

**GENDER DIMENSIONS OF COURT AWARDED CHILD CUSTODY: A CASE  
STUDY OF THE NAIROBI CHILDREN'S COURT**

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## DECLARATION

This project paper is my original work and has not been submitted for examination in any other university.

Signed-----Date-----

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This project paper has been submitted for examination with my approval as the university supervisor.

Signed-----Date-----

**Prof. Owuor Olungah**

## **DEDICATION**

To Tendai and Thandiwe, what if gender really mattered in child custody cases?

## **ACKNOWLEDGEMENTS**

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## **LIST OF ABBREVIATIONS AND ACRONYMS**

ACRWC	African Charter on the Rights and Welfare of the Child
CA	Civil Appeal
HC	High Court
CEDAW	Convention on Elimination of all forms of Discrimination against Women
CRC	Convention on the Rights of the Child
DRC	Declaration of Rights of Children
EALR	East Africa Law Report
eKLR	Electronic Kenya Law Reporting
GOK	Government of Kenya
JBB	Judicial Bench Book 2016
KJSCCE	Kenya Judicial Service Code of Conduct and Ethics
UDHR	Universal Declaration of Human Rights
UNGASS	United Nations General Assembly Special Session
UNCRC	United Nations Convention of Rights of Children
UNHCR	United Nations High Commissions for Refugees
UoN	University of Nairobi
NACOSTI	National Commission for Science and Technology Innovations



## **LIST OF HUMAN RIGHTS INSTRUMENTS**

African Charter on the Rights and Welfare of the Child 1990 (ACRWC)

Bangalore Principles of Judicial Conduct

Convention on Elimination of all forms of Discrimination against Women 1981 (CEDAW)

Convention on the Rights of the Child 1989 (CRC)

Universal Declaration of Human Rights (1948) (UDHR)

## **LIST OF NATIONAL STATUTES**

The Children's Act No. 8 of 2001

The Constitution of Kenya 2010

The Guardianship of Infants Act (now repealed) Chapters 140 of the Laws of Kenya

## LIST OF CASES

*Buzmi -Versus- Sultan [1960] E.A 801 (A.A)*

*Wambwe -Versus- OKUMU [1970] E.A 578*

*Karanu -Versus- Karanu [1975] E.A 18 CA*

*ZAK -Versus- MA Nairobi High Court Petition Case Number 193 of 2011*

*SO – Versus- LAM Civil Appeal Case Number 175 of 2006*

*SMO -Versus- CMG Nairobi Children Case Number 1651 of 2013*

*TM -Versus-BMK Nairobi Children Case Number 586 of 2016*

*WMO -Versus- DAO Nairobi Children Case Number 1229 of 2012*

*CWN -Versus- ANM Nairobi Children Case Number 363 of 2014*

*MKN -Versus- ANK Nairobi Children Case Number 847 of 2017*

*GOO -Versus- CMM Nairobi Children Case Number 1407 of 2015*

*MAN -Versus- MON Nairobi Children Case Number 1427 of 2014*

*WDS -Versus- PWM Nairobi Children Case Number 1447 of 2015*

*LKK -Versus- FMJ Nairobi Children Case Number 903 of 2017*

*NMN -Versus- S DJW Nairobi Children Case Number 1220 of 2015*

*LNM -Versus- DMK Nairobi Children Case Number 922 of 2016*

*DVK -Versus- VW Nairobi Children Case Number 995 of 2017*

*BKD -Versus- COO Nairobi Children Case Number 1280 of 2015*

*CHM-Versus- CMN Nairobi Children Case Number 792 of 2012*

*DJA -Versus- JOM Nairobi Children Case Number 797 of 2017*

*AM -Versus- DK Nairobi Children Case Number 969 of 2017*

*HMV -Versus- S JKL Nairobi Children Case Number 446 of 2016*

*CMN -Versus- WNK Nairobi Children Case Number 396 of 2015*

*MB -Versus- MI Nairobi Children Case Number 553 of 2015*

*AWN -Versus- S AJ Nairobi Children Case Number 232 of 2017*

*ACM -Versus- AMN Nairobi Children Case Number 417 of 2011*

*SWM -Versus- SM Nairobi Children Case Number 671 of 2015*

*EWV -Versus- AKG Nairobi Children Case Number 588 of 2017*

*PNM -Versus- EKI Nairobi Children Case Number 41 of 2017*

*EA -Versus- JO Nairobi Children Case Number 1411 /2016*

*MWN -Versus- US FNK Nairobi Children Case Number 588 of 2014*

*CKK -Versus- MK Nairobi Children Case Number 1229/2013*

*EG -Versus- RNG Nairobi Children Case Number 565 of 2011*

*GNT -Versus- S FGW Nairobi Children Case Number 73 of 2016*

*PMN -Versus- ANM Nairobi Children Case Number 902 of 2015*

*RNG -Versus- EG High Court Nairobi Civil Appeal Case Number 95 of 2016 (being an appeal from Nairobi Children Case Number 565 of 2011)*

*FGW -Versus - GNT Court of Appeal Case Number 98 of 2016 (being an appeal form Nairobi Children Case Number 73 of 2016)*

*ANM -Versus- PMN Civil Appeal Case Number 14 of 2015 (being an appeal from Nairobi Children Case Number 902 of 2015)*

*JKN -Versus- JTK Civil Appeal Case Number 16 of 2012*

*MK -Versus- CKK Civil Appeal Case Number 51 of 2015*

*MWM -Versus- FNK Civil Appeal Case Number 11 of 2015*

*KMM -Versus- JIL Civil Appeal Case Number 99 of 2015*

*M.S.A -Versus- P.K.A High Court Case No. 6 of 2009 (being an appeal from Nairobi Children Case Number .278 of 2006)*

*MO -Versus- JO Civil Appeal Case Number 17 of 1779*

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## **ABSTRACT**

This was an exploratory study on gender based dimensions of Court awarded child custody with focus on the Nairobi Children's Court. The study examined six key informants knowledgeable in child custody law and gender issues. The study examined four in-depth interviewees for their experiences as litigants at the Nairobi Children Court. A sample of 30 court cases comprised the study population and data was obtained through key informant interviews, in-depth interview schedules and content analysis schedules. The study was guided by the attitudinal theory. This study could be described as a text analysis aimed at understanding the reasoning of the courts when awarding custody. For this study, and in accordance with legal theory, the courts verdicts were taken to reflect the main frame, if not the full line, of reasoning.

From the findings, it appears that courts are guided by the best interest principle when making decisions in a child custody matter. The assessment of what constitutes best interest however, seems to produce differing results as circumstances vary from one case to another. The result may be that mothers get custody often but that does not mean that the judicial officers uses their bias on gender to pre-determine the custody.

The study concludes that the best interest principle has done little to free the judiciary of the gendered construct of men and women's division of labour at the home front. The ideology of motherhood and fatherhood is closely associated with the gender roles prescribed by society. The study further concludes that perceptions of bias hinder access to justice in the short term but does much bigger harm to the fight for gender equality between men and women.

The study recommends that judicial officers should clearly set out their reasoning in their decisions of custody and reaffirm to parties that they are acting in the best interests of the child and will be serving neutrally, with their sole goal being an advocate for the child. It also recommends further studies in to the phenomena of gendered child custody awards with a bid to fostering open discussion about it and aid in reforming the judicial and legal systems to rid itself of perceptions and instances of actual gender bias in child custody cases.

## **CHAPTER ONE: BACKGROUND TO THE STUDY**

This chapter presents the introduction of the study, statement of the problem, purpose of the study, objectives of the study, the study questions, and the main assumptions of the study, the scope and limitations of the study and ends with the definition of key terms.

### **1.1 Introduction**

Court user's world over have legitimate expectations that courts of law will uphold equality when adjudicating cases brought before them (Oseko, 2012). Indeed, international legal instruments such as the Universal Declaration of Human Rights 1948 (UDHR) under Article 7 affirms equality of all human beings before the law and their entitlement to equal protection of the law devoid of discrimination.

In the global arena, the African Charter on Rights and Welfare of Children (ACRWC) 1990 provides that persons in charge of a child must act in its best interest; a provision that is mirrored in the Convention on the Rights of Children (CRC) 1989. The 1959 Declaration of the Rights of the Child (DRC) at paragraph 2 and article 5(b) as well as Article 16 of Convention on the Elimination of All forms of Discrimination against Women 1981 (CEDAW) reiterate this principle as of great importance in matters concerning children.

In South Africa, the best interest principle was part of common law prior to being enshrined in the Constitution and has received mixed reaction with some courts applying the principle broadly while others have totally ignored it as a constitutional principle opting to treat it as a common law principle (Bonthuys, 2006).

In adjudicating matters touching the welfare of children in Kenya, the guiding principle in law is the best interest principle as espoused by the Kenyan Constitution 2010 and the Children's Act, 2001 (Odongo, 2012). Family law provisions are succinct that none of a child's parents have greater claim over the other when it comes to exercise of parental responsibility (Gutto, 1979; Schiratzki, 2010).

The responsibility of care of a child is conferred equally by the provisions of family law to both parents notwithstanding their marital status (Odongo, 2012). Past legal enactments such as the Guardianship of Infants Act Chapter 144 of the Laws of Kenya (now repealed) did not only make the best interests of the child a factor of utmost importance in adjudicating matters concerning children but also stressed equality of men and women when it comes to their rights and duties over children (Gutto, 1979). Article 18 of UNCRC provides that State Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.

Courts are therefore, mandated by law to use the best interest principle when adjudicating disputes involving custody and maintenance of the child instead of considering the gender and gender roles of either parent as reason to award custody and maintenance (Johnson, 2014). This study therefore, set out to understand the rationale behind the many court awards and as to whether gender considerations were central to the ultimate decisions.

## **1.2 Problem Statement**

Parties in a court of law have a legitimate expectation that judicial officers will base their decisions on matters using the facts presented before them, the evidence and the law in an objective manner thus, maintaining the integrity of a judicial system should be one of its guarantees (Oseko, 2012). The Judicial Code of Conduct and Service for Kenya provides that a judicial officer shall carry out judicial duties without bias or prejudice which may be manifested in word or deed based upon sex among other socio-economic status and religion.

The breakdown of marriages or relationships involving children has seen parents initiate proceedings relating to the custody and maintenance of their children in courts (Gutto, 1979). As discussed above, the guiding principle for courts and the most widely accepted standard when making custody determinations ought to be the best interest principle (Odongo, 2012). However, this principle has come under attack for being too general and allowing manifest prejudice by courts especially when applied to award mothers the custody of children of tender age (Mnoonkin, 2014). There exists contention that gender bias continues to manifest in the



application of the best interest standard as courts delve outside legal knowledge and rules and instead make decisions regarding psychology and child development (Schiratzki, 2010).

Such perceptions of bias even without the backing of real evidence erode the special role of the judiciary in the eyes of court users. Court cases concerning parental responsibility should be based on a transparent evaluation of what custodial arrangement is suitable for the child. A court that rules that a mother is best placed to have custody of the child because she fits the image of motherhood departs from tenets of equality for all and entrenches deep gender stereotypes. Similarly, the notion that fathers get custody of children only if the mother does not conform to the set standards of motherhood is a big departure from the best interest principle and perpetuates a gendered way of making custody decisions (Schiratzki, 2010).

