

**UNIVERSITY OF NAIROBI**

**SCHOOL OF LAW**

**THE JURISDICTION OF THE KADHI'S COURTS IN KENYA ON  
CHILDREN RELATED MATTERS**

**A DISSERTATION SUBMITTED TO THE FACULTY OF LAW OF THE UNIVERSITY  
OF NAIROBI, IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE  
AWARD OF THE DEGREE OF MASTERS OF LAW (LL. M) IN LAW, GOVERNANCE  
AND DEMOCRACY**

**COURSE CODE: (GPR 699)**

**BY: SUKYAN HASSAN OMAR**

**REG. NO. G62/67544/2013**

**SUPERVISOR: MR. YASH VYAS**

**DATE SUBMITTED: 28<sup>TH</sup> SEPTEMBER 2015**

## **DECLARATION AND APPROVAL**

### **Declaration**

I, the undersigned, do hereby declare that the work contained in this project is my own original work, which all sources used or quoted have been acknowledged by means of complete references, and that this project was not previously submitted by me or any other person at any other university for an award of an LL.M or otherwise.

**Signature:.....Date:.....**

### **Approval by supervisor**

This project was done under my supervision and has been submitted to the University of Nairobi, School of Law for examination by my approval as candidate supervisor.

**Signed.....Date.....**

## **ACKNOWLEDGEMENT**

In this world of globalization, no one is living in isolation, and nothing can be successful without assistance from other people. Therefore, for the successful completion of this research, I am indebted to many people who in one way or another assisted me. It is difficult to mention all of them but, I am thankful to all none the less. Just to mention few first in the rank is my employer, the Judicial Service Commission (JSC) and in particular the Chief Justice and the President of the Supreme Court of Kenya, Justice Dr. Willy Mutunga for granting me this golden chance to pursue this LL.M course to the completion. I am equally indebted to my family members specially my aged mother, my wife and children for their understanding and patience and the rest of the family members and friends for their moral support and valuable advice and contribution.

My special gratitude is for my supervisor, Mr. Yash Vyas, for his excellent guidance, care and patience. Likewise this acknowledgement would not be complete without mentioning my nephew Dr. Ali Abdrahman Haji, Madam Susan Kinoti, Madam Peninnah Rappasi, Secretary Department of Public Law, School of Law, University of Nairobi and Mr. Stephen Otieno also Research Assistant from the same institution. I am grateful to Haji and Otieno for assisting in organizing and harmonizing the research, Susan for editing and printing of the work and Peninna for linking me with my supervisor and for excellent communication and conveyances.

My brother Dr. Abdulkadir Hashim, an advocate of the High Court of Kenya and a lecturer in the Department of Philosophy University of Nairobi is worth to remember. His academic advice and his generosity to allow me to use his personal library have greatly helped this research. Also on the same note I thank my brother, Hon. Abdulatif Silau Malampu, Kadhi II, for his valuable contribution to the chapter on the rights of the children in Islam (chapter 4). I cannot forget to thank Africa Education Trust (AEDT) for giving educational loan free from interest and all other friends who had in one way or the other contributed towards this worthy cause.

Last but not the least, I am very grateful to all those judges who had previously found in their wise rulings and judgments that the Kadhi's Courts lack jurisdiction to handle cases related to children. In particular I am indebted to the High Court Judge, Justice Agrey Muchilule for turning down my ruling on the subject. I thank them all for provoking me to research on the

jurisdiction of Kadhis Court in Kenya on matters related to children. Once again to all of you I say thank you and God bless.

### **DEDICATION**

I dedicate this humble work to my loving and caring mother whose struggle and hardwork through difficulties natured me on the path of knowledge.

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## **ABBREVIATIONS**

- A.D:** Stands for the Latin phrase *anno domini*, which means “in the year of our Lord
- ACRCWC:** African Charter on the Right and Welfare of the Child.
- AEDT:** Africa Education Trust.
- IBEA:** Imperial British East Africa Company.
- IICWC:** International Islamic Committee for Women and Child.
- IIT:** International Islamic Institute of Islamic Thought.
- IRII:** Islamic Research Institute, Islamabad.
- JSC:** Judicial Service Commission.
- JTF:** Judiciary Transformation Framework.
- KLR:** Kenya Law Report.
- KRA:** Key Result Area.
- LL.M:** Masters of Law.
- MUHURI:** Muslims for Human Rights.
- P.B.U.H:** Peace be Upon Him.
- UNCRC:** United Nations Convention on the Rights of the Child.
- UNIFEM:** United Nations Development Fund for Women
- WAMY:** World Assembly of Muslim Youth.



## **TABLES OF CASES**

Amin Mohamed Hassan vs Zahra Mohamed Abdikadir, Civil Appeal No. 120 of 2000 (2009)  
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*Naurani V Naurani (1981) KLR.*

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*S M H v S AA (2013)eKLR*

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### **Kenya**

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The Children's Act No. 8 of 2001 of the laws of Kenya  
The Civil Procedure Act and Rules, Cap. 21 of the laws of Kenya  
The Constitution of Kenya 1963 (repealed)  
The Constitution of Kenya 2010  
The Court's Ordinance 1931  
The Hindu Marriage and Divorce Act, Cap 157 of the laws Kenya  
The Interpretation and General Provisions Act, Cap 2 of the laws of Kenya  
The Kadhi's Courts Act cap 11 of the laws of Kenya  
The Marriage Act, No. 4 of 2014 of the laws of Kenya  
The Matrimonial Courses Act, Cap 152 of the laws of Kenya  
The Mohammedan Marriage and Divorce Registration Act, Cap 155 of the laws of Kenya  
The Mohammedan Marriage and Divorce Registration Act, Cap. 155 of the laws of Kenya  
The Mohammedan Marriage, Divorce and Succession Act, cap 156 of the laws of Kenya  
The Subordinate Court (Separation and Maintenance) Act, Cap 153 of the laws of Kenya  
The Succession Act, Cap 160 of the laws of Kenya

### **Foreign statutes**

#### **Egypt**

The Law of Bequest (Law No. 71/1946).  
Law of Inheritance (law No. 77/1943)  
The law of Maintenance and Personal Status (law No. 25/1920).  
Law No 56/1923 regulating the minimum marriage age  
Law of Personal Status (Law No. 25/1929, regulating dissolution of Marriage and family dispute  
Law No. 1 of 2000

#### **Ethiopia**

The Constitution of Ethiopia 1994  
The Proclamation No. 188/1999

**Gambia:** The Constitution of Second Republic of Gambia, 1997

**Iraq:** The Law of Personal Status (No 188)1959

**Malaysia:** The Shari'ah Courts Act, 1984

**Nigeria:** The Constitution of the Federal Republic, 1999

**Sudan:** The Law of Personal Status, 1991

**Tanzania (Zanzibar)**

Constitution of Zanzibar (R.E 2006)

Kadhis Courts Act No. 3 of 1985

**Tunisia:** The Law of Personal Status, 1956

**Uganda:** The Constitution of Uganda, 1995

## **CONVENTIONS**

The African Charter on the Rights and Welfare of the Child

The United Nations Convention on the Rights of the Child

## CHAPTER I: INTRODUCTION

### 1.0 Background

The Kadhis courts in Kenya is a creature of the constitution and its mandate is to determine questions of Islamic law relating to personal status, marriage, divorce and inheritance where parties involved are all Muslims.<sup>1</sup> Despite numerous amendments of the constitution the jurisdiction of the Kadhis courts in Kenya remained unaffected.

Apart from the constitution there are other statutes that govern the operation of the Kadhis Courts. These include the Kadhis Courts Act, Cap.11 of the laws of Kenya, the Mohammedan Marriage, Divorces and Succession Act, Cap.156 (Repealed), The Mohammedan Marriage and Divorce Registration Act, Cap. 155, The Succession Act, Cap 160, The Civil Procedure Act and Rules, Cap. 21, The Children's Act No. 8 of 2001 and the Marriage Act, No. 4 of 2014.

The Kadhis courts used to exercise quite a wide range of jurisdiction within the territorial jurisdiction of the Sultanate of Zanzibar where it applied general and specific rules of Islamic law. This trend continued even after the Sultan's concession of the ten-mile strip to the British as protectorate. *In Jibana's case*,<sup>2</sup> Hamilton, J, observed "It has been argued on the bases of proposition that Mohammadan law applies to the sales of land within the sultan's dominions and that as the British Government is administering those dominions on behalf of the Sultan... this court would recognize a title which would have been recognized by the Sultan's court before the Agreement.... I have no fault to find with either of these propositions".

Further the Kadhi's courts had jurisdiction over criminal cases equivalent to the power of the subordinate court of second class over the natives. "A court of Liwali or Kathi shall have in criminal proceedings with respect to natives the same powers as a court of the second class."<sup>3</sup> "Magistrates holding subordinate Courts of first, second and third class shall have full jurisdiction over natives"<sup>4</sup> It is important to note that in addition to other sentences prescribed by law the powers of these courts extends to the sentence of whipping.<sup>5</sup>

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<sup>1</sup> Art. 170 (5), The Constitution of the Republic of Kenya 2010.

<sup>2</sup> Said bin Shariff v Shariff Mohamed Shatry (1938), 19 KLR. Pt. 1, 9. As referred to by J N D Anderson in Islamic Law in Africa, p. 101.

<sup>3</sup> S. 36 of The Special official Gazette of the East Africa and Uganda Protectorate 1907, Vol. IX-No. 187a.

<sup>4</sup> Ibid, s.33.

<sup>5</sup> Ibid, s. 34.

However, the promulgation of “The Courts’ Ordinance 1931” reduced the powers of the Kadhis courts to matters of personal status, marriage divorce and inheritance.

Marriage, divorce and inheritance are known and create no ambiguity. But what should constitute “*personal status*” need<sup>i</sup> to be demystified. As far as I am concern, there is no jurisprudence in Kenya which ever clarified the meaning of the phrase “personal status”.

However, in other jurisdictions with similar judicial system as Kenya, “*personal status*” covers quite a range of family laws. The 1959 of the Law of Personal Status of Iraq covers in nine chapters rules governing marriages, divorces, children and their rights which include maintenance, custody and the rights of the children with special need. General provisions for the descendants and ascendants and the relatives, will and inheritance are also covered

Tunisia and Sudan’s law of personal status are also similar to that of Iraq. Tunisian law contains marriage, divorce, *eda*<sup>6</sup>(waiting period), children’s and their rights including care for abandon or street children, inheritance, will and gift.

Personal status law of Sudan covers marriage, maintenance of children which include the cost of breastfeeding and education, custody and other related rights of the child. Will, gift and endowment are also issues of personal status.

The Egyptian Court of Cassation settled the definition of personal status in 1934 when it stated that:

*“Personal Status is the sum total of the physical or family descriptions of a known person which distinguishes him from the others and give legal effect under the law in his social life such as being male or female, married widowed or divorced, a parent or legitimate child, being of full legal capacity or defective capacity due to minority, imbecility or insanity, being of absolute or limited legal capacity.”*

Based on the foregoing broad understanding, the jurisdiction of the kadhis court concerning children was never questioned and that the kadhis despite absence of express provision of the law in this regard have been entertaining issues related to the children. Also since the Kadhis courts

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<sup>6</sup>*Eda*: this is the legally defined period during which women shall abstain from contracting marriage. It occurs at the instance of the termination of the previous marriage either by way of divorce, death or otherwise.

mainly deal with family matters and that the family comprises the spouse and the children, the court never hesitated in adjudicating all civil cases concerning the family.

However, after the enactment of “*The Children’s Act No. 8 of 2001*”, the jurisdiction of the Kadhis court on matters regarding children has been under question. The Children’s Act has provisions for the establishment of Children’s courts.<sup>7</sup> According to section 73 of the Act, the Children’s court deals with civil matters such as parental responsibility, custody and maintenance, orders for the protection of children and children in need of care and protection among others. The court also hears criminal matters against children and other offences under the Act except murder and where the child is charged along with adult.

As a result some litigants, Kadhis, Judges and lawyers have alleged that the Kadhis courts lacks’ jurisdiction to adjudicate children matters. In a case that originated from the judgment given by Mombasa Principal Kadhis Court, the presiding judge, the Chief Kadhi, who was an assessor and Appellants lawyer were all of the opinion that the Kadhis Court lacks’ jurisdiction to adjudicate claims relating to custody of children.

However, apart from the chief Kadhi, the rest of the Kadhis are of the view that the court has jurisdiction to handle children related cases provided they were civil in nature. This is clear from their rulings and judgments. But for the sake of brevity I will limit myself to the rulings rendered by the current deputy Chief Kadhi and, the current Principal Kadhi of Mombasa both holding that indeed the Kadhis court has jurisdiction to handle children cases. Their arguments heavily rely on the interpretation of the phrase “*personal status*” which is stated both in the constitution and the Kadhis courts Act. They are of the view that “*personal status*” as in our laws has broader meaning including children’s and their rights

Judges of the superior courts are also equally divided on this issue. In the case of *Amin Mohamed Hassan versus Zahra Mohammed Abdulkadir*, the presiding judge ruled that the kadhi’s court has jurisdiction to handle children related cases and that there is nothing in the Children’s court that suggest the Kadhi’s court lacks’ such powers On the other hand in the case of *Salah*

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<sup>7</sup>S.73 of the Children’s Act 2001.

*Mohamed Hassan versus SuatAbdulaziz*, the High Court sitting in Kasumu decided that the Kadhi's Court has no jurisdiction to entertain cases concerning children.<sup>8</sup>

The Children's Act establishes children's courts<sup>9</sup> and mandates the Chief Justice to designate some magistrates to handle children cases at a particular station.<sup>10</sup>

It is unfortunate that some judges opted to restrict the powers of the kadhis court purportedly relying on the provisions of the Children's Act, while in reality there is no such provision in the Act. To the contrary the Act expressly donates powers to other courts to continue handling cases concerning children.<sup>11</sup>s. 73 (d)(iii): *where in the course of any proceedings in a Children's Court it appears to the court that the person charged, or to whom the proceedings relate, is over eighteen years of age, or where in the course of any proceedings in any court other than a Children's Court it appears to the court that the person charged or to whom the proceedings relate, is under eighteen years of age, nothing in this section shall prevent the court, if it thinks fit, from proceeding with the hearing and determination of the case;*

Scholars have not developed a common view on the role and mandate of the Kadhis court in relation to children matters and as such depend on the courts interpretations which have not been consensual. Apparently, there is scanty literature on the subject of study thus the need to give it a scholarly attention. Therefore, this research seeks to fill this gap and suggest some useful recommendations in relation to the subject matter.

## **1.1 Historical evolution of the Kadhis Court in Kenya**

This study will not be complete until some light is shed on the historical relationship between the inhabitants of Eastern Africa and Arabian regions. It is strongly believed that Assyrians and Sumerians from Iraq, where earliest civilization of the world arose found their way to the East African coast. They sailed across the oceans for opportunities and trade and subsequently discovered route to the Eastern Africa. Historical and archaeological evidence support this finding.

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<sup>8</sup>High Court of Kenya at Kisumu, Misc. Appl. No. 125 of 2013. (unreported).

<sup>9</sup> S. 73 of the Children's Act No. 8 of 2001.

<sup>10</sup> Ibid, S. 73 (d)(ii).

<sup>11</sup> S. 73 (d)(III) of Children's Act No. 8 of 2001.

Black magic practiced along the coast of Eastern Africa is said to be identical to that practiced in Iraq.<sup>12</sup>

Historians have recorded long existence of trade relationship between the Arabs and the inhabitants of the East African coast. The Kingdom of Aksum, the present Ethiopia and Eritrea had trade contact

with Arabian traders including the Quresh of Makkah among others. This was long before the advent of Islam. Therefore, the contact of Islam with the region of Eastern Africa was rather a continuation

of a long standing relationship between the two regions. Some writers argue that Islam reached parts of Eastern Africa during the life time of the founder of Islam, Mohammad, may Allah's peace and mercy be upon him in 610 AD.

When the early Muslims suffered persecution in the hands of the Meccan pagans who were opposing the new religion of Islam, their leader allowed them to immigrate to Abyssinia (current Ethiopia) to seek refuge. This was in Rajab, the 7<sup>th</sup> month of the Islamic calendar, of the 5<sup>th</sup> year of the Prophethood.<sup>13</sup> Ethiopia was then ruled by a just christen ruler which religion shares so many similarities with Islam. The ruler welcomed the Muslims refugees and granted them asylum. It is believed that it is during this time Islam had influence on the local people to the extent that even the ruler of Abyssinia in the name of Najjash reverted to Islam and during his death the prophet of Islam performed for him funeral prayer in absentia.

Around 1330, Abu Abdullahi ibn Batuta, a Moroccan traveller visited several cities along the Coast of East Africa including Mogadisho, Kilwa and Mombasa and commented that the legal practices in those cities were based on the Shariah. In his findings he noted that in Mogadisho the Kadhi passed judgments on matters connected with the rules of shariah while other matters were determined by the governors and the ministers. Matters requiring opinion of the sultan were referred to him and he responds instantly on a note and thus such matters were settled based on his

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<sup>12</sup> Ahmed Binsumeit A. Badawy (2006), Penetration of Islam in Eastern Africa, in Proceeding of the Islamic Civilization in Eastern Africa, Kampala, Uganda, 15-17 December 2003, P. 17.

<sup>13</sup> Al-Mubarak al-Furi, Ar-Rahiq al-Makhtum in Maktabah al-Shamela, P. 44.



opinion.<sup>14</sup> He described residents of Mombasa and Kilwa as religious, trustworthy, righteous and generous and that they were followers of *Shafii Madhab*.<sup>15</sup>

From the foregoing we can conclude that long before the modern era Islamic legal system was already operational in the coastal region of Kenya. The colonial era began with the arrival of Portuguese in 1498.<sup>16</sup> About 200 years later, in 1698, the Omanis helped in liberating East African coast from Portuguese and subsequently established their own government in the region.<sup>17</sup>

The judicial system under the Omani regime was based on shariah, particularly Ibadi and Shafii School of Thoughts.<sup>18</sup> Under this regime the courts were manned by Kadhis. The Chief Kadhi's court had jurisdiction throughout the coastal region while Kadhi's court's had jurisdiction only within districts.

During the 2<sup>nd</sup> half of 19<sup>th</sup> century, the European States began the scramble for and partition of Africa which culminated into Berlin Conference of 1884 in which they divided Africa among themselves. Eastern Africa fell under three European powers i.e. Italy, British and Germany. Horn and Somalia fell under Italy, Kenya and Uganda under British rule while Tanganyika (what is now called mainland Tanzania) was under German rule. It is worth noting that the areas that fell under British and German powers were land locked and this necessitated the two powers to negotiate with the administration of Zanzibar to utilize the coast of Indian Ocean. After years of negotiation an agreement was reached in which the sultan conceded ten miles strip to be controlled by the European powers provided they recognized *inter alia* the existing legal system which was based on shari'ah law.

Further to this internationally binding agreement, the British made other commitments to honour and fulfill the terms of this agreement without prejudice to the interest of Her Majesty, the Queen.

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<sup>14</sup> Ibn Batutah, *Rihlatu Ibnu Batutah*, Al-Makatabatul Shaamella, (Edn. Akademiyah Al-Mamlakah Al-Maghribiyah; Vol. 2, pp 116-120

<sup>15</sup> Ibid, Pp. 120-122. Shafii Madhab: this is one of the school of thought on Islamic law within Sunni Muslims named after its founder Abu Abdullahi Mohamed Ibn Idriss Al-Shafii (767-820).

<sup>16</sup> Early Kenya history, In [kenyaconstitution.org](http://kenyaconstitution.org), last seen 15<sup>th</sup> April, 2015.

<sup>17</sup> Karim, "History of Mombasa", in [Mombasa info.com](http://Mombasa.info.com), last seen 15<sup>th</sup> April 2015.

<sup>18</sup> Ibid, p. 3

On 1st July, 1895, in a speech given by Sir Lloyd Mathews, Wazir [chief minister] of the Sultan of Zanzibar, while marking the transfer of territory administered on the mainland, held in Mombasa, stated:

“All affairs connected with the faith of Islam will be conducted in the honour and benefit of religion, and all ancient customs will be allowed to continue, and his wish is that everything should be done in accordance with justice and law”.

A speech given by A.H. Hardinge, Her Majesty’s Consul-General at Zanzibar, on 16th June 1895 was read in Arabic and translated into Swahili. The speech affirmed what the Wazir had announced concerning Muslim Law and Religion for the citizens of the Sultan of Zanzibar who were resident on the mainland:

*Mahommedan Law and Religion. Religious Liberty to all:*

“And with respect to what the Wazir of the Sultan has told you about religion, let it be known to you that it will be protected and respected by the new administration, and that all mosques and religious festivals, and Cadis and Ulema will receive all honour at our hands, The Mahommedan religion will remain the public and established creed in the Sultan’s territory, and all cases and law suits between natives will continue to be decided according to the ‘Sheira,’ [sic] but although the Mahommedan is and remains the State religion, we intend that there shall be the fullest liberty for all others, and that all their adherents, whether they be Christians, or Parsees, or Hindoos, shall freely worship God according to their respective rites”.

In view of the above we can conclude that the British were intent on ensuring the continuation of an Islamic legal system, while allowing freedom of religion for those of other faiths living in the Sultan’s territories.

The British also set up Islamic Courts in up-country areas, outside the ten-mile strip, where there were significant numbers of Muslims. This initiative is very significant because it marks growth of shariah court under the British rule and its influence beyond the territory of the Sultan of Zanzibar. Despite the foregoing endeavors of the colonial administration to maintain the Kadhis court, the reality was that they had objective to rid of all native legal systems including kadhis court. They retained these courts only for the fear of political repercussions and to strengthen their indirect rule. Otherwise the colonials were of the view that their laws and legal systems were superior to that of the colonized natives.

Upon taking over the administration of the sultans' territory the British embarked on so many reforms. Of relevant here is the change in the jurisdictions of the kadhis court which was limited to the matters of personal status.<sup>19</sup> This is the area of family law which covers marriage, divorce, custody and inheritance.<sup>20</sup> Cases of alimony and trusts were also subject to the jurisdiction of the kadhis court.

During the clamor and move towards independence from Britain, the Sultan wished the agreement between the Sultan and the British over the ten-mile coastal strip be retained. Accordingly, in an agreement dated 8<sup>th</sup> October 1963, Kenya agreed to retain among others operation of kadhis court in Kenya.

As a result of this agreement kadhis court was entrenched in the independent constitution of 1963 and continuously survived many amendments and the constitutional review and promulgation of the new constitution in 2010.

From independence in 1963 and before the promulgation of the new constitution in 2010, the jurisdiction of the kadhis court was limited to personal status, marriage, divorce and inheritance where all parties profess Islam as their faith.<sup>21</sup> The Kadhis courts Act, 1967 also provides similar provision.<sup>22</sup>

However, under the 2010 constitution the jurisdiction of the Kadhis court is limited to the determination of the question of Muslim law relating to personal status, marriage, divorce or inheritance where parties involved profess Islamic faith and submit to the jurisdiction of the Kadhis court.<sup>23</sup>

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<sup>19</sup>AbdulkadirHashim (2005), "Servants of Shariah: Qadis and the Politics of Accommodation in East Africa" in *Sudanic Africa, a Journal of Historical Sources*, Vol. 16, p. 28.

<sup>20</sup> John Chesworth (2010), "Kadhi's Courts in Kenya: Reactions and Responses", in the proceeding of a conference on the Constitutional Review in Kenya and Kadhis Courts, 20<sup>th</sup> March 2010, p.3. (Unpublished).

<sup>21</sup> Art. 66 (5), The constitution of the Republic of Kenya 1963 (as amended 2008).

<sup>22</sup> S. 5 of The Kadhi's Courts Act, 1967.

<sup>23</sup> Art. 170 (5), The Constitution of the Republic of Kenya 2010.

## 1.2 Statement of the Problem

There exists lack of clarity on whether the Kadhis courts in Kenya have jurisdiction to handle children related cases or not. This uncertainty has created doubt among the clients and other stakeholders on the jurisdiction of the court. There are instances where the jurisdiction of the Kadhis court in handling children matters were challenged in the High Court and the decisions were conflicting. For instance in the High Court at Mombasa, Civil appeal No. 120 of 2004, the judge ruled that the kadhis court has jurisdiction to handle child related cases and I quote:

*“even if the children Act No. 8 of 2001 was in existence, I do not think the appellant’s preliminary objection could have succeeded for two reasons; first, is that the children Act No. 8 of 2001 did expressly oust the jurisdiction of the Kadhi’s court nor did it repeal any of the provisions of the kadhi’s Act. A critical look at section 185 of the children’s Act will reveal that courts other than the children courts were given discretion to refer matters before them touching on children to the children court. The Act uses the word “**may**” instead of “**shall**”. It is not therefore true that the Kadhis court has no jurisdiction...”<sup>24</sup>*

While in another similar case the judge ruled that actually the court lacks’ jurisdiction to handle any case related to children.<sup>25</sup> The judge said:

*“My understanding is that the Kadhis court is probably seized of the divorce matter, but may not deal with issues of custody and maintenance of the children. These issues are not among those in respect of which the constitution and the Act have donated jurisdiction to the Kadhis court.”<sup>26</sup>*

Also in another case, the High court at Meru opined that the kadhis court lacks’ jurisdiction to entertain issues of children.<sup>27</sup>

It is thought that the problem of uncertainty of the jurisdiction of the Kadhis court over the children related cases is brought about by misinterpretation or misunderstanding of the relevant provisions of the Children’s Act. There is no express provision in the Children’s Act which affect the jurisdiction of the Kadhis court. Due to the gap, some lawyers, clients and judges have conceived that the Act has removed children’s matters from the jurisdiction of Kadhis court.

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<sup>24</sup>High Court of Kenya at Mombasa, Civil Appeal No. 120 of 2004 (2009) eKLR.

<sup>25</sup>SMH v SAA Kisumu High Court Misc. Appl. No. 125 of 2013 (2013) eKLR High Court of Kenya at Kisumu, Misc. 125 of 2013 (unreported).

<sup>26</sup> Ibid, p. 4

<sup>27</sup>Mohamed Hussein Abdi & another V Hassan Abdi Rage (2006) eKLR.

The practical problem and difficulties encountered by the client of the kadhi's court in this regard have been occasioned by the bureaucratic and dualistic set up of our judicial systems. Many a times a client is subjected to seek rights through different courts. For instance a mother may seek redress in a kadhi's court for her own maintenance and children's court for the maintenance of her child yet the parties to the both cases are same. This is inconvenience. It involves expenses, delays in administration of justice and ultimately hinders access to justice. When will Kenyans get their legal service from one source?

Provision of expeditious justice to all is the key priority of our judiciary.<sup>28</sup>Pillar one (1), People focused delivery of Justice and Key Result Area one (KRA 1) provides access to and expeditious delivery of justice. For this transformative goal to be achieved the question of the jurisdiction of the kadhi's court should be addressed adequately and unequivocally.

Despite this confusion there is no specific study in this area on the jurisdiction of the court. Therefore, this study will seek to address this problem and at least lay foundation to resolve this puzzling legal question.

### **1.3 Objectives of the Study**

The general objective of the study is to investigate the jurisdiction of the Kadhis court on children related matters.

