

Polygamy and effects of Gender Rights in law in the Kenyan Society; Historical implications on Kenyan Constitution

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Abstract

This work discusses polygamy and effects of gender rights in law from a historical analysis of the constitution. Women and men's experiences and case laws are used to support this argument during post-colonial era when polygamy was legalized. Polygamy which is the main bearing of this work seems well entrenched in all of the customs of Kenyan communities as spelt out in examples herein given in case laws. The Kenyan Constitution, (cap, 150, and 151) which was adopted from the colonizers had in 1902 allowed polygamy under African Customary law but quashed it in 1924 ordinance. The legal dilemma was that this made second wives concubines and their children illegitimate especially if the first marriage was monogamous. This work analyses a brief history of the Kenyan Constitution in the post-colonial era, examines the new law Marriage Act 2014 and discusses the effects and implications of this law on women and their rights in marriage. Islam is given preference due to its polygamous nature and also because sharia on family law-Qadi courts has been entrenched in the constitution. The law now allows men to marry as many women as they wish regardless of the opinion of the first wife. This seems to negate on the women rights of gender equity that have been gained in the same constitution. However, the Act seems to be the best thing that has ever happened to polygamous women and their children-recognition by the law.

Keywords: Constitution, Rights, Gender, Constitution

Introduction

The focus of this work is an analysis of gender rights in marriage with a polygamous bearing through the Kenya constitution from a historical perspective. This work is summarized unto a short history of the Marriage Bill 2013 that culminated into the Marriage Act 2014, polygamy in post-colonial era, and discusses future implications of the Marriage Act 2014 on family life. It examines legal hurdles of polygamous women in search of their rights by giving case laws in post-colonial Kenya. These legal tussles normally emerge after the death of their polygamous husbands. Majority of the polygamous women end up losing everything and eventually sent away by in laws who never recognized them. The paper analyses social implications with a bearing on Islam because of Qadi courts in the constitution and polygamous tradition. Historical method was used to analyze library data and existing literature.

Postcolonial gender perspectives in Kenya have been geared towards equity between men and women at family and private levels. These efforts have always taken a legal approach based on the Kenyan constitution which has stipulated gender rights. Kenya adopted the British legal framework almost in its entirety. The colonial laws were monogamous in nature and this opened a floodgate of legal battles against African marriages that were basically polygamous according to Mbote¹. For a long time since independence Kenyans have been agitating for the new constitutional dispensation which was realized in 2010. This was a big milestone in trying to solve gender related problems like polygamy and women rights in marriage. The postcolonial constitutional making has been an effort by Africans for Africans to address the foreignness of the legal framework in Kenya. However, issues on polygamy needed a legislation that would explicate elements of marriage which culminated in the legislation of marriage Bill 2013, passed into law in 2014.

The Marriage Act 2014² which legalizes polygamy has far reaching implications on women rights in marriage. The Act allows men to marry as many wives as they can afford without much consideration to the feelings of the first wife. Even though the second and other wives will now have a certificate, there is need to examine what indeed legalized polygamy means to women in polygamous unions. This is the basis of the problematic area that this work intends to unravel.

For instance what is the fate of a woman in a monogamous marriage which turns polygamous in terms of decision making?

How are issues of property rights, inheritance, succession being handled where a second wife comes in to claim a share of wealth accumulated by the two-in a monogamous union? Is polygamy a solution or part of the problem to many marriages falling apart due to equity power struggles? Will polygamy bring about peace in the homesteads and make marital problems more reconcilable? My assumption is that the family has always been seen as the custodian of good ethics and morality in Africa. The first moral school for an individual has always been the type of family one hails from for instance polygamous, monogamous and more recently, single parents that is beginning to gain acceptability and recognition in the societal set up.