In Kenya, courts still consider economic stability as reason to award custody to either parent thus discriminating against the parent more often the mother who has no earning power but has been the primary caretaker (Gutto, 1979). Mothers on the other hand have been denied custody of their children for venturing out of marriage, while men are not subjected to the same standard of morality when seeking custody (Schiratzki, 2010).

Gender bias in the law and practice may hamper access to justice and protection in a significant way as cases decided before form judge made law and set precedents that must be followed by courts of co-ordinate or lower jurisdiction. A case grounded on a reasoning that is gender biased, will be followed by other courts leading to grave miscarriage of justice especially if the holding was deeply skewed (Cusack, 2014). Such gender issues in a custody hearing may come out in the way the judicial officer interprets the law or through procedures that impede participation by both or one of the parties to a proceeding (Welling and Mather, 1996).

In the clamour for equality, gender biased custody awards are counterproductive as they serve to cement conventional gender roles that relegate women to home keeping while putting men at the societal acceptable position of a primary provider. They further perpetuate gender roles that see men as incapable of nurture of their children after divorce or separation on one hand while on the other hand, vanquishing women to the role of primary caregivers thus creating

the perception that they are weak and incapable of survival without the support of men (Mcneely, 1999). This then feeds to the myth that mothers are characteristically better than fathers when it comes to bringing up of children and has been argued as having very devastating implications for the role of women and men in society (Gutto, 1979).

Several studies have been carried out in respect to child custody. Nielsen (2017) asserts that parents who seek the intervention of court in settling custody disputes achieve better outcomes for the child. Bauserman (2002) delves into the issues of child custody in a different light arguing for further enquiries on the topic of child custody with a bid to address the gap in the method of collecting data and the dearth in reporting statistical results.

Rafiq (2014) asserts that in Tunisian law, fathers do not as of right get custody of the children after seven years. Instead preservation of religion and welfare of the minor is the single most objective when awarding custody. Locally in Kenya, Kamau (2010) in her research on customary law and women's rights noted that under various customary laws of Kenyan communities, custody of children is expected to be exercised by the father.

From the above studies, it is evident that though the studies strive to deal with child custody cases, the same have not been looked at from a gendered lens. This research sought to bridge the gap and answer the question on whether gender and perceptions on gender roles are a consideration when deciding matters on child custody by courts. The inquiry was guided by the following research questions:

### **1.3. Research Questions**

- i. Is the children's court gender sensitive or neutral in their award of child custody?
- ii. Do Gender roles influence the court's assessment of the capability of a parent to look after the best interests of the child in a custody dispute?
- iii. Do gender considerations or the lack of them impede access to justice and delivery?

## **1.4. Objectives of the Study**

### **1.4.1 General Objectives**

- To assess gender dimensions of court awarded child custody.

### **1.4.2. Specific Objectives**

- To establish the gender sensitivity of court awarded child custody.
- To establish if court's assessment of the best interest of the child is clouded by parties' perceptions of gender roles and assumptions on motherhood and fatherhood.
- To establish whether gender considerations or the lack of it impedes access to justice and delivery.

## **1.5. Assumptions of the Study**

- The courts are insensitive to gender issues while awarding child custody.
- Lack of gender considerations impede access to justice and delivery.
- The best interest of the child is clouded by parties' perceptions of gender roles and assumptions on motherhood and fatherhood.

## **1.6. Justification of the Study**

There is gap on information on whether the gender and gender roles of a Plaintiff or Defendant in a children's matter before a court is a consideration when making decisions (Warshark, 1996). There is need to verify if indeed custody decisions from the children's courts are gendered. This will initiate a meaningful discourse around the issue of gender sensitivity or the lack of it in a child custody matter and how they not only impact on access and delivery of justice but on the gender equality and equity in the long run.

If the study finds that there are cases of custody awards that were decided purely on notions of gender roles that society has continually ascribed to either men or women, that would be a departure from the best interest rule. Furthermore, any ruling that assumes that mothers in full time employment are less of mothers while those fully engaged in care work that has no

financial benefit are deemed as mothers with no financial capability to support their children will be a perpetuation of a gendered construct of custody award process (Mcneely, 1999).

The findings of this study have the potential of aiding the institution of the judiciary to be alive to instances when gender stereotypes and myths inform the award of custody and maintenance to either parent. The findings also contribute to the body of knowledge around the growing phenomenon of family related disputes which result in custody and child maintenance cases and the fact that gender concerns are closely intertwined with family law issues.

### **1.7. Scope and Limitations of the Study**

This study was limited to the six children's courts that are housed at the Nairobi's Milimani Commercial Courts and the Higher Courts in Nairobi that sit to hear appeals from the six children's courts. Content analysis sought to compare cases involving custody and maintenance reported at the electronic Kenya Law Report (eKLR) adjudicated on or after 2010 which is the year the Constitution was promulgated.

To be specific, the study focused on cases adjudicated which had been decided on from 2015 to date due to the two-year rule that dictates that cases at the children courts of more than two years must be archived. The study was also limited to litigants whose cases have been litigated at the Nairobi children's court or at the High Court of Kenya in Nairobi.

One of the limitations of carrying out this study was the subjective nature of determining bias. A father who has been awarded custody based on the reasoning that the mother is an unfit mother may deem the decision fair while the unfit mother may perceive bias. Furthermore, custody and maintenance cases go to the core of personal law thus the study runs the risk of the participants holding back on vital information. To overcome these limitations, study participants were assured of anonymity and confidentiality throughout the study and informed consent was to be obtained prior to their participation. The study was qualitative in nature and quantified perceptions around gender concerns in court awarded child custody cases.

Another limitation of the study was in relation to getting study participants for the in-depth interviews carried out during data collection. As it is noted in the case laws, the courts use abbreviations when quoting parties in suits involving children to protect the identity of the parties. This is in line with the best interest principle as envisaged under section 76(5) of the Children's Act No. 8 of 2001 Laws of Kenya which prohibits the publication of a child or the child's relation's details in any publication or report. The researcher conveniently used snow balling method to get persons who had litigated cases as Plaintiffs or Defendants at the Nairobi's Children court or the appellate courts sitting in Nairobi.

The study hit one other limitation when the researcher was unable to interview children officers as they needed clearance from their supervisor who was out of the country. Therefore, the research did not have their direct experience in child custody matters.

Finally, it should be noted that greatest weakness of this study is that the cases analysed are taken to reflect the true verdict and reasoning of the court. The research had no ability to decipher the body language and the several reasons that inform decision making which do not find themselves in the courts record.

### **1.8 Definitions of Key Terms**

**Adjudication:** for purposes of this study is an institutionalized dispute-settlement process in which the court has power to determine a dispute using the law and facts adduced before it by disputants by themselves or their appointed representatives.

**Case law:** is law emanating from arguments and decisions made in court.

**A child:** means a human being below the age of eighteen years.

**Child custody:** refers to the raft of rights and duties parents or guardians have towards their children.

**Children's Act:** Provisions of law setting out and governing various aspects of the lives of children.

**Common law:** is a system of law emanating from English tradition where law includes written laws as well as court decisions.

**Constitution:** refers to the fundamental law of a nation.

**Family law:** refers to pieces of legislation regulating legal issues involving family relations.

**International instruments:** refers to the internationally agreed and adopted conventions and treaties.

**Legal custody:** is the right to make an array of decisions on matters of major significance concerning the child's life and welfare.

**Parens Patriae:** refers to the traditional role of the state as sovereign and guardian of persons under legal disability such as children.

**Personal law:** refers to the law which relates to the status of persons.

**Physical custody:** refers to the right and duty to provide a home for the child and day-to-day decisions required during the time the child is with the parent having such custody.

## **CHAPTER TWO: LITERATURE REVIEW**

### **2.1 Introduction**

This section reviews literature on the history of child custody and maintenance cases and the numerous changes that the system has undergone to date as well as areas that continue to the present concern. The review is carried out along the following topics: Access to justice and the role of court in child custody cases; gendering of child custody cases; paternal preference rule in child custody cases; maternal preference rule in child custody cases; and the Best Interest Principle in child custody cases. The section concludes by discussing the theoretical framework of attitudinal theory and its relevance to the study.

### **2.2 The Role of the Family Court in Child Custody Cases**

Substantive equality, as well as an informed and impartial judiciary should be a priority for the judiciary when adjudicating matters before them to retain the confidence that court users have in the court system (Jayawickrama, 2002). Children's courts determine the welfare of children in a matter where the child is not a true participant in the case (McLaughlin, 2009).

In a child custody dispute, there exists a tough balancing act that courts make between the soared gendered relations of men and women on one hand and the welfare of children begotten out of such relationships on the other hand (Difonzo, 2014). The essence of court adjudication is the notion that the state through the judiciary, exercises authority in a process in which parties are guaranteed a fair hearing, a consideration of the proofs and arguments presented for a just outcome within the provisions of the law (Eisenberg, 1975).

Child custody disputes resolved under the broad best interests of the child depart from this model in a significant manner as the issue for determination though touches on the welfare of the child, the child is not a true participant in the process and neither does it define those interests nor has representation in the ordinary sense (Difonzo, 2014).

The tendency for gender concerns to intertwine with family law and form a powerful force in child custody cases cannot be ruled out (Welling & Mather, 1996). It has been argued that family law provides one of the ways to ascertain the status of men and women in the society and thus merges with other factors such as ethnicity, class and ideology to form a very powerful force that can propel or impede the rights of women and men (Rangita, 2009). In most jurisdictions, provisions of family law though coined in gender neutral language, they are not completely immune to machinations of gender whether directly or indirectly (Welling et al., 1996).

Though gender in the judiciary has been looked at in terms of the number of women and men in the judiciary and the differential treatments women and men receive by the judiciary as an employer (Johnson, 2014), assertions that children courts are culpable of perpetuating gender bias during child custody case are rife (Difonzo, 2014). While claims of gender bias may sound unpleasant to the judicial system, it does play a definitive role in custody determinations and thus the need for further interrogation (Dutton, Hammel and Aaronson, 1997).

### **2.3 Gendering of Custody Decisions**

The gender debate as it relates to parental alienation is speculated to have started in the late twentieth century ignited by the courts decision to abandon maternal presumption for a more gender-neutral approach where the welfare of the child was the primary reason for awarding custody (Kaslow and Schwartz, 1987). Prior to the paternal rule, women had for some time enjoyed the right to leave marriages with their children and half of the matrimonial property. This was until the rise of feudalism in England which denied women the status of personhood and their female identity by ridding them of their right to retain real and personal property and the right to custody of their children upon separation or divorce (McLaughlin, 2009).

#### **2.3.1 Gender Bias and the Paternal Rule**

Until mid of the 20<sup>th</sup> Century, the judicial definition of a child's welfare was seen through a gendered lens and skewed in favour of the father with mothers seen as lacking legally enforceable parental rights (Difonzo, 2014). Historically, in England and the United States of



America, fathers got custody as of right since children were deemed as property of the father who enjoyed an unquestionable control in the feudal family hierarchy thus working to their favour when it came to the control of matters of custody of children (Foster and Freed, 1978). Granting automatic custody to fathers at that time made economic sense as men unlike women, had access to resources and could comfortably provide for the children (Difonzo, 2014).