### **1.4 Specific objectives**

The study intends to address the following specific objectives:

- (i) To find out the meaning and the scope of the phrase *personal status* as envisaged in the constitution and the Kadhis Courts Act.
- (ii) To find out rights of the children guaranteed under Islamic Law.
- (iii) To examine the role of the Kadhis Courts in ensuring and protecting the right of the child as guaranteed by shari'ah and law.

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<sup>28</sup> Judiciary Transformation Framework (2012-2016).

## 1.5 Research Questions

The general research question is: Do the Kadhis court have jurisdiction over the children related matters?

The study intends to answer the following specific research questions:

1. What is the meaning and the scope of the phrase *personal status* as envisaged in the Constitution and the Kadhis Courts Act?
2. What rights does the Shari'ah guarantee and donate to the children?
3. What is the role of the Kadhis Courts in ensuring and protecting the right of the child as guaranteed by shari'ah and law?

## 1.6 Hypothesis

The uncertainty on the jurisdiction of the Kadhis court over the children related cases may have been brought about by diversity of interpretation of the relevant provisions of the Children's Act and Kadhis Court Act. Consequently, there is lack of clarity on the jurisdiction of the Kadhis court in relation to handling of children matters yet the court deals with family cases which includes children. Therefore, this study will seek to approve or disapprove the hypothesis that Kadhis court has jurisdiction of children's matters.

## 1.7 Theoretical Framework of the study:

This work will basically be guided by the positivist theory of law. This theory considers law as posited or laid down or imposed by relevant and legitimate legal institutions.<sup>29</sup> The main proponents of this theory are Hans Kelsen (1881-1973), H.L.A. Hart (1907-92) and Joseph Raz among other scholars<sup>30</sup>. This theory is preferred over others because it is presumed that the kadhis courts have jurisdiction over children cases however limited and this jurisdiction is conferred by law as envisaged in the constitution and statutes.

The study will also take the approach of both historical and sociological legal theories.<sup>31</sup> The historical school is relevant because it believes that law is the creation of the society's historical social development based on its traditions and customs which by its continuous operation over time

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<sup>29</sup>Omony John Paul, Key Issue in Jurisprudence: An In-Depth Discuourse on Jurisprudence Problems, 2006 (Law Africa) PP. 48-50. .

<sup>30</sup>Leslie Green Legal Positivism<[leslie.green@law.ox.ac.uk](mailto:leslie.green@law.ox.ac.uk)> 2003.

<sup>31</sup> Yusuf Kiwanda: The Exodus of Law and Legal **Methods**, 2013, LawAfrica, PP. 18-21.

evolve into legal rules.<sup>32</sup> That law is there to serve the best interest of the society and as a tool of social control it achieves its objectives by balancing competing interest of individual and general society interests.<sup>33</sup>

Therefore, it is a historical fact that kadhis court and its jurisdiction are well founded in our historical legal and political development. Both the colonial government and the Kenyan independent government accepted the ten miles coastal strip in consideration of inter alia operation of the Kadhi's court with a defined jurisdiction of determining questions of Muslim law relating to personal status, marriage, divorce and inheritance where all parties profess Islam. Under this arrangement the court had always exercised its jurisdiction over children related cases and this was never questioned before the enactment of the Children's Act Cap 8 of 2001. After all this arrangement was reached in an agreement which has quality of an international treaty and the Kenyan constitution of 2010 recognizes such treaties as part of the Kenyan laws.<sup>34</sup>

The laws applied in the kadhi's court are drawn from the Islamic culture, are expected not only to be relevant and effective but also to be legitimate.

From the sociological theory of law we move from the premise that law as a tool of social control should be made responsive to the needs of the society which it is serving.<sup>35</sup> Family which is the basic social unit is defined, regulated and protected through legal rules which must be conscious of the social needs and responsive to the needs of society. Therefore, from this understanding should the legislators enact laws and the judge's interpret.

In addition to the above mentioned legal theories, this work will also rely on theories of Islamic law in as much as it's relevant to the application of Islamic law. The kadhis court applies shariah law and this theory will help in guiding interpretation of Islamic personal status law as applied and practiced by followers of various schools of thought in Kenya. This theory is also useful in that it demarcates the scope and constituent of what law of personal status in Islam and what rights does shariah offers to the children.

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<sup>32</sup> M.D.A. Freeman, LLOYD'S Introduction to Jurisprudence, 2008, Sweet &Maxwell, Pp. 1079/1082.

<sup>33</sup>Ibid, p.838.

<sup>34</sup>Art.2 (6) of the constitution 2010 of the Republic of Kenya.

<sup>35</sup>Ibid, p. 849.

## **1.8 Methodology**

Research methodology may vary depending on the nature of the research and topic of study. In our case since the topic falls under both Shariah and law we will adopt methodology relevant to both systems.

### **1.8.1 Methodology of Shari'ah**

Under this methodology we will consult the sources of the shariah to demystify and to demarcate the concept of a child in Islam and his rights he is entitled to. The sources are the holy *Quran*, the tradition (*Sunnah*), *Ijmaa'* (concesus), *Qiyas* (analogy) and where necessary the secondary sources of Shariah. In addition we will also employ the rules of interpretation according to various schools of thoughts as applicable and practiced in our jurisdiction. We will also consider contemporary concept of law of *Ahwal al-shakhsiyyah* (personal status law) as understood and practiced by Muslims.

### **1.8.2 Methodology of Law**

Our methodology is to examine the constitution of Kenya and relevant statutes that deals with the children and the kadhis court. Limited case laws, relevant text books and journals will also be examined. I will not limit myself to the local laws but will extend to the laws of other countries which have similar judicial system as Kenya. The objective is to better understand how other jurisdictions interpret personal status and demarcate its scope and boundaries. This will help us to make comparative analysis of Kenyan situation with other countries and would help me to make my preferred conclusion on the best way to interpret personal status.

In addition I will also consult relevant international and regional treaties and as well as dictionaries and encyclopedia. The former would help to inform the right of the child with regards to religion, culture and custom. The dictionaries and encyclopedia helps in the definition of the relevant words and terms such as personal status.

Finally the rules of the interpretation of statutes will be also looked into to guide us on the best rule judicial practice of interpreting legislation.



Since I will be using some Arabic references I will be forced to use some Arabic words and terminologies. For the interest of my readers who may not be conversant with Arabic language, I will translate such Arabic words and terms either in a bracket or in the footnote.

## **1.9 Limitations**

This study investigates jurisdiction of the Kadhis courts in Kenya with regards to cases related to children. It will introduce the subject by considering historical overview of the jurisdiction of the kadhis courts in general and changes that took place throughout legal history of the kadhis courts in Kenya.

Although the study area is limited to the legal and practical status in Kenya, but in order to enrich the study and for the purpose of comparative analysis legal systems of other jurisdictions with similar legal set up will also be considered. In particular in this study we will consult references on *Ahwal Al-shakhsiyah*<sup>36</sup> as understood by Muslim contemporary scholars. This will help to demystify the meaning of the phrase (personal status) as provided for in our constitution and Kadhis court Act. Our superior courts are yet to interpret what would constitute the phrase (personal status).

The study will also define the child and consider his rights. This will be done both under the shariah and the law. Comparative analysis will reveal which of the two legal systems would offer better and favourable packages of rights for children.

While conducting this study the researcher anticipates encountering with some unavoidable limitations. Lack or shortage of relevant literature, difficulties in translating materials written in Arabic language which will constitute part of our references and inaccessibility of the relevant laws of other countries. Since some of the sources are very old it would be difficult to adopt consistent mode of referencing.. However, despite those anticipated limitations the researcher will strive to access and compile all relevant views and information.

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<sup>36</sup>Ahwal Al-Shakhsiyah: this is an Arabic phrase which means personal status.

## 1.10 Chapter Breakdown

This project shall consist of

- I. **Chapter 1:** It covers a brief history of kadhis courts in Kenya, objectives of the research and research questions; limitation and scope of the study; statement of the problem of the study which outlines importance of the topic and underlying reasons which lead to the selection of the topic. It also clarifies the methodology used and concluded with a brief introduction of the contents of the research.
  
- II. **Chapter 2: Literature Review:** This chapter will look at the previous work of the scholars on the subject and identify gap to be field by this research. The chapter will also deal with the role of the Kadhis courts in Kenya in protecting the rights of the child.
  
- III. **Chapter 3: Personal Status:** this chapter seeks to define the phrase “personal Status” both linguistically and in legal context. In this regard local laws and precedence and as well as laws and precedence of other jurisdictions with similar system as Kenya will be consulted. The objective is to unveil the meaning of the phrase “personal status as envisaged in the constitution and the Kadhis Court Act.
  
- IV. **Chapter 4: Right of the Child in Islam:** this chapter will consider the rights of child in Islam. Definition of a child and various rights offered by shari’ah will be briefly discussed. The discussion under this chapter will reveal that in Islamic context consideration and protection of the right of the child begins long before the child comes into being. Both original sources of the Shari’ah and the work of the Muslim scholars will be examined and analyzed. It is presumed that when determining any question relating to children best interest of the child shall be the guiding principle.
  
- V. **Chapter 5: Conclusion and recommendations:** this chapter will wrap up the topic. It will underscore the findings of the research and suggests useful recommendations.

## CHAPTER 2: LITERATURE REVIEW

### 2.1 Introduction

This chapter will focus on literature related to the subject of the study. Many scholars have written on Kadhi's court, but many of them focused on the history, evolution, administration and general jurisdiction of the Kadhis court as envisaged in the constitution and statutes. The literature consulted does not give an account on the subject of jurisdiction of the Kadhis court in relation to children cases, therefore, begging for a specific academic work to fill the gap.

*Hassan Mwakimako, in his article "Conflicts and Tensions in the Appointment of Chief Kadhi in Colonial Kenya 1898-1960" which was published in "Muslim Family Law in Sub-Saharan Africa" (2010) exclusively focused on the colonial politics of appointing Shaikh Al-Islam and Chief Kadhis in Kenya and how the administration endeavoured to control and curtail the powers and jurisdiction of the Kadhis Courts especially that of the Chief Kadhi. Since during this time the Chief Kadhis Courts had appellate jurisdiction that had limited appeals, at some point the colonial authorities thought of abolishing this critical office. He enumerated and gave accounts the Chief Kadhis from Shaikh Al-Islam Shariff Abdulrahman bin Ahmad Saggaf (1844-1922) a Siyu born scholar, Shaykh Mohammad bin Omar Bakore Ca. 1932, Shaykh Suleman bin Ali bin Khamis bin Sayyid al-Mazrui (1867-1937), Shaykh Al-Amin bin Ali bin Nafi al-Mazrui, Sayyid Ahmed Ali bin Ahmed Badawy.<sup>37</sup>*

Fierce competition for this powerful office arose among Swahilis in Mombasa on one side and residents of Lamu Island's influential tribes like Mazruis and others in Mombasa who was well treated on the other side. As the advisor to the appointing authority the *Liwalis*<sup>38</sup> played important role in the process of this appointment. The position in those days was exclusively reserved for Arabs in coast. It is the finding of this author that by interfering with the religious affairs of the subject of the Sultan, the British Colonial Power failed to abide by the terms of the agreement. As summarized, this article falls short of addressing the subject under review.

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<sup>37</sup> Hassan Mwakimako, "Conflicts and Tensions in the appointment of Chief Kadhi in colonial Kenya 1898-1960" published in "Muslim Family Law in Sub-Saharan Africa Colonial Legacies and Post-Colonial Challenges; International Institute for the Study of Islam in the Modern World (ISIM) and Amsterdam University Press (AUP), 2010) pp. 109-130.

<sup>38</sup> Lewaliis a colonial administrative and judicial officer with full jurisdiction over natives in all matters in which value of the subject in dispute doesn't exceed 750 rupees.

***The Islamic Charter on Family (2007): this Charter was published by International Islamic Committee for Women and Child (IICWC) and World Assembly of Muslim Youth (WAMY)***<sup>39</sup>

The charter is a product of deliberations in series of symposiums where prominent Muslim scholars participated and made their contributions. It was in response to the organizers believed that there was western ideological invasion lead by United Nations on Muslim Society.

This Charter consisting of 164 articles is based on tenets of shariah and was meant to protect and guide Muslims family life. According to the authors the invasion on Islamic family is in various United Nation Conventions which purport to be international yet based exclusively on western values whose intention was to destroy Muslim family system and morals. In particular they singled out “*Programmes for Action Document*” which was the result of the “*International Conference for Population and Growth*”, which was held in Cairo 5th to 15th September 1994. It is widely believed the conventions, was in essence, a declaration of war against the Islamic family as established by Islam.

It covers family aspects in Islam and calls for practice and application by all Muslim states and others which recognize Islamic law in their respective legal systems. Of particular interest, the Charter spells out in chapter IV the rights and duties of a child in Islam which should be established and protected under Islamic law.<sup>40</sup> Personal status rights of the child include rights to lineage (art.104), breastfeeding (art.105), custody (art. 106) and financial support (art. 107) among others. Although this Charter has considered the right of the child under personal status in Muslim family law, the status in Kenya is not quite clear.

Proceeding of the International Symposium on Islamic Civilization in Eastern Africa (2006):<sup>41</sup> this work comprises collection of scholar’s presentations at the symposium which took place 15-17 December, 2003 in Kampala; Uganda. Reknown Muslim scholars like the late Prof. Ali Mazrui participated in this symposium. The book covers extensive areas of Islamic civilization in Eastern Africa. It include penetration of Islam; Islam and trade; Kiswahili and Islamic literature; Islamic education and intellectual development; visual issues in Islamic civilization; European colonial

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<sup>39</sup>The Islamic Charter on Family, International Islamic Committee for Women and Child (IICWC) and World Assembly of Muslim Youth (WAMY), 2007.

<sup>40</sup> Ibid, Articles 91-122.

<sup>41</sup>Proceeding of the International Symposium on Islamic Civilization in Eastern Africa, Kampala, Uganda 15-17 December, 2003. Istanbul 2006.

powers and Islam, and Islam and contemporary period.<sup>42</sup> The book highlighted presence of kadhis courts which had jurisdiction on civil, criminal and administrative justice.<sup>43</sup>

History and spread of Islam through traders from Middle East and Asia and how they established settlements and governance especially along the coastal area. This new settlers came along with their culture and Islam and greatly influenced the indigenous Africans with whom they came into contact. The book discusses partly Islamic judicial system in this region which was initially the only judicial system in cities like Mombasa, Kilwa, Zanzibar, Lamu etc.

**Hammudah Abd al Ati (1977)**, *The Family Structure in Islam*:<sup>44</sup> in this book the author discusses the family in Islam which includes children and their rights and duties.<sup>45</sup> Before going into the question of family in Islam, he introduces the book by tracing back the family from the Arabian pre-Islamic rein and demonstrates the reforms which Islam introduced in the family sector. He then moves on to the definition and description of family as brought by Islam. The laws, rules, rights and duties related to marriage, divorce, children, their rights and duties, and the law of succession in Islam are discussed in this book. The book is quite relevant to us in as much as general Islamic family law is concern, but does not address our research question directly.

**Muslim Family Law in Sub-Saharan Africa (2010)**:<sup>46</sup>

This book comprise of collection of eleven (11) articles and divided into two parts: Part I which runs from article 1-6 deals with colonizing Muslim family law in Africa and Part II consisting of articles 7-11 covers Muslim family law, post colonialism states and constitutionalism in Africa. It is a wonderful book and quite relevant to the area of our study. The main theme of this book is to demonstrate history of Islamic family law in Africa and its coverage and scope before and during colonization periods and subsequent period of postcolonial and independence of Africa. It seems the theme of the scholars who have contributed whose articles are published in this book have

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<sup>42</sup>Ibid, Abdu B. K. Kasozi, Editorial Forward, p. XIII.

<sup>43</sup>Ibid, p. 32 (Article by Ahmed Bin Sumeit A. Badawy).

<sup>44</sup>Hammudah 'Abd al "ati', the family Structure in Islam (1977) American Trust Publication.

<sup>45</sup>Ibid, pp.182-207.

<sup>46</sup>Shamil Jeppie, Ebrahim Moosa & Richard Roberts (eds), *Muslim Family Law in Sub-Saharan Africa Colonial Legacies and Post-Colonial Challenges*; International Institute for the Study of Islam in the Modern World (ISIM) and Amsterdam University Press (AUP), 2010.

agreed that the colonials have suppressed both the operation of the Shariah and the customary law in Africa and that the same policy and trend continued in post colonial era of Africa.

At the introductory chapter, the book traces Muslim family Law and equates it with the law of personal status which includes age of consent, polygamy, divorce and rights to dissolution of marriage, custody, and inheritance, among others.<sup>47</sup>

**Hassan Mwakimako, in his article titled “Conflicts and Tensions in the appointment of Chief Kadhi in colonial Kenya 1898-1960”** asserts that during the reign of Sultan of Zanzibar, the Kadhis were more of representatives of the communities in Sultan’s courts than being exclusively judicial officers.<sup>48</sup>In line with the protectorate agreement the colonial administration formalized the institution though it was not at ease with the massive powers of the position of the chief Kadhi or Sheikh al Islam as it was in the early days. Their attempt to abolish this position failed but succeeded in gradual weakening of its powers.<sup>49</sup>

Confusion ensued whether the Kadhis were judges or administrators or both. In practice the Sheik al Islam/ chief Kadhi used to play both judicial and administrative role yet they were not subject to any authority of the arms of government. This confusion was settled in 1912 when the role of the chief kadhi was limited to judicial functions.<sup>50</sup>

**Dr. Abdulkadir Hashim in his article “Coping with Conflicts: Colonial Policy towards Muslim Personal Law in Kenya and Post-Colonial Court Practice”<sup>51</sup>** considers application of Muslim Personal Law how the kadhis courts which were established during the reign of the Sultan of Zanzibar along the Kenyan coast and Zanzibar in early 19<sup>th</sup> century, were systematically weakened and robbed of its jurisdiction and respect by both colonial and post-colonial administrations.<sup>52</sup>The East African Order in Council of 1889 provides that jurisdiction within

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<sup>47</sup>Ibid, p. 22.

<sup>48</sup>Ibid, Hassan Mwakimako, “Conflicts and Tensions in the appointment of Chief Kadhi in colonial Kenya 1898-1960” 2010) p. 110.

<sup>49</sup>Ibid, p.111.

<sup>50</sup> Ibid, pp. 113-114.

<sup>51</sup> Ibid, Abdulkadir Hashim, “Coping with Conflicts: Colonial Policy towards Muslim Personal Law in Kenya and Post-Colonial Court Practice” p. 221.

<sup>52</sup>Ibid, P. 221.

African continent should be exercised in conformity with the principles and standard of the law for the time being applicable in England.<sup>53</sup> Native laws (Islamic law and customary laws) were subjected to repugnancy clause of the principle of natural justice and morality as understood by English people.<sup>54</sup>

It is clear that this provision places the English law above the native laws which in turn indicates that the white man was superior to black man. In East Africa British judges have rejected some rules of Islamic personal law, including rules governing Islamic law on guardianship and custody of the child. If in their view the same does not serve best interest of the child.<sup>55</sup> The reform brought by the colonial administration in kadhis courts include limitation of its jurisdiction to matters of personal status, though what this mean is not defined.<sup>56</sup> Others were establishment of territorial jurisdiction at every *wilayet* (district) and creation of the office of the chief kadhi who was responsible of overseeing the institution and hearing appeals. In addition to this the colonial administration created administrative posts of *liwalis* and *mudirs*<sup>57</sup> which also double up with judicial powers.<sup>58</sup> Interestingly, article 57 of the Order in Council authorizes the high court to apply Islamic law in deciding Muslim personal law related cases.<sup>59</sup>

Under the sub heading of custody and guardian of children, he said that although in practice the kadhis have been entertaining cases of custody and guardianship, the law excludes this power from the jurisdiction of the court. Interestingly, he indicated that the decisions of colonial authorities in this regard have been conflicting.<sup>60</sup> However, he argued that the provision of s. 48 of the Interpretation and General Provision Act (Cap. 2 of the laws of Kenya) may be used to confer this jurisdiction upon the institution.<sup>61</sup>

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<sup>53</sup>Ibid, P. 224.

<sup>54</sup>Ibid, p. 224.

<sup>55</sup> Ibid, p. 225

<sup>56</sup>Ibid, P. 226.

<sup>57</sup>Mudir is a colonial administrative and judicial officer with full jurisdiction over natives in all matters in which the value subject in dispute doesn't exceed 250 rupees.

<sup>58</sup>Ibid, p.226.

<sup>59</sup>Ibid, p. 227.

<sup>60</sup>Ibid, P.233.

<sup>61</sup>Ibid, p. 244.

***Reforming and Retreating: British Policies on Transforming the Administration of Islamic Law and its Institutions in the Busa'idi Sultanate 1890-1963:***<sup>62</sup>

This is a PhD Theses in which the author accounts in details how the colonial administration embarked on the transformation of the administration of Islamic law and relevant institutions which included Kadhi, Liwalis and Mudirs courts. The transformation included codification of the procedural law and regulation governing Shariah Courts and Wakf Commission. According to the author the objective of the transformation was to undermine the operation of the shariah besides the colonial laws and to establish its hegemony in all key affairs of their subject. This is apparent by the entire removal of criminal jurisdiction and limitation of civil jurisdiction of the kadhis court to Muslims personal law, meaning that being the only form of judicial system operating in the Sultanate of Busa'idis, before this reform the court used to have unlimited jurisdiction in its territorial jurisdiction and applied Islamic law.<sup>63</sup>

**Journal for Islamic Studies, Vol. 22, 2002, special issue: Engagements with the Colonial State.:**

In this journal we are particularly interested with the article of Hassan Mwakimako<sup>64</sup> who discusses extension of the jurisdiction and operation of kadhis court to outside ten-miles protectorate area. In particular he examines introduction of the operation of Islamic law to Nairobi and competition over the position along ethnic lines as opposed to the teaching of Islam which propagates unity and oneness of its faithful. He described the officers holding this office as “Qadis not quite Qadis”. Meaning that this officers lack judicial powers as opposed to those who are in the protectorate and they were established upon request and persistent urge by Muslims. This office was anchored on Mohammedan Marriage and Divorce Registration Ordinance (Cap. 155) of 1906. The official title of the office holders is “Assistant Registrar of Mahammedan Marriages and Divorces”, though in public they were viewed as “Assistant Kadhis”.

The journal, in which this article is published, is a collection of similar essays from various African colonies which share same and similar tradition of applying Islamic law in their judicial needs at the time of the advent of the colonial powers. The theme was to outline the effect of the colonial

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<sup>62</sup> This is a PhD Theses ( university of western cape, south Africa, November 2010) by Dr. Abdulkadir Hashim, a Lecture Department of Philosophy, University of Nairobi.

<sup>63</sup> Ibid, Abstract, p. 2. At [www. Profiles.uonbi.ac.ke](http://www.Profiles.uonbi.ac.ke).last seen 20/08/2015.

<sup>64</sup>Hassan Mwakimako, Muslim Encounters with the Colonial State: The Making of ' Qadis not Quite Qadis' in Colonial Nairobi Ca. 1945, in Journal for Islamic Studies, Vol. 22, 2002, special issue: Engagements with the Colonial State.



administration on the operation of Islamic law in peripheral African states and reform which end up in either abolition or weakening of the institution.

### **Constitutional Review in Kenya and kadhis courts<sup>65</sup>**

This book is a collection of essays/ articles of proceedings in conference organized by St. Paul's University's Department of Religious Studies and Center for Contemporary Islam of the University of Cape Town on 20<sup>th</sup> March 2010. The conference discussed one of the contentious issues which were about to divide Kenya along religious line. A section of the church in Kenya disputed entrenchment of the kadhis court in the new constitution. **John Chesworth,<sup>66</sup> in his article "Kadhis court in Kenya: reaction and responses"**he examines historical background of the Kadhis court in Kenya which he traces back to long before the coming of British colonials and how the imperials committed themselves to protect and respect the institution along the coast. This commitment was formulized through successive agreements, constitution and legislations by both colonial and independence governments.

Of interest to us here is that this author clearly states that A. H Hardinge, her majesty's consul-general at Zanzibar in his speech on 16<sup>th</sup> June 1895 reiterated that all cases and law suits between the natives will continue to be decided according to the sharia.<sup>67</sup>The emphasis is "all cases" which in my understanding means the court in those days had unlimited jurisdiction provided the parties involved are natives of the protectorate. However, "The Court Ordinance, 1931" created three tier subordinate courts for Muslims. These are Liwalis and Mudir courts having jurisdiction in all matters but with pecuniary limitation and Kadhis court specifically for personal status.<sup>68</sup>

Samuel Mbithi Kimeu,<sup>69</sup> in his article titled "Historical and Legal Foundations of the Kadhi's Courts in Kenya" states that the history of Kadhis Court may be as old as the advent of Islam along East African Coast. On the jurisdiction of this court the author mentioned only that the court gradually lost its authority under the British rule until they were allowed to handle family related

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<sup>65</sup>This book is a collection of essays/ articles of proceedings in conference organized by St. Paul's University's Department of Religious Studies and Center for Contemporary Islam of the University of Cape Town on 20<sup>th</sup> March 2010. The book is not yet published.

<sup>66</sup> Ibid, John Chesworth's article, Kadhis court in Kenya: reaction and responses, PP. 3-4.

<sup>67</sup>Ibid, p. 4.

<sup>68</sup>Ibid. p. 4.

<sup>69</sup>Ibid, P.20.

cases. This is an indicator that initially the court enjoyed wider jurisdiction than only family matters. The author considers other jurisdiction with similar dual judicial system. Uganda, Zanzibar, Nigeria and Ethiopia are some of the countries share this dual judicial set up with Kenya and jurisdiction of their shariah courts extends to matters affecting children.<sup>70</sup> **Dr Mohamed Mraja**,<sup>71</sup> also shares same sentiment that the three forms of shariah courts existed up to the time of colonial times and that this courts had even criminal jurisdiction. However, during transition to independence only the Kadhi's court survived.<sup>72</sup>

**Abdulkadir Hashim (2005)**,<sup>73</sup> examines status and application of Islamic law in Kenya and Tanzania. He underscores that formal operation of Islamic law under the British rule dates back to 1889, when the Sultan of Zanzibar granted concession to the Imperial British East Africa Company (IBEAC) subject to the application of Shariah. He then outlines the legal basis of the application of the sharia which he concludes it anchors on the constitution and statutes. On court's jurisdiction the writer argues that in Kenya the relevant laws does not expressly provide for the custody and guardianship of children. Marriage, divorce and inheritance are expressly provided for. However, despite this, in practice kadhis courts have been handling such cases. To support this position the writer made reference to some cases of the high court where decisions were guided by the "*The Guardianship of Infants Act*"- Cap.144 of the Laws of Kenya. But in conclusion the writer makes reference to a prominent contemporary Muslim scholar, Imam Abu Zahra who holds that primarily Islam grants custody of infant to the mother because she serves the best interest.

**Civil Procedure, Quick Reference Guide for the Kadhis (unpublished)**<sup>74</sup> this manual was developed under the auspice of UNIFEM and Muslims for Human Rights (MUHURI) in fulfillment of UNIFEM's "*Access to Justice Programme*". It was felt that in order to enhance and improve access to justice in Kadhis court whose majority of its clients are women, a simplified rules and procedure was required. Thus the team focused on relevant sections of the Civil Procedure Act (Cap. 21 of the Laws of Kenya) and the rules thereunder. In the process however, the authors also

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<sup>70</sup>Ibid, P. 27.

