

Family law by ashaba-ahebwa mark essay sample

[Family](#), [Divorce](#)



In one social context a family may refer to a man and a woman who share a common household. In another, it is defined as all persons who share blood relations. In others, it is defined as all persons who share a household. In others still it means all the members of a household, including parents and children with perhaps other relations, lodgers and even servants.

Legally, the term family is a restricted concept. There are certain formal prerequisites that have to be met and the main one is a marriage ceremony. In law a family is created when families enter into a legally recognised marriage. The law also restricts the right to terminate that legal status. The family is registered because it serves a number of purposes in society.

1. It is the basic component of a society organisation; Article 16 of the Universal Declaration of Human Rights.
2. It is the basic economic unit of society that is most productive activities take place within the family set up .
3. The family setup provides for a framework for the parties to have satisfactory sexual expression.
4. It guarantees perpetuation of society through the receiving of offspring.
5. It provides a framework for companionship between the members of that family.

THE OBJECTS OF FAMILY LAW

1. It seeks to define status between the parties in that family i. e. it defines what rights a member of the family can claim over the other or over the other's property. Altering the status of parties in the family.
2. A remedial role; that is it serves to protect certain weaker members of that family e. g. children. On termination of a family relationship there are certain members who may need protection especially economic protection. Note.

The trend now is that not all family relationships are created by marriage ceremonies such as cohabitation, single parents. The law has developed to recognise some of these relationships.

Major functions of family law

HISTORY OF THE FAMILY AS AN INSTITUTION.

The trend now is that not all family relationships are actually created inside a marriage relationship. Some of the developments in law have been to deal with these issues, under common law and equity there is recognition given to cohabitants. Children born out of marriage also acquire.

Family law as an institution also has a history.

Engels: The origins of the family, Private Property and the state. In this book the author states that the institution of the family has not existed for all times and they say that relating to the institution of the family there was an ancient primitive stage of promiscuity where there were no restrictions as regarding sexual relations and it was a free for all. The authors have met criticism for alleging this fact but this points to an earlier stage when there was no family existing. They then say that the family developed along four main stages

1. Consanguine Family;
2. Punuluan Family
3. Pairing Family
4. Monogamous Family

Consanguine and Punuluan Families are based on group marriages and the pairing and monogamous family and at this stage the society tries to disassociate itself from group marriages.

Engels says that marriage groups were separated according to generations so that you find that one generation consisted of husbands and wives who could relate so long as they belonged to the same generation. Parents and child could not relate. Remnants of this type of marriage at the time he was writing in the early 19th Century could still be found among some Hawaiian tribes.

In the Punuluan stage brother and sister were excluded from sexual relations. In the consanguine family so long as you belonged to the same generation you could have sexual relations. The Punuluan type of society was found among Indian tribe called the Punulua.

These forms of group marriage it was uncertain as to who the father of any particular child was but it was certain who the mother was so that group marriages were the origin of tracing descent through the mother's line so that we have matriarchy being the form of tracing descent. The author again says that societies that are matriarchal originated from here.

PAIRING FAMILY

The essence of the pairing family is that one man lives with one woman but the relationship is such that polygamy and occasional infidelity on the part of the man is permissible. However the woman is required to be strictly faithful

and adultery on her part is strictly punished. To some people this is where subjugation of women starts.

Restrictions on sexual relations are extended so that there is a progressive stage within which conjugal relations can take place. In the pairing family conjugal relations are more restricted and women are restricted only to their husbands who cannot be their brother.

MONOGAMOUS FAMILY

This is different from the pairing family in two ways

1. There is a much greater stress that is given to the marriage institution, in the pairing family dissolution of marriage is relatively easy but in a monogamous family a marriage cannot be dissolved unless some formalities are followed. The rights to conjugal relations are extended to the wife because it is not only the wife who has to be faithful but the man as well. The authors of this text say that the main purpose of the rise of the monogamous family is to produce children of undisputed paternity and this is important for purposes of inheritance. That is the linkage that the authors make in the rise of family and private property ownership. Those who then own property become the rulers and that is the link between family, property ownership and the state.

The main reason that this history becomes relevant is when we look at the conflicts that, it is argued that when we came into contact with the Europeans, our predominant form of family was Pairing Family. In some societies we still were in the Punuluan. That means that the Europeans found

us at pairing and imposed laws which were applicable to the monogamous family and therefore we find tension existing between the two different systems of law right from the very beginning because they were at different levels of development, they reflected different values. Those tensions have existed and that is the reason why harmonisation of the different family law situations appears to be difficult.

HISTORICAL DEVELOPMENT OF FAMILY LAWS IN KENYA

The starting point in family law is the 1897 East Africa Order in Council which applied certain Indian and British Acts of Parliament to the East African Protectorate. It also applied the common law of England which was in force at the time. Insofar as the natives were concerned the Order in Council had limited application it provided that cases against natives would be brought in native courts and a Commissioner was given the power to establish and abolish those Native Courts and to regulate their procedure as well as give directions as to the application of native law and custom.