Statement of the problem

This study was prompted by unresolved, endless legal battles in courts that affect both men and women in the society. The recent gender based violence, deaths, loss of innocent lives and property brings into question the capacity of courts to mitigate gender based rights. Much attention need to be given to increasing abuse of gender based rights in marital affairs constitutionally. Hypothetically, loss of gender rights in marriage leads to a socially unstable and violent society. Indulgence even through research to expose the legal rot is a welcome endeavor towards mitigation measures.

Objectives of the study

1. To discuss the historical development of gender based laws in Kenyan constitution
2. To examine polygamy and gender rights effects in marriage in Kenyan constitution.
3. To analyze implications of polygamy and gender based effects on marriage in the Kenyan constitution

Materials and Methods used in the study

The study is purely qualitative and descriptive in nature. Quantitative design was only used for illustrative purposes. Literature review: secondary and primary data on polygamy, gender rights and constitutional development was collected from various sources which included historical analysis of libraries works;. The survey was conducted in Nairobi County through oral interviews among 10 women, 10 men, 10 government's agencies, 5 clergy, 5 court officials, 5

lawyers, among others. Sampling techniques: Purposive sampling was used in the study for well-known respondents while snowball was applied to those that were referred to through purposive sampling. SPSS was used in data analysis.

Historical development of Polygamy and gender based laws in Kenyan constitution.

There are two phases in the development of the Kenyan law in the Constitution: the colonial and post-colonial. The colonial Kenya used the British legal framework of Jurisprudence based on races³: there were four categories of law; Africans, Europeans, Muslims and Hindus who had their own laws that reflected their religious and cultural commitments. There were: civil marriage (under the marriage Act Cap 150 which was monogamous, African Christian marriage and divorce Act (under Cap 151), Islamic, Hindu and European marriages. This is well summarized by Mbote⁴, as follows:

a) Africans: that the 1897 order in council provided that African customary law was applicable to natives so long as it was not repugnant to justice and morality. African Christians were governed by Article 64 of the native Court regulations of 1897. In 1902, the East African marriage (N0 30) provided that natives' marriage under the ordinance divorced themselves from customary law and adopted the English law. In 1924 Native Christian ordinance (N0 9 Of 1924, section 2 thereof) repealed the 1902 ordinance.

b) Muslims: Islamic law recognized in 1897 under native Courts regulations of section 87. 1907, Muslims allowed to deal with Family issues of inheritance, divorce, succession and custody only. 1920 Mohammedan divorce and succession ordinance was passed.

c). Hindu: 1895-1945 colonial government neglected Hindu customary law which was polygamous. 1946-1960, Hindu marriage, divorce and succession ordinance 943 of 1946) passed.

d). Europeans had their own law that was monogamous.

Polygamous marriages allowed by law include: Customary, Civil and Islamic. The rest are monogamous unions. When examining polygamous marriages in the post-colonial period, one wonders whether the British legal system on polygamy worked well for African context.

Polygamous marriages in post-colonial Kenya

In the last two decades, women through their representations in parliament expected that future legislation would make polygamy illegal, contends Kuria⁵. Kuria explained that the main reason for polygamy was for the purposes of procreation. Culturally when couples failed to get children, it was the woman who was blamed and not the Man even if the man was the cause.

So the man would be advised to take another wife. However, polygamy has refused to go away even though cultures seem to have dynamically changed. Restrictions on polygamy had adverse challenges on the marriage institution such as gender based violence, and abuse of human rights. There is evidence collected from witnesses during interviews on how women and children used to suffer in polygamous unions. Some married without knowledge of the existence of the first wife others married due to pressure by their parents to get bride price or lured into marriage innocently direct from school for various reasons.

The Marriage Bill 2013 becomes Marriage Act 2014

The history of this Bill goes back to 2007. According to the government gazette (June, 2014)⁶, the Bill was proposed in 1981 but voted down by politicians who complained that it gave many rights to women such as specifying the time of marriage and to decide whether her husband could choose another wife or not. It was again revived and rejected in 2007. Later it was reintroduced in March 2009 where the rights to stipulate polygamy by women was deleted. After the new constitutional dispensation in 2010, the Bill was brought in the house for debate in 2013, debated and passed into an Act in April 2014 with major changes touching on women and polygamy.