<sup>71</sup> Ibid, Dr. Mohamed Maraja's article, kadhis courts in Kenya: current debates on the harmonized draft constitution of Kenya, P. 32-38.

<sup>72</sup>Ibid, P. 32.

<sup>73</sup>Abdulkadir Hashim, Muslim Personal Law in Kenya and Tanzania: Tradition and Innovation, in Journal of Muslim Minority Affairs, Vol.25, No. 3, December 2005.

<sup>74</sup>DrAttiya Waris, Civil Procedure, Quick Refrence Guide for the Kadhis(unpublished)

gave some insight on the historical background of the court in which they asserted it came as a by-product of early Arab settlers along the East African Coast in the 7<sup>th</sup> century and that it was the first formal judicial system established in Eastern Africa. They accounted that this was a special and unique court which applied dual legal system; Shariah and common law. The jurisdiction of the court extends to Muslims personal status, marriage, divorce and inheritance. But they were quick to underscore that what constitute “*Muslim Personal Status*” was not resolved in Kenya while other jurisdictions have properly clarified either in legislation or case law. In Appendix 4.4 of the book the authors listed definition of the phrase “personal status” from other jurisdictions.

*Judor Jackson: The Law of Kenya:* <sup>75</sup> at chapter four considered the law of person and gave wide range of areas. He included laws governing corporations, unincorporated associations, infants, adoption, guardianship, children and young persons, mentally disordered persons, aliens, nationality and marriage. Although this author gives a good historical perspective of Kenyan personal law, he made no reference as to whether the jurisdiction of the Kadhis court covers all what he perceives should fall under the law of personal status.

***Jamal J. Nasir: In the book titled “Arabs and Islamic Laws Series: the Islamic Law of personal Status.”***<sup>76</sup>It is a very detailed book virtually covering the entire Arab Muslim world and accounts that “*personal status*” covers all the family laws including all civil affairs of the children. Apparently that is how the term “personal status” is understood in an Islamic environment. However, its deficiency is limited to other jurisdictions hence it cannot directly serve our interest.

In “*Principle of Family Law*”<sup>77</sup> the author defined family law as those laws affecting the family which consists of a husband, wife and their dependent children. It further provides that in UK the Children Act of 1989 empowers Magistrate Courts, County Courts and the High Court to handle children related cases. Similar account is captured by authors of Bromley’s Law and others. As earlier mentioned none of these literatures referred to above could quench our desire for clarity on the subject of discussion.

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<sup>75</sup>Judor Jackson (1969), the Laws of Kenya, 3<sup>rd</sup> edn.

<sup>76</sup> Jamal J. Nasir: Arab & Islamic Laws Series: The Islamic Law of Personal Status: 2<sup>nd</sup>Edn. PP. 29-37.

<sup>77</sup> Judith Masson, Rebecca Bailey and Rebecca Robert: Principle of Family Law, 8<sup>th</sup>Edn. 2008, (Sweet & Maxwell).

## 2.2 Rights of the Children Guaranteed Under Islamic Law

The responsibilities of believers towards children are inviolable rights of the children because in Islamic jurisprudence rights and duties are correlated with each other. Children are enormous blessings from Allah; at the same time they are Amanah or trust from Him to us. The ultimate aim of preserving that trust is to do our best to protect them from hell-fire in the hereafter-life, “O You Who Believe! Protect yourselves and Your Families from that fire, whose fuel will be humans and stones.” (Al-Qur'an: 66: 6). All children, not just orphans, come into the category of ‘vulnerable’ – their parents and society as a whole need to ensure they are looked after, not only because children have intrinsic rights, but because Muslims have a duty to be charitable. Islam regards safeguarding children's rights as important because all human life is sacred to Allah.<sup>78</sup>

Children are entitled to just and equal treatment. No child should be given priority or any type of preference over the others in terms of gifts, grants, ownership or inheritance. Similarly, all children must be equally treated in terms of kind treatment and good behaviour. An unfair treatment to children may result in bad behaviour towards either or both parents in old age. Any unfair treatment to children may also cause hatred towards one another. This is derived from the Hadith, “Oh, Prophet of Allah! I want you to offer a share to one of my children and I want you to be witness to that. Upon hearing this man’s request, the Prophet asked, are you offering the gift to all of your children? The man who asked replied, no. I am not! The Prophet commented – then seeks someone else to witness your gift as I will not witness to an unjust and unfair situation. Be mindful of Allah. Be fair, just and equal in treatment of your children”<sup>79</sup>

After conception, the rights that Allah has prescribed for unborn children, in the Islamic Law, then take effect. Allah, subhanahu wa ta'ala, describes the persons who kill their children, prior or after their birth, as lost, misguided and ignorant, "Indeed lost are they who have killed their children, from folly without knowledge and have forbidden that which Allah has provided for them, inventing a lie against Allah. They have indeed gone astray and were not guided" (Al-Qur'an: 6:140). This is a clear prohibition against aborting the unborn. The person who aborts a child is punishable by paying ‘diyah’ reparation, known as algharrah. Based on person's understanding and

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<sup>78</sup> Ali, Hammudah Abd al (1977). *The Family Structure in Islam*, p.188. USA: American Trust Publications

<sup>79</sup> Assheha, Abdur Rahman (2004). *Islamic Concept of Human Rights*, pp. 11-12, Ed. Suhaib Alam Siddiqui. Delhi: Shipra Publications

assessment, some may accept varied reasons for aborting the unborn. However, Allah the All-Mighty has decreed, with His prior Knowledge, the right of the infant for sustenance and He guaranteed such rights. As a result, He soothes the hearts of those who may fear poverty, "And kill not your children for fear of poverty<sup>80</sup>. We provide for them and for you. Surely, the killing of them is a great sin" (Al-Qur'an: 17:31). The father should also do everything in his power to preserve the life of the unborn child, Allah says, "And if they are pregnant, then spend on them till they deliver" (Al-Qur'an: 65:6).

Children have a right to maintenance in Islamic law. Maintenance generally means the responsibility to spend one's own earning or property for the sustenance of some other person. Here maintenance means making all the arrangements necessary for the sustenance of a child out of one's own pocket. It includes the expenditure for nourishment, health, education and training. Under Islamic law it is the father who is responsible to provide maintenance to his children, whether in his own custody or in the custody of someone else. The extent of his liability depends on his financial position and the situation of the child. The daughters are entitled to be maintained till they get married; even if the marriage takes place after attainment of puberty. A male child can claim maintenance from father until he attains puberty. The father is liable to maintain the child even when the child is in the custody of divorced mother. The father's liability ceases only when he is refused the custody of the child for no justifiable cause. Where the child's separate living is justified the father continues to be liable<sup>81</sup>.

### **2.3 Role of Kadhi's Courts in Protecting Children**

As part of the subordinate court system, Kadhis courts are empowered to determine issues of Muslim law relating to personal status, marriage, divorce and inheritance for persons of Muslim faith. In its operation this court applies shari'ah.<sup>82</sup> However, appeal from the decision of the court lies to the higher secular courts.<sup>83</sup>

In 2012 the Judiciary of Kenya launched its transformation framework. The objective was to redeem the long-dented image of the judiciary and to make it align to the new progressive

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<sup>80</sup> Hussein, Abd Al-Razzaq (1998). *Islam and Children* in Sumayyah Bint Joan (2012)

<sup>81</sup> Arshed, I. A. (2012). Parent-Child Relationship in Islam; and Imam Al-Ghazali's views on children's education

<sup>82</sup> Art. 170 (5).

<sup>83</sup> Civil Procedure Act, Cap 21 (Rev. 2012) s. 65(1)(c).

Constitution, 2010. It provides for four pillars and ten key result areas. Pillar one is people focused delivery of justice and key result area number one is “*access to and expeditious delivery of justice*”.<sup>84</sup> This is based on Art. 159 of the constitution which demands the judiciary must enhance its service to the people fairly, equitably and expeditiously. It is a holistic working policy paper but unless it addresses our concern in this study some quarters of Kenyan population will still remain to face limited access to justice.

According to the belief of the Muslims, Shari’ah is based on the revealed and superior laws of the creator who is the most merciful Allah.<sup>85</sup> It is a complete code which suits every person at all times and under all circumstances.<sup>86</sup> Rights to life, freedom, equality and justice are corner stone pillars of the shari’ah.<sup>87</sup> Thus it gives all their due rights. The holy Quran provides: “*when judging between people judge them with fairness and just*”.<sup>88</sup>

When considering the rights of the children, shari’ah seeks to create formidable foundation for the child long before the child comes into being.<sup>89</sup> According to the rules and policy of the shari’ah there will be no child of a single parent, unless such situation occurred by natural cause of death. That is why in Islam sexual relationship outside marriage is strongly abhorred.<sup>90</sup>

In order to safeguard this policy Islam establishes and protects the institution of marriage.<sup>91</sup> Family is formed and protected within the marriage institution where the rights of all family members including

children are taken care of. In order to build the future of the yet unborn child, Islam ordains people who are planning to marry to make proper choice.<sup>92</sup> It goes a further step of suggesting certain

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<sup>84</sup> Judiciary Transformation Framework (JTF) (2012-2016), p. 14.

<sup>85</sup> Qur’an 12, verse 40.

<sup>86</sup> Qur’an 6, verse 38.

<sup>87</sup> Islam and human rights from the perspective of changing world, (first Edn), pp. 10-14.( Al-Maktabah al-shamellah).

<sup>88</sup> Qur’an 4, verse 58.

<sup>89</sup> Dr. Ibrahim Abdalla al-Marzouqy, Human Rights in Islamic Law, 2<sup>nd</sup> edn. Pp. 245-260.

<sup>90</sup> Qur’an 17, verse 32.

<sup>91</sup> Qur’an 24, verse 32.

<sup>92</sup> Al-Hafidh Ibn Hajjar al-Asqalany, Bulugh al-Maram min Adillatil Ahkam, Hadeeth No. 976, (7<sup>th</sup> Edn, Darulfalaq-Riyadh). P. 292.

qualities which should be considered when planning to marry. Of all qualities religion and good mannerism are highly emphasized.<sup>93</sup>

The legal rights of the child in Islam begin at conception. Many shared rights like inheritance are tied to the birth of the fetus. Likewise right to marry to another man while pregnant, even if just a start, is forbidden. Therefore, anything done or appropriated infavour of unborn child is legally valid and binding. Gift, will and other positive transactions can be executed in the benefit of the fetus.<sup>94</sup>

Abortion or injury as a result of unlawful act attracts criminal liability and the guilty offender should be punished.<sup>95</sup> However, in case of conflict between the life threatening interest of the fetus and that of the mother, mother's life takes preference at the expense of that of the fetus.<sup>96</sup>

These rights are further strengthened upon the birth. Right to breastfeeding, provision of full maintenance, protection against harmful practices, love and affectionate, proper education etc should be observed.<sup>97</sup> While the duty of bringing up of a child attracts certain rights, but when resolving disputes involving children the court should try to balance the rights of all stakeholders, i.e. parents and the child and give each their due right. But if such balancing may not be possible, the right of the child should be paramount. In this regard ibnAbbas, ruled that under ordinary circumstances mothers serves the best interest of the child, hence she should be given priority when determining disputes on custody of child.<sup>98</sup> Similar sentiment is reported from Sheikh al-Islam IbnTaymiyyah.<sup>99</sup>

The principle of considering the best interest of the child in cases concerning children, is similar to the provisions of international and regional conventions on the rights of the child and as well as the Childrens' Act No 8 of 2001 of the laws of Kenya. Therefore, in principle there is no conflict between the application of shari'ah and the law.

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<sup>93</sup>Dr.IbrahimAbdalla al-Marzouqy, Human Rights in Islamic Law, 2<sup>nd</sup>edn. Pp. 245-260.

<sup>94</sup> Imran Ahsan Khan Nyazee (2000), Islamic Jurisprudence, Islamic Research Institute Press, Islamabad, pp. 115-116.

<sup>95</sup>Yunus Abdu Ar-RabbFadhil al-Dulul(2007), Ruling of Abortion, [www.jameataleman.org](http://www.jameataleman.org), lorted on 11<sup>th</sup> January 2013.

<sup>96</sup> Dr. Sa'adibnMadar al-'Atiby, Ruling of Abortion on Necessity, [www.saaaid.net](http://www.saaaid.net), last seen on 17<sup>th</sup> April 2015.

<sup>97</sup>Qur'an 66, verse 6; Qur'an 2, verse 233.

<sup>98</sup> Dr. Swaleh bin Fouzan (2001), A-Mullakhas al-Fiqhiyi, al-dar al-'asimah, (1<sup>st</sup>edn). vol. 2, p. 442.

<sup>99</sup> Ibid.

Taking away jurisdiction of the kadhis courts to hear and determine cases concerning children would amount to miscarriage of justice. Family disputes are interconnected to each other. They are in form of a chain, hence cannot be separated from each other. Wife may file a suit against her husband who has neglected his duty towards the family. Imagine if she has children with him and she wants the court to compel him to provide maintenance for the family. Should she be subjected to move Kadhis court for her own rights and the children's court for the rights of the children? And in case she wants a divorce, custody of the child and maintenance?

What about a succession case where the parties are mixtures of adults and minors? Would they move different courts for the same estate?

Surely these scenarios, if allowed would involve double cost, delay and time consuming, confusion and end up in conflicting rulings from the different courts. The end result would be occasion of injustice from the institution which is custodian of justice.

Therefore, the Kadhi's courts as a special court is better placed to impart justice according to the shari'ah and it is competent to do so more than any other court.

## **2.5 Conclusion**

This chapter has dealt with the literature review and the role of the Kadhi's Court in ensuring the right of the child. The examination of the literature shows that attempts have been made to write on the Kadhis court generally but falls short of handling the topic of the research. Therefore, there is gap which hopefully this research will address.

On the other hand the chapter has seen complications and injustices which would be occasioned if the Kadhi's court would be denied jurisdiction to handle cases of the children. That shari'ah provides similar rights of the child as in international, regional and domestic conventions and legislation. Therefore, if that is the position then it is always fairer to handle all family related cases under one roof.



## CHAPTER 3: PERSONAL STATUS

### 3.1 Introduction

Personal status is a legal phrase. Both 1963<sup>100</sup> and 2010<sup>101</sup> Kenyan Constitutions and as well as the Kadhis Court Act<sup>102</sup> refers to it as part of the items in which Kadhis Courts would adjudicate. However, the phrase personal status in Kenyan contexts is not conclusively defined. There is no definition by relevant statutes or by the higher courts. However, other jurisdictions have clear provisions either by statutes or by the interpretation of the higher courts.

This chapter seeks to demystify the phrase personal status in general and in particular in Kenyan context as used in both the constitution and the Kadhis courts Act. To enable us to reach our objective we will make reference to the dictionaries, domestic and foreign statutes and courts decisions.

### 3.2 Definition of personal status:

According to English language dictionary<sup>103</sup> there is no such phrase as personal status or personal law or law of person. But it defines word by word as follows:

**Personal:** it defines with several meaning all relating to personal affairs depending on the context in which it's used. But what appears to be relevant to me in our context is *“the part of someone's life relating to things such as their sexual and family relationships, rather than their job”*.<sup>104</sup>

**Status:** the meaning as in this dictionary is *“the legal position of a person, a country etc”*.<sup>105</sup>

From the above dictionary definition of the words “personal” and “status” the merger of the two words could give rise to a different meaning. I attempt to define as follows:

**Personal Status:** The legal position of a person's life relating to things such as their sexual and family relationships, rather than their job.

This definition from the language point of view would mean all laws regulating someone's sexual and marital affairs and his relationship with the members of his family.

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<sup>100</sup> Art. 66 (5) of the Kenyan Constitution of 1963.

<sup>101</sup> Art. 170 (5) of the Kenyan Constitution of 2010.

<sup>102</sup> S. 5 of the Kadhis Court Act, Cap 11.

<sup>103</sup> Macmillan English Dictionary for Advanced Learners New Edition (2<sup>nd</sup>Edn: 2007).

<sup>104</sup>Ibid, p. 1112.

<sup>105</sup>Ibid, p. 1461.

According to the Black law dictionary<sup>106</sup> the nearest phrases are “**law of persons**” and “**law of status**” and define them as follows:

**Law of Persons:** The law relating to persons; the law that pertains to the different statuses of persons. This is also commonly known as *jus personarum*, a shortened form of *jus quod ad personaspertinet* (“the law that pertains to persons”).

**Law of status:** the category of law dealing with personal or nonproprietary rights, whether in rem or in personam. It is one of the three departments into which civil law is divided.

According to this legal dictionary definition the focus is on the laws dealing with the person in exclusion of other people.

Both the English language and legal definitions of personal status are in one way or another referring to the same subject; laws affecting a person’s life and that of his relatives in how they should relate to each other.

This would lead us to find out what would constitute family and personal law.

**Family law:** it is “*the law governing the relations of parent and child, husband and wife, guardian and ward, including such matters as illegitimacy and adoption. It is the same as the law of domestic relations and it is defined (family) to generally mean the parents and the children*”.<sup>107</sup>

The Black’s Law Dictionary defines family law as “*the body of law dealing with marriage, divorce, child custody and support, child abuse and neglect paternity, juvenile delinquency and other domestic relations issues, also termed as domestic relations; domestic relation law*”.<sup>108</sup>

In broader sense it defines it as the bodies of law dealing with Wills and estates, property, constitutional rights, contracts, employment and finance as they relate to families.<sup>109</sup>

In the words of Osborn’s concise law dictionary<sup>110</sup> family (Familia-Roman) include:

1. All those persons who were subjects to the postestas of the same individual whether his children, grand children etc or unconnected in blood eg slaves.
2. All descendants of the same ancestors.

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<sup>106</sup>Bryan A. Garner, Black Law Dictionary 9<sup>th</sup> (edn).

<sup>107</sup> R. M. DESAI, Law Dictionary, Ahmad & brothers, printers and publishers, Lahore, p. 75.

<sup>108</sup> Black’s Law Dictionary, 8<sup>th</sup>Edn. P. 638.

<sup>109</sup> Ibid.

<sup>110</sup>Osborn’s Concise Law Dictionary, 11<sup>th</sup>Edn.P.181.

3. All people's agnates.
4. The slaves of the paterfamilias.
5. The property of the paterfamilias.

Oxford Dictionary of Law defines Family as “*a group of people connected by a close relationship. For legal purposes a family is usually limited to relationship by blood, marriage, civil partnership or adoption. Statutes may expressly include other people such as common law wives. The court had interpreted the word family to include unmarried couples living as husband and wife in permanent and stable relationships. In Ghaidan v Mendoza (2002) 3 FCR (CA) the court interpreted the word family in the Rent capital Act to include the gay partner of a deceased tenant*”.<sup>111</sup>

**Closely related to family law is personal law.** The Black's Law Dictionary defines it as the law that governs family matters, usually, regardless of where the person goes. In common laws systems, personal laws refer to the law of the country in which the person is domiciled. In civil law systems, it refers to the law of the individual's nationality and so is sometimes called *lex patriae* (territorial law).<sup>112</sup>

It further states that the idea of personal law is based on the conception of man as a social being, so that those transactions of his daily life which affect him in a personal sense must be governed by that system of law deemed most suitable and adequate for the purpose. He gave marriage, divorce, legitimacy, many kinds of capacity and succession as examples of personal law.<sup>113</sup>

The foregoing definitions are very close to each other. The only difference is that one definition is clearer and wider in coverage than another. Otherwise all focuses on a person in relation to his family and laws governing their relation. It is quite clearer from the definition of Desai's Law Dictionary that “**Family Law**” covers quite a wide range of the members of the family specially parents and children.

From the above definitions I conclude that legal phrases of “personal status”, “family law” and “personal law” are synonymous and thus used interchangeably to mean one and the same thing. Further, from the definitions and discussion personal status cover all what is ordinarily known as

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<sup>111</sup> Oxford Dictionary of Law(2009) 7<sup>th</sup>Edn. P.225.

<sup>112</sup> Black's Law Dictionary, 8<sup>th</sup>Edn. P. 1180.(Quoting R. H. Graveson, Conflict of Law, 7<sup>th</sup>Edn. P. 188).

<sup>113</sup> Ibid.

family laws without any restriction whatsoever. Any restriction adopted without legal authority would amount to pervasion hence should not be entertained.

### **3.3 Statutes**

In Kenyan context the term personal status is directly employed only in the constitution<sup>114</sup> and the Kadhis courts Act.<sup>115</sup> Unfortunately these laws did not define what would constitute personal law.

Likewise, the “Interpretation and General Provisions Act”<sup>116</sup> which could guide interpretation of laws in Kenya is also silent in this regard. Consequently this uncertainty has led to conflicting interpretation of the phrase.

However, in Kenya there are statutes which expressly donate powers to kadhis Courts to entertain children related cases. The Law of Succession Act, Cap 160 of the laws of Kenya, the Children’s Act No. 8 of 2001 and the Marriage Act No. 4 of 2014 are in one way or another relevant in this regard. We will consider them briefly.

#### **3.3.1 Law of Succession Act, Cap 160**

This Act is the main law that covers both substantive and procedural provisions pertaining to the management and administration of the estate of deceased persons in Kenya.<sup>117</sup> It seeks “to amend, define and consolidate the intestate and testamentary succession and administration of estates of deceased persons; and for purposes connected therewith and incidental thereto”.<sup>118</sup> It was passed in 1972 but brought into effect on 1<sup>st</sup> July, 1981.<sup>119</sup>

The Act exempt Muslims from its operation and instead provides that the law of succession applicable to Muslims shall be Islamic law. “Subject to subsection (4), the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law”.<sup>120</sup>

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<sup>114</sup> Art. 170(5) of the Kenyan Constitution of 2010.

<sup>115</sup> S. 5 of the Kadhis Court Act, Cap 11.

<sup>116</sup>The Interpretation and General Provisions Act, Cap 2 of the laws of Kenya.

<sup>117117</sup> William Musyoka (2006), Law of Succession (LawAfrica), p. 3.

<sup>118</sup> Preamble to the Law of Succession, Cap. 160.

<sup>119</sup> William Musyoka (2006), Law of Succession (LawAfrica), p. 4.

<sup>120</sup> S. 2 (3) of the Law of Succession, Cap 160.

However, where the provision of this Act does not conflict with Islamic law it shall equally apply to Muslims especially the part relating to the administration of the estate. “Notwithstanding the provisions of subsection(3), the provisions of Part VII relating to the administration of estates shall where they are not inconsistent with those of Muslim law apply in case of every Muslim dying before, on or after the 1st January, 1991”.<sup>121</sup>

This provision is similar to the position of the law of inheritance before the enactment of the current legislation. During the colonial period Article 11 (b) of the East Africa Order in Council of 1897 applied the Indian Succession Act of 1865 as the general law of succession in Kenya and as well as

The Probate and Administration Act of India. But Muslims were exempted from the operation of these Laws and instead subjected to the provision of Islamic law governing inheritance.<sup>122</sup>

Native Court Regulation of 1897 was specific in applying Islamic law on matters of personal status. This Act was later re-enacted in Ordinance Number 13 of 1907 which established kadhis courts with full jurisdiction on matters relating to Muslim law of personal status.<sup>123</sup>

In 1920, Mohammedan Marriage, Divorce and Succession Ordinance was promulgated.<sup>124</sup> This is a unique legislation of Muslim personal law and empowers Kadhis Courts to arbitrate issues under it as a court of first instance. “Nothing herein contained shall abridge, prejudice or in anywise affect the jurisdiction of any court of Kadhi as by law established”.<sup>125</sup>

According to Musyoka the independent constitution established Kadhis Courts and mandated it to decide matters arising out of Islamic law where such matters are related to Muslim personal law.<sup>126</sup>

In case of dispute and controversies, the Act donates powers to the High Court which may be represented by Magistrate Court as appointed by the Chief Justice, to resolve issues under this Act.<sup>127</sup> The Act also empowers Kadhi’s Courts to especially determine all issues relating to the

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<sup>121</sup> Ibid, s. 2 (4).

<sup>122</sup> William Musyoka (2006), Law of Succession (LawAfrica), p. 9.

<sup>123</sup> S. 19 of Ordinance No. 13 of 1907.

<sup>124</sup> William Musyoka (2006), Law of Succession (LawAfrica), p. 9.

<sup>125</sup> S. 3(5) of The Mohammedan Marriage, Divorce and Succession Act, Cap 156.

<sup>126</sup> William Musyoka (2006), Law of Succession (LawAfrica), p.9.

<sup>127</sup> S. 47 (1) and s. 48 of The Succession Act, Cap. 160.

estates of Muslim deceased. “For the avoidance of doubt it is hereby declared that the kadhis' courts shall continue to have and exercise jurisdiction in relation to the estate of a Muslim for the determination of questions relating to inheritance in accordance with Muslim law and of any other question arising under this Act in relation to such estates”.<sup>128</sup>

This Act is quite relevant because inheritance affects adults and minors alike. Therefore by donating powers to the Kadhis Courts to adjudicate issues arising from the estate of Muslim deceased generally, it has empowered the Court to determine for children or against children.

### **3.3.2. Marriage Act 2014**

This Act is meant to amend and consolidate various marriage and divorce related laws in Kenya which existed for a long time.<sup>129</sup> Previously there were various Acts of parliament dealing with marriages of different populations based on their faith and customary allegiance. They include Christian Marriages, Islamic Marriages, Hindu Marriages, Civil Marriages, Customary Marriages etc and their registrations. The Act has now consolidated many of these laws and repealed some of them. The Act considers provision of maintenance and custody of the children as part of matrimonial proceedings and I quote: "Matrimonial proceedings" means proceedings instituted under Part IX and include *proceedings for the payment of maintenance or for custody of children* instituted independently of a petition for a declaratory decree or for annulment, separation or divorce”.<sup>130</sup>

However, the Act provides that procedures to be applied when handling children cases under this act shall be that applied under the “Children’s Act and any other laws relating to children. “Custody and maintenance of children shall be dealt with in accordance with the Children Act and any other written law relating to children”.<sup>131</sup>

The Act also empowers Kadhis Courts among other institutions to adjudicate matrimonial disputes of Muslims and issue decrees accordingly. “Where a Kadhi, sheikh, imam or person authorised by

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<sup>128</sup> Ibid, s. 47 (2).

<sup>129</sup> Preamble to the Marriage Act No. 4 of 2014.

<sup>130</sup> S. 2 of Marriage Act No. 4 of 2014.

<sup>131</sup> Ibid, s. 85.

the Registrar grants a decree for the dissolution of a marriage celebrated under Part VII, the Kadhi, sheikh, imam, Mukhi or authorised person shall deliver a copy of the decree to the Registrar”.<sup>132</sup>

The Act provides that the laws governing Islamic marriages and divorces shall be Islamic Law.

“A marriage under this Part shall be officiated by a kadhi, sheikh or imam as may be authorised by the Registrar and celebrated in accordance with Islamic law”.

<sup>133</sup>“The dissolution of marriage celebrated under Part VII shall be governed by Islamic law”.<sup>134</sup>

Part VII of the Act as referred to by these sections is the part that deals with Islamic marriages under the Act. The Act has repealed the following marriage and divorce related old legislations.<sup>135</sup>

Cap 150 The Marriage Act.

Cap 151 The African Christian Marriage And Divorce Act.

Cap 152 The Matrimonial Causes Act.