As a result of this power, the commissioner made the native court regulations of 1897 and what these regulations provided was that in matters affecting the personal status of natives, then the law of their caste or tribe insofar as it could be ascertained and insofar as it was not repugnant to national morality could be applied. For those natives who were Muslims, Islamic law would apply to them and this was with regard to matters affecting personal status.

This same formulation is what we basically find in our Judicature Act insofar as the application of customary law is concerned. The provisions were further modified but the origins are Native Courts Regulations.

There were also two other communities in Kenya at the time, the British Colonisers and the Indians who had been brought in as labour and the issue here was whether for those groups they applied Indian Act or British Laws and common law rules were applied. The Indian Law was basically British law that had been passed in India and there was not much difference between the two, they were obviously geared for application to the British Settler but did they apply to the Hindu? The assumption was that in Kenya, they would apply.

For example the Indian Succession Act of 1865, this was one of the Indian applied Acts under the 1897 Order in Council. In India it had been expressly stated that that particular Act did not apply to succession matters of Hindus in which case in India they applied their customary succession laws in matters of succession. When this particular Act was applied in Kenya there was no such exclusion with regard to the Kenya Hindus. There were also issues as regards marriage and divorce and they applied English Marriage Laws. There was a bit of problem with regard to the Hindus in Kenya especially between 1897 and 1898 when it was stated that the Indian Succession Act did not apply to Hindus and that they were to be governed by their own customary law. For those Hindus who had converted to Christianity, two Acts were passed to cater for their succession, the Hindu Wills Act and the Probate and Administration Act of India, the assumption

was that the orthodox Hindus applied their customary law in matters of succession.

As early as 1898 we have all these laws governing different peoples. In 1902 we got the East Africa Order in Council of 1902 whose main purpose was to clarify further when customary law applied. It was stated that in all cases whether civil or criminal in which natives were parties, the courts would be guided by native law in so far as it was applicable and not repugnant to justice and morality or inconsistent with any law made in the protectorate. This formulation of the Order in Council is the same formulation that we have in Section 3 of our Judicature Act insofar as application of customary law is concerned. In areas of family law for those natives who still practice customary law are still governed by African Customary Law. Muslims still continue to be governed by Muslim Law but with Hindus a number of developments occurred which made the Hindus to adopt laws that were similar to those found in the statutes.

The 1902 Order in Council gave the commissioner power to make laws which would apply in the protectorate and one of the first laws that was made in 1902 was the Marriage Ordinance. This Ordinance was a law of general application in the sense that it was not limited by race or religion and was meant to apply to all residents in the protectorate. It provided for basically a Christian form of marriage which was strictly monogamous and made it an offence for a person married under customary law to contract a marriage under the ordinance or vice versa. It was also meant to provide an avenue for the converted natives to contract the Christian type of marriage and for

the settlers to contract marriage. What was important is that any African who married under the Marriage Ordinance was supposed to have embraced the Christian way of life and therefore distanced herself from their customary way of life.

Please look at *Cole v. Cole* the ruling in this case exemplified the situation of what happened if one contracted a marriage outside the ordinance. A Nigerian couple got married according to Christian rites under the Nigerian Marriage Ordinance. They had a son who was mentally incapacitated and after a while the husband died. The issue then arose as to who was to succeed the man or who was entitled to the man's property and the man's brother argued that under Customary Law he was the one entitled to inherit the man's property. The wife argued that since they had married under the Marriage Ordinance they had distanced themselves from the African way of life therefore African customary law did not apply and instead the English Law of Succession applied and that under that English Law of Succession she was the one entitled to inherit in her own right and as guardian of her son. The court upheld her argument basically stating that since they had married under the marriage ordinance the African customary law no longer applied to them.

This was basically the same approach that was taken by the Kenyan colonial court and you will find this stated in many of the cases that were decided in that period

R v. Amkeyo

R v. Mwakio

Robin v. Rex

Most of these cases were actually dealing with issue of admissibility of evidence given by the wives arguing that they are in a privileged position and therefore could not testify against their husbands in Mwakio the Judge said that “ it is unfortunate that the word wife and marriage have been applied in this connection. If only the woman party had been described as a concubine or something of the sort, the question could never have arisen.” That illustrated the colonial courts attitude to women who were married according to customary law. They did not deserve to be termed wives as per the colonialists and the wife evidence was going to be admissible because they were married under customary law.

THE NATIVE CHRISTIAN MARRIAGE ORDINANCE IN 1904

The Native Christian Marriage Ordinance applied only to the marriage of Christian applicants. It was supposed to supplement the marriage ordinance and was intended to relieve the Africans of the need to comply with the formalities laid down in the marriage ordinance. It only applied to Africans who professed Christianity and just like marriage ordinance marriage under this Act was strictly monogamous.

This Act also provided some protection to widows in the sense that widows who had been married under the ordinance were protected from being inherited as was the case in customary law. That is they could refuse to

subject themselves to the subject of widows inheritance. The marriage had to be celebrated by a church minister and before the church minister did this he had to satisfy himself that the parties were Christians.

