

**THE SOCIO-LEGAL IMPACT OF DE FACTO ADOPTION PRACTICES IN KENYA**

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**A Research Project submitted in partial fulfilment of the requirements for the award of  
the degree of Master of Laws (LLM)**

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**DECLARATION**

I, **CARREN ALUOCH SADIA**, do hereby affirm that this project represents my original work, for which various sources of reference have been duly acknowledged. I declare that this work has not been submitted for examination or publication in any academic or research institution, and no part of research ought to be produced without my consent or that of the University of Nairobi.

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The thesis is submitted for examination with my approval as the supervisor of the researcher at the University of Nairobi.

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## **DEDICATION**

This research project is devoted explicitly to persons in need of care, protection, and family.

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Universal Declaration of Human Rights, 1948

## **LIST OF ABBREVIATIONS & ACRONYMS**

|               |  |
|---------------|--|
| <b>AAC</b>    | Area Advisory Council  |
| <b>AOP</b>    | Annual Operation Plan  |
| <b>CBOs</b>   | Community Based Organizations  |
| <b>CCI</b>    | Charitable Children's Institution                                    |
| <b>CDF</b>    | Constituency Development Fund  |
| <b>CHS</b>    | Community Health Strategy  |
| <b>CIRCLE</b> | Community Based Innovations to Reduce Child Labour through Education |
| <b>CPU</b>    | Child Protection Units   |
| <b>CSO</b>    | Civil Society Organizations  |
| <b>CT-OVC</b> | Cash Transfer to Orphans and Vulnerable Children                     |
| <b>DCS</b>    | Department of Children's Services                                    |
| <b>DFID</b>   | Department of International Development                              |
| <b>EAC</b>    | East African Community   |
| <b>EARS</b>   | Educational Assessment and Resource Services                         |
| <b>ECDE</b>   | Early Childhood Development Education                                |
| <b>ECPAT</b>  | End Child Prostitution/Pornography                                   |
| <b>ECtHR</b>  | European Court of Human Rights                                       |



|                 |   |
|-----------------|---|
| <b>EMIS</b>     | Education Management Information System                                       |
| <b>FBOs</b>     | Faith-Based Organizations   |
| <b>FDSE</b>     | Free Day Secondary Education  |
| <b>FGM</b>      | Female Genital Mutilation   |
| <b>FPE</b>      | Free Primary Education  |
| <b>IDPs</b>     | Internally Displaced Persons  |
| <b>ILO/IPEC</b> | International Labour Organization International Programme to End Child Labour |
| <b>IMCI</b>     | Integrated Management of Childhood Illness                                    |
| <b>INTERPOL</b> | International Criminal Police Organization                                    |
| <b>JICA</b>     | Japanese International Cooperation Assistance                                 |
| <b>KENSUP</b>   | Kenya Slum Upgrading Programme  |
| <b>KESSP</b>    | Kenya Education Support Programme   |
| <b>KLR</b>      | Kenya Law Reporting   |
| <b>NCCK</b>     | National Council for Children in Kenya  |
| <b>UN</b>       | United Nations  |
| <b>UNDHR</b>    | Universal Declaration of Human Rights   |
| <b>UNDP</b>     | United Nations Development Programme  |
| <b>UNICEF</b>   | United Nations International Children Economic Fund                           |

## **DEFINITION OF TERMS**

|                            |   |
|----------------------------|---|
| <b>Adopted child</b>       | a child who is under an indefinite care and control of his/her non biological parents                               |
| <b>Adoption law</b>        | The Children Act (No. 8 of 2001 Laws of Kenya)  |
| <b>Adoptive parents</b>    | any adult person who has an indefinite care and control of a child  |
| <b>Alternative parents</b> | persons who acted as putative parents of a child  |
| <b>Child custody</b>       | a court sanctioned order for care and control of a child in need of protection given to a person or an institution  |
| <b>Child rights</b>        | Sacrosanct inherent entitlements aimed at protecting a child from abuse   |
| <b>De facto adoption</b>   | indefinite care and control of a child in need of parentage   |
| <b>De jure adoption</b>    | a court sanctioned indefinite care and control of a child in need of an alternative parent(s)                       |
| <b>Family law</b>          | Legal regulations governing the rights and welfare of domestic life of parents, children, relatives and the society |

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## ABSTRACT

In a widely publicised incident in Kenya and Britain, a child was found in the company and household of Bishop Gilbert Deya, whose explanation was that the child was a "miracle baby." The emergent truth was that the child had been abandoned and had no traceable biological parents. It is not an isolated instance. Second, and perhaps more pronounced, is that in African societies, most children stay with alternative parents from extended family upon losing their parents.

The other scenario takes the form, for instance, of another widely covered case concerning a one Mr. Simon Harris, who elected to take alternative parentage to several street children under the guise of charity without following a formal process. In each instance, we find that the child exemplified is out of statutory contemplation, yet it is an everyday occurrence.

A case is made in this thesis that although the Kenyan Parliament has enacted elaborate legal provisions to protect children's rights, the law nevertheless does not recognize children who find themselves in domestic establishments through other means, which would seem non-conforming to legislative edicts. These children do not receive equal benefit and recognition in law, as do children from natural families or those that are statutorily adopted. This project aims to highlight this state of affairs, to call for and justify law reform to address the same.

The central research question in this project is whether the law as it is reflects the practice of child adoption in reality. It contends that the law does not and, drawing inspiration from African jurisprudence which is pegged on the *Ubuntu* philosophy, altruism well as natural law and third approaches to global human rights law, argues that the detachment of law is partly

caused by the Eurocentric adoption law. ó i.e., it reflects ideals of European set-up about children and is therefore not reflective even of long-standing practices. In depicting the state of affairs, from available data and reports, the study surveys the legal and institutional framework on adoption, to draw parallels between the practice in reality and the law. It uses chiefly primary and secondary data and relies on doctrinal research as well.

The Children Act of Kenya imagines a child as either being from a natural family or statutorily adopted. Recent cases, however, illustrate that by contemplating the child in this manner, we fail to capture multiple 21<sup>st</sup> Century realities. Many children in Kenya find themselves with non-biological parents through means other than the formal adoption process. This is a phenomenon that can be denoted as *de facto* adoption, in the sense that it is the practice which actually occurs in reality, whether it conforms to legal procedures or not. Several case scenarios illustrate this state of affairs.

**Keywords:** *Adopted child, adoptive parents, alternative parents, child custody, child rights, de facto adoption, de jure adoption, family law, foster parents, guardianship.*

## CHAPTER ONE

### 1.0 Introduction

The Republic of Kenya is amongst nations that are parties to the Convention on the Rights of the Child<sup>1</sup>. It is also a party to many other conventions, including the African Charter on the Rights and Welfare of the Child.<sup>2</sup> In giving effect to these principles on the international instruments that protects children's rights;<sup>3</sup> Kenya enacted the Children Act of 2001<sup>4</sup>. Ironically, cases of abandoned children with no natural families in the country are rampant. In place of child-friendly policies, Kenya has preferred to place these children in police stations and juvenile remand facilities,<sup>5</sup> which exposes them to abuse<sup>6</sup>, including defilement and sexual abuse<sup>7</sup>, and many other atrocious child rights violations.<sup>8</sup>

Domestically, the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption<sup>9</sup> was endorsed to offer abandoned children alternative families internationally but failed and remains unenforced.<sup>10</sup> Most families in Kenya offer alternative parentage to abandoned children without any of the formalities laid out in the

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<sup>1</sup>The 1989 Convention on the Rights of the Child (CRC), General Assembly Resolution 44/25

<sup>2</sup>The 1990 African Charter on the Rights and Welfare of the Child, O.A.U. Doc.CAB/LEG/24.9/49

<sup>3</sup>Preamble of the Children Act (No. 8 of 2001)

<sup>4</sup>The Children Act (No. 8 of 2001)

<sup>5</sup>Government of Kenya Initial Country Report CRC/C/3/Add.62;

2001 Committee on the Rights of the Child CRC/15/Add.160  
<[http://www.africanchildinfo.net/cnr/pdf/kenya-initial-uncrc-co\\_en.pdf](http://www.africanchildinfo.net/cnr/pdf/kenya-initial-uncrc-co_en.pdf)> 12 September 2018

<sup>6</sup>Jane Amiri & Arne Tostensen, "Kenya Country Case Study: Child Rights," 2011:4

<sup>7</sup>*W.J & another v Astarikoh Henry Amkoah & 9 others* [2015] eKLR

<sup>8</sup>Bruce, Judith, "Families in Focus: New Perspectives on Mothers, Fathers, and Children" (1995) NY 1017

<sup>9</sup>The Republic of Kenya became a signatory in July 2007

<sup>10</sup>Abiud Ochieng, "Traffickers in the Loose: How Children are sold to the highest Bidder in the name of Adoption" (*Daily Nation* (Kenya, Saturday 1 July 2018) Available at <nation.co.ke> (Accessed on 13 September 2018))



Children Act. The 2010 Constitution of Kenya bestows on the government the duty to ensure each child's right to protection and parental care<sup>11</sup>, and every child<sup>12</sup>, including those without natural parents, should enjoy this right. Equally, the Constitution envisions the "best interest of the child" as of overriding importance in all decision that relate to the child.<sup>13</sup> Accordingly, there is a need to ensure that children who find themselves in domestic establishments through other means, which would seem non-conforming to legislative edicts, enjoy equal rights as those from natural families or statutory adoptions.

This study examines *de facto* adoption<sup>14</sup>, where many children find themselves in domestic establishments through means that seem non-conforming to legislative edicts but which are widely practiced in Kenya.<sup>15</sup> It argues that most Kenyans adopt children of their kin, relatives or friends who are either deceased or face certain harsh socio-economic conditions. It draws from the fact that *de facto* adoption is not spelled out in the Children Act, from which adoption law draws.

This project analyses the adoption law in Kenya in protecting children's rights. It interrogates the challenges caused by the gap in adoption law. It seeks to find out how the rights and welfare of Kenyan children with *de facto* adoptive parents are challenged by

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<sup>11</sup> The Constitution of Kenya, 2010 art 53(1)(e)

<sup>12</sup> *Ibid* art 53(1)

<sup>13</sup> Art 53(1), Constitution of Kenya, 2010

<sup>14</sup> *Flynn v. Farr NO and others* (13967/2007)[2008] ZAWCHC 196 (12 May 2008) pg. 19 & 20 Available at [www.saflii.org/databases/South Africa/Western Cape High Court, Cape Town/2008/2008 ZAWCHC 196](http://www.saflii.org/databases/South Africa/Western Cape High Court, Cape Town/2008/2008 ZAWCHC 196) Accessed on 13 September 2018

"An adopted child shall include both *de facto* and *de lege* adopted child, the omissions in section 1(4)(e) of the Intestate Succession Act 81 of 1987 that limits an adopted child only to a *de lege* adoption be declared to be unconstitutional and invalid. The court declares Fynn to be the *de facto* adopted child of Farrö

<sup>15</sup> S.B.O. Gutto, "Children and the Law in Kenya," (Occasional Paper No. 35, Institute for Development Studies UoN NAIROBI, Kenya)

the assumptions the law makes about children who are neither from natural families nor statutorily adopted. It recommends the need to protect children who find themselves in alternative households through means that do not conform to legislative edicts, mainly where statutory adoption is not a choice for their putative families<sup>16</sup>.

### **1.1 Background to the Problem**

There is an increasing global concern about the rights of children in line with the United Nations rights treaties.<sup>17</sup> According to Cohen in "*The Developing Jurisprudence of the Right of a Child*," the notion of rights in the positive legal sense as a recognized claim is a concept that emanates from a long history.<sup>18</sup> In recent times, the theme of the right of the child has epitomized the international year of the child, which sensitizes the global community to the state of children. Such rights include the human, legal and customary rights that children ought to enjoy.

Throughout this era, Africa has come together with the rest of the globe in affirming the willpower for protection and advocacy of child rights. Accordingly, several nations have sanctioned regional and international conventions on child rights, with some equally enshrining these laws in their state Constitutions. Despite such initiatives, the reality of life of a child in Africa remains substantively unimproved<sup>19</sup>, notwithstanding the

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<sup>16</sup> United Nations Economic and Social Affairs, *Child Adoption: Trends and Policies* (2009) Available at <[www.un.org/esa/population/publications/adoption2010/child\\_adoption.pdf](http://www.un.org/esa/population/publications/adoption2010/child_adoption.pdf)> (Accessed on 01 September 2018)

<sup>17</sup> 1989 CRC and 1990 ACRWC and 1950 ECPHRFF arts 6, 8

<sup>18</sup> Cynthia Price Cohen in "The Developing Jurisprudence of the Right of a Child," <<http://heinonline.org/HOL/LandingPage?handle=hein.journals/str6&div=6&id=&page>> (27 April 2018)

<sup>19</sup> Bart Rwezaura, "*Competing 'Images' of Childhood in the Social and Legal Systems of Contemporary Sub-Saharan Africa*" (1998) Oxford University Int J Law Policy Family Vol 12(3) p 253

existence of robust social and legal frameworks to guarantee and safeguard the rights of children. Child smuggling, theft, and manipulation through drug deals, sexual exploitation, child labor and other atrocious abuses directed to minors are still rampant. The tragedy is that affected children who find themselves with alternative parents under de facto adoption, which falls within a gap in Kenyan Adoption law, are often blocked from the entitlements and privileges of children adopted under the Children Act.

The concept of extended family<sup>20</sup> practice and primogenitor principles in customary law overshadows statutory adoption rights, as it ought to be. Fittingly, the African Union, in its Charter on the Rights of the Child has echoed the sentiments in the UN Convention on the Rights of the Child<sup>21</sup>.

Kenya has challenges of informal adoption and parentage. This has, in particular, caused child theft and trafficking, as well as other new forms of abuse as shall be explored in this paper. On December 22, 2014, Kenya banned inter-country and resident adoptions.<sup>22</sup> The decision by the Labour and Social Security Services, Cabinet Secretary, Samuel Kazungu Kambi was informed by the country's ranking in 2014 United Nations Global Report on Trafficking in Persons<sup>23</sup> and statistics from its Office on Drugs and Crime<sup>24</sup>, which cited Kenya as a transit route, source and destination nation in the human trafficking cycle<sup>25</sup>. Also abolished by the Cabinet Secretary were inter-country and resident adoptions, which

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<sup>20</sup> Richard N. Rwiza, *öEthics of Human Rights: The African Contributionö* (2010) CUEA Press p 118.

<sup>21</sup> Supra note 2

<sup>22</sup> Moratorium on inter-country and resident adoption issued on 22 December 2014.

<sup>23</sup> UNODC Report (2014) publication sales no E 14 v 10

<sup>24</sup> öUNDOC, Global Report on Trafficking in Personsö (2016) UN publication sales No E.16.IV.6

<sup>25</sup> <<https://www.standardmedia.co.ke/article/2000142876/kenyan-government-bans-adoption-of-children-by-foreigners>> (accessed on 3 May 2018)

included revocations of licenses of Adoption Societies.<sup>26</sup> The effectiveness of this decision, however, remains sketchy, as many prefer and practice de facto adoption. Accordingly, the rights of the many children who find themselves in domestic establishments through this and other means are not guaranteed.

## 1.2 Problem statement

Although the law has elaborate provisions for the rights of the child, aided by regular interpretations on "the best interest of the child doctrine" by courts, it nevertheless assumes that all children are either from natural families or statutorily adopted<sup>27</sup> under the Children Act<sup>28</sup>. This assumption causes a gap and presents a weakness in the existing law because it ignores the existence of alternative means of adoption. The law is silent on the rights of children adopted under de facto adoption<sup>29</sup>. As a result, these children suffer abuse and are prone to trafficking, sexual abuse, discrimination and other biases against their best interests and welfare.