Cap 153 The Subordinate Court (Separation and Maintenance) Act.

Cap 155 The Man Marriage A'nd Divorce Registration Act.

*Cap 156 The Mohammedan Marriage Divorce and Succession Act.*

Cap 157 The Hindu Marriage and Divorce Act.

Out of the repealed old Acts relevant to the Kadhis Courts are Cap 156, The Mohammedan Marriage, Divorce and Succession Act. However, it did not affect the powers of the court in anyway. The Act shifted the issues of marriage and divorce to itself and gave powers to the kadhis courts to handle them as usual. In addition the Act gave the court powers to handle cases related to children though as seen above the procedure will be govern by children’s act. Yes the Act is silent on succession but the same is well protected under the constitution, Law of Succession Act and the Kadhis Court Act. It is interesting to note that the Act donates judicial power to the kadhis court under part VII, but at the same time defines court as limited to magistrate court as established under the Magistrate Courts Act. "Court" means a resident magistrate's court established under section 3 of the Magistrates' Courts Act;<sup>136</sup>

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<sup>132</sup> S. 72 of the Marriage Act No. 4 of 2014.

<sup>133</sup> Ibid, s. 49 (1).

<sup>134</sup> Ibid, s. 71.

<sup>135</sup> Schedule pursuant to s. 97 of the Act.

<sup>136</sup> S. 2 of the Marriage Act No. 4 of 2014.

I have no hesitance to underscore here that this is just part of the long term continuous scheme of undermining the kadhis courts and its jurisdiction. The same idea is reflected under Part X of the Act that other institutions like Imam, Mukhi and Sheikh who are not judicial officers are brought to the level of kadhis to share judicial powers with the Kadhis. And that under this Act Kadhi's judicial powers are subject to the authorization of the Registrar of Marriages and Divorces.

“Where a Kadhi, sheikh, imam or person authorised by the Registrar grants a decree for the dissolution of a marriage celebrated under Part VII, the Kadhi, sheikh, imam, Mukhi or authorised person shall deliver a copy of the decree to the Registrar”.<sup>137</sup>

This development can be looked from two sides; positive or negative. Creation of other institutions to help resolve matrimonial dispute among Muslims may be seen as an added advantage because it widens avenues by bringing service of justice closer to people, hence enhances access to justice. On the other side in the absence of proper check on the qualification and training procuring judicial services of these additional institutions may undermine the quality of service.

Also the Act purports to shift the allegiance of the Kadhis to the Registrar of Marriages and Divorces because in this area of matrimonial proceedings it is the appointing authority. This is tantamount to a conflict in that the Kadhis are appointees and employees of the Judicial Service Commission (JSC) and not that of the Registrar of Marriages and Divorces. The provision of the constitution is clear in this regard. Kadhis Courts is among the subordinate courts<sup>138</sup> and Kadhis are appointed and managed by the Judicial Service Commission.<sup>139</sup>

### **3.3.3 The Children's Act No. 8 of 2001**

This Act is a detailed piece of legislation making provisions “for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institutions; to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes”.<sup>140</sup>

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<sup>137</sup> S. 72 of the Marriage Act No. 4 of 2014.

<sup>138</sup> Art. 169 (1) (b) of the Constitution.

<sup>139</sup> Ibid, Art, 172 (1) (b/c).

<sup>140</sup> Preamble to Children's Act No. 8 of 2001.



The Act creates Children's Court "There shall be courts to be known as Children's Courts constituted in accordance with the provisions of this section...".<sup>141</sup> And it empowers the Chief Justice to appoint a magistrate to preside over children's court. ..." "The Chief Justice may, by notice in the Gazette, appoint a magistrate to preside over cases involving children in respect of any area of the country".<sup>142</sup>

The creation of children's court and the appointment of magistrate to preside over the court do not, however, preclude other courts and their presiding judicial officers from handling children related cases. This is clear from the provisions of the children's Act itself. It has express provisions which empower other courts to handle children cases just like the children court. "...where in the course of any proceedings in any court other than a Children's Court it appears to the court that the person charged or to whom the proceedings relate, is under eighteen years of age, nothing in this section shall prevent the court, if it thinks fit, from proceeding with the hearing and determination of the case".<sup>143</sup>

In addition to the foregoing, the Act list down certain legislations which it has repealed as enumerated below.<sup>144</sup>

Cap.141 the Children and Young Persons Act

Cap.143 the Adoption Act

Cap.144 the Guardianship of Infants Act

None of these repealed acts affects the jurisdiction of the kadhis courts in any way. Therefore, it was the intention of the legislatures to repeal only the above listed laws and not any other law hence the status quo of the jurisdiction of the Kadhis court remains as envisaged in the constitution and the Kadhi's Courts Act.

### **3.4 Decision of the courts in Kenya**

We have seen above the position of the relevant statutes in Kenya. However, laws are interpreted by courts of higher authority whose decision forms precedence and binds lower courts. I have examined some of the decisions of the higher courts and found that there is no consistency in their

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<sup>141</sup> S. 73 of the Children's Act No. 8 of 2001.

<sup>142</sup> Ibid, s. 73 (d) (ii).

<sup>143</sup> Ibid, s. 73 (d) (iii).

<sup>144</sup> Ibid, sixth schedule pursuant to s. 200 (i).

decisions. Their decisions are conflicting. This has caused confusion on the subject matter of this study.<sup>145</sup>

The earliest case I spotted on is the 1932 case in which the judge (Lucie Smith) observed that question of guardianship of minor children of Mohammedan are to be determined by the Courts of Colony according to English Law.<sup>146</sup> Interestingly earlier the same court applied Islamic law in determining custody of a minor girl.<sup>147</sup>

In the case of Masood bin Said, as executor of Salim bin Mohamed Ghulum versus Said bin Salim bin Mohamed Ghulum. In her majesty's Court of Appeal for Eastern Africa (vol. xxi 1954). The court was considering in a paternity case which rules of evidence should apply; Islam or Indian Evidence Act in Kadhis Court... the kadhi relied on shari'ah but the appellate court directed that the Indian evidence act should apply and remitted the case back to the kadhi for reconsideration. This shows the kadhi then had powers to handle children's related sensitive matters as paternity test.<sup>148</sup>

The effect of this finding of the learned judge is that if the applicable law in Muslims children cases is the English law, then automatically Kadhis Court will have no jurisdiction in such matters. Because, ordinarily the province of the Kadhis Courts is limited to question of Islamic law relating to personal status. And on the other hand if the applicable law in such cases is Islamic law, then the Kadhis Court may have jurisdiction.

However, in a later case of 1981, the presiding Judges (Madan, Law and Potter, JJA) on appeal ruled that ***“Ismailia Provincial Council has jurisdiction to determine on custody and maintenance of children. Hence the same matter cannot be heard under different court. The Council has jurisdiction because Ismailis submitted to it in respect of their personal law, but***

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<sup>145</sup>See HMM v KJD (2014) eKLR and Abdirahman Mohamed Abdi and another v Adan Yussuf (2013) eKLR

<sup>146</sup> Nana Binti Mzee V Mohamed Hassan, Civil Case No. 65 of 1932, Law Reports of Kenya 1942-43, Vol. XX, Part I-1942, pp. 3-4.

<sup>147</sup>Ibid, P. 3.

<sup>148</sup>Civil Appeal No. 21 of 1946 as reported in her majesty's Court of Appeal for Eastern Africa (vol. xxi 1954).

*Council is always subject to the supervisory jurisdiction of the high court should it not act according to the law*<sup>149</sup>

Ismailia is a sect in a Shi'a Muslims and by virtue of the Constitution and relevant statutes, the learned judges of the Court of Appeal found that the Council has jurisdiction to determine on custody and maintenance of children of their sect. This matter was filed under The Mohammedan Marriage and Divorce Registration Act (Cap. 155) and The Mohammedan Marriage, Divorce and Succession Act (Cap. 156) of the laws of Kenya.

I should say that by way of analogy this finding of the learned judges of the highest court in Kenya, as it was then, should equally apply to the Kadhis Courts. Hence the Court should logically have jurisdiction to determine on custody and maintenance of children. Decisions on more recent cases are not better though. They indicate continuation of conflicting views and creation of more confusion.

In a case that originated from the judgment given by Mombasa Principal Kadhis Court, Hon. Abdulhalim Athman the presiding judge, Justice M. Odero, the Chief Kadhi, Hon. Muhdhar Hussein who was an assessor and Appellants lawyer Mr. Mwaniki were all of the opinion that the Kadhis Court lacks' jurisdiction to adjudicate claims relating to custody of children.<sup>150</sup>

However, a part from the current chief Kadhi Al-Muhdhar Hussein, the rest of the current Kadhis are of the view that the court has jurisdiction to handle children related cases provided they are civil in nature. For the interest of brevity I will make reference only to the decisions of the Deputy Chief Kadhi, Hon Rashid Omar and the principal Kadhi, Hon. Abdulhalim Athman. Hon. Rashid observed "...the issues of maintenance and custody of minors is under the the categories of personal status, thus this court (kadhis') has an inherent jurisdiction to hear and make determination on them".<sup>151</sup> Also Hon. Abdulhalim remarked in his ruling on the same;

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<sup>149</sup>Udunga Digest on Civil Case Law and Procedure, Vol 3 (2<sup>nd</sup>edn.LawAfrica), p. 2689, referring to Naurani V Naurani (1981) KLR 87-102.

<sup>150</sup>H M M v K J D [2014].

<sup>151</sup>Republic of Kenya, in the Kadhis Court at Nairobi, Matrimonial/Civil Suit No. 103 of 2014, Kamran Mohamed Noorani=v=Emran Coral Walla.

“The Kadhis Court have jurisdiction to hear and determine issues of custody and maintenance of children where both parties profess the Muslim faith.”<sup>152</sup>the rest of the Kadhis including the researcher have rendered many rulings and judgments holding that indeed the court has jurisdiction to handle children cases.<sup>153</sup> Their arguments heavily rely on the interpretation of the phrase “*personal status*” which is stated both in the constitution and the Kadhis courts Act. They are of the view that “*personal status*” as in our laws has broader meaning including children’s and their rights.<sup>154</sup>

Judges of the superior courts are also equally divided on this issue. In the case of *Amin Mohamed Hassan versus Zahra Mohammed Abdulkadir*, the presiding judge ruled that the kadhi’s court has jurisdiction to handle children related cases and that there is nothing in the Children’s court that suggest the Kadhi’s court lacks’ such powers.<sup>155</sup> On the other hand in the case of *Salah Mohamed Hassan versus Suat Abdulaziz*, the High Court sitting in Kasumu decided that the Kadhi’s Court has no jurisdiction to entertain cases concerning children.<sup>156</sup>The Children’s Act establishes children’s courts<sup>157</sup> and mandates the Chief Justice to designate some magistrates to handle children cases at a particular station.<sup>158</sup>It is unfortunate that some judges opted to restrict the powers of the kadhis court purportedly relying on the provisions of the Children’s Act, while in reality there is no such provision in the Act. To the contrary the Act expressly donates powers to other courts to continue handling cases concerning children.

<sup>159</sup>s. 73 (d)(iii): *where in the course of any proceedings in a Children's Court it appears to the court that the person charged, or to whom the proceedings relate, is over eighteen years of age, or where in the course of any proceedings in any court other than a Children's Court it appears to the court that the person charged or to whom the proceedings relate, is under eighteen years of age, nothing in this section shall prevent the court, if it thinks fit, from proceeding with the hearing and determination of the case;*

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<sup>152</sup> In the Kadhis Court at Mombasa, Civil case No. 3 of 2015, Omar Salim Abdalla =v= Munaa said Ahmed.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

<sup>155</sup> High Court of Kenya at Mombasa, Civil Appeal No. 120 of 2004 (2009) eKLR.

<sup>156</sup> High Court of Kenya at Kisumu, Misc. Appl. No. 125 of 2013. (unreported).

<sup>157</sup> S. 73 of the Children’s Act No. 8 of 2001.

<sup>158</sup> Ibid, S. 73 (d)(ii).

<sup>159</sup> S. 73 (d)(III) of Children’s Act No. 8 of 2001.

### 3.5 Rules of Interpretation

In law interpretation of law is governed by certain rules which judges should observe while interpreting laws. It is not my wish at this juncture to delve so much in those rules of interpretation of statutes. Referral of few rules and examples from the superior courts of the land would suffice.

There are four rules of interpretation. Literal rule, golden rule, purposive rule and mischief rule.<sup>160</sup>

In literal rule the focus is on the plain language which should be given ordinary meaning of the word. The golden rule seeks to consider the statute together and gives meaning of any part of it according to the objective and context of the statute as a whole. Closely related to the golden rule is the purposive rule which considers interpretation of legislative words by examining the general purpose of the statute in the social, economic or political context. Lastly, the mischief rule as the word itself suggests seeks to guide the judges to consider history prior to the legislation under review, its failure, remedy and reason of the remedy intended to achieve by the new legislation.<sup>161</sup>

However, the best practice is that the above rules are used depending on the nature of the legislation. None of them stands on its own and independent of another rule. They should be examined together.

***“When the court is called for an interpretation they do it not like a dictionary but in the context of the statute.”***<sup>162</sup>

In *Kibocha v Republic* the presiding learned judges were considering whether seemingly two conflicting provisions of the Evidence Act, ss. 25A and 111, one of them repealed the other. The judges ruled that in the absence of express provision to that effect then each section should be given operational effect.

***“A statute or a section or part of a section of a statute cannot be said to have been repealed by implication. Express words must be used”.***<sup>163</sup>

Similar sentiment was observed by learned judges in *Republic v Public Procurement Administrative Review Board* and another *ex parte SelexSistemiintegrat*. The court was considering whether s. 100(4) of Public Procurement and Disposal Act No. 3 of 2005 oust or restrict the

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<sup>160</sup> James Holland & Julian Webb, *Learning Legal Rules*, 7<sup>th</sup>Edn, P. 253.

<sup>161</sup> *Ibid*, pp. 253-263.

<sup>162</sup>*Ibid*, p. 252.

<sup>163</sup>*Kibocha V Republic* (2009) KLR, Pp. 381.

jurisdiction of the High Court. The Court observed “*ouster or restrictive clause on the jurisdiction of the court would only be effective if clear statutory words were used...*”<sup>164</sup>

The gist of the above mentioned findings of the learned judges are that repealing law or section must be explicit and clear and that no law or part of law shall be repealed by implication. Therefore, in this regard there is no any direct and clear provision in the children’s Act which took away jurisdiction of the kadhi’s court in relation to the children.

### **3.6 Other jurisdiction**

There are other jurisdictions which have well defined laws on personal status. In Arab speaking countries personal status law is known as Qanun al Ahwaal Al-Shakhsiyyah<sup>165</sup> while personal status is translated as Al- Ahwaal Al-shakhsiyyah.<sup>166</sup>

In East Africa only Kenya and Tanzania (Zanzibar) have Kadhi’s Courts and their laws are almost similar. The constitution of Zanzibar empowers the parliament to establish courts subordinate to the High Court of Zanzibar.<sup>167</sup> Section 6 (1) of The Kadhis Court Act, 1985 of Zanzibar provides:

“A Kadhis Court shall have and exercise jurisdiction in the determination question of Muslim law relating to personal status, marriage, divorce or inheritance in proceeding in which all the parties profess the Muslim religion.”<sup>168</sup>

However, according to a State Counsel in the office of the Attorney General of Zanzibar, the court,s jurisdiction extends to the guardianship, custody of the children, Waqf (Endowment), gifts, maintenance where the claim does not exceed five hundred thousand shillings etc.<sup>169</sup>

In Gambia the jurisdiction of the Kadhis Court is similar to that of Kenya in that it’s limited to personal status, marriage, divorce or inheritance where all parties are Muslims.<sup>170</sup>

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<sup>164</sup>Republic v Public Procurement Administrative Review Board and another ex parte SelexSistemiIntegrat, (2008) KLR, p. 731.

<sup>165</sup> Dr. Ibrahim I Al- Wahab, Law Dictionary,English-Arabic (3<sup>rd</sup>Edn: 1988), p. 172.

<sup>166</sup>Ibid, p. 232.

<sup>167</sup> Art. 100 of the Constitution of Zanzibar (?R.E. 2006).

<sup>168</sup> S. 6(1) of the Kadhis Courts Act No. 3 of 1985 of Zanzibar (Rev.2006).

<sup>169</sup>E-mail correspondence dated 15<sup>th</sup>July 2015.

<sup>170</sup> Art. 120(b) of the Constitution of the second Republic of Gambia (1997).

There is no Kadhis Courts in Uganda. However, the Constitution provides a legislation to establish Kadhi's Court with the jurisdiction of handling Muslims cases of personal status, marriage, divorce, inheritance and guardianship.<sup>171</sup>

In Malaysia Kadhis Courts are called Shari'ah Courts.<sup>172</sup> They are available at both subordinate and appellate levels.<sup>173</sup> The jurisdiction of the shari'ah courts under Islamic Family Law (Federal Territories) Act 1984 covers marriage<sup>174</sup>, divorce<sup>175</sup>, maintenance of wife, children and others<sup>176</sup>, guardianship which include management of the person and property affairs of the minors<sup>177</sup>, question of legitimacy of a child<sup>178</sup> among others.

In the following pages we will briefly discuss few selected countries in relation to personal status law. These countries are selected because they have more elaborate laws on the subject of this research.

### **3.6.1 Iraq**

In Iraq the family law is named as personal status law.<sup>179</sup> The following are the brief outlined of this law.

It comprises of 94 articles which is divided into general provisions, nine chapters which is further segmented into smaller sections. The general provisions deals with the scope of the application of this law and gives guidance to the courts in the event there is lacuna in this law.

Chapter 1 deals with the marriage which is further arranged into sub sections. Betrothal, pillars and conditions for marriage, validity of marriage, and registration of marriage contract are covered under this chapter.

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<sup>171</sup> Art. 129, The Constitution of Uganda, 1995.

<sup>172</sup>S.2(1) Islamic Family Law (Federal Territories) Act 1984 [Act 303].

<sup>173</sup> Ibid.

<sup>174</sup>Ibid; ss.7-44.

<sup>175</sup>Ibid; ss.45-58.

<sup>176</sup> Ibid; ss. 59-80.

<sup>177</sup> Ibid; ss. 81-105.

<sup>178</sup> Ibid; ss. 110-119.

<sup>179</sup> Law No.(188) of the year 1959 as translated into English by the American Bar Association Iraq Legal Development Project.

Chapter 2 devotes on other aspects of marriage. Section 1 deals with the marriages which are prohibited either permanently or temporarily and marriage to women belonging to the people of the book (*kitabiyah*). Chapter 3 deals with matrimonial rights and their stipulations. Dowry and wife's alimony are covered here.

Chapter 4 treats dissolution of marriage. Various forms of dissolution of marriages are addressed here. They include divorce, legal separation and voluntary separation (*khul'u*). The waiting period (*eddah*) and the laws involved are also covered under this chapter.

Matters involving children is covered in chapter 6. Kinship, breastfeeding and custody are elaborated here.

Chapter 7 discusses maintenance for descendants, ascendants and relatives. It lays principle that everybody is provided for from his or her own property and wealth except wife who shall always be provided from the property of the husband. If the child does not have property of his own his father shall provide for him. Parents shall provide for their daughter until she gets married and boys until they attain the age at which their peers are ordinarily earning, unless he is a student. An adult child who is incapable of earning livelihood is considered as minor and thus his maintenance shall be provided for by the parent.

Chapter 8 deals with bequeathing. Will, appointment of an executor and cessation of custody are examined under this chapter. Laws governing Will, types of Will, valid, voidable and void Will and the role of the executor are highlighted here. Of interest article 74 provides that if any child, male or female dies before the parent and survived by a child, upon the demise of the deceased parents, he will be treated as alive and his share shall be handed down to his children according to the shari'ah.<sup>180</sup>

Chapter 9 deals with Legacy and the laws of inheritance. It runs from article 86 to 94.

From the above overview of the Iraq "Personal Law" it's clear that it covers marriage, divorce, children and their affairs, inheritance, Wills and bequeaths. This is how personal status is understood and practiced in Iraq and it's my conviction that our (Kenya) personal status also have similar scope as Iraqi's as discussed above. I do not see any reason why personal status in our context should be limited to the marriage, divorce and inheritance.

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<sup>180</sup> Ibid, Art. 74.



### 3.6.2 Egypt

Egypt's family law is called personal status laws. John Miles<sup>181</sup> in his investigation on the development of customary and Islamic law in Egypt discusses various operational courts and their jurisdiction in the country. These courts are mixed courts, the Consular courts, the national courts and importantly courts of personal status. Owing to the competing social and political interests each of these courts is modeled in such a way that it serves the interest of particular population. Courts of personal status serve personal status interest of various religious groups. There are shari'a courts for Muslims and Milli Courts for non-Muslim population.

This view of describing family law as personal status law seems to be common to the writers on the family law in Egypt. "From Jihan to Susanne, twenty years of personal status law in Egypt" is a title of an article examining general overview of Egyptian personal status law paying special attention to marriage and divorce.<sup>182</sup>

In Egypt there are many family laws titled the law of personal status governing specific aspect of the family.<sup>183</sup> I will enumerate few of these laws.

1. The law of maintenance and personal status (Law No. 25/1920);
2. Law No. 56/1923 regulating the minimum marriage age.
3. Law of Personal Status (Law No. 25/1929) regulating dissolution of marriage and family disputes.
4. Law of inheritance (Law No. 77/1943).
5. The Law of Bequest (Law No. 71/1946).
6. Law No. 1 of 2000.

Overview of those laws reveals details of what the personal status comprise in their context. Marriage, divorce, children and their rights including legitimacy, paternity test<sup>184</sup> and their physical custody, maintenance, care and welfare among others are adequately covered.<sup>185</sup>

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<sup>181</sup> John Miles, Customary and Islamic Law and its Development in Africa in Law for Development Review (Africa Dev. Bank) Pp. 13-14.

<sup>182</sup>Nathalie Bernard-Maugiron/BaudouinDupret, Twenty Years of Personal Status Law in Egypt in Recht van de Islam 19(2002), pp.1-19.

<sup>183</sup> John Miles, Customary and Islamic Law and its Development in Africa in Law for Development Review (Africa Dev. Bank), P.14.

As earlier mentioned in the introductory chapter the Egyptian Court of Cassation has settled the definition of personal status in 1934 when it stated that:

*“Personal Status is the sum total of the physical or family descriptions of a known person which distinguishes him from the others and give legal effect under the law in his social life such as being male or female, married widowed or divorced, a parent or legitimate child, being of full legal capacity or defective capacity due to minority, imbecility or insanity, being of absolute or limited legal capacity.”*<sup>186</sup>

### 3.6.3 Nigeria

Nigeria has different layers of law consisting of English Common Law, local customary law and Islamic Law.<sup>187</sup> The constitution of the Federal Republic of Nigeria, 1999 establishes shari’a courts with appellate jurisdiction based at Abuja.<sup>188</sup> It further donates powers to willing states to establish such courts.<sup>189</sup>

The constitution defines jurisdictions of the shari’a courts as covering *“civil proceedings involving questions of Islamic personal law”*<sup>190</sup> and any other question provided the parties have agreed the court has jurisdiction.<sup>191</sup>

What would constitute Islamic personal law is further described as including the following:<sup>192</sup>

1. Matters relating to marriage concluded in accordance with Islamic Personal Law;
2. Questions of Islamic personal law regarding gift, Will or succession where the endower, donor, testator or deceased person is a Muslim; and

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<sup>184</sup> Art. 15 of the Law of Personal Status No. 25 of 1929 as amended by Law No. 100 of 1985.

<sup>185</sup> Ibid, Art. 20.

<sup>186</sup> UNIFEM and MUHURI: Civil Procedure, Quick Reference Guide for the Kadhis (unpublished): P. 69.

<sup>187</sup> Ibid, P. 7.

<sup>188</sup> <sup>188</sup> Art. 260 of the Constitution of the Federal Republic of Nigeria, 1999.

<sup>189</sup> Ibid. Art. 275(1).

<sup>190</sup> Ibid, Art. 262.

<sup>191</sup> Ibid, Art. 262(2)(e).

<sup>192</sup> John Miles, Customary and Islamic Law and its Development in Africa in Law for Development Review (Africa Dev. Bank) P. 7.

3. Any question regarding an infant, prodigal, or person of unsound mind who is Muslim; or
4. The guardianship of a Muslim who is physically or mentally infirmed.

It is clear from the foregoing that in Nigeria the shariah courts which is same as kadhis court in our case has jurisdiction over civil proceedings involving question of Islamic personal law. And Islamic personal law in their context is well described as marriage and issues connected thereto, gifts and wills affairs of the estate deceased Muslim, persons of limited legal capacity as in infants and persons of unsound mind and as well as affairs of a physically handicapped Muslim.

### **3.6.4 Israel**

The English law which was the law of Palestine before the establishment of the state of Israel defines personal status law as:

“for the purpose of these provisions matters of personal status mean suits regarding marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption of minors, inhibition from dealing with property of persons who are legally incompetent, successions, wills and legacies, and the administration of the property of absent persons”.

When the State of Israel was established it took over all legal affairs including the management of personal status. The religious courts were authorized to deal with such matters of personal status.<sup>193</sup>

The status in Israel is clearer. As in our case their law talks of “personal status” and for clarity personal status is defined to cover marriage, divorce, alimony, maintenance, guardianship of infant and minors and question of their legitimacy and adoption. Others are inhibition order dealing with the property of legally incompetent persons, succession, Wills and legacies and as well as administration of the property of absent persons. Those are what constitute the legal phrase of “personal status” in Israel and judicially managed by the religious courts.

### **3.6.5 Ethiopia**

Ethiopian judicial system is similar to that of Kenya in that it has established and adopted dual legal systems. This is based on the constitution which among other rights establishes and protects rights to equality<sup>194</sup>, freedom of religion, conscience and thought<sup>195</sup>, rights relating to marriage and

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<sup>193</sup> (Solomon Zeitlin. Personal Status in Israel in “The Jewish Quarterly Review, Vol. 49, No. 2(Oct. 1958), P. 122).

<sup>194</sup> Art. 25 of The Constitution of Ethiopia (1994).

the family<sup>196</sup> and an independent judiciary<sup>197</sup>. The Highest judicial power of the Federal Government vests in the Federal Supreme Court. The parliament may establish Federal High Courts and Courts of First Instance. Besides Federal Courts, States shall have courts of similar hierarchy with the federal Courts.

Of important to us the constitution mandates People's Representatives (Federal Parliament) and as well as the States Parliament to establish or recognize religious and customary courts of law. This is done pursuant to article 34 (5) of the Constitution and I quote: "***this Constitution shall not preclude the right of parties to voluntarily submit their dispute for adjudication in accordance with religious or customary laws. Particulars shall be determined by law***".

Proclamation No. 188/1999 titled "Federal Shari'a Court" established a three tier Shariah Courts; Federal Supreme Court of Shari'a, the Federal High Court of Shari'a and First Instance Court of Shari'a.<sup>198</sup> These courts are manned by chief kadi, his deputy and kadis. They have registrars and other personnel for its operation. The jurisdiction is limited in the words of John Miles to "personal and family matters".<sup>199</sup> They are as follows:-

1. Any question regarding marriage, maintenance, guardianship of minors and family relationships; provided that the marriage to which the question relates was concluded, or the parties have consented to be adjudicated in accordance with Islamic law.
2. Any question regarding Waqf (endowment), gift/hiba, succession or will: provided that the endower or donor is a Muslim or the deceased was a Muslim at the time of his death.
3. Any question regarding payment of costs incurred in any suit relating to the aforementioned matters.

