



COUNTRY PROFILE

The Republic of Kenya's Constitution recognises the family as the natural and fundamental unit of society, entitled to recognition and protection from the State.¹⁶¹ The same provision mandates the equality of spouses within and after a marriage.¹⁶²

Treaty	Date of ratification	Reservations/Declarations
CEDAW	9 March 1984	None
African Charter	23 January 1992	None
Maputo Protocol	6 October 2010	"The Government of the Republic of Kenya does not consider as binding upon itself the provisions of Article 10(3) and Article 14(2)(c) ¹⁶³ which is inconsistent with the provisions of the Laws of Kenya on health and reproductive rights." ¹⁶⁴

MAIN TRENDS ON FAMILY LAW

In 2010, Kenya adopted a new Constitution with a progressive bill of rights, triggering an extensive review of existing law and reform process in a number of areas, including family law.¹⁶⁵ Parliament enacted a new Matrimonial Property Act and new Marriage Act to consolidate a number of laws previously contained in a number of statutes, the common law and customary law.¹⁶⁶

A key development is the Matrimonial Property Act, which provides that ownership of matrimonial property vests in the spouses according to their contribution to its acquisition, and shall be divided between them upon the dissolution of their marriages.¹⁶⁷ The Act adopts a broad understanding of "contribution", defining the term to include monetary and non-monetary contributions, including domestic work and management of the matrimonial home, child care, companionship, management of family business or property, and farm work.¹⁶⁸ This broad definition is progressive and recognises the non-financial contribution of women to marriages. However, courts are unprepared to adjudicate non-monetary contributions and equitable distribution of property.¹⁶⁹

Article 45(3) of the Constitution of Kenya, 2010 further provides that "Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage."¹⁷⁰ In the case of *JOO vs MBO*, the High Court of Kenya held that the respondent failed to prove her direct contribution to the property registered under the appellant and awarded her 30% of the matrimonial property and a 20% share of the rental units based on indirect non-monetary contribution. The Court of Appeal however overturned the High Court's decision and directed the rental units be shared on a 50:50 ratio. The Supreme Court of Kenya being the highest court found that the 50:50 share was reasonable but held that while Article 45(3) deals with equality of the fundamental rights of spouses during and after dissolution of marriage, equality does not mean the redistribution of proprietary rights at the dissolution of a marriage and neither does a reading of the provision lead to the assumption that spouses are automatically entitled to a 50% share by fact of being married.¹⁷¹ In light of this case, there is a need for Courts to address the matrimonial property

161 Section 45(1) of Constitution of the Republic of Kenya 2010. Available at <http://kenyalaw.org/lex/actview.xql?actid=Const2010> (accessed 17 April 2024)

162 Section 45(3) of Constitution of Kenya 2010

163 Article 14 (2) (c) of the Maputo Protocol provides for access to health and reproductive rights including medical abortion in cases of sexual assault, rape, incest, and where pregnancy endangers the mental and physical health of the mother or the life of the mother or fetus

164 [https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA.pdf](https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLES%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf) (accessed 16 April 2024)

165 LN Murungi "Consolidating Family Laws in Kenya" (2015) *European Journal of Law Reform* 17(2) at 321. Available at https://www.elevenjournals.com/tijdschrift/ejlr/2015/2/EJLR_1387-2370_2015_017_002_010 (accessed 17 April 2024)

166 <https://www.loc.gov/item/global-legal-monitor/2014-05-02/kenya-comprehensive-marriage-law-enacted/>

167 Section 7 of the Matrimonial Property Act 2013. Available at <http://kenyalaw.org:8181/exist/rest/db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/M/Matrimonial%20Property%20Act%20-%20No.%2049%20of%202013/docs/MatrimonialPropertyAct49of2013.pdf> (accessed 17 April 2024)

168 Section 2 of the Matrimonial Property Act 2013

169 Human Rights Watch "Once you get out, you lose everything: Women and matrimonial property rights in Kenya" (2020). Available at: <https://www.hrw.org/report/2020/06/25/once-you-get-out-you-lose-everything/women-and-matrimonial-property-rights-kenya>. (accessed 17 April 2024)

170 The Constitution of Kenya, 2010

171 <http://kenyalaw.org/caselaw/cases/view/249955/> (accessed 17 April 2024)

jurisprudential controversy on the 50:50 distribution formula versus the 'division based on contribution' approach.¹⁷² Courts must divide matrimonial property justly and equitably, so that economically-disadvantaged women are not left destitute at the end of a marriage.

Kenya has also adopted several pieces of legislation to combat child marriage,¹⁷³ female genital mutilation,¹⁷⁴ and violence against women, including domestic violence.¹⁷⁵ This legislation accords with Kenya's international obligations and is commendable, however, due to low levels of enforcement, child marriage, and female genital mutilation in particular remain relatively common in Kenya.¹⁷⁶

KEY GAPS AND CONTESTATIONS

(i) Religious law:

The Kenyan Constitution and Marriage Act are cognisant of Kenya's pluralistic society, recognising civil, customary, Christian, Muslim and Hindu marriages.¹⁷⁷ While the Constitution issues the caveat that this recognition is "so long as such systems are consistent with the Constitution",¹⁷⁸ it claws back on this guarantee by stating that "the provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhi courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce, and inheritance." As such, women's rights to equal treatment and protection under the Constitution may be limited by application of Islamic law.¹⁷⁹ Similarly, the Marriage Act provides that the dissolution of Muslim marriages shall be governed by Islamic law,¹⁸⁰ and the Matrimonial Property Act

provides that "a person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property".¹⁸¹ While recognising legal and cultural diversity is commendable, these provisions severely undermine protection afforded to Muslim women by the new family law regime.