The objective of this project is to examine the socio-legal challenges facing the de facto adoption practices in the Kenyan.<sup>30</sup>

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<sup>26</sup> Ibid; The Role of Adoption Societies in the Adoption process is to conduct home studies clearing the child free for adoption and the adoptive parents fit to adopt. The Adoption Societies also has a role in the fitness of a Guardian *ad Litem* to be appointed pending the Adoption Order,

<sup>27</sup> Supra note 4 ss 154 -183 PART XII ó ADOPTION

<sup>28</sup> Children Act (No. 8 of 2001)

<sup>29</sup> UNICEF *öThe State of the World's Children 2011: Adolescence-an Age of Opportunityö* ( 2011)

<sup>30</sup> Supra n. 28

### **1.3 General objective**

To understand challenges to the rights of children adopted under de facto adoption in Kenya.

#### **1.3.1. Specific objectives**

This study aims to:

- a. Establish whether the law as it is reflects the practice of adoption in reality
- b. To establish the existence of de facto child adoption in Kenya
- c. Analyze the gap in the law that threatens the best interest and welfare of the child under the de facto adoption practice in Kenya
- d. Understand the challenges facing the rights of children adopted under the de facto adoption practice in Kenya

### **1.4 Research questions**

- a. Does the law, as it is, reflect the practice of adoption in reality?
- b. Does de facto child adoption exist in Kenya?
- c. What is the gap in the law that threatens the best interest and welfare of the child in a de facto adoption practice in Kenya?
- d. What are the challenges facing the rights of children under the de facto adoption practice in Kenya?

## **1.5 Hypotheses**

Although the law has elaborate provisions for the rights of the child, it also assumes that all children come from natural families. There exists a lacuna here, as there are no regulations to safeguard rights of de facto adopted children.

Even where the courts have interpreted the doctrine of the 'best interest of the child' severally, implementation often fails to consider the rights of children with de facto adoptive parents because adoption laws do not cover them.

This project adopts the hypothesis that while the law has elaborate provisions for children's rights, and courts have interpreted 'the best interest of the child' doctrine severally, it nevertheless assumes that all children come from natural families and has failed to protect the many children who find themselves in domestic establishments through other means, which do not conform to existing legal edicts.

## **1.6 Methodology**

The project will employ both primary and secondary data. It relies on doctrinal research methodology, which will involve reviewing laws, policies, case laws, journals, reports, and documents. It will also involve qualitative analysis of data, which will encompass legal documentary research dealing with the content analysis of primary data, secondary data and a descriptive approach.

### **1.7 Significance of the Study**

A study of Kenya's case law reveals that trafficking, theft and other forms of child abuses are on the rise. This study seeks to contribute to the knowledge gap in adoption law as it is in Kenya today, by enriching existing literature and jurisprudence on the rights of children with alternative parents. It will, as well, create room for researchers to delve deeper into issues touching on parenting, parentage, child welfare, protection of children rights and the duty of those charged with implementing the rules protecting the rights of the child with alternative parents, in both de jure or de facto adoptions in Kenya.

This project will produce insights to aid the child adoption law regime, which has been undergoing various Executive, legislative and judicial tensions after the UNDP Report criticizing adoption law in Kenya<sup>31</sup>. This project speaks explicitly to the need to fill the gap in adoption law in the safeguarding the interest of de facto adopted children, who have been so far ignored, and who suffer discrimination and abuse of human rights.

### **1.8 Scope of the study**

The scope of this project restricts to domestic adoptions and will exclude inter-country and resident adoptions. It will delve into the comparative analysis approach of cases from different jurisdictions within the Commonwealth, more so the de facto adoption practice in South Africa.

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<sup>31</sup>Supra note 20

The study is premised on salient challenges, expressed and tacit, which affect the rights of de facto adopted children in Kenya. It shall consider the Constitution, Acts of Parliament ó specifically the Children Act, case laws, Kenya Gazette notices, subsidiary legislation, and policies, as well as journals and documents that are directly or indirectly linked with the rights and welfare of children with alternative parents.

The purpose of this study is to advocate for the rights, welfare, and õbest interestsö of children who find themselves in domestic establishments through other means that are not sanctioned under the adoption law, and their entitlement to human rights in line with the Constitution of Kenya, just like children from natural families or those adopted under the Children Act.

### **1.9 Theoretical framework**

The project relies on three theories; the Natural Law Theory approach, based on law and morality; the theory of Altruism, which has adopted the human rights approach; and the African Jurisprudence Theory, which is based on the Ubuntu philosophy. These theories all give a particular preference for human dignity as an inherent responsibility of all humankind. Accordingly, the rights of children must be respected, wherever they are to be found, without any discrimination. In other words, the rights and privileges enjoyed by children adopted under the Children Act should equally apply to children who fall under de facto adoption practice.



### 1.9.1 Natural Law Theory

The precept of Natural Law corresponds to an order of natural inclination and all those reflexes, instincts and feelings which nature has taught all animals. These instincts make for the preservation of life<sup>32</sup>, which includes rearing of offspring.<sup>33</sup> Thomas Aquinas, a Natural Law theorist, describes Natural Law as the rule of nature guided by sound reason.<sup>34</sup> John Locke, a Natural Law theorist, states that all humankind are equal and none should treat the other as subordinate.<sup>35</sup> This aspect enshrines natural right, equality, and dignity to all humankind, including children under de facto adoption, just like children under de jure adoption or those from natural families.<sup>36</sup>

Locke, on government and fundamental constitutional rights, addresses inherent natural rights that every human person is entitled to.<sup>37</sup> His theory has so much to do with human and constitutional rights, to which children are holders. Accordingly, children under de facto adoption practice should not suffer discrimination on rights and privileges.

Lon Fuller, on Law and Morality, captures areas of natural law theory and its relevance to morality significantly. Rights and welfare of children are similarly an appeal to the morality of society. Law is designed to take care of communal duties and moral obligations. The protection and safeguards on the children's rights and welfare is a

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<sup>32</sup> William Burnett Harvey, "An Introduction to the Legal System in East Africa" *The Nature of Law and Its Social Functions; The Natural Law* chapter 3 p. 221

<sup>33</sup> William Harvey Burnett *ibid*

<sup>34</sup> William Harvey Burnett *ibid*

<sup>35</sup> William Harvey Burnett *ibid*

<sup>36</sup> William Harvey Burnett *ibid*

<sup>37</sup> Nicholas L. DiVita, "John Locke's Theory of Government, and Fundamental Constitutional Rights: A Proposal for Understanding" (1982) 84 W. Va. L. Rev. 825

consideration of the moral obligation the law has towards the weak and the vulnerable in society. The ultimate point of contrast and conflict between utilitarian and rights-based views is that the first one, in their basic theory, aggregates the interests or inclinations of all the persons or parties concerned, whereas the latter insists, to the end, on the separateness of persons.<sup>38</sup> Regarding natural law theory, the right of a child is separate from that of the parents or adopters and must be so.

Accordingly, the many children who find themselves in domestic establishments through means that do not seem to conform to legislative edicts should not suffer prejudice, discrimination or deprivation just because their de facto adoptive parents have chosen not to formalize their adoption according to the requirements of the child adoption regulations in Kenya. Natural Law theory underscores the need to safeguard the rights of children who find themselves with de facto adoptive parents.

### 1.9.2 Altruism theory

Altruism<sup>39</sup>, as coined by *Auguste Comte*,<sup>40</sup> Altruism is the opposite of egocentrism. It is summed up as "living for others," and adopts a Human Rights approach, including

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<sup>38</sup> Randy E. Barnett, "Foreword: Of Chickens and Eggs—The Compatibility of Moral Rights and Consequentialist Analyses" (1989) 12 Harv. J. L. & Pub. Pol'y 611

<sup>39</sup> Feigin, S., Owens, G. and Goodyear-Smith, F. "Theories of Human Altruism: a systematic review, *Annals of Neuroscience and Psychology*" (2014) <<http://vipoa.org/neurophychol>> Accessed on 17 September 2018; Altruism was introduced by *Auguste Conte* voluntary act performed to benefit another person motivated by either a conscience or unconscious expectation of reward.

<sup>40</sup> Raymond A. Hopkins, McDonnell Douglas & Thomas L. Powers, "The Theory of Altruism and Consumer Behavior: Literature Review and Model Development" The University of Alabama Birmingham <<https://link.springer.com/chapter/10.007/978-3-3-319-17395-5-66>> (Accessed on 17 September 2018); *Auguste Conte* was the known person to first use of the word Altruism in the year 1851

equality for all. Altruistic behavior is driven by the fundamental desire to improve others' welfare.<sup>41</sup>

Adam Smith, in his three theories of altruism<sup>42</sup>, argues that there is nothing like a greater feeling for other unless there is a greater self-interest.<sup>43</sup> When a person commiserates with someone else's feeling, it is merely reflective responsiveness to satisfy his ego.<sup>44</sup> Sympathy for another is a reflection of self-interest, and self-interest must be viewed as a virtue and not a vice.<sup>45</sup> This criticism by Smith means that adoption should be promoted not just because the adopted child will benefit but also because the adoptive parents may benefit more by parenting the child.

The Human Rights Approach Theory advocates for equal rights and dignity to all humankind. Each person is bestowed with conscience and reason, and ought to treat each other in a spirit of inseparability and brotherhood<sup>46</sup>, i.e., altruism. This theory forms the core basis of this research since it regards all human beings, as being equal, amongst whom there should be no discrimination. Discrimination and marginalization remain rampant despite the stand of human rights law on equality and non-discrimination.<sup>47</sup> If we subscribe to the principles described in this theory, de jure and de facto adopted children must enjoy equal rights.

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<sup>41</sup> Raymond Hopkins et al ibid

<sup>42</sup> Elias L. Khalil, *Adam Smith and Three Theories of Altruism* <<http://www.cairn.info/reveu-recherches-economiques-de-louvain-2001-4-page-421.html>> (accessed on 17 September 2018)

<sup>43</sup> Elias ibid

<sup>44</sup> Elias ibid

<sup>45</sup> Elias ibid

<sup>46</sup> Universal Declaration of Human Rights (2006) 2 Haw J. L. & Pol. 115

<sup>47</sup> Bart Rwezaura, *The Value of a Child: Marginal Children and the Law in Contemporary Tanzania* (2000) Oxford University Press volume 14

### 1.9.3 African jurisprudence theory

*Ubuntu*, which signifies solidarity with and humanity to others,<sup>48</sup> *ó I am because we are ó* is a Communal Rights<sup>49</sup> The theory advanced in South Africa by Desmond Tutu,<sup>50</sup> Moreover, promoted in Kenya under *Harambee* – which means to pool resources together for the common good of the community. In our specific instance, it calls for the communal responsibility of pooling together to provide alternative families to abandoned children through adoption.

William Idowu<sup>51</sup>, a proponent of African Jurisprudence, affirms that the African Family Rights approach is a component of African Customary Law theory, which promotes communal as opposed to individual rights. African systems were considered communal rather than individual-oriented<sup>52</sup>. It is in this observation and study that adoption law takes into account the belongingness of an abandoned child to the community and champions the responsibility of giving the best care to orphaned children.

A community is understood to be a family of units related in one way or the other, co-existing in a given space, and having the same consanguine relations such as clans. In such units, the community has more rights than the individual as opposed to Western

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<sup>48</sup> Sarah Kinyanjui, *óRestorative Justice in Traditional Pre-colonial; Criminal Justice Systems in Kenya*” <[lawschool.unm.edu/tlj/volumes/vol10/Kinyanjui.pdf](http://lawschool.unm.edu/tlj/volumes/vol10/Kinyanjui.pdf)> ( 21 September 2018); *óUbuntu* is a concept founded upon the belief that *umntu ngumntu ngabantu, motho ke motho ba batho ba bangwe*, literally translated as a human being is a human being because of other human beings

<sup>49</sup> T. OLAWALE ELIAS, *óThe Nature of African Customary Law*” (1956) Manchester University Press p. 83

<sup>50</sup> William Idowu, *óAfrican Jurisprudence; Transcending the Boundaries between Myth and Reality*” <[https://www.brunel.ac.uk/creative-writing/research/entertext/document042/william-idowu-african-jurisprudence-transcending-the-boundaries-between-myth-and-reality-an\\_essay-pdf](https://www.brunel.ac.uk/creative-writing/research/entertext/document042/william-idowu-african-jurisprudence-transcending-the-boundaries-between-myth-and-reality-an_essay-pdf)> (accessed on 17 September 2018)

<sup>51</sup> *ibid*

<sup>52</sup> *ibid*

concepts of individual rights<sup>53</sup>. There are few individual rights in the African customary law system, with an emphasis being on "communing." A child belongs to the community so that in the event of its separation from biological or natural parents, the community takes charge of fulfilling the enjoyment of the child's rights<sup>54</sup>, and the sharing and enjoyment of attendant advantages and opportunities without discrimination.<sup>55</sup>

### **1.10 Conceptual framework**

The critical concept underpinning this study is that many children who find themselves in domestic establishments through means that do not conform to legislative edicts in Kenya face serious legal, social, economic, educational, and religious challenges that cannot be wished away. The study seeks to understand the expressed and implied factors or variables that make de facto adoption a practice within Kenya's legal system.

According to Patrice L. Engle et al., most of the challenges facing children now are as a result of changing times, comprising of political violence, speedy urbanisation, changing systems of families and, in some areas, hunger, famine and starvation<sup>56</sup>.

### **1.11 Literature Review**

In research carried out by Patrice L. et al<sup>57</sup>, he recognizes several challenges facing children now are a function of changing times, including increased political violence,

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<sup>53</sup> George Bennett, *African Socialism* (1964) 20 Int'l J. 97

<sup>54</sup> Supra note p. 111

<sup>55</sup> Florence Ijioma, *The African Concept of Jurisprudence before Western Civilization* Available at < [www.academia.edu/1786474/THE-AFRICAN-CONCEPT-OF-JURISPRUDENCE-BEFORE-WESTERN-CIVILIZATION](http://www.academia.edu/1786474/THE-AFRICAN-CONCEPT-OF-JURISPRUDENCE-BEFORE-WESTERN-CIVILIZATION)> (accessed on 17 September 2018)

<sup>56</sup> Patrice L. Engle et al., *Child Vulnerability: Vulnerability and Resilience in Social Science and Medicine* (1996) Vol 43 Issue 5 p. 621-635.

urbanization, shifting family systems and, in some areas, reduced food production. This assessment centres mainly on those changes that affect children, making them victims. In addition, the challenges induce new threats for children, rather than on problems such as disability or mental illness. This is analogous with the reality that faces the family unit in Kenya today. Some families have to contend with legal, social challenges that impact on the adoption practices.

The case study by E. Kennedy and Pauline E. Peters of the Harvard University on “*Household food security and Child Nutrition: the interaction of income and gender of household head*” reveals that statistics from Malawi and Kenya propose security on food and pre-schooler nutritional status depends on the interface of income and gender of the household’s head and rather than merely one or the other<sup>58</sup>. Such household food security issues are recipe to widespread de facto child adoption in Kenya today.<sup>59</sup>

Elizabeth Schröder-Butterfill’s article on “*Actual and de facto childlessness in Old Age: Evidence and Implications from East Java Indonesia*”<sup>60</sup> makes very significant findings on childlessness and its impact on old aged persons or couples. It indeed linked to the cases of child theft in de facto child adoption practice in Kenya as shall be discussed in this study.