The native marriage Christian ordinance was replaced in 1891 with the African Christian Marriage and Divorce Act, Cap 151 of the laws of Kenya.

THE ENACTMENT OF THE DIVORCE ORDINANCE

This was based on the Indian Divorce Act of 1869 which was one of the Acts applied by the 1897 Order in Council. It provided or afforded relief only in respect to monogamous marriages. This is still the position to the present day. It was replaced by the matrimonial Causes Act in 1941.

In 1928 we also have additional relieve being accorded by the separation Courts (Separation & Maintenance Ordinance) which was limited to monogamous marriages. It still exists under the same name in our laws and its Cap 153. The purpose was to provide parties with judicial separation other than divorce and also to provide parties in a monogamous marriage to seek maintenance while the marriage is still subsisting.

In 1906 the Mohammedan Marriage & Divorce Registration Ordinance was introduced to provide for registration of Islamic Marriages and Divorces. Please note that it only provides for registration of marriage or divorce. The Act is basically procedural and not substantive.

In 1946 we have the Hindu Marriage Divorce and Succession Ordinance being enacted. This is where Hindus parted way with Hindu Customary Law,

the Act provided that in future all Hindu Marriages were required to be monogamous and the Act extended to Hindus the reliefs that are available under the Matrimonial Act and under the subordinate Courts separation and maintenance Act. Under orthodox Hindus marriages can be polygamous.

THE CONSTITUTIONAL BASIS FOR APPLICATION OF DIFFERENT LAW SYSTEMS.

One of the arguments which was put forward very strongly by Dr. Gibson Kamau Kuria when he was teaching family law was that the Marriage Bill of 1976 was unconstitutional and for that reason could not be upheld. The Bill sought to harmonise different family law systems by introducing one law. He gave two reasons why the bill was unconstitutional 1. Historically it could not stand because it assumed that sociologically and politically the Kenyan people were one entity which they were not and his historical argument is the argument of the different law systems which was along racial lines and Kenya was still a very racially divided society; 2. The Kenyan constitution guarantees a right to freedom of conscience and this includes freedom of religion and worship. Part of that freedom and worship is found in our different family laws. He argues that the statutory law is found on Christian norms and therefore it is the Christian's choice to marry under Christian law, Muslims choice to marry under the Muslim Law likewise Africans were free to practice their customs under their customs and that to legislate under one uniform law for all would be unconstitutional.

Under the Draft Bill to alter the Constitution this argument is put forward under article 38 clause 5 the Bill provides that Parliament enacts legislation that will recognise marriages concluded under any tradition or under any

system of religious, personal or family law. If the Bill is accepted then we are looking at the continued multiplicity of family laws in Kenya and there is no sign of any possible unification in the near future.

REPORT OF THE COMMISSION ON THE LAW OF MARRIAGE AND DIVORCE

There is an appendix of a Marriage Bill proposed in 1996 which sought to harmonise all family laws in Kenya. The report is also important in the sense that it summarises what the provisions are under the different systems of family law with regard to marriage and divorce and why it was thought necessary to harmonise all the family laws.

SOME PROBLEMS OCCASSIONED BY MULTIPLICITY OF FAMILY LAWS

1. Continued application of English Family Law;
2. Change of Family law;
3. Conflicts – internal conflicts between different family law systems.

CONTINUED APPLICATION OF ENGLISH FAMILY LAW

This is an anomaly given that we are almost 40 years into independence and yet we still apply English Laws and English Statutes particular in areas of family law. This is in 3 ways a. Continued application of common law in form of common law presumptions which still apply to Kenya, e. g. Common Law Rights of a wife to pledge the husband's credit. This has been applied in Kenya in a number of cases Patterson v. Nanyuki General Stores, Ramji Dass Co. v. McDonald

The presumption is that when a wife acquires goods on credit, she is deemed to be acting as the husband's agent and the husband will be liable to pay.

In *Ramji Dass* it was stated that this presumption existed even when the wife and husband were not living together.

b. **Presumption of Advancement:** This normally arises in a family relationship when a family member transfers property to another by way of a gift. The issue arises as to whether the beneficial interest in that property has been transferred to the other person which is what is known as the advancement when the property has been wholly transferred to the other person or whether that other person holds the property in trust for the person who has given it. Is there an advancement resulting in a trust? In common law the presumption does exist if it can be shown that the intention was to transfer the beneficial interest then there is advancement.

There is authority to the effect that the presumption applies in Kenya, in *Shallo v. Maryam*, *Bishen Singh v. Mohinder Singh*, *Sarah Wanjiku Mutiso V. Gideon Mutiso*

In the case of *Wanjiku v. Mutiso* [1988] Wanjiku and Mutiso were husband and wife. In 1967, during the course of their marriage, Mutiso acquired a farm through two loans, both of which were secured by charges on the farm. Mutiso was a Member of Parliament but was jailed for 9 and a half years in 1971 for sedition. Mutiso fell into arrears in mortgage payments. Mutiso made out a power of attorney in favour of the wife but he was subsequently obliged to transfer the farm into her sole name. He executed a deed of gift to

that effect. Subsequently the parties grew apart and when Mutiso was released they were unable to resume their married life together. Mutiso therefore filed suit claiming that his wife held the property as his trustee and she should transfer the same back. The issues that arose for consideration were (1) whether the deed of gift was void; (2) whether there was an express trust in favour of the husband; (3) whether, in the absence of an express trust, a resulting trust could be applied.

