis court judges are free to adopt any Muslim <i>fiqh</i> they deem fit to apply in the cases before their courts.<sup>15</sup></p>	<p>institution of marriage, thus making it easier and more user friendly for women seeking matrimonial justice. The enactment of the law is a major victory for women in Kenya as it champions equality in marriage as well as reiterates the minimum age of marriage for all women across religious and cultural divides as outlined in Section 4 of the Act.<sup>17</sup></p>	<p>family law.<sup>18</sup></p> <p>The high court Ruling Prevails, if one party appeals to the high court high court ruling will prevail</p>	<p>about 32% of households in Kenya are headed by women.<sup>20</sup></p> <p>According to a Senior Principal Khadi, in practice:<sup>21</sup></p> <ul style="list-style-type: none"> <li>• The absence of a standard codified Muslim family law in Kenya gives practitioners who include kadhis, lawyers, scholars and Muslims in general a free hand to resort to their favoured Muslim school(s) of thought;</li> </ul>
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<sup>3</sup> Article 45 of Kenya's Constitution (2010), <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010>

<sup>15</sup> Information obtained from Kenyan advocate, February 2017

<sup>17</sup> Kenya State party report, U.N. Doc. CEDAW/C/KEN/8 (2016), para. 195, <http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>

<sup>18</sup> Information obtained from Kenyan advocate, February 2017

<sup>20</sup> Kenya National Bureau of Statistics, et al., "Kenya Demographic and Health Survey 2014", Table 2.9, p. 22, <http://dhsprogram.com/pubs/pdf/FR308/FR308.pdf>

<sup>21</sup> Information obtained from Kenyan advocate, February 2017

	<ul style="list-style-type: none"> <li>• 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;</li> <li>• 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;</li> <li>• The following legislation relating to marriage and family relations are to be enacted to the extent that any such marriages or systems of law are consistent with the Constitution: (i) marriage concluded under any tradition, or system of religious, personal or family law; and (ii) any system of person and family under any tradition, or adhered to by persons professing a particular religion.</li> </ul> <p>Article 170(5) of the Constitution provides that the Kadhis Court has jurisdiction to determine questions of Muslim law relating to personal status, marriage, divorce or inheritance in</p>				<ul style="list-style-type: none"> <li>• Ultimately, the choice of <i>fiqh</i> adopted by a Kadhi Court judge may be dictated by his personal philosophical inclination towards a certain school of thought, sect or opinion.</li> </ul> <p>In addition, according to the Senior Principal Chief Khadi, during marriage, Muslim husbands and wives take on fairly traditional roles. The husband provides maintenance for the family while the wife takes care of the internal affairs of the family. They may both work or go into business</p>
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	<p>proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts. This constitutional provision is reflected in Section 5 of the Kadhis Court Act.<sup>4</sup></p> <p>The Marriage Act No. of 2014 is the main codified law that governs marriage and family relations in Kenya.<sup>5</sup> The Act recognises five types of marriages: Civil, Customary, Christian, Hindu and Muslim.<sup>6</sup></p> <p>The provisions of the Marriage Act are applicable to all Kenyans unless stated otherwise in the Act (mainly the respective Parts of the Act that specifically relate to each of the five types of marriage recognised by the Act).<sup>7</sup></p>				<p>jointly or separately.<sup>22</sup></p>
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<sup>4</sup> Article 170(1) of Kenya's Constitution (2010), <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010>; Section 5 of the Kadhis Court Act (1967), <http://kenyalaw.org/lex//actview.xql?actid=CAP.%2011>

<sup>5</sup> Marriage Act (2014), [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage\\_Act2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf)

<sup>6</sup> Section 6(1) of the Marriage Act (2014), [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage\\_Act2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf)

<sup>7</sup> See for instance Part III (Christian Marriages), Part IV (Civil Marriages), Part V (Customary Marriages), Part VI (Hindu Marriages), Part VII (Marriages under Islamic Law) of the Marriage Act (2014), [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage\\_Act2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf); Information obtained from Kenyan advocate, February 2017

<sup>22</sup> Information obtained from Kenyan advocate, February 2017; AbdulKadir Hashim, "Muslim Personal Law in Kenya and Tanzania: Tradition and Innovation", (Journal of Muslim Minority Affairs, 25:3, 2005), pp. 450-451, [https://profiles.uonbi.ac.ke/hashim/files/tradition\\_and\\_innovation.pdf](https://profiles.uonbi.ac.ke/hashim/files/tradition_and_innovation.pdf)

	<p>Section 3(1) of the Marriage Act defines marriage as a voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with the Act.<sup>8</sup></p> <p>In line with Article 45(3) and other equality provisions in the Constitution, Section 3(2) the Marriage Act provides that parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage.<sup>9</sup></p> <p>However, despite Article 45(3) and other equality provisions in the Constitution as well as Section 3(2) of the Marriage Act:<sup>10</sup></p> <ul style="list-style-type: none"> <li>• Section 3(4) of the Marriage Act states that parties to a Muslim marriage shall only</li> </ul>				
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<sup>8</sup> Sections 3(1) of the Marriage Act (2014), [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage\\_Act2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf)

<sup>9</sup> Article 45(3) of Kenya's Constitution (2010), <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010>; Section 3(2) of the Marriage Act (2014), [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage\\_Act2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf)

<sup>10</sup> Article 45(3) of Kenya's Constitution (2010), <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010>; Sections 3(2), 3(4), 49(3) of the Marriage Act (2014), [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage\\_Act2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf)

	<p>have the rights granted under Islamic law, albeit with a proviso that this section is subject to the requirements of Section 3(2); and</p> <ul style="list-style-type: none"> <li>• Section 49(3) states that any provision in the Marriage that is inconsistent with Islamic law and practices shall not apply to persons who profess the Islamic faith.</li> </ul> <p>Kenya does not have specific codified laws relating to Muslim marriages and family relations. These areas are governed by a combination of <i>Shari'ah</i> principles and judicial precedence.<sup>11</sup> With Sunni Muslims of the Shafi'i School being the majority of Muslims in Kenya, generally, the rules of Shafi'i jurisprudence (<i>fiqh</i>) apply in Muslim personal status</p>				
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<sup>11</sup> Information obtained from Kenyan advocate, February 2017; Kevin Odimbe Wanyonyi, "The Kadhis Court in Kenya: Towards Enhancing Access to Justice for Muslim Women", *University of Lund Student Paper*, 2016, pp.20-24, <https://lup.lub.lu.se/student-papers/search/publication/8879897>

	<p>matters.<sup>12</sup> However, Kenya also has a sizable Hanafi community as well as Jafari, Zaydi and Ahmadi minority communities. The diverse Muslim population in Kenya has in turn resulted in a diversity of applicable Muslim <i>fiqh</i> governing Muslim personal status matters in Kenya.<sup>13</sup></p>				
<p><b>Minimum and equal legal age for marriage</b></p> <p><i>Is there a minimum age of marriage? Are there exceptions to the minimum age (e.g. min. age at 18, with exceptions to 16)? Is there an absolute minimum age without exceptions? Is there equality in</i></p>	<p>The minimum legal age for marriage is 18 for both females and males as per Section 4 of the Marriage Act.<sup>23</sup> Section 4 applies to all Kenyans across all religions.<sup>24</sup></p> <p>Section 11(1) provides that a union is not a marriage if, at the time of marriage, either party is below the minimum legal age</p>	<p>In the matter of Council of Imams and Preachers of Kenya, Malindi &amp; 4 others Vs Attorney General &amp; 5 Others [2015] eKLR<sup>30</sup> Justice Said Chitembwe reiterated that “The bottom-line is that the Kenyan</p>	<p>Constitutional Petition 40 of 2011<sup>31</sup></p>	<p>Council of Imams and Preachers of Kenya, Malindi &amp; 4 others v Attorney General &amp; 5 others [2015] eKLR.</p> <p>IN THE MATTER OF CHAPTER 4 OF THE CONSTITUTION</p>	<p>According to UNICEF’s State of the World’s Children 2016 report, 23% of women aged 20-24 in Kenya were first married by 18 and 4% were first married by 15.<sup>32</sup></p>

<sup>12</sup> Kevin Odimbe Wanyonyi, “The Kadhis Court in Kenya: Towards Enhancing Access to Justice for Muslim Women”, *University of Lund Student Paper*, 2016, p. 24, <https://lup.lub.lu.se/student-papers/search/publication/8879897>; AbdulKadir Hashim, “Muslim Personal Law in Kenya and Tanzania: Tradition and Innovation”, (Journal of Muslim Minority Affairs, 25:3, 2005), p. 452, [https://profiles.uonbi.ac.ke/hashim/files/tradition\\_and\\_innovation.pdf](https://profiles.uonbi.ac.ke/hashim/files/tradition_and_innovation.pdf); Emory Scholar Blogs, “The Republic of Kenya,” *Islamic Family Law*, <https://scholarblogs.emory.edu/islamic-family-law/home/research/legal-profiles/kenya-republic-of/>