Geraldine Van Bueren in his book, states “*Although the family is acknowledged as the basic unit of society, by the widespread acceptance of the Convention on the Rights of the*

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<sup>57</sup>ibid

<sup>58</sup><[https://dx.doi.org/10.1016/0305-750X\(92\)90001-C](https://dx.doi.org/10.1016/0305-750X(92)90001-C)>Accessed on 29 April 2018

<sup>59</sup> UNICEF “*The state of the World’s children 2011: adolescence-an age of opportunity*” (2011)

<sup>60</sup><<https://dx.doi.org/10.1111/j.1728-4457.2005.00051.x>> (29 April 2018)

*Child, states have accepted that not all forms of family life are conducive to the best interest of children<sup>61</sup>”. Implementation of transnational laws on children’s rights remains a severe problem. International law provides a diplomatic but a non-political framework to the child’s rights. Municipal law is more effective than international law in implementation children’s rights, including inheritance rights for de facto adopted children. The concept that children are right holders poses divergent debates. Some schools of thought still deny that children are rights-holders other than their families, while others argue that children possess rights. Several competing theories of rights seek to explain the child’s rights.*

The Convention on the Rights of the Child gives a general definition of Child rights that is acceptable by many law scholars. Children are generally disenfranchised and do not possess the skills to defend their rights verbally. In this case, their rights are delegated to society and family by extension. Such negation of children’s rights by some enhances de facto child adoption in Kenya. It is one of the causes of abuse of the rights of this vulnerable category. This failure to identify children as separate human beings causes breach of their rights where actions taken in the best interest of parents are purported to be “in the best interest of children”. It is in this purview that international laws on child rights face serious difficulty and de facto adopted children suffer prejudice and injustice.

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<sup>61</sup>. Geraldine Van Bueren, *The International Law on the Right of the Child*(1998) Kluwer Law International The Hague

Kerry O'Halloran examines and expounds the new legal regulatory framework governing inter-country and domestic adoption in Ireland.<sup>62</sup> *O'Halloran* gives guidance to the changes outlined in the Adoption Bill 2008 and incorporated Hague Convention into Irish statute law<sup>63</sup>. He sets out the process of adoption, explaining the difficulties of inter-country adoption, giving consideration to the interface between adoption and children in need of parentage, as well as dealing with the rights of adoptive parents and children involved<sup>64</sup>.

Marion Huxtable, in her research paper *"Child Protection with Liberty and Justice for All,"* affirms thus: "The Bill of Rights guarantees civil liberties that are envied around the world. Family privacy, freedom from government interference, and the right to raise children according to individual beliefs are among the fundamental rights secured by the Constitution. These rights and freedoms are held as sacrosanct by most citizens, yet they give rise to reservations when there are conflicts between the rights of parents and children. This article examines threats to the civil liberties of parents believed to have abused their children and implications for the current system of investigating and addressing child abuse."

Due to immaturity and ignorance, children enjoy fewer constitutional rights than adults.

According to Marion Haxtable;

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<sup>62</sup> Kerry O'Halloran, *Adoption Law and Practice*, Round Hall Publication, Ireland (2010) <http://www.roundhall.ie/navigateToUrl.do?idOfMenuItemToHighlight=catalogue&actionToInvoke=/displayProductDetails.do&productId=428909&unitId=428909> (accessed on 3 May 2018)

<sup>63</sup> *ibid*

<sup>64</sup> *ibid*



Legal representation and due process for youth in delinquency cases became a right following the Gault Case of 1967, spilling over into abuse and neglect cases and bringing a legal and procedural perspective into child abuse proceedings in juvenile court. Possibly as compensation for the incomplete rights and natural vulnerability of children, the standard of proof in abuse and neglect cases is less rigorous than in either criminal or delinquency cases. One is not required to prove beyond a reasonable doubt that the abuse occurred, thus tilting the balance in favor of protecting the child at the finite risk of violating the rights of the parents<sup>65</sup>.

This finding by Marion relates to the Bill of Rights entrenched in the Constitution of Kenya<sup>66</sup>. Owing to such civil liberties advanced by the supreme law, child abuses, such as failing to guarantee a de facto adopted child all the civil liberties, are still common in Kenya, as this research shall demonstrate.

The study conducted by Sara Bennett<sup>67</sup> of Johns Hopkins University on “*Policy Challenges Facing Integrated Community Case Management in Sub-Saharan Africa*” questions the policy framework that regulates *de facto* child adoption. Kenya is listed among the Sub-Saharan African countries that struggle to respond to the international child protection policies due to lack of foreign investment towards child healthcare. This is likely one of the casualties affecting the adoption law process and juvenile justice in Kenya<sup>68</sup>.

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<sup>65</sup> Marion Huxtable, “*Child Protection with Liberty and Justice for All*” Available at <<https://dx.doi.org/10.1093/sw/39.1.60>> Accessed on 29 April 2018

<sup>66</sup> Chapter 4 of the Constitution of Kenya, 2010

<sup>67</sup> Sara Bennett, “*Policy Challenges Facing Integrated Community Case Management in Sub-Saharan Africa*” Available at <<https://doi.org/10.1111/tmi.12319>> ( 29 April 2018)

<sup>68</sup> June Carbone, “*The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*” Available at <<https://dx.doi.org/10.1111/tmi.12319>> Accessed on 29 April 2018

June Carbone of the University of Minnesota has made a significant and relevant finding on her study<sup>69</sup> argues, “the determination of legal parenthood should fundamentally be about identity; that is, it should be seen as providing an answer to the question “to which family does this child belong?”<sup>70</sup>. The law must address the question of belonging in order to determine the definition of parenthood. In the practice of de facto child adoption in Kenya, similar questions ought to guide the courts. The body of law should emphasize marital status and family background to define parenthood to the child.

In the registration of persons in Kenya, the child should be registered under the lineage of the father depending on the parent's marital status. However, this may change on account of customary laws that require common marital rules to be adequately fulfilled for the child to fit in the lineage of the father. If specific rules and normative principles are unfulfilled, then such succession rights may take the mother's lineage. Family identity is very significant in any adoption process. However, the challenge is established in cases of abandoned children whose parents are unknown. In such realities, family identity becomes difficult, and *de facto* child adoption thrives on this failure to trace the historical family lineage of abandoned children.

The study “*The International Survey of Family Law: Published on Behalf of the International Society of Family Law*” conducted by Andrew Bainham and WR. Atkin on reveals:

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<sup>69</sup> ibid

<sup>70</sup> ibid

*"...It provides information, analysis and comments on recent developments in Family Law across the world on a country-by-country basis. The Survey publishes annually, and its subtitle reflects the calendar year surveyed. Where a country has been regularly surveyed each year, the developments discussed correspond to the year in question. If certain countries fail to survey for some years, the contributions will usually attempt to cover the intervening period. This applies, for example, in the present volume to the contributions relating to China and Turkey. If countries are being covered for the first time, then more background information will be provided about the state of family law in the country in question<sup>71</sup> ..."*

Although the law reform process in Kenya has taken similar direction in developing family law, there are still gaps, including in de facto adoption.

Challenges facing parenting matters are captured well in the work of Jeffrey A. Parnessø work entitled *"Challenges in Handling Imprecise Parentage Matters."* In 2016, the researcher from the Northern Illinois University discovered as follows:

*"Legal parentage under American state law is significantly and rapidly evolving. And, it is increasingly imprecise. No longer is legal parentage only defined at precise moments in time or for particular conduct, as by giving birth, having biological ties, marriage to the birth mother at the*

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<sup>71</sup> Andrew Bainham, W. R. Artkin, *δThe International Survey of Family Law: published on behalf of the International Society of Family Law*" (2017) Martinus Nijhoff <<https://ci.nii.ac.jp/ncid/BA28462866>> (Accessed on 29 April, 2018)

*time of conception or birth, name placement on a birth certificate, or formal adoption. Both men and women can now become legal parents, as through de facto parenthood or equitable adoption, where neither the time of the relevant conduct nor the conduct prompting parentage can be precisely determined. Because legal parentage increasingly depends upon fluid and imprecise doctrines, lawyers and judges must be vigilant in handling legal disputes implicating parentage. Together with the growing phenomenon of imprecise legal parentage, lawyers and judges are also challenged because an established legal parentage in one setting often is inapplicable in other settings<sup>72</sup>.”*

Children whose parents or family background is not recorded pose severe problems for de facto adoption in Kenya. There are street families whose marital status is indeterminate or non-existent. Parness' study provides a reality that shall enable this research to carry out a comparative analysis of the same reality in Kenya<sup>73</sup>.

Jeffrey A. Parness on “*Formalities for Informal Adoptions*” advances a compelling argument. In the United States, state laws chiefly guide determinations of parentage<sup>74</sup>. Until very recently, parentage has been limited to those who formally adopt and those

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<sup>72</sup> Jeffrey A. Parness, *Challenges in Handling Imprecise Parentage Matters (2016)*, Northern Illinois University <<http://commons.lib.niu.edu/handle/10843/16428>> (Accessed on 29 April 2018)

<sup>73</sup> *ibid*

<sup>74</sup> *ibid*

with natural ties to children born of sex, though such ties were usually presumed for husbands whose wives conceived or bore children during the marriage<sup>75</sup>.

Recently, more and more children are not born of sex, with their parentage often not dependent on formal adoptive or natural ties. Parentage in the United States today increasingly arises from informal adoptions, that is, from a state-recognised contract or other conduct between a prospective informal adopter and a natural or formal adoptive parent, which places the informal adopting parent on equal footing with the existing parent. Here, there is no judicial and otherwise minimal state oversight of those who informally adopt.

Informal adoption occurs under varying legal doctrines, including a presumed parent, *de facto* parent, parent by estoppel, equitable parent and in loco parentis<sup>76</sup>. Informal adoption effectively limits henceforth the existing "parents' superior rights" in the "care, custody and control"; provide children with the prospect of an additional source of court-ordered childcare and/or child support; and, usually depends upon the informal adopter's earlier "parental-like" acts<sup>77</sup>.

State interests in child welfare and in respecting parental and children's rights are protected because trial judges maintain exclusive authority over future child custody, visitation or allocations of parental responsibilities, whether or not natural or formal adoptive parents, prospective or current informal adoptive parents, or others (like

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<sup>75</sup> Jeffrey A. Parness *ibid*

<sup>76</sup> Jeffrey A. Parness *ibid*

<sup>77</sup> Jeffrey A. Parness *ibid*

grandparents) complain. The state can always pursue a child welfare order when it determines a child is in need of assistance. An informal adoption, unlike a formal adoption, provides a little opportunity at the gate for the state to assess the informal adopter individually. State assessments occur after contracts, or other acts have prompted "family bonds" between a child and an informal adopter.

This is problematic for many reasons. For instance, there are written guidelines on who can undertake formal adoptions, which typically involve considerations of prior crimes, blood relations and, whether there is only one or no current parent under law. There are no comparable written guidelines in advance for those who adopt informally. Written guidelines for informal adoptions would promote state interests in child welfare, as well as alert existing parents and would-be parents who jointly offer childcare opportunities and child support duties of informal adoptees.<sup>78</sup> In Kenya, a similar issue relating to formal and informal adoptions can be deduced. There is an apparent gap between formal and informal or de facto adoptions.

## **1.12 CHAPTER BREAKDOWN**

1.12.1. CHAPTER ONE of this project gives an introduction, background to the study, statement of the problem, research questions, research objective, hypothesis, methodology, literature review, theoretical framework which discusses theories that gives foundation to this project and significance of the study.

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<sup>78</sup> Jeffrey A. Parness, "*Formalities for Informal Adoption*"(2015) Capital University Law Review Vol. 43 p. 373 Northern Illinois University - College of Law

1.12.2. CHAPTER TWO is titled “*The Concept of De facto Adoption Practise in Kenya*”. It outlines the high number of children living with informal parents in Kenya and not monitored by the government of Kenya. This chapter shows the existence of de facto adopted children who are neither with their natural parents nor statutorily adopted.

1.12.3. CHAPTER THREE is titled “*Legal Framework*”. This Chapter outlines the legal instruments that recognize the rights of the child in Kenya. It further highlights national statutes which assume that all children are either from natural families or statutorily adopted. This chapter points out the gaps in the statutes, which assume and threatens the rights of de facto adopted children.

1.12.4 CHAPTER FOUR is titled “*Challenges facing the Rights and Welfare of the Child under De Facto Adoption Practice in Kenya*”. This chapter outlines the challenges facing children, who find themselves with informal parents, as a result of the legal gaps raised in chapter three. This chapter lays out special socio-legal problems facing de facto adopted children, unlike children who are with natural parents or statutorily adopted.

1.12.5 CHAPTER FIVE concludes the gaps in the law ought to be addressed to protect children with putative parents outside legislative edicts. It settles that the Children Act needs a review to protect all children including de facto adopted children.

## CHAPTER TWO

### THE CONCEPT OF DE FACTO ADOPTION PRACTICE IN KENYA

#### 2.0 Introduction

Chapter one has introduced the existence of both local and international laws on children's rights and best interests. It suggests that these laws are full of gaps, which have left out children with informal parents. This chapter lays out the reality of the existence of these children, who are adopted under de facto practice, in Kenya. It further shows that the number of these children is increasingly too many to be ignored by the law. The Children Act assumes that all children are either from natural families or statutorily adopted. This chapter confirms that there are many vulnerable children under informal alternative care, *de facto* adoption.

#### 2.1 De facto adoption

According to the 2017 UNICEF Report, Kenya tops 40 countries with the highest number of abandoned, unaccompanied and separated children in humanitarian circumstances. Also taking top spot are Libya, South Sudan and Uganda<sup>79</sup>. Approximately 3.6 million children in Kenya are without natural families, orphaned and vulnerable<sup>80</sup>. This is

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<sup>79</sup> UNICEF Annual Report, 2017 "Child Protection" Available at <https://www.medbox.org/child-protection/annual-results-report-2017> > (accessed on 4 October 2018)

<sup>80</sup> UNICEF "Taking Child Protection to the Next Level in Kenya"(2015) <<https://www.unicef.org/protection/files/kenya-cp-system-case-study.pdf>> (4 October 2018)



exacerbated by the fact that no controls have been put in place to monitor children placed under informal care arrangements<sup>81</sup>.

States everywhere ought to keep updated data to monitor these informal care arrangements that protect rights and best interest of children who find themselves in domestic establishments through means other than those captured in legislative edicts<sup>82</sup>. Kenya should consider the need to implement a human rights-based approach and deal with the dilemma of children deprived of natural parents<sup>83</sup>. This will ensure that de facto adopted children are not left out of the legal instruments. It will ensure compliance behind in compliance with universal human rights norms and principles.

Although the law has elaborate provisions for children's rights and courts have interpreted the best interest of the child doctrine many times, nevertheless it assumes that all children come from natural families and has failed to protect many who do not fit in these anticipated scenarios. There are many children who live with alternative families in informal care arrangements<sup>84</sup>, the actual number is unknown because many families are comfortable taking care of these children through informal arrangements<sup>85</sup>.

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<sup>81</sup> SOS Children Villages Kenya, "Assessment Report of the Alternative Care System for Children in Kenya" <<https://www.sos-childrevillages.org/getmedia/e69d1d87-6e6d-Kenya-small.pdf>> (8 October 2018)

<sup>82</sup> ibid

<sup>83</sup> ibid

<sup>84</sup> SOS Children's Villages ibid "A Snapshot of Alternative Care Arrangements in Kenya" (2013) <<https://www.sos-childrevillages.org/getmedia/1/KENYA-FINAL-toupload.pdf>> (last Accessed on 4 September 2018)

<sup>85</sup> ibid

Islam champions this informal care through a system referred to as *Kafala*, where an abandoned child gets into an alternative family permanently, although he/she is not allowed to adopt the household name of his/her alternative family or receive inheritance<sup>86</sup>.

Legal recognition of de facto adopted children will promote stronger linkage between the formal and informal mechanism to safeguard the rights and best interest of the child<sup>87</sup>. Some children with alternative families in informal kinship or non-kinship households are placed for educational purposes but end up being treated like servants<sup>88</sup>, while others are exposed to child abuse and fall into exploitative work<sup>89</sup> due to gaps in the Children Act.