The court ruled in favour of Mutiso and the wife appealed.

It was held

1. While the husband did not clearly plead resulting trust, the facts of the case and the plea of 'trust' effectively referred to a resulting trust.
2. There was no express trust in this case because the transfer was specific and expressly by way of gift.
3. Where property is transferred to another as a gift with the intention that the latter hold it as trustee for the former, a resulting trust may be implied.
4. The presumption of advancement should only be made so as to accord with the social conditions in Kenya and to conform to the most likely intentions of the spouses. In this case, the strength of the presumption would be much diminished. There was sufficient rebuttal evidence that it was not the husband's intention to make an absolute gift to the wife. A constructive trust would therefore be imposed to prevent the wife from taking fraudulent advantage of her husband.

The Appeal was dismissed.

c. Presumption of Marriage: This arises where a man and woman cohabit and call themselves out as man and wife. Under this presumption they will be deemed to be married even if they have not undergone any formal marriage ceremony. Family law is also trying to incorporate certain situations which do not fall within the family threshold and this is one of them. Where parties have not met legal requisites to be called man and wife. This presumption has been applied to the Kenyan situation with regard to this assumption the Kenyan courts have stated that this presumption existed under African Customary Law. *Wanjiku Yawe v. Public Trustee,*

Peter Hinga v. Mary Wanjiku and

R. V Peter s/o Mikhayo

Charles Manjani v. Rosemary Moraa

In *Wanjiku Yawe* the court found that this presumption can also be found under African Customary Law in *R v. Peter s/o Mikhayo* the interesting issue was that of the period of cohabitation, for how long should you cohabit for this presumption to come into place? Is it one year or 10 months?

In *Peter s/o Mikhayo*, the accused cohabited with a lady for a period of between 4 and 8 months, then one day he found his lady performing a sexual act in the bush with a man and proceeded to kill the man. In his defence on charge of murder, he said that the lady was his wife and he had been provoked to kill the man. The court had to consider whether that period of cohabitation was long enough to trigger a presumption of marriage. Again this is one of the case relied on customary law and it held that under Customary law, that period was enough and in fact stated that under

customary law, the moment you start cohabiting the presumption is triggered.

In *Charles Manjani v Rosemary Moraa* the presumption was said to apply even where the wife had previously been married to another man, it was held that the presumption would apply and the first marriage was dissolved during cohabitation but by the time cohabitation started it had not been legally resolved.

MARRIED WOMEN'S PROPERTY ACT OF 1882

An English Act that still applies in Kenya and is the principle law that applies when apportioning matrimonial property. In *I v. I* and in *Antony Karanja v. Karanja*

In *I v I* [1970] this is the first reported decision of the Kenyan High Court where the Married Women's Property Act (MWPA) of England was held to apply in Kenya. The court also considered various English authorities and made a finding on the presumption of advancement.

The husband in this case had acquired a property in England from his earnings and had it registered in the joint names of the spouses. The house was subsequently sold and most of the proceeds used to purchase a house in Kenya which was transferred into the husband's name. The wife had expected that the subsequent property would go into their joint names.

The question before the court was whether the Married Women's Property Act of 1882 of England (MWPA) would apply in Kenya. Further, whether the

presumption of advancement to the wife as a result of the initial transfer to herself of a half-share had been rebutted. Held:

1. The MWPA was a statute of general application in England on 12 August 1897. It would therefore apply in Kenya so far as the circumstances of Kenya and its inhabitants permit. The MWPA would apply in priority to customary law. Judicature Act (Cap 8) section 3 considered.
2. The presumption of advancement may be rebutted where property was acquired for the joint use of the spouses. The presumption that the property was conveyed to the wife for her own use is however not rebutted if the transfer was effected to defeat creditors.
3. In this case, there was a post-nuptial settlement between the parties in relation to the property of the marriage. The word 'settlement' should be given a wide construction. Hence, the court has power under section 28 of the Matrimonial Causes Act (K), which is applicable in this case.
4. The husband in this case had not shown any reason for variation of the prenuptial settlement between the spouses.