### **2.3.2 Gender Bias and the Maternal Rule**

The gender bias flipped and courts developed and applied the tender year's doctrine where courts presumed mothers to be more appropriate custodial parents for young children (McLaughlin, 2009). This doctrine gave women a distinct custody advantage as the consensus of the time was that mothers were better suited than fathers to care for young children due to their motherly love and care (Johnson, 2014).

Children of tender age were believed to be entitled to care, love and discipline that only a mother could provide; court decisions at that time regarded the importance of a mother's love and nurture highly than the father's contribution to the child's life (Mnookin, 2014). This rule not only reiterate the concept that women bear the key duty for child care, but also denied fathers their right to be involved in their children's lives upon separation or divorce.

Courts were advised that a child's emotional solidity and protection of key emotional relations was of utmost importance when warding custody, thus courts needed to award all custody rights including the power to deny the other parent access to the child to the parent who had proved to have all these traits; usually the mother (Goldestein, Freud and Solnit, 1973).

Prior to the promulgation of the Constitution 2010, the Kenyan law provided that at the birth of child whose parents are not married to each other, the mother acquired parental responsibility as of right and while the father had to take certain steps including moving to court for parental responsibility for him to acquire it. This position has since changed as the said provisions were declared unconstitutional and nullified. The annulled provision had the effect of legislating the deeply flawed maternal preference by putting it into a statute.

Case law continually reinforced this rule by holding that it was in the best interest of a child of tender years for the mother to have custody unless the mother is shown to be unfit to have custody. Thus, the big debate arose why mothers would be held to higher behavioral standards than men.

For instance, around 1959 and 1967, the Court of Appeal ruled thus in the case of *Bazmi v. Sultana* (eKLR) the mother was better placed than the father to have custody of the minor due to its tender years. This ruling was made to affirm a similar ruling in the High court on this same case despite evidence being adduced in court to the effect that the minor had lived with the father comfortably and happily for three years (Odongo, 2012).

This holding by the court was used as precedent and the reasoning replicated in several other cases such as *Wambwa v. Okumu* (eKLR) where it was held that in the absence of exceptional circumstances, the interest of four-year-old female minor will well be taken care of if her custody is awarded to the mother.

In *Karanu v. Karanu* (eKLR), it was decided that the welfare of children was a factor to be given utmost attention and since both parents were engaged in employment and the minors were sickly, they needed constant care and attention, which only the mother and not the father could provide.

The spirit of the three holdings discussed above perpetuated the notion that mothers are inherently better than fathers when it comes to bringing up of children, firmly grounding the rule that young children's wellbeing is well taken care of if they are with the mother (Odongo, 2012). Mothers became the predominant choice in terms of child rearing, and it was rare that fathers were awarded custody thus making men adhere to higher standard of adducing evidence to convince courts that they were the better option for the custody of their children (Gardner, 2002).

### **2.3.3 The problem of gendering of custody decisions**

The gendering of custody decisions was and is if found to exist in our courts a departure from the provisions of the international instruments and our Kenyan Constitution which articulate shared parental responsibilities by both parents as vital for the child. Gendering of custody decisions progresses a biased concept of mothers as primary caregivers while relegating fathers to figures that only have economic power to fend for children (Schiratzki, 2010). This construct, if true is factually erroneous as research shows that influence of fathers and mothers on children has more to do with parental characteristics and not gender related characteristic (Lamb, 2004).

Gendering of custody decision fails to acknowledge the fact that parental influence on a child has nothing to do with gender related characteristics but parental characteristics; that mothers and fathers influence the child in dissimilar ways based not on the time spent with the child but rather the activities done during that time that have a greater impact on the child (Lamb, 2004).

Automatic awards of custody to either parent based on entrenched myths on gender and gender roles of women and men without putting careful thought on what will serve the interest of the child violates the rights of the very child sought to be protected (Rangita, 2009). Further, gender considerations in the children's court supposes that mothers with no financial muscles could get custody of their children as they receive financial child help from the father while fathers in the same situation are treated differently with no likelihood of receiving financial support but more likely to be denied custody of their children for failure to fit the bill of a father who is a breadwinner (Schiratzki, 2010).

Men around this time increasingly agitated their feeling helpless in children courts as family law seemed to favour women by backing their legal rights through the state (Rosen, Dragiewicz and Gibbs, 2009). This progressed the perception that children courts treat men and women disproportionately during divorce and custody hearings, reducing them to the role of financiers despite their having adduced evidence of having taken a more active role in parenting (Rosen

et al., 2009). This agitation, coupled with the rising divorce and separation rates in the 1960s prompted the debate on parental roles and custody issues and led to the adoption the best interests' standard, a more inclusive but less definitive standard of deciding custody cases (Mcneely, 1999).

In the 1970s, the push for gender neutrality in award of custody of children had already piled up and the notion that custody of children was to be given to mothers automatically began waning. A gender-neutral standard started being applied (Laufer, 2008).

### **2.3.4 Best Interest Principle**

The best interests' principle is an all-encompassing common law principle that has been incorporated in statute law to primarily assist courts and other institutions charged with the welfare of children in the decision-making process (Scott and Emery, 2014). The principle originated from the English Common Law tradition used to extend protection given to children found to be without care. It flowed from the *parens patriae* authority of the state and was adopted by courts to resolve disputes in which the state, could sue a child's parent on behalf of the child (Stickler, 1997).

The principle provides that a child's welfare is a key component in cases where diverse interests exist and are competing and that, that welfare ought to be considered whenever a decision is to be made concerning a child (McLaughlin, 2009; Mnookin, 2004). It further provides that if a legal provision construed in several other meanings the court ought to use the construction that serves the child's welfare and further evaluate the effects of its decision on the child (Laufer, 2008).

The Principle introduces a standard that puts the child's welfare at the center and vanquishes the gender attributes of the parents when making custody awards (Scott et al., 2014). It enables judicial officers to decide custody cases using the set down provision of the law and facts of evidence adduced by parties thus avoiding rulings and judgments founded on preconceptions (Moreau, 2004).

In Kenya, the Constitution 2010, shifted the paradigm to joint responsibility of both parents over a child regardless of whether they are married to each other thus effectively outlawing the gendered way of determining custody (Odongo, 2012).

The best interest principle has however, been condemned for being too pliable and uncertain as what is beneficial for a child is often hypothetical and requires the court to decide between the mother and father (Mnookin, 1975). Other authors have criticized the principle for disregarding the role of fathers in childrearing and encouraged nurturing role of women by using considerations that are general and allowing for the expression of the judicial officer's pre-conceived notions about child care (Laufer, 2008; Scott et al., 2014).

Despite these weaknesses and the raging debate on how best interest principle in child custody takes us back to the gendered way of making custody decisions, it has been lauded as the best option presented for resolving custody disputes as it relies on facts to objectively identify and protect the core essential rights of a child in custody disputes (Difonzo, 2014; McLaughlin, 2009).

## **2.4 Theoretical/Conceptual Framework**

### **2.4.1 Attitudinal model**

This conceptual framework was developed to explain decisions making by the Supreme Court. Its proponents posit that judicial officers ground their decision and base their decisions on the facts of a case before them as well as their individual partialities (Segal and Spaeth, 2002). The Attitudinal model was conceived during a period dominated by legal realism where judicial decision-was conducted in a logically structured system of laws and rules devoid of subjective preferences.

Glendon Schubert, considered the father of the attitudinal model posited that while precedent may inform judicial decision-making process, it is the judicial officer's ideological proclivities and leanings that influence how they make decisions (Segal et al., 2002). Johnson (2014)

observes that judicial officers' own experience and socialization on gender play an important and distinct role in decision making.

This is despite the legitimate expectation of every court user that judicial officers reach their decisions based on facts and evidence presented before them guided by provisions of law devoid of personal biases and attitudes (Oseko, 2012). This same expectation by court users is also reposed by judicial officers and has been argued as the reason for their overlooking the existence of bias when adjudicating cases (Tversky and Kahneman, 1982).

#### **2.4.2 Relevance of framework to the study**

Attitudinal model unravels the many facets of perception that influence judicial decisions often thought to be grounded on facts of evidence presented in court and guided by the applicable provision of law. It alerts court users to the many other factors that influence judicial decision making in the judiciary.

Decisions of trial courts are often final unless reversed on appeal or reviewed. It is therefore, important that judicial officers and other court users become sensitive to the various factors that impact their decisions, especially biased and prejudiced methods of treatment of individuals embedded in a judicial officer's socialization and embedded in the operating procedures, policies, laws or objectives of large organizations.

The attitudinal model explains that judicial officers make decisions based on their own views and beliefs thus end up making public policy through their decisions without calculating how the audience responds to their policies and the consequences of policy choices. Gender bias in child custody cases is made worse by the existence of attitudinal preconception on gender roles and coupled with fluid best interest of the child standard.

For instance, both fathers and mothers will have their child-rearing abilities evaluated through the lenses of gender roles. As a result of bias, women who would otherwise be considered not fitting the stereotypic standard of motherhood are more likely to stay in bad marriages and

relationships out of fear of losing their children while men who do not fit the stereotypic figure of a father who provides are less likely to move the court for custody of their children.

Resolution of custody disputes should be based on the welfare of the child devoid of the perceived gender roles of the parent unless there exist a strong nexus between the parent's gender and an adverse effect on the child. Then again neither women nor men can be lumped together as a homogenous group as there are so many cross cutting factors and very many forms of identities including the fluid state of socially acquired norms of masculinity and femininity (Earth, 2008).

## **CHAPTER THREE: RESEARCH METHODOLOGY**

### **3.1 Introduction**

This section discusses the methodology that was used to generate data for the study. It describes the research site, design, study population, sample and sampling procedures, data collection methods and data processing and analysis. The section concludes by discussing the ethical considerations that guided the study.

### **3.2. Research Site**

This study was carried out at the six Children's Courts located at the Milimani law courts within the City County of Nairobi. The City County of Nairobi is cosmopolitan with persons of different cultures and background living in there. The study was based in the six courts to enable access to diverse opinions from people of different walks of life on their lived experiences and perceptions of how courts make child custody decisions. Nairobi Children Courts serve all the Sub-Counties of Nairobi and thus receive cases from all these sub-counties. The registry at the Nairobi Children's Court is also distinct from the other registry thus making it easier to collect information.

### **3.3 Research Design**

The study adopted an exploratory design. The approach was mainly qualitative in nature with a view to teasing out issues of child custody from individuals who had heard firsthand experience or had in one way or the other interacted with the court system regarding cases of child custody. The interviews were carried out in a one on one manner with the various cadres of informants in the study.

Content analysis, in-depth interviews and key informant interviews were the main data collection methods. Study participants were conveniently recruited at the Nairobi Children's court registry for in-depth interviews while key informants were purposively selected. The data collected through tape recording for in depth interviews and key informant interviews and



notes for content analysis were analyzed in line with the study objectives. Verbatim quotes were used during data presentation to amplify the voices of the informants.