<sup>13</sup> Emory Scholar Blogs, “The Republic of Kenya,” *Islamic Family Law*, <https://scholarblogs.emory.edu/islamic-family-law/home/research/legal-profiles/kenya-republic-of/>

<sup>23</sup> Section 4 of the Marriage Act (2014), [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage\\_Act2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf)

<sup>24</sup> Kenya State party report, U.N. Doc. CEDAW/C/KEN/8 (2016), para. 195, <http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>

<sup>30</sup> Constitutional Petition 40 of 2011: <http://kenyalaw.org/caselaw/cases/view/115306/>

<sup>31</sup> Constitutional Petition 40 of 2011: <http://kenyalaw.org/caselaw/cases/view/115306/>

<sup>32</sup> UNICEF, “The State of the World’s Children 2016”, Table 9, pp. 150-153, [https://www.unicef.org/publications/files/UNICEF\\_SOWC\\_2016.pdf](https://www.unicef.org/publications/files/UNICEF_SOWC_2016.pdf)

<p><i>the minimum age of marriage? Does the minimum age of marriage match the age of majority? Is there a minimum age verification process before the marriage is concluded?</i></p> <p><u>Applicable CEDAW Provision</u></p> <p>Article 16(2)</p> <p>Paras. 36-39 GR21</p> <p><u>Applicable Maputo Protocol Provision</u></p> <p>Article 6 (b)</p>	<p>for marriage.<sup>25</sup></p> <p>Section 87 states that any person who marries a person below the legal minimum age for marriage commits an offence and shall be liable to a penalty (imprisonment, fine or both).<sup>26</sup></p> <p>Section 92(1)(a) provides that a person commits an offence if that person celebrates or witnesses a union purporting to be a marriage where that person knows or should that at least one party is below 18 and shall be liable to a penalty (imprisonment, fine or both).<sup>27</sup></p> <p>Section 14 of the Children Act states that no person shall subject a child to early marriage.<sup>28</sup></p> <p>The Protection Against Domestic Violence Act No. 2 of 2015<sup>29</sup> provides for the definition of domestic violence that is meant to protect all females (children</p>	<p>Law does not permit marriages of people below the age of 18 years. The 2nd respondent was a child under the provisions of article 260 of the Constitution. The right to marry under article 45 (2) of the Constitution is only available to adults. Article 260 defines an adult as someone who has attained the age of 18 years. The Constitution grants the freedom to exercise one's religion. However, that</p>		<p>OF KENYA</p> <p>IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS PARTICULARLY ARTICLES 32 (1), (2), (3) AND (4) 45 (2), 4 (a) AND (b), 50 (2) (n), AND 170 (5) THEREOF</p> <p>IN THE MATTER OF ARTICLE 19 OF THE TRANSITIONAL AND consequential provisions under the sixth schedule of the constitution</p>	<p>According to Kenya's 2014 Demographic and Health Survey, the median age at first marriage for women is 20.2 and men is 25.3.<sup>33</sup></p> <p>According to Girls Not Bride, socio-economic factors are the primary drivers for child/ early marriage in Kenya. These include: (i) girls, particularly in the rural parts of Kenya often being perceived by their families an economic burden;</p>
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<sup>25</sup> Section 11(1) of the Marriage Act (2014), [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage\\_Act2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf)

<sup>26</sup> Section 87 of the Marriage Act (2014), [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage\\_Act2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf)

<sup>27</sup> Sections 92(1)(a), 92(2) of the Marriage Act (2014), [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage\\_Act2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf)

<sup>28</sup> Section 14 of the Children Act (2001), <http://www.unesco.org/education/edurights/media/docs/f587bfa8b9536d479977207b897df7a3223f57ed.pdf>

<sup>29</sup> Section 3 of the Protection Against Domestic Violence Act No. 2 of 2015 <file:///C:/Users/user/Documents/PADV%202015.pdf>

<sup>33</sup> Kenya National Bureau of Statistics, et al., "Kenya Demographic and Health Survey 2014", p. 55, <http://dhsprogram.com/pubs/pdf/FR308/FR308.pdf>



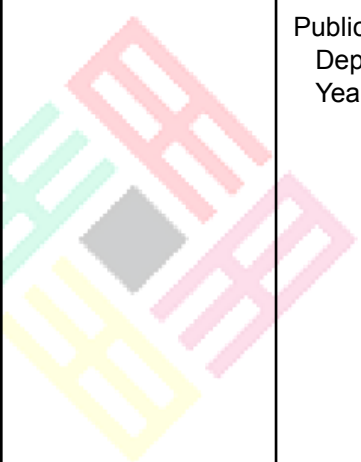
	<p>and women) in Kenya. Its states:</p> <p>In this Act, “violence” means— (a) abuse that includes— (i) child marriage; (ii) female genital mutilation; (iii) forced marriage; (iv) forced wife inheritance; (v) interference from in-laws; (vi) sexual violence within marriage; (vii) virginity testing; and (viii) widow cleansing; (b) damage to property; (c) defilement; (d) depriving the applicant of or hindering the applicant from access to or a reasonable share of the facilities associated with the applicant’s place of residence; (e) economic abuse; (f) emotional or psychological abuse; (g) forcible entry into the applicant’s residence where the parties do not share the same residence; (h) harassment; (i) incest; (j) intimidation; (k) physical abuse; (l) sexual abuse; (m) stalking; (n) verbal abuse; or (o) any other conduct against a person, where such</p>	<p>freedom has to be carried out in line with the other Constitutional provisions. If each religion is given a freehand to exercise its belief without a common ground, then the end result will be disharmony in the Kenyan society.”</p>		<p>of Kenya</p>	<p>and (ii) poor access to education. In addition, cultural norms play a part as well. Girls, again particularly in the rural parts of Kenya, are often viewed as capital for their exchange value in terms of goods, money and livestock. To justify these economic transactions, a combination of cultural, traditional and religious arguments are often employed.<sup>34</sup></p> <p>Climate change is an emerging issue that also seems to fuel an increase in child marriages especially in the North Eastern parts of Kenya as</p>
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<sup>34</sup> Girls Not Brides, “Kenya”, *Child marriages around the world*, <http://www.girlsnotbrides.org/child-marriage/kenya/>

	<p>conduct harms or may cause imminent harm to the safety, health, or well-being of the person.</p> <p>(2) "Domestic violence", in relation to any person, means violence against that person, or threat of violence or of imminent danger to that person, by any other person with whom that person is, or has been, in a domestic relationship.</p>				<p>families seek to survive in the harsh drought conditions and use their children as assets in exchange for camels, milk and other commodities they need.<sup>35</sup></p>
<p><b>Women's consent to marriage</b></p> <p><i>Is a marriage valid without the woman's consent? Is the practice of forcing women to marry against their will (ijbar) prohibited? Is there a standard marriage contract? If so, what</i></p>	<p>Consent to marriage is a vital ingredient of any marriage in Kenya despite the bride's religion. Consent cannot be assumed and minors are considered not to have capacity to consent. The Protection Against Domestic Violence Act (see above section) categorises</p>	<p>Highlights Of The Marriage Act, 2014. MAY 20, 2014</p>	<p>In having capacity to decide to have sexual relations with another person, a person needs to understand that the other person has to have the</p>	<p>The procedure for Muslim marriages is as follows: Where a marriage officiant (Kadhis, sheikh, mukhi or imam) authorised by the Registrar of Marriages</p>	<p>Media reports suggest that forced marriage is common in Kenya, especially, among young girls and in rural areas.<sup>40</sup></p>

<sup>35</sup> Kenya is Trying to End Child Marriage. But Climate Change is Putting More Young Girls at Risk: see <https://time.com/5878719/climate-change-kenya-child-marriage/>

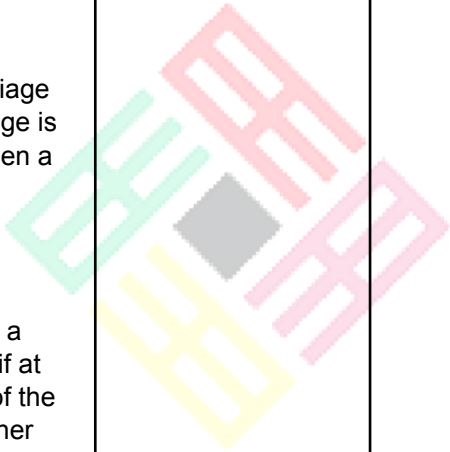
<sup>40</sup> Irissheel Shanzu, "Five girls walk for days to avoid their planned early marriage in West Pokot", *Standard*, 22 January 2016, <https://www.standardmedia.co.ke/article/2000189021/five-girls-walk-for-days-to-avoid-their-planned-early-marriages-in-west-pokot>; Catherine Soi, "Underage girls forced to marry in Kenya", *Al Jazeera*, 27 December 2013, <http://www.aljazeera.com/video/africa/2013/12/underage-girls-forced-marry-kenya-201312278350728652.html>; Anthony Aisi, "Illegal underaged marriages high in rural Kenya, report finds", *Key Correspondents*, 11 December 2012, <http://www.keycorrespondents.org/2012/12/11/illegal-underage-marriages-high-in-rural-kenya-report-finds/>