In *Karanja v. Karanja* during the course of their marriage, the parties acquired several properties which were all registered in the name of the husband. One property was acquired from money supplied by the wife while the other properties were acquired with her direct or indirect contribution. The court considered whether customary law would operate to disqualify any imputation of trust in favour of a married woman, especially one in salaried employment. Held:

1. The Married Women's Property Act is applicable to Kenya, and customary law is subject to any written law.
2. Even without power to transfer property,

the court has power under the MWPA to grant declarations of ownership of property. In cases where the property was acquired as a joint venture, it will be regarded as belonging to the spouses jointly no matter in whose name the property stands. 3. The absence of an agreement or intention that the contributing spouse share beneficially in the property does not exclude the imputation of such an intention. This will depend on the law of trust, which will not distinguish between direct and indirect contribution. 4. Where an African husband and wife are in salaried employment, the imputation of a trust cannot be rejected outright. This implication would arise where the wife is contributing indirectly through payments for household and other expenses which the husband would otherwise have had to pay. 5. In this case, the husband held the immovable properties in dispute in trust for himself and his wife in proportions of two to one respectively. However, it would not be equitable to order sale or possession of the Karen property since the husband was residing there with his new family.

The final decision of the court to award one-third beneficial interest in the properties to the wife is commendable. The Act provides that a married woman is capable of acquiring, owning and disposing of property as her own separate property and the history to this Act is that under English Law women could not hold separate property. This act liberated married women who can now own and dispose off their own property.

Registration by Reference

1. Under the Matrimonial Causes Act Section 3 it provides that the law that is to be applied in Matrimonial proceedings is that which applies in the High

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Court of Justice of England. This provision exists in our law so when we draft our pleadings in matrimonial and divorce cases we have to go back to the proceedings in England to see how they do it.

2. Section 35 of the Marriage Act which provides that no marriage will be valid if the parties are within prohibited degrees of affinity according to the law of England. Again we go back to English law to find out what are the degrees of affinity and then find out who cannot marry who in terms of relations.

A major problem is what happens when a law undergoes subsequent changes, do we adopt the changes wholesale? The perfect example is in divorce law, the divorce law underwent major reform in 1970 e. g. when it comes to divorce you find that to obtain a divorce you have to prove that the other party has been guilty of a fault. In 1970 in England all these grounds were removed and there is only one ground that of irreconcilable differences. In Kenya you still have to quote one or more of the grounds that are listed in the matrimonial causes Act.

K v K HCCC No. 123 of 1975 where it was held that any amendments which are contrary to our own laws would not be applicable in our own situation.

FAMILY LAW LECTURE 2

PROBLEM OF CHANGING ONE'S FAMILY LAW FROM ONE SYSTEM TO ANOTHER

The issue is whether one can change from one system of family law to another e. g. can one change from English Statutory Law to Customary Law or vice versa? Theoretically it looks possible because under S. 76 of the Constitution it is provided that freedom of religious belief is protected and guaranteed and following from this constitutional guarantee it follows that the moment you change from your religion, your family law will automatically change as one's family law is determined by one's religious beliefs. However it has not been that simple and the position is that while one can easily change from customary, Hindu or Islamic family law to statutory law, you have to have changed your religion. It is not easy to convert from statutory to Islamic or Customary just by the act of change of faith. Statutory law still insists on a number of formalities before one can change from one system to another.

English law started with a situation of non-tolerance of other family law systems other than their own family law system and you find cases like

Hyde v. Hyde

This case concerned the marriage in 1858 of two Mormons in Salt Lake City, and marriage was defined in that Ruling as marriage according to Christendom was the 'voluntary union for life of one man and one woman to the exclusion of all others'.

Re Bethel [1888]

In this case an English man married a Botswana Woman under Botswana customary law and they had a child, the husband died and left property in

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England. The issue was whether this daughter was legitimate and could therefore inherit the property in England and the court held that that marriage was not recognized under English law because it was potentially polygamous and the daughter was therefore not legitimate and could not inherit the property. And they quoted Hyde's case that marriage was the voluntary union for life of one man and one woman to the exclusion of all others.

Ex Parte Mir- Anwarrudin (1917)

Had a similar ruling with Re Bethel

The attitude of the English courts not recognizing any other law was also found in Kenya in colonial times Re Amkeyo the courts termed the wives in those marriages as concubines and refused to recognize them as wives,

From 1940 the English Courts started to change their attitude and started recognizing other family law systems for purposes of entertaining matrimonial causes arising from those systems. Note that this recognition was not for purposes of validating them but for purposes of facilitating the change from those systems to statutory family law systems so that they would recognize another family law system for purposes of invalidating it or purposes of facilitating change from that system to the English law system.

During 1940s up through to the present day, courts now do recognize other family law systems and recognize that you can change from one system to another

Bandail v. Bandail

A Hindu polygamous marriage was recognized for purposes of nullifying in England.

Sowa v. Sowa

In this case, a polygamous marriage was celebrated in Ghana where the parties were domiciled. Prior to the ceremony the husband promised the wife that he would go through a later ceremony which, according to the law of Ghana, would convert the union into a monogamous marriage. He failed to carry out his promise. It was held that, despite his promise and despite the fact that the husband had not taken an additional wife, the marriage continued to be regarded as polygamous.

The English courts also made rulings as to what acts could change a polygamous marriage to a monogamous marriage. The first act was a change of religious belief of faith which then affected the parties legal status was the first act to be recognized.