### **3.4. Study Population and Unit of Analysis**

The study was conducted amongst cases of child custody filed at Milimani Children's court by male and female litigants. The cases had been adjudicated on between the years 2011 to date but whose rulings or judgments had been rendered between the years 2016 to date. This is because the registry has a two-year rule on archival of filing away cases that have been adjudicated after two years. The children cases are not reported electronically and the physical files must be perused. The unit of analysis was the individual court case and the individual litigant.

### **3.5. Sample Population and Sampling Procedures**

Sampling for the study was convenient and purposive. The registers at the courts formed the sampling frame. The study conveniently sampled 30 cases at the Nairobi Children's court. The researcher afterwards purposively sampled four litigants whose cases had been litigated at the Nairobi Children's court and the Appellate courts in Nairobi.

Six key informants were purposively selected; two practicing advocates from the Nairobi Children's court and two judicial officers who had or were currently sitting and adjudicating on matters at the Nairobi children's court. Expert interviews were conducted with two gender experts randomly drawn from the National Gender and Equality Commission.

### **3.6. Data Collection Methods**

#### **3.6.1 Content Analysis**

The study reviewed 30 cases from the six courts at the Milimani Children's Courts using a content analysis schedule (Appendix 2). The researcher studied the facts, the law, the reasoning behind the decisions as well as the *obiter dictum* (a secondary authoritative observation made by a judicial officer in a case that is not binding on future courts under the doctrine of

precedent). Individual litigants on four of the cases whose outcome will have been appealed from the lower courts and finalized will be reached to illuminate their feelings and perceptions of the case outcomes.

The first part of the schedule aimed at establishing that scope of the study in terms of the relevant court forum and the case number for reference. The year when the case was filed is also captured as it is vital in pointing out the study to the regime of law applicable. Content analysis focused on cases filed and adjudicated on under provisions of the 2010 Kenyan Constitution. It also helps the study to establish the gender of the parties to the case and who between men and women are likely to initiate child custody disputes in court.

The second part of the schedule was to establish the circumstances that led to the filing of the case and the prayers made by different parties in the children's court as well as the legal issues that are mostly dealt with by the Children's court in custody matters.

Part three of the schedule is to bring out how courts answer the legal questions and what they consider when making decisions on custody and maintenance of children. Lastly, part four is to establish how often court's award of custody and maintenance are appealed against. On what basis the appeals or reviews succeed or failed and who between men and women are likely to seek review or appeal of the trial court's decisions.

Court cases are referenced to using case numbers. For purposes of this study, the information contained in the cases is of personal nature and thus to avoid violating personal integrity the decisions are therefore coded. These cases were analyzed based on the gendered assumptions and the general assessments of the best interest's standard as provided for by Kenyan law. Some cases were also analyzed in the light of the legal interpretations of the best interest's principle. This study could be described as a text analysis aimed at understanding the reasoning of the courts when awarding custody. For this study, and in accordance with legal theory, the courts verdicts were taken to reflect the main frame, if not the full line, of reasoning.

### **3.6.2 In-depth interviews**

For the lawyers the over 8,000 plus practicing lawyers only a few have specialized in child custody law and have a background training in gender. They were conveniently sampled from the website of the Law Society of Kenya database which indicates a lawyer's pre-dominant practice areas. Of the ten child practitioners, four of them were in active practice of the law. The researcher opted to interview two lawyers, one male and one female of over ten years practice experience. The two lawyers introduced the researcher to four gender experts and the researcher opted to interview two of the four experts who had a bias towards child custody law.

The consent of the key informants was sought before embarking on interviews using the key informant interview guide. Consent forms for the expert informants were sent via email and signed and mailed back after which the interviews were carried out on phone and results tape recorded and stored on a password protected computer, with only the author having access to the data.

For the in-depth interviews, it was challenging to get parties drawn from cases in the content analysis to interview since parties to cases use initials while reporting cases and do not usually indicate their cell phone or email address for ease of reach. The researcher opted to interview one female litigant who had come to obtain orders from the registry. The researcher then applied snowballing to get the other three litigants two males and one female who had also litigated at the Nairobi Children's court.

The researcher explained to them the purpose of the study and sought their consent. The results were tape recorded and stored on a password protected computer, with only the author having access to the data. Data was collected from the 4 litigants via an in-depth interview schedule (Appendix 3) which was administered by the researcher. The interviews teased out several experiences of the litigants and how their cases were settled, who between them finally got custody of the children and what in their opinion was responsible for the outcome. In each

case, the research explored whether the best interest of the child was observed or whether gender considerations were paramount in the decisions.

### **3.6.3 Key Informant Interviews**

These were conducted with six key informants selected based on their experience in gender and child custody cases. They included two family law practitioners, two magistrates who had previously adjudicated on matters at the Nairobi Children's court. The researcher also interviewed two gender experts knowledgeable on matters of children, the law and gender sourced from the National Gender and Equality Commission's database on gender experts in Kenya. The key informants provided information on perceptions on what informs judicial officers' decisions on child custody cases and suggestions for improving access to justice and ridding child custody cases of real or perceived gender bias if any. A key informant interview guide (Appendix 4) was used to collect data.

### **3.7. Data Processing and Analysis**

The data collected from secondary sources were subjected to content analysis, while the in-depth interviews and key informant interviews information was transcribed by the researcher and organized in accordance with the study themes. Analysis of the transcriptions followed in line with the study objectives. Before processing the responses, the completed research tools were edited for completeness and consistency. In general, thematic and content analysis informed the process.

### **3.8. Ethical Considerations**

Before embarking on the research, the researcher obtained ethical clearance from the University of Nairobi (UoN) and National Commission for Science and Technology Innovations (NACOSTI/P/18/65461/25257)) ethical review board and the Judiciary.

During field work, the researcher made the participants aware of the voluntary nature of the study and hence their having freedom to withdraw from the study if they deemed fit. An informed consent form (Appendix 1) was used to obtain the approval of the participant's participation in the study.

To ensure anonymity, the researcher used pseudonyms in the coding of participants information to ensure anonymity. The participants were also assured of confidentiality on the information they shared. All respondents only participated after an elaborate explanation was done on the nature of research, their free participation without coercion and their right of withdrawal at any stage was understood and accepted.

The judiciary's family division will get a copy as part of the feedback mechanisms to improve on their services and where possible engendering justice regarding children custody. It is equally envisaged that the outcome of the study will be published in refereed journals for wider circulation and sharing with the scientific community. The project documents will also be available at the different libraries of the University of Nairobi as reference materials for future researches and for use by students of gender and law among others.

## **CHAPTER FOUR: GENDER DIMENSIONS OF COURT AWARDED CHILD CUSTODY**

### **4.1 Introduction**

The chapter begins by presenting the demographic characteristics, further the findings are presented and discussed in line with the study objectives which include: To establish the gender sensitivity of court awarded child custody, to establish whether gender considerations or lack of them impedes access to justice and its delivery and to establish if court's assessment of the best interest of the child is clouded by parties perceptions of gender roles and assumptions on motherhood and fatherhood.

Discussions are geared towards assessing gender dimensions of court awarded child custody. The specific questions posed to the study participants were as follows: Are the Children's Courts in Nairobi County gender sensitive or neutral in their award of child custody? Do perceptions on gender considerations or the lack of them impede access to justice and delivery in the children's court? What influences the court's assessment of the capability of a parent to look after the best interests of the child in a custody dispute?

### **4.2. Period of study**

In the study, the regime of the law that is deemed relevant for this study is the post 2010 Constitution. It is important to note that the era before the coming of the Constitution 2010 relied on provisions of the Children Act on parental responsibility which provisions have since been declared null and void for being discriminatory and inconsistent with the provisions of the Constitution 2010.

### **4.3 Overview of Data**

The key findings of questions posed to the Key Informants, Gender experts and in-depth interviewees as well as deduction from the content analysis are presented in the tables below.

**Table 4.1: Key Informant Responses**

<b>WHO IS LIKELY TO</b>	<b>Less likely</b>	<b>Most Likely</b>
Get joint legal Custody	None	Men and Women
Get actual legal custody of the child	Men	Women
Get visitation or access rights to the child	Women	Men
Pay child support and maintenance	Women	Men
Apply to court for determination of custody and maintenance	Men	Women
Appeal or seek review for court decisions based on bias.	Women	Men
Initiate consent for custody and maintenance of children	Women	Men
Be issued with a notice to show cause why	Women	Men

**Issue one: Who is likely to get actual custody of children from court**

The women were most of the times awarded actual legal custody while men would get access or visitation rights often. The award of custody to women was on the basis that the children were of tender years and needed care, control, and nurture which only a mother was deemed to provide. However, where it was shown that the woman had neglected the children or was sexually promiscuous or was a drunk or mentally incapable, then custody would be given to the father. For children above the age of ten years, courts would make inquiries by interviewing the children to establish their wishes. Courts make these orders after having made a declaration that both parents have joint legal custody of the children. It was noted during analysis that courts rarely give sole custody to one parent. The tendency is to give shared custody between parties and have one party get actual legal physical custody with the other party getting access rights.

### **Issue Two: Get visitation rights to the child**

The research findings were that men would get access or visitation rights. In some cases, the access would be supervised if it is shown in court that the father poses a danger to the children. The study noted that in situations where the men perpetrated violence on the women when the relationship was subsisting, the rights would be granted to women or in most situations, women would mostly use that evidence to deny men access to the children.

### **Issue Three: Maintenance and upkeep**

The response from the key informants and other interviewees was mixed with 90% feeling that men were most likely to be ordered to pay maintenance while from content analysis, courts do hold that both parents would be ordered to pay upkeep equally. From the content analysis courts reiterated that responsibility of maintenance of the child was a shared responsibility. However, the feeling amongst men was that the portion given to men to maintain was costlier than for women thus not representing the 50/50 principle.

### **Move to Court for determination of custody and maintenance**

Women and in few cases the men move to courts to influence the decisions in which case society frowns upon them. Another way of looking at is that men are the ones who must be followed to provide maintenance thus the trend. Another suggestion given was that women have got several organizations working to protect their interests enabling them to move to court more often than men. The study also established that men shy away from adjudicating child custody cases in court due to the perception that they would not get any justice. Secondly, the notion that children belong to the mother coupled with the tender year rule codified in statutes and adopted by the courts make them shy away from moving to court for child custody and maintenance.



## 4.4 Discussion of Findings

### 4.4.1 Children's court: Is it gender sensitive or neutral in award of child custody?

The findings of this study were that the children courts are bound by rules and set precedents in making custody decisions as explained by the key informant below,

*“Judicial officers sitting to adjudicate matters in the children's courts are obligated to make their decisions based on the provisions of the law having related the facts and evidence adduced before them” (KI#6 Female Magistrate).*

The findings were further echoed by another key informant who opined that apart from children's rights being anchored in law, the provisions of law were also gender neutral.

*“...the Constitution of Kenya 2010 provides for expansive sources of law including international treaties and conventions and is quite gender sensitive and elaborate in as far as children rights are concerned.” (K1 #1Male Lawyer).*

From the study, the key guiding principle that underpin the decisions of the children's court was the best interest principle as stated in the below excerpt of a court judgment. This resonates with the argument that the best interest principle was introduced as a gender-neutral principle meant to focus attention to the welfare of the child in child custody cases (Scott et al., 2014).