The marriage Bill 2013 was debated in Parliament for a long time before it could be passed into a law. There were those who opposed it especially female members of Parliament against male majority who supported the Bill. The Standard News Paper of April 30, (2014) reported that Female MPs matched out of the floor of the house during the debate of this Bill 2013 before it was unanimous passed into law. Fortunately or unfortunately, President Uhuru Kenyatta assented to the Marriage bill 2013 on 29th April 2014. His signature brought into focus key legal issues raised in this paper: the role of women in decision making and in polygamy, inheritance rights,

property allocations, Children's custody and succession, and the future implications of this marriage Act 2014 on family institutions.

Polygamy and gender based rights effects in marriage in Kenyan constitution

Before marriage Act 2014, the spirit and the letter of the law was monogamous. This is evident in the list of cases and statutes heard and determined in the post-colonial period. To begin with is the sad story of Margaret Ouma who this study identified because of her marital experience. She was a second wife, a forty year old widow from the Luo ethnic group, lived and farmed on her husband's land from time she married at age fifteen until her husband died. She had six children aged between 1-13years and depended on that land for upkeep. Her husband become sick and died in 2010. Sad enough things started disappearing from the burial day. She said, "My in-laws took everything-mattresses, blankets, utensils, everything. They chased me a way like a dog. I was voiceless, a widow and worse enough a second wife".

In her sad story, she was mistreated because she was a second wife, an intruder, a family breaker, a husband snatcher. She was accused of enjoying life in town at the expense of the real family of the first wife. The first wife had big children and nobody dared touch her. This happened despite the fact that she had been married under Luo customary law which partially according to her recognized polygamy otherwise why mistreat her? She wondered where else to go or take her children. Men who wanted to inherit her could only do so if she gave in sexually and part of her money and wealth which she did not have. She went to Nairobi city to do any job to sustain her children.

Second, is Karambu got married in 1991 as a second wife after the demise of her co-wife who left behind two daughters. But she had no children until 2005 when she conceived a baby girl. Since then gave birth to three children all girls. That was her mistake. Her husband married another wife and neglected her in the village in Meru. She received no help. The husband also stopped visiting the rural home. Secretly, the husband solemnized his marriage with this other third wife without informing her. She felt betrayed and vowed to discipline her or kill herself.

It is assumed that customary law tends to favor men. The fluidity of this law makes it possible of manipulation by the main players-all genders⁷. Mr. Kamau (not his real name) is the third case, lived in Kiambu and had his life cut short by his first wife because he married another wife.

She only had one son. Mr. Kamau was a very rich man worth several millions. Mr. Kamau was killed by his wife who was in charge of all the businesses in conspiracy with unknown persons. She feared that the second wife could share part of what she thought was hers alone. The second wife ran away due to threats on her life.

What this means is that despite the civil marriage under the marriage Act Cap 150 and an amendment in section 3(5) in the law of succession Act which outlines the division of property, both willed and intestate, there was need for legislation on polygamy to clearly stipulate the nits of the law. The question of succession or inheritance vis-à-vis gender rights has been the main contention. There have been legal battles in polygamous unions whether the deceased left a will or not. Most customs had a way of inheritance which has been challenged and manipulated by the families in question. The law seemed ambiguous concerning Girls not married and widowers who lost their spouses in case of inheritance.

Different ethnic groups also have been using their customary systems to settle succession disputes thus we have multiple laws of succession. Mbote⁸, argues that the colonial law embedded in Kenyan Constitution was foreign and did not tackle polygamous cases. The law “eventually caught up with women and children who could not claim property unlike the first wives or children of such wives where the man had initially undergone a Christian or civil marriage ceremony” which were monogamous then. She gives evidence of (the Estate of Ruenji High Court of Kenya at Nairobi, Miscellaneous Civil case 136 of 1975 reported in 1977), law society Digest Part II and the Ogolla’s Estate 1978 K.L.R.18.