<p><i>are its broad provisions and is there anything particular in the contract that ought to be highlighted on the basis that it advances women's rights or otherwise? Is it mandatory to register a marriage?</i></p> <p><u>Applicable CEDAW Provision</u></p> <p>Article 16(1)(b) Paras. 15-16 GR21 Paras. 25-26, 33-34 GR29</p> <p>Maputo Protocol Article 6(a)</p>	<p>forced marriage as an act of domestic violence which any woman can seek legal recourse against it.</p> <p>A prospective bride who is an adult and has married at least once must consent to her subsequent marriage. However, it is generally understood that based on the rules of Shafi'i <i>fiqh</i>, a father has the right to conclude a marriage on behalf of a virgin daughter of any age even if it is against her will. Consequently, <i>ijbar</i> marriage of a prospective bride who has not attained puberty or who has never been married may occur "behind the scenes" in Kenya.<sup>36</sup></p> <p>This is despite the following constitutional and legal provisions stating otherwise:<sup>37</sup></p>		<p>capacity to consent to the sexual activity and has to in fact consent before and throughout the sexual activity.</p> <p>Public Sector Legal Department of the Year 2021</p>	<p>(Registrar) celebrates a Muslim marriage, the official must record the details of the marriage, issue the parties to the marriage with a certificate of marriages and deliver the record and certificate to the Registrar. If the Registrar is satisfied that the provisions of the Marriage Act are met, the Registrar will register the marriage.<sup>39</sup></p>	
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<sup>36</sup> Information obtained from Kenyan advocate, February 2017; Woodrow Wilson International Centre for Scholars, "Best Practices: Progressive Family Laws in Muslim Countries", 2005, p. 16, <https://www.wilsoncenter.org/sites/default/files/Best%20Practices%20%28English%29.pdf>

<sup>37</sup> Article 45(2) of Kenya's Constitution (2010), <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010>; Sections 3(1), 11(1)(e), 89 of the Marriage Act (2014), [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage\\_Act2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf)

<sup>39</sup> Part VIII of the Marriage Act (2014), [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage\\_Act2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf)

	<ul style="list-style-type: none"> <li>• Article 45(2) of the Constitution provides that every adult has the right to marry a person of the opposite sex based on the free consent of the parties;</li> <li>• Section 3(1) of the Marriage Act provides that marriage is a voluntary union between a man and a woman;</li> <li>• Section 11(1)(e) of the Marriage Act states that a union is not a marriage if at the time of the making of the union the consent of either party has not been freely given;</li> <li>• Section 89 of the Marriage Act states that a person who enters a marriage with knowledge or who has reason to believe that consent was induced by coercion or fraud commits an offence and shall be liable to a penalty</li> </ul>				
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	(imprisonment, fine or both).				
	The mandatory registration of marriages is provided for in Part VIII of the Marriage Act. <sup>38</sup>				
<p><b>Women’s capacity to enter into marriage</b></p> <p><i>Is consent of a marital guardian (wali) required? If so, can a woman choose her own wali? Can a woman go before a court or other competent authority to seek permission to marry if her wali refuses to consent to her marriage? Can a woman negotiate her marital rights prior to marriage and can these rights be changed during marriage? If so, who can change these rights and under what circumstances e.g. mutual consent?</i></p> <p>The contract allows couples to discuss major aspects of their</p>	<p>Regardless of her age, a prospective bride requires the consent of a marital guardian (<i>wali</i>) to enter into marriage based on the rules of Shafi’i <i>fiqh</i>.<sup>41</sup> If the <i>wali</i> opposes the marriage, the prospective bride may seek the authorisation of a Kadhis court judge to get married.<sup>42</sup></p>	<p>According to a Senior Principal Khadi, the Kadhis court is “readily available to grant relief” to prospective brides whose <i>wali</i> has refused them consent to get married.<sup>43</sup></p>	<p>The bride is often asked her opinion to make sure she receives a gift she enjoys. However, the actual mahr will take many different forms and practitioners who review Muslim marriage contracts will see a variety of items being given as the mahr.</p>		


<sup>38</sup> Part VIII of the Marriage Act (2014), [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage\\_Act2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf)

<sup>41</sup> Information obtained from Kenyan advocate, February 2017; Woodrow Wilson International Centre for Scholars, “Best Practices’: Progressive Family Laws in Muslim Countries”, 2005, p. 16, <https://www.wilsoncenter.org/sites/default/files/Best%20Practices%20%28English%29.pdf>

<sup>42</sup> Information obtained from Kenyan advocate, February 2017

<sup>43</sup> Information obtained from Kenyan advocate, February 2017

<p>marriage before they become husband and wife and make binding agreements. For example, contracts can include an agreed upon place to live or decisions regarding careers and children. 26 Islamic marriage contracts are very practical tools that allow couples to engage in negotiations to ensure their major goals and philosophies are in line.</p> <p><u>Applicable CEDAW Provision</u></p> <p>Articles 16(1)(a), 16(1)(b)</p> <p>Paras. 15-16 GR21</p> <p>Para. 34 GR29</p>					
<p><b>Polygamous marriages</b></p> <p><i>Does the law prohibit polygamy or impose strict conditions on such practice? Is the permission of the court required for a polygamous marriage? Is the permission of an existing</i></p>	<p>A Muslim man may marry up to four wives at one time. There is no legal requirement for him to seek the permission of the court or his existing wife or wives to enter into a polygamous marriage.</p>		<p>The Government of Kenya in its 2016 report to the CEDAW Committee acknowledged that contrary to Article 45(3) of the Constitution which</p>		<p>According to Kenya's 2014 Demographic and Health Survey, 11% of marriages in are polygamous. The survey also found</p>

<p><i>wife required for a polygamous marriage? Is it necessary to inform an existing wife of the polygamous marriage? Are temporary marriages such as traveller's marriages (misyar) recognised? Is it necessary to register a polygamous marriage? Can a woman stipulate in the marriage contract that her intended husband cannot enter into a polygamous marriage?</i></p> <p><u>Applicable CEDAW Provision</u></p> <p>Para. 14 GR21</p> <p>Para. 34 GR29</p>	<p>Section 3(1) of the Marriage Act states that a marriage may be a monogamous or polygamous.<sup>44</sup></p> <p>Section 6(3) states that an Islamic marriage is presumed to be polygamous or potentially polygamous.<sup>45</sup></p> <p>Section 8 provides for a couple to declare their intention to convert their potentially polygamous marriage to a monogamous marriage under the following conditions: (i) each spouse must voluntarily declare their intent to convert the potentially polygamous marriage to a monogamous one; and (ii) at the time the declaration is made, the husband must only have one wife. The declaration must: (i) be made before a marriage officer and must be recorded in writing and signed by each spouse; and (ii) registered with the Registrar of Marriage.<sup>46</sup></p>		<p>provides for that parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage, the Marriage Act not only recognises polygamous marriages but also allows the man to marry another wife without the first one's consent. The Kenyan government also declared that there is an urgent need to bring those laws and customs in conformity with</p>	<p>that.<sup>48</sup></p> <ul style="list-style-type: none"> <li>• Women in the Northern Eastern region of Kenya were most likely to report having co-wives (32%), followed by women in the Nyanza (19%) and Western (15%) regions. Women in the Central region were least likely to report having co-wives (3.9%);</li> <li>• Older women were more likely than younger women to have co-wives. For instance, 18% of</li> </ul>
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<sup>44</sup> Section 3(1) of the Marriage Act (2014), [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage\\_Act2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf)

<sup>45</sup> Section 6(3) of the Marriage Act (2014), [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage\\_Act2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf)

<sup>46</sup> Section 8 of the Marriage Act (2014), [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage\\_Act2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf)

<sup>48</sup> Kenya National Bureau of Statistics, et al., "Kenya Demographic and Health Survey 2014", Table 4.2.1, p. 57, <http://dhsprogram.com/pubs/pdf/FR308/FR308.pdf>

			the Constitution. <sup>47</sup>		<p>married women aged 45-49 reported having co-wives, as compared with 6% of women aged 20-24;</p> <ul style="list-style-type: none"> <li>• Rural women were more likely to report having co-wives than urban women (14% versus 7%);</li> <li>• Women living in poorer households were more likely than women living in richer households to have co-wives. For instance, 24% of women living in households in the lowest wealth quintile reported having co-wives,</li> </ul>
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<sup>47</sup> Kenya State party report, U.N. Doc. CEDAW/C/KEN/8 (2016), para. 30, <http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>