At least twenty-eight countries have recognized that statutory adoption is not the only means of adoption<sup>90</sup>, and that the child's best interest should not be sacrificed at the altar of formalism<sup>91</sup>. The welfare and best interest of the child is prevalent to protect the rights of de facto adopted children. Even where there is no statutory adoption, the law should

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<sup>86</sup> SOS Children Villages Kenya, "Assessment Report of the Alternative Care System for Children in Kenya" <https://www.sos-childrenvillages.org/getmedia/e69d1d87-6e6d-Kenya-small.pdf> > (last Accessed on 8 October 2018)

<sup>87</sup> UNICEF "Taking Child Protection to the Next Level in Kenya" (2015) <https://www.unicef.org/protection/files/kenya-cp-system-case-study.pdf> > (4 October 2018)

<sup>88</sup> Jini L. Roby, "Children in Informal Alternative Care" (2011) UNICEF <<https://www.unicef.org/protection/informal-care-discussion-paper-final.pdf> > (Accessed on 7 October 2018)

<sup>89</sup> UNICEF & USAID, "The Evidence Base for Programming for Children affected by HIV/AIDS in low prevalence and concentrated epidemic countries" (2008) New York

<sup>90</sup> Knaplund, "Grandparents Raising Grandchildren and the Implications for Inheritance" (2006) 48 Arizona LR 16

<sup>91</sup> Anne S Louw "A De Facto Adoption Doctrine for South Africa?" (2017) <<https://repository.up.ac.za/handle/2263/65289> > (last accessed on 4 October 2018)

ensure equitable results in the meritorious recognition of de facto adoption cases<sup>92</sup> to protect children who find themselves with putative parents.

Equitable, de facto or adoption by estoppel<sup>93</sup> in Kenya should be upheld to safeguard the best interest of the children, where putative parents have not conformed to legislative edicts. As a natural extension to the right to succession, parental care, non-discrimination and the paramountcy of best welfare and interest of the child<sup>94</sup> de facto adopted children deserve a legal protection<sup>94</sup>.

## **2.2 Factors and circumstances that lead to de facto adoptions**

Research shows that the law does not regulate all social, cultural, economic, political and spiritual needs of society. The law is just one essential element of the social sub-system that is key to harmony and order in a given society. However, customary law, cultures, beliefs, and customs are equally of crucial role in cementing the society to make it functional.

The school of thought supporting African customary law is therefore justified. There is nothing criminal like de facto practices. They exist to serve a purpose and any law seeking to abolish them won't succeed. In this case, the government cannot subject every social function to a binding body of law. There is no such society where statutes govern all social relations, which is why we cannot wish away customary law. There should be a

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<sup>92</sup> ibid

<sup>93</sup> Ibid

<sup>94</sup> Ibid

valve that is not regulated by law for members of the society to re-adjust and enjoy their rights and freedoms.

However, this is not to justify the commission of a crime. Any criminal act shall be prosecuted under fair trial and due diligence. This statement is in recognition of the idea that while *de facto* adoption is not a crime, it may be a conduit for criminal offences as shall be discussed consequently.

### **2.2.1 Children as right holders**

To test the legality and constitutionality of *de facto* adoption, the two concepts to be tested are; *de facto* and *de jure* adoption. *De jure* adoption is captured in the adoption law of Kenya, namely, Children Act 2001<sup>95</sup>. The law does not sanction *de facto* adoption and, although prominently practiced, lacks any legal effect whatsoever on the status children with putative parents. *De facto* adopters stand to abuse their responsibility against the welfare children in their care.<sup>96</sup>

Fidelity by legal, policy and legislative agencies to the *de jure* adoption process<sup>97</sup> implies that there is no evidence that *de facto* adoption is consistent or in conformity with the law. It exists as the grey area of law that has no proper position in Kenya's legal system.

Another assumption would be that *de jure* adoptions cover the best interest of all children in Kenya. This assumption is arguably inaccurate given the fact that *de facto* adoptions exist. Adhering to the definition provided on *de facto* adoption as a practice not

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<sup>95</sup> Part XII ss 154 to 183 (No. 8 of 2001 Laws of Kenya)

<sup>96</sup> *supra* note 15

<sup>97</sup> *Supra* n 87

recognized by the Children Act<sup>98</sup>, then children under the de facto adoptions suffer prejudice of their rights and entitlements.

Concerning child abuse and de facto adoptions, de facto adoption does not necessarily cause child abuse in Kenya. Presupposing that de facto adoptions are neither dependent nor independent variables in child abuse offences, it would not then make any logical sense to refer to them in law. The fact that neither written nor customary law addresses de facto adoption would lead one to conclude that de facto adoptions are a non-issue to general offences for which the legislature feels compelled to enact legislation.

Anchoring on the second assumption that de facto adoptions are not legal issues leads one to believe that they are matters of fact. They are phenomenological happenings in a society that could be addressed by other disciplines such as sociology, political science, administration, or studies of human rights but not necessarily legal discipline.

There is a challenge in understanding of the human rights jurisprudence. In advocacy of human rights, all human beings are rights holders. Children in de facto adoption are human beings. Therefore, in a deductive inference, one would be wrong to conclude that children in de facto adoptions are subject of the law. Hohfeld's bracket theory holds that only human beings have rights and duties because only human beings have interests<sup>99</sup>.

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<sup>98</sup> No. 8 of 2001 Laws of Kenya

<sup>99</sup> W. N Hohfeld, *Some Fundamental Legal Conceptions* (1919) New Haven

On the same argument of rights, it is accurate to argue that if there is the universality of rights<sup>100</sup> then such rights must be moral rights. All human beings must have their universal rights or entitlements protected. The Naturalist Law theory as well holds that every human being has natural rights or inherent rights that cannot be given nor delegated. In Locke's rights theory, each person has natural rights to life, liberty and own property.<sup>101</sup> By this theory, every child is a rights holder.

It follows that "child abuse" is also caused by de facto adoption. The fact that a de facto adopted child has no legal protection does not mean that such a child has no entitlement to universal human rights. In this case, there is an omission in the law concerning children who are de facto adopted.

### **2.3 Explaining “Best Interest of the Child”**

The interpretation of the child's best interest poses divergent opinions from different court. In jurisprudence "best interest of the child" takes into consideration the child's capacity to intend and carry out an act in his or her interest. But what is interest? Interest theory in the study of jurisprudence uses the interest to define rights.<sup>102</sup>

Interests are not created by the state they already exist in the life of the community. Rights are those interests that are recognised and protected by law.<sup>103</sup>

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<sup>100</sup> 1948 Universal Declaration of Human Rights (UDHR) U.N. Doc A811

<sup>101</sup> *ibid*

<sup>102</sup> Jhering, R. Von, *Law as a Means to an End* (1968) translated by Husik, I. Modern Legal Series Vol New Jersey Rothman Reprinters Inc p. 370.

<sup>103</sup> R.S. Balla, *Concepts of Jurisprudence* (1990) Nairobi University Press p. 67.

The Children Act allows for children to be accorded opportunities to have and share their opinion in matters that concerns and affect them<sup>104</sup>. But, this must also consider the child's age and maturity, which enables them to understand their interests<sup>105</sup>. This law is vague on such necessary framework as forensic and psychological analysis of the child's capacity to make a valid opinion as part of his interest.

The argument of Jhering on "interests" has challenged because such interests are not within the community and the law only assigns them to individuals.<sup>106</sup> As a system of rights, the law is concerned with individual rights more than collective rights.<sup>107</sup> The Lockean idea of rights<sup>108</sup> still stands valid and accurate that natural rights are individual rights, which the state is mandated to protect and guarantee.<sup>109</sup> The state or community cannot give the inherent rights to individuals but can only protect them.<sup>110</sup>

The legal conception of rights talk has often presented interests as natural rights to which each person entitles by being a human being.<sup>111</sup> In regard to children, however parents, foster parents, guardians and custodians must protect such interests or any person or group assigned to carry out such duty by the law. It, therefore, means that such guardians must act not in their interest but in the child's "best interest". In a similar conception of interests, "the best interest" means the superlative interest. It is not incumbent upon the

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<sup>104</sup> S 4(4) Children Act (No. 8 Laws of Kenya)

<sup>105</sup> *ibid*

<sup>106</sup> *Supra* n. 94

<sup>107</sup> *Ibid* p. 68

<sup>108</sup> Nicholas L. DiVita, "John Locke's Theory of Government and Fundamental Constitutional Rights: A Proposal for Understanding" (1982) 84 W. Va. L. Rev. 825

<sup>109</sup> William Burnett Harvey, "An Introduction to the Legal Systems in East Africa" *The Nature of Law and its Social Functions; The Natural Law* Chapter 3 p. 221

<sup>110</sup> *Ibid*

<sup>111</sup> *ibid*

child to express such opinion, but for legal institutions and those charged with responsibility for the child to articulate it.<sup>112</sup>

Wesley N. Hohfeld, in *Some Fundamental Legal Conceptions*, ably illustrates that rights have a correlative legal duty.<sup>113</sup> In the case of a child (one below 18 years), the question of duties that come with rights may be dispensed due to lack of capacity. On the same note, the rule demanding the opinion of the child is not only inappropriate but also does not make sense.<sup>114</sup>

The concept derived from the children international laws suggests, "All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated"<sup>115</sup>, as entrenched in the Children Act.<sup>116</sup>

The conception of best interest must include de facto adopted children with no discrimination of any kind towards adopted children. In the same breath, street and abandoned children are holders of the same rights and the rule must cover them and their interests as well.<sup>117</sup>

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<sup>112</sup> Supra n. 100

<sup>113</sup> W.N. Hohfeld, *Some Fundamental Legal Conceptions* (1919) New Haven

<sup>114</sup> Supra note 91 p. 72.

<sup>115</sup> S 4 of the Children Act (No. 8 of 2001 Laws of Kenya)

<sup>116</sup> The Children Act (No. 8 Laws of Kenya)

<sup>117</sup> Supra note 47



Rights and interests being claims are not for objects, but are claims against someone who is responsible for their fulfillment.<sup>118</sup> A child is represented in trust and does not have the full capacity to do so at a certain age or maturity. Age is essential in the best interests of the child's jurisprudence. The law does not distinguish the age bracket under which a child can make such claims.

This is not the case in Kenya; any person below the age of eighteen years is a child as captured in the UN Convention on the Rights of the Child, African Charter of the Rights and Welfare of the Child and the 2010 Constitution of Kenya.<sup>119</sup>

In practice, determination of majority age requires a scientific and psychological proof that a child of a certain age may not have full knowledge about some issues. In this case, the child is considered as being a vulnerable person whom the law must protect. An adult is considered mature and knowledgeable about risks and consequences and is therefore criminally liable. It applies a lot in matters on sexual conduct of adolescents with a particular focus on young women on defilement trials<sup>120</sup>.

#### **2.4 Factors for the spread of de facto adoptions in Kenya**

De facto adoption in Kenya has a nexus in various social, economic, cultural, religious and legal realities.<sup>121</sup> As shall be elaborated herein, child adoption has legal institutions

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<sup>118</sup>Supra note 54 p 4

<sup>119</sup> The Constitution of Kenya, 2010 art 260; "child."

<sup>120</sup> J. Shoshanna Ehrlich, *"From Age of Consent Laws to the Silver Ring Thing: The Regulation of Adolescent Female Sexuality,"* (2006) 16 Health Matrix 151 <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/hmax16&div=11&id=&page>> (24<sup>th</sup> May 2018)

<sup>121</sup> Supra n 19

mandated to protect and safeguard children's rights.<sup>122</sup> The 2010 Constitution of Kenya lays out fundamental rights in its the Bill of Rights.<sup>123</sup> Article 53(a) guarantees children the right to a name and nationality from birth, free and compulsory primary education, basic nutrition, shelter and healthcare, protection from child abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour.<sup>124</sup> Article 53(2) promotes the paramountcy of the child's best interests as a primary consideration in any matter regarding a child.<sup>125</sup>

#### **2.4.1 Poverty – Food Security**

On a case-by-case study, it has been verified that many children in Kenya suffer poverty and food insecurity.<sup>126</sup> The Case study by E. Kennedy and Pauline E. Peters of the Harvard University on, *Household food security and Child Nutrition: the interaction of income and gender of the household head* reveals as much<sup>127</sup>.

Food meant for a child must respect the child's nutritional conditions and needs.<sup>128</sup> In this case, it is not the availability of food that matters but, actually, quality.<sup>129</sup>

It is now right to discuss the question about the quality of food served to children in Kenya. Does the food fit with the standard on the *best interest of the child*? By any

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<sup>122</sup> The Children Act (No. 8 of 2001 laws of Kenya)

<sup>123</sup> Arts 19-51 chapter 4 Constitution of Kenya 2010

<sup>124</sup> The Constitution of Kenya 2010

<sup>125</sup> *ibid*

<sup>126</sup> E. Kennedy and E. Peters, *Household Food Security and Child Nutrition; the interaction of income and gender of the household head* (1992) Pergamon Press Ltd vol 20 no 8 p 1077 -1085 available at <[https://www.academia.edu/1037554/Household\\_food\\_security\\_and\\_child\\_nutrition\\_the\\_interaction\\_of\\_income\\_and\\_gender\\_of\\_household\\_head](https://www.academia.edu/1037554/Household_food_security_and_child_nutrition_the_interaction_of_income_and_gender_of_household_head)> (25-10-18)

<sup>127</sup> <[https://dx.doi.org/10.1016/0305-750X\(92\)90001-C](https://dx.doi.org/10.1016/0305-750X(92)90001-C)> (accessed on 29<sup>th</sup> April 2018)

<sup>128</sup> *ibid*

<sup>129</sup> *ibid*

estimation, Kenya is still very far from developing regulations touching on the quality of food, let alone its availability.

Another issue is that food may be available but not accessible. The reason for this is that not all parents or guardians have enough money to give appropriate diets for children they parent. For example, retail stores and markets may stock food but how many low-income families can access it? This is a situation made worse if the child is adopted through de facto mechanisms where the protection of their rights is not guaranteed.

#### **2.4.2 Low Funding – Donor Funds**

Kenya has, in reality, facilitated civil society and religious communities to provide such services that the government may not have funds to cater for. Many institutions promote childcare. However, not all children can access such services and facilities, owing to whole range of factors including priorities set by such charity institutions and their followers.

Nonprofit organisations in Kenya still rely heavily on donor funding which has been steadily dwindling through time. A few international ones that operate in the country have even changed their priorities while some have closed down due to strict government conditions. Similarly, community-based organisations have no access to public funds and may not have the resource financial capacity to implement their strategic plans absent of donor funding.

Arguably, this lack of donor funding exacerbates the nutritional challenges to children. Such children whose family background may notably support their survival can only rely on de facto adoption, where they abuse, or their fundamental freedoms and rights violated.

### **2.4.3. Socio-economic factors**

Unemployment of the youth in Kenya remains an obstacle with no looming solution<sup>130</sup>. Almost 70% of the Kenyan youth suffers unemployment<sup>131</sup>. Consequently, many in this lot rely on informal and precarious jobs that may not afford them dignified lives<sup>132</sup>. It is clear from the study that socio-economic pressure<sup>133</sup>, which many individuals and families face, puts child welfare in greater risk contrary to the constitutional provisions under Article 53<sup>134</sup>. Some parents even prefer their children to be adopted through de facto means, despite its consequences on the rights of the child<sup>135</sup>, as long as it offers some reprieve.