In the matter of Re Ogalla (1978) K.L.R. the deceased had married Gladys in 1964 and had four daughters with her. He died in 1974. Another woman Bona claimed to be the second wife married under customary law. The Judge, Simpson. J. held that she was not a legal wife and neither her child, explains Mbote⁹. This was supported by the African Christian Marriage and divorce Act (ACMDA), (37) which read:

Any person who is married under the Act or whose marriage is declared in this Act to be valid shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom

The Marriage Act 2014 by allowing polygamy brings in fresh interpretations of the law and the scenario in this case is now a thing of the past. If Bona went to Court today her status would be valid.

However, in section 3(5), amendment No. 101981 enabled subsequent women (wives) and their children to inherit. It reads:

Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act and in particular Sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.

It should be noted that this amendment was lauded by people in monogamous marriages that had turned polygamous. But in practice we see inconsistency to this amendment in the matter of the Estate of Reuben Mutua Nzioka case No 843 of 1986 (H/Court) where Mutua had married Theresia in 1961 under ACMDA. On his death in 1986, Josephine who had married to him under Kamba Customary law was denied inheritance with her children. Post-colonial Judges were monogamous at heart and would at times manipulate the law.

Maina¹⁰, accused Section 3(5) amendment of sanctioning adultery and bigamy and undermining the institution of marriage and marriage contract. This is what could be said today by proponents of monogamy.

The above scenario of confusion and fighting might have been one of the factors that moved Parliamentarians to enact the 2013 Bill into law.

The marriage Act 2014 has evolved from the Marriage Bill, 2007 which was reintroduced for legislation in 2013 with the following key clauses as seen in Kenya Gazette¹¹. The Marriage bill 2013 was legislated in parliament and passed into law in April 2014. According to this law, the marriage Act 2014 Part (II) clause 4, 8, 25, 26, Part (IV) Clause 52, Part (VI) Clauses 76, 80, 92-95 can be summarized as follows:

- a) In a customary Marriage, the husband will not have to seek consent of his first wife so as to marry a second wife.
- b) A certificate will be issued in every polygamous marriage entered into meaning that wives to the same husband will possess a certificate.

- c) A jilted lover cannot now demand damages if a man who promised to marry her fails to honor the promise.
- d) In case of divorce or separation, women will also share in the maintenance of children.
- e) All marriages registered under the Act have the same legal status; parties have equal rights and obligations at the time of marriage, during marriage and at the time of dissolution of marriage.
- f) The age of marriage is 18years but no consent from parents is required. The above foregoing has numerous implications on marriage and a critical analysis is hereby undertaken.

Implications of the Marriage Act 2014 on the family unit and gender rights

If men are allowed to marry more than one wife, is this a blessing or a curse to the family or both? In many cases all the above perspectives might apply depending on the family background and the type of marriage, whether it is religious or customary.

This law impacts on the modern Kenyan woman in a big way especially in communities where men are potentially polygamous. There could be gains and losses to the first and other wives depending on how one approaches the issue. In this respect, there are both gender gains and losses in rights.

Cohabitees

Seemingly cohabitees have received a big relief in the Marriage Act 2014. It is estimated by Kenya Bureau of statics (2010) that men and women cohabitees staying together without a formal marriage ceremony are many. Marriage Act 2014 has made it easy for such to legalize their unions by the virtue of staying together for more than six months. Women who have been losing their property rights to in laws might be now a thing of the past. In the matter of Mary Njoki V. John Kinyanjui Muthuru and others, Civil appeal N0. 21 of 1984, Kisito Charles V. Rosemary Moraa CC N0 364 of 1981.¹² The Court held that no marriage existed between them.

Gender equity

The Marriage Act 2014 seems to retrogress on gains made in gender equity. It gives more power to men than women in decision making and control at home especially in monogamous marriages. It delegates the woman to the periphery in the household with less negotiating power.