					<p>as compared with 5% of women living in households in the highest quintile; and</p> <ul style="list-style-type: none"> <li>• Lower educated women were slightly more likely to report having co-wives than higher educated women. For instance, 32% of married women with no education reported having co-wives, as compared with 6% of women who have attained secondary or higher education.</li> </ul>
<b>Divorce rights</b>	Article 45(3) of the Constitution	The case of <i>N H A v</i>		A husband may	According to a

<p><i>Is there an equal right to divorce between women and men? Can the husband divorce without reason and without having to go to court? What are the main forms of divorce? Can all forms of divorce be sought only through the courts? Are the grounds for divorce the same for the husband and wife? Is unilateral divorce by repudiation (talāq) prohibited? If unilateral divorce is not prohibited, what is the procedure i.e. is the presence of the spouse to be divorced required, are witnesses required, does the spouse seeking divorce need to go to court, is the divorced spouse informed of the divorce? Is the unilateral right to divorce delegated to the wife? If</i></p>	<p>and Section 32(2) of the Marriage Act provide for equal rights between women and men at the dissolution of the marriage.<sup>49</sup> However, Section 71 of the Marriage Act states that the dissolution of an Islamic marriage is governed by Islamic law.<sup>50</sup></p> <p>There are four main ways in which Muslims can seek for divorce in Kenya:<sup>51</sup></p> <ul style="list-style-type: none"> <li>• <i>Unilateral repudiation of the marriage (talaq)</i>: No legislation or administrative practice governs <i>talaq</i> divorce in Kenya.<sup>52</sup> Consequently, a husband can unilaterally repudiate a marriage without</li> </ul>	<p><i>M M M S A</i><sup>55</sup> held that for Muslim marriages, the types of and grounds for divorce are issues of law to be argued at trial. It is for the court to <u>adjudicate the divorce according to the principles of Shari’ah</u>.</p> <p>Please find the actual link, Succession Case 208 of 2014 - Asba Adam Khamis v Amir Ibrahim, Maulidi Ibrahim &amp; Rukia Ibrahim [Jnr.]<sup>56</sup></p>		<p>unilaterally repudiate a marriage without judicial supervision. A wife must always petition a court for divorce regardless of whatever form of divorce she is seeking (e.g. <i>khul’</i> etc.).<sup>57</sup></p> <p>The procedure for Muslim marriages is as follows: Where a Kadhis, sheikh, imam or person authorised by the Registrar grants a decree for the dissolution of a Muslim marriage, the</p>	<p>Senior Principal Khadi, in practice, among the challenges faced by Muslim women when seeking redress in court include:<sup>59</sup></p> <ul style="list-style-type: none"> <li>• <i>High court fees</i>: Due to poverty of among many Muslim women, many cannot afford to bring a matter to court. The courts fees and other incidental costs are relatively high leading one to conclude that in Kenya litigation is</li> </ul>
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<sup>49</sup> Article 45(3) of Kenya’s Constitution (2010), <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010>; Section 3(2) of the Marriage Act (2014), [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage\\_Act2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf)

<sup>50</sup> Section 71 of the Marriage Act (2014), [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage\\_Act2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf)

<sup>51</sup> Kenya Law Resource Centre, Divorce in Islamic Law, 2011, <http://www.kenyalawresourcecenter.org/2011/07/divorce-under-islamic-law.html>; See also Arjungupta, “Divorce by Mutual Consent – Mubarat”, 2015, <https://arjungupta1993.wordpress.com/2015/03/22/divorce-by-mutual-consent-in-muslim-law-mubarat/>

<sup>52</sup> Information obtained from Kenyan advocate, February 2017

<sup>55</sup> *N H A v M M M S A* [2015], eKLR, <http://kenyalaw.org/caselaw/cases/view/107531/>

<sup>56</sup> Succession Cause 208 of 2014 <https://www.cases.sheriahub.com/case/4d8c029155/>

<sup>57</sup> Information obtained from Kenyan advocate, February 2017

<sup>59</sup> Information obtained from Kenyan advocate, February 2017

<p><i>so, is it by law or through the marriage contract? Is it mandatory to register a divorce?</i></p> <p><u>Applicable CEDAW Provision</u></p> <p>Article 16(1)(c)</p> <p>Paras. 17-18 GR21</p> <p>Paras. 34, 39-40 GR29</p> <p>Maputo Protocol Article 7</p>	<p>much restrictions,<sup>53</sup></p> <ul style="list-style-type: none"> <li>• <i>Divorce by mutual consent of the husband and wife (mubarat)</i>: This can be initiated by either party. The wife loses any right she may have to her dower (<i>mahr</i>) but the husband remains liable to maintain the children;</li> <li>• <i>Redemptive divorce (khul')</i>: This is initiated by the wife if she feels that she is unhappy with the marriage. The wife returns the <i>mahr</i> to her husband and any other marriage gifts that he may have given her. The husband must consent to the <i>khul'</i> divorce;</li> <li>• <i>Court-decided divorce</i>: This is usually initiated by the wife by specifying her ground(s) for divorce and arbitrated by the court. Valid grounds for seeking a judicial divorce by a wife</li> </ul>			<p>Kadhis, sheikh, imam, Mukhi or authorised person must deliver a copy of the decree to the Registrar.<sup>58</sup></p>	<p>commercialised without check;</p> <ul style="list-style-type: none"> <li>• <i>Submission</i>: Under the Constitution, all litigation in the Kadhis court must submit to its jurisdiction. Since over 80% of Kadhis court users are Muslim women, men have resorted to using the “submission clause” under the Constitution to frustrate women’s access to justice. The clause not only allows men to cause delays in the dispensation of justice but also lead to higher costs of litigation</li> </ul>
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<sup>53</sup> See for example, *B M S v M H M* [2015] eKLR, <http://kenyalaw.org/caselaw/cases/view/107530/>

<sup>58</sup> Section 72 of the Marriage Act (2014), [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage\\_Act2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf)

	<p>include a husband's: (i) failure to provide maintenance; (ii) prolonged absence; (iv) imprisonment; (v) failure to his marital obligations; (vi) severe illness.</p> <p>The mandatory registration of a dissolution of a Muslim marriage is provided for by Section 72 of the Marriage Act.<sup>54</sup></p>				<p>and ultimately mental torture for women;</p> <ul style="list-style-type: none"> <li>• <i>Distance</i>: There are a few Kadhis courts in Kenya, thereby forcing Muslim women, many of whom are poor, to travel a long distance or stay in agony. The judiciary has been reluctant to introduce mobile Kadhis courts which may be stationed in a particular town but make visits to other parts of the counter. The judiciary Transformation Framework 2012-2016 provides for bringing justice closer to the</li> </ul>
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<sup>54</sup> Section 72 of the Marriage Act (2014), [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage\\_Act2014.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheMarriage_Act2014.pdf)

					<p>people;</p> <ul style="list-style-type: none"> <li>• <i>Cumbersome laws and procedure:</i> Laws and procedure are generally difficult to comprehend. This leaves an impression that access to justice is only for the elite class of the society to the disadvantage of the less disadvantaged members of the society who constitute the majority of the court users. Muslim women are particularly disadvantaged mainly due to their poverty and illiteracy.</li> </ul>
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<p><b>Women’s financial rights after divorce</b></p> <p><i>Is there a legal concept of matrimonial assets? Is there equal division of marital property upon dissolution of the marriage? Is the woman’s role as wife and mother recognised as a contribution to the acquisition of assets? What spousal maintenance are available to the wife after a divorce? Is she entitled to maintenance during the waiting period after the divorce (iddah)? Is she entitled to a consolatory gift or compensation upon divorce (mut’ah)? Who is responsible for the financial maintenance of children following a divorce? Can the couple agree to the division of assets acquired during marriage in the marriage contract? Can this stipulation be amended? If so, by who and on what basis e.g. mutual</i></p>	<p>Generally, upon divorce, a woman may be entitled to:<sup>60</sup></p> <ul style="list-style-type: none"> <li>• Financial maintenance during the waiting period after the divorce (<i>iddah</i>) provided that she has observed all the rules;</li> <li>• A consolatory gift or compensation (<i>mut’ah</i>);</li> <li>• Any balance of the marriage dower (<i>mahr</i>) that remains unpaid;</li> <li>• Compensation if: (i) her husband abuses his powers and divorces her arbitrarily and without valid reason; and (ii) the matter ends up in the Kadhis courts. In such instances, the court, where practicable, may grant relief to</li> </ul>	<p>In the case of <i>B M S v M H M</i>,<sup>63</sup> The wife claimed that her husband had divorced her arbitrarily and claimed for: (i) <i>iddah</i> maintenance; (ii) the balance of her <i>mahr</i>; and (iii) <i>mut’ah</i> compensation. The court awarded the wife:</p> <ul style="list-style-type: none"> <li>• <i>Iddah</i> maintenance for 90 days, calculated on the basis of 500 Kenyan Shilling per day (just under USD5/day);</li> <li>• <i>mu’tah</i></li> </ul>			<p>According to a Senior Principal Kadhis, from a practice point of view claims for matrimonial assets are not popular in the Kadhis court. However, if such cases are strongly presented and argued in the Kadhis courts, many Kadhis will recognise contribution of women including housewives to the property acquired during the marriage and thereby setting strong foundation for a strong jurisprudence leading to a case law.<sup>64</sup></p>
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<sup>60</sup> See for example, *B M S v M H M* [2015] eKLR, <http://kenyalaw.org/caselaw/cases/view/107530/>; Information obtained from Kenyan advocate, February 2017