*“All judicial institutions, and all persons acting in the name of these institutions, ... shall treat the interests of the child as the first and paramount consideration to the extent that is consistent with adopting a course of action calculated to (a) safeguard and promote the rights and welfare of the child;(b) conserve and promote the welfare of the child; and c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.” (CA Case Number 26 of 2013 NM versus SUWM).*

The children's court system determines the welfare of children in matters where the child is not a true participant in the case (McLaughlin, 2009). Its primary goal is to deliver an award that serves the best interest of the child without being caught up in the gendered division of labor at the family level as reiterated below;

*“Before creation of the children's court as a special court, children cases and concerns would be dealt in the matrimonial dispute courts. The gendered conflict given our adversarial nature of court system would see parties use children's issues to settle scores.... It should be borne in mind that in a children's case the child does not frame issues for determination, the parent does. Focus would in most cases shift from the interest of the child to the conflicting interests of the parents.”* **KI # 6 (Female Magistrate).**

Apart from its perceived gender neutrality, the best interest principle has been lauded for allowing courts to delve outside of provisions of law to serve the best interest of a child where necessary. For instance, in a custody pitting a negligent biological parent of a child and a grandmother who had been the primary sole custodian, courts used the rule to award custody to the grandmother as held below;

*“From the evidence presented by the 1<sup>st</sup> Defendant (grandmother) she has proved on balance of probability that, the environment within the Plaintiff's (father) home compromised the welfare of the minor... I am convinced that taking the child back to the same environment will not be in the best interest of the child. The 1<sup>st</sup> Defendant has demonstrated vide the photos that she has guarded the welfare of the child and she has demonstrated the ability to do so. In the best interest of this child, custody is hereby granted to the 1<sup>st</sup> Defendant with unlimited access to the Plaintiff* **(Nairobi Children Case Number 446 of 2016 H MV-vs- JKL).**

The best interest principle is also lauded for introducing positive bias as explained by the key informant below,

*“Courts have been able to introduce the tender year doctrine as the general standard of making custody where children of tender years are concerned courtesy of the best interest principle. Though this takes into consideration certain aspects of gender, it should be lauded*

*as having used gender attributes in a positive way. Men are not capable of breastfeeding young children that is a given. They may argue that they have a nurturing ability but the reality is that the woman is more alive to the needs of a child.* **“KI # 3(Female Gender Expert).**

The tender year principle came out as defining criteria used to award custody of children in 22 cases out of the thirty analysed,

*...It is settled law that a child of tender years’ best interests and welfare are where legal custody is awarded to the mother barring extenuating circumstances that would prevent the mother from providing protection and care of the child. Case law lends credence to the proposition that in cases of a child of tender years less than 10 years as defined under Section 2(1) of the Children Act 2001, custody is granted to the mother...* **(CA Case Number 99 of 2015 KMM-vs- JIL).**

However, the principle is not considered fool proof especially as it gives a lot of discretion to a judicial officer who may find opportunities to own preconceived ideas about the child rearing abilities of both men and women (Mooning, 2014). The study established that appeals and reviews of cases to higher courts were due to reasons of bias based on this rule. This argument was also echoed by a key informant, who observed as follows:

*“The best interest principle provides some wide criteria of factors that should be considered when awarding custody and maintenance of a child. This in my opinion gives leeway for judicial officers to use their experiences on gender roles of men and women to award custody and maintenance for as long they can explain it as being in the best interest of the child.”* **(KI#4 (Female Gender Expert).**

Further still, this study established that best interest principle had re-introduced the tender year rule as standard of awarding custody therefore defeating the very purpose for which it was introduced as is illustrated below,

*“The tender year rule as judge made law has become a general principle in award of custody of children of tender years. Where custody of a child of tender years is in issue, the mother should have the custody unless special circumstances are established to disqualify the mother from having such a child...A child of tender years as per the provisions of the law is a child under the age of ten years.” (KI#1 (Male lawyer)).*

*“When in court one is guided by the law and mandated to apply the law on a set of facts. We also have precedents which we must not depart from unless the facts in the cases before us materially differ from the facts that set the precedents. One such is that a child of tender years is best placed to be with the mother unless special circumstances exist to depart from this rule.” (KI#6(Female Magistrate)).*

The best interest principle therefore, provides an avenue for judicial discretion that genders the way custody decisions are made presenting a potential for bias as a judicial officer’s own conceptions of what an adequate parent is may be based on their socializations which may be gendered (Laufer, 2008).

The male participants argued during the study that making the tender year doctrine to be in the best interest of the child is akin to introducing the maternal preference rule thus counterproductive (Gibbs et al., 2009). This is put in perspective by the key informant who noted as follows:

*“I agree that the best interest principle was introduced to bring in a more gender-neutral parameter of determining custody awards. It has done the opposite by making such gendered rules of custody awards as the tender year rule general rule rather than the exception.” (KI#4 (Female Gender Expert)).*

The cases below are just a confirmation that court would use as a rule the age of the child to award custody of children to the mother to the exclusion of the father arguing that children of tender years required love, care and nurture that only a mother can provide.

*“... a child of tender age in respect to custody, care and control should be given to the mother in the absence of exceptional reasons. The reason being that a mother is generally best disposed to provide better quality care to such children than the father” (In HC Case No 6 of 2009).*

The reasoning that only a mother can provide love, care and nurture is also echoed in the below key informant 's excerpt,

*“The tender year principle is only reasonable way to go for a dispute pitting the mother and father of a child. How else would the man breastfeed the child if they were given actual legal custody of a one-year old child for instance?” (KI#2 (Female Lawyer)).*

Even though courts have tried to coin their judgments in gender neutral language as was the case in the below holding, custody was awarded to the mother as the only person capable of providing nurture and care to the child.

*“A parent, especially the resident parent is key to the development and growth of the children. Apart from being natural progenitors of the children, the parent(s) provide the social and psychological development of the children. At the initial stage, they, he or she provides the necessities of feeding, nurturing, comforting and loving the children and later at a more sophisticated level, their role is provision of guiding, socializing, protecting, educating and mentoring the children” (Court of Appeal Case Number 99 of 2015 KMM -vs- JIL).*

Such standards as seen in the content analysed had prompted appeals to courts of higher jurisdictions as the study established. Out of the seven appeal cases analysed, the basis for appeal in four of them was bias in the award of custody based on the tender year rule clothed in the best interest principle.

Another finding of this study was that courts would order both parents to have joint legal custody as being in the best interest of the child but proceed to give physical custody to mostly the mother based either on the tender year doctrine or the primary caregiver standard with the

father getting access or visitation rights. As much as this appears reasonable, it has gendered effects which may not occur to the court on a cursory glance (Jana and Reynolds, 1989).

*“Joint custody is certainly in the best interest of the child as a child has the benefit of both parents unlike where they are given to one sole custodian. The underside is that joint legal custody decrees provide for equal parental rights, but place a bigger responsibility on the custodial parent.” (KI# Female Lawyer).*

*“Joint legal custody means that both parents have equal authority or legal right to make important decisions affecting the child’s life. Courts do order that when one parent is making decisions about the child they need to consult the other. We get parties in cases coming back to court for court to stop the other party from interfering with their lives in the pretext of making decisions about the child or for courts to order that the custodial parent be allowed to move a child to another school when they move jobs and must relocate because the other parent has refused to allow the movement. We look at the circumstances and still using the best interest standard make orders that serve a child’s best interest.” (KI#6 Female Magistrate).*

It gives the nonresidential father veto power over most major decisions regarding the health, education, and upbringing of children who are not in his physical care.

*“My ex-husband and I were awarded joint legal custody despite my having asked court to grant me sole custody. I gave reasons and to me they were valid. He was not physically abusive to the children but to me. He would hit me in the presence of the children and it affected them greatly. He uses that joint custody to make decisions over my life. It is as though I never left. I can’t get a job in another place for fear of losing child support.” (II#4 Female Litigant).*

The study established that joint custody awards tended to put restriction on parents with physical custody who were mostly women while giving so much freedom to the non-custodial parent.

*“In marriages where there was a real sharing of responsibilities, joint custody is the way to go. Many joint custody decrees also provide that if the parent with physical custody moves without court approval, sole custody will automatically vest in the other parent. Significantly, no such restrictions apply to moves by the non-residential parent, despite his status as joint legal custodian and even though a move by him may disrupt significantly the joint custody arrangement”.* (KI# 4 Female Gender Expert).

Such double standards have been held to have serious ramifications not only for the child who is denied the inclusion of their fathers in their lives but rolls back the gains made in the gender Equality of men and women (Rangita, 2009).

#### **4.4.2 Court Awarded: Is it gender sensitive or neutral in ordering maintenance?**

The provisions of the Constitution introduce the principle of equality as observed below which is also the position favored by male participants in this study who maintain that courts are biased towards having men maintain the child contrary to the provisions of the Constitution.

*“It (the Constitution) bestows equal rights and responsibilities over a child on both parents. No parent should claim a higher stake over the other. If you recall the Children’s act at section 27 and 28 would automatically give the mother parental responsibility over a child born out of wedlock and specify conditions which the father had to meet to acquire parental responsibility. Those provisions juxtaposed against the provision of the Constitution were found inconsistent by courts and struck off for being discriminatory”* (KI#2(Female Lawyer)).

Some of the judgments from court proceed from the view point that parties must contribute equally to the maintenance of children as stated in the below judgment,

*“Each of the parties must contribute equally to provide food, shelter, clothing, education and all their (children’s) requirements even as custody is given to one of them. As for the issue of maintenance, both parents have an equal responsibility to provide as stated above.”*

The study established that in all the thirty cases analysed, maintenance was held to be a shared responsibility of both parents yet in 28 of the said cases, courts proceeded to order men to pay a higher percentage of the maintenance than women despite evidence being adduced in court that a good number of women had the capacity to maintain the children. It appears men had been reduced to the role of financiers (Rosen et al., 2009).

This finding does not augur well with the provisions of the article 53(1)(e) of the Constitution which provides for a child's right to parental care and protection including the equal responsibility of the mother and the father to provide for the child regardless of whether they are married to each other or not (Odongo, 2012). This is illustrated by one of the litigants interviewed as captured below:

*"I was taken to court by my wife alleging that I failed to provide for my children. She asked for custody and asked court to direct me to pay maintenance. By the time I was instructing my advocates to defend me, interim orders had been made for me to pay maintenance. Never mind that she was earning a lot more than me. I keep asking myself if the magistrate had just given me time to state my case, whether the outcome would have been different...Those children had been eating and going to school for the three months while away. There was no imminent danger that they would not be provided for that period...Did he make his orders based on the allegation that I was a dead-beat dad or what was the basis. Up today that question still lingers."* **(II#2 (Male Litigant)).**

Contrary to the equal contribution school of thought advanced by male participants and the Constitution, courts seem to increasingly depart from the 50-50% debate arguing that the best the Constitution did not envisage an equal sharing of responsibility.