Co-wives

The second wife and other wives are now recognized by the law and are no longer intruders. They benefit in terms of their status as legally married women, able to share property with the first wife plus their children, as widows and in case of separation. In most cases she has nothing to lose unlike before.

The first wife in some cases might see gains because the husband might now be open when dealing with other co-wives in terms of resources. This is relevant in cases where husbands have been spending almost all their money on what could be seen as wayward women commonly known as *mpango wa kando* in Kenya. Some women feel that money spent on unrecognized women is a waste than one who is well known. However, the first wife must content with the fact of jealousy and sharing of husband's resources, a thing that no woman in a monogamous union would willingly accept. The law affects the first wife immensely for instance, where a man marries a 19 year second wife to a 45 year first wife. This may bring stress to the first wife who has to compete with co-wife the age of her daughters. In cases where basic necessities are scarce, a second wife might add more sadness to the already struggling family. The second wife will have to share resources or even be preferred to than the second wife.

Traditionally in cases of barrenness, or old age the first wife like in Luhya community (Samia-sub tribe) would advise the husband to take on the second wife and particularly from her relatives. There were some sort of negotiations or dialogue between spouses but 2014 Act does not recognize these local arrangements. During the legislation of the 2013 Bill, Mr Jakoyo Midiwo, the Member of Parliament for Gem Constituency, on the floor of the house said 'that in a customary marriage women were never consulted'. This was supported by Mr. Aden Duale, the Member of Parliament for Dujis Constituency, who challenged Christians to check in their Old Testament that King David never asked anyone before taking on his many wives. Even though this sounds logical, there is no harm in spouses discussing it before a husband goes for another wife. Some of the reasons for polygamy could be addressed through amicable dialogue, peacefully. If spouses have equal status in marriage as the law states, why not consult the spouse of the intention to marry another wife because it will affect her materially, spiritually and psychologically.

Polygamy and Morality

There are fears that the Act might enhance adultery and promiscuity. Kabotia James (31/7/13) an activist was quoted in the media saying that “the Bill will pave way for immorality and that it was biased against male gender”. Morals are not controlled and determined by legal framework. People will not just engage in bad behavior because the law has provisions of similar nature.

Christians might not go against their highly cherished values and ethos of monogamy simply because polygamy is legalized unless the men and women in question are potentially polygamous. Kabotia also criticized the clause that “until death do us a part” as a sick joke. He argued that marriage should have an exit if it becomes sour. Perhaps the 2014 Act that allowed polygamy might be one of the ways out for some men in future. On equal ownership he said, the law is geared towards robbing men off their properties.

Age of marriage

It is noted that seven enactments regulated marriage and divorce, Coulson¹³, as follows: the marriage Act, the matrimonial Act, the Hindu marriage and Divorce Act, the African Christian marriage and Divorce Act, Customary law and Subordinate Courts (separation and marriage Act) which majority accepted marriage at 16 years. With the age raised to 18 years, this will check and punish cultural practices that have impacted negatively on the rights of women who have been forced into marriage at the whims of their parents. Girls and boys will now have equity before the law to allow them equally access education.

Inheritance and property ownership

Possession of the certificate by polygamous wives might be a good thing towards gender equality. For women in polygamous union, legalizing polygamy is a dream that has come true. Before, they would fight court battles to get anything sometimes loose completely. The law of succession came into existence in 1981. According to (Black’s Law Dictionary, 5th Edition) Succession or inheritance may be defined as “the devolution of title to property under the law of descent and distribution”. However according to Mbote (1995), concession made for Muslims in 1990 makes it a dual system.

Marital status

In Marriage Act 2014 the women and children in polygamous marriage will no longer be seen as concubines and illegitimate bastards. The earlier law Christian marriage CAP 151 and Civil CAP 150, (Section 82 (4) b had denied second wives and their children social justice in the distribution of matrimonial property based on the European understanding of the family. The Family was defined “in terms reminiscent of Hyde vs. Hyde (1861-73) ALL. E. R.175), to consist of a man, one wife and the children.