<sup>63</sup> *B M S v M H M* [2015] eKLR, <http://kenyalaw.org/caselaw/cases/view/107530/>

<sup>64</sup> Information obtained from Kenyan advocate, February 2017

<p><i>consent?</i></p> <p><u>Applicable CEDAW Provision</u></p> <p>Articles 16(1)(c), 16(1)(h)</p> <p>Paras. 30-33 GR21</p> <p>Paras. 34-35, 43-48 GR29</p>	<p>the wife.<sup>61</sup></p> <p>The Matrimonial Property Act provides for a legal concept of matrimonial assets. However, Section 3 provides that Muslims may be governed by Islamic law in all matters relating to matrimonial property.<sup>62</sup></p>	<p>compensation. The court noted that <i>mu'tah</i> compensation is a discretionary form of compensation due to the lack of consensus on the matter among jurists. <i>Mut'ah</i> compensation is encouraged to be given to divorced women to console them and to assist them in their new life. It is also aimed at reducing the rate of divorce. The court ruled that the wife had demonstrated that she has been arbitrarily divorced by her husband. The court found that</p>			
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<sup>61</sup> Information obtained from Kenyan advocate, February 2017

<sup>62</sup> Section 3 of the Matrimonial Property Act (2013), <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/MatrimonialPropertyAct2013.pdf>

		divorcing a 31-year-old woman after only 15 months of marriage is irresponsible, inhuman and inconsiderate. Consequently, the court awarded the wife 300,000 Kenya Shillings (just under USD3,000) as <i>mut'ah</i> compensation			
<p><b>Custody of Children</b></p> <p><i>Do parents have equal rights over the custody of their children? If no, who has priority right over the custody of the child? Is custody decided based</i></p>	<p>Custodial rights between women and men are equal.<sup>65</sup></p> <p>During marriage, pursuant to Section 24 of the Children's Act, a mother and father have parental responsibility for the</p>	<p>The case of <i>H M M v K J D</i><sup>68</sup> held that the Constitution and the Kadhis Court Act do not confer Kadhis courts with jurisdiction over custody and</p>	<p>Sections 81(1)(a) and (b) of the Children Act</p> <p>Section 24 of the Children Act (2001),</p>	<p>The Children's court adjudicates all matters regarding custody and maintenance of the children regardless of religion.<sup>69</sup> Kadhis court do not have</p>	<p>According to a Senior Principal Kadhis, limiting cases regarding children to the Children's court has caused confusion among Muslim women in</p>

<sup>65</sup> Sections 81(1)(a) and (b) of the Children Act define "care and control" as the actual possession of a child, whether or not that possession is shared with one or more persons and "custody" with respect to a child to mean the parental rights and duties as relate to the possession of the child;

<http://www.unesco.org/education/edurights/media/docs/f587bfa8b9536d479977207b897df7a3223f57ed.pdf>

<sup>68</sup> *H M M v K J D* [2014] eKLR, <http://kenyalaw.org/caselaw/cases/view/101618/>

<sup>69</sup> Section 73 of the Children Act (2001), <http://www.unesco.org/education/edurights/media/docs/f587bfa8b9536d479977207b897df7a3223f57ed.pdf>



<p><i>on the best interest of the child? Do mothers automatically lose custody upon remarriage or if she is deemed disobedient or when the child reaches a designated age when custody goes to father?</i></p> <p><u>Applicable CEDAW Provision</u></p> <p>Articles 16(1)(d), 16(1)(f)</p> <p>Paras. 19-20 GR21</p>	<p>child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility.<sup>66</sup></p> <p>Upon divorce, based on Section 83(1) of the Children Act, when deciding on custody matters, the court must take into account the following factors:<sup>67</sup></p> <ul style="list-style-type: none"> <li>● The conduct and wishes of the parent or guardian of the child;</li> <li>● The ascertainable wishes of the relatives of the child;</li> <li>● The ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;</li> </ul>	<p>maintenance and the Children Act grants exclusive jurisdiction over all children matters including custody and/or maintenance only to <u>Judicial Officers who are gazetted under the Children Act</u>. Therefore <u>Kadhis' court cannot preside over matters relation to custody and maintenance of children.</u></p>	<p>Section 83 of the Children Act (2001),</p> <p>H M M v K J D [2014] eKLR,</p> <p>Section 73 of the Children Act (2001),</p>	<p>jurisdiction over matters relating to custody and maintenance of children.<sup>70</sup></p>	<p>addition to costly litigation. If a Muslim woman wishes to file a suit for her own maintenance and that of her children, she may have to bring cases in both the Kadhis court for herself and the Children's court for the children's maintenance.<sup>71</sup></p>
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<sup>66</sup> Section 24 of the Children Act (2001), <http://www.unesco.org/education/edurights/media/docs/f587bfa8b9536d479977207b897df7a3223f57ed.pdf>

<sup>67</sup> Section 83 of the Children Act (2001), <http://www.unesco.org/education/edurights/media/docs/f587bfa8b9536d479977207b897df7a3223f57ed.pdf>

<sup>70</sup> AbdulKadir Hashim, "Muslim Personal Law in Kenya and Tanzania: Tradition and Innovation", (Journal of Muslim Minority Affairs, 25:3, 2005), p. 452,

[https://profiles.uonbi.ac.ke/hashim/files/tradition\\_and\\_innovation.pdf](https://profiles.uonbi.ac.ke/hashim/files/tradition_and_innovation.pdf)

<sup>71</sup> Information obtained from Kenyan advocate, February 2017

	<ul style="list-style-type: none"> <li>● The ascertainable wishes of the child;</li> <li>● Whether the child has suffered any harm or is likely to suffer any harm if the order is not made;</li> <li>● The customs of the community to which the child belongs;</li> <li>● The religious persuasion of the child;</li> <li>● Whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;</li> <li>● The circumstances of any sibling of the child concerned, and of any other children of the home, if any;</li> <li>● The best interest of the child.</li> </ul>				
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<p><b>Guardianship of Children</b></p> <p><i>Do parents have equal rights over the guardianship of their children? If no, who has priority right over the guardianship of the child? Is guardianship decided based on the best interest of the child?</i></p> <p><u>Applicable CEDAW Provision</u></p> <p>Articles 16(1)(d), 16(1)(f)</p> <p>Paras. 19-20 GR21</p>	<p>Under Section 102 of the Children Act “guardian” means the person appointed to assume parental responsibility for the child upon the death of the parent of the child.<sup>72</sup> Guardianship is determined based on the best interest of the minor in question.<sup>73</sup></p>	<p>Civil Miscellaneous Application E1 of 2020</p>	<p>Section 24 and 5 of the “Guardianship Cap 144, Laws of Kenya”</p>	<p>the Applicant be authorized to have legal guardianships over the minor child</p>	<p>In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”</p> <p>11. Section 76 of the Children’s Act provides the general principles applicable in regard to proceedings in Children’s courts. Section 76 (3) of the Children’s Act is critical in that it requires as</p>
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<sup>72</sup> Sections 81(1)(a) and (b) of the Children Act define “care and control” as the actual possession of a child, whether or not that possession is shared with one or more persons and “custody” with respect to a child to mean the parental rights and duties as relate to the possession of the child;

<http://www.unesco.org/education/edurights/media/docs/f587bfa8b9536d479977207b897df7a3223f57ed.pdf>