BY CHANGE OF RELIGION

Sinha Ppearance Case [1946] 1 All E. R. 263 P. C

The parties changed their Hindu Sect from one practicing polygamous marriage to one practicing monogamous marriage. It was held that changing their religious beliefs changed their marital status and the polygamous marriage was changed to a monogamous one.

A. G Of Ceylon v Reid [1965] A. C. 720

Local Legislation is one recognized way with the aim of changing the character of ones family law system.

BY STATUTE

Parkasho v. Singh [1967] 1 All E. R.

A statute converted Sikh marriage from being polygamous marriage to monogamous marriage and it was held that it was out of these religion changes that family law of Sikhs was changed. The legislation must be full legislation that deals with all marriages in that category.

Under our own Christian Marriages Act it is your religion that determines whether you can change your category of marriage.

Where there is a second ceremony of marriage that is designed to change one status from polygamous to monogamous union. This is the kind of situation which would obtain under the African Marriage and Divorce Act

Ohochuku V. Ohochuku [1960] 1 All E. R. 253

The parties had been married under Nigerian Customary Law and then underwent a Christian Marriage. Under English law which created a monogamous marriage

BY CHANGE OF DOMICILE

Ali v. Ali

This case provides authority for the proposition that, if a husband changes his domicile from a country that permits polygamy to one which does not, this change of domicile renders the marriage monogamous.

Change of Domicile

Domicile is essentially one's permanent home or the place that one intends to set up their permanent residence and in this case the parties had contracted a polygamous marriage in India but the marriage had remained a de facto monogamous marriage. They then changed their Domicile to England which changed their marriage into a de jure monogamous marriage.

The English accepted in two phases gradually recognizing other family law systems for the purposes of nullifying those unions or converting them into English systems, but never vice versa.

The Kenyan situation is very much like the English one. Kenya statutes do provide for the change from one system to the other. Section 11(b) of the Marriage Act implies that one can change their customary or Islamic law marriage into a Christian marriage. When you apply for a marriage certificate there must be an Affidavit stating that neither party is married under customary or Islamic law to any other person they intend to marry

Section 9 of the African Christian Marriage and Divorce Act provided for parties who are married under customary law to marry under the Act if they wish to do so and there are a number of parties that

The Islamic law under section 5 (6) also in any way does provide of conversion of customary law marriages to Islamic marriages, though not directly. The section makes it an offence for one to convert to Islamic marriage from other marriages unless there is a divorce.

In our situation one can change ones family law

Case Law

Ayoob v. (1968) E. A. 72

Estate of Ruenji

Re Ogolla's Estate

In Ayoob case the parties were Muslims and they got married under the Marriage Act as the statutory law marriage. On the same day they were married under Muslim Law. Subsequently the husband divorced the wife by way of tarak a Muslim form of divorce. He then went to court seeking a declaration that his marriage had been lawfully resolved. It was held that the husband by performing the taraq was able to divorce the Muslim marriage but if he wanted to divorce the statutory law marriage he would have to file for divorce under the Matrimonial Causes Act. The court is saying that the act of contract of a Muslim marriage after the statutory law marriage does not convert the statutory law marriage so that the statutory law marriage was still persisting and had to be divorced by following court procedures

Ruenji and Ogola – facts are similar

Estate of Ruenji

The deceased a Kikuyu by tribe and domiciled in Kenya, died leaving a gross estate of about 53, 000 shillings. It is not disputed that he was married to one Loise Murugi Mbiri under the African Christian Marriages Act in 1941. It is also alleged that the deceased subsequently married two other ladies, namely Mary Waithira and Mary Wanjohi according to the Kikuyu customary law and had children by them. The public trustee and the lawyer for Loise submitted that the first question that must be decided is whether in view of the deceased's first marriage under the African Christian Marriage and Divorce Act the deceased could enter into one or more other lawful marriages. Marriage under the African Christian Marriage and Divorce Act is meant to be a Christian marriage and that parties become legally bound to each other as man and wife so long as both of them shall live and their marriage cannot be dissolved during their lifetime except by a valid judgment of divorce and that if either of them (before the death of the other) should illegally contract another marriage while their marriage remained undissolved, the offender would be guilty of bigamy, and liable to punishment for that offence. It is apparent that the deceased had not divorced Loise during his lifetime, and that, consequently, any subsequent marriage would be illegal.

In both Ruenji and Ogola a man married his first wife under statutory law and then contracted second marriage under customary law. The man died and the question arose whether both wives could benefit from the husband Estate. The court held that the second wives were not recognized under Statutory law because the man did not have capacity to contract a second marriage and they therefore they and their children could not inherit from

the man's estate. The court is saying that the man could not convert from a statutory way of life that he had committed himself to. The second wives were not recognized.

These two cases were instrumental in leading to Succession Law and in our Law of Succession Act whilst even under customary law wives can inherit irrespective of the fact that the husbands could have married previously under statutory law.

The current bill to amend the constitution addresses this issue by giving equal recognition to all the systems under the constitution. Family law system will be protected and once one changes their religion as a result that change will be recognized and guaranteed. What is remaining is to recognize and bring all the system under one system and give them constitutional protection.