This was despite the amendment 3(5) introduced to the law of succession Act. Thus, in Africa, the family is more an extended entity Mbiti (1969), even though a stranger cannot inherit in some communities.

In the past Kenya has experienced Court cases involving sharing of the property or estate of the deceased. This could be a thing of the past as the law is somehow clear on inheritance and property ownership in polygamous marriages-50-50% between Husband and his wives. The above cases affect Christians. However, in Kenya, Muslim population and presence is becoming significant and with the entrenchment of Qadi Courts in the 2010 constitution, Muslim family law becomes evident case to deal with.

Polygamy in Islam and gender rights implications in Qadi courts

Qadi courts which is entrenched in the national constitution deals with family law in Islam has ramifications or implications not only to Muslim but mixed marriages between Muslims and Christians. The Islamic law or simply put, Qadis¹⁴ Courts only deal with Family law such as Marriage, inheritance, Succession, and child Custody rights. The Muslims were allowed by the British colonizers in Kenya to follow their religion which in Sura al Nisa (4) allows Muslim Men to marry up to 4 wives. Marriage (nikah) in Islamic Family Law, according to Hanafi School of law which is popular in East Africa is a religious sacred covenant, a civil contract legalizing intercourse and procreation. It has essential requirements, classifications, duties and obligations, as in 4:34 and 2:221-240 which are parallel with the Marriage Act 2014 of the Kenyan law:

Essentials or components of marriage include: 1. consenting parties of opposite sex. For underage, guardians (wali) can be used, 2. Proper dower /*mahr* to be paid to the girl, 3. Could Formalize in writing, and 4. Confirmed under by the court.

The Muslim marriage contract of polygamy in practice can be trick to fulfill as the husband is expected to love and support all the women equally.

Esposito¹⁵, on Surah, 4:34 observes classifications of Islamic family of marriage: 1. Batil or void. Is the unlawful marriage that awards no mutual rights to the partners and imposes no obligations or inheritance, 2. A fasid-an irregular secret marriage which either lacks required witnesses, or other lacks full requirements by law, 3. Sahih-this is sound or valid marriage and confirms to each other's and every requirement of the law.

Other competing requirement include: religion for instance, under Hanafi law, a Muslim man is allowed to marry a Muslim, Jewish, or Christian woman who is a believer in the revealed Book - *kitab* and not an idolater. The law also prohibits marrying blood relatives 4:23 and *Iddah* which prohibits women remarrying until prescribed period of three months is over.

Polygamy: Number of wives is limited to four. But the husband must be equally fair to all of them and if not should marry only one for instance in 4:3, "marry such of the women as appeal to you, two, three or four: but if you fear that you cannot be equitable, then marry only one" however Sura 4:129 seem to discourage polygamy, "you will never be able to treat wives equitably even if you are bent on doing that" the implication is that Polygamy is not tenable in Islam.

Equality doctrine or *Kafaah* states that marriage is suitable in law if the man is equal in social status to the woman because the woman's low status is raise by the husband's in terms of family, religion, freedom, good character and means.

Marriage rights and obligations of partners are spelt out in the Qur'an. The marriage agreements imposes specific obligations and ensures specific rights for each marriage partner: significant rights and obligations concern duties for the wife, repudiation of marriage agreements, property, dower, and maintenance rights, guardianship and parentage. Some of the duties of the wife may include maintaining a home, child care, obeying husband, Sura 4:7 stipulates on property rights "And give women their dowers as a free gift" this is meant to give women economic power though in pre-Islamic Arabia it was given to the parents.

There have been contradictory sentiments by Muslim women concerning gender equity on property ownership and affirmative action in Kenya¹⁶. In case of divorce, the wife gets half of the fixed dower 2:236, plus other maintenance rights called *nafagah*.