(ii) Polygamy:

In recognition of custom and belief, Kenya recognises polygamy. The Marriage Act defines marriage as the voluntary union of a man and a woman, whether monogamous or polygamous.¹⁸² The Act also provides that customary and Muslim marriages are presumed to be polygamous or potentially polygamous.¹⁸³ Polygamy is widespread in Kenya, since a majority of Kenyans live under customary law, especially in matters relating to personal law, and a significant number live under Islamic law. It is thus crucial that the State recognises and regulates these marriages. Polygamy violates women's rights, and is one of the leading causes of women being deprived of their inheritance.¹⁸⁴ Steps must be taken to protect women already in polygamous marriages.

(iii) Same-sex marriages:

Another aspect to note about the Marriage Act's definition of marriage is that it limits marriage to a "union of a man and a woman", thus excluding same-sex marriage.¹⁸⁵ The Constitution also provides that "every adult has the right to marry a person of the opposite sex".¹⁸⁶ This position was affirmed in the Marriage Act and is inconsistent with broad,

172 "A commentary on the matrimonial property conundrum in Kenya in JOO vs MBO", Marvis Ndubi. Available at <https://journals.kabarak.ac.ke/index.php/klr/article/view/353/273> (accessed 15 April 2024)

173 Section 4 of the Marriage Act 2014 prescribes 18 as the minimum age for marriage. The Counter Trafficking in Persons Act 2010 classifies child marriage and sexual exploitation as exploitation, and defines the recruitment, transportation, transfer, harbouring or receipt of a child for the purposes of exploitation as "trafficking in persons", which is a crime

174 Part IV of the Prohibition of Genital Mutilation Act 2011 criminalises aiding, abetting and performing female genital mutilation. It prescribes life imprisonment in cases where FGM leads to death. Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ProhibitionofFemaleGenitalMutilationAct_No32of2011.pdf (accessed 17 April 2024)

175 The Protection Against Domestic Violence Act 2015 aims to provide protection of spouses, children and dependent persons in cases of domestic violence. Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ProtectionAgainstDomesticViolenceAct_2015.pdf Section 3 of the Sexual Offences Act 2006 criminalises rape, Sexual 5 addresses sexual assault, Section 13 criminalises child trafficking, Section 18 criminalises trafficking for sexual exploitation, and Section 23 addresses sexual harassment

176 See https://www.equalitynow.org/www-equalitynow-org-learn_more_fgm_and_child_marriage_in_kenya/caleen/. (accessed 17 April 2024)

177 Section 45(4) of the Constitution of 2010 and Section 6(1) of the Marriage Act 2014

178 Section 45(4) of the Constitution of Kenya 2010

179 Section 24 of the Constitution of Kenya 2010

180 Sections 71 and 72 of the Marriage Act 2014. Available at <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/MarriageActCap150.pdf> (accessed 17 April 2024)

181 Section 3 of the Matrimonial Property Act 2013

182 Section 3(1) of the Marriage Act 2014

183 Section 6(3) of the Marriage Act 2014

184 LN Murungi "Consolidating Family Laws in Kenya" (2015) *European Journal of Law Reform* 17(2) at 323-324. Available at https://www.elevenjournals.com/tijdschrift/ejlr/2015/2/EJLR_1387-2370_2015_017_002_010 (accessed 17 April 2024)

185 Section 3(1) of the Marriage Act 2014

186 Section 45(2) of the Constitution of Kenya 2010

progressive and equitable understandings of family.¹⁸⁷

(iv) Time limit before divorce petition:

It is of concern that the Marriage Act provides that a party to a civil marriage may not petition the court for the separation of the parties or for the dissolution of the marriage unless three years have elapsed since the celebration of the marriage.¹⁸⁸ There are however ongoing reform discussions based on the Court of Appeal's decision in the case of *National Assembly of Kenya vs Kina & another (Civil Appeal 166 of 2019) [2022] KECA 548 (KLR) (10 June 2022) (Judgment)*¹⁸⁹ where the Court held that the three year wait provided in the Marriage Act was unconstitutional and directed that Parliament amend the Marriage Act to give effect to this.

(v) Marital rape: While the Sexual Offences Act¹⁹⁰ expands the definition of sexual offenses, it does not protect women from marital rape.

RECOMMENDATIONS

Harmonisation of laws:

- ▶ Kenya must ensure its constitutional and legislative protections apply to all women in religious and customary marriages and eliminate exceptions.
- ▶ Kenya must take steps to adequately protect the interests of women already in polygamous marriages and move towards prohibiting polygamy in the future.
- ▶ Kenya must expedite the reform of the sections of the Marriage Act declared unconstitutional by the Courts.

Implementation: Kenya must effectively enforce its prohibition on child marriage and female genital mutilation, as well as undertake awareness and mindset changing programmes to prevent these harmful traditional practices.

Judicial training: Judges must be adequately trained and sensitised to implement the Matrimonial Property Act in a way that divides matrimonial property justly and equitably.

Legal reform: Kenya must undertake a constitutional and legislative amendment process to recognise same-sex marriage. Kenya must also amend the Sexual Offences Act to recognise and criminalise marital rape.

187 LN Murungi "Consolidating Family Laws in Kenya" (2015) *European Journal of Law Reform* 17(2) at 324

188 Section 66(1) of the Marriage Act 2014

189 [2022] KECA 548 (KLR). Available at <http://kenyalaw.org/caselaw/caselawreport/?id=233583> (accessed 17 April 2024)

190 The Sexual Offences Act 2006. Available at <https://www.refworld.org/legal/legislation/natlegbod/2006/en/41526> (accessed 17 April 2024)