*"Parental responsibility is shared and not equal based on the financial position of each parent. The mother as the resident parent has nurturing role to the children and the father to provide maintenance and upkeep of the children."* **(CA Number 51 of 2015 M K -vs- C K K).**



The below experience of a former litigant captures their court experience better as follows:

*“My advocate gave me the confidence that we have a law that provides for equal responsibility over children and the courts are obligated to follow it. I had previously asked some friends who had faced similar challenges and they were of the view that I should not go to court but seek a family meeting to iron out the issues. When the orders were made, I was given supervised access and ordered to pay the bulk of the maintenance. I asked my lawyers to explain in lay man’s language what had just happened. He appeared at a loss on what to say and suggested we file an appeal or review the orders” (II#1(Male Litigant)).*

Similarly, the case below as explained by one key informant reiterates the interpretation that the equality envisaged in the Constitution is not 50-50 %.

*“the courts do not necessarily view responsibility on 50-50% sharing of responsibility. Case law has it that such an interpretation would cause a miscarriage of justice as income levels of many couple are rarely at par...”.(KI#6 Female Magistrate).*

The question then that comes to mind is if courts should uphold the supremacy of the Constitution or make rulings regarding the present realities which considers the reality that women are actively involved in unpaid care work thus have a reduced earning ability. Courts seem to take this reality into consideration as seen below:

*“A court that states that both the man and woman should contribute equally toward the maintenance of the children fails to take this power relations between men and women into considerations and produces a biased result in such cases. The reality of our families is that women engage a lot in care work at the expense of their careers” KI # 3(Female Gender Expert).*

The study also established that in making custody awards, courts consider a raft of guidelines as elaborated below:

*“The Children’s Act under section 94 of the Act gives us factors to consider when making an order non- the financial provision to be made by a parent for a child. Key among them is financial means and capacity of the parties. Their obligations and the financial needs of the child. We do not only take care of the present but we also try to project all these things for the future. As you can see, it is not an easy thing for a judicial officer to determine the future needs.”***KI#6 (Female Magistrate).**

One such guideline is the financial means and capacity of the parents in which case a party can only provide for the children in accordance with their means.

*“Whatever financial responsibility is to be awarded, the same can only be financed through a respective parent’s incomes. Parents who are earning large amounts of money will obviously be required to provide more for the children than those with meager incomes....”* **(CA Case Number 114 of 2008 J.M.M -vs- J.M).**

Courts determine financial means and capacity of a party by ordering that parties file affidavits of means but also make inferences from the children’s officers’ reports.

*“Although the courts will usually determine the financial contribution based on the affidavit of means by the father and mother of a child, no party can make financial commitments even though capable of demonstration, which override his or her responsibility to maintain his/her child. The affidavit of means is useful in this regard but it is not a magic bullet, as parties will ordinarily exaggerate their needs while understating their income”* **(ZNN V MWN (2015) eKLR).**

*“I went to court and told the court that I had been a housewife during the marriage and with little schooling with no hope of getting a job. If I got a job it will not keep me and the children going at the standards they were used to. The courts considered that and allowed me to take up roles that would not require expending of money such as house chores”* **(II#4 (Female Litigant).**

The study also established that even though the courts seemed to consider the means of a party when ordering for maintenance, the same was only in favour of women as the men felt as though when stating their means, courts would proceed from the view point that they were not fully disclosing their means.

*“I doubt....it doesn't consider means for men maybe women. I pleaded with court to allow me to maintain at my standards and the court was adamant. I was told it was my duty to maintain the children. When I read her affidavit of means, the lies were outrageous. The court never asked her how she was paying her bills without my support for the few months she alleged I was not supporting. I am currently in discussion with my lawyer to appeal the orders of court as being too punitive...They have caused me financial embarrassment.” (II#2 (Male Litigant)).*

#### **4.4.3 Children's court: Is it gendered in treatment of parties' non-compliance with court orders?**

The study established that men perceived unfair treatment when it comes to non-compliance with court orders as opposed to women.

*“I have seen women alienate children from their fathers and courts simply order that they ensure to allow access...am yet to see cases where notices to show cause why have been issued to women for non-compliance...Now flip the coin and it's a man who has refused to pay maintenance, reasons for not doing so notwithstanding, would be lenient on them ordering that they allow access.” (KI#1(Male Lawyer)).*

The study also established that where women had not complied with court orders such as orders not to alienate children from their fathers, when they gave explanations such as that the man possess a threat to them or the children, the excuses were easily admitted in court. Even though some scholars such as Manns (2008) assert that women do not alienate the children from their fathers as a form of punishment but to protect themselves against violence perpetrated on them by men, there is need for court also to investigate why men are increasingly not paying up child upkeep instead of taking very punitive measures against them as illustrated by the below interviewee.

*“I was granted actual custody and the father of my children granted access every alternate weekend. We were ordered to maintain the children equally with him paying school fees and school related expenses as well as medical and a small contribution towards food while I pay my house rent, house help, and clothing and contribute partly towards food. He refused to pay up and I took a notice to show cause why he should not be arrested. I was advised by other women who had been through that that it is the way to go and he was arrested and has since been paying. I don't allow him access as he was violent to me and I doubt he has changed.”*

**(II# 3 (Female litigant)).**

Contrasted with the below circumstances where the woman had refused to comply with court orders, the different standards come out to light,

*“I have never had access to my children as ordered by court. Every time I go to court and voice this concern order upon orders is used to have her allow me access to my children. it is now three years. The only way I get to see the children is when I go to their school. Since classes are going on am not able to have meaningful conversations with them...I finally decided to take out a notice to show cause why against her. It has taken two months and nothing has been forthcoming...Doesn't the children court have any mechanisms of ensuring that their orders are respected. I have seen men in court facing civil jail or being charged for contempt of court. Why can't the same happen to women who refuse to abide by court orders?”*

**(II#1(Male litigant)).**

#### **4.4.4 Are perceptions of gender bias justified?**

When asked whether court awarded child custody was gendered, the participants were split in reaction. One of the key informants while refuting the assertion that child custody awards were gendered explained as follows:

*“There is a procedure for recusal of judicial officers in the event of potential conflict of interest or bias. No judicial officer wants to go through the motions of recusal as it paints a negative picture about your partiality. Then we have the best principle standard. It is fool proof and provides no opportunities for judicial officers to use their experiences on gender roles of men and women to award custody and maintenance?” (KI#4(Female Gender Expert)).*

This was further echoed by a former litigant at the children’s court who asserted as follows;

*“I don’t think the court favoured me because I am a woman. I have heard men in the estate where I live say children’s courts favour women. The magistrate explained why she gave me custody of the children. I had lived with them since their father left without a word and with no support. The court explained that the children were young. When I explained to court that I had been a housewife and could only afford menial jobs and the father had a well-paying job and was the one throughout the marriage supporting us financially, the court ordered for him to pay upkeep. The court also gave him a chance to share his story” (II#4 Female Litigant).*

The likelihood of gendered custody awards in the children’s court was also refuted based on the existence of the judicial code of conduct for judicial officers and the provisions for appeal and review which would check any form of bias by judicial officers. Study participants especially the litigants were not aware that judicial officers had a conduct by which they were bound to.

*“...In as much as judicial officers are also human, they are bound by a code of conduct that requires their impartiality and application of law properly to the facts before them. That leaves no room for bias based on gender roles informed by either their experiences or attitudes. They are also alive to the fact that their decisions may be appealed against.” (KI#2 Female Lawyer).*

There was also the observation that judicial officers are trained to be alive to instance of bias based on gender roles. This is exemplified in the quote below:

*“The nature of the children’s court is that issues that need to be canvassed in the divorce court find their way here... We are trained continuously on gender issues and concerns. We also have principles on judicial conduct that caution judicial officers against bias. Attitudes on gender roles do not emanate from the judicial officer but began way before the matter comes to court.”* **(KI#6 Female Magistrate).**

The male participants however seemed to hold differing views. They believed that the children’s court had not been freed from the machinations of gender in child custody cases. That in circumstances where gender was considered, it was in favor of women.

*“The courts consider the welfare and best interest of the child as a paramount consideration when awarding custody. This is in line with jurisprudence developed over time and adopted by our courts. Even so, the criteria used by courts to award custody and maintenance is pegged on socially ascribed roles of men and women”* **(KI#1 Male Lawyer).**

*“The court was never interested in my story. It never acted against my wife who has refused me access to the children. At one point when I was unable to pay maintenance due to some health problems I was experiencing, a notice to show cause why was issued against me. I had to borrow money and pay for fear of being committed to civil jail. Yet the court has not moved with speed to punish her for not obeying court orders to allow her access. Every time I raise the issue, it is brushed off.”* **(II# 1 Male litigant).**

As observed by (Boyd (1989b) the gendered way of making custody decisions do not come out in the readings of judgments as judicial decisions are written to justify the awards as was explained by the below key informant:

*“There are instances of gender bias that influence court process and decisions which cannot be easily discerned from the record of the court. And that is the biggest problem with bias. It can only be perceived but not tangible enough”.* **(KI#4 Female Gender Expert).**

The study also established that a judicial officer’s decision in highly contested children’s cases often has the input of other court users who have a hand in the outcome of cases as illustrated by this key informant:

*“We have parties who are not necessarily judicial officers but whose input in the custody dispute is material. However, establishing if such persons such as the Children’s officer have a background in juvenile justice to the extent that they will appreciate the gender relations between men and women is difficult. They are not in the mainstream employment of the judiciary and such regulations against bias may not apply to them.”* **(KI#2 Female Lawyer).**

The contribution of the children officer to the determination of a matter seemed to have a lot of weight in how child custody determination, Could the issue of gendered custody awards have begun outside court and is made as stated by the below key informant:

*“May be this problem of gender bias in the children’s court may be coming from some of the reports children officers do. Unlike a judicial officer who has guidelines and risks having their decisions questioned by courts of higher jurisdiction, the children officer’s report has no supervisions at all. Chances that a children’s officer perception of custody of children will influence the report are so high.”* **(KI#3 Female Gender Expert).**

The study sought to find out from the litigants their experience with the child’s officer and their views of the reports filed in court and it was mixed as follows:

*“She came and looked around the house and asked me how I could sleep every night in such a house without being bothered that my children were sleeping hungry. That I was living in opulence. I showed her a trail of Mpesa messages sent to my ex-wife. I also showed her medical reports for a debilitating nerve disease that was eating into my income. She remarked that that*

*was very little for a man living in such a big house. When the judgment was read it showed that the children report had indicated that I was a person of above average means. I was ordered to pay 90% of the maintenance. I am at this registry with my lawyer to file an appeal against those orders” (II# 2 Male litigant).*

#### **4.4.4 Impact of perceptions of gender bias on access to justice**

A party who feels they have no chance of having their day in court may shy away from approaching courts because they perceive a pre-determined case on how the matter will go. Boyd (1989b) avers that gender bias in custody awards exists but the awareness that it plays a role does not come out in cases.