Law of inheritance and its implications in Islam

The law of inheritance in Islam is about economic sharing of wealth among defendants. In terms of Gender equality and human rights, in the Quran, the woman seem indirectly privileged than the man. (Sura 4:11) implies that the woman's share is for the use of the woman alone and can only share voluntarily with whoever she likes. A man gets two thirds. One –third –the equivalent of the woman's –is for his own use. The addition is one third that a man gets is to provide provision for his wife and children.

This is the obligation on the man. Extra share actually is for the family. But the wife is not responsible for the welfare of the husband, nor is she responsible for the welfare of the children. The wife is not even responsible for suckling her own child. If she chooses not to suckle her child, she does not have to. It is the husband to provide her with provisions. In inheritance, a Muslim woman receives less than the share of a Muslim man when both have equal degree of relationship to the deceased person. Sura 4.verses11, 176 as follows:

Inheritance for parents: equal share is the measure. Sura (4:11) says “For parents, a sixth share of the inheritance to each if the deceased left children”. It does not say that the father must get double and the woman half. Sura (4: 12). “If the man or woman who has left neither ascendants nor descendants, but has left a brother and a sister, each one of the two gets a sixth”.

There is balanced outlook whether it refers to men or to women but the implication is that today most men are materially incapable of leaving any inheritance behind due to joblessness or lack of property ownership. Bwire (2013)

In succession, emphasis is placed upon family ties between husband, wife and children (the family unit) and also to a number of close female relatives. No reference is made in the Qur'an to primogeniture, hence all sons, regardless of age, receives an equal portion of inheritance. In Islam, inheritance is the science of duties or obligations (ilm al-faraid), specifically religious obligations which are challenged by contemporary world economies of capitalism of survival.

Testamentary bequests, (wasiyyah) -2:179, states, “it is prescribed for you that when death is imminent for one of you and he leaves wealth, he should equitably make a testament in favor of the parents and the near of kin. This is incumbent upon the righteous”.

Divorce is the last resort in Islam. There is always an opportunity for reconciliation through the period of *iddah* just in case the wife is pregnant or couples may wish to reconcile, 2:227 states that take them back if they reconcile. There five classifications of divorce: 1. *Talag* proper. This is where the husband makes three pronouncements, 2. *Khul* and *mubaraah* divorce. This is the mutual divorce where there is common consent of the wife and husband, 3. *Talaq al-tafwid* delegated divorce, where the woman may initiate divorce but with the husband’s permission, 4. *Lian* and *Faskh*-(divorce by judicial process). According to Hanafi law, the court may dissolve marriage through spouse’s vows, 5. Divorce of apostasy: A husband’s or wife’s renunciation of Islam dissolves marital ties.

Polygamy in Islam has ramifications on the marriage Act 2014 and human rights as far as age of marriage, succession and inheritance is concerned. Some Muslim parents still force their daughters into early marriages against their will. The woman’s rights are depended on the capacity and willingness of the man to fulfill them, while men fail to meet their marital obligations as stated in marriage, dowry, and inheritance principles, asserts Bwire¹⁷.

Conclusions

The post-colonial law on marriage has been essentially monogamous until 2014 when polygamy was legalized. In effect, this Act brings joy to polygamous wives as their rights are now given in the constitution.

Whereas Monogamy appears under a threat as potentially polygamous husbands and cohabittees can turn their wishes and status into polygamy though the constitution has made it difficult to turn monogamous marriages into polygamous once chosen by the couple. Gender equity clause in the constitution is also challenged because Marriage Act 2014 appears to give men more power in marriage than women.

This study generated new findings that were not common to all. Despite several ordinances and statutes on marriage, the implication thereof is that there has been no homogeneity and consistency in solving issues of inheritance and succession rights for polygamous women.