<sup>73</sup> Information obtained from Kenyan advocate, February 2017

					<p>follows:</p> <p>“(3) Where the court is considering whether or not to make an order with regard to a child, it shall have particular regard to the following matters-</p> <p>a) The ascertainable feelings and wishes of the child concerned with reference to the child’s age and understanding.</p> <p>b) The child’s physical, emotional and educational needs and in particular, where the child has a disability, the ability of any</p>
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					person or institution to provide any special care or medical attention that may be required for the child.
<p><b>Family Planning</b></p> <p><i>Do women require the consent of the husband to practise family planning, including abortions and sterilisation in law or in practice?</i></p> <p><u>Applicable CEDAW Provision</u></p> <p>Articles 16(1)(e), 12</p> <p>Paras. 21-23 GR21</p>	<p>Abortion is strictly prohibited unless in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.<sup>74</sup></p>	<p>About half (49%) of all pregnancies in Kenya were unintended and 41% of unintended pregnancies ended in an abortion. Marie Stopes International estimates that 2,600 women die from unsafe abortions annually, an average seven deaths a day.<sup>75</sup></p>	<p>Constitution of Kenya (2010), Article 26(4)</p>	<p>Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.</p>	<p>Women who seek an abortion will also be held criminally liable and be subject to punishment of seven years' imprisonment upon conviction (art.</p> <p>According to World Bank data, the total fertility rate decreased from 7.9 children per woman in 1960 to 4.3 in 2015.<sup>76</sup></p> <p>According to Kenya's 2014 Demographic and</p>

<sup>74</sup> Article 26 of Kenya's Constitution, <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010>

<sup>75</sup> [Abortion+cases+in+Kenya&sxsrf=APq-WBvOSBtkl-Ilgxc\\_JUJ6ih-0xNWI\\_w%3A1644658986245&ei](http://www.kenyalaw.org/lex/actview.xql?actid=Const2010)

<sup>76</sup> World Bank, "Fertility rates, total (births per woman)", <http://data.worldbank.org/indicator/SP.DYN.TFRT.IN>

					<p>Health Survey.<sup>77</sup></p> <ul style="list-style-type: none"> <li>• The median birth interval in Kenya is 36.3 months, with 18% of children being born less than 24 months after their siblings;</li> <li>• 18% of married women have an unmet need for family planning services, with 9% having an unmet need for spacing and 8% an unmet need for limiting of children;</li> <li>• 58% of married women are using a method of contraception, with 53% of women using a modern method; and</li> </ul>
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<sup>77</sup> Kenya National Bureau of Statistics, et al., “Kenya Demographic and Health Survey 2014”, Tables 5.5, 7.1, 7.4, 7.12, pp. 72, 90, 94, 103, <http://dhsprogram.com/pubs/pdf/FR308/FR308.pdf>

					<ul style="list-style-type: none"> <li>• Knowledge of at least one method of family planning is very high (99%) among married women in Kenya.</li> </ul> <p>According to a Senior Principal Khadi, family planning is decided based on mutual consent in Kenya, which means that the husband should be involved in the process and his consent should be obtained.<sup>78</sup></p> <p>A Reproductive Health Care Bill is being debated in</p>
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<sup>78</sup> Information obtained from Kenyan advocate, February 2017

					the Senate. <sup>79</sup>
<p><b>Personal rights of spouses</b></p> <p><i>Does a woman need the consent of her spouse or guardian to work, choose a profession, leave the house, travel, drive, receive various health services, study, etc. on her behalf? Does a woman have the right to retain her birth name upon marriage or to choose her family name? Can a woman protect her personal rights through her marriage contract?</i></p> <p><u>Applicable CEDAW Provision</u></p> <p>Article 16(1)(g)</p>	<p>Article 39 of the Constitution states that every person has the right to freedom of movement and Kenyans have the right to freely choose their place of residence.<sup>80</sup></p> <p>Article 43(1)(f) of the Constitution states that every person has the right to education.<sup>81</sup></p>	<p>Can the right to freedom of movement be limited? The right may be restricted, either by way of derogation under article 4 of the ICCPR, or to protect national security, public order, public health or morals or the rights and freedoms of others, as allowed by article 12(3).</p>	<p>Article 20 of the Constitution of Kenya 2010 states that the Bill of Rights binds all state organs and all persons. However, the extent to which natural persons and private legal persons can be held liable for human rights violations has become an issue.</p>	<p>Muslim women retain their maiden name.<sup>82</sup></p>	<p>According to a Senior Principal Khadi, Kenyan women have the freedom of education and movement, her husband or guardian also has the right to be involved in these decisions to ensure her safety.<sup>83</sup></p> <p>According to Kenya's 2014 Demographic and Health Survey.<sup>84</sup></p>

<sup>79</sup> Geroge Githinji, "The Reproductive Health Care Bill Will Address Teenage Sex", *Political Kenyan*, 17 January 2017, <https://www.politicalkenyan.com/the-reproductive-health-care-bill-2014/>; Howard Akimala, "Kenya: Senate to Debate Reproductive Health Care Bill," *DSW*, July 2015, <http://www.dsw.org/en/2015/07/kenya-senate-to-debate-reproductive-health-care-bill>

<sup>80</sup> Article 39 of Kenya's Constitution (2010), <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010>

<sup>81</sup> Article 43(1)(f) of Kenya's Constitution (2010), <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010>

<sup>82</sup> Information obtained from Kenyan advocate, February 2017

<sup>83</sup> Information obtained from Kenyan advocate, February 2017

<sup>84</sup> Kenya National Bureau of Statistics, et al., "Kenya Demographic and Health Survey 2014", Tables 15.1, 15.2.1, 15.4.1, 15.6.1, 15.7.1, pp. 274, 275, 278, 281, 284, <http://dhsprogram.com/pubs/pdf/FR308/FR308.pdf>



<p>Para. 24 GR21 Para. 34 GR29  Maputo Protocol Article 6 (f)</p>					<ul style="list-style-type: none"> <li>● 75% of married Kenyan women were employed at the time of the survey;</li> <li>● 50% of married women earning cash made independent decisions on how to spend their earnings;</li> <li>● 58% of married women aged 15-49 do not own a house while 61% do not own land; among women who do own assets, 8% and 7% of women own a house and land by themselves, respectively;</li> </ul>
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					<ul style="list-style-type: none"> <li>• 54% of married women participate either alone or jointly with their husband in making decisions pertaining to their own healthcare, major household purchases, and visits to their family or relatives; and</li> <li>• 42% of women aged 15-49 accept at least one reason as a justification for wife beating. Women are most likely to agree that if a wife neglects the children, it justifies wife beating (33%).</li> </ul> <p>According to World Bank data, female labour force participation</p>
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					<p>decreased from 70% in 1990 to 62% in 2016.<sup>85</sup> During the same period, male labour force participation fell from 80% to 72%.<sup>86</sup></p> <p>According to the 2016 UNDP Human Development Report:<sup>87</sup></p> <ul style="list-style-type: none"> <li>• 28% of women over 25 have at least some secondary education as compared to 34% of men of the same age group;</li> </ul>
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<sup>85</sup> World Bank, “Labour force participation rate, female (% of female population ages 15+) (modelled ILO estimate)”, <http://data.worldbank.org/indicator/SL.TLF.CACT.FE.ZS>

<sup>86</sup> World Bank, “Labour force participation rate, male (% of male population ages 15+) (modelled ILO estimate)”, <http://data.worldbank.org/indicator/SL.TLF.CACT.MA.ZS>

<sup>87</sup> UNDP, “Human Development Report 2016”, Tables 5, 9, 14, pp. 214-217, 230-233, 250-253, [http://hdr.undp.org/sites/default/files/2016\\_human\\_development\\_report.pdf](http://hdr.undp.org/sites/default/files/2016_human_development_report.pdf)

					<ul style="list-style-type: none"> <li>• 87% of females aged 15-24 are able to read and write a short simple sentence as compared to 85% of males in the same age group; and</li> <li>• 76% of women are satisfied with their freedom of choice as compared to 82% of men.</li> </ul>
<p><b>Inheritance rights</b></p> <p><i>Are women and men in the same degree of relationship to a deceased entitled to equal shares in the estate and to equal rank in the order of succession? Are there procedures to address any</i></p>	<p>Generally, inheritance rights between women and men are unequal.</p> <p>The devolution of the estate of a person who, at the time of their death is a Muslim, shall be governed by Muslim Law.<sup>88</sup> Thus, Muslim women are</p>	<p>This was clarified by the court in the case of R.B &amp; R.G.O v H.S.B &amp; A.S.B [2014] eKLR where the court held that to compel all Muslims to subject</p>	<p>Section 2(3) of the Law of Succession Act (2012),</p> <p>The concept of hibah,</p> <p>A Muslim can</p>	<p>The Act does not apply in succession matters involving a deceased person who professed the Muslim faith. The mandatory provision does not</p>	

<sup>88</sup> Section 2(3) of the Law of Succession Act (2012), <http://www.kenyalaw.org/lex/rest/db/kenyalaw/Kenya/Legislation/English/Acts%20and%20Regulations/L/Law%20of%20Succession%20Act%20Cap.%20160%20-%20No.%2014%20of%201972/docs/LawofSuccessionAct14of1972.pdf>