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<sup>130</sup> Samuel Hall, "Youth Unemployment in Kenya" (2017) UKaid British Council <[https://www.britishcouncil.co.ke/sites/default/files/ng\\_kenya\\_youth\\_employment\\_in\\_kenya.pdf](https://www.britishcouncil.co.ke/sites/default/files/ng_kenya_youth_employment_in_kenya.pdf)> (accessed on 25-10-18)

<sup>131</sup> Millicent Mwololo, "Tackling Youth Employment; Innovation, Counties now the Areas to Seek Jobs", Daily Nation, Monday July 16 2016 <<https://www.nation.co.ke/lifestyle/dn2/Tackling-youth-unemployment/957860-4664298-14fujrl/index.html>> (accessed on 25-10-18)

<sup>132</sup> Supra n. 117

<sup>133</sup> ibid

<sup>134</sup> The Constitution of Kenya 2010

<sup>135</sup> Supra n 2

#### **2.4.4 Parentage**

Parentage in Kenya is well controlled by the family law and existing customary institutions<sup>136</sup>. Beyond this, the extended family<sup>137</sup> remains the most tenable way of assisting parentless children. Many children with precarious family background often find relief by living with relatives for their educational, parental, nutritional, and healthcare needs. Still, Kenya rejected other kinds of parentage, such as same-sex couples' adoption<sup>138</sup>. Same sex marriage equally remains unconstitutional in Kenya<sup>139</sup>.

There is a prevalence of single parents in Kenya today many of them are mothers whose family status is unclear. Many single parents contend with hardships and challenges occasioned by lack of income, which sometimes leads them to abandon the children or allow them to be adopted through de facto means.

##### **2.4.4.1. Family identity**

In Kenya, the registration of persons requires that a child must be born at a hospital or other "authorized institutions"<sup>140</sup>. One of the rationales of this policy is to register a child and its family background<sup>141</sup>. The concept entailed in the policy is sound, but birthing sometimes happens elsewhere, after which parents then seek the formalization afterward.

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<sup>136</sup> Art 45 Constitution of Kenya 2010

<sup>137</sup> Supra n 97 p 118

<sup>138</sup> S 158(3)(c) of the Children Act (No. 8 Laws of Kenya)

<sup>139</sup> Art 45(3) of the Constitution of Kenya 2010

<sup>140</sup> Births and Deaths Act (Cap 149 Laws of Kenya)

<sup>141</sup> Ibid.

However, no child can participate in national examinations without a birth certificate, which is demanded to ascertain the identity of the child.<sup>142</sup>

Family identity is also enforced through the National Identity Card whose acquisition requires the names of both parents during registration.<sup>143</sup> The lineage of the child must also be captured through places of birth including, the village and clan name.<sup>144</sup> It is crucial that the family identify both for the sake of the child and for assurance of government to protect the child.<sup>145</sup>

Many, especially men, have criticized the ruling by Hon. Justice Mumbi Ngugi<sup>146</sup>. The ruling provides that the names of the fathers in the children born out of wedlock ought to be on the birth certificate. The point of contention is the obligation or avoidance of legal responsibility for the child ó depending on which side one is standing - by a parent who does not feel like being in the child's upbringing. However, it is essential to understand the context of the ruling in conserving and guarding the welfare and rights of children.

The dictum of the judge reads thus:

*õ...all children born out of wedlock shall have the right and or liberty to have the names of their fathers entered in the births registers. ”<sup>147</sup>.*

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<sup>142</sup> Paul Juma, õBirth paper a Must for Exam Candidateö *Daily Nation* 18 February 2010

<sup>143</sup> Births and Deaths Act (Cap 149 Laws of Kenya)

<sup>144</sup> *Ibid*

<sup>145</sup> *Ibid*

<sup>146</sup> *L.N.W v Attorney General & 3 others [2016] eKLR*

<sup>147</sup> *Petition 484 of 2014*

This key ruling by the High Court seeks to mitigate circumstances that may put the rights of the child into jeopardy when the natural father fails to take parental responsibility.<sup>148</sup>

The Births and Deaths Registration Act<sup>149</sup> provides for an entry of the father's name in the register. *"No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, under some recognized custom."*<sup>150</sup> The judge found this section to be inconsistent with the Constitution and therefore declared it null and void<sup>151</sup>.

About de facto adopted children, the birth certificate and the registration of birth should mandatorily include both parents, and not just as a joint request by the parents. According to this provision, it is demonstrated that the child may suffer prejudice of his or her rights and the ruling by Justice Ngugi Mumbi has been approved by many as a case law that seeks to ensure more protection of the welfare of the child concerning adoption law.

#### **2.4.4.2 Extended Family**

Extended family is a practice under the African customary law that has been reflected by African socialist thinkers. Even if the European colonisation of Africa deconstructed

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<sup>148</sup> *ibid*

<sup>149</sup> Births and Deaths Act (Cap 149 Laws of Kenya s 12

<sup>150</sup> *Ibid*

<sup>151</sup> *Ibid*

traditional family system, which accommodated extended family practice, African societies widely recognize them<sup>152</sup>.

De facto adoption in Kenya has thrived under such extended family practices in a humanistic socialism fashion.<sup>153</sup> A child who has separated from his or her biological parents is accommodated in and by extended family<sup>154</sup> in a de facto and informal process. The legal safeguards of such children lack adequate institution, the implication being that children's rights are susceptible to certain violations and abuses. There is no law protecting such children since the practice is within the traditions and cultural values under the spirit of the Constitution 2010.

Under African customary law traditions, relatives can adopt the children of their blood relatives and offer them protection within their families.

Rwezaura addresses issues of equity among family members in discussing the value of a child within a family structure in Tanzania<sup>155</sup>. He has noted the existence of discrimination based on cultural, economic and social complexities.<sup>156</sup>

#### **2.4.5 HIV/AIDs – Child healthcare**

The extended family has arguably been supportive in mitigating the effects of HIV/AIDS, as, in some instances, dependants of the deceased parents would only find guardianship

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<sup>152</sup>Supra n 72 p 118

<sup>153</sup>Ibid

<sup>154</sup>ibid

<sup>155</sup> Bart Rwezaura, *δThe Value of a Child: Marginal Children and the Law in Contemporary Tanzania* (2000) Oxford University Press volume 14

<sup>156</sup> Ibid



among members of the extended families. De facto adoption in Kenya has been useful in protecting essential rights and welfare of orphaned children.<sup>157</sup>

The civil society and community-based organisations are also involved in child guardianship. These include NGOs that deal with children's rights and welfare. Nevertheless, de facto adoption still thrives owing to funding challenges.

#### **2.4.6 Premature death of parents**

HIV/Aids continue to account for a significant number of deaths. Children who lose their parents in this manner suffer specific prejudice regarding their welfare and social rights, and are often in need of more guardians and relevant institutions.

This study demonstrates that too much bureaucracy in the implementation of the Children Act offers a recipe for abuses of child rights<sup>158</sup> in Kenya, contrary to the Constitution and the UN Convention of Rights of the Child.

Orphaned children are more vulnerable as compared to children with parents<sup>159</sup>. The numbers of institutions, which offer care for children orphaned by HIV/Aids, are on the decline while relatives are taking charge of such children also face myriad socio-economic challenges.

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<sup>157</sup> *Supra* n 2

<sup>158</sup> *W.J & another v Astarikoh Henry Amkoah & 9 others* (2015) eKLR

<sup>159</sup> *ibid*

#### **2.4.7. Cultural Factors**

The Children Act of 2001<sup>160</sup> outlaws perceived harmful cultural rites that exposure to risk and prejudices the rights and welfare of children under section 14. Accordingly, *no person shall subject a child to female circumcision, early marriage or other cultural rites,<sup>161</sup> customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development*". General application of this provision covers de facto adopted children as well. According to Rwezaura, *the underlying causes of child discrimination ought to necessarily be looked at as products of an interaction between economic and cultural forces*<sup>162</sup>.

Discrimination of children can sometimes appear as preferences placed on the male child as compared to a female child. Such discriminatory treatment of children is based on cultural factors that have been practiced from time immemorial<sup>163</sup>.

Such discrimination causes biological parents to allow their children to become de facto adoption arrangements, and even allow early marriages often to aged persons, across cultures.

#### **2.5. What works and what does not work**

First and foremost, it is right to address what works within a given set of child right legislations. The enactment and existence of laws that safeguards children's rights in

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<sup>160</sup> Supra n 4

<sup>161</sup> Supra n 96

<sup>162</sup> Bart Rwezaura, *The Value of a Child: Marginal Children and the Law in Contemporary Tanzania* (2000) Oxford University Press volume 14

<sup>163</sup> Ibid

Kenya already denotes appreciable progress. The 2010 Constitution<sup>164</sup> also highlights the rights to these rights. Favorably, Kenya has sanctioned several universal and regional legal instruments to cover these rights<sup>165</sup>. Besides, there are children institutions<sup>166</sup> including the juvenile court, which has powers as those of the High Court. There are rehabilitation schools<sup>167</sup> and remand homes<sup>168</sup> for correctional justice meant for children; an education system that is sustainable, and the National Council for Children Services.<sup>169</sup>

That said it is also important to admit there is no appropriate law to govern de facto adoptions. Elsewhere, institutions are underfunded and cannot possibly function and deliver effectively on their mandate. The juvenile jurisprudence is under-developed and lacks the backing of many right pieces of research that delve into children's affairs when compared with other countries' legal systems.

## **2.6 Research Findings on the adoption legal, social framework**

Law creates social institutions while some exist as associations, which must be registered under Societies Act in Kenya. It is essential that the understanding of adoption law not ignore the role played by social institutions in place. It is through such institutions that de facto adoption thrives.

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<sup>164</sup> Supra n. 11 art 53

<sup>165</sup> Art 2(5) and (6) of the Constitution of Kenya 2010

<sup>166</sup> Part V of the Children Act (No. 8 of 2001 Laws of Kenya)

<sup>167</sup> S 47 Children Act (No. 8 of 2001 Laws of Kenya)

<sup>168</sup> S 50 of the Children Act (No. 8 of 2001 Laws of Kenya)

<sup>169</sup> Ibid s 30

## **2.7 Conclusion**

De facto Adoption is a reality in life. It is widely practiced in Kenya. Many traditional societies in Africa and elsewhere, like in the US, embrace de facto adoption as a tool in securing relationships for many children who find themselves in domestic establishments through other means that may seem non-conforming to legislative edicts. The State should, as a matter of obligation and urgency, nurture and legally recognise de facto adoption to secure the rights of the children involved. It is a practice that cannot be ignored or wished away.

## CHAPTER THREE

### THE LEGAL FRAMEWORK

#### 3.0 Introduction

This Chapter analyzes existing relevant legal framework regulating children's rights and adoption law. The analysis in this chapter brings to the fore the rights of all children and highlights the legal gaps that disregard the rights of de facto adopted children. These laws comprise: international conventions and Kenyan statutes, including the United Nations Convention on the Rights of the Child (CRC)<sup>170</sup>, and African Charter on the Rights and Welfare of the Child<sup>171</sup>, the 2010 Constitution of Kenya<sup>172</sup>, the Children Act<sup>173</sup>, Kenya Gazette Legal Notice No. 23/2002<sup>174</sup>, Social Assistance Act<sup>175</sup>, The Penal Code<sup>176</sup>, The Statute Law (Miscellaneous Amendment) Bill, 2018<sup>177</sup> and the Marriage Act<sup>178</sup>.

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<sup>170</sup> Enacted in 1989

<sup>171</sup> Enacted in 1999

<sup>172</sup> Promulgated on 27 August 2010

<sup>173</sup> No 8 of 2001 Laws of Kenya

<sup>174</sup> Kenya Gazette Legal Notice No. 23/2002 gave effect to section 1 of the Children Act (No. 8 of 2001), the Vice-President and Minister for Foreign Affairs Prof. George Saitoti appointed 1 March 2002 as the commencement date for operation of the Children Act.

<sup>175</sup> No. 24 of 2013 Laws of Kenya

<sup>176</sup> Cap 63 Laws of Kenya

<sup>177</sup> Inserted section 72A in the Children Act, 2001 that mandates the Cabinet Secretary to oversee registration and close down of charitable institutions in the best interests of the child, and legitimized Child Welfare Society of Kenya as the national adoption society

<sup>178</sup> No. 4 of 2014

The legal instruments evaluated in this chapter follow a specific chronological order because there are historical gaps in the law that needs to be harmonized.

### **3.1 United Nations Convention on the Rights of the Child<sup>179</sup>**

This was enacted in 1989 and confers on member states a duty to ensure alternative care to children deprived of natural families<sup>180</sup>. Each state party has a responsibility to enact national laws to safeguard the interests of its abandoned children<sup>181</sup>. As well, state parties have to warrant an adoption system that safeguards the "best interests of the child" as overriding primary consideration<sup>182</sup>. Accordingly, child adoption laws of Kenya<sup>183</sup> should not be Eurocentric, but must reflect the state of Kenya's abandoned children and, in the most practical way, ensure they get alternative families in their best interests. The adoption law must not ignore the rights of the many children who find themselves in domestic establishments through other means that seem non-conforming to legislative edicts in Kenya.

### **3.2 The African Charter on the Rights and Welfare of the Child**

This was enacted in 1999, ten years after the CRC in 1989 and in realization for the need to regionally protect special rights, which are majorly abused against African Children and not universally. It provides for "the best interest of the child" as supreme. It reads,

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<sup>179</sup> adopted by General Assembly Resolution; per article 49

<sup>180</sup> *ibid* art 20

<sup>181</sup> *ibid*

<sup>182</sup> *ibid* art 21

<sup>183</sup> Children Act (No. 8 of 2001 Laws of Kenya)

"In all actions concerning the child undertaken by any person or authority, the best interests of the child shall be of primary consideration<sup>184</sup>". On this premise assessing Kenya's laws of adoption shall take into consideration the principle, "best interest of the child."<sup>185</sup>

Article 4(1) of the ACRWC provides, "In all judicial or administrative proceedings affecting a child who is capable of communicating his/her views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law".

### **3.3 The Children Act**

The Children Act<sup>186</sup> was enacted in 2001 to implement parental responsibility, fostering, adoption, custody, maintenance, guardianship, care, and protection of children, and to ensure proper management of children institutions<sup>187</sup>. Besides, the Children Act harmonizes and fulfills further domestication of the UNCRC<sup>188</sup>. Moreover, the ACRWC.<sup>189</sup> The Act<sup>190</sup> in consolidating all the children laws in one statute repealed Children and Young Persons Act<sup>191</sup>, Adoption Act<sup>192</sup> and Guardianship of Infants Act<sup>193</sup>.

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<sup>184</sup> art 4(1)

<sup>185</sup>" ibid

<sup>186</sup> (No. 8 of 2001 Laws of Kenya)

<sup>187</sup> Supra note 116

<sup>188</sup> Supra note 2

<sup>189</sup> Supra note 112

### 3.3.1 Safeguards for the Rights and Welfare of the Child

The Children Act gives a comprehensive catalog of children's rights that includes non-discrimination<sup>194</sup>, the rights to parental care<sup>195</sup>, education<sup>196</sup>, religious education<sup>197</sup>, healthcare<sup>198</sup>, protection from child labor and armed conflict<sup>199</sup>, name and nationality<sup>200</sup>, rights of disabled children<sup>201</sup>. It also assures protection from abuse<sup>202</sup>, harmful cultural rites<sup>203</sup>, sexual exploitation<sup>204</sup>, drugs<sup>205</sup>, the rights to leisure and recreation<sup>206</sup>, liberty and protection from torture<sup>207</sup> also, respect for privacy<sup>208</sup>.