The Ethiopian judicial system is typically like Kenya. It has a dual court system consisting of religious courts and the mainstream secular courts. Like Kenyan kadhis courts the shari'ah courts in Ethiopia is manned by kadis or Kadhis. The jurisdiction of this court extends to children and

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<sup>195</sup> Ibid, Art. 27.

<sup>196</sup> Ibid, Art. 34

<sup>197</sup> Ibid, Art. 78.

<sup>198</sup> Art. 3 of Proclamation 188/1999.

<sup>199</sup> John Miles, Customary and Islamic Law and its Development in Africa in Law for Development Review (Africa Dev. Bank) p. 44

their welfare, endowment and gifts among others. That is how personal status is understood in Ethiopia.

### 3.7 Work of the Scholars

Many contemporary Scholars have extensively written volume of books and articles in this regard. I will make reference to few of them and briefly analyze their contributions.

#### 3.7.1. Dr.Mohamed Abu Zahra<sup>200</sup>

This scholar among many of his scholastic works is the book title “**Al-Ahwal Al-Shakhsiyyah**”. The book is in Arabic and the title may be translated as Family Law or Personal Status Law. The 3<sup>rd</sup> edition which I am using is a 500 pages one volume book and was published in 1957.

The author introduced the book as meant for the student of sharia<sup>201</sup> and took a comparative approach in discussing relevant family laws and sharia.<sup>202</sup> The book is divided into four parts as follows<sup>203</sup>:

**Part I:** deals with the inception of marriage contract, prerequisite condition and preceding introduction to a valid marriage and conditions needed for its establishment, validity and continuity.

**Part II:** this part extensively discusses the rights and duties of spouse. Dowry, provision of maintenance, obedience, mutual respect and management of the family affairs are well addressed here.

**Part III:** this part examines various ways of terminating marriage, procedures involved and applicable rules and laws of various forms of dissolution of marriage. The effect of the termination of the marriage on established marital rights and management.

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<sup>200</sup> Muhammad Abu Zahra, Al-Ahwaal Al- Shakhsiyyah (1957).

<sup>201</sup> Muhammad Abu Zahra, Al-Ahwaal Al- Shakhsiyyah (1957), P. 5

<sup>202</sup> Ibid, p. 7

<sup>203</sup> ibid

**Part IV:** this part deals with the rights of children and it's whose duty to undertake. Under this part the author discusses legitimacy of a child and rules for paternity test and how to handle related cases; the right of an abandoned child; right of the child to breastfeeding; custody and guardianship of the child and his other interests and who has the duty or right thereof and their sequences and priority. Provision of maintenance for the child and other relatives are also treated.

This part is of paramount importance to our study in that the learned scholar considered in his work children are part of personal status law.

It is interesting to note that the book did not cover succession. However, this does not mean that succession does not fall under the personal status law. Because the author did not claim that his book is exhaustive of all personal status laws.

### ***3.7.2 The Islamic Charter on Family***<sup>204</sup>

The charter is a product of deliberations in series of symposiums where prominent Muslim scholars participated and made their contributions. It was in response to the organizer's believe that there was western ideological invasion lead by united nations on Muslim Society.

This Charter consisting of 164 articles is based on tenets of shariah and was meant to protect and guide Muslims family life. According to the authors the invasion on Islamic family is in various United Nation Conventions which purport to be international yet based exclusively on western values whose intention was to destroy Muslim family system and morals. In particular they singled out "*Programmes for Action Document*" which was the result of the "***International Conference for Population and Growth***", which was held in Cairo between 5th to 15th September 1994. It is widely believed the conventions, was in essence, a declaration of war against the Islamic family as established by Islam.

It covers family aspects in Islam and calls for practice and application by all Muslim states and others which recognize Islamic law in their respective legal systems. chapter I which is arranged into V sections deals with principles, values and general concept of family in islam. Chapter II discusses general duty of the Muslim community to form and protect the family. In chapter III the

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<sup>204</sup>The Islamic Charter on Family Law (2007). It was published by International Islamic Committee for Women and Child (IICWC) and World Assembly of Muslim Youth (WAMY). Originally it was in Arabic and translated into English by: Heather Shaw.

charter discusses in details rules governing formation of marriage, management and regulation of marital life, rights and duties of the spouses, relationships between parents and their child, rights of the parents over the children, and finally rules governing termination of marriage.

Of particular interest, the Charter spells out in chapter IV the rights and duties of a child in Islam which should be established and protected under Islamic law. Personal status rights of the child include rights to lineage (art.104), breastfeeding (art.105), custody (art. 106) and financial support (art. 107) among others.

And finally chapter V considers Islamic rules on the welfare of the larger Muslim family. Here the discussion is on Islamic rules on social welfare responsibility. Doctrine of takaful, maintaining uterine ties, inheritance, Will and bequest and waqf/ endowment is discussed here.

### **3.7.3 The Family Structure in Islam<sup>205</sup>**

In this book the author discusses the family in Islam which includes children and their rights and duties. Before going into the question of family in Islam, he introduces the book by tracing back the family from the Arabian pre-Islamic rein and demonstrates the reforms which Islam introduced in the family sector. He then moves on to the definition and description of family as brought by Islam. The laws, rules, rights and duties related to marriage, divorce, children, their rights and duties, and the law of succession in Islam are discussed in this book.

The book is quite relevant in that in the view of the author family law covers marriage and issues of the marriage (children) and financial and property rights which would accrue to the members of the family by operation of law (succession).

### **3.8 Conclusion**

This chapter has traced the meaning of Personal status from different sources. Various dictionaries, statues, decisions of the courts, and work of the scholars were consulted. Other jurisdictions with similar judicial system as Kenya were also referred to.

The study shows that personal status or personal status law or personal law or family law are one and the same and used synonymously.

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<sup>205</sup>Hammudah‘AbdalAti’, The Family structure in Islam (American Trust Publication:1977).

Many authors have used either of the terms in a manner which one would believe that its one and the same. John Miles is one of such scholars who used personal status law in a manner suggesting that its family law. Throughout his article titled “Customary and Islamic Law and its Development in Africa” he categorically used the term personal status law under which he discusses the entire family law. While discussing challenges posed by the influence and impact of Islamic law in Africa, the author says: “the contest, however, in countries on the continent that have a Moslem majority in their population, is between the Executive seeking to maintain a secular state, and the Islamic establishment seeking to make Islamic law of direct effect in every aspect of the law (rather than limited to direct effect in the laws of personal status).<sup>206</sup>

While examining Ethiopia he made reference to family law and I quote “as stated above, the main area where Customary and Islamic Law has influence is in *Family Law*. This is recognized in the Ethiopian Civil Code relating to *Family Law*”.<sup>207</sup>

Therefor it’s the finding of this chapter that personal status covers quite a range of family related issues including children and their affairs.

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<sup>206</sup>John Miles, Customary and Islamic Law and its Development in Africa in Law for Development Review (Africa Dev. Bank) P. 5.

<sup>207</sup>Ibid, p.42.



## CHAPTER 4: CHILDREN RIGHTS AS ENVISAGED IN ISLAMIC LAW

### 4.1 Introduction

In this chapter, we shall strive to outline rights of the child on the shari'ah point of view as is likely to be considered in kadhi's courts in Kenya. However, the scope of this chapter is limited to children's rights of civil nature and as such will not include matters of criminal nature due to its inapplicability in the kadhi's courts in Kenya. The chapter will unveil what rights are available for the child under the principles of Islamic law and regulation of their affairs at personal status level. Under this chapter we will exclusively rely on Islamic law from its main sources and as well as opinion of Muslim jurists. We will be brief and right to the point.

It's the objective of this chapter that in addition to what the immediate previous chapter on personal status have unearthed, that shari'ah too offers good packages of rights for the children. This will correct negative notion and remove perceived fear that Islamic law does not adequately provide for the rights of the children. Some of the rights of the children which shari'ah provides are unique hence need experts in Islamic law and the custom and culture of the Muslims to manage.

An example of unique rights of the child under the shari'ah which conflict with what is offered under the Children's Act in Kenya is adoption of a child. The shari'ah outlaws and protects the child against adoption<sup>208</sup> while the Act allows it.<sup>209</sup> Therefore, for those reasons I believe that the Kadhi's court is the best court to handle cases of the children from the Muslim community.

#### 4.1.1 Definition of a Child

Despite different definition of a child depending on diverse ethnic, culture, regional, social and religious understandings. A child can basically be defined as a "young human being below the age of puberty or below the legal age of majority".<sup>210</sup>

The Quranic and Sunnah spiritual texts uses various terms to describe children e.g(Dhurriyyah, Ghulaam, Ibn, Walad, Maulud, Sabiyy, Tifl, Sagheer, Mauudhaetc).<sup>211</sup>

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<sup>208</sup>Qur'an 33: verse 5.

<sup>209</sup>s. 154 (1) of the Children's Act No. 8, Cap. No. 141 of the laws of Kenya.

<sup>210</sup>Oxford Dictionary, 5<sup>th</sup>Edn.

<sup>211</sup>Avner Giladi, Encyclopedia of the Qur'an, p. 568.

It is very clear that by referring to such texts, one can seldom understand whether they exclusively refer to non-mature children or simply offspring.<sup>212</sup>

These statements were of a normative ethical significance for later Muslim Jurists who formed the foundations of Islamic Legislation.<sup>213</sup>

#### **4.2. Caring for a Child at the Beginning of the Formation of the Family**

It is important to note that children are a divine blessing and an innate human desire. The sharia, therefore, encourages the pursuit of progeny in order to preserve the human race. It is every child's right to come into life by way of a shariah sanctioned marriage between a man and a woman.<sup>214</sup>

Allah the Exalted says:- *“To Allah belongs the kingdom of the heaven and the earth. He creates what He wills and bestows females (offspring) upon whom He wills, and bestows male (offspring), upon whom He wills or He bestows both males and females and He renders barren whom He wills. Verily, He is the All-knower and is able to do all things”*<sup>215</sup>

In fact the main objective of marriage in Islam is to sire and to have children and to establish home where the children are natured. Such is the very same wisdom the messenger of Allah (P.B.U.H)<sup>216</sup> encouraged the pursuit of offspring.

He once told one of his companions -: *“marry the woman who is loving and prolific for by you (Muslims) I will outnumber other nations”*.<sup>217</sup> This ruling came as a result of an enquiry of a companion who sought prophet's guidance whether he could marry a barren but extremely beautiful woman?

Shari'ah provides comprehensive programmed care for the child. This begins from the time when the parents are making decision on the right and appropriate spouse until when the child becomes adult.

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<sup>212</sup>Ibid, P. 568.

<sup>213</sup>Ibid. P. 570.

<sup>214</sup> Art. 91 (1,2& 4) of The Islamic Charter on Famil(2007), International Islamic Committee for Women and Child (IICWC) and World Assembly of Muslim Youth (WAMY), p. 85.

<sup>215</sup> Qur'an 42: verses 49/50.

<sup>216</sup> Acronym (P.B.U.H) stands for: peace be upon him. This is a typical prayer rendered by Muslims upon mentioning prophet's name.

<sup>217</sup>Authentic narration by Abu Daudand AnNassai.

At each stage the child is entitled to certain rights appropriate to that period of his life. The Islamic Charter on Family<sup>218</sup> summarizes these stages as follows:-

- a. Each spouse's selection of the other spouses.
- b. The period of pregnancy and birth.
- c. The period from birth until the discretion, this may vary from child to child. At this stage ordinarily the child is unable to discriminate between affairs.
- d. The period from discretion to puberty. At this stage the child is able to discriminate between affairs but still his mind is yet to develop properly to act on his own independently of his guardian.

Allah the most merciful said: *"O mankind! Be dutiful to your Lord who created you from a single soul (Adam), and from him (Adam), He created many men and women"*.<sup>219</sup>

#### **4.3 Child's Rights to life, survival and development:**

From the time the child is formed as an embryo, the child shall have an inherent right to life, survival and development.<sup>220</sup> Consequently proper health care and suitable nutrition should be given to the yet unborn child.<sup>221</sup> These rights are administered through child's pregnant mother.

The pregnancy should not be exposed to any danger which would affect its health, development, growth and continuity. Abortion of the embryo is prohibited unless the life of the mother is exposed to certain danger that cannot be forsaken except by way of abortion.<sup>222</sup> Whoever violates those rights and harm an embryo, the shari'ah imposes punitive measures to address wrongs meted against innocent defenseless soul.<sup>223</sup>

Allah the most gracious says: *"...and kill not any soul whom Allah has forbidden except for a just cause"*.<sup>224</sup>

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<sup>218</sup> Art. 92, The Islamic Charter on Family, International Islamic Committee for Women and Child (IICWC) and World Assembly of Muslim Youth (WAMY), 2007, p. 85.

<sup>219</sup> Qur'an 4:1.

<sup>220</sup> Art. 95(1), The Islamic Charter on Family (2007), International Islamic Committee for Women and Child (IICWC) and World Assembly of Muslim Youth (WAMY), p. 87.

<sup>221</sup> Ibid, Art. 95(3).

<sup>222</sup> Ibid, Art. 95(2)

<sup>223</sup> Ibid, Art. 95 (4).

<sup>224</sup> Qur'an 6: 151.

Allah the exalted further says: “.... *No mother shall be harmed on account of her child...*”.<sup>225</sup>

AbiHurairah may Allah be pleased with him reported that in the case of two women from the tribe of Hudhail who fought and one of them hit the other who was pregnant with a stone in the stomach and killed the child. They took the matter to the prophet (P.B.U.H). He convicted the accused and ordered her to pay blood wit in form of *gharrah* (slave) to the victim.<sup>226</sup>

Further, the shari’ah grants unborn child certain limited civil rights and entitlement which does not ordinarily require acceptance.<sup>227</sup> In this regard the embryo is entitled to inheritance of the estate of any of his relative which if he would have born when the death occurred, he would have inherited. Therefore, he will be counted among the heirs and should accordingly be considered for inheritance in the manner stipulated in the Islamic law of inheritance.<sup>228</sup> Other entitlements include bequest, gifts, endowment and parentage.<sup>229</sup> Shari’ah absolves the *janin* (embryo) from any liability, civil or criminal because he is naturally void of executive power. Therefore, a purchase made in his favour or on his behalf by his would be *wali* (guardian) cannot make him liable to pay for the price.<sup>230</sup>

#### **4.4 Right of the Child after Birth**

At the time of the birth, Islam emphasize that a child is accorded a good name, celebrate his birth by offering sacrifice and treating boys and girls equally.<sup>231</sup>

Islam being a complete way of life regulates entire affairs of mankind. It provides for the etiquette of giving names. Name being a title and a reflection of one’s religion, Islam prohibits bad names and offers goods names. In this regard the prophet of Islam changed many names of his companions. One of the names of the famous companion, Abdulrahman bin Awf was AbdulKa’bah

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<sup>225</sup> Qur’an 2: 233.

<sup>226</sup> Mohamed Fuad Abdulbaqi (2005), *Al- Lulu’uWal-Marjan* on what is agreed upon by Al-Bukhari and Muslim, p. 347.

<sup>227</sup> *Al-Mausu’ah Al- Fiqhiyah*, Ministry of Endowment and Religious Affairs of Kuwait (2012), vol. 16, p.119.

<sup>228</sup> *Ibid.*

<sup>229</sup> *Ibid.*

<sup>230</sup> Imran Ahsan Nyazee (2000), *Islamic Jurisprudence*, International Islamic Institute of Islamic Thought (IIIT) and Islamic Research Institute, Islamabad, p. 115/6.

<sup>231</sup> Art. 96, *The Islamic Charter on Family*, International Islamic Committee for Women and Child (IICWC) and World Assembly of Muslim Youth (WAMY), 2007, p. 87.

and when he embraced Islam the prophet may peace be upon him changed his name to Abdulrahman.<sup>232</sup>

The prophet (P.B.U.H) said: *“it is the right of the child upon his father to give him a good name and teach him good manners”*.<sup>233</sup>

Those who discriminate and displeased with the birth of a girl child are censored in the holy Qur’an. Allah says: *“and when the news of the birth of a female is brought to any of them, his face becomes dark, and he is filled with inward grief. He hides himself from the people because of the evil of that whereof he has been informed. Shall he keep her with dishonor or burry her in the earth? Certainly, evil is their decision”*.<sup>234</sup>

Generally any form of discrimination between children, irrespective of their sex, color, race, nationality, language, religion, disability etc, is prohibited in shari’ah.<sup>235</sup> It is reported in an authentic *hadeeth* (tradition and the saying of the prophet P.B.U.H) that a companion, the father of Nu’mān bin Bashir went to the prophet (P.B.U.H) and requested him to witness a gift which he donated to one of his sons. The prophet (P.B.U.H) inquired whether he gave such gift to all of his children. When the answer was negative, the prophet (P.B.U.H) refused to witness it and returned the companion. Some version of this tradition states that look for other people to witness because me I don’t witness on an injustice.<sup>236</sup>

It is reported that a man was embraced by two of his children. He carried one of them, kissed and put on his lap and the other put by his side. The prophet (P.B.U.H) told him that he did not treat with justice.<sup>237</sup>

In lieu of the above, the children should be accorded rights to maintain identity which includes the child’s name, nationality, family affiliation, language and culture as well as religious affiliation.<sup>238</sup> These rights constitute rights protected and advanced by shari’ah.

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<sup>232</sup>Reported by Al-Hakim, vol.3, p.306.

<sup>233</sup> Noble Hadith compiled by Al-Bayhaqqy and Al-Haithamy.

<sup>234</sup> Qur’an 16: verses 58-59.

<sup>235</sup> Art. 98, The Islamic Charter on Family (2007), International Islamic Committee for Women and Child (IICWC) and World Assembly of Muslim Youth (WAMY), p. 88.

<sup>236</sup> Mohamed Fuad Abdulbaqi (2005), Al- Lulu’uWal-Marjan on what is agreed upon by Al-Bukhari and Muslim, p. 329.

<sup>237</sup>Mohamednur bin AbdulhafidhSuweid (2012), Manhaj Al-Tarbiyah An-NabawiyahLiddifl, 15<sup>th</sup>Edn, P.96.

It is a settled principle of shari'ah that the main and fundamental purpose and objective of the shari'ah is to protect right to *deen* (religion), life, property, mind and family.<sup>239</sup>

Shari'ah seeks to secure and preserve each of these rights. Therefore, the followers of Islam should pursue these rights for all of its citizens to enjoy. This principle is derived not from a specific rule or text but from considering Islamic law in general and as a whole. Under the political set up of Islam violation of any of those rights would attract specific punishment some as grave as death penalty.

Other rights include right to lineage and paternity, health care, education, food, shelter, clothes, inheritance and property. These rights are briefly discussed in the following pages.

#### **4.4.1 The Child's Rights to Health Care**

It is a settled Islamic norm that the child has the right to enjoy the highest attainable standard of health.<sup>240</sup> The following provisions from the saying of the prophet (P.B.U.H) emphasize on the same: *“strive for that which benefits you and seek assistance from Allah and don't stand disabled”*.<sup>241</sup> *“Allah did not send a disease except that he sent a cure for it”*.<sup>242</sup>

Jabber ibnAbdullahi may Allah be pleased with him and his father reported that the messenger (P.U.H) said: “Every disease has a cure, when the cure gets contact with the disease (the patient) will get cured with the will of Allah”.<sup>243</sup> The prophet was once asked by Bedouins whether they would treat themselves. He told them yes oh servants of Allah treat yourselves; for Allah did not brought disease except He has sent for it treatment except for one disease. He was asked what was it? He said: old age.<sup>244</sup>

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<sup>238</sup> Art. 97, The Islamic Charter on Family (2007), International Islamic Committee for Women and Child (IICWC) and World Assembly of Muslim Youth (WAMY), p. 87.

<sup>239</sup> Imran AhsanNyazee (1994), Theories of Islamic Law, International Islamic Institute of Islamic Thought (IIIT) and Islamic Research Institute, Islamabad, p. 213-214.

<sup>240</sup> Art. 99, The Islamic Charter on Family (2007), International Islamic Committee for Women and Child (IICWC) and World Assembly of Muslim Youth (WAMY), P. 88.

<sup>241</sup> Compiled by Imam Muslim in (Assahih: P.200).

<sup>242</sup>Compiled by Al-Bukhari in Asa-Sahih: p. 120.

<sup>243</sup>Compiled by Muslim and Ahmmad.

<sup>244</sup>Compiled by Ahmmad and An-Nasai from hadeeth of Usamah bin Sharik.

The above texts are authorities on the teaching of Islam and emphasis on the general healthcare and that people should get treatment whenever they become sick. Besides treatment Islam teaches on prevention both for the children and adult. Few examples extracted from the book “Manhaj al-TarbiyyahLildiff” would help to clarify.<sup>245</sup>

1. Physical exercise: the prophet may blessings and peace of Allah be upon him used to teach children swimming, archery; he used to engage them in running and wrestling competitions among others. Physical exercises help in strengthening the body to withstand diseases.
2. Toothbrush: it is strongly recommended to protect tooth by cleaning it regularly. In this regard the prophet may blessings and peace of Allah upon him said: if it were not fear of burdening you I would have ordered you to brush your teeth at every prayer.<sup>246</sup> Compulsory prayers in Islam are performed five times in a day and this means Muslims should brush their teeth at least five times a day. In addition to this there are other times when brushing teeth is equally recommended. Introduction proper guidance of the child to this practice of brushing the teeth would help him to enjoy healthy teeth and gum.
3. Guidance of the child towards cleanliness: Islam emphasizes on cleanliness and this is achieved through various rituals of maintaining cleanliness. These include clipping the nails, ablution for prayers, which is undertaken at least five times a day. It’s a prerequisite condition for prayers that the body, the clothes and the place for performing prayers must be clean. A child is guided to perform prayers as early as he attains seven years. “Five are among the fitrah;..Clipping the nails...”<sup>247</sup>
4. Having enough sleep: Islam recommends its followers to sleep right after Isha (night) prayers which is performed in Kenya around 2000 hours. This guarantees enough rest and woke up the next morning with energy. Umar used to send his children for sleep even before performing his Isha prayer.

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<sup>245</sup>Mohamednur bin AbdulhafidhSuweid (2012), *Manhaj Al-Tarbiyah An-NabawiyyahLiddifl*, 15<sup>th</sup>Edn, Pp. 341-393.

<sup>246</sup>Related by Abu Hureirah as compiled by Malik, Ahmad and An-Nasai.

<sup>247</sup>Narrated by Abu Hureirah as compiled by Al-Bukhari and Muslim.

5. Keeping away children from contagious diseases: the prophet has ordered that there shall be no contact between patient of contagious disease such as cholera and a healthy person.
6. Supplications to ward off evil mongers: the prophet may Allah's blessings and peace be upon him taught and as well as practiced supplications which would protect against bad omen and evil eye. Some companions were reported practicing those supplications.
7. Breast feeding: breastfeeding is strongly recommended in Islam. The Holy Quran fixes period for breastfeeding to two years and that during this period the nursing mother should be well taken care of. She should be provided with proper diets among other essential rights. Allah says: *"The mothers shall give suck to their children for two whole years that is for those who desire to complete the term of suckling"*.<sup>248</sup> *"The infant shall have the right to be nursed by his/her mother unless doing so conflicts with the interests of the child or the health of the mother"*.<sup>249</sup>

A child should also be treated in a compassionate manner by his parents or others. On the same regard the child ought to be granted enough time to relax, have leisure, play and get involved in recreational activities but in strict adherence to Islamic guidance. This would generally contribute to the wellbeing of the child. It is therefore true to conclude that according to Islamic teaching child labor is abhorred.<sup>250</sup>

#### **4.4.2 Child's Right to Lineage and Paternity**

The child shall have the right to have his/her parentage attributed to his/her Shari'ah recognized parents. Accordingly, all actions that cause doubt in attributing the child to his/her parents like marrying pregnant woman are prohibited.<sup>251</sup> Apparently, the provisions of Islamic shariah shall be followed to establish genuine lineage.<sup>252</sup>

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<sup>248</sup> Qur'an 2: 233.

<sup>249</sup> Art. 105, The Islamic Charter on Family (2007), International Islamic Committee for Women and Child (IICWC) and World Assembly of Muslim Youth (WAMY), p. 90.

<sup>250</sup> Ibid, Art. 100/101, p. 88.

<sup>251</sup> Hammudah 'Abd al 'ati' (1977), The family Structure in Islam, American Trust Publication, p.191.

<sup>252</sup> Art. 104, The Islamic Charter on Family (2007), International Islamic Committee for Women and Child (IICWC) and World Assembly of Muslim Youth (WAMY), P. 90.



Lineage and legitimacy test of a child has direct link with the form of relationship between child's parents. Islam regulates sexual relationship of its followers and abhors any sexual contact outside marriage recognized in Islam.

*“And do not go near illicit sex (adultery and fornication) lo! It is an abomination and an evil way”*.<sup>253</sup>

Children of marriage are considered legitimate and entitled to the right of paternity. Children born outside marriage are categorized as illegitimate and have no right under shari'ah to paternity. In other words there is no legal relationship between the illegitimate child and his biological father.

Allah the Exalted says; *“Call them by the name of their fathers that is more just with Allah but if you do not know their fathers name, call them your brothers in faith and your freed slaves”*.<sup>254</sup>

This Qur'anic text directly concerns with the adoption of children which Islam prohibits. It is also indirectly concerns with the naming of the children after a man who has not fathered them.

However, parental and family ties relationship is recognized between illegitimate child and his mother and her relatives.<sup>255</sup> This is logically acceptable because what is in issue and may be disputed is the paternity and not the motherhood. It is the father who is disputing legitimacy or the mother claiming the child does not belong to the husband. Also in most cases there is overwhelming evidence as to the motherhood of the child.

Therefore, under Islamic set up illicit sexual relationship will cost the child's right to paternity, provision of maintenance and care in strict sense from his biological father, though a court of law may under the rule of necessity compel such fathers to provide basic needs for their illegitimate children. Likewise there shall be no right of inheritance between them.

Generally a child of a marriage is presumed to be legitimate if he is born six months after the marriage and cohabitation and within maximum of five years after their separation, widowhood or

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<sup>253</sup> Qur'an 17: 32.

<sup>254</sup> Qur'an 33: 5.

<sup>255</sup>Hammudah 'Abd al "ati' (1977), *Thefamily Structure in Islam*, American Trust Publication, p.191.

<sup>255</sup>Ibid, p. 191.

divorce, provided the mother did not remarried.<sup>256</sup> It is important to note that setting of minimum and maximum periods within which child's legitimacy is considered as an indication of maximum guarantee to the right of the child to paternity under the shari'ah.