<p><i>inequalities in inheritance between women and men e.g. can a will be written, can beneficiaries agree to inherit equal shares of the estate or can the children agree to forgo their inheritance in favour of their mother upon the death of their father?</i></p> <p><u>Applicable CEDAW Provision</u></p> <p>Paras. 34-35 GR21</p> <p>Paras. 49-53 GR29</p>	<p>entitled to inheritance as provided by <i>Shari'ah</i>.<sup>89</sup> In many instances, for example in the cases involving widows and widowers as well as siblings, a woman is entitled to half the share of a man.<sup>90</sup></p>	<p>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. It is necessary therefore to allow persons who profess Muslim faith to choose what regime will be applicable. c) Discrimination against a child or children born out of wedlock<sup>11</sup> The Act renders the ability of a child born out of wedlock to have a legal relationship with their father only subject to the father's recognition and acceptance. A</p>	<p>devolve his property in various ways. Muslim law permits the transfer of property inter vivos (gift) or through testamentary dispositions (will). A disposition inter vivos is unrestricted as to quantum and a Muslim is allowed to give away his entire property during his lifetime by gift, but only one-third of the total property can be bequeathed by will. Conventionally, a gift, Hiba is a transfer of property by act of the parties and</p>	<p>allow the deceased beneficiaries to choose a succession regime. For example, if the property is distributed under Islamic law, one cannot use the Law of Succession to contest the distribution. The Constitution allows the application of Islamic Law in personal matters but does not compel anyone to apply the same.</p>	
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<sup>89</sup> Information obtained from Kenyan advocate, February 2017; AbdulKadir Hashim, "Muslim Personal Law in Kenya and Tanzania: Tradition and Innovation", (Journal of Muslim Minority Affairs, 25:3, 2005), pp. 456-457, [https://profiles.uonbi.ac.ke/hashim/files/tradition\\_and\\_innovation.pdf](https://profiles.uonbi.ac.ke/hashim/files/tradition_and_innovation.pdf)

<sup>90</sup> OECD Development Centre, "Kenya", *Social Institutions and Gender Index*, 2013, p. 2, <http://www.genderindex.org/sites/default/files/datasheets/KE.pdf>

		<p>child born out of wedlock is also prohibited from enjoying relationships with other persons through their father if the father has not recognised him/her. This is contrary to Article 53 1 (e) that prohibits discrimination of a child born in or out of wedlock.</p>	<p>not by operation of law. It means that any transfer of property done by the court of law or any transfer of ownership by the Muslim law of inheritance will not be considered as Hiba.</p> <p>Under Hiba, a living Muslim voluntarily transfers the ownership of any property to another living person. Hence, it is a transfer inter vivos.</p> <p>The transferor transfers ownership of the property in absolute interest and the transferee gets the complete title in respect of the property given to him. Conditions, restrictions or</p>		
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			<p>partial rights in the gifted property are averse to the concept of Hiba under Islamic law.</p> <p>Hiba is operative with immediate effect and deprives the transferor of his control and ownership over the property. Moreover, as the property is passed immediately to the transferee, the property must be in existence at the time when the gift is made. A gift made for a property which will exist in the future is termed as void.</p> <p>A Hiba is a transfer of property without any consideration. If anything of any value is taken by the transferor in</p>		
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			<p>return or exchange, such a transfer of property is not a gift.</p> <p>In Kenya the management or administration of property through the law of succession in some state might be less effective due to the present situation wherever people are focusing on their own concerns and challenges. They sometimes disregard the concern to make the distribution of the deceased's estate because the process must go through several stages that involve several jurisdictions. For</p>		
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			<p>this reason, the use of hibah can be one of the best mechanisms to be measured as part of Islamic estate arrangement in Kenya. Besides, the ignorance of the true concept of farāid has caused many problems. Thus, the implementation of hibah will not only ensure the distribution of property to the heirs is in accordance with donor's wishes but also to reduce the number of unsolved cases.</p> <p>This is because the distribution of property through hibah does not have to go</p>		
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			<p>through the administrative process as necessary to be through farāid. The other purpose of implementation of hibah is to solve the problem when the division of property fails to run properly. This is because the distribution of estate cannot be considered complete if the proportion of each beneficiary cannot be used or fails to give any benefit to the recipient. In the Muslim estate distribution, the legal heirs are entitled to a certain amount of portion as governed under</p>		
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			the rule of farāid. It does not differentiate between the distribution of movable and immovable property. The distribution of movable property is not an issue. But when it comes to immovable property such as land, there is a lot of problem to be faced. T		
<p><b>Violence against women in the family</b></p> <p><i>Are there laws that define what constitute domestic violence such as battery, female circumcision, marital rape and other forms of sexual assault and violence that affect a</i></p>	<p>Article 28 of the Constitution provides that every person has the right to inherent dignity and the right to have that dignity respected and protected.<sup>91</sup></p> <p>Article 29 of the Constitution provides that every person has</p>		<p>The Kenyan government has developed a National Policy on Prevention and Response to Gender Based Violence.<sup>99</sup></p>		<p>According to Kenya's 2014 Demographic and Health Survey.<sup>100</sup></p> <ul style="list-style-type: none"> <li>• Overall, 47% of married women aged 15-49 reported having</li> </ul>

<sup>91</sup> Article 28 of Kenya's Constitution (2010), <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010>

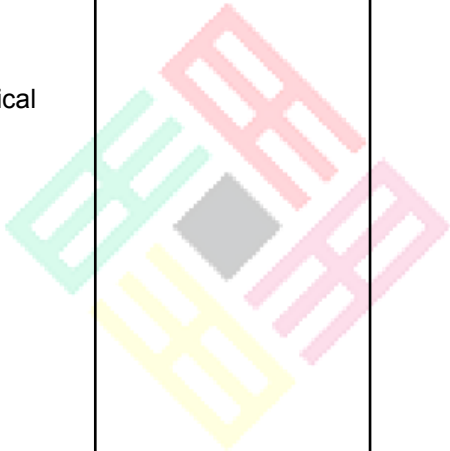
<sup>99</sup> Kenya State party report, U.N. Doc. CEDAW/C/KEN/8 (2016), para. 63, <http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>

<sup>100</sup> Kenya National Bureau of Statistics, et al., "Kenya Demographic and Health Survey 2014", Tables 16.9.1, 16.14.1, 16.17.1, 16.18.1, pp. 308, 317, 323, 325, <http://dhsprogram.com/pubs/pdf/FR308/FR308.pdf>

<p><i>woman's mental health which are perpetuated by traditional attitudes? Is there specific legislation that recognises domestic violence as a crime? Is the husband allowed to discipline his wife? Can a suspected perpetrator marry his alleged abused victim to avoid punishment? Are there support services for women who are the victims of aggression or abuse?</i></p> <p><u>Applicable CEDAW Provision</u> GRs 12 &amp; 19 Para. 40 GR21</p>	<p>the right not to be:<sup>92</sup></p> <ul style="list-style-type: none"> <li>• Subjected to any form of violence from either public or private sources;</li> <li>• Subjected to torture in any manner, whether physical or psychological;</li> <li>• Treated or punished in a cruel, inhuman or degrading manner.</li> </ul> <p>The Protection Against Domestic Violence Act criminalises a number of acts of domestic violence such as:<sup>93</sup></p> <ul style="list-style-type: none"> <li>• Abuse that includes child marriage, female genital mutilation, forced marriage, forced wife inheritance, interference from in-laws, sexual violence within marriage, virginity testing and</li> </ul>				<p>experienced emotional, physical and/or sexual violence from their spouse at least once, and 33% reported having experienced one or more of these forms of violence in the past 12 months;</p> <ul style="list-style-type: none"> <li>• 32% of married women aged 15-49 reported having experienced emotional violence from their spouse at least once, and 24% reported having experienced such violence within the 12 months prior to the survey;</li> </ul>
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<sup>92</sup> Article 29 of Kenya's Constitution (2010), <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010>

<sup>93</sup> Section 3 of the Protection Against Domestic Violence Act (2015), [http://kenyalaw.org/ki/fileadmin/pdfdownloads/Acts/ProtectionAgainstDomesticViolenceAct\\_2015.pdf](http://kenyalaw.org/ki/fileadmin/pdfdownloads/Acts/ProtectionAgainstDomesticViolenceAct_2015.pdf)