In safeguarding the rights as mentioned above, The Children Act confers High Court with original jurisdiction to preside over any challenge to these rights<sup>209</sup>. Notably, the Children Act does not articulate rights to inheritance. This failure to include succession rights jeopardizes the reality of the de facto adopted child. There is no apparent provision

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<sup>190</sup> *ibid* Sixth Schedule s 200(1)

<sup>191</sup> The Children and Young Persons Act (Cap 141 Laws of Kenya repealed)

<sup>192</sup> The Adoption Act (Cap 143 Laws of Kenya repealed)

<sup>193</sup> The Guardianship of Infants Act (Cap 144 Laws of Kenya repealed)

<sup>194</sup> *Supra* note s 5

<sup>195</sup> *ibid* s 6

<sup>196</sup> *ibid* s 7

<sup>197</sup> *ibid* s 8

<sup>198</sup> *ibid* s 9

<sup>199</sup> Children Act *supra* n 5 s 10

<sup>200</sup> Children Act *supra* n 5 s 11

<sup>201</sup> Children Act *supra* n 5 s 12

<sup>202</sup> Children Act *supra* n s 13

<sup>203</sup> Children Act *supra* note 5 s 14

<sup>204</sup> Children Act *surpa* note 5 s 15

<sup>205</sup> Children Act *supra* note 5 s 16

<sup>206</sup> Children Act *supra* note 5 s 17

<sup>207</sup> Children Act *supra* note 5 s 18

<sup>208</sup> Children Act *supra* note 5 s 19

<sup>209</sup> *ibid* s 2 22(2)



conditioning a de facto parent to include the de facto adopted child, under his or her custody, as an heir to his/her property or estate.

The Children Act also bestows on the High Court unlimited authority to issue such orders, writs, and directions as it deems fit.<sup>210</sup> The challenge with this provision is that Kenya practices Common Law Doctrine. Its adversarial traditions abhor conflicting judgments and do not allow judges to intervene and initiate judicial action. The progressive realization<sup>211</sup> of children's rights is a claw back clause on the rights of children because it limits the court's power to ensure enforcement of these rights when the offending party is the government. The progressive realization clause exposes the rights of the child to abuse so long as the abuser can prove the inadequacy of resources. In reality, the implementation of the law is a challenge in ensuring that rights and obligations are respected. Such lacunae leave the de facto adopted child at risk of suffering abuses and violations in Kenya.

Although the *locus standi* on instituting claims against breach on these rights is open for any person<sup>212</sup>, only the parties can initiate a judicial action, in this case, a child can only do it through a representative. Even under this provision the rights of the de facto adopted child are still not adequately protected.

Ideally, the enforcement of the rights must be for the society other than just parents. The government must play the primary role in ensuring every child enjoys such legal rights

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<sup>210</sup> *ibid*

<sup>211</sup> *ibid* s 4

<sup>212</sup> *ibid* s 22(1)

and welfare as provided for by the law. It would be ill advised and in bad faith, for government to sit back and wait for someone to bring a case or issue in order to act.

Another disadvantage is in budgeting. Child welfare institutions are underfunded, and there is insufficient qualified and dedicated trained staff to take care of the needs of children especially in urban sectors. There is the inadequacy of professionals such as psychological counselors who can be deployed by the government to enforce the rights of the child as per the Act. Due to such scenarios, neglect, discrimination<sup>213</sup> Moreover, abuse of the child is still prevalent in some of the cases that appear in court. There are still several unreported cases that do not reach the public on discrimination, abuse, and neglect in the Republic of Kenya. It is in this lacuna that de facto child adoption thrives.

The non-enforcement of the rights of the child is aggravated by the failure to strengthen the Chiefs Act<sup>214</sup>, which remains derailed. Many Chiefs and their assistants are either not well remunerated or not remunerated at all. By weakening such administrative institutions at the village level, families go without protection and promotion. Family issues that were at the main camps are now seldom addressed as some family members resolve to "deal" with their issues at a personal level.

The Chiefs Act<sup>215</sup> is vague and lacks proper attention regarding the duty of the chief. It reads, "It shall be the duty of every chief or assistant chief to maintain order in the area in

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<sup>213</sup> Supra n 47

<sup>214</sup> An Act of Parliament that makes provision regarding the powers and duties of chiefs and to provide for matters incidental to that

<sup>215</sup> s 6 Chiefs Act (Cap 148 Laws of Kenya)

respect of which he is appointed, and for such purpose, he shall have and exercise the jurisdiction and powers by this Act conferred upon him over persons residing or being within such area." It does not say about the rights and duties of families and parents. It also says little has nothing much about the rights and welfare of the child. It is an over-generalization on the expectation of a chief. The Act<sup>216</sup> has had several repealed sections and now has few provisions that do not even capture the rights of de facto adopted children under the chief's jurisdiction.

### **3.3.2 Adoption**

Section 2 of the Children Act, which provides for interpretation, does not include the definition of the term "adoption." On the one hand, the proposed Children Bill, 2016 defines adoption as "the process through which a child is permanently placed with an alternative family and is provided with new permanent legal parents and severs all rights, duties, obligations, and liabilities between the child and a child's natural parents." On the other, The Children Bill, 2017 defines adoption as; "The process through which a child is placed permanently with a legal parent or parents following Part XII.

The High Court is given the discretion to make an adoption order upon application made in a prescribed form.<sup>217</sup> The duty of regulating policies on adoption matters is on the Adoption Committee, which is established and regulated by Minister<sup>218</sup>.

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<sup>216</sup> *ibid*

<sup>217</sup> *Supra* n 122 s 154

<sup>218</sup> *Ibid* s 155

The Act provides for adoption by Kenya citizens and residents of Kenya, as well as for international adoption<sup>219</sup>. However, the government of Kenya has since issued an indefinite moratorium banning inter-county and resident adoptions<sup>220</sup> Following the UNDP Report that ranked Kenya as a tier 2 sources and destination in child trafficking<sup>221</sup>. This indefinite ban leaves Kenya with only one statutory form of adoption ó local adoption, which involves the adoption of Kenyan children by Kenyans.

This form of adoption further subjects to the regulation of children who may be adopted<sup>222</sup>, and persons who can adopt. The Act restricts adoption by an Applicant who is,<sup>223</sup>

- (a) *“a sole male applicant in respect of a female child;*
- (b) *a sole female applicant in respect of a male child;*
- (c) *an applicant or joint applicant who has or both have attained the age of sixty-five years;*
- (d) *a sole female applicant;”*

Besides, the Children Act bars the granting of adoption order to an applicant who is not of sound mind, same-sex couples, unmarried joint applicants, a male who is not Kenyan or any person who has been convicted of any offenses against any child<sup>224</sup>.

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<sup>219</sup> Ibid s 162 and s 156(4)

<sup>220</sup> Supra n. 22; Moratorium on Inter-Country and Resident Adoption issued by Cabinet Secretary Hon. Kazungu Kambi on 22<sup>nd</sup> December 2014

<sup>221</sup> Supra n. 24; UNDP Global Report on Trafficking in Person (2014) UNODC

<sup>222</sup> Supra n 122 s 157

<sup>223</sup> Ibid s 158

In issuing an adoption order, the court has the discretion and may order the adopter to provide a bond to ensure a provision that the court may deem necessary. The court may also order that child remains a ward of the court, or order for a post-adoption progress-home study report or order the child to be nurtured in a particular religion<sup>225</sup>.

### 3.3.3 Parental responsibility

A parent is defined in the Children Act as *“the mother or father of the child and includes a person who is liable by law to maintain a child or is entitled to his custody<sup>226</sup>”*, and a foster parent as *“a parent registered under this [Children] Act to receive and retain a child for purposes of caring for and maintaining a child<sup>227</sup>”*. The Act narrowly vests parental responsibility the child’s biological parents<sup>228</sup> leaving out the many children who find themselves in domestic establishments through other means. Besides, it reservedly mandates a person with control and care of a child to act reasonably in all circumstances to promote and safeguard the child’s welfare<sup>229</sup>. Transmission of parental responsibility upon the death of biological parents of the child remains on either a testamentary guardian, guardian appointed by the court, a person with a resident order, or one appointed by the court. In the absence, of any of the said legal persons, a relative of the child, who should be the last in order of priority<sup>230</sup>.

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<sup>224</sup> *ibid*

<sup>225</sup> *Ibid* s 163(2)

<sup>226</sup> *Ibid* s 2

<sup>227</sup> *ibid*

<sup>228</sup> *Ibid* PART III ss 23 ó 28

<sup>229</sup> *Ibid* s 23(5)

<sup>230</sup> *Ibid* s 27

The significance of parental responsibility is that while it imposes duties on parents, it confers rights and freedoms on the children<sup>231</sup>. Parental responsibility is therefore paramount in safeguarding the best interests and welfare of the child. It is noteworthy that not all children live with their parents. For instance, orphaned children, abandoned children, or deviant children may not enjoy statutory parental responsibility. Also, some parents may not have the competency and capacity to take good care of children. Other causes may be poverty, illnesses, social problems, cultural problems, health challenges, disability, or any other pertinent reason.

Arguably, social institutions including civil society and faith-based organizations are expected to fill in the remaining gap. This assumption is no longer tenable as such charity institutions are becoming fewer by the day in recent years some have shifted their priorities due to lack of donor funding. In reality, there are children whose survival depends on the de facto adoption practices that conducted in good faith. Unfortunately, the Children Act, while vesting parental responsibility, assumes that all children are from natural families or statutorily adopted<sup>232</sup>. The Act ignores those children who find themselves in domestic establishments through other means that do not necessarily conform to legislative edicts.

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<sup>231</sup> Morris Kiwinda Mbondenyi, *International Human Rights and their Enforcement in Africa* (2011) law Africa

<sup>232</sup> s 27 of the Children Act (No. 8 of 2001 Laws of Kenya)

### 3.4 The Constitution of Kenya 2010

This was promulgated on 27<sup>th</sup> August 2010. It upholds the right for every child to parental care.<sup>233</sup> The right to parental care is an entitlement, which ought not to be a reserve for only children with natural families or statutorily adopted children<sup>234</sup>. It is incumbent upon the Children Act to ensure every child gets to enjoy the right to parental care, as a constitutional command on the government.

Access to Justice under the Constitution of Kenya<sup>235</sup> is meant to ensure children clustered among the weaker members of society access justice. It does not only mean taking disputes and grievances to the court of law but also deploying other mechanisms that include administrative and customary infrastructures. However, even in this provision, the government has not done much to enable traditional (customary) institutions for this role. Such institutions where, for example, councils of elders presided over civil disputes, are on the decline in Kenya. Article 48 that gives the state the duty to ensure access to justice for all persons is not reflected as a reality on the ground<sup>236</sup>.

The new administrative structure of Kenya, under the Constitution, 2010, emphasizes the criminal services, which the government oversees rather than the public welfare of the citizens that affect parents, children, disabled persons, and women.

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<sup>233</sup>art 11 of the Constitution of Kenya, 2010

<sup>234</sup> Ibid

<sup>235</sup> Ibid art 48

<sup>236</sup> ibid

The Constitution of Kenya rules that a child's best interests are important in every matter concerning the child<sup>237</sup>. Interpretation of this part of the law has been made by the courts, which also emphasize the principle "best interest of the child" as in Civil Appeal 30 of 2016<sup>238</sup>. It is true that the matter herein relates to a girl aged six who is now in the actual custody of her father<sup>239</sup>. The couple, as it is, is estranged, the father living and working for gain in Western Kenya and the mother was living and working in Eastern Kenya"<sup>240</sup>. The court of appeal overturned the appeal and re-directed the custody to the mother rather than the father against the lower's court by relying on the best interest of the child's principle<sup>241</sup>.

According to Jonathan Herrings, the law rules that in case of conflicts over the child, the interest of the child is paramount<sup>242</sup>. Consider a scenario involving two children separated from their biological parents, where Case A shall benefit Child 1, and case B child 2<sup>243</sup>. One of the separating parents would like to relocate the child from his jurisdiction to another country, which would raise the issue of conflict of laws concerning the rights of the child. Which would be the best interest of the child? The following facts draw from this case:

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<sup>237</sup> art 53 of the Constitution of Kenya, 2010

<sup>238</sup> *NMM v JOW [2016] eKLR*

<sup>239</sup> *ibid*

<sup>240</sup> *ibid*

<sup>241</sup> *ibid*

<sup>242</sup> The New Law Journal > 2011 Volume 161 > Issue 7467, May > Articles > Family / "Children: Children first: but which one?" ó 161 NLJ 724.

<sup>243</sup> *Supra* n 229



The welfare reports made it clear that the current situation of the children living with the mother was working well. The children were performing well and had settled at school. At the first hearing, the boys presented a document to the court setting out their reasons for wishing to move to Canada, which included a reference to the "dull and depressing" English weather; but also the fact they had enjoyed their visits to Canada on holiday and believed sporting opportunities to be better in Canada.<sup>244</sup>

Judge Walford noted the principles in *Payne v Payne*<sup>245</sup> governing applications for a court's wardship order which emphasized the paramountcy of the child's welfare. He accepted it was rare that to grant leave for relocation at the application of the non-resident parent<sup>246</sup>. However, he considered the case unusual due to the clear wishes of mature children<sup>247</sup>. The clarity of their views, and the fact that they were moving to a country they knew well caused the court grant leave<sup>248</sup>.

The exciting part of this case is that the judge relied on the notion that the mother envisages the best interest of the child when it comes to who should be granted the custody when two parents have to separate. Here is a case in which the best interest of one child preferred following the mother, who was relocating to Canada on the reasons provided above. However, the father had a good job in England, and one of the two children preferred staying with the father.

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<sup>244</sup> *ibid*

<sup>245</sup> *Payne v. Payne* [2001] EWCA Civ 166, [2001] All ER (D) 142

<sup>246</sup> *ibid*

<sup>247</sup> *ibid*

<sup>248</sup> *ibid*

The mother appealed, but only in respect of C (the younger child). She was, the Court of Appeal noted, persuaded by B's jubilation at the decision of the lower court. Indeed during the hearing of the appeal, B had already moved to Canada and started school there. Realistically the court would never order him to return.<sup>249</sup>

The Court of Appeal allowed the mother's appeal against part of the order relating to C. The critical objection to the first instance decision was that the judge had, in applying the welfare principle, treated the two boys as a "unit." In doing this, he had failed to consider the welfare of C in his own right.

Sir Mark Potter held: "An individual exercise requires in respect of each child, and where there is a conflict between the respective best interests of each child, the court must balance the welfare of one against that of the other in coming to its decision."<sup>250</sup> This means that, if the court concludes or acts on the basis that it is in the best welfare and interest of siblings to stay together, and there is a dispute as to where or with whom they should live, it must be particularly astute to come to the decision that involves the least risk to their collective welfare<sup>251</sup>.

The child's best interest and welfare must take into account individual welfare other than collective welfare as pronounced in the judgment above. In case of conflict of interests among the siblings, then the court must consider balancing of such interests in its ruling. Each child's interest must consider separately.

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<sup>249</sup> Supra 172

<sup>250</sup> *Re T and E (Proceedings; Conflicting Interests)* [1995] 3 FCR 260, [1995] 1 FLR 581

<sup>251</sup> *ibid* para 55

To summarize, the welfare of each child is subjective, and the court has to find a way to balance its interests where the situation so demands.

### **3.5 Social Assistance Act**

Social Security Act was enacted to ensure the realization of the Economic and Social Rights<sup>252</sup> moreover, give effect to every person's right to social security,<sup>253</sup> establish National Social Assistance Authority and render social assistance to persons in need<sup>254</sup>. Social Assistance under this Act includes social services and financial assistance. Such social services include prevention and reduction of child neglect cases, rehabilitation and adoption services<sup>255</sup>. Vulnerable children and orphans with no adoptive parents or guardians are among the persons who qualify for social assistance<sup>256</sup>.

The socio-economic status of a family is very critical for the wellbeing and proper protection of the rights and welfare of the child. Article 43<sup>257</sup> of the Constitution provides for social and economic rights by stating that every person has a right to the highest attainable standard of health. On the strength of this constitutional provision and the statute, a child must not suffer from similar social plights due to his or her family status.

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<sup>252</sup> Supra n 11 art 43; The Preamble Social Assistance Act

<sup>253</sup> Ibid art 43(1)(e)

<sup>254</sup> Supra n 179

<sup>255</sup> Social Assistance Act (No. 24 of 2013 Laws of Kenya) s 2

<sup>256</sup> Ibid s 17(3)(a) and s 20(a)

<sup>257</sup> "Social Assistance Act is An Act of Parliament that gives effect to Article 43(1)(e) of the Constitution and to establish the National Social Assistance Authority; to provide for the rendering of social assistance to persons in need and connected purposes."