Both the mother and the father have both moral and legal duty to safeguard the right of a child to complete parentage. In one of his declaration the Prophet (P.B.U.H) cursed any woman who would misplace child's legitimacy by relating its decent to a man whom she knows has not fathered. He said such a woman has committed grave sin; she has alienated herself from Allah, and will be denied the bliss of eternity.<sup>257</sup>

Likewise any father who would deny his child, on the day of judgment, Allah will block him and will embarrass him in the full glaring of the past and present (population i.e all people from the first person to the last).<sup>258</sup>

According to another Hadeeth (tradition), Allah most exulted have servants to whom He will not talk to on the day of judgment, nor purify them nor look up at them and they will have painful torment. He was asked who are they O Messenger of Allah; he said: those who obscure themselves and turn away of hate from their parents and the one who obscure from his child.<sup>259</sup>

Further Islam sets out stringent rules and procedures for those fathers who may doubt paternity and legitimacy of any of their children. If there is no other evidence, the shari'ah subjects spouses to mutual imprecation which is administered under oath. The content of this special oath include the deponent was truthful while the opponent was telling lie and self cursing if the truth is contrary to what he or she was telling. This process is called *li'an*<sup>260</sup> and once administered it leads to automatic irrevocable dissolution of marriage and the parties are barred forever from remarrying to each other.<sup>261</sup>

Allah most exalted says: *“As for those who accuse their wives but have no witnesses except themselves; let the testimony of one of them be four (times repeated) testimonies, (swearing) by Allah that he is of those who speak the truth. And yet a fifth invoking the curse of Allah on him if*

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<sup>256</sup>Ibid, p. 190.

<sup>257</sup> Ibid.

<sup>258</sup>Al-Mausu'ah Al- Fiqhiyah, Ministry of Endowment and Religious Affairs of Kuwait (2012), vol. 40, p.233.

<sup>259</sup>Reported by Al-Tabrani and Ahmad from Mu'adh bin Anas.

<sup>260</sup>Li'an: literally means curse. However, in the context used here it is a process involving curse leading to permanent separation of spouses in case case they suspect each other foe extra-marrital affairs.

<sup>261</sup> Dr. Swaleh Bin Fauzan (2001), Al-Mulakhas Al-Fiqhi; Vol. 2, 1<sup>st</sup>edn, Darul 'asimah, , Pp. 411-414.

*he is of those who lie. And it shall avert the punishment (of adultery) from her if she bear witness before Allah four times (with an oath) by Allah that he (her husband) was telling a lie. And a fifth (time) that the wrath of Allah be upon her if he if he was telling truth”.*<sup>262</sup>

#### **4.4.3 Child’s Right to Breastfeeding**

The duty to bring up children is shared between the father and the mother. Each one of them should take his role effectively. While the father provides up keep for the family and general security externally and internally, the mother breastfeeds and executes other household duties. This right is guaranteed to the child from the birth to the completion of two years.

Allah says: *“The mothers shall give suck to their children for two whole years, that is for those who desire to complete the term of suckling”.*<sup>263</sup> *“The infant shall have the right to be nursed by his/her mother unless doing so conflicts with the interests of the child or the health of the mother”.*<sup>264</sup>

The Islamic law further stresses this right of the child that if circumstances demand the guardian of the child should pay for the cost of breastfeeding regardless of who is breastfeeding. Allah most exalted directs in the case of a divorced woman who is to breastfeed her own child, the father should pay for the service of breastfeeding. *“....And if they suckle your offspring give them their recompense.”*<sup>265</sup>

The above verse shows that it is the duty of the father to make sure that the child is breastfed. However, if he cannot afford to pay for the cost or the child is not accepting other women to nurse except the mother, then the mother is compelled to breastfeed.<sup>266</sup>

The right to breastfeeding could render mandatory deferment of criminal punishment of a breastfeeding mother. In the case of Al- Ghamidiyyah, a woman who committed the offence of

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<sup>262</sup> Qur’an 24: 6-9.

<sup>263</sup> Qur’an 2: 233.

<sup>264</sup> Art. 105, The Islamic Charter on Family (2007), International Islamic Committee for Women and Child (IICWC) and World Assembly of Muslim Youth (WAMY), P. 90.

<sup>265</sup> Qur’an 65: 6.

<sup>266</sup> Al-Mausu’ah Al- Fiqhiyah, Ministry of Endowment and Religious Affairs of Kuwait (2012), vol. 22, p.239.

adultery, the prophet (P.B.U.H) deferred her punishment until she delivers and then until she breastfeeds and weans.<sup>267</sup>

#### **4.4.4 Child's right to Custody and Guardianship**

The child shall have the right to have someone to take charge of his/her custody, to care for and raise him/her and to provide for his physical and psychological needs. The two parents are the primary custodians and the child shall not be separated from any of them unless there is a genuine necessity to do so. Necessity shall be evaluated according to its social and legal magnitude. Once the parents have separated the mother has the greatest right to the custody of the child.<sup>268</sup>

**What is custody?** Muslim scholars have advanced several definitions which can be summarized as protection and care of a person who cannot on his own be able to manage his affairs, against what may destroy or affect him.<sup>269</sup>

**Scope:** it begins from the time when the child is born and ends when the child is no longer in need of the service of a third person depending circumstances of the child.<sup>270</sup> It has two stages; from birth to the age of discretion, which scholars place it at the age of seven. This is the age at which the child could eat cloth and clean himself on his own.<sup>271</sup> Below this age it is unanimously held that under ordinary circumstances the mother has the right of custody because the child is desperately in need of her service.<sup>272</sup>

The second stage begins from discretionary age of seven to the puberty.<sup>273</sup> From this age the scholars have advanced different opinions as summarized below.

According to Hanafi School upon attaining the age of seven the custody of the boy shall shift to the father while the girl is at nine or puberty. Maliki School is of the view that mothers shall keep custody of their sons until the age of puberty while the daughters shall stay with their mother until when she is married. The shafi'i school does not differentiate between boys and girls and argue

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<sup>267</sup>Narrated by Imam Ahmad in his Musnad, vol. 5, p.348.

<sup>268</sup> Art. 106, The Islamic Charter on Family (2007), International Islamic Committee for Women and Child (IICWC) and World Assembly of Muslim Youth (WAMY), P. 90.

<sup>269</sup>Sa'dy Abu Habib (1977), Al-Qamus Al-Fiqhi, p. 92.

<sup>270</sup> Dr. Wahbat Al-Zuheyly (1985), Al-Fiqhu Al-Islamii Wa Adillatahu, 2<sup>nd</sup>edn, vol. 7, p.742

<sup>271</sup> Al-Mausu'ah Al- Fiqhiyah, Ministry of Endowment and Religious Affairs of Kuwait (2012), vol. 17, p.314.

<sup>272</sup> Dr. Wahbat Al-Zuheyly (1985), Al-Fiqhu Al-Islamii Wa Adillatahu, 2<sup>nd</sup>edn, vol. 7, p.742.

<sup>273</sup> Al-Mausu'ah Al- Fiqhiyah, Ministry of Endowment and Religious Affairs of Kuwait (2012), vol. 17, p.315.

that mothers shall keep custody until the child attains the age of discretion which they page it at seven or eight. Beyond this age the child will be given option to choose between either of the parent.<sup>274</sup>

The position of Hambalishool, upon attaining the age of discretion the boy child may be given option to choose between his parents.<sup>275</sup>

This is based on the ruling of the Prophet may Allah's blessings and peace be upon him. In the case of a woman who complained that her husband (former) wanted to take away her son who is helping her to fetch water from a specific well. The prophet may Allah's blessings and peace be upon him said to the child: "this is your father and this your mother get hold of the hand of any of them as you like. The child got hold of his mother's hand and she left with him."<sup>276</sup> However, it is a considered view of this school that right to option is not available to a girl child. They argue that upon attaining the age of seven, her custody shall shift to the father.<sup>277</sup>

### **Analysis:**

Custody of children under Islamic law exists within two spheres referred to as *hadanah* and *wilayah*.<sup>278</sup> *Hadanah* (custody) concerns the right to physical custody of the child whereas *wilayah* (Guardianship) has wider meaning but with respect to the minor is guardianship of the person and property of the child.<sup>279</sup> Islamic jurisprudence takes the view that by entrusting the right of primary residential custody to a mother and the right of guardianship to a father Islamic law protects the best interests of the child.<sup>280</sup> This position is manifested in several authorities who appear on the face of them contradicting.

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<sup>274</sup>Ibid, p. 314-316.

<sup>275</sup>Ibid, p. 316.

<sup>276</sup>Compiled by Abu Daud as narrated by Abu Herraiah.

<sup>277</sup> Al-Mausu'ah Al- Fiqhiyah, Ministry of Endowment and Religious Affairs of Kuwait (2012), vol. 17, p. 316.

<sup>278</sup>ShabnamIshaque, The Best Interests of the Child and Islamic Law, International Journal of Law, Policy and the Family(2015) 29 (1): 78 at 79.

<sup>279</sup>Mohamednur bin Abdulhafidh Suweid(2012) Manhaj Al-Tarbiyah An-NabawiyahLilddifl, 15<sup>th</sup>Edn, P.85.

<sup>280</sup>Hammudah 'Abd al "ati' (1977), Thefamily Structure in Islam, American Trust Publication, p.202.

Both parents and the child have right of custody though child's takes priority when such need arises. The mother has priority over the father subject to the absence of legal impediments.<sup>281</sup>

Abdillahi bin Amru reports that a woman complained to the prophet that her child who her womb was his container, her breast was his drinks and her lap was his abode and now his father has divorced her and want to take him from her. The prophet ruled that she has right to his custody provided she is not remarried.<sup>282</sup>

This tradition grant right of custody to the mother with one condition. Marriage of the mother to another man may be an impediment to this right. This may be interpreted as safeguarding the maximum interest of the child. There is possibility that mother's marriage to a stranger may affect the child in one way or another. Some men may resort to mistreating the child and some mothers are weak to protect them.<sup>283</sup>

Where the new marriage of the mother does not necessarily pose threat to the child, then the marriage will not affect mother's right to the custody.<sup>284</sup> This conclusion is derived from the scholar's opinion that if the mother is married to a relative of the child, her right to custody will not be affected. They arrived to this conclusion on assumption that such relative would treat the child as his own and would join the mother in providing care hence may not harm.<sup>285</sup>

When Umar disputed with a grandmother over the custody of his child 'Aasim, Abubakar ruled in the favour of the child's grandmother.<sup>286</sup>

There is consensus among the Muslim scholars that under ordinary circumstances, custody belongs to both parents provided that they are still married. And if they separate, the mother shall have the right of custody of her child of a tender age than the father.<sup>287</sup> At this age the child is ordinarily in need of the service of the mother or generally women while the mother is ordinarily affectionate to attend to the welfare of her child with patience, joy and love.<sup>288</sup>

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<sup>281</sup>Al-Sayyid Sabiq(1972) Fiqhu al Sunnah, Vol. 2, P. 217.

<sup>282</sup> Narrated by Ahmmad and Abu Daud; and authenticated by Al-Hakim.

<sup>283</sup> Dr. Wahbat Al-Zuheyly (1985) Al-Fiqhu Al-IslamiiWaAdillatahu, 2<sup>nd</sup>edn, vol. 7, p.728.

<sup>284</sup>Ibn al- Qayyim (1994), Zad al Ma'ad, 27<sup>th</sup>Edn, Vol. 5, pp. 454-458.

<sup>285</sup> ibid

<sup>286</sup> Al-SayyidSabiq (1972), Fiqhu al Sunnah, Vol. 2, P. 218.

<sup>287</sup>Al-Mausu'ah Al- Fiqhiyah, Ministry of Endowment and Religious Affairs of Kuwait (2012), vol. 17, p.302.

<sup>288</sup> Dr. Wahbat Al-Zuheyly (1985), Al-Fiqhu Al-IslamiiWaAdillatahu, 2<sup>nd</sup>edn, vol. 7, p.718.

However, this consensus of the scholars is limited to the first early seven years of the child's life. Beyond that they differed along what each considers what in his legal view would constitute the best interest of the child.<sup>289</sup>

From the age of seven, the child may be given option to choose between the disputing parents.

*AbiHureira May Allah be pleased with him reported that a woman came to the prophet, peace be upon him and said: may you be ransomed with my father and mother, my husband want to take my son and he has helped me and fetch for me water from the well of abi 'Inabah. Her husband came and said who could dispute with me over my son? The prophet(P.B.U.H) said to the child; this is your father and this is your mother, get hold of the hand of any of them (parents) as you wish. He hold his mother's hand and she went with him.*<sup>290</sup>

It appears that giving option of choice to a child is not automatic; the guiding principle is the interest of the child. Scholars like Ibn al-Qayyim are of the view that this right is not absolute and without qualification therefore it should apply only to those children who are bright and really appreciate what is good for them. Otherwise, the court must always consider the best interest of the child and rule accordingly. Therefore, if in the child's choice his interest will be defeated, such choice shall have no effect and his interest should be pursued.<sup>291</sup> Some scholars are of the view that two conditions must be met before a child is put to exercise his right of option to choose his custodian. The disputing parents or guardians over the custody must be qualified for guardianship and the child must attain the age of discretion and of sound mind.<sup>292</sup>

This position is supported by assumption that the child is not mature enough to recognize his interest, thus he might prefer a lenient parent over strict one. *Allah says: "O you who have believed protect yourself and your family from fire".*<sup>293</sup> *The Prophet may peace be upon him said:*

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<sup>289</sup>Hammudah 'Abd al "ati'(1977), The family Structure in Islam, American Trust Publication, p.202.

<sup>290</sup> Narrated by Ahmad and the four; and authenticated by al-Tirmithy. See BulughulMaraam by Al-HafidhIbnHajjar Al-Asqalani.

<sup>291</sup>Al-SayyidSabiq, Fiqhul-Sunnah, Vol. 2, P.224.

<sup>292</sup> Dr. Wahbat Al-Zuheily, Al-Fiqhu Al-IslamiiWaAdillatahu, 2<sup>nd</sup>edn, 1985, vol. 7, p.744.

<sup>293</sup> Qur'an 66: 6.

*“Teach your children prayers at seven, cane them over its neglect at ten and separate them in sleep”.*<sup>294</sup>

According to Al-Hassan: teach and discipline them and any parent who is good in this stands better position to take the custody. It is reported that a judge gave option to a child and he opted to be with his father. The mother said the child be asked why he made such choice, the child said my mother keeps on sending me to school and the teacher beats me while my father allow me to play with my friends. The judge revered his decision and ruled for the mother because she serves the interest of the child than the father.<sup>295</sup>

Right of the child under this topic include right of the child to be seen and visited by the parent who the child is not under his or her custody. This right anchors on the Islamic principle which requires the relatives to keep good ties with each other. Some scholars suggest this should be on daily bases especially if the child is very young or on weekly bases.<sup>296</sup> *“Then, is it to be expected of you, if you are put in authority, that you will do mischief in the land, and sever your ties of kith and kin? Such are those whom Allah has cursed and made them deaf and blind”.*<sup>297</sup>

The messenger of Allah peace be upon him said:

*“He who wants abundance in his provisions and blessing in his life should keep (good) ties with his relatives”.*<sup>298</sup> *“He who severe ties with his relatives shall not enter paradise”.*<sup>299</sup>

Closely related to the topic of custody is the topic of guardianship of the child. It is the management of personal and property affairs of a person of limited capacity.<sup>300</sup> However, some scholars contrast custody with guardianship in that custody is limited to the physical care of the person of the child or others with less capacity. It includes raising, bringing up or nursing a child or the office of rearing a child. On the other hand guardianship has wider meaning in that it covers

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<sup>294</sup>Narrated by Abu Daud and Al-Hakim. See Jami' al Usul Vol. 5, P. 187.

<sup>295</sup>Al-SayyidSabiq, Fiqhul-Sunnah, Vol. 2, P.225.

<sup>296</sup> Dr. Wahbat Al-Zuheyly (1985), Al-Fiqhu Al-IslamiiWaAdillatahu, 2<sup>nd</sup>edn, vol. 7, p.740

<sup>297</sup> Qur'an 47: 22-23.

<sup>298</sup> Narrated by Al-Bukari as reported by AbiHureirah, mayAllah be pleased with him. See Bulugh Al-Maram by IbnHajjar Al-Asqalani.

<sup>299</sup> Agreed upon (Al-Bukhari and Muslim) as reported by JubairibnMud'im, may Allah be pleased with him. See Bulugh Al-Maram by Ibn Hajjar Al-Asqalani.

<sup>300</sup> Dr. Wahbat Al-Zuheyly (1985), Al-Fiqhu Al-IslamiiWaAdillatahu, 2<sup>nd</sup>edn, vol. 7, p. 746.



management of the affairs and interest of the person and property of the child. Guardianship of the person means the authority to take care of a child's personal affairs such as marriage, education, and discipline whereas guardianship of property means the authority to perform legal transactions relating to a child's property.<sup>301</sup> as earlier said, hadhana (custody) belongs to the mother and female relatives of the child; while *Willayah* (Guardianship) belongs to father and male relatives of the child.<sup>302</sup>

The role of the guardian is to take care of the best interest of the minor's need. He shall take care of his personal need; food, cloths, health care, education and to teach him good mannerism. If the minor has property the guardian shall take proper care of it and invest it prudently and he should not give it to him or give him freedom to handle the property on his own until he is satisfied that he can manage it prudently.

Allah the most Exalted says: *"to those weak of understanding make not over your property, which Allah has made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice. Make trial of orphans until they reach the age of marriage; if you find sound judgment in them, release their property to them; but consume it not wastefully, nor in haste against their growing up...."*<sup>303</sup>

In the case of a minor, guardianship starts from where the custody stops. There is no explicit provision of shari'ah which could guide in this regard leading scholars taking different approaches to determine when does it really begin. Minimum age of seven. And it ends at an age also differed; boys 7-15 or puberty and for girls until she get married or becomes pretty aged or old enough to be trusted.

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<sup>301</sup>Shabnam Ishaque, The Best Interests of the Child and Islamic Law, International Journal of Law, Policy and the Family (2015) 29 (1): 78 at 80.

<sup>302</sup>Al Imam Ibn al Qayyim (2000), Jami' al Fiqhi, 1<sup>st</sup>edn, Vol. 6, p. 272.

<sup>303</sup> Qur'an 4: 5 &6.

#### 4.4.5 Rights of the Child to Maintenance

Provision of maintenance for the child is a duty of the male parent and this right has direct link with the maintenance for the mother of the child. Allah the Glorious says: *“The father of the child shall bear the cost of the mother’s food and clothing on a reasonable basis”*.<sup>304</sup>

This verse is a continuation of the verse which establishes the right of the child of the mother to breastfeed for two complete years. This caption indicates that during this time of breastfeeding the child the father should make sure that the mother is well taken care of. At least she should have plenty of basic needs; food, clothes and shelter. This provision would indirectly guarantee the right of the child to maintenance.

The question as to how much should the father provide to his child is guided by the economical ability of the father. Thus Allah the Merciful says: *“let the able man spend according to his means and the man whose ability is restricted shall spend according to what Allah has given him”*.<sup>305</sup>

Therefore, the just and balanced shari’ah is conscious of every member of the society. No one is burdened beyond his ability nor any one is allowed to neglect his duty.

In order to sanction its orders the shari’ah employs various means. Besides issuing threats for non compliance and violation of these duties, it also gives moral incentives for compliance. Upon taking due process the violators of the right of the child is judicially sanctioned. Moral incentive is also in place to motivate the duty bearer to voluntarily comply with his duty to provide for his child. In numerous Ahadeeths the prophet may Allahs blessings and peace be upon him said “a dinar you spend in the way of Allah, a dinar you spend towards freeing a slave, a dinar you give away in charity to a needy person and a dinar you spend on your family, the most worthy of reward is the one you spend on your family<sup>306</sup>... the best dinar that a man may spend is the one he spends on his

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<sup>304</sup> Qur’an 2: 233.

<sup>305</sup> Qur’an 65: 7.

<sup>306</sup>Related by Abu Hurairah as Compiled by Muslim.

family<sup>307</sup>... if a man spends on his family seeking Allah's pleasure by this, it will be counted in his credit as a charity<sup>308</sup>

It is both judicially and morally wrong to neglect one's duty to provide for the children. The prophet may Allah's blessings and peace be upon him said: "its sufficient sin for a person to neglect those for whose sustenance he is responsible".<sup>309</sup> In another version in Muslim "It is sufficient sin for a person to withhold sustenance for whose livelihood he is responsible."<sup>310</sup>

#### **4.4.6 Children's Rights to Education**

Islam treats education as basic necessity of a mankind. This is clear from the first two sources of the shari'ah; the holy Qur'an and the Sunnah of the prophet of Islam, may Allah's blessings and peace be upon him. The first five verses of the revelation revolve around acquiring education.

"Read in the name of your Lord and cherisher; who created. Created man out of a (mare) clot of congealed blood; read! And your Lord is most bountiful. He who taught (the use of) the pen (and) taught man that which he knew not."<sup>311</sup>

The holy Qur'an is full of episodes where knowledge is cherished. The Qur'an itself is a book of knowledge and wisdom. "...these are the verses of the book of wisdom"<sup>312</sup>....(this is a) book which We have revealed to you in order to lead mankind out of the depth of darkness into light<sup>313</sup>..By the Qur'an full of wisdom, you are indeed one of the messengers."<sup>314</sup>

It shows episodes where knowledge should be acquired wherever it is available and from whoever is custodian of that knowledge. Allah the most sublime orders his servant and messenger Musa peace be upon him to travel for long to acquire knowledge from a knowledgeable person even though he was not a prophet as Musa himself. <sup>315</sup>

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<sup>307</sup>Related by Abu AbdallahThauban ibn Mujdid as compiled by Muslim.

<sup>308</sup> Related by Sa'ad ibnAbiWaqqas as compiled by Al-Bukari & Muslim.

<sup>309</sup>Related by Abdallahi bn Umar ibn Al-'Aas as compiled by Abu Daud and Others.

<sup>310</sup>Compiled by Al- Muslim.

<sup>311</sup> Al-Qur'an 96: 1-5.

<sup>312</sup> Al-Qur'an 10: 1.

<sup>313</sup> Al-Qur'an 14:1.

<sup>314</sup>Al-Qur'an 36: 1&2.

<sup>315</sup> Al-Qur'an 18: 60-82.

The Holy Qur'an calls for learning from the creations of Allah and use them for their own benefits. When the first death occurred between the two sons Adam and the murderer was bewildered with what to do with the corpse of his brother, Allah sent him a bird (crow) to teach him how to bury the dead body and he complied.<sup>316</sup>

Likewise the messenger of Allah Suleiman peace be upon him was granted powers to dominate many creatures of Allah. They include birds and one of the bird, Hudhud (Hoopoe), could spy for him on the affairs of other states and gather intelligence information to help this good servant of Allah to execute some of his ordained duties.<sup>317</sup>

Allah could order His messenger, Mohammad, peace be upon him to invoke Allah for more knowledge.<sup>318</sup> Allah establishes that the learned and unlearned are never equal<sup>319</sup> and that Allah could raise the status of the educated lot above uneducated lots.<sup>320</sup>

According to the tradition of the prophet, may peace be upon him "he who travels for seeking knowledge, Allah shall make for him easy a way to (enter) paradise<sup>321</sup>... If Allah wants a good with a person, He will grant him knowledge in religion."<sup>322</sup>

In this regard Muslim scholars have established that acquiring knowledge is a basic component of human development that helps in enhancing mind and intelligence.<sup>323</sup>

Islam imposes duty on its followers to work hard to attain what is beneficial for themselves and for the weaker members of the society. They should also take measures to protect themselves against anything harmful.

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<sup>316</sup> Al-Qur'an 7: 27-31.

<sup>317</sup> Al-Qur'an 27: 17-44.

<sup>318</sup> Al-Qur'an 20: 114.

<sup>319</sup> Al-Qur'an 39:9.

<sup>320</sup> Al-Qur'an 58:11.

<sup>321</sup> Related by Abu Hureirah and narrated by al-Muslim.

<sup>322</sup> Related by Mu'awiya as narrated by Al-Bukhari and Muslim.

<sup>323</sup> Imran Ahsan Khan Nyazee (1994), Theories of Islamic Law, IRI & IIIT, pp. 2013-2014.

“O you who believe save yourselves and your families from a fire...”<sup>324</sup> This duty is manifested in various branches of worship which the guardian should teach the child. “Enjoin prayer on your people and be constant therein...”<sup>325</sup> The prophet may Allah’s blessings and peace be upon him said: “teach and order your children to perform prayers at the age of seven, punish them for neglecting the prayer at ten and separate them in sleep.”<sup>326</sup>

During the battle of Badr the prophet released the war captives upon teaching ten children.<sup>327</sup> That was their fine or ransom.

The priorities of basic upbringing include teaching the child fundamentals of faith, training him to Worship and obey Allah and instilling Islamic manners and virtue conduct.<sup>328</sup>

A child should be brought up in an enabling environment where the elders around him serve as a good role model. It is the duty of the parent, guardian and other relevant institutions and the community around the child to guarantee favourable environment to the child. The prophet may blessing and peace be upon him said; “every child is born on fitrah (clean in every aspect). Indeed it’s his parents who would make him Jewish or Christian or pagan”.<sup>329</sup>

Allah the Exalted says:-“Allah will raise the degree those of you believe and those who have been granted knowledge”.<sup>330</sup>

Indeed Islam emphasizes the right of the child to education right from the time of birth. It recommends *Adhan* (main call for prayers) and *Iqamah* (lesser call for prayers) be recited in the right and left ears respectively of a just newly born baby. The prophet p.b.u.h conducted this practice and made this calls to his grandson, Hassan.<sup>331</sup> He also advised his followers that a child should open (at birth) and close (at death) his world with “there is no God but Allah.”<sup>332</sup>

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<sup>324</sup> Al-Qur’an 66:6.

<sup>325</sup> Qur’an 20: 132.

<sup>326</sup> Narrated by Abu Daud.

<sup>327</sup> Safiyudeen Al-Mubarakfuri (1976), *Ar-Rahiq Al-Makhtoom*, P. 180.

<sup>328</sup> Art. 112, *The Islamic Charter on Family* (2007), International Islamic Committee for Women and Child (IICWC) and World Assembly of Muslim Youth (WAMY), P. 94.

<sup>329</sup> Narrated by Muslim.

<sup>330</sup> Qur’an 58:11.

<sup>331</sup> Related by Abu Rafi’ as compiled by Al-Tirmithy.

<sup>332</sup> Related by Ibn Abbas as compiled by Al-Bayhaqy, Vol 1, P. 126.

It's the duty of all stakeholders to strive in providing children with the best education they could. But since human being is prone to shortcomings, Islam advises its followers to pray for to Allah to bless their efforts in guiding children. "O Lord! Make me one who establishes regular prayer and also among my offspring, O our Lord accept my prayer."<sup>333</sup>

There are instances where prophet may Allah's blessing and peace be upon him took charge of teaching children by himself. He once taught a child table manner. "O child take food in the name of Allah and eat what is on your side".

#### **4.4.7 Children's Rights to Property and Inheritance**

Like adults children in Islam are entitled to own property. Inheritance and gift are some of the ways in which children could own property. This right accrues to the child even before the birth and as such is an established principle of Islamic jurisprudence that it is mandatory to consider an unborn child for inheritance, provided that he is born a life.<sup>334</sup>

Allah, the exalted says: "Allah commands you as regards your children's inheritance, to the male a portion equal to that of two female ..."<sup>335</sup>

AbiHureirah relates if a child is born a life he is entitled to inherit.<sup>336</sup>

Regarding gifts to the children the shari'ah ordains fairness. It is reported in an authentic *hadeeth* (tradition) that a companion, the father of Nu'man bin Bashir went to the prophet (P.B.U.H) and requested him to witness a gift which he donated to one of his sons. The prophet (P.B.U.H) inquired whether he gave such gift to all of his children. When the answer was negative, the prophet (P.B.U.H) refused to witness it and returned the companion. Some version of this tradition states that look for other people to witness because me I don't witness on an injustice.<sup>337</sup>

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<sup>333</sup> Al-Qur'an 14: 40.