Other ways in which family law might be changed

1. Where one marries someone practicing another family law system: for example if a person practicing a customary law system marries a person practicing Islamic law normally the implication is that that marriage will bestow upon the parties a new family law system and normally the operating law system will be that of the man. Ours is a patriarchal society.

2. one can also acquire a new family law system by change of Domicile

Ali bhai a family was allowed to change their family law system after settling at the Kenya Coast. From Hindu to Islam.

Change of Family Law in other jurisdiction – cited under conflict of marriage laws

Manjany v Ndongo (1967) JAL 13

Mokhotu v. Manyapelolo – Lesotho

Onwudinjo v. Onwudinjo [1962] J. A. L 49-52 – Nigerian

Bakari v. Kichunda (1973) L. R. T Tanzania

Rattansey v. Rattansey (1960) E. A. – Tanzania

These cases dealt with change of family law system,

These cases – most of commonwealth jurisdiction have basically adopted the Kenya position that is, you cannot change ones family law system just by changing ones religion especially if it is from statutory law system to other family law system.

Onwudinjo v. Onwudinjo was a succession matter, the other wife could not inherit because the husband had contracted an earlier statutory law marriage.

In Manyapelolo a second customary law marriage between the parties was declared null and void because at the time of contracting the husband had not validly divorced the first wife who he had married under statutory law.

In the Gambia in Manjany vs. Ndongo the courts recognized you could change from statutory to Islamic law marriage by contracting an Islamic marriage ceremony after the statutory marriage ceremony

In Ayoob the facts are similar to Manjany but the courts ruled differently.

In Ayoob, the appellant a Sunni Muslim, and the respondent, a Shiite Muslim, were married in accordance with the Marriage Act (Cap 150). A marriage under this Act is monogamous. Subsequently they went through a ceremony of marriage according to Mohammedan Law, the respondent by then having adopted the doctrines of her husband's sect. The appellant later purported to divorce the respondent by pronouncing talak. The Appellant then, by petition to the High Court, sought a declaration that his marriage to the respondent was lawfully dissolved. The learned judge held that a marriage under the Marriage Act was not a Mohammedan marriage and that it could only be dissolved during the joint lifetime of the spouses by a valid judgment of divorce pronounced under the Matrimonial Causes Act (Cap 152) and he accordingly dismissed the petition.

In Rattansey the facts were similar but the courts held that the talak terminated the statutory law marriage earlier contracted.

Gambia and Tanzania – these can be distinguished from other commonwealth countries in the sense that they have made an attempt to recognize their own family laws and Islamic Law and Statutory Law in Gambia are equal.

CONFLICTS THAT ARISE

The conflicts that arise are in 3 main respects

1. Conflict between statutory and other systems of family law because of the reluctance by the court to recognize that one change from statutory to other family laws. E. g. parties will get married under statutory law and continue to live their customary way of life and in the process contract customary law marriages and the issue is to what extent will that customary law apply to people married under statutory law?

There are situations such as *Re Ogola* arising or stories of people having gotten married under statutory law and then getting married under customary law and later to realize that they have committed an offence.

2. Different Customary Law systems especially African customary law system. This problem is exacerbated by the fact that the Kenyan population is becoming urbanized and when we say that the Kenya customary law applies, which is the customary law and especially for people who live in urban areas and do not practice any customary law.

3. Statutes – two examples will be between the Marriage Act and the Law of Succession Act whereby under the Marriage Act marriages are strictly monogamous and it is an offence to conduct a second marriage but the Law of Succession gives recognition to potentially polygamous marriage and that they can inherit under this law. Under the Matrimonial Causes Act there is no provision for application of customary law in determining the fate of the children. Under the children's act the act provides that in matters determining custody of children one of the matters to be taken into account are the customs affecting that child. So in an attempt to accommodate African system of law the children are brought in a concept not present in

other Acts. Unless there is a total overhaul of the statutes in the family law arena where they are harmonized and put on the same wavelength we shall continue having these conflicts of four different family law systems.

1. MARRIAGE

What is a marriage – a marriage will be a union between one man and one woman who intend to live together as husband and wife. What happens in polygamous marriages? The man will contract separate marriages with each woman so for each it is a union between one man and one woman. Marriage therefore is basically a consensual contract and is a social contract between the parties involved. Before there can be a marriage there must be the agreement to marry, and the first take in any marriage relationship includes an agreement to marry.

LEGAL INCIDENCE OF AGREEMENT TO MARRY

Not every agreement to marry will result in a marriage.

Statutory Position

Basically under statutory law an agreement to marry is said to exist under common law when parties decide to get married and act in a manner that shows their intention to marry. Under common law, agreements to marry amounted to contracts that were legally enforceable provided it could be shown that the parties involved intended to enter into a legal relationship so that a party who withdrew from such an agreement without any legal

justification could be sued for breach of contract and the injured parties could claim damages.