Polygamous women have gained more as the law has given them a lifeline for survival especially the second wives. The new polygamy law gives recognition and more protection to the second, third and other wives in polygamous marriages. Customary law adhered to ethnic traditions, was flexible and fluid hence open to manipulation and different interpretations. There is need to establish why polygamy has refused to die in the face of pressure from Christianity and statutes that supported monogamy. Institutions and persons that support monogamy have a task to maintain it in the face of polygamy that enhances men chauvinism and power over women. Islam seem to have clear cut approach to gender rights when it comes to family; inheritance and succession of property, custody of children. Early and forced marriages are still an upfront to the Kenyan constitution among Muslim communities in Kenya. Women in Kenya remain very vulnerable to the power of men who will have to decide on polygamy issues with or without their first wives opinion. This work calls for further study as what can be done to minimize polygamy or couples in monogamous marriages opting for extra-marital affairs commonly called *mpango wa kando* in Kenya.

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² Ibid, 1995, P.4. Also See the constitution of Kenya, Chap. 4: the Bill of rights, and also, Thongori, Constitutionalization of women's Rights in Kenya in Kamweru, gender gaps in our Constitutions: women's concerns in selected African countries. Nairobi. Heinrich Boell Foundation P.23-30

³ Ibid, 1995. P.4. also see, Specific Acts of Parliament of the United Kingdom: These are cited in the schedule to the Judicature Act and include: The Admiralty Offences (Colonial) Act, 1849, The Evidence Act, 1851, sections 7 and 11, The Foreign Tribunals Evidence Act, 1856, The Evidence by Commission Act, 1859, The British Law Ascertainment Act, 1859, The Admiralty Offences (Colonial Act), 1860, The Foreign Law Ascertainment Act, 1861, The Conveyance (Scotland) Act, 1874 Section 51.

⁴ Ibdi, 1995, P.4

⁵ Kuria, G.K. Trends in Marriage and succession in Kenya (1886-1977): paper presented at the annual Conference of the Historical Association of Kenya, P. 10-12

⁶ See Kenya Gazette, June, 2014.

⁷ NB, This paper is about gender rights violation and kamau's case is simply to demonstrate that men also suffer in polygamous unions.

⁸ Ibid. P.5-6

⁹ Ibid, see also, case (Re Ogallas. 1978, Kenya law reports, 18)

¹⁰ Maina, M. W. Marriage and succession: A conflict precipitated by the inclusion of section 3(5) into the law of succession Act Cap 160 laws of Kenya. Nairobi: University of Nairobi. 1992, P.4-

¹¹ Ibid.

¹² Kenya law reports, in Cotran, E. Case book on Kenya Customary law. 1987. 18

¹³ Coulson, J. N.D. Probate and Administration in Kenya, p.5-6

¹⁴ Established under the Qadi's courts Act, (Chapter 11 Laws of Kenya), it is presided over by the chief Qadi or a Qadi. It has jurisdiction to determine questions of Muslim law relating to personal status, marriage, divorce and inheritance in proceedings in which all the parties profess the Muslim religion. Appeals from the Qadi as assessors. The chief Qadi as an appointee of the president is a political one and may not represent the interest of all Muslims.

¹⁵ John Esposito, et al, Women in Muslim Family law. 2nd ed. New York Syracuse University Press P. 30-

¹⁶ Seif M. says that Muslim women are well catered for and need no affirmative action (giving them political positions or the 30% share in every employment opportunities, in Daily Nation Nov. 29th, 2000, Wed. P.7. Andati Martin, reported that Muslim women are opposed to affirmative Action on Nov. 14th Tuesday Daily Nation P. 7. Ali Abida, the chairperson of the Muslim sister Network had said, "we need the affirmative Action Bill to remedy the past of discrimination and to increase our chances of political participation" Nov. 16th 2000, Thursday P.

¹⁷ Bwire, J.P. Gender equity in Islamic Family Law: Cultural, and Socio- economic challenges in Kamukunji Constituency-Kenya. 2013, P. 150-160. (UNPUBLISHED).