<sup>334</sup> Samar Khalil Mahmud (2003), The Right of Child in Islam, Masters Project at Najjah National university, Nablus, Phalstine, P. 48.

<sup>335</sup> Al-Qur'an 4:11

<sup>336</sup> Narrated by Abu Daud.

<sup>337</sup> Mohamed Fuad Abdulbaqi (2005), Al- Lulu'uWal-Marjan on what is agreed upon by Al-Bukhari and Muslim, p. 329.

It is reported that a man was embraced by two of his children. He carried one of them, kissed and put on his lap and the other put by his side. The prophet (P.B.U.H) told him that he did not treat with justice.<sup>338</sup>

#### **4.4.8 Rights of the Children with Special Need**

Orphans and abandoned children are among the children with special need. Islam give these children have similar rights as other children. Islam is always in support of weaker members of the society. Allah commands to deal kindly with orphans and paupers.<sup>339</sup>

Abandoned children whose parental root is not known would definitely lost right to parenthood but would enjoy all other rights due to children as discussed above. Islam requires its followers to cooperate in virtues of good deeds and piety and forbids cooperation in committing sins and enmity.<sup>340</sup>

Like any other child abandoned child need life, love and affectionate and Allah directs his servants to give life to those who are less fortunate. Allah says: “..and if any one saved a life, it would be as if he saved the life of a whole nation..”<sup>341</sup>

In the words of the prophet of Islam may Allah’s blessing and peace be upon him Allah shall not have mercy on those who have no mercy for others.<sup>342</sup>

During the reign of Islamic ruler Umar Ibnal-Khattab a man collected an abandoned child and brought to the attention of the ruler. The Muslim leader ordered the man to take care of the child and he shall among his family while the state will provide for his maintenance.<sup>343</sup>

Orphans in addition to regular rights Islam provides extra care for them. They should be treated with kind and protected against harm. Allah says “disbelievers are those who treat orphans very harshly..”<sup>344</sup> taking care of orphan is among the virtues which would grant eternal bliss. The

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<sup>338</sup>Mohamednur bin Abdulhafidh Suweid (2012), Manhaj Al-Tarbiyah An-Nabawiyah Lilddifl, 15<sup>th</sup>Edn, P.96.

<sup>339</sup> Al-Qur’an 93: 9/10.

<sup>340</sup> Al-Qur’an 5:2.

<sup>341</sup> Al-Qur’an 5:32.

<sup>342</sup>Reported by Jabir as Compiled by Al- Bukhari.

<sup>343</sup>Collected by Imam Malik in Al-Mawatta’.

<sup>344</sup> Al-Qur’an 107: 1-2.

prophet may blessing and peace be upon him said; “I and the person who takes care of the orphan shall be together in paradise”.<sup>345</sup>

The guardian of the orphan is under obligation to take care of his person and property if any. “...they ask you concerning orphans. Say: the best thing to do is what is for their good...”<sup>346</sup> It is forbidden to misuse the property of orphans in any way instead should be invested and managed prudently until such time when they become adult and found responsible.

“To orphans restore their property (when become adult and mature to manage prudently). Do not substitute (your) worthless (property) with their good ones; and do not devour their property in place of yours. For this is indeed a great sin”.<sup>347</sup>

Even upon attaining maturity and before handing over their property to them, orphans should be tested on their ability and skill to manage their financial affairs. It is only when they are found fit to manage, their property is handed to them.

“Make trial of orphans until they reach the age of marriage; if then you find sound judgment in them, release their property to them; but consume it not wastefully, nor in haste against their growing up...”<sup>348</sup>

#### **4.5. Conclusion**

The chapter has unveiled various rights of the child as guaranteed in Islam. Those rights are as old as Islam itself and preceded many modern conventions concerning children’s rights. Although we did not took comparative approach, but it is obvious that there exist a lot of similarities in what rights the both system offer to the children. Consequently, it is my conviction that this chapter has removed the myth and misconception many people held against Islam on the right of the children. It is the outcome of this chapter that in all cases pertaining to children, Kadhis courts are obliged to ensure that the child’s best interests are of paramount consideration.

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<sup>345</sup> Narrated by Al- Bukhari, Vol. 10, P.375.

<sup>346</sup> Al-Qur’an 2:220.

<sup>347</sup> Al-Qur’an 4: 2.

<sup>348</sup> Al-Qur’an 4: 6.



It is in this very vital regard that Kadhi,s courts in Kenya gives much concerns and consideration to children matters. In almost all cases brought to the attention and determination of Kadhis courts, a child is predominantly at the centre of dispute by virtue of being integral component of a marriage dispute or a divorce suit or rather a succession application.

Therefore, it is a historical fact that the Kadhis courts have beenhaving jurisdiction to adjudicate children cases and awarding rights some of which enumerated under this chapter long before the establishment of other formal courts in Kenya. To this end, Kadhi's court is pride of being pioneers of children's rights for a long time.

## CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

### 5.1 Conclusion

This study have investigated jurisdiction of the Kadhis Courts in matters relating to the children in Kenya. The relevant laws in Kenya donate to the Kadhis Courts powers to adjudicate matters of Islamic law pertaining to personal status, marriage, divorce and inheritance where all parties are Muslims<sup>349</sup>.

Among these four items, marriage, divorce and inheritance are clear though not in detail. However, what constitute personal status in Kenyan legal context remained ambiguous. During my research I did not come across any domestic law be it statute or case law where personal status is defined.

As a result of this ambiguity even superior courts have given conflicting decisions on the matter. In order to bridge this gap I was compelled to resort to other jurisdictions with similar judicial system as Kenya. I have also had chance to consult some academic work of the scholars on the subject and as well as legal dictionaries. It is my humble finding that from the work consulted the phrase personal status have quite a wider meaning as discussed in chapter three. For brevity it includes marriage, divorce, inheritance, affairs of the children, *Waqf* (endowment) etc.

It is also important to note that from this research there is nothing in the Children's Act No 8 of 2001 that would suggest stripping Kadhi's Courts from jurisdiction to handle children cases. To the contrary it is my finding that international and regional conventions and the children's Act strengthen the jurisdiction of the Kadhi's Court in this regard.

Among many rights guaranteed to the child under the above laws is the right to religion which in the words of the Convention on the Right of the Child states parties to it shall respect child's rights to religion and the child shall have freedom to manifest his it without limitation whatsoever except as prescribed in the law.<sup>350</sup>

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<sup>349</sup> Art. 170 (5) The Constitution of Kenya 2010.

<sup>350</sup> Art. 14, Convention on the Right of the Child (CRC).

The African Charter on the Rights and Welfare of the Child also provides for similar rights of the child and goes further step and imposes duty on the parent and guardian to give religious direction to the child without interference of the state. However, the child under the charter enjoys religious right within the perimeter of national law and policy and in consideration of the best interest of the child.<sup>351</sup>

The Children's Act provides:

“Every child shall have a right to religious education subject to appropriate parental guidance. The Minister shall make regulations giving effect to the rights of children from minority communities to give fulfillment to their culture and to practice their own language or religion”.<sup>352</sup>

This right is further strengthened in the constitution of Kenya which guarantees freedom to manifest any religion without hindrance.<sup>353</sup>

The foregoing provisions donate powers to the Kadhis Courts to handle children's cases. Because being a religious court it is privileged to understand the best interest of a Muslim child which cannot be determined without considering his right to religion. According to the teaching of Islam religion crosscut every aspect and affairs of a Muslim person.

It is therefore my humble finding that the Kadhis Courts have full jurisdiction to handle children related cases in Kenya.

## **5.2 Recommendations:**

Lack of clarity on the subject have caused untold problems to the clients of the Kadhi's Courts. While access to affordable justice is a fundamental constitutional rights and requirements but many Kenyan have been denied this rights. A mother is subjected to move two courts (Kadhi's and Children's) to enforce her rights to maintenance as a wife and right of her child to maintenance over the same defendant who doubles as husband and father. It is logic that this amounts to waste of time and resources and as well as delay of justice.

In order to address this serious problem I recommend:-

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<sup>351</sup> Art. 9 of the African Charter on the Rights and Welfare of the Child (ACRWC).

<sup>352</sup> S. 8 of The Children's Act No. 8 of 2001.

<sup>353</sup> Art. 32, The Constitution of Kenya, 2010.

1. The Kadhi's Courts Act Cap 11 of the laws of Kenya be amended and specifically the phrase "personal status" be defined clearly in the interpretation clause.
2. Codification of Islamic family law in Kenya: this will help Kadhis to save their time in researching in the wider corpus of Islamic law and as well as the judges on appeal the lawyers, academicians and other stakeholders to have first hand information on Islamic family law.
3. As an interim solution and before the enactment of detailed Muslim Family law it is prudent for The Chief justice of Kenya to exercise his power under the children's Act to appoint the Kadhis to handle children cases.
4. Creation of awareness among the Kadhis, judges, lawyers legal academicians and other stakeholders on the role and mandate of Kadhis courts in children cases and why is it important to have the Kadhis courts to handle cases of the children of Muslim communities in Kenya. This can be done through training, seminars, meeting and discussions on the matter.

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## APPENDICES

### APPENDIX 1: Declaration Form for Students

#### UNIVERSITY OF NAIROBI

##### Declaration of Originality Form

This Form must be completed and signed for all works submitted to the university for examination.

<b>Name of the Student</b>	<b>Sukyan Hassan Omar</b>
<b>Registration No.</b>	<b>G62/67544/2013</b>
<b>College</b>	<b>Humanities and Social Science, School of Law, Univeristy of Nairobi</b>
<b>Faculty/School/Institute</b>	<b>School of Law</b>
<b>Department</b>	<b>Public Law</b>
<b>Course Name</b>	<b>Project</b>

##### DECLARATION

1. I understand that Plagiarism is and I am aware of the university's policy in this regard.
2. I declare that this \_\_\_\_\_**PROJECT**\_\_\_\_\_ (Thesis, Project, essay, assignment, paper, report, etc) is my original work and has not been submitted elsewhere for examination, award of a degree or publication. Where other people's work or my own work has been used, this has properly been acknowledged and referenced in accordance with the University of Nairobi's requirements.
3. I have not sought or used the services of any professional agencies to produce this work.
4. I have not allowed, and shall not allow anyone to copy my work with the intention of passing it off as his/her own work.
5. I understand that any false claim in respect of this work shall result in disciplinary action, in accordance with university Plagiarism Policy.

**Signature:** \_\_\_\_\_

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

**ANNEXTURE II: Samples of the Judgments/Rulings on Children Matters in Kadhis Courts**

a) **High Courts**

**ABDIRAHMAN MOHAMED ABDI & Another v ADAN YUSSUF [2013] eKLR**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CIVIL APPEAL NO. 13 OF 2012**

**BEING AN APPEAL FROM THE WHOLE OF THE JUDGEMENT OF THE KADHI'S  
COURT AT GARISSA (HON.OSMAN A. SHURIE) DELIVERED ON 17<sup>TH</sup> APRIL 2009**

**IN CIVIL CASE NO. 56 OF 2009.**

ABDIRAHMAN MOHAMED ABDI.....1<sup>ST</sup> APPELLANT

NASRA ALI BASHIR.....2<sup>ND</sup> APPELLANT

**VERSUS**

ADAN YUSSUF.....RESPONDENT

**JUDGEMENT**

1. Abdirahman Mohamed Abdi (1<sup>st</sup> Appellant) and Nasra Ali Bashir (2<sup>nd</sup> Appellant) have preferred this appeal seeking orders to set aside the judgement of the Honourable Kadhi Osman A. Shurie, any other order/relief this court may deem fit to grant and costs of the appeal. In their memorandum of appeal the appellants have raised two grounds of appeal, namely:

- a) The learned Kadhi erred in law and in fact in making a finding that the child in question belonged to the Respondent in the absence of any substantial evidence in support of finding.



- b) The learned Kadhi acted *ultra vires* as he had no jurisdiction to hear and determine an issue relating to the paternity of the child in question.
2. Parties through their respective counsels filed written submissions and left the matter to the court to give its judgement. Being a matter based on Islamic Law and given that the matter did not proceed by way of oral submissions in open court this court was not able to sit with Kadhi(s) to take down the submissions and consider the matter. This court however sought and received the opinions of Hon. Mr. Sheikh Twalib Bwana Mohamed, Kadhi, Nakuru Law Courts and Hon. Mr. M. S. Hassan, KadhiHOLA Law Courts. This was done by forwarding the record of appeal and counsel's submissions to the two **ABDIRAHMAN MOHAMED ABDI & Another v ADAN YUSSUF [2013] eKLR** Kadhis who have read, considered the same and prepared their respective opinions on the matter as regards the applicable Muslim Law. They have forwarded the opinions to this court. This court in arriving at this judgement has taken into account the two opinions in as far as the applicable Muslim Law is concerned. It was not possible to get the Kadhi Nairobi sit after he excused himself hence the KadhiNakuru.
3. The Respondent sued the Appellants in the Kadhi's Court, Garissa, asking the court to find that the 2<sup>nd</sup> Appellant was still married to him (Respondent) and that **Y.A.Y**, the child in question, is his child and therefore he should be granted custody of the minor child. The case as presented in the lower court has simple facts. The Respondent, then the Plaintiff, told the trial court that he married the 2<sup>nd</sup> Appellant (he does not say when the marriage took place) and after three (3) months he divorced her with one *talaq*. He says that he later revoked the marriage. By revocation of marriage I understand it to mean that the Respondent revoked the divorce. My understanding of Muslim Law as guided by Mr. Hassan and Mr. Mohamed (Kadhis) is that in Muslim marriages a husband can divorce his wife with one *talaq* after which she stays for a probationary period of three menstrual cycles (periods) to allow parties an opportunity to reconcile. The husband can then revoke the divorce if they have reconciled. If this is what happened here, it would mean that the Respondent divorced the 2<sup>nd</sup> Appellant then revoked that divorce after the allowed period hence his claim that she was still his wife when she allegedly eloped with the 1<sup>st</sup> Appellant. This issue does not come out clearly in the lower court proceedings.
4. The Respondent claims that the 2<sup>nd</sup> Appellant was pregnant with his child when she eloped with the 1<sup>st</sup> Appellant. This claim is denied by the Appellants who state that the 1<sup>st</sup> Appellant

was not pregnant. In her evidence in the lower court, 2<sup>nd</sup> Appellant testified that her father presided over a marriage between her and the Respondent but she did not love him. She said the marriage was consummated but after two (2) months (it is not clear whether they stayed married for one and half, two or three months since evidence is not clear) she decided to go away from the Respondent and marry the 1<sup>st</sup> Appellant. She said that after her divorce from the Respondent she observed Edda for three (3) months and during that period she used to receive her monthly periods. She eloped with the 1<sup>st</sup> Appellant after the divorce and without pregnancy. She said she married the 1<sup>st</sup> Appellant under Islamic Law in Kismayu, Somalia. She became pregnant and gave birth to a baby boy. She termed the claim by the Respondent untrue.

5. The 1<sup>st</sup> Appellant told the lower court that he did not elope with the 2<sup>nd</sup> Appellant but married her on 10<sup>th</sup> April 2004 under the guardianship of her father and got the baby boy with her. He also told the lower court that in January 2009 the Respondent claimed that the 2<sup>nd</sup> Appellant was his wife and the child was his son. That the issue of paternity of the child was not resolved by the local sheikhs in Somalia who advised the parties to have DNA done in Kenya to establish paternity.
6. The record of the lower court does not show whether the defendants (Appellants) entered appearance or filed their defence. The lower court nonetheless managed to proceed to hear the matter. The record is not clear how the matter proceeded and it seems that civil procedure was flouted. All the same the parties attended court and their evidence was recorded. It is worth noting that the evidence was recorded haphazardly and in total disregard of the civil procedure.
7. My understanding is that this appeal raises two issues for determination, whether there was sufficient evidence for the trial court to base its findings and decision on and whether the Kadhi was seized of the jurisdiction to try and determine custody of a child matter. These are the major issues this court has identified and which the two Kadhis assisting this court have also pin-pointed for determination. Article 170 (5) of the Constitution 2010 limits the jurisdiction of the Kadhis' court to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of that court. In the matter before this court, all the parties profess Muslim religion and submitted themselves before the Kadhis' court for determination of their issues. The matter came to this court only by way of appeal because the appellants are dissatisfied with the decision of the Kadhi. The issues they raised before the

Kadhi were to do with the marriage, divorce and paternity of the child.

I have no doubt in my mind that the parties were correctly before the Kadhis' court for determination of those issues. The only issue I want to raise here is whether the Kadhi had jurisdiction to decide on the issues of paternity and custody of the minor child.

8. Section 5 of the Kadhis' Courts Act reiterates the provisions of the Constitution in respect of the jurisdiction. However this section does not limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it. The Children's Act did not repeal the Kadhis' Court's Act. However, the Children's Act establishes Children's Courts to conduct proceedings on matters of custody of children among other matters listed under section 73 (a) of that Act.
9. I have considered the submissions by the Appellant that the matters relating to the custody of children must be heard in the Children's Court. I have taken the view that the Children's Act does not oust the jurisdiction of the Kadhi's court and therefore the Kadhi's court remains the right court with jurisdiction on matters of personal status, marriage, divorce or inheritance where parties profess Muslim religion. The issue before the trial Kadhi and on appeal before this court is not custody of the child *per se*. The issue involves marriage, divorce and paternity of the child. Paternity came up as an issue before the trial court because the Respondent sued the Appellants claiming that he was still married to the 2<sup>nd</sup> Appellant when she allegedly eloped with the 1<sup>st</sup> Appellant and that she was pregnant with his child when she got married to the 1<sup>st</sup> Appellant. After taking evidence of the parties the trial court ruled in favour of the Respondent. The issue of paternity is so intertwined with the other issues for determination that they cannot be separated. My view therefore is that paternity and custody of the child in this case are incidental to the issues of marriage and divorce between the Appellants and thus it falls under the jurisdiction of the Kadhi's court (see **Miscellaneous Civil Application No. 903 of 2005**

**Republic v. Kadhi Sheikh Twalib and another, Ex parte MaimunaSalim and Najma Ali Ahemd v SwalehRubea [2010] eKLR).**

10. On the issue of insufficient evidence, I wish to point out that the Evidence Act does not apply to judicial proceedings before to Kadhi's courts. Section 2 (1) of the Evidence Act provides thus: **This Act shall apply to all judicial proceedings in or before any court other than a**

**Kadhi's court, but not to proceedings before an arbitrator.** Section 6 of the Kadhi's Courts Act specifies that the law and rules of evidence applicable in a Kadhi's court shall be those applicable under Muslim law.

In deciding the issues presented before it, the trial court was required to turn to Muslim law for guidance on the issue of admitting evidence and subjecting the evidence to the standard of proof under that law.

11. In considering this issue, I have placed great emphasis on the assessment of the two Kadhis I referred the matter to. After assessing the evidence adduced in the trial court they are in agreement that under Muslim law as provided under the Qur'an the onus of proving an allegation lies on the person who has made the allegation. This is stated in the following terms in the **Qur'an: Produce your proof if you are truthful (Baqara 2:111)**. I have read the lower court proceedings and find it lacking. It is not established when the Respondent divorced 2<sup>nd</sup> Appellant, whether he revoked the divorce and when this was done and whether the 2<sup>nd</sup> Appellant was pregnant when she married the 1<sup>st</sup> Appellant. The 1<sup>st</sup> Appellant says he married 2<sup>nd</sup> Appellant on 10<sup>th</sup> April 2004 and in January of 2009 the Respondent claimed the child and 2<sup>nd</sup> Appellant.
12. The 2<sup>nd</sup> Appellant told the lower court that she was not pregnant when she married the 1<sup>st</sup> Appellant. She said that after the divorce from the Respondent she observed Edda as required. Edda is prescribed under the Qur'an as the period of waiting during which time a woman may not remarry after being divorced and a divorced woman must observe this period before remarrying. There was therefore need in view of these allegations to call for evidence on the dates of the divorce, remarriage and birth of the child to ensure justice was done to all the parties.
13. The opinion of the Mohamed (Kadhi Nakuru) and Hassan (Kadhi Hola) on the issue of DNA testing under Muslim Law is that it is relied on but as the last resort. After reading their opinions on the issue of DNA, it is my belief that DNA testing is not outlawed under Muslim Law but must only be applied as the last resort. I have read some opinions tending to say DNA is not acceptable in certain Muslim communities and I am sure opinion is divided on the issue.
14. Both Kadhis agree that the trial court did not apply the full spectrum of the Muslim Law of

evidence. I am meant to understand that under Muslim Law of evidence when a man suspects his wife of adultery he is required to bring four male eye witnesses failing which both he and his wife take LI'AAN translated as oath of curse (Nisa 4:15) and those who have no witnesses except themselves should testify four times by Allah (Noor 24: 6-9). To my mind this is a very high standard of proof. To get four eyewitnesses is not easy! The failure to apply the full spectrum of Muslim Law in this case by the trial court may have led to miscarriage of justice.

15. Having fully understood the issues before me and the opinion of the two Kadhis who assisted me in assessing the evidence under Muslim Law, and having considered the grounds of appeal, the submissions of both parties and the issues for determination, it is my finding that I agree with the Appellants that the trial court erred in law and fact in making a finding that the 2<sup>nd</sup> Appellant is the wife of the Respondent and that the child in question belonged to the Respondent in the absence of substantial evidence in support. I however find that the Kadhi had jurisdiction to try this matter being a matter that relates to marriage, divorce and incidentally the paternity of the child in question. The latter question (paternity) which I have explained is incidental to the issue whether the 2<sup>nd</sup> Appellant was still the Respondent's wife and whether she was pregnant by the Respondent when she married the 1<sup>st</sup> Appellant cannot be separated from the main issues of this case hence my finding that the issue relates a question of personal status to the parties.

16. Given the opinion of the two Kadhis who assessed the Muslim Law to me that the trial Kadhi did not exhaust the Muslim evidence law, it is my considered view that for justice to be done in this matter, it would be proper to send it back to the Kadhi's court Garissa for retrial by the sitting Kadhi. This is the opinion expressed by the two Kadhis and I totally agree with them. In conclusion therefore, I allow the appeal, set aside the judgement of the Kadhi and order each party to bear their own costs. The matter should proceed with haste to be placed before the Kadhi, Garissa for mention with a view to giving a hearing date and any further orders. I order accordingly.

**STELLA N. MUTUKU, JUDGE**

**DATED SIGNED AND DELIVERED THIS 21<sup>ST</sup> DAY OF JANUARY 2013**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 15 OF 2013**

*(Appeal from the decision in Civil Case No. 148 of 2012 of the Kadhis Court at Mombasa:  
Abdulhalim H. Athman – Principal Kadhi)*

**H M M.....APPELLANT**

**VERSUS**

**K J D.....RESPONDENT**

**JUDGMENT**

Before this court is the appeal filed on 7<sup>th</sup> May, 2013 by the Appellant **H M** against the decision of the Hon. Principal Kadhi which decision was rendered on 11<sup>th</sup> April, 2013. The Appellant in her Memorandum of Appeal relied *inter alia* on the following grounds

- 1. The Learned Kadhi erred in Law and fact in entertaining and purporting to adjudicate a claim relating to custody of children which does not fall under the jurisdiction of his court as the claim has no bearing whatsoever to Islamic Law and/or rights enforceable thereunder.**
- 2. The Learned Kadhi erred in Law and fact in presiding over a case involving children while not being duly gazetted pursuant to section 73(ii) of The Children Act No. 8 of 2001.”**

The appeal was heard in the presence of the Hon. Chief Kadhi as required by Law. **MR. MWANIKI** acted for the Appellant whilst **MR. KHATIB** represented the respondent KJD.

The brief facts of the case are as follows. The appellant and the respondent got married under Islamic Law on 12<sup>th</sup> February, 2003. Their union was blessed with four (4) children as hereunder

- a) F 1K born in 2004
- b) F2 K born in 2006
- c) F3 K born in 2007
- d) A K born in 2009

The couple later divorced in 2010. After the divorce the four children remained in the custody of the Appellant (their mother) except for the third daughter F2 who lives with a relative in Lamu. Even after the divorce there appears to have been no dispute over custody. It is only when the appellant re-married that the respondent moved to the Kadhi Court in Mombasa seeking custody of the four children of the marriage. After hearing both parties the Hon. Principal Kadhi delivered his judgment on 11<sup>th</sup> April, 2014 in which he awarded custody of two children to the appellant and two to the respondent. Being dissatisfied with this decision the appellant moved to the High Court under certificate and on 12<sup>th</sup> February, 2014 obtained orders staying the execution of the Hon. Kadhi's decision.

This appeal revolves around only one main issue for determination – whether the Kadhi Court as currently established has jurisdiction to determine issues relating to the custody and maintenance of children. I have carefully considered the submissions of both counsel on this point. The question of jurisdiction was indeed considered by the Hon. Principal Kadhi who on that point rendered himself thus **“The defendant raised the issue of jurisdiction of this court to hear [an] issue of custody of children she stated [that] the court has no jurisdiction to hear custody matters. However she did not advance any reasons. It could be that she holds the notion that the enactment of the Children Act [2001] denies this court jurisdiction on children matters. This is a misapprehension of the Law. Jurisdiction of Kadhi's Court is derived and provided for in the Constitution in Article 170(5) which provides ..... Under Islamic Law, questions of custody and maintenance of children fall and is specifically provided for under personal status. It is also the direct result of divorce.”**

By this the Hon. Kadhi appeared to suggest that the reference in Article 170(5) to '*Personal Status*' included issues of custody and maintenance. With respect I do not agree with this finding of the Hon. Kadhi for the following reasons. As stated correctly the jurisdiction of the Kadhi Court is derived from Article 170(5) of the Constitution of Kenya 2010. Article 170(5) provides

**“The jurisdiction of the Kadhi Court shall be limited to the determination of questions of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi Court.” [myemphasis]**

Article 170(5) is couched in mandatory terms and sets a limit on the areas upon which the Kadhi Court would have jurisdiction. Similarly Section 5 of the Kadhi Courts Act Cap 11 sets out the jurisdiction of the Kadhi thus

**“A Kadhi’s court shall have and exercise jurisdiction, namely the determination of questions of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all parties profess the Muslim religion .....**”

Once again the provision setting out this jurisdiction is by the use of the word '*shall*' couched in mandatory terms. No mention is made in either the Constitution or in the Kadhi Court Act to '*custodyand/or maintenance of children*'. If the drafters of either the Constitution or the Act had intended thatcustody and or maintenance be included in the jurisdiction of the Kadhi Court then nothing would have been easier than to specifically state so. The exclusion of childrens matters in law is a clear indication that the jurisdiction of the Kadhi Court does not extend to such matters. No doubt the thinking was that the Children Act 2001 provided sufficient and exhaustive legislative cover for children’s matters in Kenya.