A family is the natural and fundamental group unit of society and is entitled to both state and societal protection.<sup>258</sup> Government through this Act aims to ensure that the family is protected and empowered in order to perform its desired functions including protecting the rights, welfare and best interest of the child.<sup>259</sup> So, socio-economic status of the family should not render the child vulnerable and subjected to any abuse or violation of his or her rights and fundamental freedom.<sup>260</sup>

The National Social Assistance Authority has the mandate to implement the Act in question. It shall identify and provide for persons in social need. To this effect, any child including de facto adopted child entitles statutory protection appropriate for his or her needs echoed in section 3 of the Children Act No. 8 of 2001.

### **3.6 The Penal Code**

The Penal Code protects a child under the age of fourteen from abduction, trafficking, and illegal detention<sup>261</sup>. It provides a penal liability of seven years imprisonment to such abduction, trafficking and illegal detention<sup>262</sup>.

The Penal Code prohibits many child cases of abuse that may be related to sex, child marriage, or any other prohibited indecent act such as defilement and molestations. It is

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<sup>258</sup> 1948 UDHR

<sup>259</sup> Art 45 and art 53 of the Constitution of Kenya 2010

<sup>260</sup> *ibid*

<sup>261</sup> s 174(1) of the Penal Code (Cap 63 Laws of Kenya)

<sup>262</sup> *ibid* s 174(1)(a)(b)

this purview that the Code regards as safeguarding the protection of rights and welfare of the child.

### **3.7 Marriage Act**

Marriage law in Kenya has long been an issue of contention concerning monogamous and polygamous arrangements, and whether or not to legalize same-sex marriage. Similar questions arise on the scope of the right to adopt.

#### **3.7.1 Same-Sex Marriage**

Same-sex marriage in Kenya is still illegal as the law recognizes only heterosexual relationships. The Kenya society insists on keeping its cultural values, heritage, and patrimony when it comes to new forms of marriage already acceptable and legal in other jurisdictions. In this context, the adoption only recognizes a heterogeneous family constituted by a man and a woman. However, de facto is not regulated by the Marriage Act since it can occur in single parent or same-sex unions.

The law has no clear articulation on this practice as yet. The Marriage Act is the fruit of long legislative debate<sup>263</sup>. Children Act prohibits same-sex couples from adopting children.

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<sup>263</sup> No. 4 of 2014 Laws of Kenya

### **3.7.2 Islam Marriage**

Part VII of the Marriage Act is on those who profess Islamic faith<sup>264</sup>. Any issue regarding children rights and welfare fall under the Islamic law and creed as per the Sharia Law and Kadhi's court<sup>265</sup>. In general, however, civil process suffices. Under Islamic law adopted children known as "*kafala*"<sup>266</sup>. They are neither allowed acquire the family name of their putative parents nor allowed inherit wealth.

### **3.7.3 Polygamous marriage**

Marriage under customary law in Kenya does not prohibit polygamy. The parties must only express consent that is; a husband can marry other wives provided the first wife is knowledgeable and consenting.

Payment of dowry right has recognition under some customary law, which the Act also accords cognizance. Importantly, the rights and welfare of children get protection.

## **3.8 Challenges of International Law**

Perusing through the existing international legal instruments on adoption law reveals formidable and airtight law on adoption practices. The Convention on the Rights of the Child in relevance to the Universal Declaration of Human Rights 1948, and the entire International Bill of Rights, as well as attendant relevant protocols, demonstrates vast

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<sup>264</sup> *ibid* Marriage Act

<sup>265</sup> *ibid*

<sup>266</sup> *Supra* n. 58

legal literature on the adoption practices. The Hague Convention on Inter-Country Adoptions provides more on the adoption rules already captured in the CRC and Human Rights documents.

It is necessary to understand that international law is a soft law or a law of diplomatic consensus among states; it is, however, not municipal. For instance, the moratorium issued by the government of Kenya in 2014<sup>267</sup> to ban international adoptions could not stand, as it may be prejudicial to the child's rights and welfare, and negate the principle of the best interest of the child.<sup>268</sup> International instruments have no jurisdiction to reverse domestic law, policy or regulation. The same regulation issued by the government of Kenya suspended licenses of adoption societies<sup>269</sup>. Any international or resident applicant will therefore not be granted adoption orders until the moratorium is lifted. It calls for the re-evaluation of the principle "best interest of the child"<sup>270</sup>.

For perspective, trafficking in persons is a crime and must not happen anywhere in the world<sup>271</sup>. It is equally unfair for children whose protection may depend on intercountry adoption to lose such opportunity. The policy stands to be revised to secure the protection of the rights and welfare of the child.

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<sup>267</sup> Moratorium on Inter-Country and Resident Adoption (2014)

<sup>268</sup> *MS Av P K A [2009] eKLR*

<sup>269</sup> Moratorium supra note 263

<sup>270</sup> Moratorium ibid

<sup>271</sup> Moratorium ibid

### **3.9 Conclusion**

This chapter has analyzed the legal framework governing the rights and welfare of the child. It concludes that the Children Act, as the law on child adoption, has ignored the existence of children under informal parental care. This chapter shows that the Children Act is Eurocentric, and narrows the concept of child adoption. The Act fails to reflect de facto adoption, despite its prominence in Kenya.

Chapter four shall highlight the challenges, as caused by the gaps in the legal framework in this chapter that face children under informal parentage, in de facto adoption practice.



## CHAPTER FOUR

### CHALLENGES FACING DE FACTO CHILD ADOPTION IN KENYA

#### 4.0 Introduction

This chapter addresses the question on the efficiency of such body of law and the social institutions charged with a duty to protect and safeguard children's rights. It analyses the dilemma of children who find themselves with putative parents who abuse their rights because of the gap in the law.

#### 4.1 De Facto adoption process versus child abuse

A televangelist preacher, Bishop Gilbert Juma Deya, and his wife, Mary Gilbert Juma Deya<sup>272</sup> of the Miracle Babies Ministry are facing child offender charges in Kenya. The cases involve child theft and trafficking. Mary Juma Gilbert Deya, the appellant, was accused of three offenses<sup>273</sup>. The first was stealing a child contrary to Section 174 (1) (b) of the Penal Code with the particulars of the charge stated;

*"..on 10th September, 2005 at Kenyatta National Hospital, Nairobi, jointly, with others not before the court, with intent to deprive an unknown parent or guardian the lawful charge of unnamed child alias BABY "A" a child under the age of fourteen years of the*

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<sup>272</sup> *Mary Juma Gilbert Deya v Republic [2014] eKLR*

<sup>273</sup> *Mary Juma Gilbert Deya ibid*

*possession of the said child, she harbored the said unnamed child alias BABY 'A' knowing him to have been so taken, detained or enticed away”<sup>274</sup>.*

It is a strong case on de facto child adoption that serves as crucial evidence for the research.

In the appeal at the High Court, in which the appellant lost the case, Justice Mbogholi Msagha ruled as follows: *"I do not doubt in my mind that the appellant stole this child. That as a result, to justify the result she gave false information as stated in Count II and III. The offenses were proved beyond any reasonable doubt, and the convictions founded. If it is true that the convicted was found guilty of child theft, then it is allegedly true that de facto adoption in which the accused was involved in was in contravention of the rights of the child. She was found not to be the natural parent of the claimed child. She could not give birth, and she was seeking ways of adopting the child through the de facto mechanism that landed her in court."*<sup>275</sup>

However, many cases of child theft are not investigated and processed by executive and judicial authorities to their best conclusion. The Mary Deyaø case is one of the many several cases that involve child trafficking by so-called de facto parents<sup>276</sup>. There is a presumption that child offenders in Kenya find their way through corrupting some administrators who fake documents for them.

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<sup>274</sup> Mary Juma Gilbert Deya *ibid*

<sup>275</sup> *ibid*

<sup>276</sup> *ibid*

Under the disguise of faith, the Miracle Babies Ministry preacher exploited the legal weakness and engaged in child theft and trafficking against the international conventions, and the statutes. Freedom of worship in Kenya is constitutional and the government refrains from regulating religion. Often, some abuses this freedom, and de facto child adoption is a direct victim. The Mary Deyaa case is a relevant scenario.<sup>277</sup>

Even if the research is in the United States, in reality, Kenya is not only faced with child trafficking offenses but also violations of rights of children through illegal and informal adoptions that are neither statutory nor customary. In Kenya, same-sex marriages are infiltrating the system, but the government is still reluctant to observe and cognize the rights of it sex marriages.

Issues about test-tube children may get very soon into the Kenyan jurisdiction. At the moment, a test-tube child is not a pressing issue in the definition of de facto adoption as an adoption process outside legislative edicts.<sup>278</sup>

Faith-based organizations in Kenya governed by the laws of Kenya and cannot go around the laws of adoption that are in force in Kenya's jurisdiction. The extradition of Bishop Gilbert Deya (supra), justified by the virtue that the alleged crime occurred in Kenyan territory. The prosecution is in Kenya.

This project reveals that most children in de facto adoptions suffer child abuse. The child abuse cases of de facto adopted children brought before courts are but a small portion of

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<sup>277</sup> *ibid*

<sup>278</sup> *Supra n. 15*

numerous others that go unreported. Equally some of the child abuse cases are resolved in out-of-court processes<sup>279</sup>.

In the English case of *Lister & Ors v Hesley Hall Limited*,<sup>280</sup> the court demonstrated that *"Experience shows that in the case of boarding schools, prisons, nursing homes, old people's homes, geriatric wards, and other residential homes for the young or vulnerable, there is an inherent risk that indecent assaults on the residents will be committed by those placed in authority over them, particularly if they are in proximity to them and occupying a position of trust"*.<sup>281</sup>

The above case shows the replica of similar claims in the Kenyan institutions. Subjects in such contexts are vulnerable to sexual abuse due to abused informal parentage practices.

#### **4.2 De facto adoption and child sexual abuse**

Under the Penal Code, child sexual abuse or any other form of molestation and is a felony. De facto adoption does not provide sufficient grounds to violate the law and commit a crime. Crimes can equally occur in de jure adoptions.

The law provides that when a crime is committed, circumstantial evidence takes a subordinate role. Whether the victim was in a compromising situation or not, it is a crime.

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<sup>279</sup> Supra n 7

<sup>280</sup> *Lister & Ors v Hesley Hall Limited (2001) 2 ALL E.R 769*

<sup>281</sup> *ibid*

The legal system adopted in Kenya emphasizes retributive justice as opposed to, say, restorative or corrective justice. Accordingly, de facto adoption is not the problem, but the criminal justice system could be the problem. The proponents of this argument consider them beyond just the social framework in place.

The admission that social institutions and authorities charged with developing policies to protect the rights and welfare of all children do not function sufficiently is proof that de facto adoption is not the reason for the commission of a crime. The underlying reason is that administrators are relaxed when it comes to policy generation and subsequent implementation.

De facto adoption can function where there is restorative and educational justice in place. Retributive justice is good but not sufficient for enforcing the law. Enforcement must take into account social frameworks that can rehabilitate offenders and prevent a repeat of similar offenses other than just jailing the convicts.

In Petition 331 of 2011, Judge Mumbi Ngugi ruled thus<sup>282</sup>:

*“I declare that all acts of sexual and gender-based violence against the 1st and second petitioners and all students amount to a violation of the right to education under Article 43(1) of the Constitution and Section 7 of the Children Act.*

*I declare that all acts of sexual and gender-based violence against the 1st and second petitioners and all students amount to a violation of the right to health as*

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<sup>282</sup> *ibid*

*provided for under Article 43(1) of the Constitution and Section 7 of the Children Act.*

*I declare that all schools and school teachers are at all times under the legal capacity of a guardian and are under a duty to protect all students from sexual and gender-based violence or harm by teachers”.*

This groundbreaking judgment does not impute the crimes on the institutions but the persons charged with responsibility for children in such institutions.<sup>283</sup> To be clear, it is not the de facto adoption process that is under investigation, but the alleged "crime."

#### **4.3 Narrow literature on adoption legal framework**

As opposed to other jurisdictions, there is little documentation concerning the informal care and child sexual abuse<sup>284</sup> in Kenya. The case of Simon Harris created fear in street children, who were the targets of a sexual offense<sup>285</sup>. He had similar cases in England and Kenya. Harris ran a charity institution in Kenya from 1990 to 2013<sup>286</sup>. A convicted child sex offender, he would pick up children from the streets in his car and take them to

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<sup>283</sup> *ibid*

<sup>284</sup> Julia O'Connell Davidson, *Children in the Global Sex Trade* (2005) Polity Press Ltd USA

<sup>285</sup> Paul Redfern, "British man raped Kenyan street children" *Daily Nation* 18 December 2014 <nation.co.ke> (accessed on 27-10-18)

<sup>286</sup> *ibid*

his home<sup>287</sup>. The victims were boys as young as six years, who Harris sexually abused at his house within Kenyan territory<sup>288</sup>

The Harris case, which took place around 2014, could be one of the reasons the government banned intercountry adoptions as discussed previously<sup>289</sup>. Despite knowledge of Harris' past, Kenyan authorities allowed him to work as a "charity worker," which was just a front for his real intentions<sup>290</sup>. It was a London court that ordered an investigation on the suspect, subsequently jailing him for 15 years<sup>291</sup>. Harris was found guilty in almost all counts against him<sup>292</sup>.

The failure by Kenyan authorities to intervene and render justice to the offended children exposed legal gaps in Kenya's laws regarding juvenile justice. In contrast, being a British citizen, the UK government could pursue the wherever he was to bring him to justice<sup>293</sup>.

The small literature on child adoption practices is a recipe for more violations of children rights and welfare in Kenya. The Harris case is sturdy and groundbreaking, which

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<sup>287</sup> West Mercia Police, "UK charity boss Simon Harris jailed for Kenya child abuse- a British charity boss who abuse Kenyan street after luring them to his home has been jailed for more than 17 years" *BBC News* 26 February 2015 <bbc.com> (accessed on 27-10-18)

<sup>288</sup> *ibid*

<sup>289</sup> *ibid*

<sup>290</sup> *ibid*

<sup>291</sup> *ibid*

<sup>292</sup> *ibid*

<sup>293</sup> Theresa May, "New cyber unit to tackle child sex abuse in Kenya; British built cyber center in Nairobi will help bring paedophiles who target and abuse vulnerable children in Kenya to justice" *The Office of the Prime Minister* 30 August 2018 [www.gov.uk](http://www.gov.uk) (accessed on 27 October 2018)

demonstrates that a de facto adoption process that happens outside the law is one of the enablers of child sexual abuse in Kenya<sup>294</sup>.

Harris, who ran a charity in Kenya and was described by West Mercia police as the "most prolific sexual offender against children" they had ever encountered, was convicted at Birmingham crown court in December after victims' evidence via video link to Kenya.<sup>295</sup> The conclusion of this case demonstrates what ought to happen in a functional system.

#### **4.4 De facto witness tampering**

After briefly examining the doctrinal and normative aspects of de facto child adoption in Kenya, it now becomes clear that it fuels increasing despair and danger amongst victims and its omission from discourse animates much regressive case law<sup>296</sup> in Kenya. The present statute fails to address most virulent and direct manifestations of de facto child adoptions.

Most cases show that most de facto adopted children cannot successfully defend their cases in court or stand as witnesses to the offense. Part of this problem lies in the failure to address the problem at hand through legislative means comprehensively, and more because such victims find themselves under immense psychological pressure to confirm that it is challenging to protest violations of their rights and welfare.