*“The reports by media on children courts’ ruling in favour of women while awarding child custody reflect the correct situation as often women are awarded custody not based on bias but pure application of law. These notwithstanding perceptions of gender bias would lead to failure of justice and diminish public confidence in accessing justice through the court system. Parties would therefore, prefer alternative dispute resolution mechanisms.” (KI#3 (Female Gender Expert)).*

This study found that male participants were averse to going to court for resolution of child custody issues since courts had a predetermined way it would rule and mostly to their disadvantage as elucidated by the below litigant:

*“I only filed the case in court because my children whom I had been staying with were taken away to an unknown location. The police were not able to assist given the fact that the children were with their mother and not stranger. I need an order from court for which I would take to the police. I gave the children’s court the benefit of doubt. When I was not awarded legal actual custody, I confirmed that that was not the forum for men to get justice.” (II#1 Male Litigant).*



The above excerpt shows that men do not see the children's court as a viable option and where they approach it, it is mostly with an expected outcome on custody and maintenance awards and decided to adopt a wait and see attitude as was the case below,

*"I was taken to court for allegedly having abdicated as a father. She left I never chased her. I asked around for men who had been through the court process and the feedback I was given was shattering. I was told that chances of me getting custody were slim but I should prepare to dig deep in my pockets for maintenance so, I went to court to defend myself but was not expectant of positive results. I know I got the custody of the children but only after their mother abandoned them. Otherwise I would never have gotten them."* **(II#2 Male litigant).**

When asked if perceptions of bias contributed to disobedience of court orders both men and women participants answered in the affirmative. This was echoed by the below key informant as follows;

*"Yes, perceptions of bias would most definitely hinder access to justice. Men and women who perceived bias may be tempted to use underhand tactics to get custody of the children... When you see women alienating their children despite orders of access having been issued by court ...that send a message to our judiciary. That I do not trust you enough to look at my case with gender lens and award me orders that would protect my situation. The saddest bit about this is that the children bear the brunt of this"* **(KI#4 Female gender expert).**

Further still, the male participants in a bid to defeat justice would encumber the bulk of their income or fail to pay up maintenance or better still abandon their jobs when they perceived that the orders made by court on maintenance were biased.

*"I have observed many cases in court where men have lost faith in the court to the extent of devising ways not to honor court orders. In fact, any advice for them to seek review of the orders or appeal against unfavorable orders appear unpalatable to them as most prefer to suffer in silence as they pay up and have the access rights or just fail to pay up and have endless notice to show cause issued against them. I know of one gentleman who was suffering*

*under the weight of paying upkeep opted to resign from their jobs. At the end of the day it is the innocent child who suffers” (II#2 Male Litigant).*

The access to justice though takes a new twist for parties from the low-income brackets. The study established that people from low income areas preferred to keep custody disputes out of court despite having several organizations willing to offer free legal aid schemes.

*“I used to offer legal aid in the slum areas and low-income groups. Any suggestions to the women specially to go to court for redress on issues of custody were met with stiff resistance. Most women insisted that the children belonged to them and they would fend for them without the help of the men...One posed a question and asked...why go to court to force a man who is already not willing to support? Others thought that by going to court, the man would take away their children...There is a feeling of helplessness among such women” (KI#1 Male lawyer).*

This reluctance is put in better perspective by the litigant below and the study established that it had nothing to do with the perception of gender in court but more of gendered attitudes outside court.

*“I was called all sorts of names by my friends and neighbors for going to court. I was given free legal help...They said the mother struggles to fend for her children. It is true that my mates rarely go to court to ask for maintenance. Even the low-income earners among women would try as much as possible not to ask for support, they have somehow figured out survival tactics without men” (II#4 (Female Litigant).*

*“The court takes judicial notice that in our patriarchal society; the actual work of caring for the child is for the better part entrusted to women and other females in the society. The number of fathers who regularly care for their children is increasing can't measure to the number of women engaged in care work. Women still pay a higher price when they are perceived to be absentee mothers unlike absentee fathers; this should not be the case as the Constitution has introduced the equality of genders in providing parental care and protection.” (Children's Case Number 903 of 2007 LKK -vs- FMJ).*

This standard under the guise of the best interest also introduces a different and harsh standard of judging women's parenting unlike men in similar circumstances.

*"This rule (the tender year doctrine) on the surface appears to give lots of autonomy and power to the women when it comes to custody care and control of the children. The underside of this rule is the introduction of a very harsh standard of judging women's parenting skills by highly scrutinizing them, a standard I have not seen being applied to men in the custody cases I have done..." (II#4 (Female Litigant)).*

*"When in court I felt as though the case had shifted away from the child to me. I was asked by my ex-husband's lawyer about my drinking habits, the man I was dating and why I was asking for custody yet I had left the children with their father...I was asked to explain if the father had done anything untoward towards his children. I felt naked like my character was on the line." (II#3 (Female Litigant)).*

The scrutiny of women's mothering abilities is more intense than that of fathers. Women's nurturing skills come into question just because they do not adhere to the stereotypic image of motherly self-sacrifice as seen in the decisions made in the cases below:

*"The mother's disgraceful conduct, say her immoral behavior, drunken habit, bad company are some of the factors which would disqualify her from being awarded custody of a child of tender age." (CA Nairobi 16 of 1979 MO -vs- JO).*

*"When a court says the mother should have the custody unless special circumstances are established to disqualify the mother from having such a child...what are those special circumstances... a woman must appear innocent of such things as adultery, must be of sound mind and not a drunkard." (KI#4 (Female Gender Expert)).*

The tender year doctrine therefore, produces very negative results for women who don't fit the stereotypic image of motherhood as then they are constructed as an unfit mother from the very systems that are designed to protect them (Hughes and Kirby, 2015).

*“I have experienced cases where a man adduces evidence to show a woman's character as departing from what is societal attributed to her as a mother and voila she loses custody. On the contrary all a man needs to prove is that he is a good man and fond of his children. This good man versus bad adulterous wife introduces double standards when determining who gets custody of the child.” (KI#2 (Female Lawyer)).*

Contrast the above case with the ones below in which the father was given custody on the basis that the mother of the children did not stay with them and that the father had taken the children to school. The notions of good father and bad mothers comes out when determining custody.

*“The issue to determine is whether exceptional circumstances have been demonstrated by the Plaintiff why the mother should be denied custody... The mother has not provided any evidence to show that during this period the father compromised the welfare of the children in any way. The children officers report confirms as much that the Plaintiff was a good father. The actual legal custody of the children is granted to the Plaintiff”. (Nairobi Children Case Number 396 of 2015 CMN-vs- WNK).*

#### **4.4.5 Conclusion**

As discussed above the issues for determination in a child custody case are framed by adults and not the children themselves (Difonzo, 2014). The tendency for gender issues to intertwine with family law in child custody cases cannot therefore be ruled out (Welling & Mather, 1996).

It is also clear from the findings that parents never contemplate what custody arrangement would suit a child in case of divorce or separation. The default situation would be to accede the traditional notion that children belong with their mothers, a belief that is deep-seated within our social and legal provisions of the tender year doctrine and primary caregiver rules are to go by.

Even though the provisions of the law as well as judge made law are gender neutral in their language, there is a growing perception that gender is a factor in custody decisions. The best interests of the child standard appear to make the gender of the parents immaterial, and seems to require that courts consider the welfare of the children as primary as opposed to the gender attributes and roles associated with the parenting. However, this standard is subject to the individual prejudices of judges and dictates that judicial officers bank on their own values and ideals or those of children officers and other players in determining which parent should receive custody.

Despite judicial officer's reliance on precedent as well as the law whose provisions are touted as being gender neutral, women still receive custody in greater numbers than men. This trend shows that society at large see women as the traditional, proper caregivers for children. There is also an indication that our judicial and legal system devalue women's unpaid work on the home front echoing research findings to the effect that women 's unpaid care work goes unrecognized in custody cases yet the care wok put by men is recognized as it creates positive outcomes for men in custody bias (Boyd (1989b)

Though fathers are increasingly getting custody awards of children, the number does not come near that of mothers. Our society is still a long way from fully recognizing the rights fathers have with respect to their children, and from applying truly gender-neutral standards in a systematic fashion.

Given the research and the results of the study, it is important that society recognizes that there is a perception that gender bias remains in family law. Recognizing this bias and guarding against it will be essential in ensuring that children are given the best opportunity to thrive and that the child's best interest is at the centre custody awards by court.

## **CHAPTER FIVE: SUMMARY, CONCLUSION AND RECOMMENDATIONS**

### **5.1 Introduction**

This study assessed the gender dimensions of court awarded child custody from cases filed at the Nairobi Children's court and those appealed in courts of higher jurisdiction in Nairobi. Most specifically, the study undertook to establish the gender sensitivity of court awarded child custody and further establish if court's assessment of the best interest of a child in custody cases is clouded by parties' and judicial officers' perceptions of gender roles and assumptions on motherhood and fatherhood. Further, the study sought to understand if the gender considerations or the absence of them was an impediment to access to justice and its delivery by potential litigants. This study focused on contested custody cases where the judicial officers settle the dispute.

### **5.2 Summary**

The study established that the underlying criteria for determining custody and maintenance is the best interest's principle. This is after courts adopted the change in custody laws from the gendered rules of paternal and maternal preference rules to the more gender-neutral standard of best interest principle. However, even with the introduction of the gender neutral best interest principle, perceptions that the court's award of custody is based on the gender roles of parents persist. This bias is perceived more by men than women.

The study also established that the best interests' principle has done little to free the judiciary of the gendered construct of men and women's division of labour at the home front. The ideology of motherhood and fatherhood is closely associated with the gender roles prescribed by society. Findings of this research show mothers being awarded custody in a clear majority of the cases based on the reasoning that it is in the best interest of the child.

Men and women involved in contested child custody cases are still judged by these standards if the tender year doctrine is to go by. Through the reinforcement of gender roles, judicial officers reinforce the status quo, which helps to perpetuate the reconstituted patriarchal ideology ever-existent in family law.

The effect of the tender year doctrine rule for instance looks at men as incapable of providing nurture and can only be given custody of their children if the mother is shown to have deviated from the ideal image of motherly self-sacrifice. Fathers who don't have the value system to support their children financially are deemed as less of fathers as they don't adhere to the image of a father as a provider.

Judicial officers believe that that best Interests principle is gender neutral and is mostly administered without partiality in the granting of custody awards. Yet from the research findings, the best interest principle is seen to have given courts a great deal of latitude in applying it hence the likelihood of the influence of their socialisations on gender roles which may creep in and inform award of custody.

The role of fathers in child upbringing is less scrutinized than that of mothers who will be treated to a more gendered scrutiny of not fitting the stereotypic image of society's expectations of women. In general, and from the verdicts of court, it does not appear that courts duly consider the gender of parents or the assumptions held on mothering and fathering when making decisions on parental responsibility.

Some of the ideologies that find themselves reinforced in law and which the judicial officers have no choice but to follow need to be relooked at and even overhauled as recorded below. When a father is to be given custody, reasons such as he is a good father and fond of the child or rather has actively been involve in the care and upbringing of the child thus should get custody while such arguments are not used on women.

### 5.3 Conclusion

Custody decisions should reflect those societal changes, and should no longer discriminate against fathers. Children should not lose the benefits of interacting with both parents and experiencing a more holistic family life simply because their parents' divorce.