I have perused the opinion of the Hon. Chief Kadhi and find that he is in agreement with this position. The Hon. Chief Kadhi opines

**“Therefore I am of the opinion that the Kadhi Court has no jurisdiction in determining children matters as there is nowhere any written laws of Kenya which gives Kadhi jurisdiction over children matters .....**”



He goes on to conclude thus **“It is therefore my opinion that the Kadhi Court in Kenya lacks jurisdiction by lack of written law giving it the jurisdiction on children matters”**

I could not agree more. I am of the opinion that the Children Act grants **exclusive jurisdiction** over all children matters including custody and/or maintenance **only** to Judicial Officers who are gazetted under the said Act. The Kadhi is **not** a judicial officer gazetted to handle children matters. I am buttressed in this finding by the various decisions of fellow High Court Judges on this same point. In the case of **SMH-VS- SAA KISUMU HIGH COURT MISC. 125 OF 2013 [2013] eKLR** my learned brother Hon. Muchelule J. held that

**“My understanding is that the Kadhi's Court is properly seized of the divorce matter, but may not deal with the issues of custody and maintenance of the children. These issues are not among those in respect of which the Constitution and the Act have donated jurisdiction to the Kadhis Court. These issues can only properly be dealt with by a children's court under the Children Act No. 8 of 2001”**

Similarly in the case of **GSA -VS- ASA Nairobi High Court Civil Appeal No. 53 of 2013[2014] eKLR**. Hon. Musyoka J. held

**“From the wording of Article 170(5) of the Constitution, it would appear that the constitution has not granted jurisdiction to the Kadhi's Court over matters touching on custody and maintenance orders over children”**

In the above decisions having been made by the High Court are not binding on this court but they are persuasive. I am persuaded that they do set out the correct position in law. In the case of **ZHZ Vs. SDSMombasa High Court Civil Appeal No. 45 of 2013 [2014] eKLRI** did myself hold that

**“The cited law [Constitution and Kadhi's Court Act] makes it clear that the jurisdiction of the Kadhi's Court is to matters of personal law e.g. marriage, divorce and inheritance. No mention is made of children's matters like custody access and/or maintenance of children of a marriage. Matters relating to children are special and exclusive and this is why there exists a specific Act to deal with such matters being the Children Act 2001.**

**It is only in a children's court and with reference to the Children Act that decisions respecting custody, access and/or maintenance of children can properly be made .....**”

My position has not altered. My finding is that the Hon. Principal Kadhi had no jurisdiction to determine the issue of custody in this case. His orders purporting to do so were *ultra vires* his jurisdiction and were therefore null and void. As such I do hereby allow this appeal and set aside the orders made by the Hon. Principal Kadhi in his judgment of 11th April 2013. This being a family matter I direct that each party meet its own costs.

**Dated and Delivered in Mombasa on this 24<sup>th</sup> day of September 2014.**

**M. Odera**

**JUDGE**

**In the presence of:**

**Mr. Khatib for Respondent**

**No Appearance by Appellant**

**Court Clerk Mutisya**

a) **Kadhis Courts**

**REPUBLIC OF KENYA**

**IN THE KADHIS COURT AT NAIROBI**

**MATRIMONIAL/CIVIL SUIT NO. 103 OF 2014**

**KAMRAN MOHAMED NOORANI.....PLAINTIFF/RESPONDENT**

**V E R S U S**

**EMRANA CORAL WALLA..... DEFENDANT/APPLICANT**

**RULING**

This case was filed by Kamran Noorani on 28<sup>th</sup> March, 2014 in this court. The parties are husband and wife and married on 4<sup>th</sup> May, 2012 and blessed with the minor Fatima Kamran (1 year old). In his plaint, the plaintiff/respondent claimed that the defendant deserted her marital home in November 2013, denied him access to the minor and caused various marital problems. He first requested for reconciliation but later opted for divorce.

On 9<sup>th</sup> April, 2014 the defendant/applicant filed her defence in conjunction with notice of preliminary objection on jurisdictions of the court. In her defence the defendant/applicant sought for divorce (khulla) and denied allegations leveled against her by the plaintiff partially or in toto. This ruling is, therefore, premised on the notice of preliminary objection raised by applicant/defendant herein that this honourable court is divested of jurisdiction to hear and determine this suit in light of the rights of the child dated 8<sup>th</sup> April, 2014. The defendant through her advocate listed following authorities against this court's jurisdiction on the issues in question

1. The constitution of Kenya, 2010
2. Kadhis Court Act, Cap 11
3. Children Act No. 8 of 2001

4. John Kipnge'eno Koech & two others Vs Nakuru County Assembly and five others (2013) EKLK
5. G.S.A Vs A.S.A. (2014) EKLK
6. S.M.H. Vs S.A.A. (2013) EKLK
7. M.H.A. & another Vs H.A.R (2006) EKLK
8. Abdirahman Mohamed & another Vs Adan Yussuf (2003) EKLK
9. A.A.M Vs M.S.M. (2014) EKLK

In the first and second authorities the defendant asserts that the jurisdiction of Kadhi's Court is established in Article 70 Constitution of Kenya 2010. According to her assumptions children custody and maintenance is not among elements of Kadhi's jurisdiction and that Kadhis act cap 11 did not donate such powers while in the third authority children matters are governed and specified by the provision of children Act, No. 8 of 2001.

In support to the above, Justice Musyoka in his ruling on the Appeal against Nairobi Kadhis Court dated 14<sup>th</sup> day of March, 2014 of civil appeal 53 of 2013 states:

*“From the wordings of Article 170(5) of the Constitution, it would appear that the Constitution has not granted jurisdiction to the Kadhis Court over matters touching on custody and maintenance of children. It is doubtful therefore whether the Kadhis Court can grant custody and maintenance orders over children. He further posits in paragraph (5) of the ruling that affairs of children is exclusively determined in children act and has a universal application to all.”*

This assertion is also held and corroborated by Justice Muchelule in his ruling to Misc Appeal No. 125/13 against Kisumu Kadhis Court case between SMH and SAA. In his ruling he mentioned that under Article 170(5) in the Constitution of Kenya 2010, the jurisdiction of a Kadhis Court **shall be limited to the determination of question of Muslim Law related to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess Muslim religion.....**

In regard to the article (170) Justice Muchelule viewed by saying:

*“My understanding is that the Kadhis court is properly seized on the divorce matter, but may not deal with issues of custody and maintenance of children. The issues are not*

*among those in respect of which the constitution and the act have donated jurisdiction to the Kadhis Court. The issue can only be properly dealt with by a children's court under the children act, No. 8 of 2001".*

In conclusion Justice Muchelule's result is that the Kadhi's Court proceed to hear and determine the divorce cause but matters on children be filed in children's court.

Among other authorities given for lack of jurisdiction is the MHA & Another V HAR (2006) ruling by Justice Isaak Lenaola on paternity, in which he pointed out that the issue canvassed in the case was no tone with regard to marriage nor divorce status. The Honourable Judge offered a definition of personal status, as quoted in James Hadley's introduction to Roman Law, to mean **"...the position that he (the person) holds with reference to rights which are recognized and maintained by the law; in other words, his capacity for the exercise and enjoyment of legal rights"**

The Honourable Judge also gave the Black's Law Dictionary definition of Law of status as:

**"The category of Law dealing with personal or non proprietary rights, whether in rem or in personam"**. The counsel for the applicant also relied on Abdirahman Mohammed Abdi & Another V Adan Yusuf (2013) eKLR where Justice Mutuku stated that:

*"... paternity and custody of the child in this case are incidental to the issues of marriage and divorce between the appellants and that it fall under the jurisdiction of the Kadhis Court."*

The counsel also relied on AAM Vs MSM (2014) eKLR in which the Hon. Judge Odera ruled that the Kadhis court does not oust the jurisdiction of the High Court in matters involving persons who profess the Muslim faith.

On the other hand, the respondent depended on the following authorities; Mohamed Omar Vs J.B. Mdiwo (2007) in which Judge Sergon ruled that he did not think the jurisdiction of the Kadhis Court had been taken away by enactment of the Children's Court, and that children custody and maintenance fall under the jurisdiction of Kadhis court for it is accomponent of personal status.

Other authority is that of *Abdiraham Mohamed Abdi & Another Vs Adan Yusuf* (2013) eKLR where Hon Justice Stella Mutuku ruled that children's Act did not repeal the Kadhis Court Act and that it did not oust jurisdiction of Kadhis Court on matters it has jurisdiction.

In relation to jurisdictions, I believe that It is a trite law that jurisdiction is fundamental and a judgment rendered by a court that does not have jurisdiction to entertain the matter is void *ab initio*.

The rationale in this was pertinently stated by Justice Nyaranga in *Owners' of Motor Vessel "Lilian v Caltex Oil (Kenya) Ltd.* (1989) KLR 1 at p.14 where he stated that a question of jurisdiction ought to be raised at the earliest possible opportunity and the court is obliged to decide on it right away. He went on to state that:

*".....jurisdiction is everything, without it a court has no power to make one more step".*

Judicial powers, according to Sharia, must always operate in conformity with equity, specifically in issues pertaining to family law, even to the benefit of an enemy and to the detriment of a relative since justice is for all.

Sharia doesn't allow slightest modification in the rule of perfect justice or any form of arbitrary procedure to replace it. It firmly establishes the rule of law, eliminating all deference between the high and low.

In consonance with and having given due attention to submissions and materials placed by the parties, the question which falls for my consideration is:-

**1. Whether or not this court has a jurisdiction to entertain the matter pertaining to custody and maintenance of the minor?**

The court's attention was drawn to Art. 170(5) of the constitution wherein it is stated that:

**' The jurisdiction of a Kadhi's court shall be limited to the determination of a question of Muslim law relating to personal status, marriage, divorce or inheritance**

**in which all the parties profess the Muslim religion and submit to the jurisdiction of Kadhi's court.'**

And to Sec. 5 of The Kadhi's Court Act;

**' The Kadhi's court has been given jurisdiction to determine questions of Muslim law relating to personal status ,marriage, divorce and inheritance in proceedings in which all parties profess the Muslim religion..'**

Ethically it's the role and mandate of judicial officers to expound on their jurisdiction qualitatively and quantitatively without the expansion, to create jurisprudential inferences and insight within the confines of the law.

On the issues in hand, therefore, it is my humble opinion that prudence demands reading Article 170(5) constitution of Kenya 2010, children act No. 8 of 2001, Kadhis act cap 11 section (5) and (6) together to avoid overlap, inconsistencies and exposing the law to uncensored conjectures, delusive serendipities, asymmetrical deductions, fathomless theories and paradoxical decisions.

During my perusal to the Judges decision, there was no mention on section six (6) of the Kadhis act that clarifies:-

***"The law and the rules of evidence to be applied in a Kadhis court shall be those applicable under Muslim Law".***

This seems to be symptoms of the problem and if employed would have led to clues for definitions, scope nature and components of personal status, marriage, divorce and inheritance as stipulated in the Islamic rule of law.

The gist of this application revolves around whether issues concerning custody and maintenance fall into the category of personal status.

In giving the interpretation of personal status, the court's attention was drawn to the decision by Justice J. K. Serگون in Amin Mohammed Hassan v Zahra Mohammed Abdulkadir (2009) eklr wherein the word '**status**' is described as indicated in Black's Law dictionary as follows;

***“A person’s legal condition whether personal or proprietary; The sum total of a person’s legal rights, duties, liabilities and other legal relations or any particular group of them separately considered.”***

He further states that;

*“The issue touching on custody and maintenance was properly before the kadhi’s court. It is not right to claim that the kadhi’s court had no jurisdiction to hear and determine the issue.....Issues touching on maintenance and custody fall into the category of personal status.”*

The Judge, further, unfolds that Section 185 of the children’s act gave discretion to courts other than the children court to refer matters touching on children to the children court. The Act uses the word ‘may’ instead of ‘shall’ alluding that the Kadhi’s court or any other courts had jurisdiction to entertain children matters as long as the best interest of the child is taken into account as per the provisions of children act.

In *Abdirahman Mohamed and another v AdanYussuf(2013)*eklr the Court stated that;

*“...paternity and custody of the child in this case are incidental to the issues of marriage and divorce between the Appellants and thus it falls under the jurisdiction of the Kadhi’s court.”*

The preceding legal position corroborates and/or reflects the legal concept of personal status under Islamic legal system as elucidated in the jurisprudential works of eminent jurists.

*Doi in ‘ Shariah: The Islamic Law’ (1984); and Zuhayli’s‘Fiqh Al-Islam Wa-Adillatuhu’(2007)-(Islamic Jurisprudence and Evidence); Zakiyudhini’s‘Al-Ahkam Ash-Shar’iyyah Lil Ahwaal Ash-Shakhsiyah(1993).-(Sharia Rules on Personal Status),* indicates that:**personal status is conceptualized in a broader category of jurisprudential questions pertaining to status of the person in relation to rights, duties and liabilities he or she owes to family rights from the founding of a family to distribution of estate upon death.**



According to these jurists: The scope of personal status in Islamic Law is as broad as to be put in the following categories:-

- 1) **The scope of marriage:** this involves issues like purpose of marriage, conditions and pillars of marriage, rights and obligations of both spouses, children's rights, multiple partnership in marriage, transgender and intersex persons, paternity provisions, children out of wedlock, pre-nuptial agreements, solemnization, legal guardianship betrothal and registration of marriages
  
- 2) **The Scope of Divorce:** it involves issues like categories, grounds for/or and procedure for divorce, conditions and degree of talaq, Iddah(probation period), mataa' (consolatory gift), matrimonial property upon divorce, nafaqa(maintenance), Hadhanah( Child Custody), and Remarriage after divorce.
  
- 3) **The Scope of Inheritance;** this involves wills, waqf, hiba(gift), distribution of deceased's estate among others.

Likewise, encyclopedia of Islamic jurisprudence, (2012).Vol. 17. Explicate that:-

*“To safeguard and protect the interest of children naturally and legally, it shall flow from pregnancy, during marriage and after divorce of parents. It further expanded exhaustively, on the priorities and degree of custodianship for the minors in these various components and situations”. In addition, the determinant criteria for the interest and rights of children in custody are demarcated.*

Therefore, without considering afore-mentioned pertinent component, then issues of the subject matter may not properly be demarcated, structured and taken care of.

In the premises given above, the issues of maintenance and custody of minors is under the categories of personal status, thus this court has an inherent jurisdiction to hear and make a determination on them. That the court, therefore, dismisses the application for being incompetent and lacking in merit.Each party bears its costs.It is so decided.

**DATED, DELIVERED AND SIGNED AT NAIROBI,  
THIS 26<sup>TH</sup> DAY OF AUGUST 2014.**

**HON. RASHID ALI OMAR**

**DEPUTY CHIEF KADHI**

IN THE PRESENCE OF:

HASSAN A. LAKICH/ Counsel for plaintiff/respondent

KIPROP CHERUIYOT/ Counsel for defendant/applicant

**REPUBLIC OF KENYA**

**IN THE KADHIS COURT AT MOMBASA**

**CIVIL CASE NO. 3 OF 2015**

**OMAR SALIM ABDALLA .....PLAINTIFF**

**VERSUS**

**MUNAA SAID AHMED .....DEFENDANT**

**RULING**

The plaintiff filed this suit praying for actual custody of the child Salwa Omar Salim aged [9] years and the defendant be given restricted access to the child. The defendant raised a preliminary objection to the plaint on the following grounds:-

1. That the Kadhi's court has no jurisdiction to hear and determine matters concerning children.
2. That the subject matter of this suit is in Malindi and therefore the children's court in Malindi has jurisdiction to hear and determine this matter.
3. That the defendant shall be prejudiced if she is compelled to submit to the jurisdiction of the Kadhi's court for the matter.

The plaintiff oppose the preliminary objection. He contends the court has requisite jurisdiction to handle children matters and that the court may return the plaint to the plaintiff to present it to the court where it should have been instituted or the High court could transfer it to the right court.

The issues for determination in this preliminary objection are:-

1. Whether or not Kadhi's court have jurisdiction to hear and determine matters concerning children
2. Place of suing - whether the suit was filed in the right court with territorial jurisdiction
3. Submission to the jurisdiction of the Kadhi's court.

The preliminary objection was disposed by way of written submission. Mr. J. K. Mwarandu represented the defendant while Mr. Yunis Mgupu represented the plaintiff.

## **PLACE OF SUING**

The plaintiff resides in Mombasa while the defendant resides in Malindi. The plaintiff agrees the defendant is resident in Malindi. Section 12 of the Civil procedure Rules, cap 21 provides suit shall be instituted where cause of action situate. Section 15 of the Act provide suits shall be instituted where the defendant actually resides.

*Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—(a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or*

This suit should have been filed in Malindi.

## **JURISDICTION OF KADHIS COURT TO HEAR AND DETERMINE ISSUES OF CUSTODY AND MAINTENANCE OF CHILDREN.**

The jurisdiction of the Kadhis court is derived from Article 170 [5] of the constitution of Kenya [2010]

*The jurisdiction of a Kadhis' court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.*

Section 5 of the Kadhis court Act, Cap 11 replicates the same:

*" A Kadhi's court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it".*

The issue of custody and maintenance of children is incidental to divorce. Further while personal status in common law may not clearly include issues of children, under Islamic law it categorically falls under personal status.

In the Black's law dictionary , eighth edition, Bryan A. Garner law of status is defined as 'the category of law dealing with personal or non-proprietary rights, whether in *rem* or *personam* and is distinguished from the other two departments of civil law namely the law of obligation and the of property.

Professor Dr.Wahba Al Zuhaily in his Islamic jurisprudence and its evidences defines 'personal status

***' as the laws that relate with person's relationship with his family from marriage to his death...***

Doiin '*Shariah - Islamic law*' andZakiyuddin's' *Sharia Rules on Personal Status*', indicate that:

***personal status is conceptualized in a broader category of jurisprudential questions pertaining to status of the person in relation to rights, duties and liabilities he or she owes to family rights from the founding of a family to distribution of estate upon death.***

Dr. Ahmed Al Ghandur in his 'Personal status in Islamic Shariah' [9182], Al Falah Publishers- Kuwait at pg 21 states:

***'the term personal status started to be used in Islamic Shariah when Sheikh Mohamed QadriBasha wrote his book titled 'Shariah laws on personal status' in the form of statues comprising of rules on marriage, divorce and issues related thereto, inheritance, wills, gifts ...***

Section 13, Egyptian Judicature Act of 28th August 1949 provides that personal status consist of:

1. Issues relating to legal competence of individuals
2. Family issues such as marriage proposal, marriage, rights and obligations of spouses, dowry, matrimonial property.
3. Divorce, dissolution of marriage, separation

4. Paternity, parenthood, relationships between parents and children, provision of maintenance and to relations and in laws.
5. incapacity, administration, desertion, determination of death of a lost person
6. Issues pertaining to inheritance and wills and other issues relating to ones transactions taking effect after one's death.
7. Issues relating to correction of legal paternity, adoption
8. (Personal status in Islamic Shariah, Dr. Ahmad Al Ghandur, 2nd edition, pp 21-22)  
The issue of custody and maintenance of children is clearly a personal status issue under Islamic law. The High court has dealt with the issue of whether or not Kadhis court can hear and determine issues of custody and maintenance of children. Judges have differed on this issue between those holding the Kadhis court has jurisdiction to deal with issues of children custody and maintenance and those who hold it does not.

On the one hand Hon. Judges Musyoka, Muchelule and Odero held that the Kadhi's court lack jurisdiction to hear and determine issues of custody and maintenance of children because it is not expressly provided for in the law and due to the enactment of the Children's Act, Cap 141.

Hon. Musyoka J, in the case of GSA VS ASA Nairobi High Court Civil appeal No. 53 of 2013 [2014] eKLR states:

***“From the wordings of Article 170(5) of the Constitution, it would appear that the Constitution has not granted jurisdiction to the Kadhis Court over matters touching on custody and maintenance of children. It is doubtful therefore whether the Kadhis Court can grant custody and maintenance orders over children.***

Hon. Muchelule J, in the case of SMH VS SAA Kisumu High Court Misc application No. 125 of 2013 [2013] eKLR, held :

***“My understanding is that the Kadhis court is properly seized on the divorce matter, but may not deal with issues of custody and maintenance of children. The issues are not among those in respect of which the constitution and the Act have donated jurisdiction to the Kadhis Court. The issue can only be properly dealt with by a children’s court under the children act, No. 8 of 2001”.***

Hon. M. Odero J, in the case of ZHS VS SDS, Mombasa High Court, Misc. Civil application No. 45 of 2013 [2014] eKLR and HMM VS KJD, Mombasa High Court, Civil appeal No. 15 of 2013 [2014] eKLR held:

***'The cited law [Constitution and Kadhis court Act] makes it clear that the jurisdiction of the Kadhis court is to matters of personal law e.g. marriage, divorce and inheritance. No mention is made of children's matters relating to custody, access and / or maintenance of children of a marriage. Matters relating to children are special and exclusive and this is why there exists a specific act to deal with such matters being the Children's Act 2001. It is only in a children's court and with reference to the Children Act that decisions respecting custody, access and / or maintenance of children can properly be made...'***

On the other hand Hon. Judges Sergon, HellenOmondi and Stella Mutuku held that the Kadhi's court have jurisdiction to hear and determine issues of custody and maintenance because it is incidental to the issue of divorce, it is a component of personal status and the enactment of the Children's Act did not oust the jurisdiction of the Kadhis Court and / or repeal any of the provisions of the Act.

The High Court at Mombasa (Sergon, J )in HCCA 120 of 20004, Amin Mohamed Hassan Vs Zahra Mohamed Abdulkadir [2009] eKLR held:

***"even if the Children's' Act No 8 of 2001 was in existence, I don't think the appellant would have succeeded for two reasons. First, the Children's Act No. 8 of 2001 didn't expressly oust the jurisdiction of the Kadhi's court nor did it repeal any of the provisions of the Kadhi's Act.***

***A critical look at section 185 of the Children's Act will reveal that courts other than the children's court were given discretion to refer matters before them touching on children to the children's court. The Act uses the word 'may' instead of 'shall'. It is therefore not true that the Kadhi's court has no jurisdiction... Secondly the preliminary objection came late in the proceedings.."***

Hon. Sergon J, in the case of Mohamed Omar Vs J.B. Mdivo, Mombasa High Court, Misc. civil application No. 949 of 2005 [2007] eKLR ruled that

***I do not think the jurisdiction of the Kadhi's court has been taken away by the enactment of the children's court.. '***

Hon. H.A. OMONDI J, in the case of Najma Ali Ahmed VsSwalehRubea , Malindi High Court Civil appeal No. 22 of 2007 [2010] eKLR held:

*'Part VII of the Act deals with custody and maintenance of the child and gives the children's court provision to make orders of maintenance for the child. However it must be borne in mind that the child's maintenance is incidental to the marriage and this thus falls under the jurisdiction of the Kadhi's court which addresses matters of personal law on members of the Muslim faith. Indeed the teachings of the Qur'an are so specific even as regards provision by fathers for their sons and there was no error by the Kadhi'.*

Hon. Stella Mutuku J, in the case of Abdirahman Mohamed Abdi& another VsAdan Yusuf, Garissa High Court, Civil appeal No. 13 of 2012 [2013] eKLR held:

*My view therefore is that paternity and custody of the child in this case are incidental to the issues of marriage and divorce between the appellants and thus it fall under the jurisdiction of the Kadhis Court. [see Miscellaneous Civil application No 903 of 2005, Republic VsKadhi Sheikh Twalib& another, Ex parte, MaimunaSalim And Najma Ahmed VsSwalehRubea [2010] eKLR].*

These are two schools of thoughts on interpretation of the law on the issue by the High Court, the literal and purposive [Lord Donning, Discipline of law, pg 16]. Clearly the issue is not settled. I am more persuaded, which I hereby hold, by the decisions confirming Kadhi's court jurisdiction to hear and determine issues of custody and maintenance of children; the Kadhis Court Act not having been repealed by the enactment of the Children's Act, cap 141, the said issues being incidental to divorce proceedings before Kadhis Court and being a component of personal status. Further the direct consequence of finding the Kadhis court lacks jurisdiction to hear custody and maintenance of children is multiple litigation, which apart from being costly also delays justice. This offends Article 159 (2) (b) and sec. 1 A, of the Civil Procedure Act, Cap 21.



## **SUBMISSION TO THE JURISDICTION OF THE KADHI'S COURT.**

Mr. Mwarandu submitted for the defendant that she *'will be highly prejudiced if she is compelled to submit herself to the jurisdiction of the Kadhi's court for the matter which concerns the rights of a child'*.

Article 170[5] of the Constitution provides the Kadhis court will exercise its jurisdiction where both parties profess the Muslim faith and submit to the jurisdiction of the Kadhis court. Hon. Odero J, in *Mariam S. Swaleh & 4 others Vs The Chief Kadhi & 3 others*, Judicial Review No 9 of 2013 [2013] eKLR held :

***'..what this means is that there must be consensus between the parties that a matter of inheritance be determined in the Kadhis court. The fact that one is a Muslim does not obligate such a person to have a matter concerning inheritance determined in the Kadhi's court. In this case whilst the applicant appears to desire that distribution be done in accordance with Islamic law, the respondents in sworn affidavits have clearly expressed a desire not to subscribe to the jurisdiction of the Kadhi's court. This is a choice which they are entitled to make..'***

The Kadhi's court is the only court that parties have to submit to its jurisdiction, which may be used as the first line of defence and consequently lead to its weakening. I do not believe this was the intention of the constitution but I must observe the decision of the High Court in the matter.

I am however compelled by the dictates of Qur'an to remind the parties, the serious consequences of such seemingly innocent and harmless averment. Muslims have no choice on whether or not they should be judged according to Qur'an and Sunnah. Where Shariah law or part thereto is not applied in a country, they have an excuse, but where it is operational, they should not have any choice. To choose to be judged by other laws where Shariah law or part thereto is operational, is a weakness in one's faith. This is based on Qur'an: Nur: 24: 47 - 51 and Ahzab: 33: 37.

***'But they [hypocrites] say, 'we have believed in Allah and in the Messenger and we obey' then a party of them turns away after that and they are not believers. And when***

*they are called to [the words of] Allah and His Messenger to judge between them, at once a party of them turns aside in refusal. But if the right is theirs, they come to him in prompt obedience. Is there disease in their hearts? or have they doubted or do they fear that Allah will be unjust to them or His messenger? rather, it is they who are wrong. The only statement of the [true] believers when they are called to Allah and His messenger to judge between them is that they say, ' we hear and we obey', and those are the successful.*

Qur'an: Nur : 24: 47 - 51.

*'and it is not for a believing man and a believing woman, when Allah and His messenger have decided a matter, that they should [thereafter] have any choice about their affair and whoever disobeys Allah and His messenger has certainly strayed into clear error.* Qur'an: Al Ahzab: 33: 37.

## CONCLUSION

The preliminary objection is allowed in part. The Kadhis Court have jurisdiction to hear and determine issues of custody and maintenance of children where both parties profess the Muslim faith. However this court lacks territorial jurisdiction to hear this matter and the defendant has chosen to not submit to this court's jurisdiction. Accordingly, the plaintiff has leave to file the plaint at the Children's Court at Malindi.

Each party to bear its own costs.

**DATED AND DELIVERED IN OPEN COURT AT MOMBASA ON 23RD APRIL 2015.**

**ABDULHALIM H. ATHMAN**

**PRINCIPAL KADHI**

In the presence of

**Mr. Yunis Mgupu for plaintiff**

**Mr. Mwarandu for defendant.**

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