	<p>widow cleansing;</p> <ul style="list-style-type: none"> <li>• Damage to property;</li> <li>• Defilement;</li> <li>• Depriving the victim of access to the victims place of residence;</li> <li>• Economic abuse;</li> <li>• Emotional or psychological abuse;</li> <li>• Harassment;</li> <li>• Incest;</li> <li>• Intimidation;</li> <li>• Physical abuse;</li> <li>• Stalking;</li> <li>• Verbal abuse; and</li> <li>• Any other conduct against a person, where such conduct harms or may cause imminent harm to the safety, health or well-being of the person.</li> </ul> <p>Section 8(1) allows a victim to apply to the court for a</p>				<ul style="list-style-type: none"> <li>• 37% of married women aged 15-49 reported having experienced physical violence from their spouse at least once, and 23% reported having experienced such violence within the 12 months prior to the survey;</li> <li>• 13% of married women aged 15-49 reported having experienced sexual violence from their spouse at least once, and 10% reported having experienced such violence within the 12 months prior to the survey;</li> </ul>
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	<p>protection order.<sup>94</sup></p> <p>Section 32(1) states that, where the victim of domestic violence suffers personal injuries or damage to property or financial loss as a result of the domestic violence, the court may award compensation as it deems just and reasonable.<sup>95</sup></p> <p>Other legislation that may be applicable to domestic violence include the Sexual Offences Act<sup>96</sup> and the Penal Code.<sup>97</sup></p> <p>Section 43(5) of the Sexual Offences Act however, specifically, exempts marital</p>				<ul style="list-style-type: none"> <li>• Among married women who had experienced spousal violence (physical or sexual) in the past 12 months, 43% reported experiencing physical injuries; and</li> <li>• 41% of women in Kenya never sought help and never told anyone about the violence they have experienced. Among women who have sought</li> </ul>
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<sup>94</sup> Section 8(1) of the Protection Against Domestic Violence Act (2015), [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ProtectionAgainstDomesticViolenceAct\\_2015.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ProtectionAgainstDomesticViolenceAct_2015.pdf)

<sup>95</sup> Section 32(1) of the Protection Against Domestic Violence Act, 2015, [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ProtectionAgainstDomesticViolenceAct\\_2015.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ProtectionAgainstDomesticViolenceAct_2015.pdf)

<sup>96</sup> Section 3 of the Kenyan Sexual Offences Act (2006), <http://kenyalaw.org/lex/rest/db/kenyalaw/Kenya/Legislation/English/Acts%20and%20Regulations/S/Sexual%20Offences%20Act%20Cap.%2062A%20-%20No.%203%20of%202006/docs/SexualOffencesAct3of2006.pdf>

<sup>97</sup> Penal Code (1930), <http://kenyalaw.org/lex/rest/db/kenyalaw/Kenya/Legislation/English/Acts%20and%20Regulations/P/Peal%20Code%20Cap.%2063%20-%20No.%2010%20of%201930/docs/PealCode81of1948.pdf>

	<p>rape as an offence.<sup>98</sup></p>				<p>help, most sought help from their own family (65%) or their husband's family (31%). Only 7% sought help from the police.</p> <p>According to a Senior Principal Kadhi, although the law prohibits any form of violence against the women, some forms of domestic violence such as wife battering, are rampant. Among Kenyan Muslims, there are some who believe that what the law considers as violence against women, are actually their religious rights.</p>
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<sup>98</sup> Section 43(5) of the Kenyan Sexual Offences Act (2006), <http://kenyalaw.org/lex/rest/db/kenyalaw/Kenya/Legislation/English/Acts%20and%20Regulations/S/Sexual%20Offences%20Act%20Cap.%2062A%20-%20No.%203%20of%202006/docs/SexualOffencesAct3of2006.pdf>

					Such acts include female circumcision, marital rape, etc. <sup>101</sup>
<p><b>Nationality rights</b></p> <p><i>Does a wife have the right to confer her citizenship on foreign husbands and children? Can the nationality of an adult woman be arbitrarily removed because of marriage or dissolution of marriage or because her husband or father changes his nationality?</i></p> <p><u>Applicable CEDAW Provision</u></p> <p>Article 9</p> <p>Para. 6 GR21</p>	<p>A Kenyan woman or man may pass their nationality to their non-Kenyan spouse provided after at least seven years of marriage.<sup>102</sup></p> <p>A Kenyan mother or father may pass their citizenship to their children regardless of whether the child was born in Kenya or abroad.<sup>103</sup></p>				

<sup>101</sup> Information obtained from Kenyan advocate, February 2017

<sup>102</sup> Article 15(1) of Kenya's Constitution (2010), <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010>

<sup>103</sup> Article 14(1) of Kenya's Constitution (2010), <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010>



**ACCESS TO JUSTICE (please include sources to information as much as possible)**

SYSTEM	PROCEDURES	CHALLENGES FOR WOMEN	GOOD PRACTICES IN COURT SYSTEM
<p><i>How are Muslim family law (i.e. marriage and family related) cases administered in your country? (E.g. Do you have a Quazi/Kadhi court system, family courts or civil courts?)</i></p> <p>Local courts applying customary law were abolished in 1967. Four levels of courts: Resident Magistrates' and District Magistrates' Courts (1st, 2nd and 3rd classes), Senior Resident Magistrates' and Chief Magistrate's Courts, High Court, and Court of Appeal as highest court. Islamic law applied by Kadhis' Courts</p> <p><i>How many courthouses/court rooms around the country that administer Muslim family law cases?</i></p> <p>Eight Kadhis Courts in Kenya, presided over by Chief Kadhi or a Kadhi appointed by Judicial Services Commission; appeals lie to High Court which sits with Chief Kadhi or two other Kadhis as assessor(s).</p>	<p><i>Are the procedures pertaining to family matters (e.g. divorce, maintenance etc.) are defined in the family law and/or are there guidelines/policies available for judges/Kadhis?</i></p> <p>Yes they are well defined in details and a clear procedure of what it is supposed to follow by both parties.</p> <p><i>In general practice do judges/Kadhis follow procedures?</i></p> <p>Absolutely, Judges/ Kadhis do follow the procedure as required by the law.</p> <p><i>How much judicial discretion do judges/Kadhis have over marriage and family matters?</i></p>	<p><i>What are some key challenges that Muslim women face in accessing justice on family law matters? E.g. lack of accessibility, costly, bad procedures, delayed processes, gender insensitive judges, etc?)</i></p> <p>There are some challenges women experience at the Kadhis court</p> <ol style="list-style-type: none"> <li>1. Legal representation; - Most Muslims are denied justice at the Kadhis court due to lack of legal representation.</li> <li>2. Gender insensitive: Women are not comfortable and freely in expressing themselves a place where men are present and they shy to express freely and that why they want women judicial officer to hear their cases'</li> <li>3. Procrastination of the cases until someone is giving up to continue with the case</li> <li>4. Corruption at the court corridors which end files is missing at the Kadhis court.</li> </ol>	<p><i>Are there any good practices, procedures or policies that you would like to share pertaining to how courts in your country deal with family law cases?</i></p> <p><i>(E.g. prioritising certain types of cases, timely delivery of decisions, clear procedure, etc.)</i></p> <p>So far there are some a bit changes on the Justice part at the Kadhis court on the divorce part which has been a clear directives from the Principle Kadhi that all the assistant Kadhis all over the country are not subjected to issue Divorce certificate (Talaqa), but since 2020, all assistant Kadhis are require to refer all the cases and matters of divorce to the Kadhis court for determination. Unlike previous times, all the assistant Kadhis had the mandate to issue divorce certificates at their local offices</p>

<p><i>If civil or Kadhi courts - what cases are handled by what courts?</i></p> <p>Kadhis' court where "all the parties profess the Muslim religion" in suits involving "questions of Muslim law relating to personal status, marriage, divorce, or inheritance</p> <p><i>How many Muslim family law-related judges? Are there women working within the court system as judges/marriage registrars etc.?</i></p> <p><i>There are no women within the court system as judges or marriage registrar but.</i></p> <p><i>Do lawyers represent clients? Yes there are women and men lawyers representing clients at the Kadhis Court.</i></p> <p><i>Additional point is that AWAPSA has done capacity building to women rights organisation advocates and women activists on Islamic legal issues to promote women's empowerment of their legal rights.</i></p>	<p>In section 5 of the Kadhis Courts Act in the following fashion as Kadhis 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;</p> <p><i>Are there appeal processes?</i></p> <p><i>Yes there is an appeal process which has been mentioned in section 5 that;-Nothing in the section 5 of Kadhis act shall limit the Jurisdiction of the High Court or of any subordinate Court in any proceeding which comes before it.</i></p>	<p><i>5. Language Barrier: Most of the women don't understand some terminologies which are used during the court proceedings and end up confusing the women who do not even know what is going on with her case.</i></p> <p><i>6. lack of money to open case files</i></p> <p><i>7. Very low understanding of the court process by women who are 95% users of the Kadhis court services.</i></p> <p><i>8. lack of use of ADR by the Kadhis court delays justice for the women</i></p> <p><i>7. Online court proceedings are useful at the same time as it is a challenge that not all women can afford online internet and some are semi-illiterate.</i></p>	<p>without any consultation with the chief Kadhi.</p> <p><i>Additionally, this was as a result of COVID 19, where some court proceedings are being conducted online and therefore women can express themselves confidently as they are not mingling with men.</i></p> <p>As part of achievements we had 17 Kadhis in 2017 and now we have 50 Kadhis as at 2022</p>
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