Parties in a court of law expects nothing short of objectivity and fairness in the outcome of cases presented before court. As relates to this study, courts appear to decide child custody cases in an impartial manner guided by the best interest of the child. A conclusion of the study is that court do not appear to unduly consider the gender of parents or assumptions on mothering and fathering in cases on parental responsibility, at least not from what is spelled out in the verdicts. The assessment of legal interpretations of the child's best interests, however, produces different results depending on whether a parent lives with the child or not.

The study establishes that cases on parental responsibility are complex and certain experiences may not openly be covered by the legal provisions thus the need for judicial officers utilising the best interest principle which introduces a discretionary standard of determining custody. It is at this point that perceptions of gendered custody awards creep in as the best interest principle is viewed as too malleable and allowing for expression of judicial bias.

Such doctrines as the tender year doctrine even though anchored in the best interest principle, introduce differing standards of judging the parenting of men and women. The study established that for a mother to be judged best equipped to satisfy the best interests of a child; and thereby get an award of custody she must behave according to a conventional image of motherly self-sacrifice. The father on the other hand can only be given custody if the mother is not fulfilling the stereotypical demands on motherhood.

The best interests of the child are assessed in accordance with a patriarchal model in which fathers as breadwinner are invested with powers as opposed to caretaking mothers. A custody case pitting dual earning parents each with a career equally taking care of the child and bread winning, will most likely see the father being ordered to pay more maintenance than the father.



It is worthwhile to note that with such doctrines as tender year doctrine, the perception of gender bias lingers thus impeding access to justice in the short term for parties who may be denied active involvement in their children lives. In the long run, such perceptions do much bigger harm to the fight for gender equality between men and women as the eventual custody orders granted subordinate to the role of primary caregivers while men are viewed as not capable of nurture. A distinctly larger responsibility for a child's welfare is imposed on the primary caregiver than on the non-resident parent thus skewing the responsibility of child upbringing and care to the disadvantage of one parent.

Judicial officers therefore need to move away from the comfort that the best interest principle is gender neutral and consider the present realities of child care and upkeep in families. Court ordered mediation for parties in child custody cases at early stages of disputes will cater for present realities of child upkeep and care where parents makes parenting plans suitable to their situations.

#### **5.4 Recommendations**

Emanating from the above findings and to make child custody adjudication a win-win situation for both parents, the informants and experts in this study mooted certain recommendations that if adopted would go along way in improving access to justice in the children's courts. Some of these considerations are enumerated as follows:

##### **5.4.1 Reasoned reported decisions**

Judicial officers should clearly set out their reasoning in the decisions and reaffirm to parties that they are acting in the best interests of the child and will be serving neutrally, with their sole goal of being an advocate for the child. Furthermore, they should provide an explanation and rationale for their decisions and call for reporting of their cases in the Kenya Law reports within the allowable parameters of protecting the identity of parties to the case.

#### **5.4.2 Collaborative Practices**

Judges and lawyers should encourage a collaborative process for families in child custody decision-making while seeking information pertaining to type and level of conflict experienced by women and children. Collaborative Practice provides family friendly lawyers and other persons who use a more peaceful approach which has the necessary structures that create an environment to deal with high conflict child custody situations outside court.

#### **5.4.3 Reform and revamp the position of the children's officer**

The children's officer acts as the eye of the court in matters where the court cannot perceive from the pleadings filed. We need to adopt to empower children officers to the level where they frame issues in a child custody matter and file the same in courts as a friend of the child. This will remove focus from the parents to the child. Further still, where children officers file children report in court the same need to follow a guide on the scope of what they should interview. This will ensure that the reports filed in court guide the judicial officer by giving information that is real about the realities of a child's custodial arrangements.

#### **5.4.4 Commission of further studies**

The study only shows a perception of bias but not the existence of it. Further studies could differentiate the different cases and help in reducing the perception of bias. More studies are needed to more accurately measure bias in the family court system. A gap exists in Kenya on available literature on the phenomena of gender bias custody awards. The Perception of bias makes parties shy away from court. More studies should be done around how child custody cases are resolved even outside court. It is important to look beyond a content analysis of custody case law, because the language of legal documents often distort the experiences of the parties in custody matters. The legal text is a good starting point when examining how patriarchal traditions are perpetrated in legal discourse, and especially in legal method, but one must not stop their investigation there.

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## APPENDICES

### Appendix I: Consent Form

Good morning/afternoon, my name is Stella Amisi Orengo, a Masters of Arts student in Gender and Development Studies at the University of Nairobi. I am carrying out a study on the gender dimensions of court awarded child custody at the Milimani Courts within Nairobi County. You have been selected as a participant in this study by virtue of being a litigant in the children's court in Nairobi having filed a case at one of the six children courts in Nairobi. I undertake that the responses and reactions you give to my questions will be kept strictly confidential. There will be no disclosure of your name nor will it be kept in my records and please note that there is no wrong or right answer in this study.

Your participation is completely voluntary and should you feel the need to discontinue with the interview you should forthwith inform me. I however note that your experiences will be very helpful to different stakeholders in the justice system as it will help improve delivery of justice with due regard to the unique gender needs of the litigants. The interview will take approximately thirty minutes to complete. Do you agree to be interviewed?

Please sign here as evidence of your informed consent.

Sign \_\_\_\_\_ Date \_\_\_\_\_

Thank you for your cooperation.

## **Appendix II: In-Depth Interview Schedule**

Interviewer's Initials: \_\_\_\_\_

Date: \_\_\_\_\_

Name: \_\_\_\_\_

Good morning /Good afternoon

I am Stella Amisi Orengo. I am most grateful for your time and the opportunity to speak with me. I will keep the interview to utmost one hour. (Let me know if this is okay)

This interview is being conducted to get your experience at the Milimani Children's Court in Nairobi as a litigant. I am especially interested in finding out the challenges you encountered and if you felt the court decisions was based on the role you supposedly play in the upbringing of children.

If you do not mind I will be tape recording our conversation. I shall compile a report with the comments but will not make any reference to individuals. If you agree to this interview and the tape recording please sign this consent form.

Gender dimensions of court awarded child custody and maintenance at the Nairobi Children's Court

1. Which court was your matter handled? Was going to court your first option at resolving the matter or it was the last resort?
2. What was the case number and who were you in the matter? (plaintiff or defendant of interested party)
3. Give me a brief fact of the case, what you were you seeking from court and what was the basis
4. Were you represented in court by a lawyer or you self-represented. How easy was it for you to get legal help?
5. Were you given custody of the child/children. What reasons were advanced for the decision



6. Were you satisfied with the ruling/judgment? If not did you seek to appeal or review the case?
7. If given another chance would you go to court for redress of children issues. Do you think the courts trend of ruling in child custody matters keep men and women in abusive marriages? Please explain you answer.
8. Did you seek any advice before going to court?
9. Tell me briefly about the different parties in court. How did they treat you?
10. Between men and women who should:
  - (a) Get actual custody of children from court
  - (b) Get visitation rights to the child;
  - (c) Pay child support and maintenance;
  - (d) Move the Court for determination of custody and maintenance
  - (e) Initiate consent for custody and maintenance of children
  - (f) Appeal or seek review for court decisions based on bias.

Before we conclude the interview, do you have any additional suggestions for the resolution of child custody cases in a way that every party wins?

Close: Thank you so much for sharing insights on this topic. This will go a long way in developing an understanding about perception on bias in court awarded child custody and maintenance

### **Appendix III: Key Informant Interview Guide**

Interviewee's Initials: \_\_\_\_\_

Date: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Organization: \_\_\_\_\_

Number of years of experience in current position: \_\_\_\_\_

Introduction: Good morning/afternoon. My name is Stella Amisi Orengo. And am most grateful for you agreeing to this interview. I will try to keep our time to an hour (Let me know if this is okay)

I am gathering data on the theme of gendered court child awarded custody and maintenance. Expert input is essential to this process. Content analysis, in depth interviews and key informant interviews are being used to engage users and players in the children's court.

You have been selected for a key informant interview because of your in-depth knowledge and expertise with the law on child custody. I will tape record our conversation and summarize the themes emerging from this interview and make them available to the public. I will however, keep the interviewee's name confidential.

If you agree to this interview and the tape recording please sign this consent form.

11. Tell me briefly about the nature of your work about justice and children's law.
12. Who has parental Responsibility over a child?
13. What standards do court apply to determine custody and maintenance of children?
14. It the best interest of the child a paramount consideration when awarding custody?
15. Does the best interest rule provide for the consideration of gender roles when making decisions?
16. Do you think the experience and attitude of a judicial officer on gender roles would affect how they make custody awards?

17. Between men and women who are the likely persons to:
- (g) Get actual custody of children from court
  - (h) Get visitation rights to the child;
  - (i) Pay child support and maintenance;
  - (j) Move the Court for determination of custody and maintenance
  - (k) Initiate consent for custody and maintenance of children
  - (l) Appeal or seek review for court decisions based on bias.
18. Do courts take into consideration the reality of power relations between men and women when making decisions in child custody cases
19. Are assertions carried in sections of the media to the effect that children courts are tools to punish men by awarding custody to women and punish men when awarding maintenance justified
20. Do these perceptions of bias affect access to justice by both men and women? Please give instances and how gender bias will affect access and delivery of justice.
21. Do court procedures provide an opportunity for a judicial officer to caution themselves over the issue of bias.
22. Share with me recommendations on improving adjudication of child custody cases by our children courts.
23. Please recommend anyone else as a “key informant” for this interview.

Before we conclude the interview, do you have any additional suggestions for the resolution of child custody cases in a way that every party wins?

Close: Thank you so much for sharing insights on this topic. This will go a long way in developing an understanding about perception on bias in court awarded child custody and maintenance.

#### Appendix IV: Content Analysis Schedule

Gender dimensions of court awarded child custody and maintenance at the Nairobi Children's Court	
PART ONE	
Court: Case Number Gender of Plaintiff/ Gender of Defendant	
PART TWO	
Brief Facts of the Plaintiff Case/Defendant Case Prayers / counter prayers Legal Issues Raised	
PART THREE	
Legal rules used by the court to make decision	
Application of the rules to the facts of the cases (highlight facts the court found most important)	
What was ordered in terms of: Joint Legal Custody Sole Legal Custody Actual physical Custody Unsupervised Visitation Supervised visitation Maintenance and upkeep	
PART FOUR	
Was the ruling/judgment reviewed or appealed against and what was the outcome (give reason for upholding /overturning /reviewing the ruling)?	
Who sought the appeal or review and what was the basis	

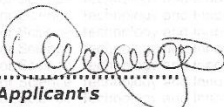
**THIS IS TO CERTIFY THAT:  
MS. STELLA AMISI ORENGO  
of UNIVERSITY OF NAIROBI, 29179-100  
NAIROBI, has been permitted to conduct  
research in Nairobi County**


**Permit No : NACOSTI/P/18/65461/25257  
Date Of Issue : 17th October, 2018  
Fee Received :Ksh 1000**

**on the topic: GENDER DIMENSIONS OF  
COURT AWARDED CHILD CUSTODY: A  
CASE STUDY OF THE NAIROBI  
CHILDRENS COURT**

**for the period ending:  
12th October, 2019**



  
.....  
**Applicant's  
Signature**

  
.....  
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