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<sup>294</sup> Supra n 7

<sup>295</sup> <<https://www.channel4.com/news/simon-harris-sentenced-kenya-child-abuse-birmingham>> ( 4 May 2018)

<sup>296</sup> Sarah M. Buel, *De Facto Witness Tampering*(2014) vol 29 Berkeley J. Gender L. & Just 72



Their predators, the so-called de facto adopters, who threaten them to submission, often groom victims. In this issue, human rights could be instrumental as an alternative tool for dealing with elements of harassments and bullying of the victims as has been demonstrated in the Simon Harris case in Kenya<sup>297</sup>.

A British charity boss jailed for sexually abusing Kenyan street children has had his sentence reduced by two years.<sup>298</sup> Harris committed the offense while running a charity institution known as Green House<sup>299</sup>. The victims were street children ó a group amongst the vulnerable<sup>300</sup>. This is a typical case involving de facto child adoption that turns to be sexual exploitation of the child.

The offense occurred in the Kenyan jurisdiction, but Harris was tried and jailed by the court in London<sup>301</sup>. This is a sign that Kenyan legal system is still hollowed and deficient in legal tools in regard to protecting the rights and welfare of the children under de facto adoption, which makes witnessing tampering a reality in courts, including the disappearing of critical files in the registries and colluding with suspects and to offer/receive bribes to derail justice<sup>302</sup>.

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<sup>297</sup> supra note 289 Office of the Prime Minister, Theresa May on the Simon Harris child sex abuse case

<sup>298</sup> <http://www.bbc.com/news/uk-england-34602953> accessed on 4<sup>th</sup> May 2018

<sup>299</sup> ibid Simon Harris child sex abuse case

<sup>300</sup> ibid Simon Harris child sex abuse case

<sup>301</sup> ibid

<sup>302</sup> ibid ðNew cyber unit to tackle child sex abuse in Kenya; British built cyber center in Nairobi will help bring paedophiles who target and abuse vulnerable children in Kenya to justiceö

#### **4.5 Efficiency in Kenyan adoption law in protecting and safeguarding the rights and welfare children**

In Petition No. 8 of 2012<sup>303</sup>, reference was made to the failure by law enforcers to safeguard the rights of the petitioner as being an offense. A declaration to the effect that neglect, omission, refusal, and failure by the police to conduct prompt, adequate, proper and professional investigations into the first eleven petitioners' complaints of defilement violates their fundamental rights and freedoms. This failure by the executing authorities violates the laws on the right on children's rights.

The Constitution of Kenya at article 53(1) provides as follows:

*“Every child has the right to be protected from abuse, neglect, harmful cultural practices,<sup>304</sup> all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labor<sup>305</sup>.”*

The supreme law of the land provides for legal and social protection of the rights and welfare of the child in Kenya. The entire body of statutory law is also apparent on the safeguards that every child must enjoy as legal and natural right.

Addressing the research question as to whether Kenya's legal system is protecting the right of children or not, is clear that there are problems with law enforcement. Judge J.A.

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<sup>303</sup> *C K (A Child) through Ripples International as her guardian & next friend) & 11 others v Commissioner of Police / Inspector General of the National Police Service & 3 others [2013] eKLR*

<sup>304</sup> *Supra* n 47

<sup>305</sup> *Supra* n 11 art 53(1)(d)

Makau made it clear in his ruling as follows: *“An order of mandamus be and is hereby made directing the 1st respondent together with his agents, delegates and/or subordinates to conduct prompt, effective, proper and professional investigations into the 1st to 11th petitioners’ respective complaints of defilement and other forms of sexual violence”*<sup>306</sup>

Some jurisdictions do not recognize de facto adoption. The United Kingdom is one of those; where it is discovered to have happened, then the de jure process of adoption must be done. A child may also be adopted abroad under local laws in a country that is not a party to The Hague Convention or a designated country, but such adoption is not in the United Kingdom. The proposer will need to go through the necessary procedure to adopt in accordance with UK legislation<sup>307</sup>.

For more than three decades, de facto family relations have been a topic in the European Court of Human Rights. The courts have stated, *“Irish law has always had a somewhat uneasy relationship with the concept. At a constitutional level, Irish law places the marital family on a pedestal and excludes non-marital families from recognition. However, case law in the 1990s showed a willingness by the courts to indirectly recognize de facto families when applying legislation on guardianship, custody, and access. Two recent High Court decisions, concerning international child abduction and*

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<sup>306</sup> *C K (A Child) through Ripples International as her guardian & next friend) & 11 others v Commissioner of Police / Inspector General of the National Police Service & 3 others [2013] eKLR*

<sup>307</sup> Atkin's Court Forms > Immigration Vol 22 > Practice > C: ENTRY AND STAY: NON-EEA FAMILY MEMBERS WHERE SPONSOR NOT IN POINTS-BASED SYSTEM > 3: SPECIFIC MATTERS FOR ENTRY AND STAY AS A FAMILY MEMBER > (2) CHILDREN > 37. Types of adoption with an immigration element Lexis Nexis

*the rights of a lesbian couple as against a sperm donor, saw a more radical approach adopted, but an appeal from one of these saw the Supreme Court decisively reject the concept of the de facto family. This article will examine the boundaries of the definition of family life under Article 8 of the European Convention on Human Rights and assess whether Irish law, which provides limited recognition to non-traditional families, can be reconciled with Convention obligations<sup>308</sup>”*

Kenya does not have much jurisprudence on de facto family relations, and there is a need for the legal researchers and practitioners to work on research that would ensure a mechanism to register such relationships for better posterity and the protection of children found in such de facto scenarios. The definition must be founded on the jurisprudence as has been found in the Irish legal system and definition of what family life means at law.

Article 8(1) of the ECHR provides, "Everyone has the right to respect for his private and family life, his home and his correspondence." It gives rise to a negative obligation on contracting states to refrain from interfering with family life, save in the limited circumstances permitted by Article 8(2). Article 8 may also, in particular circumstances, give rise to certain affirmative obligations on contracting states to provide a legal framework that recognizes and safeguards family life.

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<sup>308</sup> Volume 26 > Issue 1, April > Articles > Irreconcilable Differences? (2012) Article 8 ECHR and Irish Law on Non-Traditional Families ó Int J Law Policy Family (2012) 26 (1): 31. Lexis Nexis Library (accessed on 4<sup>th</sup> May 2018)

A full discussion of the scope of obligations arising from Article 8 is beyond the scope of this article; the analysis will focus on the definition of the term 'family life', particularly in the context of non-marital de facto families, and the question of whether the obligations owed to such families are any different to those owed to traditional marital families.<sup>309</sup>

Addressing efficiency in the adoption law must take into account the legal interpretation of what family life is. What is the definition of marital statuses in Kenya according to the Marriage Act? What is the de facto family life in Kenya? What marriage unions are recognized and which ones are not, in the Kenyan legal system? The answer to the above questions should provide a proper trajectory for developing a better and functioning jurisprudence in the Kenya family law:

In line with the European Convention on Human Rights;

*“The Court recognizes that support and encouragement of the traditional family are in itself legitimate or even praiseworthy. However, in the achievement of this end recourse must not be had to measures whose object or result is, as in the present case, to prejudice the 'illegitimate' family; the members of the 'illegitimate' family enjoy the guarantees of Article 8 (art. 8) on an equal footing with the members of the traditional family. The Court in Marckx<sup>310</sup> stated that by guaranteeing respect for family life, Article 8 presupposes the existence of a*

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<sup>309</sup> Ibid

<sup>310</sup> *Marckx v Belgium (1979) ECtHR*

*family, and held that family life encompasses the ties between an unmarried mother and her child, as well as between near relatives such as grandparents and grandchildren. Equally, however, it is also clear that the Court is willing to accept a certain level of legal privileging of the marital family, and indeed its automatic recognition of marital families under Article 8 is arguably one example of this<sup>311</sup>. ”*

As discussed earlier, the Kenyan legal system is still in support of heterogeneous marriages that include husband and wife of opposite sex as opposed to the reading of other European jurisdictions that recognize same-sex marriages. Whether this might explain how adoption law works in safeguarding and protecting rights of the child is still a subject of many controversies that accuse Kenya of denying people their sexual rights, and that of assembly

The definition of family life is critical to understanding whether or not de facto adoption has *locus standi* in law. The concept of family life, on which Article 8 embraces<sup>312</sup> ó even where there is no cohabitation ó the link between a parent and his or her child, whether or not the latter is legitimate and although subsequent events may break that tie, this can only happen in exceptional circumstances.<sup>313</sup>

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<sup>311</sup> Ibid

<sup>312</sup> art 8 of the European Convention on Human Rights

<sup>313</sup> ibid

The Marriage Act 2014 provides for a legal mechanism under which family life in Kenya ought to be understood. Whatever union occurs outside the scope of the statute should be a de facto family life that does not have a locus in the Kenyan legal system as yet.

The question of a wife and husband uniting is one thing; it is quite another one when we address the rights of the child that arises out of such marital union. At any given time, the rights of the child are distinct from the rights of the parents and, in the event of divorce; the child shall be handled separately from the marital union of the parents. Should both parents die, the child's right to protection entrusts to a designated caretaker, guardian, foster parent, or institution empowered by the court. In a traditional system, such orphaned children get de facto adopted by willing relatives of the parents, who cater to its basic needs such as security, shelter, food, and health. To a large extent, education and ó in some cases ó inheritance rights, come from the adopting family.

#### **4.6 Child Marriage**

The law outlaws child marriages, and the Act is clear about it. Nevertheless, such traditional practices still thrive in some areas. Education has reduced by a significant margin the practice of child marriage in Kenya. The Penal Code, Sexual Offences Act, Constitution 2010, Human Rights Treaties and the UDHR and the African Charter on Rights and Welfare of the Child<sup>314</sup> all prohibit child marriage, which severely prejudices the rights and fundamental freedoms of children.

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<sup>314</sup> Supra n. 2

De facto adoptions, as a conduit for child marriages, have since been illegalized and criminalized. The Children Act and other family laws in place in Kenya also address the discrimination against the girl child. Often, such discrimination leads to abuse, neglect, and marginalization.

#### **4.7 Unregulated faith sector**

The case of the Republic v Gilbert Juma Deya<sup>315</sup> in Kenya is typical of how faith-based institutions can violate the rights of the child. There are many other reported cases involving faith organizations of violations of the rights and welfare of children. Defilement in Kenya is rampant amongst charity institutions<sup>316</sup> and faith organizations, often perpetrated by people placed in positions of power and trust which somewhat renders the faith sector non-compliant with the laws that protect and safeguards rights and welfare of the child<sup>317</sup>.

In a situational analysis of the practices related to unregulated faith entities, child abuse is common. Some individuals with no attachment to religious institutions pose as pastors, preachers, or healers and proceed to commit crimes against abandoned children in informal parentage.

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<sup>315</sup> Criminal Appeal Case 97 of 2011 - Kenya Law

<sup>316</sup> Paul Redfern, "British man raped Kenyan street children" *Daily Nation* 18 December 2014 <nation.co.ke> (accessed on 27-10-18)

<sup>317</sup> Paul Redfern, "British man raped Kenyan street children" *Daily Nation* 18 December 2014 <nation.co.ke> (accessed on 27-10-18)



#### 4.8 Weakened traditional socio-legal structures

Considering the social and legal change in Kenya, it is true that traditional legal systems get suppressed to the point of becoming irrelevant. However, Dr. Peter Onyango<sup>318</sup> in his book<sup>318</sup>, states African customary law persists and thrives in upholding specific cultural values that are crucial to the well being of the society.

The UNDP Global Report on Trafficking in Persons points to the weakening of family units for the prevalence of trafficking of persons ó where even relatives facilitate the trade. In essence family, ties are often abused to aid human trafficking, for instance, in cases where relatives entrusted with the care of family members who break their promise and profit from child exploitation.<sup>319</sup>

The crime does not have its basis in African customary institutions but, as explained in the document, relatives driven by greed engage in the vice.

Trafficking for forced labour and sexual exploitation are the most conspicuously identified forms though victims also get abused in many other ways such as being used for forced or sham marriages, benefit fraud and pornography, among many other reported by various countries.<sup>320</sup>

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<sup>318</sup> Peter Onyango, *African Customary Law System: An Introduction* (2013) Law Africa Publishing Ltd Nairobi p 109 "Quest for African Jurisprudence."

<sup>319</sup> Supra n 24

<sup>320</sup> UNDP Global Report supra note 24

#### **4.9 The efficiency of the existing Adoption in Kenya**

After in-depth consideration, of a de facto adoption practices in Kenya and establishing the gap in the law, it is now proper to evaluate the efficiency of adoption law in Kenya. It is to ask whether or not such a law effectively protects and promote the human rights of the child. Further, we must investigate the efficiency of such law given the violations of children's rights and welfare as entrenched in the *corpus juris* of Kenya.

The efficiency of the law discussed under what works and what does not; functions of existing adoption institutions and Family Law; the National Council of Children Services; the adoption committee; law enforcement authorities; as well as parents and institutions.

#### **4.10 Conclusion**

The findings in the previous chapters show that though the law protects the rights of children, this is not the case in actual practice on the ground in Kenya. Law enforcing authorities show laxity in carrying out investigations and prosecuting specific allegations involving children in informal parentage. Faith-based institutions or some individuals suspected of certain crimes against children abuse these children but can go scot-free. Simon Harris (supra) in the Crown Court of London is strong evidence that Kenya's law enforcers are either reluctant or disabled from carrying out their legally sanctioned mandate to protect all children's rights.

## CHAPTER FIVE

### SUMMARY, CONCLUSION, RECOMMENDATIONS

#### 5.0 Summary

The analysis of the socio-legal impact of de facto adoption practice in Kenya relied on empirical and scientific methodology as demonstrated in Chapter One. It has tested the objectives with justified literature as a requirement for the accuracy of the argument. It has also taken into consideration the testing of the hypothesis and how concepts relate to each other in a systematic argument. Finally, it has accurately looked at research questions that appeared at the proposal stage and elaborated in the body of the work.

The project findings have revealed most of the challenges obtained through both the primary and secondary data. The analysis also adopted a comparative approach in analyzing the topic in a critical realism paradigm of the research.

From the onset, the project has taken care of the reality as viewed and how it relates to the factual life of children in Kenya today. The part and role of the law of adoption in Kenya has been discussed and comments made to meet the needs of a critical approach to legal documentary research. The theories elevated for this design have served as lenses through which this project report has relied entirely on upon.

Most of the literature is on a thematic and topic-based approach to providing the reader with a logical and cohesive way of following the substance of the project in question.

## **5.1 Conclusion**

In conclusion, human rights of children suffer abuse under de facto adoption practices that are not subject to statutory regulation. Most cited cases show children under de facto adoption as being exposed to various and diverse abuses of their rights against what the law provides for in the constitution and other relevant family law statutes. It often leads to forced labor, trafficking outside Kenya, sexual exploitation and defilement, and exposure to health hazards.

## **5.2 Recommendations**

This project recommends the following undertakings by decision, law, and policymakers:

- 1) The legal framework must be enforced to the letter by the Director of Children Services to ensure safeguards to children in family settings under de facto adoption.
- 2) The National Council of Children Services should come up with an adoption legislation to provide and care for the adoption processes in light of the international convention and lift the suspension of inter-country adoption.
- 3) The Director of Children's Services must scrutinize social framework and confirm it to work in tandem to the law.
- 4) The Social Assistance Fund should also be proactively directed to child support institutions, authorities and societies to ensure there is no deficiency of resources in such institutions.

- 5) Children should be able to access medical care, primary education and recreational facilities for free and with no strings attached. Urban and city plans must be designed to fit the needs and rights of the children.
- 6) The Minister - Cabinet Secretary for Labour and Social Security Services should subsidize families and support them for their socio-economic needs.
- 7) Public institutions involving children should have counselors who are appropriately trained to handle matters related to children.
- 8) Street, orphaned and other vulnerable children in Kenya should have a better option for their rights and protection to be guaranteed as this research has revealed.

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