Being essentially a contractual relationship, all the usual contractual requirements must apply i. e. requirements as to capacity to enter into that contract, consent, intention to create legal relations etc. All these must be met before one can allege that there has been a breach of that contract.

Shaw v. Shaw (1954) 2 Q 3

The Plaintiff had cohabited with a man she regarded as a husband for 14 years and they lived together as husband and wife and at one point even celebrated their marriage. Upon his death, the plaintiff discovered that for 10 years of their marriage the man had been married to another woman who died 2 years before him and that it was therefore in those two years that he had capacity to marry the plaintiff. i. e. he was only single for 2 years of their cohabitation and only in those 2 years that he should have been legally been married to her. She sued in the States for breach of warranty and that warranty was that he was single and had capacity to marry and he had therefore breached his promise to marry her. The court awarded her damages for breach of that warranty.

Other than general damages, when there is a breach of agreement to marry under common law normally gifts given in contemplation of that marriage will also be required to be returned by the guilty party.

Cohen v. Seller (1926) 1 K. B. 536

The gift in question was a diamond engagement ring that had been given to the lady and the issue was whether she should return the ring when the engagement was broken and it was held that if it was the man who was guilty, or responsible for the breach, then he could not demand the return of the engagement ring but if it was the woman who had refused to fulfill the conditions of the agreement then she was required to fulfill the conditions of the ring. It was found that it was the man who had refused to carry out his promise and the woman was awarded general damages and the lady allowed to keep the engagement ring.

Larok v. Obwoga (Ugandan Case)

The lady who was the Respondent and the Appellant were friends when the lady was a pupil at college she became pregnant and as a result was expelled from the college. The man then wrote to the lady promising to marry her by the end of April. This was in 1968. In October he again wrote to the lady indicating that he was no longer keen to marry her. The lady then went to court and sued for breach of promise to marry and the lower court held that the man had committed a breach of the promise and awarded the lady 2000 as damages. The court based its computation on two grounds that the chances of getting married had been impaired and secondly the injury posed to her feelings. The man appealed but his appeal was dismissed and the sum of 2000 shillings was to be paid. In England this action of breach of promise to marry is no longer recognized. It was abolished in 1970 by the Law Reform Miscellaneous Provisions)Act UK (1970) the act abolished actions

of breach of promise to marry but in KENYA IT WAS NOT and still applies in Kenya via the Judicature Act. **MUINDE V. MUINDE**

Please note provisions of Section 170 of the Penal Code which states that any person who willfully and by fraud causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit and have sexual intercourse in that belief is guilty of a felony and is liable to imprisonment for 10 years. **AGREEMENT TO MARRY**

Under Islamic law agreements to marry are entered into between the parents of the intended spouses. Which means that until the contract to marry and the actual marriage takes place; no contractual obligations arise as between the intended spouses. Therefore no suit for breach of agreement to marry can be instituted. However, where gifts or ornaments have been exchanged between the two families, then these can be returned if the agreement to marry is broken. This was the issue in **FAZALDIN V. DIN MOHAMMED**

The girl's father entered into a betrothal agreement without her consent and she later refused to marry the prospective suitor. The prospective suitor brought an action where he claimed damages for breach of agreement to marry and in the alternative he also sought an injunction to restrain her from marrying any other man until he had recovered all his damages and the gifts he had given. The court held that he could only recover the presents and the ornaments he had given but could not recover any damages. The same position obtains under Hindu Law where agreements to marry are made

between the parents of respective spouses and a betrothal in respect of a boy and a girl can be done when they are still infants. In *Dhanji v. Ruda*

The betrothal agreement was made when the parties were still children and the parents exchanged ornaments, clothing and other gifts. When the girl became of age, she indicated that she had no intention of getting married to the boy and the engagement was eventually broken. The parents of the boy instituted proceedings for damages for the breach of contract. Court held that no damages were recoverable because a contract where a person is forced against her will is contrary to public notice and morality and the parents could only recover their gifts and ornaments. Agreement to marry under customary law

Under customary law agreement to marry normally take the form of betrothals and the nature of the betrothal will differ between the different communities whereby for some communities it is quite an elaborate formal ceremony while for others it is a family affair with a few witnesses, therefore the agreement under African customary law takes place between the families of the parties and not the parties themselves. The effects of a betrothal under customary law is that on part of the woman she loses her sexual freedom and cannot have any sexual or any relationship with any other man and on the part of the man he is under an obligation to pay the bride price .. On the part of the family, the family of the girl is bound to give away their daughter and are under an obligation to keep her chastity while the family of the boy is under an obligation to pay the bride price. In the event of a breach occurring, it has been held that under African customary

law an action of breach of promise to marry will not lie. This was held in *Muinde v. Muinde*. There are other remedies provided for under the Magistrates Act which include actions for damages for seduction, and also actions for pregnancy compensation. *Muinde Muinde*

It stated that if the Agreement to marry is made under statutory law, the action will lie because the action is part of the deceased family law but it will not lie in customary law because the remedies provided for in customary law are listed and they had been awarded in the past.